SUPREME COURT No. S137730 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TROY LINCOLN POWELL,

Defendant and Appellant.

Los Angeles County Superior Court No. BA240299-01

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

HONORABLE WILLIAM POUNDERS , JUDGE

OPENING BRIEF FOR APPELLANT TROY LINCOLN POWELL

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STATEMENT OF APPEALABILITY

This appeal is automatic pursuant to the California Constitution, art. VI, section 11 and Penal Code section 1239, subdivision (b). Further, this appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF CASE

Appellant Troy Lincoln Powell was indicted by a grand jury for the county of Los Angeles on June 20, 2002. The Indictment, filed on September 20, 2002, consisted of five counts. Count 1 alleged that on or about November 12, 2000 appellant Troy Lincoln Powell murdered Tammy Epperson in violation of Penal Code section 187(a). (3 CT 347.) The Indictment further alleged that the murder was committed during the commission of rape, in violation of Penal Code section 190.2(a)(17), rape by instrument and mayhem, in violation of Penal Code section 190.2 (a)(17) and torture, in violation of Penal Code section 190.2(a)(18). (1 CT 72-73; 3 CT 348.) Count 2 alleged, as a separate cause of action, forcible rape, in violation of Penal Code section 261(a)(2)(73). (1 CT 73; 3 CT 348.) Count 3 alleged sexual penetration by a foreign object, in violation of Penal Code section 289(a)(1). (1 CT 74; 3 CT 349.) Count 4 alleged mayhem, in violation of Penal Code section 203. (1 CT 74; 3 CT 350.) Count 5 alleged torture, in violation of Penal Code section 206. (1 CT 75; 3 CT 350.)

On July 10, 2002 proceedings were adjourned and on August 1, 2002 appellant was referred to department 95 for competency proceedings pursuant to Penal Code section 1368. (3 CT 355-356.) Following a hearing on September 13, 2002 appellant was found mentally competent to stand trial. (3 CT 360-362.)

On September 20, appellant waived arraignment and pled not

guilty to all counts and denied all special allegations. He was again found mentally competent to stand trial. (3 CT 365.)

On March 11, 2003 the prosecution informed the court the People would seek the death penalty. (3 CT 385.)

On October 31, 2003, the court declared doubt as to appellant's competency and criminal proceedings were suspended for a competency examination. (3 CT 417-418.)

On February 3, 2004, the court again found appellant competent to stand trial and criminal proceedings resumed. The appellant entered a plea of not guilty and not guilty by reason of insanity. The court appointed Drs. Niedorf and Mohandie to prepare reports regarding appellant Powell's sanity at the time of the incident. (3 CT 432, 434.)

On October 18, 2004 a jury and alternates were impaneled and sworn to try the charges and the presentation of evidence commenced on October 19, 2004. (3 CT 564-565.) Jury deliberations commenced ten days later on October 29, 2004. (12 CT 2921.)

On November 1, 2004 the jury returned unanimous verdicts finding appellant Powell guilty as charged of murder in the first degree as to Count 1 and found the special circumstances of rape, mayhem and torture to be true. (12 CT 2955.) The jury found appellant Powell guilty as charged in Counts 2, 4, and 5, forcible rape, mayhem and torture, respectively. (12 CT 2955, 2958, 2960, 2961.) Appellant was found not guilty of sexual penetration by a foreign object as charged in Count 3 and the special circumstance

allegation of rape by instrument (Count 1) was found to be not true. (12 CT 2956-2957, 2959.)

On November 2, 2004 trial began on appellant Powell's plea of not guilty by reason of insanity. (12 CT 3023.) Both sides rested and the jury retired to deliberate on November 9, 2004. (13 CT 3115.) On November 10, 2004 the jury found appellant Powell to be sane at the time of the commission of the offenses in Counts 1, 2, 4 and 5. (13 CT 3127-3130, 3132.)

On November 17, 2004 jury trial in the penalty phase commenced. (13 CT 3133.) Jury deliberations began on November 19, 2004. (13 CT 3138.) On December 1, 2004 the jury informed the court it was hopelessly deadlocked and the court declared a mistrial as to the first penalty phase. (13 CT 3173-3174.)

Appellant Powell's motion to dismiss the penalty phase was heard and denied on January 10, 2005. (13 CT 3186-3187.)

On June 2, 2005 evidence in the second penalty phase commenced. (23 CT 5581.) On June 16, 2005 the jury began deliberations. (23 CT 5602.) On June 27, 2005 the jury returned a verdict decreeing the penalty of death. (23 CT 5646.)

On September 23, 2005 defendant's motions for a new penalty phase trial (on grounds of jury misconduct), motion for a new trial and motion for modification of the verdict were heard, evidence taken and the motions denied. (23 CT 5687-5688.)

That same date, the court sentenced appellant Powell to death as to Count 1. The court sentenced appellant to the upper term of 8

years as to both Count 2 and Count 4, both to be served concurrently and stayed pursuant to Penal Code section 654. The court imposed the term of life imprisonment as to Count 5, to be served concurrently and stayed pursuant to Penal Code section 654. (23 CT 5689-5699.)

Additionally, the court imposed a restitution fine in the amount of $10,000 pursuant to Penal Code section 1202.4(b) and a parole restitution fine in the amount of $10,000 pursuant to Penal Code section 1202.45. The latter fine was stayed, with the stay to become permanent upon successful completion of parole. (23 CT 5689.)

Appellant received 1, 773 days of custody credits. (23 CT 5699.)

The Abstract of Judgment was filed on September 28, 2005. (23 CT 5715-5716.)

STATEMENT OF FACTS

Guilt Phase

Prosecution Evidence

The Incident

On November 12, 2000 Tammy Epperson lived in apartment A125 at the Ballington Plaza on South Wall Street in Los Angeles. (8 RT 1010, 1012-1013.) The Ballington Plaza complex housed referrals from various recovery drug programs and had specific rules as to security and the signing in and out of visitors.[1] (8 RT 1011.)

Per the sign-in sheets (People's exhibit no. 1), Ms. Epperson signed in with Troy Powell, a guest, at 10:45 a.m. on Sunday, November 12, 2000. (8 RT 1012-1013.) Mr. Powell signed out at 1:26 p.m. that same day. (8 RT 1014.)

On Monday, November 13th, Officer Gonzalez, received a radio call to report to Ballington Plaza, apartment A125. (8 RT 1029.) On arrival, unable to gain entry through the door, he looked through the window and saw Ms. Epperson lying on the floor. (8 RT. 1030.) Security did not possess a key for the dead bolt lock on the door so Officer Gonzalez and one of the Ballington security guards forced their way through the front door. (8 RT 1020; 8 RT 1030, 1032.)

The apartment appeared ransacked and paramedics summoned by Officer Gonzalez determined that Ms. Epperson was deceased. (8

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[1] However, as with any non-automated system, it was not ironclad. It would have been possible for a tenant and guest to enter or leave unrecorded. (8 RT 1019.)

RT 1031, 1429.) The autopsy report (People's exhibit no. 7) stated that death was caused by multiple blunt force injuries. (9 RT 1217.)

Ms. Epperson had no upper teeth and an upper denture was broken. (9 RT 1222.) She had partial lower teeth. (9 RT 1222.) There was hemorrhaging in her eyes and bruises on her neck which could indicate strangulation, but the coroner, Dr. Wang, did not believe this was the cause of death. (9 RT 1223-1224, 1261.)

Ms. Epperson sustained multiple bruises and abrasions on the back of both arms and hands and bruising and abrasions on her right leg. (9 RT 1225.) She had multiple blunt force injuries on her head and face as well as multiple lacerations on her forehead and face, including both eyes, her nose, cheeks and upper and lower lips. (9 RT 1228-1229.) A large laceration on her forehead had an underlying open skull fracture; a laceration on her lower lip went all the way through; and abrasions on the back of her neck indicated blunt force injury. (9 RT 1229-1230.) Ms. Epperson's injuries were not consistent with knife wounds but were more likely caused by a kind of glass or other object. (9 RT 1230-1231.)

Dr. Wang took multiple pieces of different colored glass from Ms. Epperson's body, clothing, head and hair area. (9 RT 1246.) No major arteries or veins were cut. (9 RT 1231.) Ms. Epperson's facial bones were fractured and there were jagged cuts on both sides of her throat. (9 RT 1233.) She had extensive fractures at the front base of her skull, caused by blunt force trauma. (9 RT 1242-1243.) Dr. Wang opined Ms. Epperson suffered a very severe beating. (9 RT

1244.)

Ms. Epperson also suffered vaginal trauma, including bruising, and some abrasion. (9 RT 1247.) Dr. Wang opined that the cause was blunt force penetration of either a penis or other kind of object of similar shape and size. (9 RT 1248-1249, 1256.)

He also opined that the majority of Ms. Epperson's injuries were inflicted while she was alive. She was alive when she suffered the injuries to the vaginal area, the trauma to her face and the cuts to her neck. (9 RT 1249-1250.) He could not say which of at least ten severe blows to her head killed her. Any one of them could have caused lack of consciousness; she could have died very quickly or over a period of time. (9 RT 1250-1252.)

Ronald Raquel, criminalist for the city of Los Angeles, responded to the crime scene on November 13, 2000. (10 RT 1286, 1288.) Tammy Epperson was lying on the floor, adjacent to the corner of her bed. (10 RT 1294.) She was nude from the waist down with a towel covering her lower body. She was wearing a sweatshirt with the hood beneath her. The sweatshirt was blood soaked. (10 RT 1295; 10 RT 1429.) She was wearing a blouse underneath the sweatshirt. (10 RT 1296.) A flat-head screwdriver was underneath her right ear and between her right hand and her head was a partial dental plate.[2] (10 RT 1297, 1375.)

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[2] Pieces of wood from a broken foot stool were also found by Ms. Epperson's body (10 RT 1296-1297,1375), underneath the bed, under the bed, by the chest of drawers and on the left side of the living quarters. (10 RT 1375-

Mr. Raquel found blood spatter, blood stains and blood transfer stains throughout Ms. Epperson's apartment, including on the walls (10 RT 1300), the bed (1299), the chest of drawers (1356), entertainment center (1360-1361) and the television (1302, 1358-1359) with extensive stains in the bathroom. (10 RT 1303-1305.) He opined several of the stains were cast off stains indicative of separate incidents of a bloody object in motion suddenly stopping. (10 RT 1360-1361, 1362-1363, 1366.)

There were blood stains on the bathroom walls, transfer stains on the wall between the toilet and the shower, broken glass on the floor, stains on the inside of the toilet, stains between the toilet lid and some shelves on the wall, stains on the waste basket, on paper towels in the toilet, on the wall adjacent to the toilet, on the scales and on the wall behind the toilet. (10 RT 1304-1309.)

Mr. Raquel opined the three different types of stains, transfer, spatter and cast off, indicated three different events occurred in the bathroom. (10 RT 1311.) The stains were consistent with a person with a bleeding head injury being shaken and hitting the wall three times. (10 RT 1311-1312.) There were broken bloodstained pieces of glass on the floor at the entrance to the shower and also in front of the waste basket. (10 RT 1313.) Multiple low velocity bloodstains on the floor, caused when a bloodstained object is dripping, were in the toilet area of the bathroom. (10 RT 1314.) Six different transfer

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1376.)

patterns, each one lower on the wall than the one above it, were consistent with a person's head with bloody hair making contact with the wall; it appeared Ms. Epperson was having her head slammed against the wall going lower and lower as her knees gave out. (10 RT 1318.)

There were no blood drops from the bathroom to the living quarters indicating that Ms. Epperson was carried from one to the other. (10 RT 1320-1321.)

Pieces of a broken flower vase[3] in the living area contained blood stains and hair. (10 RT 1325-1326, 1352.) A piece of that vase found on the opposite side of the room from Ms. Epperson's body made contact with her multiple times. (10 RT 1354, 1396.) A broken lamp[4] in the bedroom also contained blood stains which indicated the lamp was used to strike Ms. Epperson multiple times. (10 RT 1349-1350, 1354, 1395.) Spatter blood stains on the bedspread were indicative of a bloody object on the floor being hit or struck with a fist or weapon causing the blood to spatter upwards to the bed cover. (10 RT 1343.)

A purse, T-shirt and papers were scattered on the bed and on the floor next to the bed. (10 RT 1299.) A pair of blue jeans and a

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[3] The vase, made of plaster-like material, was quite heavy. (10 RT 1354.) Three fragments weighed ten pounds. Pieces were found by Ms. Epperson's head by the bed, on the opposite side of the room beneath some clothes and paper and at the entrance of the living quarters. (10 RT 1294, 1325, 1352.)

[4] The lamp was made of hard porcelain, heavy and hard. (10 RT 1351-1352.)

pair of lady's panties were at Ms. Epperson's feet. (10 RT 1300.) Blood stains on the waistband of the jeans and the outer liner of the right pocket were consistent with bloody hands unbuttoning the jeans and pushing them down. (10 RT 1345, 1347-1348.) The panties were ripped and bloodstained on the top of the crotch. (10 RT 1348, 1404.) Samples of the stains on the jeans pocket liner and the panties were taken for DNA analysis (10 RT 1346, 1348) as were transfer stains found on the surface of Ms. Epperson's brassier. (10 RT 1370-1371.)

Also taken for DNA analysis were an empty water bottle on the sink in the foyer and two bloody face cloths in the sink. (10 RT 1355-1356.)

Mr. Raquel determined the initial contact between Ms. Epperson and her assailant took place in the bathroom where Ms. Epperson's head made contact with the wall at least six times. She was carried to the living quarters where additional contact occurred first with the vase then its pieces striking Ms. Epperson multiple times and the same as to the foot stool. (10 RT 1379-1380, 1397, 1407.)

Following the attack in the living quarters, some ransacking occurred (1380-1381, 1398-1399) and Ms. Epperson's jeans and panties were removed. (10 RT 1381, 1406.) No blood was found on the zipper of the blue jeans, consistent with removal by force. (10 RT 1389.)

Background

Tammy Epperson moved to Ballington Plaza on November 11, 1999. (2 RT 136[5], testimony of Michael Ramakrishnan[6], property manager.) She moved to Ballington Plaza after she completed a 12-step Stairs Program at the Weingart Center, a multilevel housing complex for male and female parolees, many of whom were recovering from drug and/or alcohol addictions. (2 RT 130-131.) The Weingart Center provided housing for as long as six months, but no longer. Ballington Plaza was a long term residence. (8 RT 1021.)

While at Weingart Center, Tammy met Ronald Sims (8 RT 1040), Timothy Todd, and appellant, Troy Powell. (8 RT 1041; 9 RT 1145, 1149.) Ronald Sims moved into Ballington Plaza a short time after Ms. Epperson. (8 RT 1016; 1042.) At the time they were boyfriend/girlfriend. (8 RT 1023; 1041-1042.) However, when Mr. Sims started using drugs again, Ms. Epperson terminated the relationship. (8 RT 1043.) Subsequently, Mr. Sims fell behind in his rent at Ballington Plaza and was evicted on October 14, 2000[7]. (8 RT 1016.) He returned to Weingart Center and in November 2000 was

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[5] A few of the minor background facts are taken from the Grand Jury proceedings to provide the Court with context for the trial testimony.

[6] Mr. Ramakrishnan's employer is Volunteers of America. Residents of Ballington Plaza are recovering alcoholics, recovering drug addicts, former inmates who have gone through an extended rehabilitation program, etc. (2 RT 134.)

[7] If a tenant is evicted for non-payment of rent, he/she is never again allowed to enter the Ballington, not even as a guest. (8 RT 1017.)

seeing Ms. Epperson as a friend. (8 RT 1045.)

Timothy Todd and Tammy graduated from the 12-step program together. (9 RT 1150.) While Ms. Epperson was still living at Weingart Center, Mr. Todd was working in the computer room as a student aid. (9 RT 1151.) Appellant saw her there and later asked Todd for an introduction[8]. (9 RT 1151.) Although Tammy was not interested in a relationship at the time, she eventually agreed to go out with appellant accompanied by Todd (9 RT 1151-1152) and, according to Todd, this became a pattern. (9 RT 1152-1154.)

After graduation from the 12-step program, Tammy moved to Ballington Plaza and Todd moved to the Courtland Hotel; appellant was still at Weingart. (9 RT 1154.) Ms. Epperson got a job at G&V Communications. (9 RT 1154.) She eventually became the manager there and offered Todd a position as her secretary. (9 RT 1155.)

According to Todd, appellant dated Tammy for four or five months before she was killed. (9 RT 1155.) In Todd's view, Tammy and appellant had an on again off again relationship. (9 RT 1171, 1178.) At the time, appellant weighed about 280 pounds; he is 6'3" to 6'4" tall. (9 RT 1171.)

Todd insisted that appellant told him he had not been successful in developing a relationship with Ms. Epperson (9 RT 1184-1185);

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[8] Both Mr. Todd and appellant were at Weingart Center in 1998 and again in 1999. (9 RT 1145, 1150.) They became friends prior to moving to Weingart when appellant intervened in prison when Todd was in danger of being stabbed. (9 RT 1147, 1187.)

that they had never had sex (9 RT 1214), and that he would kill her if he saw her with another man. (9 RT 1185.) On many occasions during that time appellant told Todd that he loved Tammy and if he couldn't have her, no one would. (9 RT 1155-1156, 1185, 1214.) Todd remembered one specific incident in October 2000 during a ride to Malibu when appellant said if he could not have Tammy he would kill both of them. (9 RT 1156.) Todd encouraged appellant to slow down, that Ms. Epperson just had a bad relationship and was not ready for another one. (9 RT 1159.)

Appellant often brought food, stuffed animals, flowers and other little gifts to Ms. Epperson. It was Todd's opinion that Tammy threw the gifts away and she was often in tears over appellant's appearance at G&V Communications. (9 RT 1158.) In the three or four months before the homicide, Todd saw appellant and Ms. Epperson fighting. It appeared to Todd that Ms. Epperson wanted to get away from appellant, did not want a relationship with him. (9 RT 1168.) Even so, Todd encouraged her to give appellant another chance. (9 RT 1168.) Appellant was his friend and Todd felt he was caught in the middle. (9 RT 1169.)

In the weeks before November 12, 2000, appellant called Ms. Epperson at work constantly. On November 6, 2000 Ms. Epperson noted the calls on a weekly planner. (9 RT 1157, 1178.) She was very distraught and in tears and asked Todd to answer the telephone. (9 RT 1157-1158.) On November 9th, Ms. Epperson fired Todd so he was personally unaware of any contact between appellant and Ms.

Epperson after that date. (9 RT 1178.) Todd admitted that he was fired for smoking crack cocaine. (9 RT 1177.)

Todd also conceded that Defense Exhibit G is a photograph of Ms. Epperson sitting in appellant's lap and she looks quite happy. Todd admitted that he was not present when the picture was taken so obviously Epperson and appellant had a relationship and did things together as a couple of which Todd was not aware. Todd conceded the same with respect to Defense Exhibit H (picture of appellant hugging Ms. Epperson). (9 RT 1174-1176, See also defense exhibits I & J showing appellant and Ms. Epperson together.)

Todd testified that he knew Ronald Sims and on several occasions heard appellant make derogatory remarks about Sims. (9 RT 1161.) It was Todd's understanding that around the time of the homicide that once Sims got off of drugs [again] that Ms. Epperson was going to marry Sims. Todd saw them together on several occasions. (9 RT 1181.) On several occasions appellant told Todd that he "would kill that nigger if he kept trying to see Tammy." (9 RT 1161.)

On November 12, 2000 Todd was in his room at the Courtland Hotel when he received a telephone call from appellant. Appellant told Todd that Todd should go check on Tammy, that he [appellant] had killed her. (9 RT 1160.) Todd did not believe appellant and when appellant called a second time and asked if Todd had checked on Ms. Epperson, Todd turned off his telephone until the next day. (9 RT 1161.)

Ronald Sims and Tammy Epperson both attended the First Nazarene church across the street from Weingart Center. (8 RT 1045.) On Sunday, November 12, 2000, Sims met Ms. Epperson outside the church. (8 RT 1045-1046.) As they were talking, Sims noticed appellant across the street. (8 RT 1046-1047.) As Sims left he told Tammy he would call her later. (8 RT 1050.) Sims did so around 1 p.m.; he paged her at least three times and she did not return his page. (8 RT 1051.) Since Tammy usually returned his page, Mr. Sims went to Ballington Plaza and asked the security guard to tell Ms. Epperson he was there; the security guard responded he could not do so. (8 RT 1051.) Mr. Sims noticed appellant's truck in the parking lot across the street. (8 RT 1052.) Sims again unsuccessfully attempted to get a message to Ms. Epperson through a man entering the Ballington. (8 RT 1052-1053.) He asked the man to knock on Ms. Epperson's door and tell her Sims was there and wanted to see her. (8 RT 1052-1053.) The man told Sims there was no answer. (8 RT 10532.) Sims then went home. (8 RT 1053.)

On Monday, November 13th, Mr. Sims reported to work but was sent home due to a hydrogen sulfide leak. (8 RT 1054.) He went home, showered and changed and proceeded to G&V Communications, but the business was locked. (8 RT 1054.) Mr. Sims never knew Ms. Epperson to miss work. He was concerned and attempted to reach Todd by telephone. He was unsuccessful until around 4 or 4:30 p.m. that afternoon. (8 RT 1055.)

Following his conversation with Todd, Sims went to the police

station, explained what he heard from Todd and asked the police to investigate Ms. Epperson's apartment. (8 RT 1057.) Mr. Sims then went to Ballington Plaza and waited for the police to arrive. When they had not done so after fifteen to twenty minutes, Sims returned to the police station, reiterated his story and again requested they send a unit to Ballington Plaza. (8 RT 1058.)

Eventually the police did arrive and Sims reiterated what he heard from Todd. (8 RT 1059.) Sims waited until he saw the paramedics leave the Ballington with an empty stretcher. (8 RT 1060.) At that point he believed Ms. Epperson was deceased. (8 RT 1060.)

The Investigation

At Ballington Plaza no guest is allowed without a sponsor's signature and valid ID. (8 RT 1011-1013.) The fourth entry for November 12, 2000 shows that at 10:45 a.m. Tammy Epperson signed in Troy Powell as her guest. (8 RT 1012-1013.) Next to her name on the sheet is appellant's name and driver's license number; Ms. Epperson's apartment number; and the initials 'M.B' for Mark Baltar, the security officer that morning. (8 RT 1013-1014.) The sign-in sheet indicates that appellant signed out at 1:26 p.m. that same day. (8 RT 1014.)

Ms. Epperson kept her apartment immaculate. (8 RT 1018.) Prior to November 12, 2000, Ms. Epperson informed Michael Ramakrishnan, the property manager, that she changed one of the locks on her door, but she neglected to produce a duplicate key. (8 RT 1020.) Mr. Ramakrishnan testified that Tammy told him she changed

the locks on her door because Ronald Sims had a key and was entering her apartment against her will and was stalking her[9]. (8 RT 1022-1023.) Since Mr. Sims was evicted from Ballington Plaza in October, Mr. Ramakrishnan believed the locks were changed prior to that time. (8 RT 1024.)

Clevers Ray was also working at Ballington Plaza as a security officer in November 2000 and was working on November 12th and 13th. (8 RT 1015; 9 RT 1117.) On Sunday, November 12th, she had the 2:00 p.m. to 10:00 p.m. shift. (9 RT 1119, 1131.) She usually arrived at work five to ten minutes early and did so that day. (9 RT 1119, 1131.)

Ms. Ray knew Epperson, Todd and Powell by sight. She often saw the three together then she saw just Epperson and Powell together two to four times. (9 RT 1121, 1134.) On the 12th between 2:00 and 3:00 p.m. Ray saw appellant leaving the Ballington through the lobby. Since Ms. Epperson was not with him and the sign-in sheet indicated he left at 1:26 p.m., Ray stopped appellant and asked him where Tammy was. (9 RT 1121-1123, 1132, 1135-1136.) Appellant answered that Tammy was resting in her apartment. Ray asked about

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[9] Sims testified that he was aware Epperson changed the locks. It was not because he was stalking her. (8 RT 1065.) Timothy Todd also testified concerning the locks. He stated he was present when Ms. Epperson changed the locks and it was not true that she changed them because Sims broke into her apartment. (9 RT 1175, 1179-1180.) Todd stated that appellant bought the locks and changed them for Epperson in Todd's presence. (9 RT 1180.) The reason for the change had nothing to do with Sims breaking in or stalking Epperson. (9 RT 1180.)

Ms. Epperson because according to Ballington Plaza rules, Ms. Epperson should have brought appellant back to the lobby. (9 RT 1123.)

Appellant appeared calm and Ray did not see anything on his face, hands or clothing. (9 RT 1123, 1135.)

Stipulations Read into the Record

Both sides stipulated that the results of DNA analysis were as follows: The blood stain from the pocket liner of Ms. Epperson's blue jeans and the blood stains from the left and right inner thighs of Ms. Epperson, matched a mixture of blood from Ms. Epperson and appellant, Troy Powell. (10 RT 1449-1450.) The blood stain located on the front center of Ms. Epperson's panties, the blood stain from the right lateral thigh area of Ms. Epperson, the blood stain on a wash cloth found in the sink of Ms. Epperson's apartment, and a blood stain found on a plastic water bottle on the sink matched the DNA of appellant. (10 RT 1450-1451.) A blood stain found on the right inside cup of Ms. Epperson's brassier, blood stains near the front door, inside the doorway and on the entry closet door all matched the DNA of Ms. Epperson. (10 RT 1450.) Analysis of a vaginal swab taken from Ms. Epperson and vaginal and external genital swabs all showed sperm which matched the DNA of appellant. (10 RT 1450-1451.)

Both sides also stipulated that when Ms. Epperson's body arrived at the coroner's office she was wearing a gray hooded sweatshirt, a light blue shirt and a pink brassiere which was pushed up above the nipples of her breasts. (10 RT. 1452.)

Finally it was stipulated that on or about November 15, 2000 at about 9 p.m. appellant was found at 1629 Pacific Coast Highway, room 209 in Harbor City, California. Ms. Epperson's keys were found on the table next to the bed on which appellant was lying[10]. (10 RT 1452.)

Known Incidents Involving Appellant

Betsy McDermott

Betsy McDermott met appellant in January 1999 at an AA meeting. The two started going for coffee and lunch together. (10 RT 1431-1432.) At about the second or third week appellant became very vocal about his desire to become romantically involved. (10 RT 1432.) They dated until March 1999 when Ms. McDermott made it very clear she did not want to continue seeing appellant. (10 RT 1433.)

On April 9, 1999 Ms. McDermott received a telephone call from appellant who told McDermott he was afraid his parole was about to be terminated and he wanted McDermott to keep safe a gift from his mother, a teddy bear, while he was in jail. (10 RT 1434.) On arrival at appellant's apartment, Ms. McDermott needed to use the bathroom. When she exited the bathroom her car keys were gone from where she left them on the table and a big chair was in front of the door. (10 RT

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[10] Todd recognized Ms. Epperson's keys, People's exhibit 5. (9 RT 1162.) It was also stipulated that appellant owned a red Mitsubishi Mighty Max truck, license plate no. 3W75897 registered to a Joseph Powell. (10 RT 1452.) The stipulation is marked People's exhibit no. 83. (10 RT 1452.)

1434.)

Appellant began ranting about how Ms. McDermott ruined his life; that he was in love with her. (10 RT 1434.) Initially Ms. McDermott started to cower. When she began to stand up for herself, appellant hit her in the face knocking off her glasses. She fell to the floor where appellant climbed on top of her and choked her to the point where everything went black. (10 RT 1435.) When she awakened, appellant was on the other side of the room rocking back and forth with a knife in his hand. (10 RT 1435.)

Ms. McDermott believes she may have hit appellant in the groin area. When he recovered he told her to strip and backed her into the bedroom section of his studio apartment. (10 RT 1436.) She stood there, naked, pleading for her life until almost 5 p.m. Then, at appellant's direction, she called his parole officer and told him that appellant missed his appointment because he was sick. (10 RT 1436.)

Still carrying the knife, appellant then accompanied Ms. McDermott to a day care center where McDermott picked up her two children. (10 RT 1437.) En route to the day care center appellant told Ms. McDermott if she said or did anything that involved the police he would kill her children in front of her then kill her. (10 RT 1437.) Appellant insisted Ms. McDermott drive to her apartment from the day care center. There he made a telephone call then told Ms. McDermott to take him home. She did so. (10 RT 1437.)

After McDermott returned one evening to find angry threatening messages from appellant on her answering machine, Ms. McDermott

called the police and reported the incident. (10 RT 1438.)

Debra Colletta

Ms. Colletta and appellant were boyfriend/girlfriend for about three years. (10 RT 1441, 1443.) On July 26, 1992 Ms. Colletta was at the home of Jeff Levine. (10 RT 1443.) She previously told appellant she wished to end their relationship and appellant came to Mr. Levine's residence and asked to speak with Ms. Colletta. (10 RT 1443-1444.)

Ms. Colletta went to the front porch to speak with appellant and told him she was ending the relationship. Appellant responded that if she did so, he would kill her. (10 RT 1444.) At some point appellant grabbed Ms. Colletta by the throat and dragged her to the ground where he kicked her in the head and neck. (10 RT 1444.) Appellant was squeezing her throat and she was unable to breathe or talk. (10 RT 1445.)

As he dragged Ms. Colletta down the driveway he said, "You're going to die." (10 RT 1446.) At that point two people came to Ms. Colletta's aid and assisted her back to the house.[11] (10 RT 1445-1446.)

Defense Evidence

Appellant testified in his own defense. He admitted past convictions for residential burglary and assault with a deadly weapon.

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[11] On cross examination Ms. Colletta denied that she and appellant were talking about an abortion she had and denied telling appellant that she was "glad I killed your kid; you'd make a terrible father." (10 RT 1449.)

(11 RT 1486-1487.) He met Tammy Epperson through Timothy Todd. (11 RT 1487.) At the time, appellant was taking medications to control his paranoid feelings. (11 RT 1490.)

He was taking Sinequan, a sedative, as well as Depakote and Paxil. (10 RT 1490.) Appellant stopped taking his medications around September 2000 after he and Epperson first had sex. He testified that he was feeling okay and it was hard to maintain an erection on Paxil. (11 RT 1532.)

Appellant often gave Ms. Epperson a ride to work and accompanied her to the bank to make the G&V Communications deposit. (11 RT 1493-1494.) They began dating in late September 2000 and had sex for the first time. (11 RT 1495-1497.) Moreover, contrary to Todd's testimony, Ms. Epperson kept the gifts which appellant gave her; he recognized some of them in the photographs (People's exhibit L) of the stuffed animals on her bed. (11 RT 1499-1500, 1503.) He gave her the stuffed dog on Saturday, November 11th, the day before the incident. (11 RT 1500.)

Appellant stated he bought the lock for Ms. Epperson's door and installed it for her because she was afraid of Ronald Sims. (11 RT 1503.)

Appellant accompanied Ms. Epperson to visit her son, Jeremy, almost every week. Jeremy was in the county jail. (11 RT 1505-1506.) Appellant also put money on Jeremy's books. (11 RT 1506.)

In early November, appellant called Ms. Epperson and told her he needed a break; he was leaving Los Angeles and expected to be

number one in Epperson's life. (11 RT 1513.) On November 6, 2000 he called her at G&V and she hung up on him; he called back and it went back and forth like that. (11 RT 1514.) Later that day he refused to answer Ms. Epperson's page until finally he called her back and she implored him to return to the Stairs program. (11 RT 1515.) He did so the next day. (11 RT 1516.)

On November 11th Ms. Epperson wanted to spend the day shopping. They did so going to Wal-Mart then to lunch and during the day appellant bought a stuffed dog and a jacket for Ms. Epperson. (11 RT 1517-1518, 1519.) They returned to Ms. Epperson's apartment, put away the purchases then drove to the county jail to see Jeremy. (11 RT 1520.) On the way home they ate at Denny's. Later they had sex. (11 RT 1520-1521.)

By November 11th, the security people at Ballington Plaza recognized appellant and a few times he and Tammy did not have to sign in if they were going in and out. (11 RT 1522.) At that time appellant was living at Weingart Center. (11 RT 1522.) He saw Ronald Sims in the Weingart lobby that day. Ms. Epperson was across the street by the church. (11 RT 1523.)

Appellant watched as Mr. Sims exited the lobby, crossed the street and approached Ms. Epperson. (11 RT 1523.) After Mr. Sims left, Ms. Epperson crossed the street and asked appellant to walk her home. He did so. (11 RT 1524.) When they arrived at Ballington Plaza, Ms. Epperson asked appellant to come in; according to the sign-in sheet it was about 10:45 a.m. when appellant signed in. (11 RT

1524-1525.)

At some point appellant drove Ms. Epperson to a Christian book store where she purchased a Bible.[12] When they returned to Ms. Epperson's apartment, they did not sign in. (11 RT 1526.) Ms. Epperson was wearing tennis shoes and jeans; they had consensual sex on the bed. (11 RT 1526-1527, 1534, 1540.)

Then Ms. Epperson went to the bathroom. While she was there, the telephone rang and Ms. Epperson returned to the bedroom to answer it. She was making plans to go out with someone. (11 RT 1527.) When appellant asked who the caller was, Ms. Epperson declined to tell him because she feared he would confront the man. Appellant confirmed this was true and again asked for the name of the caller. Ms. Epperson answered it was someone who went to her church and with appellant still pursuing the issue, she returned to the bathroom. (11 RT 1529-1530.) Appellant followed her and asked if it was over; Ms. Epperson replied that it was. (11 RT 1530.) That made appellant feel worthless, crushed, and he hit her with his fists, but he did not intend to disfigure or kill her. (11 RT 1530, 1532-1533, 1602.) Appellant vaguely remembered leaving the Ballington, and did not know he killed Ms. Epperson. (11 RT 1533.) He thought he remembered the conversation on the telephone with Todd. (11 RT 1533.)

On cross examination appellant again stated he did not

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[12] People's exhibit KK (38 RT 4808) is a receipt dated 12:09 p.m. on 11/12/00. (11 RT 1525-1526.)

remember what happened after he started to hit Ms. Epperson; they had just had consensual sex on the bed, he started to hit her, then he left. (11 RT 1540-1541, 1617-1618.) He told the police Ms. Epperson was not moving when he left the apartment. (11 RT 1541.) He did not attempt to wake her up and did not realize how she looked. (11 RT 1542.) He did not know where he got the cuts on his hands when he was arrested. He remembered hitting Ms. Epperson in the face with his fists and he did ejaculate inside her on November 12, 2000, but he did not rape her. (11 RT 1596.) He did not remember specific punches or blows after the initial punch in the bathroom. (11 RT 1598-1600.) Appellant also did not recall having blood on his face or using the small towels in the sink to clean himself. (11 RT 1597.) He did not know how his blood got on Ms. Epperson's pants. (11 RT 1604-1605.)

Although People's exhibit no. 84, four photographs of tattoos on appellant's arms and legs read, "White Pride" and "White Anger", appellant denied belonging to racist groups and/or being a racist. He obtained the tattoos in prison. (11 RT 1546-1547, 1621.) He did not like Ronald Sims, but it was not because Sims was an African-American. (11 RT 1544, 1621.) Appellant believed he protected Ms. Epperson from Ronald Sims. (11 RT 1567.)

Charles Vannoy was a friend of appellant. Although it was in the statement he gave to the police, appellant did not recall seeing Mr.

Vannoy after the homicide or giving Mr. Vannoy his truck.[13] (11 RT 1548, 1561.) He also did not recall telling Mr. Vannoy that he hit Ms. Epperson with a thing that holds candles, that he cut her twice on the neck or that he used a screwdriver and there was a big hole in her head. (11 RT 1618.)

As for similar incidents attributed to appellant, appellant testified he was not aware he broke his mother's back, did not deny hitting his sister on the head with a lead pipe, denied beating a former girlfriend, Angel Berry, because she wanted to leave him; did not kick Ms. Colletta in the neck, but in the bottom of her back; Ms. Colletta was not leaving him, he had left her; and he did not pull a knife on Ms. McDermott and force her to strip. (11 RT 1556-1559.) Further, he denied telling the authorities in each of the above incidents that he did not remember what he had done. (11 RT 1559.) Appellant admitted he was an alcoholic but continued to drink. (11 RT 1561.) Although he was not drinking on the day Ms. Epperson was killed, appellant quit taking his medications in September; when he is not taking his medication he gets violent and has blackouts. (11 RT 1560.)

Appellant was arrested on November 16, 2000 at a motel after the police kicked in the door. Appellant denied he was lying on the bed at the time and watching a pornographic movie on television. (11 RT 1568-1569.) At that point he did not know he had Ms. Epperson's

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[13] However, later on cross examination appellant said after leaving the Ballington he got into his truck and drove to Vannoy's house where he proceeded to get drunk. (11 RT 1607.)

keys. (11 RT 1568.)

Prior to going to the motel, appellant went to the home of Neida and Mike Walsh in San Pedro. (11 RT 1570.) He did not mention the incident to them. (11 RT 1570.)

Testimony of Charles Vannoy

When Mr. Vannoy was called as a prosecution rebuttal witness, Mr. Vannoy did not remember what he said to the police nor did he remember what appellant told him the night appellant stayed at Mr. Vannoy's apartment. (12 RT 1688-1690.) Initially Mr. Vannoy was certain he did not tell the detectives that appellant told him that appellant killed Ms. Epperson - beat her to death; however, asked again, he replied that he did not remember if he did or not . (12 RT 1691.) He did not remember if he told the detectives that appellant said he cut Ms. Epperson twice on the neck, that he hit her with a stool, or that he used a screwdriver. (12. RT 1692.) Mr. Vannoy did not remember anything he told the detectives regarding Vannoy's conversation with appellant and did not remember if appellant gave him details regarding the beating. (12 RT 1696-1698.)

The videotape of Mr. Vannoy's statement to the detectives (People's exhibit 88A) was played in open court. (13 RT 1770.) After the videotape was played, Mr. Vannoy vaguely remembered his interview with the detectives and vaguely remembered saying the things on the tape. However, it had been three years since the interview and he takes a lot of medication. (13 RT 1771.)

The transcript of Vannoy's interview with the police showed the

following: first, it established the medications Vannoy was taking for paranoid schizophrenia (People's Exhibit 88A, pg 10), seizures and heart problems. (12.) At the time of the interview Vannoy was seeing a psychiatrist and a psychologist. (Exh. 88A, 11.)

Vannoy stated that he was a drop-out of the Aryan Brotherhood (9) and had used narcotics in the past, but was no longer a user. (Exh. 88A, 11, 15.)

Vannoy met appellant in December 1999 when both were incarcerated at C.M.C. (Exh. 88A, 16.) Both were released in May 2000 and moved into the Weingart Center. (Exh. 88A 17-18, 20.)

The Thursday prior to the homicide, appellant assisted Vannoy in moving into an apartment at the Parkview Apartments. (Exh. 88A, 18-19.)

The last time Vannoy saw appellant was the following Sunday afternoon around 4 p.m. or later. (Exh. 88A, 21.) Between 3:45 and 4:15 p.m., appellant called and asked if he could come over. (Exh. 88A, 21, 32, 42-43.) When he arrived appellant was wearing a pair of gray slacks, a long-sleeved shirt and a hat, which he gave to Vannoy. (Exh. 88A, 43.) Appellant seemed skittish but when Vannoy asked what happened; appellant did not want to talk about it. (Exh. 88A, 22.)

Appellant then asked to use Vannoy's telephone and made at least three long distance telephone calls, one to Montana (23), one to Orange County (23) and two to San Pedro. (Exh. 88A, 23, 25.) Vannoy guessed the calls were, respectively, to appellant's biological

mother, his sister, and to a friend. (Exh. 88A, 22-25.)

Appellant and Vannoy spent the rest of the day talking, drinking (appellant) and eating. Appellant spent the night, sleeping on the floor. (Exh. 88A, 26.) Around 3 a.m. on Monday, appellant asked Vannoy to give him a ride to Hollywood and told Vannoy that he killed Tammy, beat her to death. (Exh. 88A, 26, 35.)

Vannoy suggested calling 911 in case Ms. Epperson was still alive; appellant's response was a threat that if Vannoy said anything, he would be next. (Exh. 88A, 33, 49.)

Vannoy said that appellant told him he beat Tammy because she rejected him, was seeing someone else. (Exh. 88A, 27-28.) Appellant said they went in by the bed then Ms. Epperson went into the bathroom where appellant grabbed a candle holder and hit her with it. (Exh. 88A, 29.) The argument progressed to the living room where appellant cut her twice, once on both sides of her neck, with glass. (29.) Appellant said he hit Tammy with a wooden stool and a large lamp and, with an ice pick or a screwdriver, put a big hole in her forehead. (Exh. 88A 31, 50-51.) He said he tore the whole house up. (40.)

As appellant was beating Ms. Epperson, she asked him why he was doing this and he told her that all he wanted her to do was to love him and she wouldn't do that. (Exh. 88A 38-39.) She asked if he was going to kill her and he told her that he was. (39, 85.) Appellant said he had sex with Ms. Epperson about 20 minutes before he killed her. He did not rape her; they had been having consensual sex on a regular

basis for the last two or three weeks. (Exh. 88A, 40 64.)

However, Vannoy said the street talk at The Drifters and at the Weingart Center was that appellant had been stalking Ms. Epperson for the last three months. (Exh. 88A, 51, 52.) Vannoy believed that appellant just went berserk when according to appellant, "Man, she – we fucked. Um, we got done and she's – um, oh, yeah. Somebody called. A guy called. Okay? And I guess she told the guy, "Yeah. That sounds like fun. We're going to have to do this, you know. It sounds like fun." and then Ms. Epperson told appellant that he did not own her. (Exh. 88A, 84.)

Appellant told Vannoy he was going to have fun for a couple of days then turn himself in. (Exh. 88A, 46-47.) He signed his truck over to Vannoy and Vannoy drove him to Highland and Hollywood. (Exh. 88A, 30, 35-36.) Vannoy said no when appellant asked if he could spend another night in Vannoy's apartment. (36.)

Vannoy, concerned about implication in the homicide, assisted the detectives in any way he could. He gave them appellant's pager number (Exh. 88A 54), appellant's jacket left in Vannoy's closet (Exh. 88A 55), appellant's camera (63), and a pink Motorola pager which appellant gave to him. (Exh. 88A 75, 76.) He volunteered to call appellant and said that appellant indicated he would call Vannoy on Wednesday or Thursday. (Exh. 88A, 65-66, 72, 77.) Vannoy firmly believed that he was going back to prison just for associating with appellant at this point in time. (Exh. 88 A, 49.)

On cross examination after the tape was played, Vannoy

testified that he was on parole at the time of the interview, was afraid of being implicated in the homicide and told the police what he thought they wanted to hear. (13 RT 1777-1780; 1785-1786.)

Additional Rebuttal Evidence

Detective Larry Barr responded to Ms. Epperson's apartment on November 13, 2000. (13 RT 1791-1792.) The crime scene had been secured and officers were present. (13 RT 1793.) Detective Barr was in possession of the keys retrieved from appellant's hotel room. (13 RT 1793.) One key opened the dead bolt to Ms. Epperson's apartment and another opened the actual door lock.[14] (13 RT 1793.)

At some point Detective Barr was informed appellant's red Mitsubishi truck had been located. (13 RT 1797.) Mr. Vannoy was detained when he attempted to enter the truck.[15] (13 RT 1797-1798.) Subsequently, Mr. Vannoy was interviewed at the police station. (13 RT 1798.)

Prior to Mr. Vannoy's interview there were no newspaper articles about the instant case and the coroner's report was not prepared until over a month later. (14 RT 1798-1799.) Prior to the interview, Barr did not know the coroner's opinion that the cuts on Ms. Epperson's neck were caused by a piece of glass (1799-1800), that she had been hit on the head by a stool (1800), and he had told no

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[14] Other keys recovered from the hotel room unlocked the doors at G&V Communications. (13 RT 1811.)

[15] Mr. Vannoy was detained because he was driving a murder suspect's truck and he was on parole. (13 RT 1816.)

one that a screwdriver was found in the apartment. (13 RT 1800.)

Following the interview, the detectives accompanied Mr. Vannoy to his apartment because Vannoy indicated that appellant was going to call him. (13 RT 1803.) With Barr listening, appellant told Vannoy his location. (13 RT 1805-1806.) Subsequently, appellant was arrested at the Colony Motel on Pacific Coast Highway. (13 RT 1806.)

When the detectives entered the room[16] there was a pornographic movie playing on the television; appellant was in boxer shorts and either a T-shirt or a tank top and he was lying on the bed. (13 RT 1807, 1809.)

Appellant had numerous tiny cuts on both hands and a little bruising. (13 RT 1810.) He also had a one inch cut on his right calf. (13 RT 1813.) Appellant was *Mirandized*; he waived his rights and spoke to the detectives. (13 RT 1813-1814.)

During the subsequent interview, appellant told the detectives that Ms. Epperson got a telephone call and appellant became upset and attacked her; he "lost it" and hit her a few times with his fists. (13 RT 1819-1820.) Appellant said he could not remember anything that happened after that. (13 RT 1820.) Detective Barr stated that appellant gave basically the same story in court as he did in the interview. (13 RT 1823, 1828.)

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[16] A fugitive team from the Harbor Division, called by Barr, and a parole team entered the room first and apprehended appellant. (13 RT 1806-1807.)

Sanity Phase

Defense Evidence

The defense offered the testimonies of Drs. Boone, Bertoldi, Neidorf and Vicary in this phase of the trial. (15 RT 2136; 16 RT 2218; 17 RT 2322; 18 RT 2468.) Drs. Boone and Bertoldi testified primarily on brain damage in the limbic region and how it affects brain function; Dr. Niedorf concentrated on intermittent explosive disorder and why he considered appellant insane during the homicide of Ms. Epperson and Dr. Vicary summarized the testimony of the others, relying on his own observations as well as the test results of Drs. Boone, Bertoldi and Wu to form his opinion concerning appellant's sanity during the commission of this crime.

Dr. Bertoldi, a neurologist and clinical neurophysiologist reviewed appellant's medical records. He testified that as a young boy, appellant was epileptic. Based on his review of appellant's abnormal radioencephalogram taken in 1970 and an abnormal EEG taken in 1976, it was his opinion that appellant had abnormal brain activity, frontal, posterior and frontal bilaterally, meaning both sides. (16 RT 2243.)

After examining appellant in 2004, Dr. Bertoldi requested that Q-Metrx administer another EEG to appellant. (16 RT 2246-2247.) The EEG indicated an abnormality (2249, 2259), that is, a brain dysfunction in the frontal area which extended backwards to the temporal lobes. (16 RT 2260-2261.) This finding was consistent with a report written by Dr. Kyle Boone. (16 RT 2250-2251.)

Taking into account appellant's EEG as a young boy, Bertoldi's own examination, appellant's medical records and the EEG taken in 2004, Dr. Bertoldi opined that appellant suffered from organic brain dysfunction, frontal and spreading temporally, which is consistent with episodic loss of control. (16 RT 2265.) On cross examination, he stated that in his opinion appellant "has a history of Jacksonian seizures and abnormal EEGs with spike and wave discharges, left temporal and abnormal quantitative and irregular EEG recently showing frontal temporal slowing and paroxysmal temporal slowing as well as consistent with interictal activity probably from seizure disorder." (16 RT 2281.)[17]

Significantly in the 30 year period between 1976 and 2004 the EEG shows that the physiology of his brain did not change significantly. Moreover, that kind of abnormality is consistent with episodic loss of control. (16 RT 2265.) As to the incidents of

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[17] The 2012 Merriam Webster medical dictionary describes Jacksonian epilepsy as:

> "[E]pilepsy that is characterized by progressive spreading of the abnormal movements or sensations from a focus affecting a muscle group on one side of the body to adjacent muscles or by becoming generalized and that corresponds to the spread of epileptic activity in the motor cortex ."
>
> (http://www.merriam-webster.com/medical/jacksonian%20epilepsy)

Even the definition of Jacksonian seizures urged by the prosecution mirrors the one set forth above. (See 15 R.T. 2169.)

violence, Dr. Bertoldi opined that appellant's brain dysfunction was likely contributory, but he could not quantify the degree. (16 RT 2281-2283.)

Dr. Kyle Boone, a clinical neuropsychologist, testified that in addition to administering IQ tests, she tested appellant's ability in basic attention, mental speed, language, visual spacial skills, memory - both verbal and nonverbal - reading, math, and several tests that measure executive or problem solving skills. (15 RT 2143-2144.) In the tests that measure an individual's problem solving skills, reasoning and logic, most of appellant's test scores were very low. Those scores show that appellant is and was very impaired. (15 RT 2144.) This impairment is particularly acute in those areas where he is required to confront a problem situation, evaluate different strategies and figure out the best solution. The same is true for his ability to think through consequences of behavior and to quash a behavior that is not correct or appropriate to the situation. (15 RT 2148.) Indeed, in the various test areas, appellant scored in just the second, fifth, ninth, fourth and sixth percentiles. (15 RT 2149, 2152, see also defense exhibit T.) These scores were much lower than one would expect for appellant's IQ and much lower than his scores in all other areas. (15RT 2149.) More important, these scores suggest that appellant would have a great deal of difficulty stopping a behavior that was not appropriate to the situation. (15 RT 2152.) Moreover, given those cognitive difficulties, whether or not appellant also fit the criteria for a diagnosis of antisocial personality disorder does not change her opinion that

appellant's behavioral difficulties stem from brain dysfunction. (15 RT 2187-2188, 2189.)

Dr. Niedorf, a psychiatrist, opined that Powell suffers from an Axis I or primary diagnosis of intermittent explosive disorder. (17 RT 2327, 2329.) This is a condition usually linked to brain dysfunction as well as familial and social dysfunction. It is characterized by actions, often destructive or violent which can come on suddenly. More important, it has the characteristic of not being inhibited or prohibitive. That is, the mechanism that would turn off the violence or destructive behavior in a normal person is simply not working. (17 RT 2327-2328.) The disorder develops over a lifetime and can be seen at various stages in a person's life by the sudden onset of aggressive violence. (17 RT 2329.) Organic brain dysfunction and other neurological defects can affect a person's ability to control this behavior. (17 RT 2329-2330.)

Dr. Niedorf noted that appellant's aggressive activity and anti social behavior always appear in relation to these intermittent explosive episodes. Very little of his aggressive behavior was the kind ordinarily seen in a culture of sociopathy. (17 RT 2333.) Further, appellant's choice of relationships, the style of relating, the duration and intensity of his relationships, the style of work, the work he chose, and his domestic interests in cooking are qualities of behavior that are **not** typical of a person with a primary diagnosis of sociopathy. Nevertheless, all of these lifelong behavioral issues **were** related to an intermittent explosive disorder. (17 RT 2333-2334.) Dr. Niedorf also

noted that an anti-social personality disorder would be an Axis II or secondary diagnosis. (17 RT 2332.)

Certainly the pet scan, the EEG and the neuropsychological tests done by Drs. Boone, Bertoldi, and Wu confirmed organic brain damage consistent with someone with bipolar disorder. (18 RT 2508-2509.) Dr. Neidorf administered the Millon test to appellant and prosecution witness Dr. Mohandie, gave appellant the MMPI test. According to Dr. Neidorf, both tests showed appellant had a brain disorder of moderate to severe extent with indications of irritability, explosiveness, aggressiveness, paranoia and problems in interpersonal relationships. (19 RT 2510-2511.)

Dr. William Vicary, a lawyer and forensic psychiatrist, testified that he initially interviewed Troy Powell in April 1993 at the request of the superior court. (18 RT 2472.) The issue was whether Mr. Powell was competent to stand trial on another case. At that time, Mr. Powell was determined not to be competent and he was sent to Patton State Hospital for treatment. A little over a year later, in July, 1994, Mr Powell was found to be competent and returned for trial. (18 RT 2472-2474.)

In 2003 and 2004, Dr. Vicary was asked to evaluate Mr. Powell for the defense in this case. (18 RT 2474.) In the recent evaluations, he came to the same conclusion s that he did in 1993. That is, appellant primarily suffers from bipolar disorder. (18 RT 2475.) Intermittent explosive disorder is close to bipolar disorder (18 RT 2476-2477) and appellant could have both. (18 RT 2477.) Dr. Vicary

also agreed with many of appellant's other treating physicians that in addition to a major mental illness, appellant also suffers from a secondary (or axis II) problem of an anti-social personality disorder. (18 RT 2556.)

Dr. Vicary also opined that the tests done by Drs. Boone, Bertoldi, and Wu confirmed organic brain damage consistent with someone with bipolar disorder. (18 RT 2508-2509.) Dr. Vicary administered the Millon test to appellant and Dr. Mohandie, a prosecution witness, gave appellant the MMPI[18] test. According to Dr. Vicary, both tests showed appellant had a brain disorder of moderate to severe extent with indications of irritability, explosiveness, aggressiveness, paranoia and problems in interpersonal relationships. (18 RT 2510-2511.)

Dr. Vicary conceded that appellant probably knew the nature and quality of his act at the time he killed Ms. Epperson. (18 RT 2487-2488, 2549.) That is, appellant probably had some level of understanding that this attack could be fatal. (18 RT 2489.) However, Dr. Vicary opined that he did not believe that at the time of the homicide, appellant was able to distinguish right from wrong. (18 RT 2490.) For this reason, at the time of the act, appellant was legally insane because he did not appreciate the wrongfulness of his act.[19] (18

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[18] MMPI (Minnesota Multiphasic Personality Inventory)

[19] On cross examination, however, Dr. Vicary noted that in California the inability to appreciate the criminality of conduct or conform to the requirements of the law does not fit the legal definition of insanity. (18 RT 2525.) Nevertheless,

RT 2520.) During an explosive outburst, a bipolar moment, the individual is not thinking. There is no rationality, no restraint, nothing that can stop the explosion. (18 RT 2491.)

Significantly, Dr. Vicary explained that a person who suffered from nothing more than a personality disorder and malingering could not take the kind of medications that appellant took through his life and remain functional. Only a person with a very serious mental disorder could take those drugs and remain coherent. Further, as Dr. Vicary explained, a person with a personalty disorder would not be placed in the psychiatric unit of the county jail, the County hospital, the state prison, Patton state hospital, or Atascadero state hospital. Only persons with major mental illnesses, the very sickest of mentally ill patients are placed there. (18 RT 2478.) While there, these patients are administered very potent anti psychotic drugs with extremely serious side effects. Indeed these side effects would be particularly dangerous for patients suffering only a personality disorder who did not need those drugs. (18 RT 2479.) Moreover, any physician who prescribed such large dosages of those kinds of drugs for a person who did not need them would likely go to jail. (18 RT 2480.)

Therefore, appellant clearly needed those drugs for his major mental illness and they were helping him. (18 RT 2480.) Additionally, any person who receives these drugs has to have his or her blood

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on redirect, Dr. Vicary testified that appellant met the third prong of the M'Naughton test: the inability to distinguish right from wrong at the time of commission of the act. (18 RT 2565.)

repeatedly tested to be sure that the high doses administered are not toxic or fatal. The blood tests in appellant's medical records confirm that appellant took those high doses. (18 RT 2481.)

Dr. Vicary also pointed out that even the minority of doctors in the institutions who did not believe appellant had a major mental illness, nevertheless noted appellant's lifelong symptoms of mental illness, such as rapid mood swings, hearing voices, suicidal ideation, and that he slit his wrists on 20 occasions. (18 RT 2581.)

Prosecution Evidence

Dr. David Griesemer is board certified in child neurology and clinical neurophysiology. (16 RT 2294) Dr. Griesemer concluded that before the age of eight, appellant had at least two seizures that were focal in origin arising from the right side of the brain. These required medication management at the time. (16 RT 2297-2300.)

Dr. Griesemer noted that later reports showed that appellant's focal seizures moved from the left side of the brain to the right side; a shift indicative of inherited epilepsy rather than structural brain abnormalities. (16 RT 2300.)

In addition, in appellant's 1976 study, although the EEG remained abnormal, appellant seemed to be doing well so the phenobarbital was discontinued and appellant apparently remained seizure free. (16 RT 2300-2301.) This particular type of pattern is consistent with some of the benign epilepsies. (16 RT 2301.)

Interpreting Dr. Bertoldi's testimony, Dr. Griesemer noted that although there was episodic or intermittent slowing on the EEG they

were not related to epilepsy. (16 RT 2302-2303.) Griesemer further noted that a QEEG for diagnostic purposes has been discouraged by the American Academy of Neurology; that is, an abnormal QEEG should not be used to diagnose specific behavior. (16 RT 2304.)

If he understood Dr. Bertoldi correctly, Bertoldi was suggesting that the seizure focus was on the surface of the brain on the right side during childhood then migrated to the left side during adulthood. Dr. Griesemer testified that typically one does not see migration of epileptic foci. (16 RT 2305-2306.)

In looking at the brain waves in appellant's tracing, Dr. Griesemer found nothing that indicated a tendency to have epilepsy or to indicate there is significant frontal lobe slowing. He found nothing that would encourage him to look further diagnostically at appellant. (16 RT 2307.)

It is Dr. Griesemer's opinion that appellant outgrew the epilepsy he had as a child. (16 RT 2307-2308.)

On cross examination, Dr. Griesemer admitted that there are jail records showing that appellant tried to commit suicide even as a juvenile, and records showing that appellant was paranoid throughout his life even as a child. (16 RT 2310.) Dr. Griesemer also conceded that appellant's juvenile jail records show that he was treated with anti-psychotic medication. (16 RT 2310.) Further, one of the medications that appellant receives is Depakote, a drug that inhibits seizures. (16 RT 2311.)

Dr. Griesemer admitted that while appellant's EEG is abnormal,

nevertheless, he felt that the abnormality was subtle and not consequential. (16 RT 2312.) Finally, Dr. Griesemer admitted that although the American Academy of Neurology and the program accompanying the QEEG has a specific disclaimer saying that there is no direct correlation between an abnormal QEEG and a particular behavior, many clinicians use the QEEG in assessing and treating abnormal behavior. (16 RT 2315.)

Psychologist Dr. Kris Mohandie testified that he formally interviewed appellant on three occasions, looked at videotapes of police interviews with appellant and Vannoy, and reviewed medical records and many different psychiatric reports. (18 RT 2594-2595.) At no time did Dr. Mohandie see evidence that appellant suffered from a bipolar disorder such that he was a danger to himself or others or that he should have been involuntarily committed. (18 RT 2595-2596.)

In addition, he administered the MMPI test and a SIRS (Structured Interview of Reported Symptoms) test. The MMPI is used in forensic settings and has eight different validity indicators. The SIRS test is specifically a test to determine evidence of malingering. (18 RT 2599.)

Dr. Mohandie regards these as the standards for assessment of malingering and would disagree with Dr. Boone that the Millon test (aka, MCMI, Millon Clinical Multi Axle Inventory) is a newer test and more sensitive than the MMPI. (18 RT 2600.)

Dr. Mohandie found evidence of malingering in both the MMPI

II test and in the SIRS test. (18 RT 2601.) Significantly, he did not find evidence of a major mental disorder because of appellant's tendency to exaggerate his symptoms. He would label appellant as having anti-social personality disorder with narcissistic and borderline traits, none of which would render him incapable of knowing right from wrong. (18 RT 2601-2602, 2608, 2651.) Nevertheless, Dr. Mohandie agreed with Dr. Vicary in that there are cross-overs. Bipolar disorder and anti-social personality disorder are not necessarily mutually exclusive; you can have both. (18 RT 2612.)

Dr. Mohandie did not find the homicide was a result of intermittent explosive disorder. Instead, he believed the homicide to be the result of motivated behavior in the context of rejection. (18 RT 2613.) Thus, Dr. Mohandie concluded that appellant was legally sane at the time of the homicide. (18 RT 2605, 2614.)

On cross examination Dr. Mohandie noted that he worked as a psychologist for the Los Angeles police department for approximately 14 years from 1989-2003. (18 RT 2614-2617.)

More important, he also conceded that appellant might have a major mental illness. However, again, he could not really label any major mental illness because of appellant's tendency to exaggerate his symptoms. (18 RT 2622, 2628.) Consequently, Dr. Mohandie did not agree with the majority of psychiatrists who saw appellant in prison and diagnosed appellant with a major mental disorder of some type. (18 RT 2623-2624.)

Dr. Mohandie also conceded that appellant was admitted to

Patton State hospital in April 1993 for major depression with psychotic features, but noted that in 1994 a panel of two or three psychologists and a psychiatrist found appellant to have anti-social personality disorder and was manipulating the system. (18 RT 2323-2624.) In Dr. Mohandie's opinion, although appellant has been diagnosed as having a major mental disorder by numerous mental health professionals over many years, these professionals have simply been deceived. Appellant has just been manipulating the system. (18 RT 2626, 2628, 2631.)

As to the abnormal EEG data and PET scans, Dr. Mohandie agrees with Dr. Griesemer that as it relates to brain issues and behavior, these tests are not reliable predictors of specific behavior. (18 RT 2634-2635.) Nevertheless, Dr. Mohandie conceded that a person could appear normal both shortly before an explosion of violence and shortly afterwards, yet have a true mental disorder during the explosion of violence. Further, a person could be mentally ill while accomplishing significant achievements. (18 RT 2639-2640.)

Dr. Mohandie refused to opine whether the medications given to appellant were indicative of a major mental illness because he was not allowed to prescribe such medications and he did not know if appellant actually took those medications. Appellant could have been faking the ingestion of those medications, even for the previous 15 years for which there are medical records. (18 RT 2645-2646.) Moreover, even if the medical records show that appellant has had blood tests showing that he has been taking the medications, those

results would not change Dr. Mohandie's opinion. (18 RT 2647.)

Penalty Phase

Prosecution Evidence

Since the first penalty phase trial resulted in a hung jury, the evidence presented there will not be summarized here.

As to the evidence concerning the homicide in the second penalty phase trial, witnesses Ramakrishnan (28 RT 4235-4267), Ray (29 RT 4273-4305), Gonzalez (29 RT 4305-4314), Raquel (29 RT 4321-4460), Vannoy (30 RT 4464-4507), Wang (31 RT 4526-4578), Todd (31 RT 4603-4656), Sims (32 RT 4714-4747) and Barr (32 RT 4783-4820) testified substantially in accordance with their testimonies in guilt phase.

Both Deborah Colletta and Betsy McDermott, however, expanded their testimonies to include other incidents which involved appellant. (31 RT 4657-4708; 32 RT 4750-4781.)

Deborah Colletta recalled that about six months into their relationship appellant sat on her and punched her in the chest several times. (31 RT 4664.) She did not recall what initiated the incident. (31 RT 4665.) There was also a time when her brother was in the house and appellant choked Ms. Colletta; she did not recall what initiated that incident either. (31 RT 4665.) Other incidents included incidents where her knee was injured (4665) and one in which Ms. Colletta's mother was in appellant's way and appellant pushed Ms. Colletta's mother against the door jamb. (31 RT 4666-4667.) In a later incident, Ms. Colletta was babysitting in her home and appellant

kicked in the door then grabbed Ms. Colletta by the throat, threw her on the floor and hit her head. (31 RT 4669.) Finally, there was an incident that took place in a friend's home when appellant forced himself on Ms. Colletta at knife point and required her to perform oral and anal sex with him. (31 RT 4670-4671.)

Ms. Colletta also stated that on more than one occasion appellant threatened to kill her. (31 RT 4675-4677, 4679.) She called the police on only a few of the incidents because appellant threatened to kill her if she did so. (31 RT 4679.)

At the conclusion of her direct testimony, Ms. Colletta recalled that appellant told her that the ultimate for him would be to have somebody look in his eyes as they took their last breath; he wanted to kill somebody. (31 RT 4681.)

On cross examination Ms. Colletta reiterated that she stayed with appellant for two and a half years because she was afraid to leave him for fear of her life and the lives of her family. (31 RT 4684, 4702, 4705.) Nevertheless, she admitted that she recalled and listed these additional incidents only about a month and a half prior to the instant testimony and approximately 15 years after these alleged incidents occurred. Moreover, she declined to discuss these incidents with the defense investigator; she did not report these incidents to the authorities, and all of the people who could corroborate these incidents were either not present in court, deceased or otherwise unavailable. (31 RT. 4689-4694.)

Betsy McDermott testified that she was separated from her

husband when she met appellant. (31 RT 4752.) She told appellant she liked him as a friend, but she was seeing someone else. (31 RT 4753.) Still, appellant brought stuffed animals, cigarettes, flowers and toys for her children. (31 RT 4753.)

On March 14, 1999 Ms. McDermott had an asthma attack; appellant was present and drove her to the hospital. (31 RT 4754.) After her treatment, he drove her back home where she fell asleep on the couch. (31 RT 4755.) When she awakened, she was in her room and appellant was on top of her having sex with her. (31 RT 4755.) She told appellant to get off but he did not do so until he was finished then told her, "You wanted this. I did not rape you." (31 RT 4755.)

Appellant then began throwing condoms and other personal things from Ms. McDermott's marriage and accused her of seeing someone else. (31 RT 4756-4757.) She was afraid for herself and her children and asked appellant to leave. (31 RT 4758.) He did so several hours later. (31 RT 4758.)

In the interim, Ms. McDermott's children awakened and when appellant grabbed her by her neck and hair and tried to drag her into the bedroom, she screamed for her son to help her. (31 RT 4758-4759.) Ms. McDermott pulled the screen off the bedroom window and told her son to go out the window and get help. Appellant caught him and threw him back into the room. (31 RT 4760.) Finally, when Ms. McDermott told appellant if her children did not show up at day care they would call the police, appellant allowed them to leave. When Ms. McDermott returned, appellant was gone. (31 RT 4760-4761.)

She claimed that she did not report the incident to the police because of fear for her children. (31 RT 4761.)

After the incident, Ms. McDermott always kept someone in the apartment and had someone walk her to her car after her A.A. meetings or caught rides from other male members of the program. (31 RT 4761-4762.) She made it clear to appellant she wanted nothing to do with him. (31 RT 4762.)

On April 4, 1999 Ms. McDermott's children were with her ex-husband who was threatening to take custody of the children if McDermott did not report the incident in mid-March to the police. (31 RT 4762-4763.) Appellant came to her apartment. She told him to leave; he had cost her enough. (31 RT 4763.) Five days later, she received a telephone call from appellant which initiated the incident to which she testified in the guilt phase. (31 RT 4763.)

Ruth Steward, a lay minister at Central City Community Church of the Nazarene, became friends with Tammy Epperson about a year before Ms. Epperson's death. (28 RT 4213-4215.) Ms. Epperson had drug problems but overcame them and was determined to make good of her life. (28 RT 4215-4216.) Ms. Steward believes that Ms. Epperson not only took charge of her own life, but would have helped others in the neighborhood. (28 RT 4216, 4221.) Ms. Epperson tried to help other people with problems. (28 RT 4225.)

Bette Ruiz de Esparza is Ms. Epperson's former mother-in-law. (31 RT 4578-4579.) Paul Grano, her son, and Ms. Epperson met in grade school. (31 RT 4579-4580.) Ms. Epperson's mother left when

Ms. Epperson was still a teenager; her mother had alcohol problems. (31 RT 4580.) Ms. Epperson's father was in Chicago and after her mother left, Mr. Grano basically raised Ms. Epperson. Eventually, Ms. Epperson and Paul married. (31 RT 4580.)

Ms. Epperson called Ms. Ruiz de Esparza quite often. Ms. Epperson intended to be there when de Esparza had a heart operation. There was mutual affection between the two women. (31 RT 4584.) Ms. Epperson was never a mean person. They got very close during the last few years. (31 RT 4585.)

Ms. Ruiz de Esparaza was aware of Ms. Epperson's, Paul's and Jeremy's periodic involvements with drugs. (31 RT 4588-4589, 4591.) In the few months prior to her death, however, Ms. Epperson was doing great and Ms. Epperson was attending church. (31 RT 4589.) Moreover, contrary to Todd's testimony, Ms. Esparza testified that Ms. Epperson had plans to get back together with Paul. (31 RT 4591-4592.)

Defense Evidence

Appellant's Childhood

Wanda Agnew, a friend of appellant's mother Joyce, has known appellant since birth. (32 RT 4844-4845.) Ms. Agnew met Joyce Powell and appellant at church, where she taught appellant in Sunday School. (32 RT 4846, 4849.) Ms. Agnew lived about two blocks away from the Powell residence. (32 RT 4846.) Ms. Powell took her children to Ms. Agnew's home three or four times a week for at least ten years, maybe fifteen. (32 RT 4287.) Ms. Agnew's home was a

"safe house" where appellant would not be kicked or hit with a belt by his father. (32 RT 4847.) Joe Powell was quick tempered and domineering. Appellant, his siblings and his mother were afraid of him. (32 RT 4848.)

When appellant was about two years old, Ms. Agnew was told there was an accident and appellant hit his head on an iron pole. (32 RT 4850.) She found appellant emotionally upset for the next year or so; he was not quite himself. (32 RT 4849.)

Terri Powell, appellant's sister, is five years older than appellant. Their other siblings are Lance, the oldest, and Marcia. (32 RT 4869-4870.) Terri remembered appellant being rushed to the hospital due to seizures when he was two to three years old. He took phenobarbital to control the seizures. (32 RT 4872.) The phenobarbital turned appellant's teeth gray and he was teased about that. (32 RT 4873; 35 RT 5386.)

Terri took appellant everywhere. Their father was not a very good father; he was not supportive, not encouraging and verbally abusive. (32 RT 4873.) He was also physically abusive to the boys; he would pick them up and throw them against the wall, kick them, slap them and beat them. (32 RT 4874.) Mrs. Powell would just watch. (32 RT 4876, 4878.) Her father was verbally abusive, but not, except for one occasion, physically abusive to Terri. (32 RT 4877.) Marcia, the youngest, was favored a bit more by Mr. Powell. (32 RT 4878.)

On one occasion Terri entered the house to find Lance sitting in

the middle of the living room with a rifle pointed at the door. He was going to shoot his father. Terri was able to take the gun from him. (32 RT 4881.) Later, however, Lance injured some classmates with a gun in response to being bullied at school. (32 RT 4882.) Lance was sent to juvenile detention and their father repeatedly told appellant that he was going to end up just like Lance. (32 RT 4884.)

Terri was in college when she heard there was an incident when appellant attacked Marcia with a lead pipe and that he pushed his mother against the couch or something. (32 RT 4884-4885.) Another time, when appellant was around thirteen years old, their mother called Terri at college and asked Terri to come home because appellant was really upset. (32 RT 4886.) When Terri arrived, appellant had a gun in a little duffle bag; Terri talked to him for hours to calm him down; she felt he was going to try to harm himself or their father. (32 RT 4886.)

Terri reported an incident to the police when appellant tore the mirror from the driver's side of her car. She believed that appellant needed help and told appellant in court that she would drop the charges if he promised to get help with his alcohol problem and get counseling on anger control. Appellant agreed to do so. (32 RT 4890.)

When appellant was incarcerated, he received medications and counseling. However, when he was released, he would discontinue his medications. (32 RT 4891.) Terri has met some of appellant's girlfriends. They seem to be pretty normal relationships until a

woman rejects him. Then he gets very, very angry and hurt and frustrated. (32 RT 4894, 4902.) If they want to leave, he slaps them around because that is what he saw as a child. (32 RT 4909-4910.)

Montana Powell Gomez, Terri's sister, also testified to a nightmarish childhood. (35 RT 5326, 5330.) She and her siblings suffered physical and verbal abuse. (35 RT 5330-5331.) Although Ms. Gomez is now married with children of her own she continues to go to therapy in an attempt to understand and cope with her past. (35 RT 5332-5333.) Even birthdays and holidays were not good. Especially at Christmas, her father would find a way to ruin the festivities. (35 RT 5338-5339.)

Appellant had really light hair and he was light-skinned so the other children would call him "Troylet paper." On one occasion, they tied him to a pole and were going to beat him until Terri stopped it. (35 RT 5345-5346.)

Asked about the time appellant hit her with a lead pipe, Ms. Gomez said she was asleep and woke up to find her head covered with blood; appellant had no idea what he had done; he "just went to that place he goes to and just came and hit me." (35 RT 5349.)

Appellant was seen by psychiatrists once or twice, but then her father put a stop to that. (35 RT 5350.)

Even though appellant has put her through hell at times, Ms. Gomez believes appellant does not realize what he is doing. Moreover, although she loves him, she is afraid of him. (35 RT 5363.) She believes appellant to be a warm, loving person (5358), but he does

have a problem when he is rejected. (35 RT 5362.)

Appellant's mother, Joyce, testified that she is one of eleven children and she was sexually abused by her father when she was eight or nine years old. (35 RT 5378-5379.) She met Joe Powell when she was fifteen years old. His father was deceased, but Joe's mother drank a lot and put her children into foster care whenever she could do so. (35 RT 5380.)

Joe hit appellant for the first time when appellant was about two years old. (35 RT 5384.) Appellant was playing with another boy and appellant pushed the other boy down. Joe picked appellant up and threw him into a pole and asked him how that made him feel. (35 RT 5384.) About six months later appellant started having seizures. (35 RT 5384.) After appellant suffered another seizure a couple of months later, the hospital ran some tests and found appellant had some brain damage. (35 RT 5385.) Appellant was on medication until he was seven and a half years old. (35 RT 5385.)

Mrs. Powell also recalled other incidents when her husband physically kicked or threw appellant in anger; once appellant hit the wall very hard, he was between eight and ten years old at the time. (35 RT 5387.) There was also an incident when his father told appellant to beat another boy and when appellant refused to do so his father kicked him down the street and all the way back up. At the time, appellant was about eleven years old. (35 RT 5388.) Not only was her husband physically and verbally abusive to the children, he also threw her into the kitchen wall once and choked her. (35 RT 5389.)

This behavior went on until he found a girlfriend. (35 RT 5389.) Mrs. Powell never left because she was afraid of Joe; he told her if she ever left he would take the children and leave her destitute. She never called the police. (35 RT 5390.) However, on the occasion when Joe kicked appellant down the street, the neighbors did so. (35 RT 4390.)

When appellant was about thirteen years old Joyce prevented him from committing suicide with a butcher knife by promising to get him help. (35 RT 5392, 5396.) Appellant did see a psychologist, but after a few sessions the psychologist informed Joe that he was the problem and Joe refused to pay for any more sessions. (35 RT 5393.) When Joe threw appellant out of the house, Joyce asked child protection for assistance in relocating him; child protection informed her she had to take appellant back to the house. (35 RT 5395.)

Appellant was fifteen and a half when Joe told Joyce that he [Joe] had a girlfriend and he wanted Joyce out of the house. Joyce moved into a duplex with Montana (Marcia). (35 RT 5400.) Appellant lived with Joe until he was almost eighteen. Appellant then moved to San Francisco. (35 RT 5401.) It was on a visit to the duplex that appellant fell asleep on the couch and attacked Marcia. (35 RT 5401-5402.) Appellant had a confused look on his face; the same look he would sometimes get when he was just sitting. (35 RT 5402-5403.) Appellant was agitated and tried to prevent Joyce from taking Marcia to the hospital. (35 RT 5403.) Following the incident appellant went to juvenile hall and received some psychiatric treatment until Joe was told he had to contribute and he refused to do so. Consequently, the

treatments stopped. (35 RT 5403.)

Appellant received an honorable discharge during basic training in the Navy when it became apparent he had asthma. (35 RT 5404.) The incident involving Joyce's back occurred when appellant was twenty to twenty-two years old. (35 RT 5404.) Appellant came to the apartment wanting money. When Joyce told him she had none, appellant was "real strange." He got angry and began looking for Joyce's purse. He had a blank look on his face and said, "I want the money and I want the money and I want it." (35 RT 5405.) Joyce again told appellant she did not have any money and appellant picked her up and threw her across the room. She hit a dresser and broke a vertebra in her back. (35 RT 5406.) Joyce was unable to do so, so a neighbor called the police. (35 RT 5405.) As a result, Joyce went to the hospital and appellant went to jail. (35 RT 5406.) The look appellant had that night was the exact same look as the one he had when he tried to prevent Joyce from taking Montana to the hospital. (35 RT 5406.)

Joyce loves appellant and believes he did not know what he was doing when he hurt her and Montana. When he isn't drinking he is a very, very caring and loving person, always protective of others. (35 RT 5407.)

Joyce described the relationship between appellant and his father as a conflicted relationship. Appellant has complained his whole life about being abused by his father, but has never quite put his father out of his life. (35 RT 5421-5422.) Joyce believes appellant wants his

father to love him in spite of the abuse. (35 RT 5422.)

Kevin Brunner was a childhood friend of appellant. They grew up just outside of Barstow and their families knew each other very well. (33 RT 5078-5079.) Mr. Brunner also knows Wanda Agnew. (33 RT 5079.)

Mr. Brunner and appellant did not become intimately acquainted until they were in high school. Appellant's mother prompted them to spend more time together because appellant was a little troubled. (33 RT 5080.) Appellant's father was not around; his parents had been separated off and on for years and Mrs. Powell thought Kevin might be a good influence. (33 RT 5080.)

Appellant's father, Joe, had a horrible reputation in the community: violent temper, mean, just not a real nice guy. (33 RT 5081.) Mr. Brunner remembered that in high school appellant was a nice kid and the nice kids got picked on because they were an easier target. (33 RT 5082.) In addition, the association with Lance was something appellant's father, peers and even teachers never let appellant forget. (33 RT 5082.)

Appellant was the first person to help around the Brunner's farm. In school he acted as a buffer between several retarded students and a small community of gang members who bullied them. (33 RT 5084, 5086.) When Mr. Brunner enlisted in the Marine Corps he lost contact with appellant. (33 RT 5085.) He felt that appellant grew up in a household that was extremely troubled with a father that was abusive and a mother who did the best she could with what she had.

(33 RT 5086.) Mr. Brunner did not know the specifics of this case or of any other incidents attributed to appellant, but he remembered appellant as having a big heart. (33 RT 5088.)

Testimony of Adult Friends

Neida Cook-Welsh was in the Stairs Program at Weingart Center for parolees in 1998. (33 RT 5069-5070.) She met appellant there and they became friends. On a couple of occasions she almost totally lost control and would have been sent back to prison on a violation had appellant not intervened. (33 RT 5071-5072.) At the time of her testimony she had been out of prison for seven years and drug-free for six to seven years. (33 RT 5072.) Discharged from parole and married for three years, Ms. Cook-Welsh and her husband manage a 36-unit apartment building in Carson City, Nevada and were about to purchase their first home. (33 RT 5072.) Ms. Cook-Welsh said that appellant played a big part in her success because of his friendship. (33 RT 5072.) Both appellant and Timothy Todd visited Ms. Cook-Welsh and her husband in their home in San Pedro on several occasions. (33 RT 5073.)

Ms. Cook-Welsh recalled two things in particular concerning being with appellant at the Weingart Center: appellant received medications while at the center and he became very upset when Cook-Welsh once asked him why she would want to be friends with a black ex-convict like her. She referred to herself as a nigger and appellant angrily told her to never call herself that again. (33 RT 5076-5077.)

Asim Askar testified that she met appellant about fifteen years

ago. (32 RT 4855-4856.) Ms. Askar knew Deborah Colletta and saw her and appellant together often. They appeared to have a normal relationship, a typical couple. (32 RT 4858.) Mr. Askar was friends with both of them and they did things together. (32 RT 4858.)

Psychiatric Evidence

Psychiatric evidence was presented in the penalty phase. Drs. Vicary, Boone, Bertoldi and Niedorf testified for the defense as did Dr. Richard Romanoff. Dr Romanoff is a clinical and forensic psychologist. He testified on sur-rebuttal. (32 RT 4927; 33 RT 5091; 34 RT 5151; 35 RT 5433; 36 RT 5588.)

The prosecution presented evidence from Drs. Griesemer (34 RT 5285) and Mohandie on rebuttal. (36 RT 5521.)

Defense Evidence

Although each interviewed appellant, Drs. Vicary, Niedorf, and Romanoff relied primarily on numerous institutional records, prior psychiatric evaluations and the results of a complete battery of tests including EEGs, PET scans and neuropsychological testing, given by others, to determine their opinions as to appellant's mental health and its relation to the homicide of Tammy Epperson. (32 RT 4929; 35 RT 5437; 36 RT 5591-5592.)

Overview

Dr. Vicary provided an overview including the times appellant was found to be incompetent to stand trial prior to medication[20] (32 RT

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[20] Excluding the instant case.

4930, 4933), the massive doses of medication necessary to stabilize him during those times he was incarcerated (32 RT 4932, 4962) and his traumatic family background and childhood seizures. (32 RT 4937-4939, 4942.)

In Dr. Vicary's opinion appellant suffers from a major mental disorder. (32 RT 4949.) A prison psychiatrist diagnosed appellant as having bipolar disorder. (32 RT 4950.) Appellant attempted suicide several times. (32 RT 4951-4952.) Neuropsychological testing done by Dr. Boone confirmed damage to the frontal and temporal parts of appellant's brain; these are the areas that control one's ability to control emotions. (32 RT 4943.)

However, on cross examination Dr. Vicary did not deny that Patton State Prison originally diagnosed appellant with bipolar disease, but within a year, appellant was showing no symptoms consistent with auditory or visual hallucinations and did not appear to be suffering from a severe mental disorder. (32 RT 5005-5006.) Dr. Vicary also admitted that when appellant says he does not remember anything after hitting Ms. Epperson, that to some extent appellant is minimizing what he did and to some extent he may have been lying. (32 RT 4985.)

Also on cross examination, Dr. Vicary confirmed that in another high profile homicide case he deleted parts of his interview notes [prior to discovery] because he was threatened by defense counsel that if he did not, he would not be allowed to testify. (32 RT 4970-4971.) Dr. Vicary agreed this was an ethical violation for which he was

brought before the certification board and placed on probation. (32 RT 5042-5043.)

Seizures

Dr. Bertoldi reiterated the testimony given in the sanity phase concerning appellant's Jacksonian seizures. (34 RT 5610-5161.) He explained that in general, a third of childhood patients outgrow the seizures, a third continue to have seizures in childhood and in a third of the cases the patient can grow out of the seizures and have them return later in life. (34 RT 5162.)

He also reiterated that appellant's EEG showed abnormal activity mainly in the left posterior frontal region, a different place than when he was two years old; same side of the brain, but a different location[21]. (34 RT 5166.) The paroxysmal activity shows the epileptic activity shifting. The shifting of the focus from side to side also means the focus is deep within the brain; the limbic portion of the brain is the deepest portion of the brain part. (34 RT 5191, 5217.)

Dr. Bertoldi explained that if you put a seizure focus in the limbic area of rats you get uncontrollable rage. In humans where there have been instances of uncontrollable rage then subsequent autopsy, there have been lesions noted in the limbic structures. (34 RT 5193.)

On cross examination, Dr. Bertoldi stated that the focus of appellant's seizure is too deep to see evidence of a deep limbic seizure

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[21] Defense exhibit W2 indicates a study done on 4/19/72 indicating paroxysmal activity accentuated in the left posterior frontal region; the defense had records of 1970 and 1976 but not of 1972. (34 RT 5167-5168.)

disorder (5208-5209), but he believed that a deep limbic seizure was a factor in some portion of the instant crime. (34 RT 5210.)

In addition, Dr. Bertoldi was of the opinion that when appellant attacked his mother, his sister, and Colletta in each case a paroxysmal episode was at some level contributory, not the exclusive cause, but certainly contributory. (34 RT 5259-5260, 5263.)

Brain Damage

Dr. Kyle Boone's testimony in this phase again centered on appellant's test scores on a series of tests. (33 RT 5091, 5095, 5097.) She testified that the tests can be faked, so various tests are embedded to specifically check for malingering. The test results showed appellant was doing his best. (33 RT 5096.)

Appellant did well on some tests and very poorly on others, a normal result since any damage is usually in one area; scores will be low on tests that measure that area and normal on the other scores. (33 RT 5098.)

Appellant's scores were above average in verbal memory (33 RT 5102), high average in basic attention (33 RT 5099), average in overall intelligence and language (33 RT 5099, 5101), average to low average in visual spacial skills and non-verbal memory (5102-5103), and low average in thinking speed (33 RT 5100), with a clear deficiency in executive or problem solving skills. (33 RT 5103.) The latter score came from six tests in which appellant scored from less than 1% to a high of 16% in the individual tests. (33 RT 5108, 5110-5115, 5127.) On the tests which measured the ability to inhibit, to

stop a behavior that is no longer correct for the situation, appellant scored in the 2nd percentile. (33 RT 5116.)

Dr. Boone explained that the problem solving skills were most closely related to the front portion of the brain, the frontal lobes. (33 RT 5106.) People who score low on problem solving skills will have trouble thinking through consequences of behavior; they will be impulsive, not empathetic. They will have difficulty understanding the impact of their behavior on others. They will also have trouble making logical plans and following through on those plans. (33 RT 5107.) People without fully functioning frontal lobes don't really have a choice in terms of doing organized, willful, well planned behavior; they don't have the brain equipment to do that. (33 RT 5108.)

The consistent weaknesses in the problem solving area suggest to Dr. Boone there might be a dysfunction of the frontal lobes of appellant's brain. (33 RT 5123, 5131, 5133, 5140.)

Dr. Boone added that a paper that appeared in a professional journal in 1996 written by three doctors who actually studied patients with brain damage found that violence was most frequent in patients with damage or lesion in the frontal lobe. (33 RT 5125.) The literature is mixed on the scores of persons with anti-personality disorder; some can do poorly on problem solving tests and others do fine. (33 RT 5132.)

Dr. Bertoldi testified that he examined appellant and requested an EEG be done by Q-Metrx. (34 RT 5158.) An EEG measures the electrical activity of the brain. (34 RT 5156.) Based on the results of

that EEG and other testing by various doctors, Dr. Bertoldi believes appellant has cognitive difficulty that would be consistent with brain damage. (34 RT 5171.) For more confirmation Dr. Bertoldi ran a QEEG. This test takes the same data of an EEG and puts it in a computer for comparison to a normal data base then maps the difference in terms of color and gives a statistical deviation from normal. (34 RT 5182.) The findings of the QEEG were consistent with what Dr. Bertoldi saw on the EEG printout. (5186.) When he read the routine EEG he saw frontal slowing, but the results of the QEEG showed a higher degree of abnormality. (34 RT 5186-5187.)

Malingering

Dr. Vicary gave appellant a test similar to the SIIRS test, a structured inventory of malingered symptoms. Even though the test scores indicate appellant is borderline, Dr. Vicary opined that appellant is not a malingerer. (32 RT 5010-5011, 5013.) However, Dr. Vicary opined there have been times when appellant malingered; appellant's claim that he did not remember what happened after a certain point when he assaulted the decedent showed Dr. Vicary that appellant was malingering or outright lying to some extent. (32 RT 5016.)

Dr. Boone did not find malingering on the tests he administered, but offered that did not preclude appellant from malingering on others. (33 RT 5128.)

Dr. Romanoff agreed with the opinion of prosecution witness Dr. Mohandie that appellant suffered from malingering. (36 RT

5592.) Dr. Bertoldi thought it possible. (34 RT 5250.)

Sexual Sadism

While it was not introduced in the sanity phase, the prosecution brought up sexual sadism in it's cross examination of Drs. Vicary, Bertoldi and Niedorf. (33 RT 5054; 34 RT 5233; 35 RT 5496.)

Dr. Vicary testified he was familiar with the Crime Classification manual by Douglas and Burgess and agreed that appellant's incident with Ms. Colletta during his visit to her apartment was consistent with the profile outlined therein of a sexual sadist. (33 RT 5001.)

Dr. Niedorf, however, defined a sexual sadist as a person who degrades, humiliates, and harms a female and gets sexual gratification from the same. (35 RT 5496-5497.) He opined that appellant gets sexual gratification from non-violent ways, from ordinary typical sex; appellant explodes when there is a threat of loss. (35 RT 5497.)

Mental Disorders

In Dr. Niedorf's opinion appellant suffers from a major mental illness, a bipolar disorder, as well as a seizure disorder. (35 RT 5438-5439.) He opined a seizure disorder over time can change from a shaking or tension of muscles and loss of consciousness to a behavioral problem, one of which is intermittent explosive disorder. (35 RT 5440.) He believed appellant's attacks on his mother, sister, Colletta and Epperson to be consistent with intermittent explosive disorder. (35 RT 5446.)

Over the years appellant has had many diagnoses including:

major depression with psychotic features, alcohol dependence, anti-social personality disorder, and major mental illness. (35 RT 5461-5462.) Dr. Benson from CMC dated October 13, 1995 diagnosed Axis I, schizo-affective disorder, bipolar type (5467), doctors in Atascadero in 1997 diagnosed schizo-affective disorder, bipolar type and intermittent explosive disorder (5470-5471) and in 2000, severe mental disorder. (35 RT 5471.)

As a result of the diagnoses appellant received numerous medications including but not limited to: depakote, an anti-epilepsy medicine; haldol, a very potent anti-psychotic medication; and cogentin for side effects (35 RT 5467-5468), as well as lithium, valproic acid, and sertraline, drugs for control of seizures, anti-psychotic behavior, hallucinations and trouble sleeping. (35 RT 5468-5469.)

Dr. Niedorf, however, also believed appellant to be suffering from anti-social personality and malingering. (36 RT 5592-5593.)

Dr. Romanoff agreed that appellant suffered from a complex set of mental disorders. (36 RT 5593, 5595, 5614-5615, 5623-5624.) If he had to reduce appellant to a DSM set of diagnoses, Romanoff would start with intermittent explosive disorder (36 RT 5597), but the totality of the evidence supports the presence of some atypical ill defined organic disorder. (36 RT 5619.) He stated there is clear evidence in the literature that the harmful effects of long term trauma that repeats over and over again over time are much more damaging to overall psychological health than a single trauma that essentially

repeats itself only once. Romanoff believes that the factors that contributed to appellant's developing these personality difficulties were already laid down and pretty solidly entrenched in him prior to his becoming sixteen years old. (36 RT 5628.)

Dr. Bertoldi concluded there was a high degree of medical certainty that appellant suffered from a deep seizure focus limbic or temporal limbic disorder causing episodic discontrol, emotional mobility and intermittent rage. (34 RT 5227-5228, 5248-5249.)

In conclusion, Dr. Vicary stated there was no doubt that virtually all the doctors who have examined appellant would say he qualifies for anti-social personality disorder but there are also major mental illness issues including bipolar disorder, brain damage and seizure disorder. (33 RT 4999, 5048-5049.)

Prosecution Evidence

David Griesemer spent an hour and a half with appellant. (34 RT 5285, 5288-5289.) Dr. Griesemer took a neurologic history and did a neurologic exam. (34 RT 5290.) He also reviewed Dr. Bertoldi's report which included a physical examination and a mental status exam. It appeared to Dr. Griesemer that Dr. Bertoldi deferred to cognitive testing done by several neuropsychologists. (34 RT 5291.)

Seizures

Griesemer concluded appellant had a normal neurological exam. Appellant discussed with Griesemer taking phenobarbital until he was about eight years old and appellant recalled having no seizure activity

after that time. (34 RT 5291-5292.) Also, county jail medical records viewed by Griesemer showed no objective evidence of seizure activity since childhood. (34 RT 5292.)

Brain Damage

Dr. Griesemer reviewed the read-out from Q-Metrx and would classify the study as mildly abnormal. He believes Dr. Bertoldi is correct in identifying some intermittent slowing but believes Bertoldi is incorrect in the significance he attributes to that slowing. (34 RT 5294, 5315.) He also disagrees with Bertoldi regarding a deep limbic focus. (34 RT 5295, 5306.) Dr. Griesemer opined that since appellant had abnormalities on both sides of his brain, had EEG abnormalities that increased during sleep, had abundant EEG abnormalities without having clinical seizures and that he was able to be taken off phenobarbital and go seizure-free all suggest that as a child appellant had a benign epilepsy syndrome (5297); that is relevant because that undermines the necessity of searching for a deep focus and breaks any continuity that Dr. Bertoldi would tie to the present day. (34 RT 5297.) In addition, Dr. Bertoldi responded affirmatively when asked if appellant's EEG was consistent with a deep limbic epilepsy, but a normal EEG is also consistent with a deep limbic epilepsy as is an EEG pattern that shows temporal lobe sharp waves, but none of them are diagnostic of such an epilepsy. [22](34 RT 5298.)

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[22] On rebuttal Dr. Mohandie testified he did not find [evidence of] a limbic seizure disorder which resulted in primal rage. (36 RT 5544.)

Malingering

Dr. Kris Mohandie, a psychologist, gave appellant the MMPI (Minnesota Multiphasic Personality Inventory) test.[23] (36 RT 5521, 5528.) He also interviewed appellant, reviewed his medical reports and the trial transcripts, viewed the videotape of appellant's police interview and reviewed other data, including appellant's prison records. (36 RT 5530-5532.)

Dr. Mohandie also gave appellant the SIIRS (Structured Interview of Reported Symptoms) test, the standard for detection of malingering. (36 RT 5531.) Mohandie interpreted the results of the MMPI test to strongly support symptom exaggeration. (36 RT 5532.) In the results of the SIIRS test he found evidence of malingering in two ways: 1) blatant symptoms sub scale which measures feigning of symptoms which is detected by combinations of improbable symptoms in combination (5533) and 2) appellant's total score on the overall test. (36 RT 5534-5535.)

Dr. Mohandie opined that in the police interview appellant reported he had been off his medication for approximately six weeks; usually when people go off their medication psychiatric symptoms return after about two weeks. (36 RT 5536.) So, at six weeks appellant should have been expressing very overt symptoms and he was not. (36 RT 5537.)

In addition, when Dr. Mohandie interviewed him, appellant had

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[23] There are a couple of different ways to score the test. (36 RT 5530.)

perfect recollection up to the moment of the actual homicide. (36 RT 5538.) Appellant claimed amnesia from the time of the first hitting. (36 RT 5538-5539.)

Sexual Sadism

As to the McDermott incident, Dr. Mohandie reviewed the trial transcripts and would diagnosis the incident as a result of sexual sadism. (36 RT 5540.) In addition, if there is evidence that appellant raped Ms. Epperson as she was dying, the diagnosis of sexual sadism would be warranted as to the instant case also. (36 RT 5549-5550.)

Mental Disorder(s)

Dr. Mohandie disagrees with Dr. Vicary's report (People's exhibit 136) in that Mohandie did not find appellant to have a major mental disorder. (36 RT 5541-5542.) Dr. Mohandie, in agreement with Dr. Niedorf, found the diagnosis of anti-social personality disorder and malingering. (36 RT 5535, 5541-5542.)

Dr. Mohandie also does not agree with the diagnosis of Intermittent Explosive Disorder [IED]. (36 RT 5542.) Within the DSM IV manual is the caveat that IED is not to be used when there is a personality disorder, like anti-social personality disorder, that more accurately accounts for the noted behaviors. (36 RT 5542.) IED actions and those displayed by anti-social personality disorder are mutually exclusive; you look at the totality of the person's entire life for a diagnosis as opposed to focusing on one or two incidents out of context. (36 RT 5543-5544.)

As to Dr. Romanoff's suggestion of underlying organic

impairment, Dr. Mohandie says there can be organic problems that are a consequence of long term chronic substance use, a function of head injuries, etc., but in Dr. Mohandie's view, there is no documentation to that effect in appellant's records. (36 RT 5546-5547.)

In summary, even though a number of the psychiatrists/psychologists who examined appellant found he had a mental disorder, Dr. Mohandie has a different opinion. (36 RT 5580.)

GUILT PHASE ISSUES

I.

SINCE THE MAYHEM AND TORTURE ALLEGATIONS WERE INTEGRAL TO THE HOMICIDE, A CONVICTION FOR FIRST DEGREE FELONY-MURDER BASED ON THOSE FELONIES VIOLATED THE MERGER PRINCIPLE OF *PEOPLE V. IRELAND* (1969) 70 CAL.2d 522.

Summary of Issue

The *Ireland* merger doctrine prohibits a felony that is integral to the homicide from being used as the predicate felony for a felony murder conviction. Here, the appellant's purported intent to kill arose from a sudden quarrel and heat of passion. The instrumentalities that appellant used to assault Ms. Epperson were simply household objects close at hand, virtually all of which broke during the fight. Do the disfiguring injuries suffered by Ms. Epperson prove beyond a reasonable doubt that appellant had independent felonious purposes to torture and main, or were the injuries simply the result of an indiscriminate attack arising from animal fury and the use of inefficient weapons?

Summary of Argument

As explained in the statement of facts, appellant suffers from a lifetime of severe mental illness. While off his medication, appellant was visiting his girlfriend, Ms. Epperson in her apartment. During his

visit, Ms. Epperson received a phone call from an unknown person. Apparently, the gist of the conversation was that she anticipated dating someone else. When appellant confronted Ms. Epperson about the call, there was a quarrel. Ms. Epperson informed appellant that their relationship was terminated.

Appellant exploded in violence and eventually beat Ms. Epperson to death. Although the jury believed he intended to kill her, the evidence shows that such an intent arose during their quarrel when his reason was impaired by the heat of passion.

In any event, during the course of the assault, he seized whatever instrumentalities were close by and available to him in the apartment. These included a flower pot, a wooden stool, a glass candlestick holder and a statue or pillar. He also finally located a screwdriver and used that as well. Significantly, however, all of these instruments broke during the assault except the screwdriver. It should be noted as well that Ms. Epperson's injuries were clustered primarily on the head, neck and face.

There is no dispute that the assault occurred over a period of time; that appellant sometimes used the pieces of the smashed instruments to keep on hitting Ms. Epperson or that as a result of the beating Ms. Epperson was badly disfigured. What is in dispute is whether appellant harbored any independent or concurrent intent to maim or torture Ms. Epperson.

Since appellant simply chose whatever instrumentalities were handy, if his intent was to kill, then a beating in the head, face and neck

area would be more likely to accomplish that goal than striking other areas of the body. For instance, it is highly unlikely that smashing a flower pot against Ms. Epperson's arms, legs or torso would be fatal.

Further, although the beating took some period of time to accomplish, the evidence shows that the time was largely the result of the breakage of the instrumentalities used to kill her. That is, after a few blows the instruments would break and appellant would either continue striking Ms. Epperson with the pieces or locate another instrument. Moreover since none of these instruments was intended to be used as a weapon, they were very inefficient for striking the fatal blow.

Therefore, because the instrumentalities used to effect the battery continually broke before Ms. Epperson finally succumbed, the fact that the assault took place over time and necessarily caused prolonged pain as well as disfigurement, these results were integral to the manner by which the homicide was accomplished. They were not the result of any separate or concurrent intents to maim or torture.

Background Facts

Appellant testified that while they were at Ms. Epperson's apartment, she received a phone call. The gist of the call was that she was making plans to go out with someone. (11 RT 1527.) When appellant asked who the caller was, Ms. Epperson declined to tell him. (11 RT 1529-1530.) Appellant asked what happened to the affection over the last few months? Ms. Epperson apparently replied that he was a " fill-in" while she was lonely. That is, he was a temporary boyfriend

until she found someone that she wanted to be with for good. Further she did not think he was good enough for her. (11 RT 1529.)

Appellant asked if their relationship was over. Ms. Epperson replied "Yeah. It's fun while it lasted, but we're done." (11 RT 1530.) That assertion made appellant feel worthless and crushed. He then began hitting her with his fists, but he did not intend to disfigure or kill her. (11 RT 1530, 1532-1533, 1602.)

Charles Vannoy claimed that appellant mentioned that during the heat of the assault, Ms. Epperson asked appellant if he was going to kill her. Purportedly, he replied that he was. (Exh. 88A. pp. 39, 85.)

The criminalist testified that the beating probably began with fists. Ms. Epperson was hit at least six times. (See, e.g., 10 RT 1318.) She was also hit multiple times with a heavy ceramic flower pot or vase which broke (10 RT 1325-1326, 1352, 1354, 1396), a heavy lamp base or statue which also broke (10 RT 1349-1350, 1354, 1395) as well as a glass candle holder that broke. (9 RT 1230-1231, 1247.) Apparently a wooden foot stool was also used in the beating and that broke as well. (10 RT 1296-1297,1375-1376.) The only thing that apparently did not break was the screwdriver found under Ms. Epperson's hand. (10 RT 1297.)

Ms. Epperson sustained multiple bruises and abrasions on the back of both arms and hands and bruising and abrasions on her right leg. (9 RT 1225.) She had multiple blunt force injuries on her head and face as well as multiple lacerations on her forehead and face, including both eyes, her nose, cheeks and upper and lower lips. (9 RT

1228-1229.) A large laceration on her forehead had an underlying open skull fracture; a laceration on her lower lip went all the way through; and abrasions on the back of her neck indicated blunt force injury. (9 RT 1229-1230.) Ms. Epperson's injuries were not consistent with knife wounds but were more likely caused by a kind of glass or other object. (9 RT 1230-1231.)

No major arteries or veins were cut, but Ms. Epperson's facial bones were fractured and there were jagged cuts on both sides of her throat. (9 RT 1233.) She had extensive fractures at the front base of her skull, caused by blunt force trauma. (9 RT 1242-1243.) She was also stabbed in the face[probably by the screwdriver found near her body]. (9 RT 1229-1230.)

The coroner could not say which of at least ten severe blows to her head killed Ms. Epperson. Any one of them could have caused lack of consciousness; she could have died very quickly or over a period of time. (9 RT 1250-1252.)

The Charged Felonies were Integral to the Homicide

As explained above, the evidence would support a finding that appellant had an intent to kill arising from the sudden quarrel and heat of passion. Nevertheless, because the instruments available to him were simply household objects at hand, and because they broke during the assault, they very inefficient to effect a quick death. Therefore, simply because of the nature of the assault, disfigurement and pain and were virtually inevitable.

Under these circumstances, the *Ireland* merger doctrine

prohibits mayhem and torture from being used as the underlying felonies supporting a conviction for first degree felony murder. That is, the infliction of disfigurement and pain were integral to the homicide, not the result of an independent or concurrent intent to maim or torture.

A review of the merger doctrine explains why it applies here. In *People v. Ireland* (1969) 70 Cal.2d 522, the defendant was convicted of second-degree felony-murder, with assault with a deadly weapon as the underlying felony. Noting that the felony-murder rule relieved the jury of any need to find malice aforethought, this Court explained:

> "We have concluded that the utilization of the felony-murder rule in circumstances such as those before us extends the operation of that rule 'beyond any rational function that it is designed to serve.' (*People v. Washington* (1965) 62 Cal.2d 777, 783.) To allow such use of the felony- murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault--a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law. We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide."

Ireland expressly dealt only with the second-degree felony-murder rule, and expressed no opinion on whether its conclusion would apply in a first degree felony-murder context. (*Id.*) However, the following year, this Court extended the rule to the first degree felony-murder context in *People v. Wilson* (1970) 1 Cal.3d

431[24], and in *People v. Sears* (1970) 2 Cal.3d 180. [25]

Sears is particularly instructive on this matter. Not only does the case deal with mayhem, such as charged here, but this Court's explanation of why a mayhem offense that is integral to the homicide will not support a felony murder theory is practically on "all fours" with the instant case. In *Sears* this Court first observed that in order to support a first degree murder on a felony murder theory, the prosecution must prove that the defendant committed the killing during the perpetration of mayhem pursuant to Penal Code section 203. While some cases held that a specific intent to inflict injury is not prerequisite for a mayhem conviction, nonetheless, there is a difference between the requirement for a mayhem conviction and a conviction for felony murder predicated on mayhem.

Under the felony murder doctrine, the intent required for a conviction of murder is imported from the specific intent to commit the predicate felony. Nevertheless,

> "to presume an intent to maim from the act or type of injury inflicted, and then to transfer such 'presumed intent' to support a felony murder conviction is artificially to

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[24] *Wilson* has been somewhat limited in its scope by *People v. Gonzales* (2011) 51 Cal. 4th 894, 942.

[25] Although in *People v. Farley* (2009) 46 Cal.4th 1053 this Court essentially limited the *Ireland* merger doctrine to second degree felony murder cases, that ruling was specifically intended to be prospective only. Any other application would violate the ex post facto rule. (*Id.* at p. 1121.) Here, appellant's crimes were committed in 2000, well before the ruling in *Farley.* Thus, the *Ireland* merger doctrine fully applies to this first degree felony murder case.

> extend the fiction. We cannot compound such fictions. The doctrine of felony murder, therefore, must be limited to those cases in which an intent to commit the felony can be shown from the evidence. In the instant case, the evidence discloses that defendant struck Elizabeth several times with a steel pipe; one of the blows resulted in a laceration of the lip; another, a laceration of the nose. **But such evidence does no more than indicate an indiscriminate attack; it does not support the premise that defendant specifically intended to maim his victim.** In the absence of such a showing of specific intent to commit mayhem, the court should not give the jury an instruction on felony murder mayhem." *(People v. Sears, supra*, 62 Cal.2d at pp. 744-745.)

Citing *People v. Wilson, supra*, 1 Cal.3d 431, 440-441, the *Sears* case also pointed out that "the purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." (*People v. Sears, supra*, 2 Cal.3d at p.186.) In the *Ireland* case, this Court concluded that a man assaulting another with a deadly weapon would not be deterred by the second degree felony-murder rule, because the assault was an integral part of the homicide. (See *People v. Sears, supra*, 2 Cal.3d at pp.186-188.) That is, the assault facilitated the homicide. It was not committed with a separate or even concurrent intent.

The same is true of the felonies here. If there is an intent to kill, certainly an assailant would not be hitting the decedent on the legs or torso with a flower pot or wooden stool in order to effect her death. He would hit her in the head. Additionally, virtually all the

instrumentalities that appellant used to strike Ms. Epperson broke during the assault. The fact that appellant continued the assault with the broken pieces is apropos of nothing. The evidence suggests that he stopped using the pieces when he found another suitable object.

More important, as the opinion in *Sears* pointed out, multiple injuries sustained during the course of the assault will not support a finding of specific intent to maim - or torture for that matter. Instead, it shows nothing more than an indiscriminate attack. (*People v. Sears, supra*, at pp. 744-745.)

In the recent case of *People v. Gonzales, supra*, 51 Cal. 4th at p. 942, this court noted that although *Farley* does not apply to crimes committed before its date, nevertheless, even prior to *Farley*, the *Ireland* merger doctrine was limited to burglary felony murder because of the unique nature of burglary. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1262, and *People v. Burton* (1971) 6 Cal.3d 375, 387–388.)

Those cases have no application here. The felony murder was intended to punish an assailant who committed other offenses during the perpetration of the homicide when the assailant had an independent or concurrent felonious purpose in addition to the specific intent to kill. As explained above, when the perpetrator entertained solely a specific intent to kill, the merger doctrine in *Ireland* was intended to eliminate multiple convictions for offenses that were, in fact, integral to the homicide. (*People v. Burton, supra,* 6 Cal.3d at pp. 386–388.) The ostensible reason for limiting the merger doctrine to burglary was

because simply entering the home with the specific intent to kill provided only a technical additional violation rather than a true independent felonious purpose. (*Ibid.*)

The defendant's intent here, however, was solely a specific intent to kill Ms. Epperson. The fact of disfigurement was integral to the homicide and merely the result of an inefficient method of accomplishing the homicide. There was no other independent or concurrent felonious purpose to disfigure. Thus, at least under the facts of this case, the *Ireland* merger doctrine applies to mayhem felony murder.

Prejudice

The instructions permitted, and the prosecutor encouraged, a first-degree murder conviction and special circumstance finding based on a legally invalid felony-murder theory, in violation of state law and appellant's rights under the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *People v. Wilson, supra*, 1 CaI.3d at pp. 438-440 [where jurors instructed on legally correct theories of first degree premeditated murder and felony-murder predicated on a burglary with intent to steal, error to also instruct jurors on alternative, legally incorrect theory of felony-murder predicated on a burglary with intent to commit assault with a deadly weapon in violation of *Ireland*-merger doctrine]; *People v. Smith (1984)* 35 Cal.3d 798 at pp. 802-808 [court erred in providing instructions on legally correct theory of second-degree murder with malice and legally incorrect theory of second-degree felony-murder in violation of *Ireland*-merger doctrine]; *Suniga v. Bunnell* (9th Cir. 1993)

998 F.2d 664 at pp. 667- 670 [permitting jurors to convict of felony-murder under alternative felony-murder theory that was barred by *Ireland*-merger doctrine violated defendant's federal constitutional right to due process]; see also *People v. Morales* (2001) 25 Cal.4th 34, 43 ["'Trial courts have the duty to screen out invalid theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place"']; *People v. Pulido* (1997) 15 Cal.4th 713, 728-729 [same.].)

Furthermore, the jurors' first degree murder verdict and rape conviction do not reveal that they unanimously relied on a legally correct theory. "In these circumstances the governing rule on appeal is both settled and clear: when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green* (1980) 27 Cal.3d 1, 69[26]; accord *People v. Perez* (2005) 35 Cal.4th 1219, 1232; *People v. Guiton* (1993) 4 Cal.4th 1116, 1127-1129.)

It might be argued that any error was harmless with regard to the murder conviction because the jury convicted appellant of rape and found the rape murder felony-murder special circumstance to be true, thus proving beyond a reasonable doubt that it relied upon a legally

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[26] *Green* was overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834 & n.3, and abrogated on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239, 241.]

correct theory of rape felony-murder. However, for the reasons stated in Argument III (all of which are incorporated here by reference) the evidence is insufficient to show forcible sexual intercourse. Thus, the murder conviction cannot be sustained on that theory either.

Furthermore, the state's case for premeditation was invalid as explained in issue IV. The manner in which Ms. Epperson was killed strongly demonstrated that it was committed in a rage rather than with premeditation. (See, e.g., *People v. Alcala* (1984) 36 Ca1.3d 604, 626, and authorities cited therein ["a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder"]; *People v. Anderson* (1968) 70 Ca1.2d 15, 25 [same - evidence insufficient to prove premeditation where, inter alia, victim stabbed multiple times]; *People v. Jiminez* (1950) 95 Cal.App.2d 840, 842-843 [same); *Austin v. United States* (D.C. App. Ct. 1967) 382 F.2d 129, 132, 139-140 [same]; see also *People v. Arcega* (1982) 32 Ca1.3d 504, 524-525 [evidence victim beaten, strangled, and stabbed "certainly open to the interpretation that the killings were committed in a sudden rage"].)

Moreover, even if the theory of first degree premeditated murder was legally correct (which it is not) the prosecutor's explicit reliance on the incorrect mayhem and torture murder theory makes it impossible to know which theory the jurors relied upon. (*See People v. Wilson, supra*, 1 Ca1.3d at pp. 438-440 [where jurors instructed on legally correct theories of first-degree premeditated murder and felony-murder predicated on a burglary with intent to steal, but also instructed on

alternative, legally incorrect theory of felony-murder predicated on a burglary with intent to commit assault with a deadly weapon in violation of *Ireland*-merger doctrine, reversal required because verdicts did not affirmatively reveal that jurors relied on correct theory].) Therefore, the first-degree murder conviction must be reversed and the mayhem and torture murder special circumstances must be set aside. (See, e.g., *People v. Smith, supra,* 35 Cal.3d at p. 808; *People v. Wilson, supra*, I Cal.3d at pp. 438-442; *People v. Green, supra*, 27 Cal.3d at pp. 67-69; accord, *Suniga v. Bunnell, supra*, 998 F.2d at pp. 667-670.)

II.

ALTERNATIVELY, EVEN IF ALL THE CHARGED FELONIES ARE NOT INTEGRAL TO THE HOMICIDE, THERE IS INSUFFICIENT EVIDENCE TO SUPPORT EITHER THE TORTURE MURDER THEORY OF FIRST DEGREE MURDER, THE CONVICTION FOR TORTURE, OR THE TORTURE MURDER SPECIAL CIRCUMSTANCE.

Summary of Issue

The torture murder theory of first degree murder, the crime of torture, and the torture murder special circumstance all require a showing that the defendant specifically intended to inflict extreme pain for personal gain or satisfaction. There was no direct evidence of appellant's intent to inflict prolonged pain for those purposes. Is the condition of the body sufficient circumstantial evidence to prove beyond a reasonable doubt that appellant harbored the requisite intent?

Summary of Argument

Appellant was convicted of Count I alleging first degree murder/felony murder on the basis of several felonies including torture. The jury also found the torture murder special circumstance to be true.

The law is clear that the condition of the body is insufficient to prove beyond a reasonable doubt that an assailant necessarily intended to inflict extreme and prolonged pain. A badly abused corpse may reflect many things besides torture, including a frenzied killing. To prove a specific intent to inflict pain for personal gain, there must be

some additional evidence.

In this case, the only evidence of any specific intent to inflict pain was the condition of the body. If this factor was removed from the jury's consideration, there is simply no other evidence which would support a conviction for torture murder as a theory of first degree murder or a true finding on the torture murder special circumstance.

Factual Background

As explained in the previous issue, the evidence showed that Ms. Epperson suffered the following wounds: multiple bruises and abrasions on the back of both arms and hands and bruising and abrasions on her right leg (9 RT 1225), multiple blunt force injuries on her head and face as well as multiple lacerations on her forehead and face (9 RT 1228-1229), a large laceration on her forehead, an underlying open skull fracture; a laceration on her lower lip which went all the way through; and abrasions on the back of her neck. (9 RT 1229-1230.) Ms. Epperson's injuries were not consistent with knife wounds but were more likely caused by a kind of glass or other object. (9 RT 1230-1231.)

No major arteries or veins were cut, but Ms. Epperson's facial bones were fractured and there were jagged cuts on both sides of her throat. (9 RT 1233.) She had extensive fractures at the front base of her skull, caused by blunt force trauma. (9 RT 1242-1243.) She was also stabbed in the face. (9 RT 1229-1230.)

The coroner could not say which of at least ten severe blows to her head killed Ms. Epperson. Any one of them could have caused lack

of consciousness; she could have died very quickly or over a period of time. (9 RT 1250-1252.)

After instructions, the parties presented closing argument. On the issue of torture, the prosecutor urged the jury that appellant wanted to destroy Ms. Epperson's face, so he hit her in the head multiple times. (13 RT 1857.) Further, he wanted her to suffer so he picked her up and hit her in the head at least six times in the bathroom. (13 RT 1858.) Moreover, instead of finishing her off in the bathroom, appellant carried her out to the living area (13 RT 1859) and continued to beat her. (13 RT 1860.) At some point, appellant stabbed Ms. Epperson in the face with a screwdriver. The stabbing wasn't to kill her, it was instead to torture her. (13 RT 1860.) Appellant hit Ms. Epperson with a ceramic statue which broke, and he hit her with some of the pieces. He also hit her with a wooden stool which also broke. Appellant then continued to hit Ms. Epperson with pieces of the stool. (13 RT 1861.)

Insufficient Evidence of Torture

Torture murder is defined in Penal Code section 189. That section provides that all murder which is perpetrated by means of torture is murder of the first degree. Additionally, torture murder "is murder committed with a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*People v. Steger* (1976) 16 Cal.3d 539, 546.) Nonetheless, even where one inflicts severe and prolonged pain on another, if there is no deliberation or premeditation, the infliction of pain may not be torture under section 189. *(People v. Davenport* (1985) 41 Cal.3d 247, 268-269; see also *People v.*

Talamantez (1985) 169 Cal.App.3d 443, 452.)

Similarly Penal Code section 206 defines "torture" as the infliction of great bodily injury "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose . . . ."

The torture-murder special circumstance requires the intent to kill, intent to torture, and commission of an act calculated to cause extreme pain. (*People v. Cole* (2004) 33 Cal. 4th 1158, 1225, citing *People v. Proctor (1992)* 4 Cal.4th 499 at pp. 534-535.) The key distinction between the torture special circumstance and murder by torture is that the former requires that the defendant must have acted with the intent to kill. (*People v. Cole, supra,* 33 Cal.4th at p. 1226.)

For purposes of this case, the principal area of overlap between the elements of first degree torture murder, the crime of torture and those of the torture special circumstance is the requirement that the prosecution prove beyond a reasonable doubt that the defendant had an intent to cause the victim extreme pain. Thus, although the defense discusses primarily murder by torture, the same considerations apply to the crime of torture and the torture murder special circumstance.

This Court has defined murder by torture restrictively. (*People v. Steger, supra*, 16 Cal.3d. at pp. 543-544.) The focus is on whether the defendant intended to cause cruel suffering, not "'whether the victim merely suffered severe pain since presumably in most murders sever pain precedes death.'" (*Id.* at p. 544, quoting *People v. Tubby* (1949) 34 Cal.2d 72, 77.)

Under the Court's restrictive definition, murder by torture may not be inferred solely from the condition of the victim's body or from the mode of assault or injury suffered. There must be other evidence of intent to cause suffering. (*People v. Davenport, supra*, 41 Cal.3d at p. 268; *People v. Wiley* (1976) 18 Cal.3d 162, 168.) "While the severity of the injury may provide a basis for an inference that the killer harbored the required intent to torture, it does not necessarily compel that conclusion. [Citation.]" (*People v. Davenport, supra*, 41 Cal.3d at p. 268; see also *People v. Steger, supra*, 16 Cal.3d at p. 547.) Indeed, this Court has cautioned against "giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an 'explosion of violence,' as with the intent to inflict cruel suffering." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239.)

Moreover, "it is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. [Citation.] Rather, it is the state of mind of the torturer--the cold-blooded intent to inflict pain for personal gain or satisfaction--which society condemns." (*People v. Steger, supra,* 16 Cal.3d at p. 546.) Even the deceased's awareness of pain is not an element of first degree murder by torture. (*People v. Wiley, supra*, at p. 171.) Appellant's state of mind is critical to determining whether he intended to commit torture. "Intent is a state of mind which, unless established by the defendant's own statements, must be proved by the circumstances surrounding the commission of the offense[.]" *People v.*

Proctor, supra, 4 Cal.4th 499, 530-531; accord *People v. Crittenden* (1994) 9 Cal.4th 83, 141; see also *People v. Mincey* (1992) 2 Cal.4th 408, 433 ["a defendant's state of mind must, in the absence of the defendant's own statements, be established by the circumstances surrounding the commission of the offense." (emphasis added); *People v. Davenport, supra*, 41 Cal.3d at p. 270.)

In the present case, the prosecutor relied primarily on the state of the body to show appellant's intent to commit murder by torture, torture and the torture murder special circumstance. The prosecutor argued that appellant attempted to strangle Ms. Epperson. (13 R.T 1857.)[27] He hit her with a glass candle holder and a statue, both of which broke. (13 RT 1857, 1861.)[28] He used his fists to hit her at least six times and probably more. (13 RT 1858.) Appellant hit her with a wooden stool which also broke. (13 RT 1861.) He also stabbed her in the face with a screwdriver. (13 RT 1860.)

It is true that in the absence of other evidence, such as the defendant's own statements, the condition of a victim's body may help establish circumstantial evidence of the requisite intent to torture. (*People v. Proctor, supra*, 4 Cal.4th at p. 531; *People v. Mincey, supra,* 2 Cal.4th at p. 433.) Nonetheless, the severity of a victim's wounds is not wholly determinative of an intent to inflict extreme pain and

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[27] Dr Wang testified that the strangulation was not successful and was not the cause of death. (9 RT 1223-1224, 1261.)

[28] Both of these objects apparently broke because Dr. Wang found pieces of them embedded in Ms. Epperson's wounds. (9 RT 1230-1231, 1247.)

suffering. Severe wounds may reflect an "explosion of violence," "a killing in the heat of passion," or an "act of animal fury." (*People v. Mincey, supra,* 2 Cal.4th at p. 433; *People v. Davenport, supra*, 41 Cal.3d at p. 268; *People v. Wiley, supra*, 18 Cal.3d at p. 168; *People v. Steger, supra*, 16 Cal.3d at p. 546.) Thus, this Court has cautioned against giving undue weight to the severity of the victim's wounds when attempting to ascertain whether the defendant intended to inflict extreme pain and suffering. (*People v. Pensinger, supra,* 52 Cal.3d at p. 1239; see also *People v. Haskett* (1990) 52 Cal.3d 210, 229-230, fn. 9,["[U]se of wounds or manner of killing has limited value in supplying evidence or inferences of a requisite state of mind. . . ."]; *People v. Walkey* (1986) 177 Cal.App.3d 268, 274.)

Moreover, in *People v. Leach*, (1985) 41 Cal.3d 92, 110, this court found that the "record does not establish intent to inflict pain as a matter of law." In words that apply to the facts in this case, the court concluded that "[i]ndeed, the strong evidence of intent to kill militates to some extent against a finding of intent to inflict pain. Under one view of the evidence, the numerous wounds indicate not so much a wish to inflict pain, as great difficulty in killing Messer." (*Id.* at 110.)

Indeed, here, the cause of death was multiple blunt force injuries to the head. (9 RT 1217.) Since most of the instrumentalities that appellant used simply broke during the beating, it is hard to argue persuasively that they were used in so skillful a manner as to deliberately impose pain and suffering - but not death. Moreover, Dr. Wang testified that he did not know which of at least ten severe blows

to her head was the fatal one. Any one of them could have caused lack of consciousness. Most important, however, Dr. Wang opined that Ms. Epperson could have died fairly quickly or over a period of time. (9 RT 1250-1252.)

Given that multiple wounds caused by an explosion of violence have little probative value in determining a perpetrator's specific intent to torture, this Court has "reversed convictions based on a torture-murder theory in spite of the extreme gruesomeness of the crime [where the evidence showed that the killing resulted from 'an explosion of violence' or 'an act of animal fury produced when inhibitions were removed by alcohol.'"] (*People v. Davenport*, *supra*, 41 Cal.3d at p. 268.) One such case is *People v. Anderson* (1965) 63 Cal.2d 351. The evidence presented at appellant's trial is similar to that before the Court in *Anderson*. A review of the facts of *Anderson* show that the trial court here erred in instructing the jury on the theory of murder by torture.

In *Anderson,* the defendant was angry at the 10-year-old daughter of his girlfriend. He stabbed the child a total of 60 times. The child died from lacerations of the left lung. There were "41 knife wounds ranging over the entire body from the head to the extremities. One of the cuts extended from the rectum through the vagina. Additionally, the tongue was cut. Many of the wounds, including the latter two, were designated post mortem. Cigarette traces were found in one wound and a cigarette butt in another. The flesh, however, had not been burned." (*Id.* at p. 356.) An additional 20 superficial cuts

were on the body, bringing the total to over 60 wounds. (*Ibid.*) The prosecutor contended the child was killed after the defendant attempted to sexually molest her and she refused and either threatened to implicate the defendant or to scream. *(Ibid.)*

This Court held that such evidence was insufficient to instruct on murder by torture. The Court reasoned that the evidence "shows only an explosion of violence without the necessary intent that the victim should suffer." Although a cigarette butt was found in one of the wounds, the flesh was not burnt; the presence of the butt alone cannot support the conclusion that defendant intended to 'cause cruel suffering.' [Citation.] Accordingly, the evidence was not sufficient to convict defendant of murder in the first degree on the theory that death resulted from acts of torture." (*People v. Anderson, supra*, 63 Cal.2d at p. 360.)

Similarly in *People v. Walkey, supra*, 177 Cal.App.3d. 268, a child was beaten to death by his babysitter, the defendant. The deceased was covered in recent bruises and the evidence showed extreme blunt force trauma to his head and abdomen. Nonetheless, in reversing the first degree murder conviction based on torture, the court stated: "Although the medical experts testified Nathaniel's injuries would have caused him pain, the amount of pain inflicted on the victim is not determinative of the crime of torture murder." (*Id.* at p. 275.)

Here, the injuries to Ms. Epperson were, without a doubt, gruesome and painful. But as in *Anderson* and *Walkey*, they are insufficient to convict appellant of murder in the first degree on the

theory that Ms. Epperson's death resulted from acts of torture. Like the victim in Anderson, Ms. Epperson sustained numerous wounds, some of which were superficial. But there is nothing in the number or type of these wounds to show they were inflicted as a means of torture rather than an explosion of violence or some other intent.

On these facts, there is no evidence, direct or circumstantial, from which a reasonable juror could have concluded that appellant committed murder by torture, torture, or that a true finding on the torture murder circumstance could be sustained.

Moreover, since the evidence was insufficient to sustain the verdict under a murder-by-torture theory, the court erred as well in giving the torture murder instruction, CALJIC No. 8.24. (See *People v. Steger, supra*, 16 Cal.3d at p. 549; *People v. Anderson, supra*, 63 Cal.2d at p. 360.) It is error to give an instruction which, while an accurate statement of the law, has no application to the facts of the case. (*People v. Guiton, supra,* 4 Cal.4th 1116, 1129.)

Prejudice

When a court instructs on different theories of liability, one of which is not factually supported by the evidence, reversal may be required "if the record affirmatively demonstrates there was prejudice, that is, if it shows that the jury did in fact rely on the unsupported ground." (*People v. Guiton, supra*, 4 Cal.4th at p. 1129.) The error is subject to the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) test applicable to errors of state law. (*People v. Guiton, supra*, 4 Cal.4th at p. 1130.) Reversal is required if the jury based its verdict solely on the

unsupported theory. (*Ibid.*)

Unquestionably the jurors based their verdict on torture murder, because they found the torture murder special circumstance to be true and convicted appellant of torture. Certainly the jury could not have found the special circumstance to be true or the crime of torture if it rejected the underlying theory of torture. Therefore, to the extent that the jury relied solely on a torture murder theory, the conviction on Count I must be set aside.

Further, because the evidence was insufficient to support the true finding on the torture murder special circumstance or the crime of torture under Penal Code section 209, those findings must be set aside as well.

III.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF RAPE, OR TO SUPPORT THE RAPE MURDER THEORY OF FELONY MURDER OR TO SUPPORT THE TRUE FINDING ON THE RAPE SPECIAL CIRCUMSTANCE

Summary of Issue

Establishing that sexual intercourse took place does not establish rape. Establishing that a grievous assault took place does not establish rape. Nevertheless, is evidence of both sufficient to prove rape beyond a reasonable doubt?

Standard of Review

As established in *In Re Winship* (1970) 397 U.S. 358, proof of guilt beyond a reasonable doubt is an essential facet of Fourteenth Amendment due process and required for a constitutionally valid conviction. On appeal, the test of whether the evidence is sufficient to support a conviction is "whether a rational trier of fact could find defendant guilty beyond a reasonable doubt." (*People* v. *Holt* (1997) 15 Cal.4th 619, 667.) As the United States Supreme Court put it in *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319, explaining the *Winship* due process standard on appeal, "The relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt."[29]

Nevertheless, *Jackson* does not require the reviewing court to defer to any inference a jury might have drawn, so long as the inference favors the prosecution. Such deference would effectively bar any *Jackson* challenge to a conviction that depended on an inference. That is, requiring deference to such an inference would effectively reduce the *Jackson* standard (requiring evidence sufficient for proof beyond a reasonable doubt) to a preponderance, or even a 'some evidence' standard, whenever the verdict depends on an inference.

To satisfy this due process standard and to avoid an affirmance based primarily on speculation, conjecture, guesswork, or supposition (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543), the record must contain **substantial** evidence of each of the essential elements. In order for the evidence to be "substantial," it must be "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577, 578.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, interior quotation marks deleted.) In *People v. Morris, supra*, this court stated:

We may *speculate* about any number of scenarios that may

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[29] *Jackson v. Virginia* was superseded by statute on other grounds as noted in *Hurtado v. Tucker* (D.Mass 1998) 90 F.Supp.2d 118, 124 .)

> have occurred on the morning in question [when the victim was murdered with no eyewitnesses present]. A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [Para.] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'

[Citations.] (*Id.* at p. 21; emphasis and ellipses in original.)

Moreover, because this is a capital case, there are additional considerations that come into play. Even if the evidence were sufficient, in a noncapital context, to support a rape conviction or a rape/ murder conviction (which it is not), the evidence of forcible sexual intercourse is too weak and uncertain to serve as a constitutionally valid basis for establishing death-eligibility and turning a noncapital homicide into capital murder. The evidence cannot satisfy the heightened-reliability requirement mandated in capital cases by the Eighth and Fourteenth Amendments and California state constitutional analogues. Thus, permitting appellant's rape conviction, rape murder conviction and the rape special circumstance finding to stand would violate not only *Winship*'s due process standard for criminal convictions, but would also violate the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama* (1980) 447 U.S. 625 at 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

Background Facts

Appellant testified that he and Ms. Epperson had consensual sex before the phone call that triggered the assault. (11 RT 1526-1527, 1534, 1540.) That is, they had sex on the bed in her apartment then Ms. Epperson went to the bathroom while appellant stayed on the bed. The telephone rang and Epperson returned to the bedroom to answer it. (11 RT 1526-1527.) She then went back into the bathroom and appellant followed her. (11 RT 1530.)

Vannoy testified that although appellant admitted telling Ms. Epperson that he was going to kill her, he flatly denied raping her. Appellant told Vannoy that he had sex with Ms. Epperson for about 20 minutes before the assault. He also told Vannoy that they had been having consensual sex on a regular basis for two or three weeks before the fatal encounter. (Exh. 88A, 40 64.)

Prosecution criminalist Ron Raquel testified that the attack began in the bathroom and the decedent was carried into the living area where the attack finished. Ms. Epperson had a lot of blood on her. (10 RT 1397.) In the living area, there was a pile of clothing found at Ms. Epperson's feet that contained Ms. Epperson's jeans and her panties. (10 RT 1300.) The blood on the panties was low velocity (as from a drip). The blood on the inside of the jeans and the bra was likely a transfer pattern from a hand. (10 RT 1382.) The place appeared to have been ransacked after Ms. Epperson's death. (10 RT 1380.)

On cross examination, Raquel admitted that if the jeans had been ripped off of Ms. Epperson, they would have gone on the floor first.

(10 RT 1393.) However, the panties were under the jeans. (10 RT 1394.) Moreover, the only evidence the panties were pulled off was a small rip on the left side; but that rip would also be consistent with just wear and tear. (10 RT 1405.)

The coroner, Dr. Wang testified on direct examination that there was an abrasion/bruising in the vaginal area and the trauma was fairly severe. (9 RT 1248.) He further opined that the bruising was likely caused by blunt force penetration either by a penis or some other kind of object with a similar shape and size. (9 RT 1249.)[30] He also identified bruising on Ms. Epperson's arms, hands and legs, including a wound on her leg. (9 RT 1225-1227.)

On cross -examination, however, Dr. Wang admitted that the abrasion near her vaginal area was only 3/16 of an inch. (9 RT 1256.) Further, he conceded that the abrasion and bruising trauma could have been caused by a 280 pound man (appellant's size) having consensual sex with a 118 pound woman (Ms. Epperson's size) over a period of time. (9 RT 1256-1257.) He also admitted that he was not aware of any study concerning how much force would be used during sexual intercourse. (9 RT 1257.)

Defense criminalist Taylor testified that he examined Ms. Epperson's panty liner for bodily fluids. He noted that epithelial cells

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[30] As noted in the Statement of the Case, appellant was found not guilty of sexual penetration by a foreign object as charged in Count 3 and the special circumstance allegation of rape by instrument (Count 1) was found to be not true. (12 CT 2956-2957, 2959.)

are found in mucous membranes which line the inside of the mouth and are also found in the lining of the vagina. These cells slowly move to the surface of the skin and are then sloughed off. They are found in saliva and vaginal secretions in high numbers. (11 RT 1577.) If those cells are found on an object, it is indicative of body fluids having been deposited on the object. (11 RT 1577.)

Mr. Taylor identified photos of Ms. Epperson's panties and the attached panty liner. (11 RT 1578 -1579.) There was a small amount of blood on the front of the panties. (11 RT 1580.) In sexual assault cases those items are examined to determine whether the garment was worn subsequent to sexual intercourse. (11 RT 1580.) If so, one would expect to find semen or other bodily fluids that were secreted from the body into the garment. (11 RT 1580.) If only epithelial cells were found, it would indicate that the garment was worn prior to intercourse but not afterwards. If semen was found, it would likely indicate that the garment was worn after intercourse. (11 RT 1580.)

In this case, neither epithelial cells nor semen was found. Thus this garment was not likely worn **at all** by the decedent. (11 RT 1580-1581.) Additionally, there were no indications of blood in the panty liner. The only blood was a small amount found on the front of the panties. (11 RT 1583-1584.) If a woman was fighting for her life wearing these panties, he would expect to see a great deal of secretion of bodily fluids into the panty liner. (11 RT 1584 - 1585.)

The parties stipulated that appellant's DNA was found in a vaginal swab and in semen taken from Ms. Epperson. (10 RT 1450-

1451.) They further stipulated that a mixture of appellant's blood and Ms. Epperson's blood was found on various parts of Ms. Epperson's jeans, as well as blood found on Ms. Epperson's inner thighs. Appellant's DNA was found on blood stains on the front of Ms. Epperson panties, in her bra, on a washcloth found on a sink in her apartment and a water bottle found in the bathroom. (10 RT 1450-1451.)

Elements of Rape

Forcible rape is defined as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator against . . . a person's will by means of force, violence, duress, or fear of immediate and unlawful bodily injury on the person or another." (Penal Code section 261, subdivision (2).)

A rape special circumstance exists if a murder was committed while the defendant was engaged in the commission or attempted commission of rape in violation of Penal Code section 261. (Pen. Code § 190.2 (a)(17)(C).)

Evidence Insufficient to Establish Rape

At the outset, it is important to recognize that while there is evidence of sexual intercourse between appellant and Ms. Epperson, there is no direct evidence of any rape. Thus, a conviction for this offense necessarily rests solely on inferences. Because this is a capital case with its heightened concern for reliability in both the guilt and penalty phases (*Beck v. Alabama, supra*, 447 U.S. at p. 638), those inferences must be scrutinized with special care.

The prosecution urged that the following factors constituted proof of rape (plus the rape/murder and the rape special circumstance) beyond a reasonable doubt: appellant's sperm and DNA were found in Ms. Epperson's vaginal cavity: a mixture of appellant's blood and Ms. Epperson's blood was found on Ms. Epperson's thighs and appellant's blood was found on the inner pockets of Ms. Epperson's jeans as well as her bra. There was bruising and abrasion near the vagina. (13 RT 1861-1862.) Finally, appellant talked to Vannoy and "went over all the details, every little detail of what he did to Tammy Epperson." (13 RT 1864.)

The defense notes that if it is true that appellant talked to Vannoy as the prosecution alleged, and, if it is true that "he went over all the details, every little detail of what he did to Tammy Epperson," then it is also true that he did NOT rape Ms. Epperson. What appellant allegedly told Vannoy was that he had consensual sex with Ms. Epperson, he did not rape her. (Exh. 88A, 40 64.) Indeed, it would be highly inconsistent with reason, logic or common sense for a defendant to freely admit a killing that could send him to death row, yet deny the lesser offense of rape.

More to the point, however, the evidence supports only an act of animal fury and an indiscriminate beating, not a rape. For instance, Ms. Epperson's panties were found in a pile **underneath** her jeans. (10 RT 1394.) As defense counsel argued, and criminalist Raquel conceded, if appellant forcibly pulled off Ms. Epperson's jeans and her panties in order to rape her, the panties would be on top of her jeans. (13 RT 1904-

1905.) That is, the jeans would be pulled off first and flung on the floor. The panties would be pulled off second and would have landed near or on top of the jeans. (13 RT 1904-1905.) Further, criminalist Raquel conceded that even the small rip in the panties could have been caused by normal wear and tear as opposed to being ripped during a forceful rape. (10 RT 1405.) The blood on the panties was low velocity (as from a drip). (10 RT 1382.)

More important, however, there was no evidence of epithelial cells on the panty liner, let alone sperm. (11 RT 1580-1581.) Thus, there is simply no evidence that Ms. Epperson was wearing those panties after the intercourse or during the assault. (11 RT 1580-1581.) The lack of bodily fluids on the panty liner is certainly not consistent with a woman attempting to fend off an assault, a forcible rape or having her panties and jeans ripped from her body. It is consistent, however, with appellant's statement that he and Ms. Epperson had consensual sexual intercourse before she got the phone call and went into the bathroom. Thus, apparently, she was not wearing panties or jeans when she received the phone call. (See also 11 RT 1603.)

Consistent with that evidence, prosecution criminalist Raquel opined that the assault actually began in the bathroom and thereafter Ms. Epperson was carried to the living area where the assault finally resulted in her death. (10 RT 1407.) Moreover, any transfer of appellant's blood to the jeans, panties or bra likely occurred during the struggle or after Ms. Epperson's death when the apartment was ransacked. (See, e.g., 10

RT 1380.)[31]

With regard to the bloodstains on Ms. Epperson's thighs, the investigation showed that Ms. Epperson bled profusely during the assault and there was blood all over her. (10 RT 1397.) The blood on her thighs showed a mixture of her DNA and appellant's DNA. (10 RT 1450-1451.) Moreover, the coroner identified a wound on Ms. Epperson's leg and bruises in the knee area. (People's exhibit 10, 12; 9 RT 1226-1227.) Thus, the mixture of appellant's blood and Ms. Epperson's blood on her thighs were simply smears that occurred during the struggle between the two or when appellant purportedly carried Ms. Epperson from the bathroom to the living area.

Significantly, not only is the evidence of rape insubstantial in this case, but in cases far more compelling than this one, this court has not hesitated to reverse convictions for underlying sex felonies and special circumstances based on sex felonies because the evidence was simply insufficient to prove the charged offenses. (*People* v. *Craig* (1957) 49 Cal.2d 313 ("*Craig I*"); *People* v. *Anderson*, *supra*, 70 Cal.2d 15; *People* v. *Granados* (1957) 49 Cal.2d 490; *People* v. *Raley* (1992) 2 Cal.4th 870; and *People* v. *Johnson* (1994) 6 Cal.4th 1.)

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[31] Indeed, with respect to the blood stains found on Ms. Epperson's bra, and the placement of the bra above one nipple after the assault, the prosecution argued that appellant picked up Ms. Epperson in the bathroom and placed her against the wall before he started hitting her. After he started hitting her, she sank lower and lower against the wall as her knees buckled . (See, e.g., 13 RT 1858.) Thus, if appellant had a hand on her torso as she started to sink while he attempted to hold her against the wall as he hit her, his bloody hand would not only touch her bra, but would pull the bra upwards over her nipple as she sank towards the floor.

For example, in *People* v. *Craig (Craig I)*, *supra*, this court reversed a felony murder conviction because the evidence was insufficient to prove either an attempted rape or an actual rape. Defendant Craig told someone early in the evening of the murder that he wanted to "have a little loving." Later that same evening, he got into an argument with a woman who would not dance with him at a bar. After leaving the bar, he attacked and killed a different woman by strangling her and hitting her 20 to 80 times. Her body was found the following morning beneath an automobile at a gas station; it appeared to have been dragged approximately 25 feet. The deceased was lying on her back with her legs spread apart. She was wearing a ripped open raincoat over a torn nightgown and torn underwear. The front part of her body was exposed. She had also suffered many contusions and lacerations on her face, breast, neck and lower abdomen. (*Id.* at pp. 315-316.)

Defendant Craig was arrested the following afternoon with a swollen and skinned hand. In addition, the police found blood consistent with the deceased's blood type on his coat, hat and shoes but not on his shorts or jeans. They also found heel prints from the defendant's shoes on the deceased's body. (*Id.* at p. 317.)

Reversing the underlying sex based felonies of rape and attempted rape, this court rejected the prosecution's argument that the torn clothing, the position of the deceased's body and legs, the defendant's abusive conduct toward the woman at the bar and his statement about wanting "a little loving" proved that the defendant had raped or attempted to rape the deceased. (*Id.* at p. 318.) This court found "[a]

complete absence of any evidence in the record to show that he had an intent to commit rape." (*Ibid.*) The court further observed:

> [There was] . . . a complete lack of satisfactory evidence that this killing was committed during either an attempt to commit rape or in the commission of rape; that the evidence shows no more than the infliction of multiple acts of violence on the victim, and even though the killing was an extremely brutal one, the People have only proved that the defendant was guilty of a second-degree murder.

(*Id.* at p. 319.)

Here, as in *People* v. *Craig*, *supra,* Ms. Epperson was found partly unclothed and with multiple wounds. Additionally, defendant Craig said he was going out looking for "a little loving" and later in the evening he scuffled with another woman in a bar who refused to dance with him. (*Id.,* at p. 315.) Nothing like that occurred in this case. Thus, here, even less evidence supported the rape allegations than in *Craig I.*

As noted in the prior issue, this court came to a similar result in *People* v. *Anderson*, *supra*, 70 Cal.2d 15. In *Anderson*, a ten-year-old girl was found naked under a pile of boxes and blankets next to her bed. Her torn and bloody dress had been ripped off her and was under her bed. (*Id.* at p. 21.) The crotch of her blood soaked panties had been ripped out, and her slip, with the straps torn off, was found under the bed in the master bedroom of the house. (*Id.* at p. 24.) A large blood stain was in the center of her mattress. There were over 70 wounds on her body, including repeated cuts and lacerations on her thighs and vaginal area. A knife had been thrust into her vagina and had cut through into the anal canal. Only defendant's socks and shoes had blood on them,

suggesting that he was partly nude during the attack on the deceased. (*Id.* at p. 34.) The window blinds were down and the doors were locked. (*Ibid.*)

The prosecutor argued that the murder had taken place during the course of a violation of Penal Code section 288, molestation of a child under 14. The prosecution cited the following evidence in support of its claim: "The nature of the wounds and the clothing of the deceased, the appearance of blood in several rooms in the house, and the lack of blood on any of the defendant's clothing except for his socks and shorts." (*Id.* at p. 34.) The prosecution argued that this evidence was sufficient to infer that "defendant was almost naked while attacking the victim and pursued her through several rooms of the house and slashed, stabbed and ripped off her clothing with the intent to commit a lewd act upon her to satisfy his sexual desires." (*Ibid.*)

Rejecting the prosecution's argument, this court concluded that aside from the homicide, there was virtually no evidence relating to a possible section 288 offense; let alone evidence showing the defendant had the requisite intent to commit a sexual assault. Commenting on the argument that the laceration to the vaginal area was relevant to show the intent to commit a sexual offense, the court noted that the wound was "only one of several randomly inflicted wounds covering the victim's body." (*Ibid.*)

Certainly, if this evidence was legally insufficient in *Anderson*, *supra*, for the trier of fact to find an independent intent to commit a sex crime, the evidence was even less sufficient here. In *Anderson,* not only

was the deceased's body partially undressed but there were wounds to her vaginal and anal areas. In addition, the crotch of the decedent's panties had been torn out, and the body was found next to her bed. At least part of the attack occurred on the decedent's bed, as evidenced by a large blood stain found in the center of her mattress.

Further, in *Anderson* the evidence supported an inference that the decedent struggled with her assailant, and fought with him or tried to escape from him as he pursued her through several different rooms in the house. Even under that circumstance, this court found the evidence insufficient to prove anything more than a murderous attack on the decedent, or to support a reasonable inference that the motivation for the attack was sexual.

The same is true here, while there was undoubtedly a brutal beating, there is no evidence of rape. Contrary to the prosecution's argument, Ms. Epperson's jeans and panties were not forcibly removed during the attack. The lack of sperm or even epithelial cells in Ms. Epperson's panties shows that she was not even wearing panties or jeans when the assault occurred. Moreover, if the panties and jeans had been forcibly removed, the panties would have been on top of the jeans instead of underneath them.

The bloodstains on the bra and the fact that the bra had been pushed up over one nipple are entirely consistent with the struggle while appellant attempted to hold Ms. Epperson against the wall. Further, the mixed blood stains on Ms. Epperson's legs and thighs are also consistent with the struggle. That is the abrasion on her knee and being carried from

the bathroom into the living area certainly would have resulted in mixed bloodstains on her legs and thighs. Moreover the general mortal struggle between two individuals resulted in bloodstains almost everywhere in the apartment, not just on Ms. Epperson's person. Even the coroner, Dr. Wang conceded that the bruising and small abrasions in Ms. Epperson's vaginal area were consistent with sexual intercourse over time between a man of appellant's size and a woman of Ms. Epperson's size.

In short, the evidence is consistent with appellant's claim of consensual intercourse followed by an assault and inconsistent with the prosecution's claim of forcible rape. For these reasons, the rape conviction, the rape felony murder theory and the rape special circumstance must all be set aside.

IV.

APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER MUST BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION AND DELIBERATION

Summary of Issue

Here, since there was no evidence of planning, no viable evidence of motive and the manner in which Ms. Epperson was killed did not support a finding of premeditation and deliberation, the first degree murder conviction must be reversed. Further, although there was evidence of an intent to kill based on a sudden quarrel and heat of passion, the heat of passion negates the intent to kill and will not support a first degree murder conviction.

Requirements of Proof for First Degree Premeditated Murder Conviction

Count I alleged that appellant murdered Tammy Epperson in violation of Penal Code section 187 subd. (a). (3 CT 347.) For the reasons set forth below, the evidence was not sufficient to support a finding of premeditation and deliberation. Therefore, the verdict of first degree murder violated appellant's right to due process, to present a defense, and to reliable guilt and penalty phase verdicts. (U.S. Const. Amends. 6, 8, and 14; Cal. Const., art. I, §§ 7, 15, 16, and 17; *Jackson v. Virginia, supra,* 443 U.S. 307; *Beck v. Alabama, supra,* 447 U.S. 625.)

In *People v. Anderson, supra,* 70 Cal.2d 15, this court identified three types of evidence which generally must be present in order to

sustain a jury finding of premeditation and deliberation. The court described these categories as follows:

> (1) Facts about . . . what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward and explicable as intended to result in the killing which may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with the facts of type (1) or (3), would . . . support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed'; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take the victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type '(1) or (2).' (*Id.* at pp. 26-27.)

Under the standard stated in *Anderson, supra*, this court has sustained verdicts when there was evidence of all three types or at least extremely strong evidence of type (1) or evidence of type (2) in conjunction with either (1) or (3). (*Ibid.*) Here, the evidence showed nothing more than that appellant acted on a "rash impulse hastily executed. "

Standard of Review

As noted previously, the test of whether evidence is sufficient to support a conviction is "whether a rational trier of fact could find

defendant guilty beyond a reasonable doubt." (*People v. Holt, supra*, 15 Cal.4th 619, 667; see also, *Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319 ["The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"].) To satisfy this due process standard, there must be substantial evidence (that is, evidence which is reasonable, credible, and of solid value) from which a reasonable trier of fact could find, beyond a reasonable doubt, that the defendant premeditated and deliberated the killing. (*People v. Johnson, supra*, 26 Cal.3d at p. 562.) Further, because this was a capital murder proceeding and a death sentence was imposed, the evidence in support of a finding of deliberate, premeditated murder must also satisfy the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. 637-638.)

There Was No Evidence of Planning

The prosecution did not present substantial evidence that the killing of Ms. Epperson resulted from the kind of planning described in *Anderson, supra*. The evidence most favorable to the prosecution was the taped statement of Vannoy to the police. In that statement, Vannoy said that appellant told him that he and Ms. Epperson had been having regular consensual sex for several weeks. On the date of the assault, they had been having consensual sex for about 20 minutes (Exh. 88A, 40 64)

when she got a call from some other guy. She responded, "Yeah. That sounds like fun. We're going to have to do this, you know. It sounds like fun." Appellant asked who called and she refused to tell him. Then Ms. Epperson told appellant that he did not own her. (Exh. 88A, 84.) The argument progressed from the bedroom to the bathroom to the living room. In the bathroom, appellant hit Ms. Epperson at least six times. In the living room, appellant cut Ms. Epperson twice, hit her with a wooden stool and a large lamp and then stabbed her with a screwdriver. (Exh. 88A 31, 50-51.) After that, he just tore up the whole house. (Exh. 88A 40.)

Vannoy also claimed that appellant mentioned that during the heat of the assault, Ms. Epperson asked appellant if he was going to kill her. Purportedly, he replied that he was. (Exh. 88A 39, 85.)

Appellant's testimony was similar. As noted in issue I, appellant said that while they were at Ms. Epperson's apartment, she received a phone call. The gist of the call was that she was making plans to go out with someone. (11 RT 1527.) When appellant asked who the caller was, Ms. Epperson declined to tell him. (11 RT 1529-1530.) Appellant asked what happened to the affection over the last few months? Ms. Epperson apparently replied that he was a " fill-in" while she was lonely. That is, he was a temporary boyfriend until she found someone that she wanted to be with for good. Further she did not think he was good enough for her. (11 RT 1529.)

Appellant asked if their relationship was over. Ms. Epperson replied "Yeah. It's fun while it lasted, but we're done." (11 RT 1530.)

That assertion made appellant feel worthless and crushed. He then began hitting her with his fists, but he did not intend to disfigure or kill her. (11 RT 1530, 1532-1533, 1602.)

Nothing in the foregoing scenario from either witness establishes any sort of planning or careful consideration. The argument was spontaneous and resulted from the unexpected phone call. The subsequent immediate assault certainly did not show the kind of planning described in the *Anderson* decision, *supra*, that is required to prove premeditation and deliberation.

There Was No Evidence of Motive

The prosecution also failed to present sufficient evidence of motive to support a finding of premeditation and deliberation under the *Anderson* standard. As noted above, *Anderson* requires motive evidence consisting of "proof of the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a motive for a planned killing." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.)

In this case the evidence showed that appellant's prior contact with Ms. Epperson was obviously favorable. Even prosecution witness Vannoy testified that they had just been engaged in consensual sex when the phone call arrived. Nothing in the scenario leading to Ms. Epperson's death suggests that appellant harbored any motive to kill prior to the sudden quarrel. Indeed, if there was some motive or planning prior to the phone call, most likely appellant would have brought a weapon or other instrumentality to effect the killing rather than simply grabbing the first implement that he could find in Ms. Epperson's apartment.

Thus, no evidence was introduced, beyond mere "conjecture and surmise," that appellant possessed the kind of motive contemplated by *Anderson* to support a finding of premeditation and deliberation. (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8.)

Evidence of Manner of Killing

The manner in which Ms. Epperson was killed did not support a finding of premeditation and deliberation. Indeed, the manner of killing in this case was very similar to that in *People v. Anderson, supra*, which this court found, as a matter of law, did not support a finding of premeditation and deliberation. (*Id.* at p. 21.) In both cases, the crime scene was chaotic. The victim had sustained multiple wounds including stab and cutting wounds. There also was evidence that the killer had attempted to clean up the evidence of his crime. (*Ibid.*)

In *People v. Frank* (1985) 38 Cal.3d 711, 734, this Court noted that "hazardous infliction of multiple stab wounds" suggests a lack of premeditation and deliberation. Moreover, in *Anderson* the Court also noted that premeditation and deliberation cannot be inferred from "indiscriminate multiple attacks of both severe and superficial wounds." (*People v. Anderson, supra*, 70 Cal.2d at p. 21.)

Intent to Kill Will Not Support First Degree Murder Conviction

Even if the jury believed Vannoy's claim that appellant allegedly told Ms. Epperson during the beating that he was going to kill her, that assertion does not prove premeditation and deliberation. The standards for provocation and heat of passion as they apply to second degree murder and voluntary manslaughter are not the same. The test for whether

provocation or heat of passion can negate malice so as to mitigate murder to voluntary manslaughter is objective. (*People v. Steele* (2002) 27 Cal.4th 1230, 1254.) However, the test of whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder, on the other hand, is **subjective**. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.)

Based on the facts of this particular case, provocation may exist for second degree murder but not for manslaughter. Provocation that negates malice and reduces the crime to voluntary manslaughter also requires an objective determination that a reasonable person under like circumstances would have reacted with deadly passion. (*Ibid.*) Nevertheless, a defendant who is subjectively precluded from deliberating because of provocation is guilty of second degree rather than first degree murder, even if a reasonable person would not have been so precluded. (*Ibid.*, see also *People v. Hernandez* (2010) 183 Cal.App. 4th 1327, 1332.) The evidence here clearly shows that appellant was subjectively under the influence of heat of passion as a result of Ms. Epperson's demeaning language at the breakup and thus did not act with premeditation or deliberation.

Instead, the evidence of the murder in this case is "consistent with the sudden, random explosion of violence" which is insufficient to support a finding of premeditation and deliberation. (*People v. Alcala, supra*, 36 Cal.3d 604, 623.) The wounds suffered by Ms. Epperson did not exhibit a particular and exacting manner of killing or a preconceived design, as required under the *Anderson* standard.

Appellant recognizes that this court has described the *Anderson* analysis as ". . . intended only as a framework to aid in appellate review." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125; *People v. Hawkins* (1995) 10 Cal.4th 920.) Nonetheless, for all of the foregoing reasons, even when viewed in the light most favorable to the prosecution, the evidence presented at appellant's trial did not support his conviction of first degree murder based on a premeditated and deliberated murder theory.

V.

THE TRIAL COURT ERRED BY REFUSING TO EXCLUDE IRRELEVANT EVIDENCE OF APPELLANT'S PURPORTED GANG AFFILIATION AND GANG TATTOOS.

Introduction

This was not a gang case. Because Ms. Epperson's death was the result of an explosion of violence and animal fury born of a sudden and jealous quarrel, did the improper gang evidence implying criminal disposition lower the prosecution's burden of proving first degree murder and the torture allegations? Additionally, since the first penalty jury hung and the second was deadlocked 10-2 for a time, did the gang evidence implying bad character improperly bolster the prosecution's attempt to prove that death was the appropriate punishment?

Summary of Argument

Because similar gang evidence was presented at both the guilt and penalty phase trials and because the rationale for the trial judge's rulings was inextricably intertwined in both phases of trial, appellant presents this problem as a single issue rather than separate guilt and penalty phase issues.

There are multiple errors with the admission of the white supremacist gang tattoo/membership evidence here. As explained in Issues I, II, III and IV, this case was about appellant's state of mind when he assaulted Ms. Epperson. As explained in those issues, this was a

classic case of seething jealously that monumentally erupted when the object of appellant's affection terminated their relationship presumably in favor of another.

Although Sims was black and appellant was white, as explained below, the evidence shows unequivocally that Sims could **NOT** have made the phone call that ultimately triggered the assault. He did not have Ms. Epperson's phone number (only her pager) and Sims specifically admitted that he did not talk to her and that she never answered his page. Moreover, there is no evidence that appellant thought Sims made the phone call or that he thought Sims and Ms. Epperson were getting back together. Thus, even if there was some racial animus between appellant and Sims (which there was not) absent some nexus between the racism and the assault, the white supremacist gang evidence was simply irrelevant.

For the three reasons set forth below, the trial court erred in admitting the evidence at all and appellant was highly prejudiced by the admission of this evidence.

First, the initial mention of white supremacist gang affiliation was elicited as a result of prosecutorial misconduct. Because the prosecutor's series of questions leading up to Sims' assertion that appellant was a white supremacist was a blatant invitation to"volunteer" the inadmissible opinion, the prosecution either deliberately elicited this evidence or failed to admonish Sims not to reveal it. Either circumstance constitutes misconduct.

Second, the trial court compounded the initial misconduct by

mistakenly asserting that appellant invited the gang evidence. The trial court claimed that appellant raised the issue of whether Sims avoided appellant thus insinuating that Sims had a bias against appellant. By allowing the racial animus evidence, the prosecution could show that in fact Sims avoided appellant because appellant had a racial bias against Sims. Further, the racial animus evidence was relevant to show why appellant attacked Ms. Epperson and why the beating was so brutal. That is, because appellant was infatuated with Ms. Epperson, but apparently Ms. Epperson was involved with Sims, appellant not only assaulted her out of jealousy, but administered such a brutal beating because she had a sexual relationship with a black man.

A review of the transcript, however, demonstrates that it was the prosecution NOT the defense that raised the issue of why Sims would avoid appellant. The defense vehemently objected to such evidence and those objections were overruled. Although the defense explored the issue on cross examination of Sims after its objections on direct examination were overruled, there can be no invited error where the defense tried to limit the damage from a bad situation that it did not create.

Further, as noted above, even assuming arguendo that there was some sort of racial animus between appellant and Sims, there is no evidence linking it to the assault on Ms. Epperson. Because Sims did not make the triggering phone call to Ms. Epperson and there is no evidence that appellant thought he had, there is no fair inference that jealously of Sims led to the assault. Moreover, aside from pure unadulterated speculation by the trial court, there is no evidence - or even an inference -

that racial animus made the beating more severe than would be apparent from simple jealousy alone.

Third, appellant was severely prejudiced by the gang evidence. In the guilt phase the evidence showed that assault was motivated by a jealous rage and heat of passion emanating from a sudden quarrel. Moreover, because appellant was severely mentally ill and unable to control his rage, the conviction for first degree murder cannot stand.. The improper gang evidence was intended to persuade the jury that appellant had a predisposition to commit criminal acts. Introducing this improper evidence lowered the prosecution's burden of proof and made it easier to persuade the jury to convict of first degree murder and render a true finding on the torture allegations.

In the penalty phase, death was certainly not a foregone conclusion. The first penalty phase jury hung. In the second penalty phase trial, the jury was apparently hung 10-2 for awhile before finally voting to impose the death penalty. By unfairly portraying appellant as a person of bad moral character, there is little question that the improper gang evidence assisted the prosecution in persuading the jury to impose death.

Background Facts

On direct examination, the prosecutor asked Ronald Sims whether he was still dating Ms. Epperson at the time of the homicide. Sims replied that he was still friends with her, but there was no longer any boyfriend/girlfriend relationship. (8 RT 1045.) They had previously been together, but broke up when he started using drugs again. (8 RT 1043-1044.)

On the day Ms. Epperson was assaulted, Sims was supposed to attend church with Ms. Epperson. However, he was late. He decided to wait outside the church until she emerged after the service. After the service ended, Ms. Epperson met Sims on the sidewalk outside the church building and they spent a few minutes talking. While they were talking, Sims spotted appellant standing across the street. (8 RT 1046-1047.)

The prosecutor inquired of Sims how the sight of appellant made him feel. The defense immediately objected but the objection was overruled. (8 RT 1047-1048.) Sims replied that he felt like appellant was watching them. (8 RT 1049.) After a few questions concerning whether Ms. Epperson also saw appellant, the prosecutor again asked how Sims felt about appellant standing across the street. Again the defense objected on the grounds of relevance and again the objection was overruled. (8 RT 1048-1049.) Sims replied that he did not really know, just that appellant was watching him. (8 RT 1049.)

Probing further, the prosecutor asked if Sims had any prior contact with appellant. (8 RT 1049.) Sims replied that at one time they both lived in the same building as part of a drug rehabilitation program. Nevertheless, they did not know each other and they never spoke to each other. (8 RT 1049.) That said, one day as Sims was leaving the building, appellant passed him near the end of a hallway and purportedly said , "you punk m.f." Since it appeared to Sims that appellant was about to rush him, Sims continued through the hallway door and went outside. (8 RT 1049.)

After relating the foregoing incident, the prosecutor asked Sims for

a third time how he felt about being watched by appellant as he was talking with Ms. Epperson. (8 RT 1049 -1050.) Again the defense objected on relevance grounds and again the objection was overruled. (8 RT 1050.)

Sims replied that he was intimidated. Then he volunteered that he knew appellant to be a white supremacist. (8 RT 1050.) The defense again objected and moved to strike the response. The trial court sustained the objection and told the jury to disregard Sims' remark. (8 RT 1050.) Nevertheless, the record shows that Sims' comment was the very first time the jury was made aware of any possible racial animus between Sims and appellant.

Sims further testified that he spoke with Epperson for about ten more minutes, then ran across the street to catch a bus. He left Epperson standing on the corner. As he left, Ms. Epperson said she had to go see what appellant wanted. (8 RT 1050.)

Sims testified that he told Epperson he would call her later after he got out of church. (8 RT 1050.) Sims told the jury that he got out of church about 1 p.m. and **paged** Ms. Epperson at least three or four times. She did not return his page which he thought was unusual. (8 RT 1051.) Sims then took action to determine what happened to Ms. Epperson. (8 RT 1051-1053.) Eventually, he went to the police station where he explained the situation to the police. (8 RT 1057.)

On cross examination by the defense, Sims again acknowledged that he did not really know appellant because they never actually met. They were simply in a drug rehabilitation program together and living in

the same housing complex. Moreover, he confirmed his testimony on direct examination that they never talked to each other, not even once. (8 RT 1061-1062.)

Sims also admitted that he thought about marrying Ms. Epperson, but denied ever being jealous of appellant. (8 RT 1064.) Sims was aware that Ms. Epperson changed the locks on her apartment door, but denied that it was because he was annoying or stalking her. (8 RT 1065.) Significantly, when confronted with the assertion that he never told the police that appellant called him a "punk mother fucker," Sims first insisted that he had. (8 RT 1063.) Nevertheless, after admitting that he had actually been detained by the police, placed in handcuffs and later in a cell (8 RT 1065), Sims conceded that although he thought he told the police about the prior incident where appellant called him names, he may not have. (8 RT 1067.)

On redirect, Sims said that while he and appellant were living in the same housing complex, he never thought about appellant one way or the other. Sims did not dislike appellant and did not try to avoid him. Nevertheless, Sims admitted that he never went looking for appellant either. (8 RT 1069-1070.)

Later in trial, Todd testified on direct examination that he knew Ronald Sims. Further, on several occasions appellant purportedly told Todd that he (appellant) "would kill that nigger if he kept trying to see Tammy."(8 RT 1161.) At a defense requested sidebar a few moments later, the defense noted that it had not been provided any discovery wherein Todd averred that appellant said he would kill Sims if Sims

continued to try and see Ms. Epperson.

The prosecutor noted that Todd's testimony was the first time she was aware of that claim as well. Nevertheless, on a taped statement, Todd told the police that he knew appellant to be a member of a white supremacist group and that appellant was having trouble with that group because he was dating a white woman who had been with a black man. Thus, the racial animosity was in the discovery. (8 RT 1165.)

Defense counsel Symonds stated that he did not recall anything like that on the tape provided in discovery. (8 RT 1165.)

The trial court pointed out that even if the statement wasn't in discovery, that circumstance would not prevent Todd from testifying to the matter. The judge explained:

> "I also wanted to indicate that this problem about white supremacy and whether the defendant is adverse to people of color was something I kept out initially, but the defense has gone into the fact that the witness [Sims], who was African-American, was basically staying away from the defendant and they went into it, so this becomes relevant.
>
> In other words, a man knows that he's not well liked by Mr. Powell, he's going to stay away from him, so you've brought up the issue. **Defense has brought up the issue.**"
> ([Emphasis added] 8 RT 1165-1166.)

Later in trial, the gang connection with appellant's tattoos came up during the prosecutor's cross examination of appellant himself. The prosecutor first asked if appellant had a problem with Ronald Sims.

Appellant replied that he did. However, it wasn't because Sims was Ms. Epperson's ex-boyfriend, it was because of what Sims did to her. The prosecutor then asked appellant if he was a racist. Appellant said he was not. (11 RT 1541 -1544.) The prosecutor responded, "Then what are those tattoos doing ——-" The defense immediately objected and asked for a sidebar. (11 RT 1544-1545.)

At sidebar, the following colloquy occurred.

Prosecutor:

> Actually what I was going to say is what about those tattoos on your arms and legs and then mark them, not saying what they are, approach or at least give it [pictures] to the bailiff and see if he [appellant] can identify those as his tattoos. Tattoos show on his arm White Pride, on his leg rather large White Anger.

Court:

> [looking at photos] And what's this on one arm? There is a death head, and I don't know what the rest of it is, and there are more on his chest, more tattoos that I can't quite read on his chest.
>
> Okay. What's the objection?

Defense Counsel:

> Well, it's a collateral issue, your honor. I mean if the court is thinking of allowing it, I think you're going to have to excuse the jury and have him explain the tattoos. I think they were a long time ago. He is not any member of any white supremacist group. It's already in the record he has black friends, and it just is -- it's inflammatory and prejudicial. They don't have any date where these -- how long they've

been there and they have no testimony that they're related to this case.

Court:

I don't know whether you [the prosecutor] wanted to add anything. I'm going to overrule the objection. To begin with, the defense brought this in - in asking why he was not responsive to your client, and at that point I would have reversed the original ruling that this was too prejudicial to bring in. It made it look like Mr. Sims was avoiding your client unfairly, that he was unfriendly and aloof and in fact it appeared that the answer was that he recognized that your client did not like African Americans, but in any case, this part is directly responsive.

Your client can give an excuse, but it doesn't mean it's excludable. It would go to the weight of it. Objection is overruled. (11 RT 1545-1546.)

In open court, the prosecutor marked four photos plus three photos reproduced on a sheet of paper for identification. (People's 84 and 85.) She then asked the appellant if he could identify the tattoos in the photos. (11 RT 1546-1547.) Appellant said they were his tattoos. The ones on his arms say "White Pride" the ones on his calves say 'White Anger". (11 RT 1547.) Appellant said he got those tattoos in prison years ago. (11 RT 1547-1548.) Responding to renewed aggressive questioning by the prosecutor about whether he was a racist and whether he hated Sims because Sims was black and Ms. Epperson was white, appellant again denied those assertions. (11 RT 1548.)

The prosecution then asked if Charles Vannoy was a close friend of

appellant. He replied that Vannoy was simply a friend. The prosecutor then said "isn't he connected to the Aryan Brotherhood?" (11 RT 1548.) The defense immediately objected as appellant answered "absolutely not." The objection was sustained. (11 RT 1548.) The defense then asked for another sidebar. (11 RT 1549.)

At the sidebar, the defense observed that it had not been provided with any discovery or evidence that Vannoy was a member of the Aryan Brotherhood or that appellant was in any way connected with that gang. (11 RT 1549.) The defense asked that the jury be admonished to disregard both the question and answer. The prosecution conceded and the court so instructed the jury. (11 RT 1549-1550.)

Nevertheless, hammering away on the gang tattoos, the prosecutor asked if he described them to the police after his arrest. Appellant replied that he did not recall. (11 RT 1571.)

On redirect, the defense was compelled to address the tattoos and gang evidence. Defense counsel asked appellant if the tattoos made him a racist. Appellant replied that they did not. (11 RT 1620-1621.) Asked why he had the tattoos, appellant explained that almost 90% of white prisoners had the tattoo that says "White Pride," but it does not identify a prisoner with a white supremacist group. (11 RT 1621.) Further, he got the nickname "White Anger" in 1988 because in prison he was angry a lot. (11 RT 1621.) In response to further questioning, appellant stated that one of his best friends was a black woman . (11 RT 1621.) Additionally, his problem with Ronald Sims had nothing to do with race (11 RT 1621.) As appellant put it, "Color means nothing to me." (11 RT

1621.) Moreover, with respect to tattoos, he also had a tattoo "Tam" on his body, because that was the abbreviation he always used with her. (11 RT 1622.)

Finally, and most important, he was upset with Ms. Epperson after she received the phone call. More important, his anger arose because he had no idea she was involved with anyone else. Certainly that was why he was not upset with Sims. He had no idea that Sims was in any way still involved with Ms. Epperson. (11 RT 1622.)

Later, during rebuttal argument at the end of the first penalty phase trial, the prosecution urged that while appellant was in prison, he was not a man alone in a lifeboat surrounded by sharks,. She argued instead:

> "I submit to you this defendant is not the man in the life boat. He's the shark. Because how else is he going to protect anybody [Todd] in prison **unless he's got his gang to back him** and he knows that he can protect somebody? He's not afraid of prison." (22 RT 3230.)[32]

The defense immediately objected to the gang reference but the objection was overruled. (22 RT 3230.)

After the arguments were complete and the jurors retired to deliberate, appellant was quite agitated. He was removed from the courtroom and sent back to jail to cool off. The prosecutor asked the bailiff to explain why appellant was so agitated. The bailiff explained that

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[32] It should be noted that during the guilt phase, Todd testified that appellant protected him in prison. (9 RT 1147.) However Todd never testified that appellant said he could protect Todd because appellant was a member of a gang and the gang would back him up.

appellant was agitated during the prosecution's argument asserting that he was a white supremacist. (22 RT 3238.)

The court then explained that the reason it overruled the objection about what was said on the tattoos was because they showed "gang affiliation". (22 RT 3228-3229.) Further,

> "Normally while in prison, you have to be involved with some affiliation with others that are going to help protect you, so it's fairly common that the court sees that; but it was a tattoo, self-admitted by being tattooed White Pride and the other was White ..... Anger. So that's the reason why I allowed it and why I think it's a fair argument to make, even if he doesn't personally feel that way any longer, or if he did it solely for the purpose of protecting himself in custody." (22 RT 3239.)

Defense counsel stated for the record that appellant did not feel that he had ever belonged to a gang or any white supremacist gang and in all the records counsel reviewed from juvenile through adult and in the prison, counsel found no reference to appellant ever belonging to or claiming membership in any gang. The defendant maintained that the tattoos had nothing to do with actually being a member of any particular gang. (22 RT 3239.)

The court replied that it seemed inconsistent that the defendant could have both "White Pride" and "White Anger" tattoos and not be a member of a gang. Thus, the defendant could deny the association, but the court thought the argument was still there and the likelihood would be very strong that he was a member of a white supremacist gang at least in prison. (22RT 3239-3240.)

Shortly thereafter, the court concluded that the jury was hung and declared a mistrial on the first penalty phase. (22 RT 3241.)

At an *in-limine* session before the second penalty phase -during discussions concerning jury questionnaires - the defense again moved to exclude evidence concerning appellant's purported membership in any gang. (23 R.T 3268-3269.) In response, the court observed:

> "I'm still not -- my position on it is the same as it was during the trial. When an individual has in large block prints a tattoo that says, "White Power," regardless of their denials, it seems to me that's self-evident that there was, if not currently, a -- not only a gang affiliation, which is less important, but an animosity toward people that are not white. The oddity here is that he had a good friend who was African American, but I think the reason I let it in was that it did tend to explain his animosity toward an African American male involved in the trial and very close to the victim in the case." (23 RT 3286.)

Near the beginning of jury selection, the defense again addressed appellant's tattoos. The defense expressed concern that African-American jurors might be offended by the tattoos and wanted to exclude them as irrelevant to the prosecution's case. Even if the evidence showed that Mr. Sims hated appellant and appellant hated Mr. Sims, that circumstance would be tangential to the prosecution's case. (24 RT 3363-3364.)

The judge replied that if appellant hated Mr. Sims, that would provide a motive and an excuse for the homicide. Moreover, at trial Sims testified that he never talked with appellant even though they lived in the same housing complex. That circumstance seemed quite strange and it

tended to suggest that one or the other of the two men had a bias. Further, since the tattoos were fairly large, they suggest that appellant had a problem with African American men. (24 RT 3364-3365.) The court further noted that the whole issue was quite complex. Perhaps appellant had an issue with African American males but not African American females. In any event, depending on the circumstances, the tattoo issue might not come up at the second penalty phase at all. (24 RT 3365.)

Before the second penalty phase trial actually began, the defense again asked the court to rule on its motion to exclude the tattoos. (28 RT 4157.) Reading aloud from the guilt phase transcript - at p. 1049- the trial court noted that on cross examination of Sims, the defense asked:

> "Actually you met Troy before you met Tammy; isn't that true?"
>
> "Answer, "I never met him. I knew him through the program and I saw him.
>
> "Question: all right. He was in the "Stairs" [drug rehabilitation] program with you in 1998; isn't that true?
>
> "Answer: '98, '99, yeah.
>
> "Question: And you lived together in the Weingart (building complex]?
>
> Answer: "True.
>
> Question: "In the same building?
>
> "Answer: yes.
>
> "Question: and all -- and two years you never talked to Troy

once?

"Answer: no." (28 RT. 4157-4158.)[33]

Based on the foregoing passage, The judge observed: " You're emphasizing a bias on the part of Mr. Sims against your client, and one answer to that is your client realized he had racist tendencies and did not like black people." (28 RT 4158.)

The defense responded that the passage was elicited by the former co-counsel and current counsel would not have asked those questions. Nevertheless, in penalty phase it was not necessary to bring out any information regarding bias against Mr. Sims and counsel was not going to get into that area. (28 RT 4158.)

The court responded that under evidence Code section 352, there was expanded latitude for the admission of evidence in penalty phase. (28 RT 4159.) The court noted that the phone call and Ms. Epperson's reactions to appellant's inquiry about it caused appellant to start hitting her. (28 RT 4149-4160.) As the judge put it, "if the concept is the person she's talking to is Mr. Sims and he has a racial bias against black people, that's another reason for [appellant] to be aggravated. Not only is Tammy interested in another man, she's interested in a black man." (28 RT 4160.)

Defense counsel objected noting that there was **NO** testimony that Sims made the telephone call or that appellant knew it was Sims if in fact Sims made the call. In response , the judge **conceded** that there was no

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[33] It should be noted, however, that on direct examination of Sims, the prosecution first asked whether he had ever spoken with appellant at the housing complex. Sims replied that he had not. (8 RT 1049.) Thus, the prosecution raised this matter first.

such testimony. (28 RT 4160.)[34]

Defense counsel noted that there were African Americans on the jury and the tattoos might prejudice them. Further, the tattoos were irrelevant to any issue in the penalty phase. Moreover, even if appellant held racially biased views while in prison in 1989, he certainly did not hold them at the time of the incident. (28 RT 4160.) Further there was absolutely no evidence that appellant was a member of any white supremacist gang. (28 RT 4161.) Defense counsel went on to note that he might not even present testimony from Ms. Cook- Welsh, appellant's female African American friend. (28 RT 4161.)

The judge responded that at guilt phase , Ms. Welch testified that she asked appellant "am I your token nigger?" In the judge's mind that question was a tacit acknowledgment that she felt she did not really belong in appellant's world. (28 RT 4161.)

Before defense counsel could respond, the prosecutor interjected that Todd testified that appellant told him that he [appellant] was a member of a prison gang and therefore could protect Todd in prison. Further, Todd also testified that the defendant told him , "if that nigger keeps trying to come around Tammy, I'll kill her." (28 RT 4161.)

The court noted that it agreed with the defense that evidence of racial bias was a dangerous area to get into and inquired what the

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[34] As noted previously, Sims testified that on the day Ms. Epperson was killed, he called Epperson several times after 1 pm. However, she did not answer or return his page. (8 RT 1051.) **Thus, he could NOT have been the caller who spoke with Ms. Epperson and who set in motion the chain of events leading to the assault.**

prosecution intended to offer in penalty phase. (28 RT 4161 -4162.)

The prosecutor responded that because appellant saw Sims talking to Ms. Epperson the day she was killed, and because Sims testified that he was trying to get back together with her, appellant's racial animus provided the spur for appellant to murder and torture her. Indeed, that was the prosecution's whole theory of the case. (28 RT 4162.) As the prosecutor explained: " the fact that he has white pride and white anger tattooed on him in huge letters, and the fact that he even made it known that he belonged to a white supremacist group, I think that's part of the motive for what he did. I think that's logical." (28 RT 4162.)

The trial court again observed that racial bias was a dangerous issue but appellant placed the tattoos on himself. (28 RT 4162.) Even the question from the female African American defense witness suggested that appellant was biased. Further, the fact that the decedent was a white woman interested in a black man would make a racist very angry. (28 RT 4162-4163.)

Defense counsel objected to the court's line of reasoning noting that it was purely speculative without some evidence to link racism to the theory of the case, such as a psychologist who could render an opinion on the matter. (28 RT 4163.) Connecting the tattoos to the killing and tortures had no factual predicate. (28 RT 4163.)

The judge disagreed, noting again "in this case he's trying to be romantic with a white woman that is interested, instead of being interested in him, with a black man." (28 RT 4163.)

Defense counsel explained the fallacy in that argument observing:

"first of all, the white woman was with the black man, so if he was a racist, she was with him previously, so if he was a racist, he would consider her contaminated and not want her anymore." (28 RT 4163.) Further, there has to be something linking the tattoos to the crime. The argument that race had anything to do with the killing was pure speculation. Even if appellant did not like Sims, it does not follow from that fact that race was the motive for killing Ms. Epperson. (28 RT 4163-4164.) Indeed, appellant apparently unleashed violence on his mother, sisters and girlfriends all of whom are white. Involving race in this pattern of violence against females would be a particularly prejudicial matter. (28 RT 4164.)

The trial court opined that the prosecution would have to explain the rage that produced such a brutal crime. Not only was the defendant a violent individual, and violent against females, but the involvement of an African American male "adds fuel to the fire." (28 RT 4164-4165.)

Defense counsel replied that if the prosecution was going to argue that race added fuel to the fire, it had to offer some evidence to that effect. Defense counsel explained: "For example, a doctor saying that yes, in my mind what pushed him over was this racial animus, that there would not have been this significant of an explosion had not there been racial animus." (28 RT 4165.) Moreover, because there were African Americans on the jury, exposing the tattoos would be highly prejudicial without that link. (28 RT 4165.)

The trial court noted that it never agreed to exclude the testimony. The concern was the defense cross examination of Sims to show that he

was biased against appellant because he never spoke to Mr. Powell for two years. Appellant's racial animus provides an explanation for that behavior. Moreover, the evidence goes to the motivation for the crime and the explosive, brutal nature of it. (28 RT 4165-4166.) For those reasons, the judge overruled the defense objection noting "it's not even a close issue." (28 RT 4166.)

At the second penalty phase when prosecution witness Charles Vannoy took the stand, the prosecutor asked if he had a swastika tattoo. Vannoy admitted that he did. The prosecutor then asked if he was a member of the Aryan Brotherhood. Vannoy denied that. Pressing on, the prosecutor asked if lightning bolts were also a sign of the Aryan brotherhood. Vannoy replied that they were and admitted that he had such a tattoo. (30 RT 4486.) The prosecution then asked: "Now, isn't it true that you and Troy ..." The defense immediately objected and asked for a sidebar conference. At sidebar, the prosecution announced that it was going to ask Vannoy if he knew about appellant's tattoos; what he thought about the tattoos and whether appellant also belonged to the Aryan Brotherhood. (30 RT 4487.)

The trial court asked whether the inquiry would be limited to the time appellant and Vannoy were in prison together. (30 RT 4487.) The prosecutor replied that it would. The trial court sustained the defense objection although it did not admonish the jury. (30 RT 4487-4488.)

Immediately after the sidebar concluded, the prosecution asked: "You mentioned that the defendant said that he saw Tammy's ex-boyfriend, and you said that it was a black boyfriend and might have

seen him a couple of times. Is there any reason why, did you see any significance to saying that the boyfriend was black? " (30 RT 4488.)

The defense again objected and asked for another sidebar conference. At sidebar, the court ruled that **a question about racial animus would be appropriate** but sustained the objection on the ground that Vannoy never actually said that Ms. Epperson's ex-boyfriend was black. Nevertheless, the jury was not admonished. (30 RT 4488.)

Later, before Todd testified, the defense asked for yet another sidebar conference. At sidebar, the defense pointed to Todd's guilt phase testimony where he alleged that appellant announced he would, "kill that nigger if he kept trying to see Tammy." (31 RT 4598.) Defense counsel asked that Todd be admonished to delete the racial epithet pursuant to Evidence Code section 352 because the word "nigger" was highly prejudicial before African American jurors and not probative. (31 RT 4598.)

The trial court replied that the word showed the anger appellant felt towards Sims. (31 RT 4598.)

The prosecution argued that the word was justified because it showed racial animus. Further, appellant bragged about belonging to a white supremacist gang, and he had the tattoos. Those matters show why he killed Ms. Epperson after he saw her talking to Sims. (31 RT 4598-4599.)

Defense counsel argued that Todd did not say that appellant belonged to a white supremacist gang. Moreover, the defense did not have any discovery showing gang membership. (31 RT 4599.)

The prosecutor replied that Todd would testify that appellant said he belonged to a gang, but Todd did not know which gang. (31 RT 4599.)

Defense counsel argued that such evidence would be irrelevant. (31 RT 4599.)

The court noted that the evidence would be relevant if it occurred near the time of the crime. (31 RT 4599.)

The prosecutor noted that Todd and appellant were in prison together in 1998 and 1999. They were paroled in the year 2000. (31 RT 4599-4600.)

The defense continued to object on Evidence Code section 352 grounds. (31 RT 4600.) The defense argued that the inference the prosecution wanted the jury to draw is that appellant committed this crime because he hated Sims and Sims is black. That is not an appropriate inference on the facts of this case, particularly since the history of appellant's offenses against women had nothing to do with racial animus. (31 RT 4600.) Moreover, in view of all the expert testimony from the guilt phase and the first penalty phase, **NO** expert attributed any aspect of the offense to racial animus. The only evidence was that appellant did not like Sims because he had previously been a suitor to Ms. Epperson. (31 RT 4600.)

The court replied: "[T]he evidence would suggest it's for both reasons, that he was a suitor and that he was African-American, and Mr. Powell didn't treat anybody like he treated Tammy, so this explains the explosive anger that he shows by essentially the torture and ultimate death of Tammy." (31 RT 4600.) Further, appellant and Todd were paroled

about six months before the offense took place. (31 RT 4601.) Finally, there were the tattoos. Appellant testified that he got them in prison. That was just before he was released and the crime took place approximately six months after his release. (31 RT 4601.)

The defense again objected arguing that even assuming racial animus could be proved, there was still no proof that racial animus caused appellant to do more violence to Ms. Epperson than if he merely found out that she was seeing someone else. (31 RT 4601-4602.)

The trial court responded that the evidence showed why appellant used such extreme violence on Ms. Epperson and why the court allowed the tattoo evidence to be presented. Moreover, the parties already covered this ground, so the objection was overruled. (31 RT 4602.)

In response to prosecution questioning, Todd testified that appellant once told him that if Sims kept trying to see Ms. Epperson, he [appellant] would kill Sims. Appellant used a racial epithet when making the statement. (31 RT 4621.) The defense objected that the question eliciting that response was leading and the answer irrelevant. The court sustained the objection but did not strike the answer or admonish the jury. (31 RT 4621.)

The prosecutor then asked if appellant said anything about killing Sims and Ms. Epperson. Todd responded that appellant said: "if Ron kept coming around Tammy, he would kill Ron and Tammy." (31 RT 4622.)

Todd also testified that in the year 2000, after they were both out of prison, appellant told Todd that he belonged to a white gang. (31 RT 4625.) The defense immediately objected on the grounds of relevance but

the objection was overruled. (31 RT 4625.)

The prosecutor then engaged in the following colloquy;

Prosecutor:	And when you say, "a white gang," do you mean a white supremacist gang?
Defense:	Objection.
The Court:	Sustained.
Prosecutor :	What do you mean by white gang? Do you know what that means, a white gang?
Todd:	Well, I know there's several white gangs. There's like the LRL, Aryan Nations, gangs like that.
Prosecutor:	That's fine. ..... (31 RT 4625.)

Of note, Todd admitted that Epperson's ex-husband, Paul Grano, was still friends with Epperson just as much as Sims was. (31 RT 4635.)[35]

On cross examination, Todd testified that he knew Gretchen Black, a black woman. (31 RT 4650.) He also knew that appellant was very good friends with Black. (31RT 4650-4651.) Black married a white man and she, her husband, Todd, and appellant were all at the drug rehabilitation center together and everyone got along. (31 RT 4651.)

When Ronald Sims testified for the prosecution, the prosecutor asked if he knew appellant. Sims responded that he did not know appellant personally. He just knew appellant from being in the same drug

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[35] In fact, Grano's mother testified that shortly before her death, Epperson told her that she [Epperson] and Grano were getting back together. (31 R.T 4595.)

rehabilitation facility. (32 RT 4727-4728.) Over defense objection the prosecution was allowed to ask if there was a reason Sims avoided appellant. (32 RT 4728.) Sims replied that appellant had tattoos on his calves and arms. (32 RT 4728-4729.) On one occasion appellant called him a "punk m.f." as he was walking out a door of the facility. He was intimidated by appellant. (32 RT 4732.)

On cross examination, Sims admitted that Epperson was upset with him because he kept coming around. He also knew that she changed the locks on her apartment. However, Epperson never told Sims she was changing the locks because of him. (32 RT 4742-4743.)[36]

When Ms. Cook-Welch took the stand, she said she was very fond of appellant and that he treated her well. (33 RT 5076.) On cross examination by the prosecution, she was asked what comment she made to appellant that got him upset with her. She replied:

> Troy befriended me, and I didn't understand, well, why would this big guy, I'm going to be more specific, why would this big white guy want to be friends with a black ex-convict like me, and I spoke how I felt to him. I said, "why are you

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[36] It should be noted, however, that property manager Ramakrishnan testified that he approved the change in locks because Epperson told him that Sims had a key and was entering the apartment against her will. (8 RT 1022-1023; 28 RT 4244.) In effect, Sims was stalking her. (8 RT 1023, 1027; 28 RT 4244.) Ramakrishnan further testified that Epperson changed the locks prior to October 2000. At that time, Sims was still living in the complex . (8 RT 1024.) Subsequently, Sims was evicted but he attempted to reenter the complex several times after being evicted. (8 RT 1025. 28 RT 4244.)

Further, there is no dispute that appellant was the one who bought the locks and changed them for Epperson. (9 RT1180; 11 RT 1503.)

> hanging out with me? Am I your token nigger" or something, and he got very angry at me and said, "don't you ever let me hear you call yourself that ever again." (33 RT 5076-5077.)

The prosecution then asked if Ms. Cook Welch was aware of appellant's tattoos. She replied that she was but that they did not bother her at all. (33 RT 5077.)

When appellant's mother took the stand she was cross examined about racial prejudice in the family. She testified that appellant's father was a bigot, a racist, and didn't like anyone who was not total white. Nevertheless, many times when appellant came home he had black and Hispanic friends. She admitted that the last time appellant came out of prison he had some tattoos. (35 RT 5415.) The prosecutor then asked "and those tattoos are associated with, for want of a better word, white supremacist?" The immediate defense objection was overruled. (35 RT 5415.) Mrs. Powell replied that she did not know what the tattoos signified. (35 RT 5415-5416.)

Nowhere in the prosecution's closing argument did it argue that the beating was race based revenge. The only thing the prosecutor argued was that appellant was a predator who took advantage of women. (37 RT 5691.) Nevertheless, responding to appellant's new trial motion based in part on the improper introduction of racial animus, the prosecution argued that its theory remained that racial animus against Sims fueled his anger against Ms. Epperson. Thus, the evidence involving appellant's tattoos and the references to white supremacist gangs was appropriate. (38 RT 5934-5935.)

The defense responded that the injection of race into the penalty phase was inappropriate. The evidence showed that Ms. Epperson died as a result to appellant's reaction to a phone call she received. It is undisputed that **Sims did not make that phone call.** (38 RT 5935.)

Further, appellant was prejudiced because during deliberation, the vote was apparently ten to two at one point. The two holdouts for life were jurors 6 and 12. Both those two jurors were black; all the others were non black - that is, white or Asian. Thus, "Racial animus might have been the thing that put them over the top or created an atmosphere where they would be more willing to give the death penalty than had that evidence been excluded." (38 RT 5935-5936.)

The trial court observed that the killing here showed a viciousness beyond mere jealousy. The racial animus evidence explained that extra level of viciousness. (38 RT 5936.)

Surprisingly, the prosecution suggested that the jury could have found that sexual sadism might have provided that extra level of brutality. (38 RT 5936-5937.)

Nevertheless, the trial court denied the motion noting:

> "I think the white power designation, when somebody allows themself to be tattooed with the words in block print, as I recall, on each leg White Power, nobody is going to convince me that that doesn't show racial bias on his part, and since the victim's boyfriend was African-American and not white, that I think went directly to the motivation for the viciousness of the attack, not just the attack but the viciousness of it..." (38 RT 5942.)

Trial Court Errors

As noted in the summary of argument, there are multiple errors with the admission of the white supremacist/gang tattoo material. The evidence is undisputed that the assault on Ms. Epperson was an explosive reaction to Ms. Epperson's decision to terminate her relationship with appellant after a phone call she received from an unknown caller. The evidence is also undisputed that Sims did not make that call and there is no evidence that appellant thought that Sims made the call. Thus, there is no nexus between the charged offenses and any purported racial animus between appellant and Sims. In that regard, aside from mere speculation there is no evidence - or even a fair inference - that racial animus made the beating more severe than would be apparent from simple jealousy alone. Thus, because the assault on Ms. Epperson did not involve any white supremacist/gang related activity, gang evidence was irrelevant.

Moreover, the prosecutor engaged in misconduct in eliciting the white supremacy issue at all. While Sims "volunteered" his opinion that appellant was a white supremacist, the prosecutor's series of questions leading up to that claim was a clear invitation to"volunteer" that opinion. Whether the prosecution deliberately elicited this evidence or failed to admonish Sims not to reveal it does not matter. Either circumstance constitutes misconduct.

Additionally, the trial court compounded the initial misconduct by mistakenly asserting that appellant invited the gang evidence. The foregoing facts, however, demonstrate that it was the prosecution NOT the defense that raised the gang issue. The defense vehemently objected to

such evidence and those objections were overruled. Certainly, the defense explored the issue of Sims' bias against appellant on cross examination, but there is no invited error where the defense tries to limit the damage from a bad situation that it did not create.

Finally, appellant was severely prejudiced by the gang evidence. In the guilt phase the evidence showed that the assault was motivated by a jealous rage and heat of passion emanating from a sudden quarrel. Moreover, because appellant's mental illness rendered him unable to control his rage, this was a classic instance of voluntary manslaughter. The improper gang evidence was intended to persuade the jury that appellant had a predisposition to commit criminal acts. Introducing this improper evidence lowered the prosecution's burden of proof and made it easier to persuade the jury to convict of first degree murder and render a true finding on the torture allegations.

In the penalty phase, death was not a foregone conclusion. The first penalty phase jury hung while the second penalty phase jury was apparently stuck at 10-2 for some time before finally voting to impose death. By unfairly portraying appellant as a person of bad moral character, there is little question that the improper gang evidence assisted the prosecution in persuading the jury to impose death.

The Prosecutor Committed Misconduct By Eliciting Testimony About Appellant's Alleged Racism and Gang Membership

As noted above, the evidence concerning appellant's purported white supremacy views and his membership in a white supremacist gang

was totally irrelevant. More to the point, it was initially elicited via prosecutorial misconduct.

As explained in the fact section above, in the guilt phase, the prosecution asked Sims three times how he felt about being watched by appellant as he conversed with Ms. Epperson on the sidewalk after church. Twice, the defense objection was overruled. After Sims second response, the prosecution asked if Sims knew appellant. Sims replied that he did not, he just knew who appellant was. (8 RT 1049.) After being specifically asked if he ever spoke to appellant, Sims replied that he had not. (8 RT 1049.) Nevertheless, appellant once called him a "punk m.f." (8 RT 1049.)

After asking virtually the identical question the third time -again over defense objection - Sims replied that he felt intimidated. Then, he blurted out that he felt intimidated because he knew appellant to be a white supremacist. (8 RT 1050.) The defense immediately objected and moved to strike the response. The trial court sustained the objection and told the jury to disregard Sims remark. (8 RT 1050.)

Even though the jury was directed to disregard the comment about being a white supremacist, the cat was out of the bag. As explained below, gang membership portrays the defendant as being criminally disposed and is such an inflammatory topic that the mere admonition to disregard it is not sufficient to erase any prejudice.

Moreover, even though Sims apparently blurted out the remark, it was the prosecutor's series of questions about Sims' perception of appellant as intimidating that unquestionably prompted the comment.

Moreover, because the jury heard this highly prejudicial evidence, the defense clearly had to counter this perception of appellant being criminally disposed. On cross examination, the defense asked Sims if he really knew appellant. Sims replied that he didn't, they were just in the same drug rehabilitation program and living in the same housing complex. (8 RT 1061-1062.)

When asked about whether appellant ever actually called him a "punk mother fucker," Sims claimed he certainly told the police that when he was questioned after Ms. Epperson's death. When pressed, however, he admitted that he might not have told the police about that remark. (8 RT 1063, 1065, 1067.)

Not content to let the matter rest, on redirect, the prosecution elicited testimony from Sims that although they lived in the same building Sims did not dislike appellant or try to avoid him. Nevertheless, he did not seek out appellant either. (8 RT 1069-1070.)

Later in trial when Todd testified about appellant's purported threat to kill Sims if he continued to try and see Ms. Epperson, the defense vehemently objected. In overruling the objection, the court noted that although it originally kept out the evidence concerning white supremacy, **the defense** raised the issue. That is, because the **defense** went into the issue of why Sims stayed away from appellant, the whole question of white supremacy became relevant. (8 RT 1165-1166.)

The trial court's ruling on admissibility was demonstrably in error. Starting with Sims' initial statement that he knew appellant to be a white supremacist, there is no question that the statement was inadmissible. This

was not a gang case. Therefore, attributing racial animus and gang membership to appellant was not only irrelevant, it was highly prejudicial. For that reason, the court initially, and properly struck the offending statement.

Certainly it is true that Sims' statement was volunteered. The prosecutor never specifically asked Sims if he thought appellant was a white supremacist. Nevertheless, the prosecutor repeatedly asked Sims if he was intimidated by appellant. The next step in the logical chain would be to ask Sims why he felt intimidated by appellant. Here, Sims simply volunteered the answer to that next question instead of waiting for the prosecutor to ask it. By setting up that logical chain, however, the prosecutor engaged in misconduct.

Certainly a prosecutor engages in misconduct by intentionally eliciting inadmissible testimony. (*People v. Silva* (2001) 25 Cal.4th 345, 373; *People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Bonin* (1988) 46 Cal.3d 659, 689.) "'In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury.' [Citation.] His 'good faith vel non' is not 'crucial.' [Citation.] That is because the standard in accordance with which his conduct is evaluated is objective." *(People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) "The mere offer of known inadmissible evidence or asking a known improper question may be sufficient to communicate to the trier of fact the very material the rules of evidence are designed to keep from the fact finder." (ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993) § 3-5.6, p. 102.)

Crucially important to the issue here, it has also long been the law that a prosecutor has a duty to guard against prosecution witness' answers containing excluded or inadmissible matters. (*People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688.) As the court in *Cabrellis* pointed out "A prosecutor is under a duty to guard against inadmissible statements from his witnesses and guilty of misconduct when he violates that duty. [Citations omitted.]" (*Ibid.*)

People v. Baker (1956) 147 Cal.App.2d 319, 324-325, cited in *Cabrellis, supra*, is instructive on the question of misconduct here because the facts there are so similar to the facts of this case. In *Baker*, the witness made an improper statement and the jury was instructed to disregard it. The prosecutor claimed to be ignorant of the fact the officer would volunteer the statement, but the appellate Court determined that such an explanation was insufficient to dispel either the misconduct or the prejudice. As the Court explained:

> "It is of frequent occurrence in criminal trials that police officers, in relating conversations with the defendant, testify to statements by the latter that are detrimental to him and inadmissible as evidence, thus necessitating a motion to strike the evidence, the granting of the motion, and an admonition to the jury to disregard it. This was true of the testimony of Officer Natividad as to Baker's admission of the use of narcotics. We said in *People v. Bentley*, 131 Cal.App.2d 687, 690 [281 P.2d 1][19]: 'The district attorney knew, or should have known, the testimony the officer was going to give and should have warned him not to make the statement. Every prosecutor who offers a witness to testify to conversations with an accused should know what the witness will relate if given a free hand. **The prosecutor has the duty to see that**

> **the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial.'** It must be presumed here that the deputy district attorney had discussed with Officer Natividad what his testimony would be as to his conversation with defendant and knew that it would include defendant's admission of prior addiction to narcotics. If so, it was his duty to instruct the witness not to relate that alleged admission. **A claim of ignorance on the part of the prosecutor as to the testimony the witness would give cannot be reconciled with the affirmative duty of fairness in the trial to which prosecutors must be alert at all times."** (*People v. Baker, supra*, at pp. 324-325. Emphasis added] .)[37]

Because Sims' "volunteered" statement was both a logical and foreseeable response to the prosecutor's line of questioning, the fact that it was "volunteered" is of no consequence. The prosecutor had an affirmative duty to warn Sims not to make such a statement.

Moreover, there are additional indicia of misconduct here. There is NO evidence that the prosecutor gave Sims any warning to avoid the gang evidence. Indeed, the prosecution never even hinted that Sims' response was unexpected. To the contrary, the line of questioning and the prosecution's later assertion that racial animus was a significant theme of its case suggests that the white supremacy evidence was elicited deliberately. Whether deliberately or inadvertently elicited, however, the

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[37] *People v. Bentley, supra*, has been disapproved on other grounds insofar as it held there was a *sua sponte* duty to admonish the jurors. (See *People v. White* (1958) 50 Cal.2d 428, 429.)

evidence resulted from prosecutorial misconduct.

The Prosecutorial Misconduct Here Was Exacerbated by the Trial Court's Mis-Attribution of the Source of the Evidence to the Defense and its Assertion That Defense Tactics Invited the Evidence.

Even though the initial assertion of white supremacy was elicited through prosecutorial misconduct, the trial judge concluded that the whole issue of white supremacy and gang tattoos became relevant because the defense invited the error. In the trial court's view, the **defense** brought up the issue of why Sims avoided appellant. That is, Sims wanted to stay away from appellant because Sims is African American and he knew that appellant did not like black people. (8 RT 1165-1166.)

Indeed, before the second penalty phase began and the whole issue of white supremacy and gang tattoos was raised by the defense, the judge read from the initial defense cross examination of Sims and asserted that this series of questions and answers (from p. 1049) demonstrated why the evidence was relevant. In the trial court's view, the defense was "emphasizing a bias on the part of Mr. Sims against [appellant], and one answer to that is that [appellant] realized he had racist tendencies and did not like black people." (28 RT 4158.)

The problem with the judge's ruling is that it was the **prosecution, NOT** the defense that raised the whole issue of white supremacy. As explained in the background facts, on direct examination in the guilt phase, **the prosecutor** asked if Sims had any prior contact with appellant. (8 RT 1049.) Sims replied that at one time they both lived in the same building, although they did not know each other. Moreover, except for the

one incident where they passed each other in a hallway and appellant purportedly called Sims a "punk mother fucker," Sims categorically denied that they ever spoke to each other. (8 RT 1049.)

On cross examination by the defense, Sims again acknowledged that he did not really know appellant because they never actually met. They were simply in a drug rehabilitation program together and living in the same housing complex. **He also confirmed his direct testimony that he and appellant never talked to each other, not even once.** (8 RT 1061-1062.)

On **redirect**, Sims said that in the two years while he and appellant lived in the same building, he never thought about appellant one way or the other. Further, in response to the prosecutor's questions, Sims testified that he did not dislike appellant and did not try to avoid him. Nevertheless, he never went looking for appellant either. (8 RT 1069-1070.)

As the foregoing facts demonstrate, it was the **prosecution** that initially elicited the clearly inadmissible testimony that appellant was a white supremacist. Thereafter, it was the **prosecution** that brought up the issue of intimidation and appellant's purported comment about "punk mother fucker." It was the **prosecution** that raised the question of whether appellant and Sims knew each other or ever spoke to each other. When the defense sought to discredit Sims' claim that appellant called him names, it was the **prosecution** that elicited testimony that Sims avoided appellant and it was the **prosecution** that elicited testimony concerning **why** Sims avoided appellant.

Morever, one cannot point to any comment by defense counsel at

any time contemporaneous with the litigation over this "white supremacy" evidence where defense counsel agreed or even acquiesced to its admission. Counsel repeatedly and strenuously objected to the admission of this evidence.

Moreover, to the extent that counsel was subsequently forced into exploring these issues on cross examination of Sims, it is obvious from the context that the defense was NOT suddenly making a shrewd tactical choice. The defense was simply making the best of a bad situation brought on by the trial judge's erroneous ruling.

Discussing just this sort of problem, in *People v. Coleman* (1988) 46 Cal.3d 749, this Court stated:

> "On this record, we find defense counsel did not waive or invite error. There is no indication of an express waiver, and in fact the more contemporaneous record indicates that defense counsel objected to the instruction but agreed to the supplemental instruction once it became clear that the Briggs instruction would be given. In addition, there was no clear tactical reason for defense counsel to agree to the giving of the Briggs instruction, and in the absence of such a purpose, we are reluctant to find invited error. [Citations] Defense counsel's decision to accept the supplementary instruction with the Briggs instruction does not abrogate his original objection to the instruction or constitute invited error. (*Id.*, at p. 781 fn 26.)

In *People v. Calio* (1986) 42 Cal.3d 639, 643. this Court also observed:

> " '[a]n attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding

in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' [Citation.]" (*Id.*, at p. 643.)

Given these circumstances, the trial court's erroneous attribution of the evidence to the defense instead of the prosecution did not provide an additional ground of admissibility. Instead it merely aggravated the admission of the gang evidence that was erroneously admitted in the first place.

There Is No Evidence to Support the Trial Court's Inference That the Assault on Ms. Epperson Was Caused or Aggravated by Racial Animus.

Even if the initial "white supremacy" evidence was the result of prosecutorial misconduct and even if the continuing admission of such evidence was erroneously attributed to the defense having raised the issue initially, it might be argued that the trial judge properly admitted the race evidence on the theory that it supported an inference that appellant's assault on Ms. Epperson was motivated or at least aggravated by racial animus against Sims with whom Ms. Epperson had a prior intimate relationship. (*See*, e.g., 28 RT 4165-4166;[38] also 38 RT 5942.[39]) Such an

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[38] The trial judge's concern was the defense cross examination of Sims. The examination showed that Sims was biased against appellant because Sims never spoke to Mr. Powell for two years. Further, appellant's racial animus provided an explanation for that behavior. Moreover the evidence went to the motivation for the crime and the explosive, brutal nature of it. For these reasons, the issue wasn't "even close." (28 RT 4165-4166.)

[39] "I think the white power designation, when somebody allows themself to be tattooed with the words in block print, as I recall, on each leg White

inference, however is both unsupported by the facts and legally invalid.

The evidence shows that the assault on Ms. Epperson was motivated by the phone call she received in appellant's presence. It is undisputed, however that Sims did not and could not have made that telephone call. Even Sims admitted that he did not talk to Ms. Epperson on the phone the afternoon she was killed. (8 RT 1051.)

Further, appellant testified on cross examination that although he did not like Sims, it was not because of Sims' race. (11 RT 1541 -1544.) Moreover, although he was upset with Ms. Epperson after she received the phone call, it was because he had no idea she was involved with anyone else. Most important, however, appellant testified that he was not upset with Sims because he had no idea that Sims was in any way still involved with Ms. Epperson. (11 RT 1622.)

It should be noted that shortly before the assault, appellant bought and replaced a lock on Ms. Epperson's door because Epperson told him that she was afraid of Sims. (11 RT 1503.) Further she told the building manager that Sims was stalking her. (8 RT 1022-1023; 28 RT 4244.) Even Sims admitted that he knew Ms. Epperson was upset with him because he kept coming around. (32 RT 4742-4743.) Thus, there is nothing in the evidence suggesting that appellant had any idea that Sims was still involved with Ms. Epperson or that Sims' race had anything to do with the assault.

Power, nobody is going to convince me that that doesn't show racial bias on his part, and since the victim's boyfriend was African-American and not white, that I think went directly to the motivation for the viciousness of the attack, not just the attack but the viciousness of it..." (38 RT 5942.)

It might also be argued that Todd's testimony to the effect that appellant purportedly said that he (appellant) "would kill that nigger if he kept trying to see Tammy"(8 RT 1161) supports the inference that race was a factor in the assault on Ms. Epperson. Such an argument, however, would also be unsupported by the evidence. Had the trial court not determined that racial evidence would be admissible based on the prior cross examination of Sims, the quoted portion of Todd's testimony would not be admissible over the defense objection. (See 8 RT 1161-1162.)

Even if the racial epithet was properly admitted and even if it would support a valid inference that appellant was in fact a racist, there is no connection between racial bias against Sims and the assault on Ms. Epperson. As defense counsel explained, without some evidence to link racism to the theory of the case, such as a psychologist who could render an opinion on the matter, any inference that the assault was even partly motivated by racial animus against Sims would be pure speculation. (28 RT 4163.) There was simply no factual predicate for connecting the tattoos to the killing and/or torture of Ms. Epperson. (28 RT 4163.) Again at the beginning of the second penalty phase trial, defense counsel pointed out that appellant's prior history of offenses against women had nothing to do with racial animus. (31 RT 4600.) Moreover, even after all the expert testimony from both the guilt phase and the first penalty phase analyzing appellant's motives for the assault, **NO** expert attributed any aspect of the offense to racial animus. (31 RT 4600.)

Despite the repeated defense arguments on the point, the trial judge ruled the racial animus evidence including the purported gang tattoos was

admissible. As the judge phrased it: "[n]obody is going to convince me" that the tattoos don't show racial bias. (38 RT 5942.) Further, appellant's racial bias against Sims "went directly to the motivation for the viciousness of the attack, not just the attack but the viciousness of it..." (38 RT 5942.)

The trial court erred because the facts simply will not support an inference that racial animus motivated the assault or made the assault worse. Indeed, as a matter of law, "[a]n inference cannot be based on mere possibilities; ...it must be based on probabilities." *(Sanders v. MacFarlane's Candies* (1953) 119 Cal.App.2d 497, 500, 259 P.2d 1010, 1012; accord, *People v. Mayo* (1961) 194 Cal.App.2d 527, 535- 536, 15 Cal.Rptr.366, 371 [An inference of fact" ...must be based on probability,""...not...on mere surmise or conjecture..., nor on mere possibility." .)

Nothing in the foregoing facts would permit the jury to properly infer that racial animus against Sims either led to the assault on Ms. Epperson or aggravated it. [40] Sims did not make the triggering phone call, and there is no evidence that appellant thought he did. Indeed, because he recently changed the lock on Ms. Epperson's apartment door, appellant was under the impression that Ms. Epperson was not only NOT renewing a friendship with Sims but was instead afraid of him.

In the guilt phase trial and the first penalty phase trial, Todd never

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[40] Indeed, the prosecution even suggested that the jury could have found that sexual sadism might have provided an extra level of brutality rather than racial animus. (38 RT 5936-5937.)

even suggested that racial animus between appellant and Sims had anything to do with the assault on Ms. Epperson. Todd testified that appellant said he would kill **SIMS** if Sims kept trying to see Ms. Epperson. (See, e.g., 8 RT 1161) It wasn't until the SECOND penalty phase trial that Todd suddenly remembered that appellant said he would kill **both** Sims and Epperson if Sims kept trying to see Epperson. (31 RT 4622.)

Critically, Todd's testimony changed somewhat in the second penalty phase. As noted above, in the guilt and first penalty phase, Todd testified that appellant proclaimed he "would kill that nigger if he kept trying to see Tammy." (8 RT 1161.) In the second penalty phase, however, Todd's testimony was to the effect that, "if Ron kept coming around Tammy, he would kill Ron and Tammy." (31 RT 4622.) Moreover, assuming that Todd's sudden, late revelation is an accurate reflection of what appellant actually said [a highly doubtful proposition], in context, his testimony shows that appellant threatened to harm both Sims and Ms. Epperson if they got back together again. Indeed, it would be nonsensical to suppose that appellant would change the door locks on Ms. Epperson's apartment to keep Sims from annoying her, but he would nevertheless kill Ms. Epperson simply because Sims persisted in trying to see her.

Moreover, if appellant actually said he would kill both, it is a wonder that there is nothing in the testimony of either Vannoy or Todd that suggests that appellant expressed any ill will towards Sims at any point after the death of Ms. Epperson.

More to the point, however, there is nothing in the evidence supporting an inference that Sims and Ms. Epperson were getting back together or that appellant thought they were getting back together. As noted previously, Todd testified that it was his understanding that once Sims got off drugs, Sims and Epperson were going to get married. (9 RT 1181.) That would have been a surprise to Sims since he testified that although they were still friends , there was no longer any boyfriend/girlfriend relationship. (8 RT 1045.) Further, Sims did not even have Ms. Epperson's telephone number. All he had was her pager number. (32 RT 4747.) If, as Todd suggested, Sims and Ms. Epperson were so close to being married, it is certainly odd that she changed her telephone number and refused to give it to him.

Thus, there is nothing in the facts that would support a valid inference that racial animus had anything to do with the assault or torture of Ms. Epperson. The trial court's series of tenuous assumptions is contrary to the weight of the evidence and simply does not add up to a valid inference of racial animus, let alone sufficient justification to allow the white supremacist gang evidence admitted here. In that regard, as this Court pointed out in *People v. Morris, supra,* 46 Cal.3d 1, 21, (overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543), the record must contain **substantial** evidence. In order for the evidence to be "substantial," it must be "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson, supra,* 26 Cal.3d 557, 576-577, 578. In *People v. Morris, supra,* this Court stated:

> We may *speculate* about any number of scenarios that may have occurred on the morning in question [when the victim

> was murdered with no eyewitnesses present]. A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [Para.] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'

[Citations.] (*Id.* at p. 21; emphasis and ellipses in original.)

Thus, even if the tattoos and gang membership evidence were admissible, that evidence rises merely to the level of suspicion that they played a role in Epperson's death. It is well accepted that suspicion, even strong suspicion, will not support an inference of fact. (*People v. Martin* (1973) 9 Cal.3d 687, 695; see also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837.)

Even if there was some factual support for the inferences the court permitted the jury to draw (which there is not), there is yet another reason why the trial court's purported inference is not legally valid. Where the uncontradicted evidence gives rise to two equally likely reasonable inferences of a defendant's intent, the prosecution must prove beyond a reasonable doubt that the **probability** of one inference of intent overcomes the probability of the other. If the probabilities are equal, or the prosecution's inference of intent is less likely, there is a failure of proof. (Cf. *In re Winship*, *supra*, 397 U.S. 358, 90 S.Ct. 1068.) Thus, regardless of the nature of the underlying facts, and regardless of the state's supposition that the defendant probably had some racial animosity towards Sims and probably some intent to kill or torture Ms. Epperson, a judgment in such a case must be reversed.

Therefore, here, even if it could be persuasively argued [which it

cannot] that there was some evidence of racial animus against Sims that played a part in the assault and torture of Ms. Epperson, the foregoing evidence shows that it is at least equally likely (or probably more likely) that racial bias played NO part in that assault. Therefore, because these two contradictory inferences are (at best) equally likely, the prosecution inference of appellant's intent must fail. Absent, stronger proof that racial animus against Sims motivated or aggravated the assault on Ms. Epperson, the prosecution has failed to carry its burden of proof.

Pennsylvania Railroad Co. v. Chamberlain (1933) 288 U.S. 333, 53 S.Ct. 391 illustrates this principle. There, the decedent was working in a train yard riding on a "string" of train cars. There was an unobserved crash and the decedent was later found between the rails. The Court held that the trial court's grant of a directed verdict was proper:

> "[H]ere there.. .is no conflict in the testimony as to the facts... There is no direct evidence that in fact the crash was occasioned by a collision of the two strings in question... At most there was an inference to that effect drawn from observed facts which gave equal support to the opposite inference that the crash was occasioned by the corning together of other strings of cars entirely away from the scene of the accident, or of the two-car string ridden by deceased and the seven-car string immediately ahead of it.
> We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. [Citations.]" (288 U.S. at 339-340,53 S. Ct. 339340.)

In accord is *Cuppett v. Duckworth* (7th Cir. 1993) 8 F.3d 1132, 1137. There the court held, "When evidence supports two inconsistent inferences, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences.'" *Stirk v. Mutual Life Ins. Co. of N. Y.* (10th Cir. 1952) 199 F.2d 874, 877, holds similarly: " ...where proven facts give equal support to each of two inconsistent inferences neither of which is established, it is the duty of the court to render judgment against him upon whom rests the burden of proving his case."

The equal inferences rule was applied in *People v. Allen* (1985) 165 Cal.App.3d 616 to reverse a finding of personal use of a weapon. There, defendant and his co-defendant, Brewer, were found guilty of, *inter alia*, the murder of Gregory. The Court noted "[t]here were no witnesses to Gregory's murder in the kitchen. Consequently, it is urged that although Allen might be the shooter, it is equally probable that he was merely present at the scene." (165 Cal.App.3d at 625, 211 Cal.Rptr. at 842; italics original.) Citing *Pennsylvania Railroad, supra*, the Court reversed the personal use finding:

> "Allen's argument does make sense...with respect to the jury's findings that he personally used a weapon... Since two .32 caliber cartridges were found on the kitchen floor, the evidence suggested that both of Gregory's wounds were inflicted by the same gun. Whether that gun was used by Allen, as opposed to Brewer, is purely a matter of conjecture.
>
> The state had the burden of establishing Allen's personal use beyond a reasonable doubt. [Citation.] Since the evidence of what happened in the kitchen proved at most a 50 percent

probability that he was the user, the state's burden was not met: 'We...have a case belonging to that class of cases where proven facts given equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other...'" (165 Cal.App. 3d at 626, 211Cal.Rptr. at 842-843; italics original.) (In accord, Showalter v. Western Pac. Railroad Co. (1940) 16 Cal.2d 460,475, 106 P.2d 895, 903 [" ...the correct rule...is where the evidence tends equally to sustain either of two inconsistent propositions that neither of them can be said to have been established by legitimate proof."])

In *People v. Blakeslee, supra,* 2 Cal.App.3d at p. 840, the defendant's murder conviction was reversed because, *inter alia*: "...on the evidence before the court we could draw on almost equally plausible series of inferences to build a case of murder against defendant's brother... When evidence is susceptible to such manipulation we think it lacks substantial probative value..." (Accord, *People v. Snow* (2003) 30 Ca1.4th 43 at 68,[noting that in *Blakeslee*, "the evidence was thus at least as consistent with the brother's guilt as with the defendant's."].)

Therefore, even if it could be persuasively argued that intent to kill and torture were possible inferences that could have been drawn from the racial animus evidence in the instant case, they are not established as the probable primary intent. The inference of these factors as the primary intent is at best equally consistent with the inference that neither was the primary intent (or comprised any intent at all). Simply because a possible inference may be drawn does not mean that that inference is more

probable than any other, or that it constitutes substantial evidence of the thing inferred. In such a case, the prosecutor has not maintained the proposition upon which alone he would be entitled to a guilty verdict, i.e., proof by substantial evidence, beyond a reasonable doubt, of a primary intent to kill or torture. (*In re Winship, supra*, 397 U.S. 358, 90 S.Ct. 1068.)

Evidence of Gang Membership Was Entirely Irrelevant to This Case and Was Therefore Inherently Prejudicial

There is no question that the introduction of gang evidence into a non-gang case is a practice fraught with peril. Even the trial judge recognized that this area was very complex (24 RT 3365) and a dangerous subject matter to explore. (28 RT 4161-4162.)

The reason for the peril is the very high potential for prejudice. This Court has repeatedly recognized the inherently prejudicial impact of gang membership evidence because it "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) Thus, even in cases where gang evidence is relevant, this Court has cautioned that "trial courts should carefully scrutinize such evidence before admitting it." *(People v. Champion* (1995) 9 Cal.4th 879, 922.) In cases where the evidence is "only tangentially relevant," the Court has "condemned the introduction of evidence of gang membership [. . .] given its highly inflammatory impact." *(People v. Cox* (1991) 53 Cal.3d 618, 660.)

Because of the inflammatory nature of gang evidence and its

tendency to imply criminal disposition, erroneous admission of gang-related evidence has frequently been found to be reversible error. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345; *People v. Maestas* (1993) 20 Cal.App.4th 1482 at pp. 1498-1501); *People v. Perez* (1981) 114 Cal.App.3d 470, 479; *In re Wing Y* (1977) 67 Cal.App.3d 69, 79.) In *Dawson v. Delaware* (1992) 503 U.S. 159, 163, the United States Supreme Court held that admission of evidence in the penalty phase of a capital trial that a defendant was a member of a white racist organization constituted federal constitutional error when such evidence was not relevant as proper rebuttal to any specific mitigating evidence. Introducing such evidence to show a defendant's bad character is prohibited.

Here, the proof of prejudice is in the pudding. If even so sophisticated an observer as the trial judge concluded that this "white supremacist" gang evidence supported an inference that appellant assaulted and tortured Ms. Epperson because of racial animus against Sims, it is hard to fathom why jurors would not do likewise.

The trial court's inference of intent based on racial animus was based on the assumption that because appellant had "White Power" and "White Anger" tattooed on his arms and legs; because he might have belonged to a white supremacist gang at some point in his life; because he called Sims a "punk m.f" approximately two years before the assault (8 RT 1049) and because appellant saw Sims talking to Ms. Epperson for a few minutes after church on the date of the assault, appellant must have thought the phone call meant that Epperson and Sims were getting back

together. Moreover, because appellant was a racist and Sims was black, racial animus must have been the reason the assault was so violent. That is, appellant acted beyond any mere jealousy of Sims when he killed Epperson. As the judge phrased it: "I think the white power designation, when somebody allows themself to be tattooed with the words in block print, as I recall, on each leg White Power, nobody is going to convince me that that doesn't show racial bias on his part, and since the victim's boyfriend was African-American and not white, that I think went directly to the motivation for the viciousness of the attack, not just the attack but the viciousness of it..." (38 RT 5942.)

As explained above, these inferences are based on nothing more than speculation. Sims did not make the call that sparked the assault (8 RT 1051) and there is no evidence that appellant thought he did. Appellant testified that he was not aware that Sims was in a continuing relationship with Epperson (11 RT 1622) and no witness testified that he was so aware. Even Sims admitted that he knew Ms. Epperson was upset with him for coming around. (32 RT 4742-4743)

Further, the evidence is undisputed that appellant changed the locks on Ms. Epperson's apartment shortly before the assault. (8 RT 1024; 9 RT1180; 11 RT 1503.) Appellant testified that he changed the locks because Ms. Epperson told him that she was afraid of Sims. (11 RT 1503.) In a similar vein, the apartment manager, the one witness who did not have a motive to shade the truth, testified that he approved the lock change because Epperson told him that Sims was stalking her. (8 RT 1023, 1027; 28 RT 4244.) Moreover the change took place while Sims was still living

in the apartment complex shortly before he was evicted for drug use. (8 RT 1024.)

Appellant claimed that his problem with Sims arose from Sims' attempts to see Ms. Epperson, not because Sims was African American. (11 RT 1622.) No witness testified to the contrary. Indeed, even Todd testified that appellant said "he would kill that nigger if he kept trying to see Tammy."(8 RT 1161.) It wasn't until the second penalty phase trial that Todd changed his story to aver that appellant said he would kill both Sims and Epperson if Sims kept trying to see Ms. Epperson. (31 RT 4622.) Moreover, for the reasons set forth above, any claim that such a statement supported racial animus as the basis for the assault is simply nonsensical.

Where the inadmissible evidence is the result of a calculated attempt by the prosecution to prejudice the defendant, California courts have stated the test as follows:

> Where evidence has been improperly admitted which is calculated to result in prejudice to the accused, the weighing of the harm that has resulted involves the impact of the evidence upon the character and integrity of the accused and an appraisal of the conflicting evidence and inferences pointing to guilt or innocence. The same may be said of an instruction to the jury to disregard the questioned evidence. It is, of course, well recognized that facts that have been impressed upon the minds of jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court. Among the facts which are generally considered to be incapable of obliteration from the minds of the jurors by the court's direction is the fact that the accused has been previously charged with or convicted of a crime. [Citation.]

(*People v. Roof* (1963) 216 Cal.App.2d 222, 225.)

Sims' testimony and that of Todd and Vannoy to the effect that appellant's tattoos were indicative of gang membership ensured that the jury would be visibly reminded of the assertion that appellant was a gang member every time the jurors looked at appellant during the trial. Thus,"the jurors would have read it in defendant's features as he sat before them as clearly as if it had been written there." *(People v. Ozuna* (1963) 213 Cal.App.2d 338 at p. 342.)

Additionally the prosecution's case against appellant with respect to the first degree murder and the torture allegations was far from overwhelming. As explained in Issues I-IV, *supra*, while the evidence of a homicide was clear, the horrific nature of the killing itself undermines the prosecution's theory of a deliberate, premeditated homicide. The extreme beating and multiple blunt force trauma is entirely consistent with an "explosion of violence," "a killing in the heat of passion," or an "act of animal fury." *(People v. Mincey*, *supra*, 2 Cal.4th at p. 433; *People v. Davenport*, *supra*, 41 Cal.3d at p. 268; *People v. Wiley*, *supra*, 18 Cal.3d at p. 168; *People v. Steger*, *supra*, 16 Cal.3d at p. 546.) Certainly that much force would not be required to kill Ms. Epperson. Thus the nature of the injuries leaves no doubt of its sudden explosive violence.

To persuade the jury that appellant was guilty of first degree murder and to support the torture allegations, the prosecution bolstered its case through innuendo and character assassination by eliciting extremely inflammatory evidence that portrayed appellant as a gang member and a person of bad character. None of this evidence had any relevance to the

death of Ms. Epperson, but it was precisely the kind of highly prejudicial criminal propensity evidence calculated to cause a jury to improperly resolve its reasonable doubts about appellant's guilt in the prosecution's favor.

Given the weakness in the prosecution's case, its elicitation of this inflammatory evidence cannot be deemed harmless beyond a reasonable doubt. Reversal is therefore required. (*Chapman v. California* (1967) 386 U.S. 18 at p. 24.) Further, the reliability of the penalty determination was sufficiently undermined by the prosecutor's misconduct that appellant's death sentence must be reversed. (*Hendricks v. Calderon* (9th Cir.1995) 70 F.3d 1032, 1044-1045.)

The Inadmissible Gang Evidence Violated Appellant's Constitutional Rights

Finally, the elicitation of this inadmissible evidence violated appellant's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *(In re Winship*, 397 U.S. 358, 364 (1970).) The elicitation of this inadmissible testimony lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, for the reasons stated above, the elicitation of this testimony so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also

McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378.)

Appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama, supra,* 447 U.S. 625, 638; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds, *Atkins v. Virginia* (2002) 536 U.S. 304.)

For all of the foregoing reasons, appellant's convictions and death sentence must be set aside.

V.

THE VERDICT FINDING APPELLANT TO BE SANE MUST BE REVERSED BECAUSE THE EVIDENCE OF INSANITY WAS OF SUCH WEIGHT AND QUALITY THAT A JURY COULD NOT REASONABLY REJECT IT

Summary of Issue

The defense must prove a claim of insanity by a preponderance of the evidence. Here the defense presented a medical history showing a lifetime of brain damage or dysfunction as well as multiple diagnoses of major mental illness. In support of that history, the defense offered evidence of abnormal EEGs, abnormal brain function test results and psychiatric medications of such high dosage that no normal person could remain conscious, let alone functional at the dosage levels of medication given to appellant. Moreover, even if appellant suffered from an anti social personalty disorder as a secondary or Axis II diagnosis, because of his organic brain dysfunction, severe mental illness and the events that triggered it, appellant was insane at the time of the homicide.

The prosecution did not fully dispute the abnormal EEGs, the brain function test results or the large doses of the medication given to appellant. It merely urged that these factors were not illustrative of either brain dysfunction or mental illness. Moreover, while also conceding that the appellant might have suffered from a major mental illness, the primary

prosecution expert could not determine what it might be because appellant exaggerated his symptoms on prosecution administered tests. Instead, the prosecution argued that because appellant tried to fake his results on the prosecution administered tests, he suffered from nothing more than an anti social personality disorder. Thus by definition, appellant must have understood the difference between right and wrong.

Even assuming that appellant suffered from an anti social personality disorder in addition to his mental illness, was the defense evidence of such weight and character that no rational trier of fact could have concluded that appellant failed to prove insanity by a preponderance of the evidence?

Summary of Argument

The only evidence of sanity was Dr. Mohandie's opinion that because appellant showed himself to be a malingerer on the tests Mohandie administered, appellant suffered from nothing more than an anti social personality disorder. Moreover, by definition, an anti-social personality disorder will not support a finding of insanity.

In support, Dr. Griesemer opined that although appellant suffered from epileptic seizures as a child, because the locus of the seizure apparently moved from the left to the right side of the brain as appellant got older, that pattern of migration suggests an inherited epilepsy, a type that most children outgrow. Moreover, although the last hospital report on his epilepsy states that there was likely an organic focus of the epilepsy, since appellant was taken off of phenobarbital and apparently had no further seizures, in Dr. Griesemer's opinion, appellant did not suffer from

any organic brain damage related to his epilepsy.

Appellant presented a history of brain damage, including Dr. Bertoldi's opinion that the physical locus of appellant's epileptic seizures moved not just from left to right but deep within the brain to the limbic system. Persons with limbic seizures can be extremely violent. Moreover a limbic seizure can last only a few seconds such that a person would hardly be aware of a seizure at all. Dr. Boone tested appellant and discovered that the had a low average IQ of 90. However, although he scored reasonably well on his brain function tests in most areas, he was only in the second to ninth percentile in executive function.

Appellant also presented evidence of organic brain damage through abnormal EEG results and psychological function test results showing significant mental impairment. Even though appellant may have suffered from an anti social personality disorder as well, any normal person would be comatose if he received anti-psychotic medication at the large dose levels given to appellant simply to stabilize him. Defense experts testified that because of the nature of his mental illness and the triggering mechanisms, he was insane at the time of the homicide.

Nevertheless, Dr. Mohandie opined that appellant's multiple hospitalizations and diagnoses of major mental illness were simply the result of malingering. When questioned about the effect of the medication dose levels, Dr. Mohandie asserted that the mere fact that appellant was taking large doses of anti-psychotic medications and remained functional would not lead him to believe that appellant suffered from a major mental illness. Significantly, Dr. Mohandie gave no reason for this conclusion.

However, the defense expert testimony was un-rebutted that appellant received such large doses of these anti- psychotic medications that no normal person could tolerate those doses. Only a person with a major mental illness could remain functional with those doses. Thus, appellant had to have a major mental illness. Prosecution experts did not dispute the abnormal EEG results or the abnormal psychological function test results. Without cogent explanation, or occasionally any explanation at all, they merely disagreed that these factors contributed to a showing of brain dysfunction or mental illness.

Under these circumstances, there is no credible evidence that would support a jury finding that appellant was sane at the time of the offenses. More to the point, no rational trier of fact could conclude that appellant failed to prove insanity by a preponderance of the evidence.

Factual Background

Seizures and Brain Dysfunction

Dr. Roger Bertoldi testified that he viewed four documents from Loma Linda University (Defense Exhibit V), regarding the past neurological records of appellant. (16 RT 2232-2233.) The records documented nocturnal seizures on January 2, 1970 and on February 28, 1970 when appellant was two and a half years old. (16 RT 2234-2235.)

An EEG, or electroencephalogram, tests the electrical activity of the brain. (16 RT 2221-2224.) The brain emits a normal rhythm of about eight to ten hertz. (16 RT 2224.) An abnormality is a resting background rhythm. (16 RT 2226.) There is also a paroxysmal activity that is separate from the background rhythm. It is any rhythm that arises out of the

background then goes away. (16 RT 2227.)

If the activity of the brain is abnormal, the way in which it is abnormal will determine whether one has epilepsy and if so what type of epilepsy of at least a half dozen. (16 RT 2228.) Some brain dysfunctions, or epilepsy, are known to be related to loss of control. (16 RT 2229.)

The limbic system is the deepest most primitive portion of the brain. In clinical research with animal models, seizures in the limbic system result in uncontrollable rage. (16 RT 2230.)

A radioencephalogram, the 1970s version of an EEG, indicated that at that time appellant had an abnormality in the left portion of the brain with paroxysmal activity. (16 RT 2236-2237.) He was treated with phenobarbital. (16 RT 2239-2240.)

In 1976 appellant had an EEG (Defense exhibit W1); the last paragraph reads: "Impression: Abnormal record due to the appearance of paroxysmal activity in the left posterior frontal region that becomes nearly continuous and mirrored in the right posterior frontal region during sleep. The record is highly suggestive of a focal seizure disorder..." Dr. Bertoldi opined that a reference to a tracing on April 19, 1972 indicates that appellant was seen in 1970, in 1972 then a third time in 1976. (16 RT 2242.) The conclusion is that as a young boy appellant was epileptic; he had abnormal brain activity, frontal, posterior and frontal bilaterally, meaning both sides. (16 RT 2243.)

After examining appellant in 2004, Dr. Bertoldi recommended genetic testing for Klinefelter syndrome and requested that Q-Metrx administer an EEG to appellant. (16 RT 2246-2247.) Analysis of the EEG

indicates an abnormality[41] (16 RT 2249, 2259), a brain dysfunction, in the frontal area which extends backwards to the temporal lobes. (16 RT 2260-2261.) Further, it is common for this type of brain dysfunction to spread deep into the brain and into the most primitive part, the limbic system. (16 RT 2264-2265.)[42]

If this brain dysfunction spreads to the limbic system, a person can experience extremely violent rage and explosive aggression. It is more than just anger, it is a primitive, violent rage. (16 RT 2244, 2266.) During a limbic seizure a person lacks awareness; he would not remember what he did. (16 RT 2276-2277.)

Taking into account appellant's EEG as a young boy, Bertoldi's examination, appellant's medical records and the EEG taken in 2004, Dr. Bertoldi opined that appellant has organic brain dysfunction, frontal and spreading temporally, which is consistent with episodic loss of control. (16 RT 2265.)

On cross examination he stated that in his opinion appellant "has a history of Jacksonian seizures and abnormal EEGs with spike and wave discharges, left temporal and abnormal quantitative and irregular EEG recently showing frontal temporal slowing and paroxysmal temporal slowing as well as consistent with interictal activity probably from seizure disorder." Appellant has had this all his life although in the last 30 years there is no clinical back-up for that opinion unless you consider his

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[41] This abnormality is consistent with a report written by Dr. Kyle Boone. (16 RT 2250-2251.)

[42] That is, a Jacksonian seizure.

behavioral problems. (16 RT 2281.) As to the incidents of violence, Dr. Bertoldi believes appellant's brain dysfunction was probably contributory to some degree, but he does not know how much. (16 RT 2281-2283.)

Brain Damage

Dr. Kyle Boone, is the director of the neuropsychological testing unit at UCLA Medical Center and a full professor in the UCLA Psychiatry Department. (15 RT 2139.) She explained that different thinking skills are located in different areas of the brain. By measuring those skills, one can determine which areas of the brain are not working correctly. (15 RT 2136-2137, 2138.) Certain approved tests, both written and oral, have been tested on a large number of people beginning in the 1940s and have been found to be reliable. (15 RT 2138.)

Dr. Boone interviewed appellant when appellant was 35 years old and gave him certain objective standardized tests. (15 RT 2139-2140.) People with average IQs score between 90 and 109. Appellant scored 90. (15 RT 2142.)

In addition to IQ tests, Dr. Boone tested appellant's ability in basic attention, mental speed, language, visual spacial skills, memory - both verbal and nonverbal - reading, math, and several tests that measure executive or problem solving skills. (15 RT 2143-2144.) Appellant scored the highest in attention (75% percentile) and verbal memory (some scores in the 96% percentile). (15 RT 2144.) He scored average in math, above high school level in reading, and low average to average in language and visual spacial skills. (15 RT 2144.) His executive problem solving skills, however, ranged from the second percentile to the ninth

percentile. (15 RT 2147-2148.)

This last area of testing measures an individual's problem solving skills, reasoning and logic. That is, one's ability to face a problem situation, think of different strategies to solve the problem and figure out the best solution; the test also measures the ability to think through consequences of behavior and the ability to quash a behavior that is not correct or appropriate to the situation. (15 RT 2148.) In these areas, most of appellant's test scores were very low showing that he is very impaired. (15 RT 2144.) Appellant's score on one of the tests in this area was in the second percentile, meaning that in a group of 35-year olds he would score worse than 98 out of 100. (15 RT 2148, 2152-2153.) On another test he scored in the fifth percentile; in the third test he scored in the ninth to tenth percentile, and on a fourth test he scored in the fourth percentile.[43] (15 RT 2149.) These scores were much lower than one would expect for appellant's IQ and much lower than his scores in all other areas. (15RT 2149.) These results suggest that in his daily life, appellant would have a great deal of difficulty stopping a behavior that was not appropriate to the situation. (15 RT 2152.)

The executive problem solving skills relate to the functioning of the frontal lobes of the brain. They enable normal persons to solve problems in a logical way, to think through the consequences of behavior, to control emotional expression, to understand the consequences of one's behavior on someone else, to be empathetic, the ability to face a problem situation

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[43] This was the Stroop test. Defense exhibit T presents a sample of the test questions. (15 RT 2149.)

and generate different solutions and figure out the best solution. Appellant's poor performance on these tests would suggest this area of his brain is not working correctly. (15 RT 2158.) The tests indicate appellant can make decisions, but not good decisions. In addition, people with damage to the frontal lobes have little control and have the highest scores in aggression and violence. (15 RT 2160.)

Dr. Boone testified that people can be born with frontal lobe damage. Seizures themselves would not cause frontal lobe damage, but whatever is causing the seizures is also interfering with the function of the frontal lobes. (15 RT 2162.)

On cross examination, Dr. Boone stated that she recommended (as did Dr. Bertoldi) that appellant have a Klinefelter syndrome DNA test. Appellant had some symptoms of the syndrome and a subset of men with Klinefelter syndrome have problems in executive problem solving skills and can have very socially inappropriate behavior. However not all men with Klinefelter have these problems. (15 RT 2165-2167.) Dr. Boone stated that whatever the cause, appellant has deficits in executive skills; he has frontal lobe dysfunction and Dr. Boone was trying to determine what could have caused it. (15 RT 2169-2170.)

As to the difference in opinion between Dr. Boone and Dr. Bertoldi as to which side of appellant's brain is dysfunctional, appellant is left-handed and in five percent of left-handers, the brain organization is different. Seizures in childhood also tends to change the way the brain is organized. (15 RT 2171.) When Dr. Boone makes judgments about which side of the frontal lobe is dysfunctional those judgments are based on the

way the typical brain is organized. (15 RT 2171.)

Dr. Boone agreed that if the evidence adduced at trial is true, then appellant demonstrated goal oriented behavior when he fled the scene of the homicide, went to Vannoy's house, got rid of his truck and evaded the police for three days. (15 RT 2174.) However, a lot of appellant's behavior surrounding his crimes has been completely illogical. (15 RT 2174-2175.) His behavior as a whole does not make sense. For example, he committed violent acts in front of witnesses. (15 RT 2179.) In addition, after the homicide appellant apparently left all kinds of clues as to his whereabouts so it was not hard for the police to find him. (15 RT 2192.)

Asked about the diagnostic criteria for anti-social personality disorder, Dr. Boone responded that appellant has cognitive difficulties that suggest brain dysfunction. Whether or not he meets the criteria for anti-personality disorder as well, does not change her opinion concerning organic brain dysfunction. (15 RT 2187-2188, 2189.)

Intermittent Explosive Disorder[44]

Dr. Saul Niedorf, a psychiatrist with a speciality in domestic violence (17 RT 2223), interviewed appellant during his incarceration and reviewed numerous records regarding appellant's childhood and the instant case. (17 RT 2325.)

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[44] The DSM IV definition for intermittent explosive disorder is: "Several discreet episodes of failure to resist aggressive impulses that result in serious assaultive acts .." "The degree of aggressiveness expressed during the episodes is grossly out of proportion to any precipitating psycho social stressors. ..." "And, the aggressive episodes are not accounted for by any other mental disorder such as anti-social personality disorder." (17 RT 2373.)

Dr. Niedorf formed the opinion that appellant suffered and still suffers from intermittent explosive disorder, a condition usually linked to brain dysfunction, familial dysfunction and social dysfunction and which is characterized by actions, often destructive or violent which can come on suddenly and have a characteristic of not being inhibited or prohibitive. (17 RT 2327-2328.) Dr. Niedorf characterized this finding as an Axis I diagnosis, or primary diagnosis. An Axis II or secondary diagnosis could be a personalty disorder such as an anti social personalty disorder. (17 RT 2331-2332.)

The EEG results found by Dr. Bertoldi corroborate the existence of brain damage consistent with intermittent explosive disorder . That is, the physical evidence of slow waves are signs of immaturity and failure of development. (17 RT 2335-2336.) If appellant did not have brain dysfunction, he would have developed a more normal brain wave pattern as appellant entered adolescence. The latest EEG tests show, however, that there is still this infantile brain wave pattern. (17 RT 2336.) Tests done by Drs. Boone and Wu also corroborate organic brain damage. (17 RT 2337.) Dr. Boone's work shows the absence of a certain kind of function, executive functions, essentially the functions that either initiate behavior or stop inappropriate behavior. (17 RT 2337.) These tests corroborate the diagnosis of intermittent explosive disorder because they show that parts of appellant's brain are not able to inhibit rage or violence once they get started. (17 RT 2339.)

In that regard, there were four different reports of physical manifestations of brain damage that corroborate the diagnosis of

intermittent explosive disorder: the Loma Linda report, Dr. Bertoldi's report, Dr. Boone's report and Dr. Wu's report.[45] (17 RT 2334-2339.) A fifth thing that corroborates Dr. Niedorf's diagnosis is the initial treatment appellant was given to handle the Jacksonian seizures. (17 RT 2347.) All of these reports show abnormal brain activity indicative of brain damage or dysfunction. Further, when appellant received anti-manic medications in prison he improved to the point he could reflect on his behavior and even describe it. (17 RT 2347.) Unfortunately, appellant did not like the side effects of the medications and stopped taking them. (17 RT 2348.)

Even assuming everything in the crime reports is true, in Dr. Niedorf's opinion at the time appellant was committing the offenses he did not know the nature and quality of his acts. Dr. Niedorf believed appellant was in an altered state of consciousness as most if not all people are, in the intermittent explosive episodes. (17 RT 2351.) In such a state appellant would not feel empathy or the significance of his acts; there is a disassociation. (17 RT 2351, 2355-2356.) In addition, appellant did not know right from wrong. The frontal lobes and the temporal lobes that carry those values are damaged, disconnected and appellant did not have the medications to help them work. (17 RT 2356-2357, 2398, 2401.) It was Dr. Niedorf's opinion that during the commission of the crime appellant was insane. He had a mental illness or defect that led to his behaviors. They were not intentional or voluntary. (17 RT 2358, 2360, 2398.)

On cross examination, Dr. Niedorf agreed that intermittent

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[45] A PET scan done by Dr. Wu . (18 RT 2510.)

explosive disorder episodes are not controllable; they are usually rash, sudden impulsive actions with little provocation. (17 RT 2371.)

Also on cross examination, Dr. Niedorf conceded that appellant might have anti-social personality disorder (17 RT 2383) and he is sure that appellant has learned some ways to manipulate the system. (17 RT 2384.) Indeed, during appellant's stays at state prisons there have been multiple diagnoses of anti-social personality disorder along with other diagnoses on the Axis II. (17 RT 2398.)

Nevertheless, on redirect Dr, Niedorf noted that Patton State hospital records show that in April 1993 appellant was diagnosed with major depression with psychotic features (17 RT 2395-2396), in October 1995 he was diagnosed with bi-polar disease (17 RT 2396), in July 1996 he was diagnosed as schizophrenic, bipolar type, in Atascadero in 1997, 1998, 1999 and 2000 he was diagnosed with depressive disorder and seizure disorder. These are all major mental disorders. (17 RT 2397.)

As a result of this evidence, Dr. Niedorf concluded that at the time of the incident, appellant was acting under an irresistible impulse. That is, he did not know the nature and quality of his act and he did not know the difference between right and wrong. (17 RT 2398.)

Bipolar Disorder

Dr. William Vicary, a lawyer and forensic psychiatrist, determined that appellant primarily suffers from manic-depressive illness. The modern term is bipolar disorder. (18 RT 2475.) Intermittent explosive disorder is something very close to bipolar disorder and appellant could have both. (18 RT 2476-2477.) Dr. Vicary also agreed with the vast

majority of doctors who interviewed appellant, that he has an anti-social personality disorder as a secondary diagnosis. (18 RT 2556.)

There are different types of bipolar disorders. Some have "up" symptoms lasting for a period of months then "down" symptoms for the same amount of time. In other types, there are rapid cycles where the cycles vary by the day or by a period of hours. (18 RT 2482-2483.)

The symptoms of bipolar disorder include depression, significant weight gain or loss, insomnia or excessive sleep, agitation, feelings of worthlessness, decreased ability to think or concentrate and recurrent suicidal ideation. (18 RT 2485-2486.) Appellant has demonstrated all of these symptoms. (18 RT 2486.)

Appellant's family history corroborates the diagnosis of bipolar disorder. The overlap between alcohol and drug abuse and bipolar disorder is 60-70%. Bipolar individuals are hyper sexual; appellant's grandmother was hyper sexual. (18 RT 2504.) Appellant's paternal uncle spent most of his life in a psychiatric hospital (18 RT 2504-2505), his father was alcoholic, paranoid, explosive and abusive to his wife and children. (18 RT 2505.)

Dr. Vicary also opined that the tests done by Drs. Boone, Bertoldi, and Wu confirmed organic brain damage consistent with someone with bipolar disorder. (18 RT 2508-2509.) Dr. Vicary administered the Millon test to appellant and Dr. Mohandie, a prosecution witness, gave appellant the MMPI[46] test. According to Dr. Vicary, both tests showed appellant had a brain disorder of moderate to severe extent with indications of

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[46] MMPI (Minnesota Multiphasic Personality Inventory)

irritability, explosiveness, aggressiveness, paranoia and problems in interpersonal relationships. (18 RT 2510-2511.)

Dr. Vicary conceded that appellant probably knew the nature and quality of his act at the time he killed Ms. Epperson. (18 RT 2487-2488, 2549.) That is, appellant probably had some level of understanding that this attack could be fatal. (18 RT 2489.) However, Dr. Vicary opined that he did not believe that at the time of the homicide, appellant was able to distinguish right from wrong. (18 RT 2490.) For this reason, at the time of the act, appellant was legally insane because he did not appreciate the wrongfulness of his act.[47] (18 RT 2520.) During an explosive outburst, a bipolar moment, the individual is not thinking. There is no rationality, no restraint, nothing that can stop the explosion. (18 RT 2491.)

Anti Social Personality Disorder and Malingering

The tests which Dr. Boone administered to appellant included scales within those tests to determine malingering. Appellant passed the tests, meaning that he was doing his best, not pretending to have problems in his thinking skills that really did not exist. (15 RT 2142-2143, 2173, 2181, 2191.)

Dr. Neidorf also discounted a primary diagnosis of anti-social personality disorder. Dr. Neidorf first noted appellant's organic brain dysfunction problems beginning at an early age with his epilepsy and their

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[47] On cross examination, however, Dr. Vicary noted that in California the inability to appreciate the criminality of conduct or conform to the requirements of the law does not fit the legal definition of insanity. (18 RT 2525.) Nevertheless, on redirect, Dr. Vicary testified that appellant met the third prong of the M'Naughton test: the inability to distinguish right from wrong at the time of commission of the act. (18 RT 2565.)

lifelong effects on his inability to control his executive functions. (17 RT 2330-2333.) Additionally, appellant had a series of terrible psychological, emotional events growing up. He had suicide attempts on a number of occasions as a child and adolescent. He was also terribly abused by his father. These are the hallmarks of conditions other than sociopathy. Indeed, his purported anti social tendencies are found at a much later age. (17 RT 2334.)

Dr. Niedorf further noted that appellant had an identification with and attachments to women who are feminine and who are maternal. He attempted to please them by cooking and other ways. Sociopaths or persons with an antisocial personality disorder are generally not interested in pleasing people. They are irresponsible about a work life and about relationships. (17 RT 2349.)

Of perhaps greater significance, however, Dr. Vicary corroborated the foregoing testimony by explaining appellant's treatment history. Dr. Vicary explained that a person who suffered from nothing more that a personality disorder and malingering could not take the kind of medications that appellant took through his life and remain functional. Only a person with a very serious mental disorder could take those drugs and remain coherent. Further, as Dr. Vicary explained, a person with a personalty disorder would not be placed in the psychiatric unit of the county jail, the County hospital, the state prison, Patton state hospital, or Atascadero state hospital. Only persons with major mental illnesses, the very sickest of mentally ill patients are placed there. (18 RT 2478.) While there, these patients are administered very potent anti-psychotic drugs with

extremely serious side effects. Indeed these side effects would be particularly dangerous for patients suffering only a personality disorder who do not need those drugs. (18 RT 2479.)

Reciting appellant's long history of hospitalizations, Dr. Vicary noted that virtually every time appellant had been incarcerated, even as a juvenile, he was transferred to a psychiatric unit and placed on anti-psychotic, anti-depressant mood stabilizing medications. These began with thorazine and haldol when appellant was a teenager and continuing similar treatment all the way through California Men's Colony East, Vacaville, Atascadero and Patton State Hospital. (18 RT 2479.)

During each stay he was treated with extremely high doses of these medications. These included:1500 milligrams of lithium, 2000, milligrams of depakote, 60 milligrams of haldol - the equivalent of 3000 milligrams of thorazine. In that regard, if a very large animal, such as a horse was given a 3000 milligrams dose of thorazine, it would be knocked to the ground. A normal person would be semi comatose for three days. (18 RT 2479.) Moreover, any physician who prescribed such large dosages of those kinds of drugs for a person who did not need them would likely go to jail. (18 RT 2480.)

Therefore, because appellant was getting high doses of those potent drugs and remaining alert and rational, clearly he needed those drugs for his major mental illness and they were helping him. (18 RT 2480.) Additionally, any person who receives these drugs has to have his or her blood repeatedly tested to be sure that the high doses administered are not toxic or fatal. The blood tests in appellant's medical records confirm that

appellant took these high doses. (18 RT 2481.) Indeed, at one point appellant was given a drug called Clozapine, an anti-psychotic agent. It is given to less than one percent of the sickest of the sick because it can have the very potent side effect of wiping out a patient's white blood cells, thus effectively eliminating the immune system. This very potent drug helped appellant cope with his mental problems, but his blood had to be tested weekly to be sure his white cell count did not drop into a critical zone. (18 RT 2481.)

On cross examination, Dr. Vicary agreed that appellant had previously malingered in court. [48] (18 RT 2532-2533, 2556.) Dr. Vicary also testified that he believes appellant has lied to him on occasion. (18 RT 2539.)

On redirect, Dr. Vicary pointed out that even the minority of doctors in the institutions who did not believe appellant had a major mental illness nevertheless noted appellant's lifelong symptoms of mental illness, such as rapid mood swings, hearing voices, suicidal ideation, and that he slit his wrists on 20 occasions. (18 RT 2581.)

Prosecution Evidence

Dr. David Griesemer testified that he spoke with appellant and reviewed appellant's department of correction and county jail medical records. He concluded that before the age of eight, appellant had at least two seizures that were focal in origin arising from the right side of the

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[48] Vicary recited an incident when appellant laid on the courtroom floor saying he had taken an overdose but had no medications in his system. (18 RT 2532-2533.)

brain. These required medication management at the time. (16 RT 2297-2300.)

Dr. Griesemer noted that later reports showed that appellant's focal seizures moved from the left side of the brain to the right side. This shift is a pattern indicative of genetic or inherited epilepsy rather than focal structural brain abnormalities. (16 RT 2300.)[49]

In addition, in the 1976 study there almost seemed to be a disconnect between how dramatically abnormal the EEG was and how appellant was doing clinically. (16 RT 2300-2301.) There was a lot of abnormal paroxysmal activity on the EEG, but the phenobarbital was discontinued and apparently, appellant remained seizure free subsequent to that.[50] (16 RT 2301.) This particular type of pattern is consistent with some of the benign epilepsies. (16 RT 2301.)

Interpreting Dr. Bertoldi's testimony, Dr. Griesemer said that Bertoldi was not talking about paroxysmal epileptic discharges but simply episodic or intermittent slowing on the EEG. There were some subtle abnormal findings, but not epileptic findings. (16 RT 2302-2303.) Griesemer noted that a QEEG for diagnostic purposes has been discouraged by the American Academy of Neurology; that is, an abnormal

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[49] Nowhere in Dr. Griesemer's testimony, however, did he opine who appellant might have inherited this epilepsy from, nor did the prosecution present evidence of other members in appellant's genetic lineage who might have suffered from epilepsy. More to the point, however, a Jacksonian seizure does move throughout the brain so Dr, Griesemer's acknowledgment is consistent with the defense theory. (See fn 17.)

[50] At least there is no clinical evidence of further seizures.

QEEG should not be used to diagnose specific behavior. (16 RT 2304.)

If he understood Dr. Bertoldi correctly, Bertoldi was suggesting that the seizure focus was on the surface of the brain on the right side during childhood then migrated to the left side during adulthood. Dr. Griesemer testified that typically one does not see migration of epileptic foci. (16 RT 2305-2306.) [51]

In looking at the brain waves in appellant's tracing, Dr. Griesemer found nothing that indicated a tendency to have epilepsy or to indicate there is significant frontal lobe slowing. He found nothing that would encourage him to look further diagnostically at appellant. (16 RT 2307.)

It is Dr. Griesemer's opinion that appellant simply outgrew the epilepsy he had as a child. (16 RT 2307-2308.)

On cross examination, Dr. Griesemer admitted that even a benign epilepsy is quite serious when the epileptic seizures are taking place. (16 RT 2309.) Further, he conceded that there are jail records showing that appellant tried to commit suicide even as a juvenile, and records showing that appellant was paranoid throughout his life even as a child. (16 RT 2310.) Dr. Griesemer also conceded that appellant's juvenile jail records show that he was treated with anti-psychotic medication. (16 RT 2310.) Further, one of the medications that appellant receives is Depakote, a drug that inhibits seizures. (16 RT 2311.)

He and Dr. Bertoldi saw the same thing on appellant's EEG, the same theta activity, the same slowing. However, they draw different

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[51] With Jacksonian epileptic seizures, however, the electrical disturbance moves in waves across the brain. (see fn 17)

conclusions from the same data. (16 RT 2311-2312.) Dr. Griesemer conceded that while the EEG is abnormal , nevertheless, he felt that the abnormality was subtle and not consequential. (16 RT 2312.)

Finally, Dr. Griesemer admitted that although the American Academy of Neurology and the program accompanying the QEEG has a specific disclaimer saying that there is no direct correlation between an abnormal QEEG and a particular behavior, many clinicians use the QEEG in assessing and treating abnormal behavior. (16 RT 2315.)

Prosecution psychologist Dr. Kris Mohandie testified that although he is now independent, he worked as a psychologist for the Los Angeles police department for approximately 14 years from 1989-2003. (18 RT 2614-2617.) He is a diplomate member of the Society for Police and Criminal Psychology as well as a member of the Association of Threat Assessment Professionals and the American Psychological Association. (18 RT 2591-2592.)

Dr. Mohandie formally interviewed appellant on three occasions, looked at videotapes of police interviews with appellant and Vannoy, and reviewed medical records and many different psychiatric reports. (18 RT 2594-2595.) At no time did Dr. Mohandie see evidence that appellant suffered from a bipolar disorder such that he was a danger to himself or others and should have been involuntarily committed. (18 RT 2595-2596.)

In addition to reviewing documentation and transcripts in the instant case and interviewing appellant, Dr. Mohandie administered some tests to appellant. (18 RT 2599.) He administered the MMPI

test and a SIRS (Structured Interview of Reported Symptoms) test. The MMPI is used in forensic settings and has eight different validity indicators. The SIRS test is specifically a test to determine evidence of malingering. (18 RT 2599.)

Dr. Boone did not administer either of these tests . Moreover although Dr. Mohandie reviewed Dr. Boone's reports, he did not note anything in her testing showing whether or not appellant malingered. (18 RT 2600.) Dr. Mohandie regards the two tests that he administered as the standards for assessment of malingering and would disagree that the Millon test (aka, MCMI, Millon Clinical Multi Axle Inventory) is a newer test and more sensitive than the MMPI. (18 RT 2600.)

Dr. Mohandie found evidence of malingering in both the MMPI II test and in the SIRS test. (18 RT 2601.) He would label appellant as having anti-social personality disorder with narcissistic and borderline traits, none of which would render him incapable of knowing right from wrong. (18 RT 2601-2602, 2608, 2651.)

When queried about mental illness, Dr. Mohandie replied that because of appellant's tendency to exaggerate his symptoms, Dr. Mohandie could not find evidence of a major mental disorder.(18 RT 2602)

When Dr. Mohandie interviewed appellant, appellant had very specific recollection of all the events leading up to the exact moment of the homicide. (18 RT 2605.) Appellant also denied any psychiatric symptoms such as hallucinations or false sensations or any consumption of alcohol just before the homicide. (18 RT 2606.) In addition, following

the homicide, appellant cleaned up, locked the door, and left the location without incident. (18 RT 2607.) Dr. Mohandie did not find the homicide a result of intermittent explosive disorder because he believed the homicide to be the result of motivated behavior in the context of rejection. (18 RT 2613.) Dr. Mohandie concluded that appellant was legally sane at the time of the homicide. (18 RT 2605, 2614.)

Significantly, Dr. Mohandie agreed with Dr. Vicary with respect to cross-overs. That is, bipolar disorder and anti-social personality disorder are not necessarily mutually exclusive; a person could have both. (18 RT 2612.) Moreover, Dr Mohandie **explicitly conceded that appellant might have a major mental illness.** However, again, he could not really label any major mental illness because of appellant's tendency to exaggerate his symptoms. (18 RT 2622, 2628.) Consequently, Dr. Mohandie did not agree with the majority of psychiatrists who saw appellant in prison and diagnosed appellant with a major mental disorder of some type. (18 RT 2623-2624.) In Dr. Mohandie's opinion, although appellant has been diagnosed as having a major mental disorder by numerous mental health professionals over many years, these professionals have simply been deceived. Appellant has just been manipulating the system. (18 RT 2626, 2628, 2631.)

As to the abnormal EEG data and PET scans, Dr. Mohandie agrees with Dr. Griesemer that as it relates to brain issues and predicting behavior, these tests are not reliable predictors at this time. (18 RT 2634-2635.) Nevertheless, Dr. Mohandie conceded that a person could appear normal both shortly before an explosion of violence and shortly

afterwards, yet have a true mental disorder during the explosion of violence. Further, a person could be mentally ill while accomplishing significant achievements. (18 RT 2639-2640.)

Dr. Mohandie refused to opine whether the medications given to appellant were indicative of a major mental illness because he was not allowed to prescribe such medications and he did not know if appellant actually took those medications. Appellant could have been faking the ingestion of those medications, even for the previous 15 years for which there are medical records. (18 RT 2645-2646.) Moreover, even if the medical records show that appellant has had blood tests showing that he has been taking the medications, that would not change Dr. Mohandie's opinion. (18 RT 2647.) He did not explain why it would not change his opinion.

Standard of Review

In California, Penal Code section 25 requires a defendant to prove by a preponderance of the evidence that he or she was insane at the time the crime was committed. (See Penal Code Section 25(b): see also Evidence Code Sections 115, 522.) Further, a verdict of not guilty by reason of insanity may be returned: either (1) if the defendant was incapable of knowing or understanding the nature and quality of his or her act at the time of the commission of the offense or (2) that the defendant was incapable of distinguishing right from wrong at that time. (See *People v. Lawley* (2002) 27 Cal.4th 102, 170; see also *People v. Skinner* (1985) 39 Cal.3d 765, 782.) In that regard, a defendant "who is incapable of understanding that his act is morally wrong is not criminally liable merely

because he knows the act is unlawful." (*Skinner* at p. 783.)

On appeal, the test is **NOT** the substantiality of the evidence favoring the jury's verdict. Instead, it is "whether the evidence contrary to [the jury's] finding is of such weight and character that the jury could not reasonably reject it." *(People v. Drew* (1978) 22 Cal.3d 333, 351; see also, *People v. Duckett* (1984) 162 Cal.App.3d 1115, 1119, both superseded by statute on another ground.) Moreover, while a reviewing court must view the record in the light most favorable to the verdict, the jury's discretion is not absolute. "The verdict must be supported by substantial evidence-that is, evidence reasonable in nature, credible and of solid value; it must actually be substantial proof of the essentials of which the law requires in a particular case." (*People v. Samuel* (1981) 29 Cal.3d 489, 505; interior quotation marks and citations omitted.) In that regard, "[I]n passing on its substantiality, we must look to the record as a whole. Although an item of evidence considered without regard to the rest of the record may appear probative, its value may be undercut by undisputed facts compelling a contrary conclusion." (*Id.,* at p. 504; citations omitted.)

Here, the evidence was of such weight and character that no rational jury could conclude that appellant failed to prove insanity by a preponderance of the evidence. The error violated appellant's Fifth and Fourteenth Amendment rights to due process and a fair trial.

The Totality of the Evidence Will Not Support a Finding of Sanity

As Justice Mosk noted, even though evidence standing alone may be probative, in the context of the entire record, its value may be undermined by undisputed facts to the contrary. (*People v. Samuel, supra,*

29 Cal.3d 505.) Moreover, this is not a case where the jury simply had to weigh conflicting expert opinion and come to a conclusion. (See, e.g., *People v. Chavez* (2008) 160 Cal.App.4th 882, 891.) Instead, this is a case where the credible evidence of solid value simply will not support a sanity verdict. Not only did appellant suffer from organic brain damage and major metal illness all his life, but Dr. Mohandie's diagnosis of malingering simply does not account for all of appellant's behavior. More to the point, Dr. Mohandie's opinion is not based on a rational evaluation of all of the documented evidence of appellant's lifelong history of compromised mental condition. Instead, it is based almost entirely on a test where appellant simply did not cooperate with Dr. Mohandie.

By contrast, the opinion of the defense experts that appellant was insane at the time of the homicide was based on multiple factors. These included objective tests showing brain dysfunction (where appellant did not fake the results) and a lifelong history of brain dysfunction including EEG and PET scans showing abnormal brain activity. There were also related additional factors such as familial dysfunction and social dysfunction characterized by destructive or violent action coming on suddenly and not inhibited. Finally, the opinions also relied on appellant's lifelong tolerance for large doses of anti-psychotic medication.

Brain Damage

The evidence is overwhelming that the appellant suffered from both organic brain damage and mental illness all his life. While Dr. Griesemer conceded that appellant suffered from epilepsy as child, he noted that the phenobarbital medication was discontinued at the age of approximately

eight, and that appellant remained seizure free and appeared to do quite well clinically. Further, Dr. Griesemer noted that later reports showed that appellant's focal seizures moved from the left side of the brain to the right side. This shift is a pattern indicative of genetic or inherited epilepsy which appellant outgrew rather than an epilepsy based on any structural brain abnormalities. (16 RT 2300-2305.)[52]

Not surprisingly, Dr. Bertoldi disagreed. He noted that the last paragraph of the later EEG that appellant was given at the age of about eight in 1976 (Defense exhibit W1) stated "Impression: Abnormal record due to the appearance of paroxysmal activity in the left posterior frontal region that becomes nearly continuous and mirrored in the right posterior frontal region during sleep. The record is highly suggestive of a focal seizure disorder..."[53] Dr. Bertoldi concluded that as a young boy appellant was epileptic because he had abnormal brain activity, frontal, posterior and on both sides. (16 RT 2243.) After examining appellant in 2004, Dr. Bertoldi requested that Q-Metrx administer another EEG to appellant. (16 RT 2246-2247.) Analysis of the later EEG indicates an abnormality or a brain dysfunction in the frontal area which extends backwards to the temporal lobes. (16 RT 2260-2261.) Further, this brain dysfunction can extend into the limbic system deep in the brain and produce an extremely violent and aggressive rage. (16 RT 2244, 2266.) Moreover although there is no clinical evidence of seizures after age 8, a limbic seizure could last

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[52] Left unmentioned is the issue of Jacksonian seizures where the abnormal brain electrical activity moves around the brain. (See fn. 17.)

[53] That is, Jacksonian epileptic seizures.

only a second or two and a person who suffered one likely would not remember it. (16 RT 2276-2277.)

Considering appellant's EEG as a young boy, Bertoldi's examination, appellant's medical records and the EEG taken in 2004, Dr. Bertoldi opined that appellant has organic brain dysfunction, frontal and spreading temporally, which is consistent with episodic loss of control. (16 RT 2265.) As to the incidents of violence, Dr. Bertoldi testified that appellant's brain dysfunction was at the very least contributory. (16 RT 2281-2283.)

Further, Dr. Griesemer's conclusion that appellant was clinically doing quite well after the phenobarbital treatment ended (16 RT 2301) is simply not supported by the record. As Dr. Griesemer and all of the experts who examined appellant agreed, his EEG was abnormal and has been all his life. (See, e.g., 16 RT 2301.) Further, even though there is no clinical evidence of seizures after appellant was taken off phenobarbital, even Dr. Griesemer acknowledged that there are jail records showing that appellant tried to commit suicide as a juvenile and that appellant was paranoid throughout his life. (16 RT 2310.) At a minimum, this evidence refutes Dr. Griesemer's claim that appellant was clinically doing well after the phenobarbital was stopped.

Dr. Griesemer also conceded that appellant's jail records show that he was treated with anti-psychotic medication, including Depakote, a drug that inhibits seizures. (16 RT 2310-2311.) Thus, the fact that there is no clinical evidence of seizures after age eight does not mean that appellant did not suffer from brain damage or even that he did not suffer from

seizures, all it means is that there is no medical documentation of further seizures. Nevertheless, since appellant was given anti-seizure medication, and a limbic [Jacksonian type] seizure could last only a few seconds leaving no memory of the event, the absence of clinical records showing further seizures is not particularly compelling on the issue of whether appellant suffered brain damage. (See, e.g, 16 RT 2276-2277.)

Further, as for the prosecution's assertion that abnormal EEGs and QEEGs are not predictive of specific behavior, that assertion is only partially correct. By way of analogy, a blood alcohol level of .31 may not be accurately predictive of a specific abnormal driving characteristic such as speeding or weaving through lanes of traffic. Nevertheless, it is beyond dispute that such a high blood alcohol level has a high correlation with impaired and abnormal driving generally. Thus, a high blood alcohol level is an extremely useful tool in assessing the reasons underlying abnormal driving behavior.

Similarly, an abnormal EEG or QEEG may not be 100% accurate in predicting a specific abnormal behavior such as confused thinking or irrational fear. Nevertheless, there is likely to be a very high correlation between abnormal brain activity and abnormal behavior. It is likely for that reason that, as Dr. Griesemer conceded, clinical practitioners use the QEEG in assessing and treating abnormal behavior. (16 RT 2315.)

Even if it could be persuasively argued that the foregoing evidence presents merely a battle of experts concerning whether appellant has a structural brain dysfunction arising from his epilepsy, and is therefore nothing more than a factual dispute that the jury is well equipped to

handle, that argument is not dispositive. Dr. Griesemer's opinion fails to account for the additional objective tests done by Dr.'s Boone and Wu showing organic brain dysfunction irrespective of whether it was a byproduct of his youthful epilepsy.

Dr. Boone's tests showed that appellant's test scores on executive decision making ranged from the second percentile to the ninth percentile. (15 RT 2147-2148.) That is, appellant's problem solving skills, ability to appreciate consequences and avoid inappropriate behavior was severely impaired. (15 RT 2144, 2148.) These results suggest that in his daily life, appellant would have a great deal of difficulty stopping a behavior that was not appropriate to the situation. (15 RT 2152.)

These executive problem solving skills relate to the functioning of the frontal lobes of the brain and appellant's poor performance on these tests show that this area of his brain is not working correctly. (15 RT 2158.) The tests demonstrate that appellant can make decisions, but not good decisions. In addition, people with damage to the frontal lobes have little control and have the highest scores in aggression and violence. (15 RT 2160.)

Dr. Boone conceded that appellant demonstrated goal oriented behavior when he fled the scene of the homicide, went to Vannoy's house, got rid of his truck and evaded the police for three days. (15 RT 2174.) She noted however, that even conceding some goal directed behavior, appellant's overall behavior surrounding his crimes was completely illogical. (15 RT 2174-2175.) He committed several violent acts in front of witnesses. (15 RT 2179.) Further, after the homicide, appellant left all

kinds of clues so it was easy for the police to find him. (15 RT 2192.)

With regard to the possibility of an anti-social personality disorder, Dr. Boone asserted that appellant's cognitive difficulties show brain dysfunction. Whether or not he also meets the criteria for anti-personality disorder would not change her opinion concerning organic brain dysfunction. (15 RT 2187-2188, 2189.)

In that regard, the PET scan done by Dr. Wu confirmed a diagnosis of brain dysfunction in the frontal area and in the temporal area of the brain. (18 RT 2509.)

Neither Dr. Mohandie nor Dr. Griesemer dealt with this evidence in any meaningful way. Dr. Mohandie testified that appellant malingered in the tests he administered and he did not agree that the tests administered by Dr. Boone were more sensitive to detecting malingering than the tests he administered. (18 RT 2600.) Implicitly, therefore, the results that Dr. Boone obtained were false.

Nowhere, however, did Dr. Mohandie explain how appellant knew enough to falsify only those tests measuring executive decision making on Dr. Boone's tests, but not those that measured other skills. Indeed, appellant scored fairly well on Dr. Boone's test in areas such as such as attention (75% percentile), verbal memory (some scores in the 96% percentile) math (average), reading (above high school level) and low average to average in language and visual spacial skills (15 RT 2144.) If appellant was solely a malingerer and did not have brain damage or dysfunction, one would expect that his scores would be consistently low across the entire spectrum of tests. (See, e.g., 15 RT 2173.)

Significantly, when concluding that appellant was a malingerer, Dr. Mohandie based his opinion on the MMPI and the SIRS tests he administered to appellant. Reviewing those test results, Dr. Mohandie concluded that appellant exaggerated his symptoms. More important, however, apparently the exaggeration extended to **all parts of both Dr. Mohandie's tests**. (18 RT 2261.) Significantly, as Dr. Boone pointed out, someone who was malingering would likely score poorly on all phases of the tests, not just one or two portions. (15 RT 2173.)

Given this conflicting testimony, the only rational conclusion that a jury could draw was that appellant apparently refused to cooperate with Dr. Mohandie and faked his answers when taking Dr. Mohandie's tests. Nevertheless, he did not do so when taking Dr. Boone's tests. The fact that appellant did not cooperate with Dr. Mohandie, however does NOT make his results more valid than those of Dr. Boone. In fact, the opposite is true. Because appellant did not malinger when he took Dr. Boone's tests, **her test results more accurately reflected appellant's true mental state** than Dr. Mohandie's test results.

Finally, neither Dr. Mohandie nor Dr. Griesemer took issue with Dr. Wu's Pet scan showing damage to the frontal lobes and the temporal area of the brain. (18 RT 2509.)

For these reasons, the substantial weight of the evidence shows that appellant suffered from organic brain damage or dysfunction.

Mental Illness

Regarding the issue of mental illness, the prosecution evidence is again insubstantial when compared to the defense evidence of severe

mental illness.

The defense experts testified that appellant was severely mentally ill. Dr. Niedorf testified that appellant had intermittent explosive disorder. (17 RT 2327-2328.) Dr. Niedorf characterized this finding as an Axis I, or primary diagnosis. An Axis II or secondary diagnosis could be a personalty disorder such as an anti social personalty disorder. (17 RT 2331-2332.) Corroborating his diagnosis were four different reports of physical manifestations of brain damage: the Loma Linda report, Dr. Bertoldi's report, Dr. Boone's report, Dr. Wu's report (17 RT 2334-2339) as well the initial treatment appellant was given to handle the Jacksonian seizures. (17 RT 2347.) All of these reports show abnormal brain activity indicative of brain damage or dysfunction. Further, when appellant received anti-psychotic medications in prison he improved to the point he could reflect on his behavior and even describe it. (17 RT 2347.)

Dr. Vicary determined that appellant primarily suffers from bipolar disorder. (18 RT 2475.) Intermittent explosive disorder is something very close to bipolar disorder and appellant could have both. (18 RT 2476-2477.) Dr. Vicary also agreed with the vast majority of doctors who interviewed appellant, that he has an anti-social personality disorder as a secondary diagnosis. (18 RT 2556.)

Appellant's family history corroborates the diagnosis of bipolar disorder. Bipolar individuals are hyper sexual and appellant's grandmother was hyper sexual. (18 RT 2504.) Further, appellant's paternal uncle spent most of his life in a psychiatric hospital. (18 RT 2504-2505.) Appellant's father was alcoholic, paranoid, explosive and

abusive to his wife and children. (18 RT 2505.)

Additionally, the tests done by Drs. Boone, Bertoldi, and Wu confirmed organic brain damage consistent with someone with bipolar disorder. (18 RT 2508-2509.) Moreover, both the Millon and the MMPI tests showed appellant had an organic brain disorder of moderate to severe extent with indications of irritability, explosiveness, aggressiveness, paranoia and problems in interpersonal relationships. (18 RT 2510-2511.)

By contrast, Dr. Mohandie testified that he found no evidence of either bipolar disorder (18 RT 2595-2596) or intermittent explosive disorder. (18 RT 2613.) Instead, based on the tests he administered, Dr. Mohandie found that appellant suffered from a mere antisocial personality disorder and thus by definition could not have been insane. (18 RT 2601-2602, 2608, 2651.) Nevertheless, **Dr. Mohandie explicitly conceded that appellant might have a major mental illness**, he just could not detect it because appellant exaggerated his symptoms on Dr. Mohandie's tests. (18 RT 2602, 2622, 2628.) Moreover, because Dr. Mohandie determined that appellant was a malingerer, he opined that all of the other mental health professionals who examined appellant and found a major mental illness - including those with no bias such as those who worked in jails, prisons or Patton State hospital - were simply fooled. (18 RT 2626, 2628, 2631.)

Certainly many mental health professionals who examined appellant conceded that he could malinger and that he probably tried to manipulate the system. (See, e.g., 17 RT 2384, 2398: 18 RT 2532-2533, 2539, 2556.) However, instead of a primary diagnosis, malingering was a secondary

diagnosis. (See, e.g., 17 RT 2331-2332, 18 RT 2556; see also 15 RT 2187-2188, 2189.) A diagnosis of anti-social personality disorder can only be made when it fully accounts for a patient's violent behavior while other mental illnesses such as intermittent explosive disorder do not. (See, e.g., 17 RT 2373.)

Of course the problem here is that anti social personality disorder does not fully account for appellant's behavior. For example, it does not account for the multiple documented instances of attempted suicide, or for appellant's lifelong paranoia , both of which Dr. Griesemer acknowledged. (16 RT 2310.)

Most important, however, it does not account for appellant's behavior on anti-psychotic medication. As Dr. Vicary explained, during appellant's many stays in psychiatric facilities throughout his life, he was treated with extremely high doses of these medications. These included:1500 milligrams of lithium, 2000 milligrams of depakote, 60 milligrams of haldol - the equivalent of 3000 milligrams of thorazine. (18 RT 2479.)

A person without severe mental illness simply could not tolerate those doses of medication. (18 RT 2479.) Therefore, because appellant was getting such large dosages of those kinds of drugs and remaining alert and rational, clearly he needed those drugs for his major mental illness. (18 RT 2480.)

Moreover, there was no doubt that appellant was actually taking those high doses because his blood was repeatedly tested for dosage levels and those test results are contained in appellant's medical records. (18 RT

2481.) Indeed, at one point appellant was given Clozapine, an anti-psychotic agent. It is given to less than one percent of the sickest of the sick because it can have the very potent side effect of wiping out a patient's white blood cells, thus effectively eliminating the immune system. Appellant's medical records show that his blood was tested weekly to be sure his white cell count did not drop into a critical zone. More important, this very potent drug helped appellant cope with his mental problems. (18 RT 2481.)

Dr. Mohandie did not even make credible attempt to respond to this evidence. First he simply averred that he was not authorized to prescribe those kinds of drugs. Without any further explanation, the apparent inference the jury was to draw was that he was not totally familiar with them. Nevertheless, when pressed further, he suggested that appellant could have cleverly avoided taking these drugs, thus fooling the medical personnel even for a period as long as the 15 years encompassed by his medical records. (18 RT 2645-2646.) When advised that blood tests in the medical records proved that appellant was in fact taking these anti-psychotic drugs at these high doses, Dr. Mohandie simply averred that such information would not change his opinion that appellant was nothing more than a malinger. (18 RT 2647.)

Significantly however, Dr. Mohandie never offered any further explanation concerning how appellant could tolerate those high doses of anti-psychotic medication if he did not have a major mental illness. Given this evidence, Dr. Mohandie's opinion that appellant did not suffer from any major mental illness is simply not credible. His obdurate refusal

to acknowledge the actual nature of appellant's clinical history, or even offer a plausible explanation for appellant's tolerance for the large doses of anti-psychotic medication, does not entitle the jury to give substantial weight to his diagnosis of antisocial personality disorder. As Justice Mosk observed in *People v. Samuel*, "'[t]he chief value of an expert's testimony ... rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusions.'" (*People v. Samuel*, *supra*, 29 Cal.3d at p. 498; citations omitted; see also *People v. Drew, supra*, 22 Cal.3d at p. 350.)

Absent a credible diagnosis of malingering as a primary cause of appellant's behavior instead of a secondary diagnosis, the jury could not reasonably reject the opinion of the defense experts that appellant suffered from organic brain dysfunction or that he had a major mental illness.

Insanity

It might be argued that even if appellant suffered from both organic brain dysfunction and a major mental illness, the jury could nevertheless conclude that he was entirely sane at the time of the assault. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 608.) Such an argument, however, would not be persuasive on the facts of this case.

Dr. Mohandie was the only expert who testified that appellant was sane at the time of the assault. (18 RT 2614.) As noted above, he concluded that although appellant might have a major mental illness, **he could not detect it because appellant exaggerated his symptoms on Dr. Moahnie's tests.** (18 RT 2602, 2622, 2628.) Further, Dr. Mohandie tests indicated that appellant was a malingerer. Malingering is indicative of an

antisocial personality disorder, a disorder that would not prevent him from knowing right from wrong. (18 RT 2601-2602, 2608, 2651.) Thus, because appellant had an antisocial personality disorder, Dr. Mohandie concluded that appellant acted purposefully in the context of rejection by Ms. Epperson. (18 RT 2613.)

As also explained above, many of the mental health professionals who diagnosed appellant conceded that he malingered. The difference is that Dr. Mohandie did not thereafter fully pursue his investigation into appellant's mental health. When he determined that appellant did not fully cooperate on the MMPI and SIRS tests and was therefore a malingerer, Dr. Mohandie simply took the position that appellant must have similarly faked his symptoms when dealing with all the other mental health professionals who treated appellant throughout his life. That is, because there is some evidence of malingering in appellant's background, and because anti-social personality disorder explained at least some of appellant's behavior, that disorder explained all of appellant's behavior. Manifestly, it does not.

As described above, evidence of anti-social personality disorder found in appellant's medical records is primarily an Axis II diagnosis, not an Axis I diagnosis. It does not account for appellant's paranoia, his multiple suicide attempts, his abnormal EEG's and PET scans, or his tolerance for large doses of anti-psychotic medications.

Even if Dr. Mohandie could validly assert his disagreement with a diagnosis of either intermittent explosive disorder or bipolar disease, he explicitly conceded that his examination of appellant could NOT rule out a

major mental disorder. More important, when pressed on these objective factors supporting an Axis I diagnosis of either intermittent explosive disorder or bipolar disease, Dr. Mohandie had no answers, at least not credible answers. He relied on Dr. Griesemer's opinion that appellant did not suffer organic brain damage arising from childhood epilepsy. Whether or not appellant suffered organic brain damage from epilepsy does not resolve the issue of brain damage. There were other indicators of brain damage or dysfunction such as the abnormal EEG's and PET scans. Dr. Mohandie's response to these objective indicators was simply that they cannot predict specific behavior. Perhaps, so but they certainly correlate strongly with abnormal and violent behavior. Further, the diagnosed types of brain damage and mental illness under which appellant suffered are precisely those leading to uncontrollable rage and an inability to inhibit inappropriate behavior.

Dr. Mohandie dismissed the defense claims of insanity because in his view, appellant acted rationally and purposefully in the context of rejection by Ms. Epperson. (18 RT 2613.) Purposefully to be sure, but not rationally or normally. Even if it could be said that killing a girlfriend in the context of rejection would be a normal or rational reaction - a highly dubious proposition at best - this was not a normal homicide. As set forth more fully in the statement of facts, this was a particularly brutal killing. Ms. Epperson was beaten so severely that her face was virtually unrecognizable. There was evidence that appellant cut Ms. Epperson on the neck, that he repeatedly hit her with a stool and/or a candlestick holder and that he stabbed her with a screwdriver.

If killing Ms. Epperson was somehow the rational reaction to being rejected, that much violence would not be required simply to effect her death. This behavior, while goal directed towards killing is not nearly as consistent with a deliberate premeditated murder as it is with a sudden and insane explosion of violence. (See, e.g., *People v. Anderson, supra,* 70 Cal.2d 15, 21-22[54]; see also *People* v. *Alcala*, *supra*, 36 Cal.3d 604, 623.) Further, even an uncontradicted showing that the defendant's actions were goal directed towards the commission of a homicide does not negate a claim of insanity. That is, even being "goal oriented" is fully consistent with being insane. An insane person could intend to kill and take steps to accomplish that goal. The critical difference from a mere criminal, however, is that an insane person might not understand the difference between right and wrong. That difference is precisely what the defense experts testified to and precisely why Dr. Mohandie's opinion is not substantial credible evidence of sanity.

Indeed, the situation presented here is similar to that in *People v. Duckett*, *supra,* 162 Cal.App.3d 1115. In *Duckett*, evidence adduced at the guilt phase of trial established that the defendant suffered from chronic paranoid schizophrenia. (*Id.* at pp. 1118-1119.) At the sanity phase, three psychiatrists testified that, as a result of his schizophrenia, the defendant could not substantially appreciate the criminality of his conduct nor

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[54] In *Anderson*, this Court concluded that the record lacked substantial evidence of premeditation or deliberation, notwithstanding that the defendant had inflicted more than 60 separate wounds on the victim's body, including "one extending from the rectum through the vagina, and the partial cutting off of her tongue." (*Id.* at pp. 21-22.)

conform his conduct to the requirements of the law. The jury nevertheless found the defendant to be sane when he murdered the victim. (*Id.* at p. 1119.)

The Court of Appeal recognized that a verdict finding a defendant to be sane frequently has been upheld on appeal in the face of contrary unanimous opinion from expert witnesses. (*Ibid.*) As set forth above, however, the test on appeal is not the substantiality of the evidence favoring the jury's verdict, but "whether the evidence contrary to [the jury's] finding is of such weight and character that the jury could not reasonably reject it." (*People v. Drew, supra,* 22 Cal.3d 333, 351; *People v. Duckett, supra*, 162 Cal.App.3d at p. 1119.)

The evidence of insanity in *Duckett* included evidence showing a long history of chronic paranoid schizophrenia and a history of assaultive crimes, often focused on women. (*People v. Duckett, supra*, 162 Cal.App.3d at p. 1121.) One psychiatrist testified that the charged offense was the product of a command hallucination caused by the defendant's mental illness. (*Ibid.*) Another psychiatrist testified, based on his examination of the defendant, the defendant's hospital records, and the defendant's statements, that the defendant lacked capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (*Id.* at p. 1122.) The third psychiatrist agreed that the defendant was a paranoid schizophrenic and opined that the defendant could not appreciate that his conduct was criminal and could not conform his conduct to the requirement of the law. (*Id.* at p. 1123.) Evidence also was adduced from a clinical psychologist who had

participated in the treatment of the defendant when the defendant was at Napa State Hospital for five years. (*Id.* at p. 1122.) Finally, the record contained the report of the prosecution psychiatrist who had interviewed the defendant and had concluded the defendant was insane. (*Id.* at p. 1123.) The Court of Appeal held that there were no circumstances present that would have permitted the jury to reject the expert opinion. The court therefore reversed the verdict finding the defendant to be legally sane. (*Ibid.*)

A similar decision in *Strickland v. Francis* (11th Cir. 1984) 738 F.2d 1542 compels a similar result. In *Strickland*, the court of appeals for the Eleventh Circuit reversed the denial of a petition for writ of habeas corpus on the ground that the defendant was incompetent to stand trial at the time of his conviction. (*Strickland* at p. 1543.) At the competency trial in state court, four members of the defendant's family had testified that the defendant had a history of mental problems, and two court-appointed psychiatrists who examined the defendant testified that the defendant was unable to understand the proceedings or to assist in his defense. (*Strickland* at pp. 1544-45.) The prosecution called seven witnesses who testified concerning the defendant's behavior at the time of the crime and arrest and subsequently in jail. (*Strickland* at pp.1546-1547.)

One of these witnesses testified that she observed periodic changes in the defendant's behavior in jail which correlated with "big court" times, and that she believed that the defendant was faking mental illness. (*Strickland* at p. 1547.)

Here, of course, the prosecution similarly called witnesses such as

Vannoy who observed appellant's behavior after the assault in an effort to demonstrate that appellant was faking mental illness. In *Strickland v. Francis*, as here, the mental health experts testified that the defendant's behavior, as described by the prosecution's witnesses, was consistent with their diagnoses, and that they had considered and rejected the possibility that the defendant was faking. (*Strickland* at pp. 1548-1549.)

The Court of Appeal reversed the trial court's finding that the defendant was competent to stand trial, holding that since the expert testimony so clearly and overwhelmingly pointed to a conclusion of incompetency, the jury could not ignore that expert testimony. (*Strickland* at p. 1552.)

The Court of Appeal emphasized that, although as here the psychiatrists relied to some degree on the defendant's subjective description of his symptoms, "This case presents no valid reason for disregarding the testimony of experts, whose opinion was based on [the defendant's] documented mental history and objective scores on sophisticated tests, and who were fully aware of the legal consequences of "their determination." (*Strickland* at p. 1553.) The court stressed that the fact that the psychiatrists were disinterested state employees "works strongly in favor of the doctors' testimony," as did the fact that the testimony of the doctors was consistent. (*Strickland* at pp. 1553-1554.) Finally, the court noted that the behavior described by the prosecution's witnesses was, according to the experts, consistent with their diagnoses and did not undermine their opinions. (*Strickland* at p. 1555.) Accordingly, the court held that the jury "lacked reasonable cause" to

disregard the experts' testimony. (*Ibid.)*

Given the foregoing legal precedent, even when viewing the evidence in the light most favorable to the prosecution in this case, no rational trier of fact could have concluded that appellant failed to prove by a preponderance of the evidence that he was insane at the time of the offense.

PENALTY PHASE ISSUES

VI.

THE TRUE FINDINGS ON ALL OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE ALLEGATIONS MUST BE REVERSED BECAUSE EACH PREDICATE FELONY WAS MERELY INCIDENTAL TO THE HOMICIDE AND DID NOT MANIFEST AN INDEPENDENT FELONIOUS PURPOSE

Summary of Issue

As to the homicide count, after finding appellant guilty of murder, the jury also found true the special circumstance that he committed murder while engaged in the commission of a predicate felony, i.e., mayhem, torture and rape. These special circumstances findings made appellant eligible for the death penalty. (Cal. Pen. Code § 190.2(a)(17).)

If the evidence shows that the predicate felonies were intended solely to facilitate the killing itself, is there sufficient evidence to support a felony murder special circumstance? [55]

Summary of Argument

A felony-murder special circumstance, is only proved "when the murder occurs during the commission of the felony, not when the felony

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[55] In Issue III, appellant demonstrated that there was insufficient evidence to support a rape or a rape special circumstance. Thus, the rape special circumstance is not valid and not at issue in this argument.

occurs during the commission of a murder." *(People v. Mendoza* (2000) 24 Cal.4th 130, 182.) True findings of felony-murder special circumstances may be upheld only if appellant had an independent felonious purpose for committing the felony separate from committing murder. (*People v. Green, supra,* 27 Cal.3d at pp. 61-62.) This issue is similar to the "*Ireland* merger" issue discussed in Issue I. However, it applies to the special circumstances even if the "*Ireland* merger" rule does not apply to the felony murder itself.

In this case, there was no evidence of an independent felonious purpose. The prosecution's theory of the case was that appellant used various instrumentalities to effectively torture, rape and commit mayhem against Ms. Epperson before she died. The evidence, however shows that all the instrumentalities that appellant used were intended solely to facilitate the homicide.

That is, the flower pot, the lamp base, the ceramic statue and the wooden stool all simply broke while appellant was using them to assault Ms. Epperson. Significantly these were not objects that appellant brought with him because he intended to use them to commit various felonies against Ms. Epperson. They were just objects that were handy in the apartment when appellant lost control. When one object broke, appellant simply seized another until the assault resulted in Ms. Epperson's death. Nothing in the intrinsic nature of these objects or the way these objects were used will support a finding that appellant harbored a felonious purpose independent of the intent to kill. These instrumentalities were just the means appellant used to facilitate the homicide.

Requirement of an Independent Felonious Purpose

Penal Code § 190.2(a)(I7) provides that a defendant is eligible for the death penalty if he is found guilty of first degree murder and the jury finds the murder was committed while the defendant was engaged in the commission of one or more of the enumerated felonies including mayhem and torture. In *Green, supra* , 27 Cal.3d 1, this court held that California's felony murder special circumstance provision does not apply unless a murder is committed to facilitate or conceal one of the statutorily enumerated felonies.[56]

The Court explained that by including the felony-based special circumstances in Penal Code § 190.2, the Legislature intended to carve out a narrow category of murders subject to the death penalty because they were committed "to advance an independent felonious purpose." *(Green,* 27 Ca1.3d at 61.) This legislative goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery [or other felony] is merely incidental to the murder-"a second thing to it," because its sole object is to facilitate or conceal the primary crime. (*Id.*) Therefore, "[t]o prove a felony-murder special-circumstance allegation, the prosecution

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[56] In *Green* the Court was construing former § 190.2, subd. (c)(3), the felony-murder special circumstance provision enacted by the Legislature as part of the 1997 death penalty statute. But the rationale for the Court's holding in *Green* is fully applicable to current section 190.2, subd. (a)(17), the successor felony-murder special circumstance provision enacted by the Briggs Initiative as part of the 1978 death penalty statute, and this court has made clear that *Green's* holding applies to the Briggs Initiative special circumstance provision. (See, e.g., *People v. Weidert* (1985) 39 Ca1.3d 836, 842; *People v. Mendoza, supra*, 24 Ca1.4th at 182].)

must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder.")*People v. Mendoza, supra,* 24 Ca1.4th at p. 182 (emphasis added).)

The "independent purpose" rule is not only compelled by the statutory language and legislative intent of Penal Code § 190.2(a)(17). The state and federal constitutions also dictate that the felony-murder special circumstance be limited to those cases in which the defendant has killed in order to advance or conceal a separate felony. The Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 7, 15, and 17 of the California Constitution prohibit the states from imposing the death penalty in a "capricious and arbitrary manner." *(Furman v. Georgia* (1972) 408 U.S. 238, 274, 277; U.S. Const. amend. VIII, § I; U.S. Const. amend. XIV, § I; Cal. Const. art. I, § 15, cl. 2; Cal. Const. art. I, § 17.)

Thus, in order to avoid the risk of capricious and arbitrary capital sentencing decisions, states "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of the same crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 877.) As the Court explained in *Green*, a scheme that subjected defendants to the death penalty solely because they incidentally committed a felony to facilitate or conceal a murder would violate these principles:

> To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct

> that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court .... (*Green*, 27 Cal.3d at 62 (quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189.)

Such a scheme "would not rationally distinguish between murderers," as required. (*Id.*; see also *Furman, supra,* 408 U.S. at 313 (White, J., concurring) (a procedure for imposing the death penalty is unconstitutional if there is "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").)

In keeping with the statutory and constitutional constraints on the application of the felony-murder special circumstance, this Court has consistently adhered to the "independent felonious purpose" rule. The rule applies to all of the enumerated felonies in § 190.2(a)(17). (*Mendoza*, *supra*, 24 Cal.4th at 182 (arson-murder special circumstance finding sustained because the evidence supported a finding that arson was committed to cover up a rape); *People v. Clark* (1990) 50 Cal.3d 583, 598 (arson-murder special circumstance finding sustained because there was evidence the defendant set fire to the victim's house in order to drive the victim out of the house); see also, *People v. Weidert, supra,* 39 Cal.3d 836, 842 (reversing kidnap-murder special circumstance finding because' there was no evidence the victim was kidnaped for a reason independent of the murder); *People v. Thompson* (1980) 27 Cal.3d 303, 324 (robbery murder special circumstance reversed because the evidence was insufficient to show that the robbery was not committed merely to escape from the murder scene).)

The rule applies regardless of when the intent to commit a felony for an independent purpose is formed in relation to any intent to kill. "[D]etermining whether a killing had occurred in the commission of a felony is not 'a matter of semantics or simple chronology.'" *(People v. Hernandez* (1988) 47 Ca1.3d 315, 348 (quoting *Green, supra,* 27 Cal.3d at 60).)

"Instead the focus is on the relationship between the underlying felony and the killing ...." (*Id.*) Evidence that a defendant had a "concurrent intent ... consisting of both an intent to kill and an intent to commit an independent felony" does Not, therefore, necessarily disprove a special circumstances allegation. *(People v. Barnett* (1998) 17 Cal.4th 1044, 1158.) But there must still be proof sufficient to allow "a rational trier of fact [to] find beyond a reasonable doubt that defendant had a purpose for the kidnapping apart from murder." (*Id.* (emphasis added).)

The decision in *Mendoza* illustrates the proper application of this test. In the *Mendoza* case, the Court upheld special circumstances findings on the basis of evidence the defendant committed arson for a purpose other than facilitating a killing. The victim died in a fire defendant set in her bedroom after he raped her. (*People v. Mendoza, supra*, 24 Cal.4th at 182-83.) There was evidence indicating the defendant intended the fire to kill the victim. But the physical evidence also "supported the conclusion that defendant committed the arson not just to kill the victim, but also as a means of concealing the rape or avoiding detection." (*Id.* at 183.) The fire was set in a manner intended to destroy the victim's torn clothing, the bruises on her body, and the defendant's fingerprints in the victim's

bedroom. *(Id.* at 183-84.)

The Court upheld the arson-murder special circumstance finding on the ground that the evidence was sufficient to establish the defendant started the fire with "'independent, albeit, concurrent goals.'"(*Id.* at 183 (quoting *Clark*, 50 Cal. 3d at 609).)

Unanimous Jury Finding of Proof Beyond a Reasonable Doubt

Under California law, the prosecution must prove the truth of any alleged special circumstance beyond a reasonable doubt. (Penal Code § 190.4; *People v. Robertson* (1989) 48 Cal.3d 18, 58.) In addition, the federal constitution requires that any fact that increases the maximum punishment a defendant is subjected to must be submitted to a jury and unanimously found true beyond a reasonable doubt. *(Ring v. Arizona* (2002) 536 U.S. 584, 609 (Sixth Amendment jury trial guarantee applies to the finding of facts or circumstances "necessary for imposition of the death penalty").)

The special circumstances set forth in Penal Code § 190.2 operate as "'the functional equivalent of an element of a greater offense'" because they make a criminal defendant eligible for the death penalty. *(Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, n.19); see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 ("Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact- no matter how the State labels it-constitutes an element, and must be found by a jury beyond a reasonable doubt.").) Findings on special circumstances must therefore be decided by the jury unanimously and

beyond a reasonable doubt to satisfy the constitutional standard. *(Ring, supra,* 536 U.S. at 609; see also *People v. Prieto* (2003) 30 Cal.4th 226, 256 (holding that under Ring, defendants have rights under the Sixth and Eighth Amendments "to have a jury determine the existence of all of the elements of a special circumstance.").)

The True Findings of the Felony Murder Special Circumstances Must Be Reversed Due to Insufficiency of the Evidence

Standard of Review

As explained in detail in issue III, evidence is sufficient to support a verdict only if, when viewed in the light most favorable to the judgment, the record is found to contain "substantial evidence, i.e., evidence that is credible and of solid value from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*Green, supra,* 27 Cal.3d at 55; *People v. Johnson, supra,* 26 Cal.3d 557, 578; see also *Jackson v. Virginia, supra,* 443 U.S. 307, 317-18 (the evidence in the record must "reasonably support" the jury's finding).)

A jury's findings may rest on "reasonable inferences" but may not be based on "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." *(People v. Morris, supra,* 46 Cal.3d 1, 21 (internal quotation marks and citations omitted); see also *United States v. Lewis* (9th Cir. 1986) 787 F2d 1318, 1323 ("mere suspicion or speculation cannot be the basis for creation of logical inferences").) This standard of review applies to findings on special circumstances. *(People v. Michaels* (2002) 28 Cal.4th 486, 515.)

There Was No Evidence of an Independent Purpose for Committing the Predicate Felonies and No Evidence That the Murder Was Committed to Advance or Conceal the Predicate Felonies

As explained at length in issue I (and those arguments are incorporated here by reference), the evidence here was insufficient to support the jury's felony murder special circumstances findings of torture and mayhem. Viewing the record in the light most favorable to the verdict, as required, the record discloses no "substantial" evidence that appellant had an independent felonious purpose to commit torture or mayhem, or that the murders were committed in order to advance or conceal these crimes.

During the course of the assault, appellant seized whatever instrumentalities were close by and available to him in the apartment. These included a flower pot, a wooden stool, a glass candlestick holder and a statue or pillar. He also finally located a screwdriver and used that as well. Significantly, however, all of these instruments broke during the assault except the screwdriver. It should be noted as well that Ms. Epperson's injuries were clustered primarily on the head, neck and face.

There is no dispute that the assault occurred over a period of time or that as a result of the assault Ms. Epperson was badly disfigured. Nevertheless, since appellant simply chose whatever instrumentalities were handy, if his intent was to kill, then a beating in the head, face and neck area would be more likely to accomplish that goal than striking other areas of the body.

Further, although the assault took some period of time to accomplish, the evidence shows that the time was largely the result of the difficulty in

effecting her demise. That is, after a few blows the instruments would break and appellant would either continue striking Ms. Epperson with the pieces or locate another instrument. Moreover since none of these instruments was intended to be used as weapon, they were very inefficient for striking the fatal blow.

Therefore, the fact that the assault took place over time and necessarily caused prolonged pain as well as disfigurement does not mean that appellant harbored a separate or concurrent intent to torture or maim. These results were simply an inherent byproduct of the manner by which the homicide was accomplished.

The record here contains even less evidence of an independent felonious purpose than cases where this Court has found insufficient evidence to support a jury's findings. For example, in *Green*, the evidence showed that the defendant killed his wife out of spite and jealousy. At the murder scene, he took her clothes, ring, and purse in an effort to conceal her identity. Because there was no evidence that the murder was committed to advance or cover up the robbery, this Court held there was insufficient evidence to sustain the robbery-murder special circumstance finding. (*People v. Green, supra,* 27 Cal.3d at 62.)

In *People v. Thompson,, supra,* 27 Cal.3d 303, the defendant took his victims' car keys in the course of a murder. But because he had previously refused to take money and valuables the victims offered him, the Court concluded, "It is at most a close question whether the perpetrator had any intent to steal at all" and reversed the robbery-murder special circumstance finding. (*Id.* at 323 (concluding that in light of all the evidence, the only

reasonable conclusion was that the defendant stole the car keys to facilitate his escape from the murder scene).)

In *People v. Marshall, supra,* 15 Cal.4th 1, the jury heard evidence the defendant took a letter from the victim during the course of a rape and murder. There was no evidence to show that the letter "was so valuable to defendant that he would be willing to commit murder to obtain it." (Id. at 35.) The Court held the evidence was therefore insufficient to support an inference that the defendant killed the victim to advance or conceal a robbery and reversed the jury's finding on the special circumstance. *(Id.* at 41; see also *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103-04 (gang sentencing enhancement would have to be reversed because there was "no testimony or other evidence to support a rational inference that the robbery of [the victim] was committed with the intent to further other criminal activity of [a gang]") (emphasis in original).) Viewing the record in the light most favorable to the verdict, there was no evidentiary basis for an inference - and certainly no direct proof that an arson was committed to serve some independent purpose "apart from the murder[s]." *(Barnett, supra*, 17 Cal.4th at 1158.)

Under the circumstances presented in this case, the jury could only have arrived at true findings on the mayhem and torture special circumstances by relying impermissibly on "suspicion, ... imagination, speculation, supposition, surmise, conjecture, or guess work," *People v. Morris, supra,* 46 Cal.3d at 21, or by misapplying or entirely ignoring the "independent felonious purpose" requirement. Either way, the findings must be reversed.

A capital conviction that is not supported by substantial evidence violates the defendant's rights to due process and a reliable penalty determination guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. (*Jackson, supra,* 443 U.S. at 317-18; see also *Thompson v. City of Louisville* (1960) 362 U.S. 199, 206 ("it is a violation of due process to convict and punish a man without evidence of his guilt").) The failure of the prosecution to sustain its burden of proof on a special circumstance allegation also fails to narrow the case to those most deserving of death, in violation of his Federal Constitutional right under the Eighth Amendment. (*Zant v. Stephens, supra,* 462 U.S. 862, 876-877.)

For the reasons set forth above, under both state and federal law, the true findings on the special circumstances must be set aside.

VII.

IMPOSING THE DEATH PENALTY ON A MENTALLY ILL DEFENDANT VIOLATES THE FIFTH, SIXTH AND EIGHTH AMENDMENTS.

Summary of Issue

Children and persons with low IQs cannot be executed because they cannot meaningfully appreciate the consequences of their behavior or exercise meaningful control over it. Since severely mentally ill persons like defendant have exactly the same cognitive issues as children and persons with low IQs, does execution of persons who are severely mentally ill violate the due process and equal protection clauses of the Fifth and Sixth Amendments to the United States Constitution? Further, does execution of severely mentally ill defendants with organic brain damage offend the Eighth Amendment prohibition against cruel and unusual punishment?

Summary of Argument

Even if it could be persuasively argued that appellant was not insane at the time of the assault on Ms. Epperson (which it cannot), there is little question that as a result of organic brain damage, he was - and is - severely mentally ill. Moreover, he has been diagnosed with major mental illnesses from early childhood onward, throughout his life.

These illnesses have affected his behavior in such way that he did not have the unfettered choice between good and evil. Therefore, like persons with a very low IQ or children whose brain development is not fully formed, the severely mentally ill do not have the requisite ability to

conform their behavior to acceptable social norms. Therefore, executing the severely mentally ill, for behavior which is only partially controllable does not conform to contemporary values, nor does it serve any viable penological purpose. Absent these justifications, executing the severely mentally ill violates the Eight Amendment prohibition on cruel and unusual punishment as well as the due process and equal protection clauses of the Fifth and Sixth Amendment.

Mental Illness- Background Facts

The facts set forth below are summarized from the sanity phase of the trial. Included, however are additional pertinent facts presented at the second penalty phase trial.

As explained extensively in Issue V., the evidence showed that appellant suffered from organic brain damage, a condition that existed from early childhood. At the age of two he was beaten by his father and hit his head on a metal pole. Mrs. Agnew, a neighbor testified that appellant was emotionally upset for the next year or so; he was not quite himself. (32 RT 4849.) About six months after hitting his head, appellant experienced nocturnal seizures. (16 RT 2234-2235.) A radioencephalogram indicated that in early 1970, appellant had epilepsy and an abnormality in the left portion of the brain with paroxysmal activity. (16 RT 2236-2237.) Appellant was medicated for his brain damage until he was seven and a half years old. (35 RT 5385.)

In 1976 appellant had an EEG (Defense exhibit W1); the last paragraph reads: "Impression: Abnormal record due to the appearance of paroxysmal activity in the left posterior frontal region that becomes nearly

continuous and mirrored in the right posterior frontal region during sleep. The record is highly suggestive of a focal seizure disorder..." That is, as a young boy, appellant was epileptic; he had abnormal brain activity, frontal, posterior and on both sides. (16 RT 2243.) Apparently there was no clinical follow up after appellant was seven years of age. (16 RT 2281.)

Dr. Bertoldi examined appellant for the defense and requested an EEG. (34 RT 5158.) Appellant's EEG showed abnormal activity mainly in the left posterior frontal region, a different place than when he was two years old, but nevertheless on the same side of the brain. (34 RT 5166.) The paroxysmal activity shows the epileptic activity shifting. The shifting of the focus from side to side also means the focus is deep within the brain; the limbic portion of the brain is the deepest portion of the brain. (34 RT 5191, 5217.)

Dr. Bertoldi further explained that a seizure focus in the limbic area of rats develops uncontrollable rage. In humans where there have been instances of uncontrollable rage, autopsies have shown lesions in the limbic structures. (34 RT 5193.)

Based on the results of that EEG and other testing by various doctors, Dr. Bertoldi opined appellant has cognitive difficulty that would be consistent with brain damage. (34 RT 5171.) For more confirmation Dr. Bertoldi ran a QEEG. This test takes the same data as an EEG and puts it in a computer for comparison to a normal data base then maps the difference in terms of color and gives a statistical deviation from normal. (34 RT 5182.) The findings of the QEEG were consistent with what Dr. Bertoldi saw on the EEG printout. (34 RT 5186.) When he read the routine

EEG he saw frontal slowing, but the results of the QEEG showed a higher degree of abnormality. (34 RT 5186-5187.)

Dr. Boone interviewed appellant when appellant was 35 years old and gave him certain objective standardized tests. (15 RT 2139-2140.) Appellant's IQ tested as average at about 90. (15 RT 2142.) Dr. Boone also tested appellant's ability in basic attention, mental speed, language, visual spacial skills, memory - both verbal and nonverbal - reading, math, and several tests that measure executive or problem solving skills. (15 RT 2143-2144.) The test results were consistent with appellant's IQ except in the area of thinking speed where appellant scored in the 48th percentile.

Thinking speed measures an individual's problem solving skills, reasoning and logic. The area of the brain where those skills reside are the frontal lobes. Most of appellant's four test scores involving thinking speed were very low. Essentially they show that he is very impaired. (15 RT 2144.) This area rates one's ability to face a problem situation, think of different strategies to solve the problem and figure out the best solution; it also measures the ability to think through consequences of behavior and the ability to quash a behavior that is not correct or appropriate to the situation. (15 RT 2148.) In these four tests, appellant scored in the second percentile (15 RT 2148, 2152-2153), the fifth percentile, the ninth to tenth percentile, and the fourth percentile. (15 RT 2149.) These scores were much lower than one would expect for appellant's IQ and much lower than his scores in all other areas. (15 RT 2149.) Thus, in his daily life, appellant would have a great deal of difficulty stopping a behavior that was not appropriate to the situation. (15 RT 2152.)

Moreover, Dr. Boone opined that although appellant obviously could make decisions, they would not necessarily be good decisions. In that regard, problem solving skills were most closely related to the front portion of the brain, the frontal lobes. (33 RT 5106.) People with frontal lobe damage have little executive control and have the highest scores in aggression, violence. (15 RT 2160.) If a person scores low on problem solving skills that person will have trouble thinking through consequences of behavior. Decisions will be impulsive, not empathetic. Moreover, a person with that kind of brain damage would have difficulty understanding the impact of his behavior on others and have trouble logically making plans and following through on those plans. (33 RT 5107.) Without fully functioning frontal lobes people don't really have a choice in terms of doing organized, willful, well planned behavior; they don't have the brain equipment to do that. (33 RT 5108.)

The consistent weaknesses in the problem solving area suggest to Dr. Boone there might be a dysfunction of the frontal lobes of appellant's brain. (33 RT 5123, 5131, 5133, 5140.)

While some people are born with frontal lobe damage the seizures themselves would not cause frontal lobe damage. Nevertheless, in Dr. Boone's view, whatever caused the seizures also interfered with the function of the frontal lobes. (15 RT 2162.)

More significantly, while appellant demonstrated goal oriented behavior by purportedly evading the police for three days (15 RT 2174), his behavior surrounding the offense was almost completely illogical. (15 RT 2174-2175.) The offense was committed with witnesses easily available

(15 RT 2179) and appellant left lots of clues making it easy for the police to find him. (15 RT 2192.)

Dr. Vicary testified that appellant suffers from bipolar disorder. (18 RT 2475.) Bipolar disorder is very similar to explosive disorder and appellant could have both. (18 RT 2477.) Appellant probably has an anti-social personality disorder as well. (18 RT 2556.)

Appellant's family history corroborates the diagnosis of bipolar disorder. The overlap between alcohol and drug abuse and bipolar disorder is 60-70%. Bipolar individuals are hyper sexual; appellant's grandmother was hyper sexual. (18 RT 2504.) Appellant's paternal uncle spent most of his life in a psychiatric hospital (2504-2505), his father was alcoholic, paranoid, explosive and abusive to his wife and children. (18 RT 2505.)

Dr. Vicary also opined that the tests done by Drs. Boone, Bertoldi, and Wu confirmed brain damage consistent with someone with bipolar disorder. (18 RT 2508-2509.) Further, Dr. Vicary administered the Millon test to appellant and Dr. Mohandie gave appellant the MMPI[57] test. According to Dr. Vicary, both tests showed appellant had a brain disorder of moderate to severe extent with indications of irritability, explosiveness, aggressiveness, paranoia and problems in interpersonal relationships. (19 RT 2510-2511.)

Dr. Niedorf formed the opinion that appellant suffered from intermittent explosive disorder. The disorder is a condition usually linked to brain dysfunction, familial dysfunction and social dysfunction. It is characterized by actions, often destructive or violent which can come on

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[57] MMPI (Minnesota Multiphasic Personality Inventory)

suddenly and have a characteristic of not being inhibited or prohibitive. (17 RT 2327-2328.) Dr. Niedorf explained that the EEG results found by Dr. Bertoldi corroborate the existence of intermittent explosive disorder - that is, the slow waves, signs of immaturity, and failure of development. (17 RT 2335-2336.) Tests done by Drs. Boone and Wu also corroborate brain damage. (17 RT 2337.) Dr. Boone's work shows the absence of executive functions, that is, the functions that either initiate behavior or stop or inhibit behavior. (17 RT 2337.) These findings corroborate the diagnosis of intermittent explosive disorder because they show that parts of appellant's brain are not able to inhibit rage or violence once those emotions get started. (17 RT 2339.)

There were four different physical reports of physical manifestations that corroborate the diagnosis of intermittent explosive disorder: the Loma Linda report, Dr. Bertoldi's report, Dr. Boone's report and Dr. Wu's report. (17 RT 2339.) Indeed, a PET scan done by Dr. Wu confirmed a diagnosis of brain damage in the frontal area and in the temporal area of the brain. (18 RT 2509.) The scan showed an abnormality consistent with brain damage and bipolar disorder. (18 RT 2510.) A fifth thing that corroborated Dr. Niedorf's diagnosis was the initial treatment appellant was given to handle the Jacksonian seizures. (17 RT 2347.) When appellant received anti-manic medications in prison he improved to the point he could reflect on his behavior and even describe it. (17 RT 2347.)

In that regard, Patton State hospital records show that in April 1993 appellant was diagnosed with major depression with psychotic features. (17 RT 2395-2396). In October 1995 he was diagnosed with bi-polar disease.

(17 RT 2396.) In July 1996 he was diagnosed as schizophrenic, bipolar type. In Atascadero in 1997, 1998, 1999 and 2000, appellant was diagnosed with depressive disorder, seizure disorder, and a major mental disorder. (17 RT 2397.)

While the defense experts conceded that appellant could probably malinger, Dr. Vicary opined that if appellant was a fake, given the prescribed medications he was given at Atascadero and Vacaville he would have been under the influence and unable to speak. (18 RT 2479-2480.)

The prosecution experts took a somewhat different view. Dr. Griesemer opined that although appellant clearly suffered from a form of epilepsy as a child, his evaluation was that it was a "benign" epilepsy that was probably genetic in origin and appellant simply outgrew it. (16 RT 2294-2308.)[58] While the EEG tracings from the 1970's showed fairly dramatic abnormality, those abnormalities do not correlate well with behavior. (16 RT 2300-2304.) That is, a person with these abnormalities might exhibit fairly normal behavior. (16 RT 2312.)

Prosecution expert Dr. Mohandie did not find evidence of any major mental disorder. Instead, he would label appellant as having anti-social personality disorder with narcissistic and borderline traits. (18 RT 2601-2602, 2608, 2651.) While conceding that bipolar disorder and anti-social personality disorder are not necessarily mutually exclusive (18 RT 2612), nevertheless, his examination of the evidence convinced him that appellant

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[58] As noted previously, however, the prosecution did not present any evidence of other members of appellant's genetic lineage who might have suffered from epilepsy.

was simply a malingerer. (18 RT 2601.) While it was not impossible that appellant could suffer from a major mental illness, Dr. Mohandie could not properly evaluate appellant for such an illness because appellant continually exaggerated the severity of his symptoms. (18 RT 2622, 2628.)

As for the diagnoses of myriad other professionals including prison physicians who examined appellant and found major mental disorders, Dr. Mohandie concluded that they were simply misled by appellant's ability to malinger and fake the symptoms. (18 RT 2626, 2631.) Regarding the significantly abnormal EEG and PET scans and their relationship to appellant's behavior, Dr. Mohandie opined that these diagnostic tools were simply not reliable science. (18 RT 2626, 2631.)

Finally, as explained in lengthy detail in the statement of facts, appellant's brain damage and its effect on his behavior was apparent throughout his life. Appellant's mother, siblings and neighbors recounted many instances where appellant was beaten by his father, bullied by schoolmates, experienced suicidal ideations, and physically assaulted family members for no apparent reason.

Appellant Is Severely Mentally Ill.

It could be argued that since the prosecution experts did not find that appellant was insane and that he suffered from a personality disorder, there is at least a prima facie showing that he was not severely mentally ill at the time of the offense. Such an argument, however would not be persuasive for four reasons:

First appellant has a long and documented history of severe mental illness. These diagnoses ranged from epilepsy as a child to a diagnosis of

major depression with psychotic features in 1993 (17 RT 2395-2396), a 1995 diagnosis of bi-polar disease (17 RT 2396), a 1996 diagnosis of schizophrenia, bipolar type and a diagnosis of depressive disorder, seizure disorder, and a major mental disorder in the years 1997, 1998, 1999 and 2000. (17 RT 2397.) Moreover, these latter diagnoses were made primarily by jail and prison physicians - "disinterested state employees" - a status that gives their conclusions added weight. (See *Strickland v. Francis, supra,* 738 F.2d at pp. 1553-1554.) Even the minority of doctors in the institutions who did not believe appellant had a major mental illness nevertheless noted appellant's lifelong symptoms of mental illness, such as rapid mood swings, hearing voices, suicidal ideation, and that he slit his wrists on 20 occasions. (18 RT 2581.)

Most significantly, however, even prosecution expert, Dr. Mohandie conceded that appellant could suffer from a major mental illness; he simply could not diagnose it apart from the personality disorder. (18 RT 2602, 2622, 2628.)

Second, the fact that appellant was goal oriented does not preclude a diagnosis of mental illness. Even insane persons can demonstrate goal oriented behavior. (See, e.g., *People v. Duckett, supra*, 162 Cal.App.3d at p. 1121.) Moreover, Dr. Boone noted that while appellant demonstrated goal oriented behavior by purportedly evading the police for three days (15 RT 2174), his behavior surrounding the offense was almost completely illogical. (15 RT 2174-2175.) The offense was committed with witnesses easily available (15 RT 2179) and appellant left lots of clues making it easy for the police to find him. (15 RT 2192.)

Third, the fact that the abnormal diagnostic tests do not always correlate with or demonstrate a particular behavior does not rule out the likelihood that appellant's abnormal brain activity led to the behavior here. As appellant explained in Issue V., although the prosecution's experts asserted that abnormal EEGs and QEEGs are not predictive of specific behavior, that assertion is only partially correct. Appellant argued by analogy that a blood alcohol level of .31 may not be accurately predictive of a specific abnormal driving characteristic such as speeding or weaving through lanes of traffic. Nevertheless, it is beyond dispute that such a high blood alcohol level has a high correlation with impaired and abnormal driving generally. Thus, a high blood alcohol level is an extremely useful tool in assessing the reasons underlying abnormal driving behavior.

Similarly, an abnormal EEG or QEEG may not be 100% accurate in predicting a specific abnormal behavior such as confused thinking or irrational fear. Nevertheless, there is likely to be a very high correlation between abnormal brain activity and abnormal behavior. It is likely for that reason that, as Dr. Griesemer conceded, clinical practitioners use the QEEG in assessing and treating abnormal behavior. (16 RT 2315.) Further, Dr. Griesemer's opinion fails to account for the additional objective tests done by Dr.'s Boone and Wu showing organic brain dysfunction irrespective of whether it was a byproduct of his youthful epilepsy.

Finally, no prosecution expert fully came to grips with the issue of appellant's medications. As Dr. Vicary pointed out, if appellant was faking mental illness, given the high doses of potent medications he was prescribed at Atascadero and Vacaville, he would have been virtually

comatose. (18 RT 2479-2480.) Additionally, any person who receives these drugs has to have his or her blood repeatedly tested to be sure that the high doses administered are not toxic or fatal. The blood tests in appellant's medical records confirm that appellant took these high doses. (18 RT 2481.)

Moreover, as appellant also explained in issue V., Dr. Mohandie did not even make a credible attempt to respond to this evidence. First, he simply averred that he was not authorized to prescribe theses kinds of drugs. Without any further explanation, the apparent inference the jury was to draw was that he was not totally familiar with them. Nevertheless, when pressed further, he suggested that appellant could have cleverly avoided taking these drugs, thus fooling the medical personnel even for a period as long as the 15 years encompassed by his medical records. (18 RT 2645-2646.) When advised that blood tests in the medical records proved that appellant was in fact taking these anti-psychotic drugs at these high doses, Dr. Mohandie unreasonably asserted that such information would not change his opinion that appellant was nothing more than a malinger. (18 RT 2647.)

Significantly however, nothing in Dr. Mohandie's testimony showed how appellant might have faked the blood test results that showed he ingested large doses of these medications. Moreover, Dr. Mohandie never offered any further explanation concerning how appellant could tolerate those high doses of anti-psychotic medication if he did not have a major mental illness.

Given this evidence, Dr. Mohandie's opinion that appellant did not

suffer from any major mental illness is simply not credible. His obdurate refusal to acknowledge the actual nature of appellant's clinical history, or even offer a plausible explanation for appellant's tolerance for the large doses of anti-psychotic medication completely undermines his diagnosis of antisocial personality disorder. As Justice Mosk observed in *People v. Samuel*, "'[t]he chief value of an expert's testimony ... rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusions.'" (*People v Samuel, supra*, 29 Cal.3d at p. 498; citations omitted; see also *People v. Drew, supra*, 22 Cal.3d at p. 350.)

Absent a credible diagnosis of malingering as a primary cause of appellant's behavior instead of a secondary diagnosis, there is no evidence to dispute the defense showing that appellant suffered from organic brain dysfunction and that he had a major mental illness.

Applicable Law - Eighth Amendment

Disproportionate sentencing

Although the Eighth Amendment does not specifically prohibit disproportionate sentences nor does it contain an express mandate for individualized punishment, the Supreme Court has held that the cruel and unusual punishment clause of that Amendment bans sentences that are grossly disproportionate to the crime for which the defendant is convicted. (See, e.g., *Solem v. Helm* (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637].) Additionally, in *Woodson v. North Carolina* (1976) 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944] (followed in *Lockett v. Ohio* (1978) 438 U.S. 586, 603- 04, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973]), the Court set

forth the requirements of individualized sentencing:

> "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

(*Woodson*, 428 U.S. at 304, 96 S.Ct. at 2991.)

In that regard, the determination of the proportionality of a capital sentence cannot be based solely upon the magnitude of harm resulting from the offense "[f]or purposes of imposing the death penalty . . . punishment must be tailored to [a defendant's] personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801; see also *California v. Brown* (1987) 479 U.S. 538, 545[O'Connor, J. concurring] ["[P]unishment should be directly related to the personal culpability of the criminal defendant."].) Thus, in considering claims that the constitution bars the execution of particular categories of convicted murderers, the Supreme Court has always focused on the offenders' moral culpability and their degree of personal responsibility for the harm resulting from the offense.

This Eighth Amendment requirement is applicable to the States through the Fourteenth Amendment. (*Roper v. Simmons* (2005) 125 S. Ct. 1183, 1190; *Furman v. Georgia, supra,* 408 U.S. 238, 239 (per curiam); *Robinson v. California* (1962) 370 U.S. 660, 666-667.) In a series of cases beginning with *Gregg v. Georgia, supra*, 428 U.S. 153, the Supreme Court has applied that proportionality principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia*

(1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida, supra*, (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony-murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty for defendant under 18 - years old] and more recently *Kennedy v. Louisiana* (2008) 554 U.S. 407, ___, 128 S. Ct. 2641, 2660, 171 L. Ed. 2d 525, 550 [death penalty excessive for child rape] .)

In *Kennedy*, the Court also observed that the Cruel and Unusual Punishment Clause of the Eighth Amendment springs from the evolving standards of decency that mark the progress of a maturing society. That is, the standard for extreme cruelty "'itself remains the same, but its applicability must change as the basic mores of society change.' (Citation.)" (*Kennedy, supra*, at ____ U.S. ____; 128 S.Ct. at p. 2660.) Since punishment must be graduated and proportional to the crime, while informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (Citation) (*Kennedy, supra*, at ____ U.S. ____; 128 S.Ct. at p. 2660.) As noted above, those evolving standards of decency have already put the execution of juveniles, mentally retarded persons and the insane outside the pale of civilized behavior.

In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test,

asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia, supra*, 428 U.S. at p. 183.)

With respect to whether the death penalty comports with contemporary values, in *Graham v. Florida* (2010) ___ U.S. ____ , 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825, the United States Supreme Court explained the factors it considers. The Court noted that there are two general classifications. The first is a sentence to a term of years - a matter not applicable here. The second involves categorical rules against the death penalty. A subset of those cases turn on the offender's characteristics. (See e.g. *Roper v. Simmons*, *supra*, 543 U.S. 551,, and *Atkins v. Virginia*, *supra*, 536 U.S. 304.)

In cases involving categorical rules, the Court first looks to "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue. *Roper, supra*, at 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1." Then , "looking to 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' *Kennedy, supra,* at ___, 128 S. Ct. 2641, 171 L. Ed. 2d 525, the Court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution, *Roper, supra*, at 564, 125 S. Ct. 1183, 161 L. Ed. 2d 1." *(Graham , supra,* 130 S.Ct. at p. 2022.)

Fifth and Sixth Amendment

If appellant's significant mental impairments make him identically situated in all relevant respects to persons whose youth or mental retardation categorically exempt them from the imposition of a sentence of death, then appellant's death sentence also violates the equal protection and due process clauses of the Fifth, Sixth and Fourteenth Amendments.

DEATH PENALTY INAPPROPRIATE FOR SEVERE MENTAL ILLNESS.

It is practically hornbook law that the Constitution requires that the death penalty be reserved for the offenders with the greatest moral culpability. (*Atkins v. Virginia, supra*, 536 U.S. at p. 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335.) The whole notion of moral culpability is premised on the assumption that persons have the free will to "steer between lawful and unlawful conduct." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) When the law attempts to deal with persons whose behavior is largely controlled by mental afflictions, however, this underlying philosophical assumption is severely challenged.

Penological purposes - Deterrent and Retribution

As noted above, there is a two part test for determining if the death penalty is appropriate for a particular offense or offender. Does the death penalty comport with contemporary values and does it serve one or both of two penological purposes, retribution or deterrence. For ease of understanding, appellant will deal with these matters in inverse order.

In *Atkins v. Virginia,* the United States Supreme Court reasoned that

executing the mentally retarded does not serve either of the two purposes recognized as the justification for the death penalty, retribution and deterrence. The Court held that mentally retarded individuals, "[b]ecause of their impairments, ... have diminished capacities" and noted "their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." (*Id*, at p.318.) Among the "diminished capacities" of mentally retarded persons noted by the Court was the capacity "to control impulses." (*Ibid.*) The Court noted it was these "cognitive and behavioral impairments that make these defendants less morally culpable." (*Id.*, at p. 320.)

Further, the Court held that because retribution depends on culpability, the lesser culpability of the mentally retarded does not merit the death penalty as an appropriate form of retribution. The court also held that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation, that exempting the mentally retarded from the death penalty will not affect the cold calculus that precedes the decision of other potential murderers, and that that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. (*Atkins v. Virginia, supra*, 536 U.S. 304, 319.)

The Court applied similar reasoning in *Roper v. Simmons, supra.* In *Roper* the Court's reasoning rested on three rationales. First, in persons under age 18, a "lack of maturity and ... underdeveloped sense of responsibility.... often result in impetuous and ill-considered actions and decisions." (*Roper v. Simmons, supra*, 543 U.S. at p. 569, citations omitted.) Second, juveniles "are more vulnerable or susceptible to negative influences

and outside pressures, including peer pressure." (*Ibid.*, citations omitted.) Juveniles "have less control ... over their own environment." (*Ibid.*, citations omitted.) Therefore, they "lack the freedom that adults have to extricate themselves from a criminogenic setting." (*Id.* at p. 569, quotations omitted].) Third, the Court acknowledged that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (*Id.* at p. 570, citations omitted; *Thompson v. Oklahoma, supra,* 487 U.S. 815, 834, quoting *Eddings v. Oklahoma* (1982) 455 U.S.104 at pp. 115-116 ["But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"]; see also *Johnson v. Texas* (1993) 509 U.S. 350, 367 ["A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions"].)

Similar to the rationales in *Atkins* and *Roper*, execution of the severely mentally ill does not serve the penological purpose of either deterrence or retribution. Deterrence is of little value as a rationale for executing offenders with severe mental illness when they have diminished impulse control and planning abilities. Further, since retribution is based on moral culpability, under the evolving stands of decency, the death penalty for persons who are volitionally impaired is an inappropriate form of retribution.

In that regard, although some juries may well seek to punish an offender by death despite the presence of a mental illness impairing

self-control does not establish a higher degree of culpability. Instead, allowing a jury to emotionally respond to the horrific details of a sexually violent case and return a death verdict in spite of clear evidence that the person is volitionally impaired is exactly the type of arbitrary result condemned by Eighth Amendment jurisprudence. "In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be 'freakish'". (*Kennedy v. Louisiana, supra*, 128 S.Ct. 2641, 2661, citing *Furman v. Georgia, supra,* 408 U.S. 238.)

The Death Penalty for the Severely Mentally Ill Does Not Comport with Contemporary Values

The second part of the test is whether capital punishment comports with contemporary values.

While there is no legislative enactment which specifically prohibits the execution of the severely mentally ill, that omission is not fatal to appellant's argument. While legislative enactments may be persuasive, nevertheless, "[t]here are measures of consensus other than legislation." *(Kennedy, supra,* at ___, 128 S. Ct. 2641, 2657, 171 L. Ed. 2d 525, 547.)

For instance, a Gallup Poll conducted in October, 2003 found that almost 75 percent of those surveyed opposed executing the mentally ill. (See Kevin Drew, *Arkansas Prepares to Execute Mentally III Inmate*, CNN.com, Jan. 5, 2004.)

The legal community has examined the issue and weighed in as well. After forming a task force to study the issue of executing the mentally ill,

the American Bar Association adopted a resolution opposing the execution of the severely mentally ill. (See ABA Report with Recommendation No. 122A, Adopted August 2006; see also, Ronald S. Honberg, The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses, 54 U.L.Rev. 1153 (2005) (describing how *Atkins* principles concerning reduced culpability might apply to the severely mentally ill).)

Additionally, virtually every major mental health association in the United States has published a policy statement advocating either an outright ban on executing all mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented. The organizations that take positions against execution of mentally ill offenders include, but are not limited to, the American Psychiatric Association (see Recommendations and Report on the Death penalty and Persons with Mental Disabilities; Mentally III Prisoners on Death Row (approved December 2005); Moratorium on Capital Punishment in the United States (approved October 2000), APA Document Reference No. 200006); the American Psychological Association (see Resolution on the Death Penalty in the United States); the National Alliance on Mental Illness (see Public Policy Platform of the National Alliance on Mental Illness (8th ed. 2006) and the National Mental Health Association (see Death Penalty and People with Mental Illness (approved March 2001).) Capital prosecution of volitionally incapacitated offenders carries heightened risks of unjustified executions.

Thus the weight of national consensus dictates that petitioner's death sentence constitutes cruel and unusual punishment in violation of the

Eighth Amendment, and must be vacated.

Prejudice from Allowing the Death Penalty in this Case

Procedures authorizing the death penalty for volitionally incapacitated defendants create a constitutionally unacceptable risk that the penalty will be imposed in spite of factors which may call for a less severe punishment. Appellant testified in his own defense here and volitionally incapacitated defendants typically are poor witnesses and their demeanor may create an unwarranted impression of lack of remorse for their crimes. Certainly the prosecution argued that appellant was not a credible witness.[59]

Any defendant whose mental illness at the time of the offense rendered him or her unable to conform conduct to the requirements of the law is a defendant suffering from severe mental illness. The effects of severe mental illness in defendants such as appellant sharply constrict the ability to give meaningful assistance to counsel in proceedings leading to the determination of culpability, eligibility for the death penalty, and the appropriate penalty. Mentally ill, neurocognitively impaired defendants are significantly less able than other defendants to assist their attorneys in presenting factors which may call for a reduction in the level of legal culpability and/or a less severe penalty because they are unable to appreciate, recall, assess and meaningfully communicate information

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[59] The prosecutor told the jury "I would submit to you that when he took the stand and he kind of blubbered a little bit, he looked down and kind of cried when the defense asked him did you intend to kill Tammy, and he kind of waited and waited and no, you know, kind of blubbering.

That's for purposes of getting your sympathy. That's not because he didn't remember what he did, and you know that. That was his excuse. " (13 RT 1866.)

necessary to question the accuracy of aggravating details of the crime or identify the existence of mitigating circumstances. (See, e,g., Christopher Slobogin, *What Atkins Could Mean/or People with Mental Illness*, 33 N.M. L. Rev. 293, 297 (2003) ("The same types of assertions that *Atkins* and *Thompson* made about people with retardation and juveniles can be made about people with significant mental illness."); see also *id.* at 303 ("[E]xecution of people with mental illness should not be permitted unless there is good reason to believe that people with mental illness are more culpable or deterrable than people with mental retardation or juveniles. That demonstration ... cannot be made when mental illness is equated with psychosis at the time of the crime."); Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 St. Louis U. Pub.L.Rev. 283, 290 (2006) ("Generally, [the psychotic mentally ill] are more impaired in their ability to avoid committing serious crimes than are juveniles under age eighteen, whom *Roper* categorically exempts from capital punishment.").)

Mental illness that disables a defendant from controlling his own conduct can act as a two-edged sword in penalty phase deliberations by increasing the likelihood that the aggravating impact of apparent future dangerousness will be considered and inappropriately weighed by the jury. A defendant's serious mental illness is that fact about a defendant which unfairly engenders the greatest fear of future violence, and yet does not reflect moral culpability on his part. (See *State v. Ketterer* (Ohio 2006) 855 N.E.2d 48, 87 ("The time has come for our society to reexamine the execution of persons with severe mental illness."); see also *People v. Danks*

(2004) 32 Cal.4th 269, 322 (conc. & dis. opn. of Kennard, J.) (acknowledging that while the disability at issue in *Atkins* was mental retardation other mental impairments such as schizophrenia may be equally grave because they involve the same "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.").)

While appellant has not been adjudged insane in the legal sense, he was nonetheless acting under the compulsion of a mental affliction not shared by the public generally. Like the defendant in *Atkins v. Virginia*, *supra*, appellant exhibited a diminished capacity to understand and process information, to abstract from mistakes and learn from experience, to engage in logical reasoning, or to control his impulses. Nonetheless, appellant is being punished as severely as if he premeditated and deliberated a homicide. This sentencing scheme makes no sense in light of appellant's limited ability to control his medical condition.

Moreover, because appellant was unable to control his conduct, for which he was convicted and sentenced to death, appellant's execution is barred by the Eighth Amendment's requirement of proportionality. The imposition of the death penalty on offenders so mentally ill that they are unable to control their behavior offends a longstanding collective judgment of the American people, as expressed in their laws and sentencing practices. Such sentences are grossly disproportionate to such offenders' moral culpability, they serve no permissible penological goal, and they carry an enhanced risk of error. Because such an anomalous sentence was imposed

upon appellant, the Cruel and Unusual Punishment Clause of the Eighth Amendment requires that the sentence be vacated.

Further, because appellant's significant mental impairments make him identically situated in all relevant respects to persons whose youth or mental retardation categorically exempt them from the imposition of a sentence of death, petitioner's death sentence also violates the qual protection and due process clauses of the Fifth, Sixth, and Fourteenth Amendments.

VIII.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

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.)[60] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every

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

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 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 § 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 § 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.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. 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 457, 468.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make <u>all</u> 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[61] 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.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

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

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. (See Section E. of this Argument, *post*).

B. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.*

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." 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.[62] 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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[62]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

weeks after the crime,[63] or having had a "hatred of religion,"[64] or threatened witnesses after his arrest,[65] or disposed of the victim's body in a manner that precluded its recovery.[66] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary 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, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is

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

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

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

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

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 explained 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. ___ [166 L. Ed. 2d 856, 127 S. Ct. 856], [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*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.[67] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (37 RT 5792), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its severity 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.[68] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is

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

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

the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[69]

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. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow, supra,* 30 Cal.4th 43, 126, fn. 32; *People v. Prieto, supra,* 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

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

The U.S. Supreme Court explicitly rejected this reasoning in

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

Cunningham.[70] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*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

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[70] *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 at 1253; *Cunningham, supra,* at p.8.)

> 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, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (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.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th 226 at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[71] 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

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[71] 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."

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." 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*, *supra*, 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 factfinding 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* (AZ 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State, supra,* 59 P.3d 450.[72])

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"].)[73] As the high court stated

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[72] 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).

[73] 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

in *Ring, supra*, 122 S.Ct. at pp. 2432, 2443:

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

The 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.

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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.430 at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

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, supra*, 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; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer*, *supra*, 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

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*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

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. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision 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. 538 at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 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." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39

Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[74] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957 at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v.*

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[74]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.)

Arizona, *supra*), 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. Demetroulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 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, supra,* 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. at p. 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 can *not 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. (See *People v. Fierro* (1991) 1 Cal.4th 173 at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the

Eighth Amendment.

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. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant including assaults on prior girlfriends and family members.

The U.S. Supreme Court's recent decisions in *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 an unanimous jury. Appellant's jury was not instructed on the need for such an 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, supra*, (1988) 486 U.S. 367; *Lockett v. Ohio, supra,* 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.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304;

Zant v. Stephens, supra, 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, supra,* 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 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, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*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 at pp. 727-729.) This Court

recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 762, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is 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. at p. 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. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential

treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. 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*,[75] as in *Snow*,[76] this Court analogized the process of

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[75] "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 at p. 275; emphasis added.)

[76] "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*

determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Penal Code sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, 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."[77]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree

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court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

[77] 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.

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 loss of life; they violate equal protection of the laws.[78] (*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. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra,* 897 F.2d 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

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

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 Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

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* (1895) 159 U.S. 113 at p. 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, supra,* 536 U.S. 304 at p. 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. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316.) Furthermore, since the law of nations now recognizes the impropriety of capital punishment as a regular punishment, it is unconstitutional in this country since international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty

to only "the most serious crimes."[79] 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, for the reasons set forth above, the very broad death scheme in California and death's use as regular punishment violates both international law and the Eighth and Fourteenth Amendments. Therefore, appellant's death sentence should be set aside.

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

IX.

IF ANY COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

The jury made its decision to impose a death judgment at a time when appellant had been convicted of one count of first degree murder, one count or torture, one count of mayhem and one count of rape. Further, the special circumstances of torture, mayhem and rape were found true. If this Court reduces or vacates any of the counts or special circumstances, the matter should be remanded for a new sentencing hearing to permit the jury to reconsider its death judgment. (See *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849 (court found prejudice, noting that three of the four special circumstances the jurors found to be true were invalidated on appeal); *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1060 (same).)

Section 190.3 codifies the factors that a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's penalty phase jury was instructed that it "shall" consider and be guided by the presence of enumerated factors, including, *inter alia*, "the circumstances of the crime of which the defendant was convicted." (Cal. Pen. Code § 190.3(a).)

A reduction or reversal of any the charges would clearly fall within the rubric of factors permissibly considered by appellant's jury in setting the penalty of death in this case. All the special circumstances

were critical to the prosecution's call for the death penalty in this case. Compare *People v.Sanders* (1990) 51 Cal.3d 471, 521("the prosecutor did not urge the jury to impose the death penalty merely because the crime could be categorized as heinous or atrocious, or because of the sheer number of special circumstances) and *People v. Silva* (1988) 45 Cal.3d 604, 635 ("we conclude a reasonable juror would not have been swayed by abstract concepts of 'heinous[, atrocious or cruel]' ... but would instead have focused on the actual circumstances of the offense which formed the foundation for finding those special circumstances to be true").

The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article 1, section 17 of the California Constitution, appellant must be granted a new penalty trial, to enable the fact-finder to consider the appropriateness of imposing death. (U.S. Const. amend. VIII; Cal. Const. art. 1, § 17.) Moreover, in *Ring v. Arizona*, *supra*, 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi v. New Jersey, supra* 530 U.S. 466, to capital sentencing procedures and concluded that specific findings the legislature made prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In this State, jurors have two critical facts to determine at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists, and (2) if one or more aggravating circumstances

exists, whether they outweigh the mitigating circumstances. If this Court reverses or reduces any of the convictions or special findings, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt. This Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" (See *Ring,* 536 U.S. at 584, quoting *Apprendi,* 530 U.S. at 483.)

Accordingly, because jury findings regarding the facts supporting an increased sentence is constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed or reduced.

X.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 (en banc) ("prejudice may result from the cumulative impact of multiple deficiencies"); see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637 at pp. 642-643 (cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"); *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. *(Chapman*, 386 U.S. at 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 (applying the Chapman standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors).)

The errors in the guilt phase included an *Ireland* merger violation, insufficient evidence of torture, insufficient evidence of rape, insufficient evidence of first degree premeditated murder, insufficient

evidence to show the defendant was sane at the time of the offense, and improper admission of the gang/tattoo evidence.

The cumulative effect of these guilt phase errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. amend. XIV; Cal. Const. art. 1, §§ 7 & 15.) Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ("even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"); see also *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-76 (reversing heroin convictions for cumulative error); *People v. Hill* (1998) 17 Cal.4th 800, 844-45 (reversal based on cumulative prosecutorial misconduct); *People v. Holt* (1984) 37 Cal.3d 436, 459 (reversing capital murder conviction for cumulative error).)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 (court considers guilt phase error in assessing prejudice in the penalty phase).) In this context, this Court has recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-37; see also *People v. Brown, supra,* 46 Cal.3d 432, 463 (error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the error affected the jury's verdict); *In re Marquez* (1992) 1 Cal.4th 584, 605 (an error

may be harmless at the guilt phase but prejudicial at the penalty phase).)

The errors committed at the penalty phase of appellant's trial include the gang/tattoo evidence that was presented at both phases of trial, insufficient evidence to support a finding that the mayhem and torture special circumstances were separate and not "incidental" to the homicide, the Constitutional violation in executing the severely mentally ill and the various flaws in California's death penalty statute. None of these errors contributed to the reliability of the death judgment.

Thus, reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399 (reversal required in absence of showing that the error was harmless or had no effect on the jury's verdict); *Skipper v. South Carolina* (1986) 476 U.S. 1, 8 (error may have affected the jury's decision to impose death); *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341(penalty reversed because Court could not say that the error had no effect on the verdict).)

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

CONCLUSION

For the reasons set forth herein, appellant's convictions and sentence to death must be set aside.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I am the attorney for appellant Troy Lincoln Powell. Based upon the word-count of the Word Perfect 12.0 program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, is 75,857 words. (California Rules of Court, rule 8.630 (b)(1)(A).)

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

Date: September 27, 2012

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STATE OF ARIZONA, COUNTY OF YAVAPAI

I, Nancy D. Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 1200, Prescott, AZ 86304. On September 27, 2012 I served the within

Appellant Powell's Opening Brief

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I declare that the document was printed on recycled paper. Further, I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on September 27, 2012, at Prescott, Arizona.

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