IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

BILLY JOE JOHNSON,

Defendant and Appellant.

Case No. S178272

Orange County Superior
Court Case No. 07CF2849

DEATH PENALTY CASE

APPELLANT'S OPENING BRIEF

On Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Orange

Honorable Frank F. Fasel, Judge Presiding

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

The Orange County District Attorney's Office filed a felony complaint on August 23, 2007, charging appellant Billy Joe Johnson in Count 1 with the March 8, 2002, murder (Pen. Code, § 187, subd. (a))[1] of Scott Miller. The complaint also charged appellant in Count 2 with conspiracy to commit the same murder (§§ 182, subd. (a)(1) & 187, subd. (a)) and in Count 3 with accessory after the fact for harboring and concealing two other participants in the same murder after they were charged (§ 32). Special circumstances of committing a prior murder (§ 190.2, subd. (a)(2)), murder by lying-in-wait (§ 190.2, subd. (a)(15)), and murder to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)) were alleged on

[1] Unless otherwise indicated, all further statutory references shall be to the Penal Code.

the murder count. A sentence enhancement of a principal discharging a firearm causing death (§ 12022.53, subds. (d) & (e)) was alleged as to the murder and conspiracy to murder counts, and a criminal street gang enhancement (§ 186.22, subd. (b)(1)) was alleged as to all counts. Also alleged were three prior "strike" convictions (§ 667, subds. (d) & (e) & § 1170.12, subds. (b) & (c)(2)(A)), three prior serious felony convictions (§ 667, subd. (a)), and one prior prison term (§ 667.5, subd. (b)). (CT 1:1-6.)[2] On October 26, 2007, waived a preliminary hearing and was held to answer on all charges and special allegations. (CT 1:40-41.)

The information on which appellant was tried was filed November 1, 2007, and contained the same charges and special allegations against appellant. (CT 1:54-59.) Appellant pleaded not guilty to all charges and denied the enhancement and special circumstance allegations. (CT 1:60.)

Jury selection commenced on October 5, 2009, and continued through October 6, 2009, when a jury was impaneled. (CT 15:33800-3803, 3804-3810.) Jury deliberations at the end of the guilt phase trial commenced and concluded on October 14, 2009, at which time the jury found appellant guilty of first degree murder, conspiracy to commit murder, and being an accessory after the fact. The jury also found true the lying-in-wait and criminal street gang special circumstance allegations as to the murder count. The enhancement allegations for principal discharging a firearm causing death were found true as to the first degree murder and conspiracy to commit murder counts and the criminal street gang enhancement allegations were found true as to all three counts. (CT 17:4527-4533.)

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[2] The Clerk's Transcript will be thus cited and will be formatted "CT VOLUME:PAGE." In like manner, the one volume "Supplemental Clerk's Transcript on Appeal Re Accuracy" will be cited "SCT" and formatted without a volume number, and the Reporter's Transcript will be cited "RT" and will be formatted "RT VOLUME:PAGE."

On October 19, 2009, appellant waived a jury trial solely on the prior murder special circumstance allegation and, after a court trial, the trial judge found the allegation to be true. The penalty phase trial began on the same day. (CT 18:4571-4574.) Jury deliberations commenced October 28, 2009, and ended the following day with a verdict of death. (CT 18:4759-4761, 4991-4992.)

On November 23, 2009, the trial court denied appellant's automatic motion for modification of the death verdict. The court imposed a judgment of death on the murder count. The court also sentenced appellant on the enhancements on Count 1, but stayed those sentences because the facts underlying the enhancements were relied upon in denying the motion to modify the death verdict. The court additionally sentenced appellant on the conspiracy to commit murder and accessory after the fact counts, together with the enhancements on those counts, staying the sentences on the conspiracy count pursuant to section 654 and on both counts because the court relied upon them in denying the motion to modify the death verdict. Appellant was ordered to pay victim restitution in the sum of $6,541.25, a restitution fine of $5,000, a criminal conviction assessment of $30 per count of conviction, and a court security assessment of $30 per count of conviction. Appellant was not awarded any custody credit for time served. The trial judge granted the prosecutor's motion to dismiss the prior strike, prior serious felony, and prior prison term allegations. (CT 20:5050-5062, 5095-5096; RT 9:2833-2834.)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. GUILT PHASE

A. EVENTS BEFORE THE SHOOTING

During the first months of 2001, a southern California television station, Fox 11, aired two news segments reporting on the activities of the white supremacist prison gang Public Enemy Number One, or "PEN1." During the segments, a gang member was interviewed and spoke about the gang. Although the gang member was not identified in the segments and the station had disguised his face and voice, other members of the gang recognized the man who appeared on the segments as Scott Miller, a gang member also known as "Scottish." (SCT 99-108; RT 5:1895.)

On March 8, 2002, a man named Johnny Raphoon threw a birthday party for himself at his home in Costa Mesa, California. Several members and associates of the PEN1 gang attended Raphoon's party. Among them were Miller and appellant, who was also Raphoon's cousin. (RT 4:1542-1544, 1546-1548, 1553.)

Andrea Metzger, a drug user who lived on the streets in Costa Mesa, attended the party. She had known appellant for about 10 years and also knew Miller. (RT 4:1540-1542.) Metzger saw Miller and appellant talking and laughing together at the party and spoke with both of them. She recalled Miller joking with appellant that Miller would have to keep his guard up. (RT 4:1542-1544, 1546-1548, 1553.) At about 8:00 or 9:00 p.m., Metzger left the party with appellant in appellant's truck. They had sex and appellant dropped Metzger off in a parking lot. She did not see appellant again that night. (RT 4:1549-1550.)

Shirley Williams also attended the party.[3] She had been friends with appellant for about 15 years. She had also dated Miller earlier in the year, but had only known him for a short period. (RT 4:1556, 1563.) Williams arrived at Raphoon's birthday party at about 10:00 p.m. and saw Miller there, but left after about 15 or 20 minutes with a friend to buy drugs. When she returned to the party at about 11:00 p.m., Miller was no longer there. (RT 4:1557-1559.) Williams had sex with appellant at the party, then left with him at about 1:00 a.m. She spent the night with appellant, and eventually they got a hotel room together and spent most of the weekend with each other. (RT 4:1559-1562.)

Marnie Simmons had dated Miller, known as "Scottish," for about one year, breaking up with him in early 2002. On more than one occasion while they were dating, Miller had told Simmons he was concerned for his safety because of the Fox 11 news segment. After they broke up, Simmons continued to get telephone calls from him. (RT 4:1530-1531, 1537.) Simmons had known appellant for about the same length of time she knew Miller. (RT 4:1532-1533.)

At about 10:30 p.m. on the evening of March 8, Miller left a voice message for Simmons in which Miller sounded concerned. A voice Simmons heard in the background of the recording could have been appellant's voice. (RT 4:1533, 1535, 1538.)

B. SHOOTING OF SCOTT MILLER

In March, 2002, Christina Hughes and her young son lived in a two story apartment unit at 1800 West Gramercy Avenue, in Anaheim. North of the apartment was a fenced area to a back alley, and north of the alley was a

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[3] At the time of her testimony, Williams was a state prison inmate, in custody on an unrelated case. (RT 4:1555.)

flood control channel. (RT 3:1395, 1398-1399.) Hughes' best friend "Chucky" was a PEN1 associate and in custody. About a month earlier, Hughes had met a woman named Tanya Hinson, and through Hinson she also met two PEN1 gang members, Michael Lamb and Jacob Rump. Hinson, Lamb and Rump frequented Hughes' apartment on a regular basis. (RT 3:1397-1399, 1401-1402.)

On March 8, 2002, Lamb called Hughes and asked if Hinson was with her. Hughes told Lamb that Hinson was not there and Lamb told her it was important that Hinson call him when she arrived. When Hughes later saw Hinson, she told Hinson that she did not want company. (RT 3:1402-1403.)

However, shortly before 11:30 that night, Hughes came downstairs and found Hinson, Lamb and Rump on the first floor of the apartment. She told them to get out. Hinson said they were leaving and Hughes went back upstairs. (RT 3:1403-1404.) Minutes later, Hughes heard a gunshot coming from the alley. She checked on her son, then went outside. Hughes walked east down the alley with her friend Brenda, where they found the dead body of a man and a great deal of blood. They ran to the apartment of Brenda's boyfriend in the next apartment complex. Hughes did not recognize the man she observed on the ground. (RT 3:1405-1407, 4:1601.)

At about 11:30 p.m., Luis Mauras was at home at 1800 Greenleaf Avenue, in Anaheim. The window of his condominium looked out on the flood control channel 50 to 100 yards away, and West Gramercy Avenue was on the other side of the channel. (RT 3:1388-1390.) As he prepared a snack, Mauras heard a single gunshot followed 15 or 20 seconds later by the sound of screeching tires. (RT 3:1390-1391.)

The police found Scott Miller's body lying face down in a part of the alley near the trash area of the condominium complex. A pool of blood surrounded his head. A nine millimeter casing was found fifteen feet from the

body in the center part of the alley. There were tire impressions in the blood near the body that were not made by a police vehicle. (RT 3:1411-1415, 1417, 1431.) A bloody baseball type cap and Pepsi can were under the body, indicating that Miller had fallen where he was shot. (RT 3:1419-1421, 1431.)

An autopsy revealed a non-contact gunshot entry wound in the back of Miller's head. The bullet lodged just outside and above the right ear canal, but did not exit. The cause of death was the gunshot wound to the head with laceration of the brain. Miller likely lost consciousness immediately and died within minutes of the injury. (RT 3:1438-1440, 1443-1445, 1448.)

C. EVENTS AFTER THE SHOOTING

On March 9, 2002, appellant called Marnie Simmons and asked if Simmons had heard what happened. Appellant said, "Scott is no longer with us." Appellant said that if Simmons needed anything, he would be there for her. (RT 4:1536-1537.)

That same day, appellant spoke to a man named Donald McLachlan about the Miller killing.[4] McLachlan, a heavy drug user, had known both appellant and Miller for many years and considered appellant a very dear

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[4] At the time of his testimony, McLachlan was on parole. His last prison term had been for second degree burglary, and he was in-and-out of prison many times having been convicted of a few felonies. He also stole from people many times. (RT 4:1573, 1594.) He claimed not to be part of any prison gang, although he was previously into a white supremacist group and still sported a swastika tattoo. He claimed to have gotten out because he snitched and was in protective custody in prison. (RT 4:1573, 1587, 1594.) After giving the police some information in 2002, he was stabbed in Costa Mesa. (RT 4:1576.) When subpoenaed to testify by Lamb in his earlier trial, McLachlan wrote a letter to the prosecutor offering to help the family of Miller find closure, seeking something in return, but the prosecution did not offer McLachlan anything. (RT 4:1588, 1590, 1595-1596.)

friend. (RT 4:1573-1574, 1577.) Appellant told McLachlan that he drove with Miller to Anaheim after telling Miller that they were going to score drugs.[5] (RT 4:1578-1581, 1585.) Appellant said that he was walking next to Miller in an alley just before Miller was shot and when they heard footsteps from behind, Miller asked appellant, "Are those PEN1 guys?" Appellant said he introduced Lamb and Rump to Miller and that Miller appeared resigned to the idea something was going to happen to him. (RT 4:1581, 1592.) Appellant told McLachlan that Lamb shot Miller. He said that he, appellant, was upset with Lamb because Miller had been appellant's dear friend in the past, and appellant wanted Lamb to look Miller in the eyes before shooting and tell him, "You had a good run, you ran afoul of the rules, it is time to go." Appellant said he had words with Lamb about it. (RT 4:1582-1583.) Appellant claimed the reasons Miller had to be killed were the Fox 11 news segments and Miller's "actions" in the neighborhood. (RT 4:1583.)

D. APPREHENSION OF MICHAEL LAMB AND JACOB RUMP

On the afternoon of March 11, 2002, the police located a stolen car in the alley behind 318 South Melrose Street, Anaheim, and called for backup before approaching it. (RT 3:1451-1453.) While they were waiting, the car started moving, turned around, and double parked in front of 318 South Melrose Street. A heavily tattooed male came out of the apartment complex and got into the car. (RT 3:1455-1457.) The car then drove off, attempted to evade the police and a high speed pursuit started. (RT 3:1457-1461.)

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[5] According to McLachlan, Miller was "a dope fiend." (RT 4:1585.)

When the car turned off of Broadway onto Center Avenue, two men got out and ran into an apartment complex. The police chased them to a path that led to two apartments on the ground floor and two apartments up a flight of stairs. (RT 3:1461-1464, 1475-1476.) The police approached the stairwell with their weapons drawn. The car's passenger fired a single gunshot from the balcony directly above them. As he pointed the gun down the stairwell, the police retreated to a point of cover. (RT 3:1465-1468, 1477-1478, 1480.) The police ordered the shooter to put his hands up and come down. After about a minute, Michael Lamb walked to the rail and tossed what appearing to be a handgun over the rail into a planter. Lamb came down and was taken into custody. Eventually, Jacob Rump, the driver of the car came down and was taken into custody. (RT 3:1468-1471, 1479-1480, 5:1903, 1905.)

A Browning semiautomatic handgun with a chambered nine millimeter bullet was found in the planter. (RT 3:1488.) It was the same gun that was used to kill Miller. (RT 5:1806-1809.)

E. PUBLIC ENEMY NUMBER ONE AND OTHER WHITE SUPREMACIST PRISON GANGS

Clay Epperson, a long time Costa Mesa Police Department Officer, testified as an expert on white supremacist gangs. (RT 5:1851, 1854.) Epperson first became aware of white supremacist gangs in the early 1990s: first Nazi Low Riders ("NLR") came to his attention, and then Public Enemy Number One to a lesser extent. These gangs were violent, criminally active, and mercenary. At the time, NLR, PEN1, and other white racist gangs were starting to expand both on the street and in prison. (RT 5:1854, 1856.) They were not turf-oriented and would commit crimes with members of other gangs. (RT 5:1858-1859.)

Epperson initially expected the gangs to target minorities or other races, but found that they generally targeted Caucasians within their own community and did not commit hate crimes. The gangs evolved in areas without street gangs, so members made voluntary decisions to join. (RT 5:1859, 1869.) Nevertheless, Epperson thought hate was important to the gangs because without it, members would get soft and would be sensitive to the pain and injury inflicted on others. Thus, even though the groups are not ideologically motivated, hate keeps the groups cohesive and motivated. (RT 5:1860.)

Membership is open to any racial group and crosses socioeconomic and educational lines. (RT 5:1860-1861.) According to Epperson, gang members are identified, or "validated," by the California Department of Corrections and Rehabilitation when they are in prison, but it takes more than tattoos for validation. Epperson said that not everyone that goes to prison joins a gang. (RT 5:1862-1863.)

Epperson testified that joining a white supremacist gang on the street initially requires engaging in criminal activities that benefit the gang; in other word; in other words, a new member "crimes" their way in. In prison, a new member joins by associating with members and putting in work that contributes to the gang. (RT 5:1863-1864.) "Claiming" a gang is openly admitting the association and if someone does so without actually being a member, the person can be sanctioned, beaten or killed. (RT 5:1864.)

Each member of the gang has status and shot caller status is based on the person's body of work for the gang, particularly the members willingness to engage in violence and to commit a crime knowing that he will be caught. (RT 5:1864-1865.) Respect in the gang is very important and is earned through criminality and violence. If disrespected, a person must earn respect back through violence. (RT 5:1865-1866.) Members are aware of the gang hierarchy and can increase their status by engaging in criminality

or violence directly for top level people. (RT 5:1870-1871.) Discipline is imposed if a member embarrasses the gang, shows weakness, fails to back up the gang in a fight, or speaks disrespectfully about the leadership. Pay-back can be immediate or may take years, and is generally more harsh than what the member did to deserve the sanction. (RT 5:1871-1873.) Tattoos indicate that a person is a member of a white supremacist gang and has a history with the gang. Members are very proud of their tattoos and showcase them. Among other tattoos are Nazi "SS" bolts, swastikas, and anarchy symbols. Gang members also use hand symbols to wordlessly identify their gang. (RT 5:1866-1867.) Providing information to the police is punishable by death. The gangs hate law enforcement, calling it "ZOG," an acronym for "Zionist Occupational Government." (RT 5:1873-1874.)

According to Epperson, the Aryan Brotherhood ("AB") is the oldest and most dominant white supremacist prison gang in California, calling the shots for most of the other white racist gangs. It is the best organized and the most successful white supremacist gang in terms of criminality and the ability to inflict violence, but gives mere lip service to ideology. (RT 5:1868-1869.)

Epperson testified that PEN1 started in 1986 as a group of punk rockers who followed a punk rock group that performed at venues with other racist groups. The punk rockers morphed into a skinhead group, then into a skinhead street gang, and finally into a racist skinhead prison gang. (RT 5:1876-1877.) The key founders were Donald Mazza, also known as "Popeye;" Devlin Stringfellow; Dominic Rizzo; Scott Miller, also known as "Scottish;" and Brody Davis. Mazza became the gang's undisputed leader in the early 1990s. (RT 5:1874, 1877.) The top PEN1 members were validated AB associates and Mazza was made a member of AB, a status that required him to perform a substantial body of work. Mazza's plan to be-

come a member of AB involved running PEN1 as a money-making operation. (RT 5:1878.)

Prior to 2002, Epperson became aware that PEN1 was increasing its power on the street and in the prison system while the influence of NLR waned. PEN1 rapidly grew to fill the power vacuum, adding members and becoming more criminally organized. In March, 2002, PEN1 had about 200 members. (RT 5:1880-1881.)

Epperson explained that by the late 1990s, Scott "Scottish" Miller had become marginalized within PEN1, but was still a member. (RT 5:1888.) On February 20 and 21, 2001, two news segments about PEN1 aired on Fox 11 news in Southern California. Although his face and voice were disguised, Miller appeared on the segments and spoke freely about the gang and its activities.[6] (SCT 99-108; RT 5:1895.) The broadcast of the news segments gave PEN1 a desirable level of notoriety, but the timing was bad because Mazza and Rizzo were about to go on trial for conspiracy to commit murder. (RT 5:1895-1896.) At about this time, the police received intelligence that as a result of the news segments, PEN1's leadership had imposed a "green light" on Miller; a "green light" is an authorization to kill a person. Accordingly, the Costa Mesa police began actively looking for Miller in March, 2002. At about the same time, Epperson heard that PEN1 members Michael Lamb and Jacob Rump were returning to the street from prison. (RT 5:1890, 1896, 1902, 1904, 1906.)

Epperson testified that he had known appellant for many years. Epperson had first arrested appellant for a crime in Costa Mesa in 1989 and began to have frequent contact with him around 1998. (RT 5:1907.) He was

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[6] The videotape containing both segments was marked as Exhibit 67 and played for the jury. (RT 5:1891, 1894.) The transcript of the videotape can be found at SCT 99-108.

familiar with appellant's many tattoos demonstrating membership in PEN1. (RT 5:1911-1916.) In 2006, appellant admitted in court that he had committed a crime in 2004, and that the crime included using force to dissuade a witness from testifying, an act he committed for the benefit of PEN1. (RT 5:1908.) Appellant admitted in court that Mazza was his "employer," meaning he worked directly for Mazza in PEN1. (RT 5:1909.)

According to Epperson, appellant had originally been a member in good standing in NLR, but got into trouble with that gang when he refused to carry out an order relating to Joseph Govey.[7] In March, 2002, appellant had transitioned from NLR to PEN1. (RT 5:1917.)

According to Epperson, Mazza suffered a 1993 conviction for possession of a short barreled shotgun, a 1993 conviction for assault with a deadly weapon causing great bodily injury, a 1998 conviction for commercial burglary, and a separate conviction of attempted murder and street terrorism for the benefit of PEN1. (RT 5:1896-1897, 1899.) Rizzo had a 1993 conviction for possession for sale of methamphetamine, a 1995 conviction for possession of sale of methamphetamine, and a separate conviction of conspiracy to murder and attempted murder for the benefit of PEN1. (RT 5:1896-1897, 1900.) Daniel Lansdale, another PEN1 member, suffered a conviction in 1994 for conspiracy to commit forgery, forging checks and passing bad checks, and multiple counts of commercial burglary when he passed bad checks for the benefit of PEN1. (RT 5:1897, 1901.) Brody Davis was convicted in 1998 of street terrorism and dissuading a witness by force. (RT 5:1897-1898.) PEN1 member Brian O'Leary was convicted in 1999 of attempted murder for the benefit of PEN1. (RT 5:1898-1899.) Stringfellow was convicted of conspiracy to murder and attempted murder

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[7] In the penalty phase trial, Joseph Govey testified that appellant had refused an order to kill him. (RT 8:2537-2538.)

for the benefit of PEN1. (RT 5:1900.) PEN1 member Kory Shaw was convicted in 2000 for assault by means of force likely to produce great bodily injury for the benefit of PEN1. (RT 5:1900.) Another PEN1 member, Eric Parks, was convicted in 2000 for conspiracy to sell and transport methamphetamine. (RT 5:1900.)

Epperson testified that the primary activities of PEN1 in March, 2002, were drug running, drug trafficking, violence in support of drug trafficking, and other criminal enterprises. (RT 5:1901.)

In Epperson's opinion, appellant's participation in Miller's killing was done for the benefit, at the direction of, or in association with PEN1. (RT 5:1918-1919.) Epperson also opined that it was done to promote, further and assist the criminal conduct of the members of the gang. (RT 5:1919.) According to Epperson, appellant's status within PEN1 was enhanced because he set up Miller's execution. Moreover, later testifying that he set it up in the trial of the two other participants, trying to absolve them by saying they had nothing to do with it, was consistent with Epperson's opinion about the gang nature of appellant's actions because there was an expectation that if someone was in a position to take the fall for others without damaging himself, he had done the other people a huge service by possibly keeping them on the street. (RT 5:1920-1921.)

Orange County Deputy Sheriff Seth Tunstall testified as an expert on prison gangs, including white supremacist prison gangs. (RT 5:1810-1812.) Tunstall was familiar with AB and PEN1. (RT 5:1818-1819.) According to Tunstall, in August, 2009, there were approximately 165,000 inmates in California prisons; 42 of them were validated AB members and about 150 were validated AB associates. When AB members landed in a California

prison, they almost always went to a Security Housing Unit ("SHU").[8] (RT 5:1819-1820.) Kites -- messages on pieces of paper that are written on and sent with another inmate or through the dayroom -- are a means of inmate-to-inmate communication used to avoid discovery by guards. (RT 5:1820-1821.) Outside communication is made through three way telephone calls. (RT 5:1821.) PEN1 also used women associated with the gang to communicate. (RT 5:1822.)

On cross-examination, Tunstall stated that California spends a lot of time and money on the issue of prison gangs and has attempted to shut down AB. (RT 5:1834-1835.) However, within the prison system there is drug trafficking, a great deal of unchecked violence, and improper communication that cannot be stopped. (RT 5:1840-1841.) White supremacist prison gangs are pervasive within the prison system. They have power and influence that extends beyond the prisons and can call shots from within the prison that reverberate in the community. Shot callers are members of the gang within the yards of their respective prisons. (RT 5:1843-1845.)

The first white supremacist prison gang was AB. When they were locked down, NLR picked up the slack. Tunstall described PEN1 as the "newcomer." (RT 5:1843-1844.) According to Tunstall, inmates form gang alliances a long time before going to prison and then reestablish or continue their alliance in jail or prison. Members know they have to align with one

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[8] A security housing unit, or "SHU," is a maximum security facility designed for inmates who, in the opinion of the Department of Corrections and Rehabilitation, have engaged in conduct that endangers the safety of others or the security of the institution. Members of prison gangs such as Nuestra Familia, Aryan Brotherhood, the Black Guerrilla Family, or inmates who have committed serious rules violations are typically housed in such units. (See, e.g., http://www.cdcr.ca.gov/facilities_locator/cor-institution_details-shu.html.)

of the races in prison for protection, power and control, survival and life-style. (RT 5:1846-1847.)

Tunstall was familiar with both appellant and Joseph Govey. In 1991, Govey was a validated AB associate within the California prison system. However, during a period in the 1990s, Govey fell out of favor with AB. Thereafter, AB constituted a threat to Govey for over a decade. (RT 5:1822-1823, 1842.)

Eric Kraus, a parole agent with the California Department of Corrections, testified that he supervised white supremacist prison gang members out of prison on parole. (RT 3:1490-1491.) According to Kraus, only a small percentage of prisoners join a gang and one does not need to do so to survive in prison. Moreover, a gang member can get out of a gang by "debriefing," or providing information about the gang to prison officials. A former gang member will be provided protection once the process is initiated. (RT 3:1494-1495.)

Kraus became familiar with appellant in 2000 while Kraus was supervising parolees in Costa Mesa. In early 2001, appellant was assigned to Kraus' specialized caseload. Over a period of three years, Kraus had many conversations with appellant. (RT 3:1496-1497.)

On May 24, 2001, Kraus arrested appellant for a parole violation. On the way to jail, the two men had a heated exchange. Appellant said he was unhappy to be returned to custody and that when he was released, he would not report on parole and Kraus would have to track him down. (RT 3:1497, 1500.) On May 31, 2001, Kraus learned that appellant had been assaulted in a yard at Chino State Prison, sliced with a razor on the back of his neck, but that the injury was not life threatening. (RT 3:1499.) However, appellant wanted to speak with Kraus, so Kraus and Clay Epperson went to the prison and met with appellant. Appellant apologized for his earlier statement and wanted to make amends. At an earlier time, appellant told Kraus that he had

been ordered to assault Joseph Govey, a close friend and cellmate, while they were in custody, but that appellant did not do it because it would be his third strike. According to Kraus, the green light on Govey could only have come from a shot caller in AB or NLR. At their meeting on May 31, 2001, appellant said that his own safety was now "all good," meaning he would receive no further discipline because he had already been assaulted. Appellant also said that he was a member of PEN1. (RT 3:1499-1504, 1519.) Kraus knew that appellant was a documented associate of NLR. (RT 3:1504.)

F. APPELLANT'S PRIOR TESTIMONY

Appellant testified in the guilt phase of Michael Lamb and Jacob Rump's joint trial in 2007, and in Lamb's penalty phase retrial in 2008, appearing both times as a defense witness for Lamb.[9] (RT 4:1602-1603, 1692-1693.) His redacted testimony from those trials was read into the record at appellant's trial and is summarized below.

Appellant testified that he had grown up in Costa Mesa and that Miller had been his good friend. Raphoon, appellant's cousin, lived two blocks away and hosted his own birthday party on March 8, 2002. Appellant arrived at about 4:00 or 5:00 p.m. (RT 4:1608, 1694-1696.) Miller arrived between 5:30 to 7:00 p.m. There were about 30 people present. (RT 4:1609, 1697.) Appellant spoke with Miller at the party. (RT 4:1610.) According to appellant, there were no members of PEN1 or NLR at the gathering. (RT 4:1611.)

Appellant testified that he was angry at Miller, partly because of issues with women and partly because of the Fox 11 television program in

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[9] Lamb's automatic appeal from a judgment of death is currently before this court in Case No. S166168.

which Miller was talking about PEN1 gang activities. Appellant said that Miller's participation in the news segments made Miller a "dead man." Appellant had known about the broadcast for about nine months, when it first came out, and even though the person in the video was disguised, appellant knew immediately who it was because of the person's tattoos, things around the person in the video, and the presence of Miller's pit bull, Tank. (RT 4:1611-1615, 1699-1701, 1707-1708, 1767, 1772.) Appellant and Miller had a lot of mutual friends and everyone knew it was Miller in the video. The party was the first time appellant had seen Miller since about a year before the video aired on television. (RT 4:1615-1616, 1699, 1701, 1766.)

Appellant had a short conversation with Miller in which he told Miller he would kill him for not abiding by gang rules. Sometime between 8:00 and 10:00 p.m., appellant left the party with Miller to buy heroin and they went to the area of Euclid and Lincoln in Anaheim, where Miller's connection was located. When they got into appellant's truck together, appellant knew that Miller would be dead before the night was over. Appellant did not know the location where the connection lived, so Miller gave him directions. (RT 4:1611-1612, 1616, 1676-1677, 1703-1707, 1773, 1779.) On the way, they stopped at a strip mall and Miller used the telephone. Miller got back into the truck and they drove to an alley, parked appellant's grey Chevrolet Silverado truck, and walked down the alley. (RT 4:1616, 1708-1709, 1769.) As they approached an apartment complex, appellant reached into his waistband, grabbed his nine millimeter handgun, shot Miller, then ran back to his truck and returned to the party so he would have an alibi. Miller was 1½ to 2 feet in front of appellant when appellant shot him. (RT 4:1617, 1668, 1674, 1710, 1775.)

Later that night, appellant went with Shirley Williams to appellant's mother's house for two to three hours. Appellant and Williams then went to

the house of a friend whose first name was Noel, on Baker Street, arriving at about 3:30 or 4:00 a.m., and Williams picked up some clothing. While they were there, appellant saw Gordon Bridges and, aware that Bridges was a good friend of Miller, asked Bridges, "Did you hear that Scottish got blasted?" (RT 4:1618-1620, 1711-1715, 1770, 1772.)

About a day later, appellant ran into Lamb, known to appellant by both his real name and as "Pok1," at the Coach House bar. Appellant had met Lamb once before, about a year earlier. (RT 4:1655, 1717.) Lamb told appellant that Mexican gang members had shot at him the previous night and that he was looking for a weapon. Appellant gave Lamb a nine millimeter handgun and told him it was "hot," meaning that it was stolen, not that it had been used in a killing. (RT 4:1622-1624, 1654-1655, 1718-1720.)

Appellant contradicted the testimony of Donald McLachlan had testified that he had told McLachlan he had killed Miller by himself. (RT 4:1737-1738, 1740.)

Appellant also said that at the time of his testimony he was in custody on a separate case. He said he had been sentenced about a year earlier to 45 years to life imprisonment after entering a guilty plea. (RT 4:1627, 1642, 1646, 1728.) Appellant said he had a scar from the center of his spine all the way across the right side of his neck, ending below his ear, the result of being cut while in prison for not following the rules. (RT 4:1628-1629, 1722-1724.)

According to appellant, he lived by his own laws. (RT 4:1726.)

G. PRIOR MURDER SPECIAL CIRCUMSTANCE

Appellant was convicted of the April 4, 2004, second degree murder of Cory Lamons. Appellant pleaded guilty to the crime on June 30, 2006.[10] (CT 4536-4548; RT 6:2086.)

II. PENALTY PHASE

A. PROSECUTION CASE

The prosecution presented evidence of a number of incidents in aggravation. This evidence is summarized below.

1. THE TROUTMAN INCIDENT

In 1985, Virgil George Troutman lived in Costa Mesa. He grew up with appellant, they went to school together, and were friends. (RT 6:2157, 2160, 2163.) Troutman claimed that while he was a drug dealer at one time, he was not selling drugs in 1985. (RT 6:2164, 2166.)

At about 11:00 p.m. on April 22, 1985, Troutman and a man named Gary Smith were about to leave Troutman's apartment when appellant, Gerald Schaffer and Henry Rogers came into the apartment looking for money or drugs. (RT 6:2158-2160.) The three men pushed Troutman and Smith around. Schaffer punched Troutman in the right eye. The three men took a small diamond ring and some small change from Troutman. One of the men told Troutman that if he reported the incident, they would kill him. (RT 6:2160-2161.)

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[10] This is the same crime that resulted in appellant's prior sentence of 45 years to life imprisonment.

After the three men left, Troutman and Smith went looking for them with baseball bats, but did not find them. (RT 6:2162-2163, 2165.) Instead, Troutman reported the incident to the police that night. (RT 6:2109.)

On April 24, 1985, appellant called Michael Teichner, his parole agent,[11] and said that he struck Troutman one time during the incident. Teichner told appellant to turn himself in to the Costa Mesa Police Department. (RT 6:2122-2123.)

Appellant was arrested on April 25, 1985 after turning himself in. Appellant said Troutman was a drug dealer and appellant was angry because he found out Troutman sold cocaine to a 12 year old boy. (RT 6:2114-2115.)

On May 28, 1985, appellant pleaded guilty to one count of grand theft in connection with this offense. (CT 18:4560-4569; RT 6:2124.)

2. THE BRANDOLINO INCIDENT

In the very early morning hours of April 1, 1989, Linda Nguyen and Catherine Brandolino[12] had breakfast together at Denny's Restaurant in Costa Mesa. As they walked to Nguyen's car, a man approached them and asked what time it was. As he did so, a truck pulled up with its door open. As Brandolino turned to speak to Nguyen, the man grabbed Brandolino's purse, ripped it from her shoulder, and got into the pickup truck. Brandolino had money and credit cards in her purse. (RT 6:2130-2134.)

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[11] According to Teichner, appellant was paroled out of Tehachapi State Prison on July 29, 1984, and Teichner was assigned as appellant's parole agent on December 3, 1984. (RT 6:2120-2121.)

[12] At the time of her testimony, Brandolino's name was Catherine Schreiner. (RT 6:2137.)

Costa Mesa Police Department Officer Michael Cacho spoke to Brandolino at 4:20 a.m. He noticed she had a minor laceration to her left ring finger and was bleeding a little bit. Brandolino described the car, license number and the robber. (RT 6:2125-2126.) Nguyen also described the vehicle and both the driver and perpetrator. Cacho radioed the information. (RT 6:2126-2127.)

Clay Epperson immediately went to the residence the car was registered at and detained the two people he found inside. Following an in-field showup with Brandolino and Nguyen, appellant and Joseph Bennett were detained. Appellant was wearing the same type of shirt as the driver of the truck. (RT 6:2127-2129, 2135, 2140.)

On April 28, 1989, appellant pleaded guilty to second degree robbery in connection with this incident. (CT 18:4570A-4570I; RT 6:2141.)

3. THE SETTLES INCIDENT

On June 4, 1991, Susan Mireles was working as a correctional officer at New Folsom Prison, and was assigned to "block control," opening cell doors to allow inmates to come and go under escort in an administrative segregation unit consisting of two man cells. (RT 6:2141-2142.) She saw appellant attack his cellmate, an inmate named Settles. Settles sat with his back to the door as appellant stood over him hitting him with closed fists. Mireles ordered Settles out of the cell and closed the door. (RT 6:2143-2145.)

On June 9, 1991, Correctional Lieutenant Kenneth Kukrall held a hearing based on Mireles' observations. Appellant admitted the assault and said, "I have been wanting out of that cell due to Settles' action. I couldn't take it anymore, so I threw him out." The hearing disposition was guilty. (RT 6:2150-2152.)

4. THE NORDEEN INCIDENT

In 1991, an area inside Folsom State Prison known as China Hill was being used for training, agricultural purposes, and wood-cutting. Inmates were sometimes assigned to work on China Hill and were taken in a group from the lower yard to the work area. The inmates all wore long- sleeved blue chambray shirts, usually with short-sleeved white undershirts underneath. Correctional officers monitored working groups from different locations on China Hill and two towers covered the area. (RT 6:2168-2170.)

On April 19, 1991, a group of approximately 25 to 30 inmates were assigned to work on China Hill to cut up scrap wood for the prison sweat lodge. Appellant and inmates John Alder and Ronald Rostamo were part of the group. The inmates were supposed to work in the locations to which they had been assigned, but were allowed some freedom of movement. The inmates in the detail were permitted to use pick-axes and shovels. (RT 6:2177-2178, 2197-2199.)

At about 11:35 a.m., Correctional Officer Marshall Stewart was finishing a security check along a fence line on the back side of China Hill when he noticed blood running down a small hill. He followed the blood trail up the hill and found the body of an inmate named Clyde Nordeen at the back corner of a storage shed. The body had been stuffed between the shed and a pile of large granite blocks that were stored nearby. Nordeen had been badly beaten and there were large holes above his eyes. Blood was coming from the back of his head. (RT 6:2170-2172, 2184.)

Correctional Officer Samuel Geiser found a piece of wood underneath the body. About 65 feet away, in tall grass, he found a 30-inch length of metal pipe filled with concrete. He also found two wooden pick-axe handles without corresponding axe ends and another wooden handle, possibly from a shovel, but without a shovel head. He also found jackets and T-shirts under the shed. (RT 6:2214, 2216-2218, 2223.)

Correctional Officer Robert Buda performed unclothed body searches on inmates returning from China Hill after the body was discovered. Although the inmates were required to wear their blue chambray shirts, appellant, Alder and one other inmate did not have their blue shirts with them. Appellant and Alder said they had taken their shirts off, left them on the hill, and had not been allowed to collect them before returning. (RT 6:2210-2212.)

Rostamo was interviewed by Corrections Sergeant Steven Vance. (RT 6:2226.) Rostamo told Vance that he was working on China Hill in the immediate area of appellant and Alder, but had gone to the bathroom at about 11:00 a.m. He said he returned ten minutes later, overheard Alder tell appellant, "He's not dead yet," and saw Alder pick up a pick handle from the wood pile. Alder told appellant that there was another handle on the ground. (RT 6:2227-2228.) Rostamo said that appellant and Alder, both wearing white T-shirts and blue jeans, walked to a pathway leading to the rear of the shed and disappeared, then reappeared walking together. Appellant approached Rostamo and asked for his T-shirt because appellant's T-shirt had blood on it. Rostamo gave appellant his T-shirt. The body was discovered ten minutes later. (RT 6:2229-2231.)

An autopsy revealed that Nordeen had extensive blunt force trauma to his head -- a total of 16 external injuries -- with no defensive wounds. (RT 6:2189-2191.) Large areas of brain tissue had been torn or lacerated. (RT 6:2192-2193.) The cause of death was blunt craniocerebral trauma, meaning blunt injury of the skull and brain as a result of multiple blows to the head. While death was not immediate, Nordeen would have been unconscious by the end of the trauma. (RT 6:2194-2195.)

Nordeen was in custody for a child molestation conviction. (RT 6:2234.)

No charges were filed against appellant, but he was transferred to a SHU and served 26 months in the unit. (RT 6:2232, 2238-2239.)

5. THE VLAHOS INCIDENT

On May 22, 1992, at about 11:00 a.m., Correctional Officer Andrew Gomez was a control booth officer, opening and closing doors within the SHU yard at Corcoran State Prison. (RT 6:2267, 2268.) Appellant and an inmate named Vlahos were housed together in a two-man cell. Gomez heard appellant shouting and went to his cell. Appellant said, "I am not gonna babysit this guy. Get him out of this cell. He fell down and is bleeding all over." Vlahos was sitting in the cell and had bloodstains on his shirt. (RT 6:2268-2270.)

Gomez opened the cell door, ordered Vlahos out, and Vlahos complied. Gomez later removed appellant from the cell and appellant stated, "He called me a punk, said he would beat my ass. He took a swing at me, so I hit him. He is crazy." (RT 6:2271.)

Appellant was rehoused in a different cell. (RT 6:2272.)

6. THE AGEE INCIDENT

On July 2, 1992, at about 1:30 p.m., Correctional Officer John Schuman was an exercise yard gunner at the Security Housing Unit at Corcoran State Prison. He supervised the exercise yard and worked in a tower with a view of the yard. Schuman was armed with a rifle and a gas gun that shot wooden blocks. (RT 6:2275-2277.)

Schuman observed appellant attack an inmate named Agee in the exercise yard, hitting Agee on the head and shoulders with clenched fists. Agee fell backwards. Appellant continued to hit Agee in the same area of the head. (RT 6:2277-2280.) Schuman gave appellant a verbal warning to stop fighting but appellant continued hitting Agee, so Schuman shot one

round from the gas gun and appellant and Agee both assumed a prone position and ceased fighting. (RT 6:2280.) As Schuman waited for the sergeant to go to the yard, Agee got up and assaulted appellant. Appellant got up and defended himself. Schuman gave a verbal order for the two men to stop fighting and get down, but they did not, so he fired the gas gun again and both men got down in a prone position. (RT 6:2281-2282.)

According to Schuman, appellant started the fight, but Schuman had no idea what sparked the conflict. (RT 6:2283, 2285.)

7. EVADING POLICE

At about 9:30 a.m. on the morning of October 29, 1994, Garden Grove Police Officer Tom Dare was patrolling in a black-and-white marked police car in a residential area around Volkwood and Blue Spruce, in Garden Grove. (RT 6:2288-2290.) Dare saw a white 280ZX turn quickly and erratically into a driveway. When the driver did not get out of the car, Dare ran the license number and found the car was listed as having been recently stored or towed, meaning it had been impounded shortly before. (RT 6:2290-2291.)

Dare decided to stop the vehicle and made a U-turn. He saw the car pull into the street and followed it. The car ran a stop sign at approximately 40 miles per hour, so Dare activated his lights. The Datsun accelerated. When Dare activated his siren the Datsun accelerated to 75 miles per hour in the residential area. (RT 6:2292.) The car went through another stop sign, drove quickly into a driveway and slammed on the brakes. The driver got out of the car and fled on foot. The driver was not located. (RT 6:2293-2294.)

Dare searched the car and found a wallet. In the wallet was appellant's driver's license and a letter from the California Department of Cor-

rections addressed to appellant. The photograph on the driver's license was the same person who had been driving the car. (RT 6:2295-2296.)

8. THE DOWLING INCIDENT

Following his arrest for a parole violation in early 1995, appellant was sent to the Reception Center at the California Institute for Men in Chino. At 5:45 p.m. on May 4, 1995, Correctional Officer Anthony Wren responded to a call that an inmate needed help. (RT 6:2302-2303.) Appellant and Eugene Dowling were in a two-man cell. Wren observed Dowling on the floor, bleeding profusely. Wren removed Dowling from the cell and saw that Dowling had multiple deep, large cut wounds on his right shoulder, right hand, right forearm, chest and thigh. The injuries were consistent with the use of a razor blade as a weapon. Returning to the cell, Wren saw that appellant had a laceration on his right hand. (RT 6:2303-2305.)

Appellant pleaded guilty to one count of assault by a state prisoner on July 18, 1995. (CT 18:4581-4592; RT 6:2307.)

9. THE YOUNG INCIDENT

At 9:15 a.m. on September 15, 1995, appellant was housed at the Reception Center at the California Institute for Men in Chino with an inmate named Antonio Young. Correctional Officer Joe Hinojos responded to a "man down" call from their cell and found Young with an injury to the head. Appellant was examined by the medical staff and was treated for minor abrasions and bleeding middle and ring fingers of the left hand. (RT 6:2310-2313.)

10. CONTRABAND IN PRISON

On May 27, 1996, appellant and an inmate named Wagner were in a two-man cell in the Administrative Segregation area of Corcoran State

Prison. Inmates in Administrative Segregation are designated as dangerous or potentially violent and are moved in handcuffs for safety. Correctional Sergeant Clinton Smith conducted a search of the cell and found two pieces of metal that were considered by the prison to be weapon stock. One piece was sharpened to a point. Smith also found a handmade handcuff key. The weapon was in Wagner's area and the handcuff key was in appellant's area. (RT 2315-2317.)

11. THE WHITE INCIDENT

At 4:30 p.m. on November 27, 1996, appellant and an inmate named White were in a two man cell in the Security Housing Unit at Corcoran State Prison. Correctional Officer Randall Priest heard a commotion from their cell, looked over from the control booth, and observed the two inmates fighting in their cell. Appellant was punching and kicking White in the head and upper torso as White laid on the ground in a fetal position. (RT 6:2326-2329.) Priest yelled for appellant to stop, activated the alarm, opened the cell door, and ordered one of them to exit, but neither man complied. Appellant continued punching and kicking White as White lay on the ground. Priest repeated the order a few more times, but appellant continued the assault. White neither responded nor fought back. (RT 6:2329-2330.) Priest fired a non-lethal 37 millimeter rubber baton round at appellant. Appellant then stopped hitting White, exited the cell and assumed a prone position. (RT 6:2330-2331.)

12. INAPPROPRIATE PRISON MESSAGE

On June 28, 2003, Correctional Officer Richard Nava was conducting cell searches at Chino State Prison in connection with the investigation

of a homicide[13] the previous day and transporting inmates to the kitchen to be interviewed. (RT 6:2333-2334.) As Nava exited the kitchen, he saw and observed appellant say in a loud voice: "Radio, radio, all wood pile, all wood pile and comrades. The sergeants are conducting -- are taking interviews in the kitchen so you will not, I repeat, you will not go into the kitchen. And I mean no one. And I mean no one. Thank you." Inmates then responded, "Thank you." According to Nava, "wood pile" is a reference to white inmates and "comrades" is a reference to all active inmates in appellant's racial prison gang. (RT 6:2333-2335, 2338.) Nava told the sergeants what he heard appellant say and went to the cell with Sergeant Caldwell. Appellant was asked what was going on. Appellant said nothing was going on and that no white inmates were going to be going to the kitchen for interviews. Afterward, no white inmates gave interviews. (RT 6:2336-2337.)

13. THE LAMONS HOMICIDE

On April 4, 2004, Sara Lenard had just moved into a two-story apartment at 1355 Delaware Street in Huntington Beach. The apartment belonged to Patrick Carroll, a man she had known for about a year. Lenard's boyfriend at the time was James Hartman. The apartment had an attached garage. Lenard's bedroom was on the second floor. (RT 7:2405-2406, 2432.)

At about 4:00 p.m., Lenard was in her room with Hartman. When she went downstairs to the kitchen, she saw three men and a woman on the first floor of the apartment. She did not know any of them, but later identified Suzanne Miller as the woman. (RT 7:2408-2409.) One of the men -- whom she later identified as appellant -- was holding a hammer in his hand and standing with his back against the wall, close to the door to the garage.

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[13] Appellant was not involved in the homicide. (RT 6:2337.)

Lenard asked Miller what was going on and Miller replied, "This isn't going to be good." A man Lenard did not know, but who was later identified as Cory Lamons, walked in from the garage door and appellant began repeatedly hitting him in the head with the hammer. Lamons started screaming, "I didn't do anything." Lenard ran out the front door. (RT 7:2410-2413.)

After a minute or two the screaming stopped and Lenard went back inside. Lamons was lying still on the floor of the hallway leading to the garage. Lenard observed a lot of blood in the hallway. She ran upstairs and grabbed Hartman to leave. As they went downstairs, Lenard saw Miller scrubbing blood off of the wall. (RT 7:2414-2415.)

A few hours later, Lenard and Hartman returned to the apartment. The blood had been cleaned up, but Miller and appellant were not present. Instead, two other men that Lenard had not seen before were in the apartment. The men told Hartman, "Keep your mouth shut or something like this will happen to you." Lenard took her property and left the apartment. (RT 7:2416-2417.)

Two days later, on April 6, 2004, Huntington Beach Police Department Detective Steven Mack, the lead detective in the killing of Cory Lamons,[14] was in an unmarked police vehicle watching a white Ford pickup. Mack had received information that a group of individuals were going to use the truck to dispose of Lamons' body. At about 8:30 p.m., Mack followed the truck to the intersection of Spruce and Anderson in Riverside. Mack then contacted the Highway Patrol and requested assistance in stopping the truck. (RT 7:2424-2426.)

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[14] This murder is the prior murder alleged and found true as a special circumstance in this case.

After the stop was performed, officers found appellant and Suzanne Miller in the truck, with appellant driving. In the bed of the pickup truck was a pile of wood covered by a carpet. As Mack approached the back of the truck, he smelled decomposing flesh and saw Lamons' body wrapped in a bed sheet, concealed under the wood pile. (RT 7:2426-2428.)

Lamons had bruising about the forehead, the left eye and lips were swollen, and there was a laceration below the right eye. The body had turned a bluish-greenish color, which was normal for the period 48 to 72 hours following death. (RT 7:2431-2432.) The coroner was initially unable to determine a definitive cause of death because the autopsy revealed the presence of very high levels of narcotics in the body in addition to multiple blunt force head injuries. Ultimately, Lamons' cause of death was concluded to be blunt force head injuries with methamphetamine and amphetamine intoxication. (RT 8:2503-2504.)

Lenard's apartment was searched. Spots on the carpet had were determined to be bleach stains. A claw hammer was found in the apartment. (RT 7:2433-2435.)

14. PRIOR CRIMINAL CONVICTION

The prosecutor entered into evidence a certified copy of court documents proving appellant had been convicted of the August 16, 1982, burglary of a residence occupied by James Watson. (CT 18:4549-4559 [Exhibit 104]; RT 6:2107.)

15. VICTIM IMPACT EVIDENCE

a. BONNIE MILLER

Bonnie Miller[15] testified that she is Scott Miller's mother. She recalled that Miller was born October 4, 1963, when Bonnie was 20 or 21 years old. When he was handed to her that day, he was beautiful, clean, and had a good disposition from that day on. Miller's brother, Calvin, was 18 months older than Miller and is totally disabled. (RT 8:2491-2492.)

Growing into a teenager, Miller was good, fun, had a really good personality, and was a jokester. He was very popular at school, athletic, a bodybuilder, skateboarder, and surfer, and interested in staying healthy. Miller almost became a professional surfer and has a surfboard on his gravestone. (RT 8:2492-2493.)

Calvin moved to Michigan when he was 16 years old and Miller stayed with Bonnie in California. Bonnie drove Miller everywhere and they talked, had fun, and did everything together. With the exception of a couple years in the 1990s, Miller lived with Bonnie until he died. (RT 8:2496.)

Miller testified that she can only go to Miller's gravesite every few weeks because her heart cannot take it to go more often. She visits the gravesite with Scott, Jr. -- born after Miller was killed -- who goes to visit his father. She asserted that it is painful and unbearable to clean her son's gravestone. (RT 8:2493, 2499.) Bonnie also goes to the beach with Scott, Jr. to watch the surfers and it breaks her heart that Miller is not there. (RT 8:2495.) Scott, Jr. did not have a father and did not understand why. Bonnie had to tell Scott, Jr. that he would never see his father and it was devastat-

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[15] Bonnie Miller will be referenced as "Bonnie" to avoid confusion with her son, Scott Miller. In similar fashion, Miller's son, Scott Miller, Jr. will be referenced as "Scott, Jr."

ing to do so. According to Bonnie, since she lost Miller, her life will never be the same. There is a big hole in her heart, part of her died with Miller, and she cannot be happy. Bonnie no longer has many friends and shut herself off from the rest of the world. (RT 8:2497, 2499.)

Miller's death caused Calvin to have a breakdown and he was hospitalized for an extended period. Calvin could not talk about Miller's death and was unable to come to court because he would fall apart. (RT 8:2498.)

Miller's father was Bruce Miller, who died after developing heart problems and had a stroke after Miller was killed, telling Bonnie just before dying: "Please, get justice for our son. Please, do that for me." (RT 8:2492.) Bonnie attended every court hearing trying to get justice. (RT 8:2497.)

Bonnie's elderly mother, Alma, lives close to Bonnie and was very close to Miller, who did everything for his grandmother. Alma took Miller's death very hard and almost died with a heart problem. (RT 8:2496-2497.)

b. SHARON THOMPSON

Sharon Thompson testified that she is Cory Lamons' mother. According to Thompson, Lamons was born October 7, 1977, and he was a beautiful baby, huge and cried a lot, and had a sister seven years older than him. Growing up, Lamons was good, sweet and funny. He had a learning disability, so he went to private schools. (RT 7:2442-2443.)

After Lamons was killed, Thompson felt like all of the air had been sucked out of the room. Not believing that it really occurred, she kept expecting to see Lamons walking down the street. The worst part for Thompson was feeling that she was not there to protect her son from a violent death. She continued to miss him every day and moved out of state because she could not handle it any more. She claimed it did not get easier for her

and that she closed up emotionally after the killing, not letting anyone get close to her. (RT 7:2443-2444.)

16. APPELLANT'S PRIOR TESTIMONY

Appellant testified[16] that he knew Cory Lamons and pleaded guilty in 2006 to killing him. Appellant stated that he killed Lamons on April 4, 2004, by beating him up with a hammer. Appellant said that he killed Lamons because Lamons had it coming, because of a woman, because Lamons ripped off a woman, and because Lamons was a dope fiend and was stealing things. Appellant was accused of murder, with an allegation that it was done for the benefit of PEN1, along with street terrorism, and dissuading a witness by force or threat. There were multiple defendants in the case: appellant's girlfriend at the time, Suzanne Miller, known to appellant as "Suzzy Q," Jason Kerr, Patrick Carroll, and Erin Brooks. (RT 7:2448, 2450-2451, 2457-2459.) Appellant pleaded guilty to second degree murder with a gang enhancement, along with the other counts, and was sentenced to 45 years to life imprisonment because it was a third strike offense. (RT 7:2451-2452, 2455, 2458, 2460, 2463, 2464.)

Appellant admitted being present when Clyde Nordeen was killed, stating that he was beaten to death with a pick-axe handle and a metal bar. (RT 7:2462.)

Appellant acknowledged that he had been previously convicted of residential burglary in 1983, grand theft from a person in 1985, robbery in

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[16] As in the guilt phase of the trial, the prosecution used appellant's testimony in the guilt phase of Lamb and Rump's trial in 2007 and in Lamb's penalty phase retrial in 2008. (RT 7:2447, 2457.) Again, his redacted testimony from those trials was read into the record at appellant's trial.

1989, assault with force likely to produce great bodily injury in 1995, and burglary. (RT 7:2449, 2455, 2464-2465.) In addition, appellant violated parole multiple times prior to the killing of Lamons and was caught multiple times in prison in possession of deadly weapons. (RT 7:2456, 2465.)

Appellant testified that he put hits on people to be killed while he was in custody if he did not like them. (RT 7:2466.)

B. DEFENSE CASE

1. CHARACTER EVIDENCE

Suzanne Miller testified that appellant is her boyfriend and she had known him for about 6 years, but only four months of that time while he was out of custody. She believed that there are two sides to appellant and that he had always treated her well and others with respect. (RT 6:2260.) She had seen appellant with his son, Justin. She thought appellant was fatherly, cared for Justin, showed him love, and she never witnessed any discipline. (RT 6:2262.) She believed there is value in appellant's life. While he was capable of great violence, he was loving and a respectful son, brother and father. (RT 6:2263.) According to Miller, appellant was very protective. Along with appellant, she and others were charged in the Cory Lamons murder. Appellant pleaded guilty and received a sentence of 45 years to life imprisonment so that everyone else, including Miller, would receive determinate sentences. (RT 6:2261.)

Shirley Williams[17] testified that she had known appellant about 15 years and was good friends with appellant's entire family. Appellant's

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[17] With the consent of both the prosecutor and court, defense counsel was allowed to elicit penalty phase character evidence from Williams

brother, Bobby, was her best friend. (RT 4:1563.) According to Williams, appellant was always courteous and respectful with her and other women, going so far as not to allow another man to do anything disrespectful to a woman. Williams and appellant tried to get clean and sober together. She never saw appellant get violent or rage and would trust him with a child. (RT 4:1564, 1567.) Williams considered appellant a good father who loved his children. (RT 4:1565.) Williams stated that while appellant looked mean, he had a gentle side, and she had never seen him out of character, even at parties. (RT 4:1566.)

According to Donald McLachlan, appellant was a friend that would always be there for you. Appellant once paid for a transmission for McLachlan's car and protected McLachlan's belongings after McLachlan was arrested. (RT 4:1586.)

2. JOSEPH GOVEY

Joseph Govey testified that he knew appellant very well, having met him in prison about 20 years earlier when they were cellmates. At other times, they were on the same tier or in the same yard. (RT 8:2536.)

Once, appellant showed Govey a letter indicating someone wanted appellant to kill Govey. Appellant let Govey know that he was not going to kill him. (RT 8:2537.) Before he saw the letter, Govey knew someone wanted him killed, but did not know the person wanted appellant to do it, and appellant refused to carry out the order. (RT 8:2538.)

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during the guilt phase so that Williams could be returned to prison. (RT 4:1562.)

3. PSYCHOLOGICAL EVIDENCE

Roberto Flores de Apodaca ("Flores") testified he is a clinical psychologist. Contacted by the defense to evaluate appellant, he met with appellant for six hours over two days, read the records submitted by the defense, administered psychological tests, and formulated opinions. (RT 7:2345-2346.)

According to Flores, appellant was 46 years old at the time of trial, and had been incarcerated about 25 years since his early 20s. (RT 7:2347.) Appellant was the youngest of his siblings and the family moved to California when he was one year old. (RT 7:2348.) Appellant's parents separated when appellant was ten years old and appellant lived with his mother. Appellant lost contact with his father and only saw him once when appellant was 26 years old. (RT 7:2349.) When appellant's father left the family, appellant began having problems in school for his conduct and fights, appellant gave up on academics, and his trouble with authorities began. (RT 7:2349-2350.)

Flores felt that appellant's relationship with his mother sounded positive as he was grateful she raised the children, worked hard, provided for them, and was caring. Nevertheless, she was overwhelmed and unable to exercise authority over appellant. Appellant likewise described his positive relationships with his siblings and an idyllic childhood and adolescence. Appellant's older siblings provided parental-type care and guidance for him. (RT 7:2350, 2354.)

Flores recounted how appellant started running afoul of the law when he was 10 years old and there was a low-to-moderate level of criminality through adolescence. While appellant did not try to minimize or express remorse for his activities, he also did not brag about them. (RT 7:2350-2351.)

Appellant was a long term substance abuser, starting with alcohol at age 10, escalating to marijuana, then to LSD when he was 14 or 15. At the same time, snorting, smoking and shooting cocaine was an everyday thing for about two years. From the age of 25 on, methamphetamine was appellant's drug of choice. Drug abuse was both a cause and effect of appellant's bad judgment and decisions and from the age of 10 until he was 21, appellant lived a sort of feral lifestyle in which he was on his own and making decisions with nobody telling him what to do. (RT 7:2352-2353.)

Flores told how appellant was married to Holly Ann Scott when he was 22 years old. She had a daughter when they married, but the girl died at the age of 7 from cardiac problems and it was hard on everyone, especially Scott. Appellant was arrested shortly after their marriage and Scott became pregnant after appellant's release. Appellant's son from their marriage, Justin, 25 years old at the time of trial, grew up with Scott. Appellant conveyed to Flores that his drug use had a significant role in the stressors of marriage and the resulting breakup. Appellant had nothing bad to say about Scott. (RT 7:2354-2356.)

Appellant's second marriage, when he was 35 years old and out of prison in 2001, was to Sabrina Elizabeth Cass, and it lasted until he was arrested in this case. Appellant felt that his history of going in-and-out of prison was the stressor that broke the marriage. They had a child, Ryder Edward, 8 years old at the time of trial. Appellant told Flores that he was committed to his family life, wives and children. (RT 7:2356-2357.)

Appellant informed Flores that his mental approach in prison must be like a person in the military. Appellant said, "I can be your best friend or your worst nightmare," meaning he could be loyal, committed and helpful, or very violent and vengeful when circumstances in his judgment called for it. Appellant said, "The two things that cannot be forgiven are 'rapoes' and rats, everything else can be forgiven in life." Flores said that appellant had

been referring to child molesters and gang members violating their code of ethics and honor. (RT 7:2358.)

Flores administered a test of non-verbal intelligence and assessed appellant's IQ at 92, about the 30th percentile. Flores believed this was an under-realization of appellant's abilities and underestimated what appellant could have accomplished. (RT 7:2358-2360.)

Flores next administered a personality assessment inventory, which gave personality and psychopathology indicators. He interpreted the test to mean that appellant approached it in a way that tried to accentuate his positive characteristics. Appellant's aggression, anti-social and drug measures were elevated, consistent with his history. Appellant was prone to aggression and violence, violating the rights of others, and disregarding social norms and the law. (RT 7:2360, 2363-2364.) Flores opined that it is fairly typical for someone with a substantial history of criminal conduct to have an over-inflated opinion and positive impression of himself. The test indicated a heightened sense of aggression and that appellant was prone to it, was irritable, short tempered, prone to extreme displays of physical aggression against others, and that control of his anger had lapsed on occasions. Flores stated that others would go to great lengths to avoid provoking appellant and that drug abuse was the cause and effect of appellant's impulsivity. (RT 7:2365-2366.)

Flores believed that appellant's stated desire to get the death penalty was a form of state assisted suicide. Flores said that appellant's stated reasons based on a more desirable set of circumstances of incarceration and quality of life on death row were rationally thought out and not impulsive. (RT 7:2367.)

Flores administered the Hare psychopathology checklist, measuring certain personality characteristics to quantify the degree of a person's psychopathology. (RT 7:2369-2370.) Based on the test, Flores did not believe

that appellant could ever be free or rehabilitated, and was not amenable to therapy. His diagnosis was antisocial personality disorder, subsumed in being psychotic. (RT 7:2390.) Flores stated that antisocial personality disorder is marked by a pervasive pattern of disregard for and violation of the rights of others, beginning in childhood and continuing to adulthood, failure to conform to social norms with respect to lawful behaviors, impulsivity or failure to plan ahead, aggression through repeated physical fights or assaults, reckless disregard for the safety of one's self or others, and lack of remorse. He stated that it is a diagnosis often found in serial killers. (RT 7:2399-2401.)

Flores stated that spending the rest of his life in the SHU at Pelican Bay State Prison would not work well with appellant's mental makeup. (RT 7:2391-2392.)

4. INSTITUTIONAL EVIDENCE

Daniel Vasquez testified that he started work with the California Department of Corrections as a correctional officer, finished the last ten years of his employment as the warden at San Quentin State Prison, and was currently a criminal justice consultant. (RT 8:2505-2506.)

According to Vasquez, appellant last paroled out of the prison system from the Security Housing Unit at Pelican Bay State Prison. (RT 8:2506.)

Vasquez stated that the SHU at Pelican Bay State Prison ranks as one of the most secure prison facilities in existence. Prisoners are sometimes placed in the SHU indefinitely if the prisoner is a validated member of a street gang or prison gang. In each unit, there are eight inmates on the top tier and eight inmates on the bottom tier, with both single and double cells, resulting in a very small span of control for the staff. (RT 8:2506-2508, 2515.) Inmates exercise by themselves in a small yard and any time

they are out of the unit they are escorted by staff and under restraint consisting of handcuffs or waist chains. Inmates are locked in their own cells almost 24 hours a day and allowed to shower about three times per week. There is no outside visibility, only filtered sunlight. There can be some contact with other inmates, but it is not face-to-face or personal contact. Visitation is always behind glass, inmates are only allowed three cubic feet of property, and can have a television or radio. (RT 8:2507-2508, 2516, 2517.)

Vasquez acknowledged that the SHU at Corcoran State Prison is somewhat less restrictive, but inmates there are moved to the SHU at Pelican Bay if they pose a greater security risk. (RT 8:2519.)

Vasquez compared the Pelican Bay SHU to Death Row at San Quentin, stating that the housing was in a couple areas of the institution, including the "Adjustment Center." While housing on Death Row is determined by a classification committee, the most desirable housing is in "North Seg," a part of the prison located on the sixth floor of the north block. Very good behavior is necessary for housing in North Seg, and there is a long waiting list. It is the most sought-after area because inmates can exercise outside their tier, right outside the cell door, and there is a little bit more time out of the cell. (RT 8:2508-2509.)

"East Block" on Death Row is less attractive because the existence is redundant -- the same every day -- with breakfast in the cell, a sack lunch, supper in the cell, and inmates are not permitted to leave their cell except for visits or exercise time. Movement of prisoners is very deliberate. Inmates are searched and handcuffed through the food port when they go out and are escorted to the exercise yard, which contains a dense population and is covered by guards with guns. (RT 8:2509-2510.)

Vasquez testified that Death Row inmates who engage in very bad or dangerous behavior are assigned to the Adjustment Center. Movement in

the Adjustment Center is under restraint, and exercise is limited to the Adjustment Center yard under armed supervision. (RT 8:2510-2511.)

According to Vasquez, Grade A prisoners on Death Row are allowed up to six cubic feet of property, while Grade B inmates start with three cubic feet of property, although they may be allowed more based on their behavior. Inmates are allowed no personal clothing, but have books, magazines and state-issued clothing. If inmates can afford it, they are allowed a television or radio, ordered from a vendor familiar with institutional rules, for use in their cell. (RT 8:2511-2512.)

Death Row inmates are allowed attorney and family visits following a background investigation. Visiting initially is behind glass with a telephone, with later contact visits in Plexiglas booths earned by staying out of trouble, showing respect to the staff, avoiding assaultive behavior, and not violating the rules or posing a security threat. (RT 8:2512-2514.) Once an inmate gets to Death Row, privileges in general can improve premised on behavior, but the inmate will never have the privileges afforded a general prison population inmate. (RT 8:2515.)

Vasquez opined that if a convict had two choices for the rest of his life -- the SHU at Pelican Bay because he was a documented prison gang member and had a history of bad conduct, or Death Row -- it was understandable that he might prefer Death Row because of the attendant privileges, less threat of violence, and lack of continuous pressure to be involved in allegiance and loyalty to a prison gang. (RT 8:2520.)

5. APPELLANT'S TESTIMONY

Appellant testified that it did not matter to him whether he was sentenced to life imprisonment without the possibility of parole or death, but that he would rather be on Death Row because there was less range of movement in the SHU at Pelican Bay. According to appellant, inmates in

the SHU usually did not have cellmates and went to the exercise yard, which was eight feet long, twenty feet wide, with thirty feet high walls, by themselves. Appellant said he did not want the death penalty because he wanted to die, but because he heard that Death Row was a better place than others where he could end up. (RT 8:2540, 2593.) Appellant did not expect anyone to feel sorry for him. (RT 8:2542.)

Appellant admitted that he killed Miller, having driven him to the place of his death and shooting him because Miller violated the gang's laws by talking about what the gang is and does. According to appellant, Lamb and Rump were not involved in the killing. Appellant reiterated that this is the truth and that he does not lie. (RT 8:2541, 2550-2551.) Appellant said that he instructed his trial attorney not to ask Bonnie Miller any questions because appellant felt bad for her, but that Miller knew the consequences of his actions. (RT 8:2542.)

Appellant testified that he first became involved with white supremacy when he was about 28 years old, and said his involvement resulted from going in and out of prison. He said that in prison groups divided voluntarily according to race. Appellant said he is proud that he is White and does not care about any other race. He never beat anyone up because they were Black or Mexican and had no problem with any other race, but said that he also would not back down. Appellant said that he had never been convicted of a hate crime. (RT 8:2542-2544, 2560.) Appellant had a lot of tattoos on his body referring to Vikings and Nazis, and was first introduced to them in prison. (RT 8:2547-2548.) According to appellant, he is not scared of anything. (RT 8:2554.)

Appellant said that when he was a young boy, he played Little League and loved it. He also played football, roller-skated, took part in track and field, and always tried to do the best he could. Appellant enjoyed sports, but did not enjoy school because of the authority-figure aspect of it.

Still, appellant did like math and carpentry at school, but was not interested in history and spelling. (RT 8:2546-2547.)

Appellant claimed that his relationship with his father was good before his father left the family. His father was a military man and strict with him, and would discipline appellant by spanking him and making him stand in the corner for hours because appellant showed disrespect to his father and talked back to him. (RT 8:2548.)

Appellant's relationship with his mother was always wonderful and he continued to have a soft spot in his heart both for her and his own children. Other than having himself tattooed, appellant said he obeyed his mother all of the time. (RT 8:2549-2550.) Appellant attributed his strong respect for women to his relationship with his mother. (RT 8:2554.)

Appellant's first marriage was to Holly Ann Scott. Appellant met her at a party and they married 2½ years later because "she was the apple of my eye." On their dates, they went to concerts, the beach, and volleyball and baseball games. (RT 8:2560.) They had a child together, Justin Earl Johnson, who was almost 25 years old at the time of trial. Appellant only spent about four years with Justin while appellant was not incarcerated, but always maintained contact. Justin would visit appellant in prison, but could not do so now because Justin had his own troubles with the law, having been incarcerated for receiving stolen property. (RT 8:2561-2562.) Appellant's first marriage ended because of appellant's drug use and prison stays, but he remained good friends with Holly, who lived in Arizona at the time of trial. (RT 8:2562-2563.)

Appellant married again in 2002, this time to a woman named Sabrina Elizabeth Capps. He said it had been love at first sight when he met her. They dated about a year before marrying. Their child, Ryder Edward Johnson was almost eight years old at the time of trial, and appellant had only been able to spend about a year with him. Sabrina had been taking

care of Ryder, but she was incarcerated at the time of appellant's trial and Ryder was staying at her parents' house. (RT 8:2563-2564.)

Appellant testified that when he had been out of custody, he worked five to six days a week building custom houses. He loved playing with his own children, brothers, nieces and nephews. (RT 8:2589.) Appellant stated that his friends were from all races and did not have to be part of his ideological group. While appellant did not hate people from other racial groups, he did not care if they blew themselves up and did not want them harassing White people. In addition, if anyone came into his neighborhood and dealt drugs or stole, appellant would do whatever it took to get rid of them. (RT 8:2589-2590.)

Appellant first smoked pot and drank booze when he was about 11 years old. (RT 8:2545.) Appellant opined that his life would have been different if he never did drugs and that he would have lived a crime-free life, but he was attracted to the high of drugs and still loved them. (RT 8:2553.)

Appellant's first stay in prison was at Chino for 16 months. He was a Level One prisoner, but segregated from the general population. Appellant did not become involved in violence or gang activity during that stay and was more focused on weight lifting. He claimed he was too naïve to see that the White race needed help, but was scared because a bunch of tattooed freaks -- appellant described himself as becoming one of them 20 or 30 years later -- were running around with knives and no one was doing anything about it. (RT 8:2557-2558.) Later in prison, appellant spent most of his time in Administrative Segregation or the SHU. (RT 8:2558.)

Appellant did not know why he was not prosecuted after Nordeen was killed, but assumed that it was because Nordeen was a known child molester. Appellant did not like the fact that Nordeen raped children and no one did anything about it. (RT 8:2571-2572.)

After Nordeen's killing, appellant was put in Administrative Segregation. He said that the prison placed known informants into his cell in an attempt to get appellant to talk. Appellant told the informants not to come in because either the informant or appellant would go out "on their ears." Appellant explained that this was why he was repeatedly assaulting his cellmates. (RT 8:2574.)

With reference to the Cory Lamons killing, appellant admitted that he was there when Lamons was killed and that he pleaded guilty so others who did not know what was going down with Lamons would receive determinate sentences. Appellant claimed his problems with Lamons arose because Lamons owed appellant money for drugs and Lamons was disrespectful to women appellant knew, stealing from them, taking their cars, and tearing up their houses. In addition, Lamons was a drug addict. (RT 8:2587-2588, 2591.) Appellant said he wrapped up Lamons' body, put him in the back of the truck, and put wood on top of him. Appellant testified that when stopped, he was taking Lamons' body to a specific location in Twentynine Palms. According to appellant, he knows there are sites where bodies are buried. (RT 8:2623-2624.)

Appellant stated that he only knows violence because he grew up through the system and it took him 30 years to get there. In prison, it was "kill or be killed," and appellant was almost killed because he spared Joseph Govey's life. Govey had been smart-mouthing to the higher ups in the gang -- he said "f-you" -- and they did not like it. Appellant said that he knew the whole background of the situation and that the shot-caller was lying to the people around him. Appellant said that he weighed the consequences, believed Govey did not deserve the judgment brought down on him, and that appellant had paid for his insubordination when he was attacked and almost killed. (RT 8:2565-2566, 2568-2571.)

Appellant aligned with white supremacists in prison of his own free will, but not out of a desire to hurt people. Instead, appellant did it to help people that could not help themselves in the prison system -- the older men and younger kids. Only child molesters and rats drive appellant crazy. (RT 8:2566.)

Appellant said that he violated his parole roughly 12 times, once for gang association and every other time for drugs. (RT 8:2575.)

Appellant stated that he only steals from addicts, gangsters and convicts, all of whom are fair game because they are breaking the law. (RT 8:2551-2552.) Appellant said that his first crime was the residential burglary of a dope dealer named Troutman. The man was a friend and appellant went to his house because appellant was using drugs heavily at the time. Appellant wanted to have Troutman front drugs to him that appellant would pay for later, but Troutman did not want to do it, so appellant demanded the drugs and took Troutman's property. In addition, appellant had heard that Troutman dealt drugs to children. (RT 8:2544-2545, 2591-2592.)

His next criminal conviction resulted from the Brandolino incident at Denny's when a "jackass" friend snatched a lady's purse and jumped into appellant's truck. Appellant said he did not know the friend was going to do this and appellant was sitting in his truck when the police arrived. Appellant was high on alcohol and cocaine when the crime occurred. (RT 8:2553-2555.)

Appellant said that he was not the person that ran from the Garden Grove Police in a Datsun 280Z and that he had never run from the police. Appellant maintained that the 280Z was driven by a Mexican man named Alex. Appellant said that he owned the vehicle with a mutual friend and that the car was impounded. The car was retrieved by Alex, but Alex ran from the police because he had a pound of marijuana in the car. Appellant

said his identification was found in the car because it had been in the car when it was impounded. (RT 8:2556-2557.)

Appellant stated that his assault on Agee occurred at Corcoran in the gladiator arenas. Appellant knew he was in a gladiator arena because he had to go to the yard every ten days and would find a large group from another race present. A videotape was made of appellant's assault on Agee and a guard asked appellant if he could take the cassette home to show his children the proper way to beat someone. (RT 8:2576.)

Appellant testified that he had never attempted to escape from incarceration or open his handcuffs, and he never assaulted anyone in law enforcement, but that he had no respect for authority or law enforcement. (RT 8:2577, 2579-2580.) The rule in prison was not to cooperate with the officers. (RT 8:2583.)

On Mother's Day, 2004, appellant was in the Theo Lacy Jail in Orange County. Officers came to do a cell search, asked appellant and his cellmate to exit, and they complied. Appellant was holding methamphetamine and threw it in his mouth. When appellant was already handcuffed and on the ground, one deputy jumped on appellant's back, another sprayed appellant with mace, and appellant was hit on his head, neck and shoulders. (RT 8:2580-2581, 2609.)

Appellant testified that he did not expect to win his appeal and did not care about the appeal, but was merely looking to get the best situation to live the rest of his life. (RT 8:2594.)

On cross-examination, appellant testified that he committed two more murders that he had not been charged with; one was in custody and the other was out-of-custody. Appellant also alleged that he had not been prosecuted for a bunch of robberies and home invasion robberies of drug dealers. (RT 8:2620-2621.)

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT APPELLANT KILLED MILLER BY MEANS OF LYING-IN-WAIT EITHER AS A THEORY OF FIRST DEGREE MURDER OR A SPECIAL CIRCUMSTANCE

A. INTRODUCTION

The prosecution presented evidence that appellant, Lamb and Rump agreed to kill Miller because approximately one year earlier, Miller had given a televised interview to the news media, breaking a primary rule of PEN1 that outsiders could not learn about the inner workings of the gang. As a result, it was well known -- at least to the police -- that a green light to kill Miller had been placed by gang leadership. (RT 5: 1890, 1895-1896, 1902, 1904, 1906.) Miller apparently knew of the danger as the evidence showed Miller made comments to Marnie Simmons on a couple of prior occasions that he was concerned for his safety. (RT 4:1530-1531, 1537.)

On March 8, 2002, Miller and appellant were both at a birthday party at Johnny Raphoon's house. At that party, Miller told Andrea Metzger that he had to keep his guard up. (RT 4:1542-1544, 1546-1548, 1553, 1557-1559.)

At about 10:30 p.m., Miller left a voice message for Simmons in which she thought Miller sounded concerned. A voice she heard in the background could have been appellant's voice. (RT 4:1533, 1535, 1538.)

A little later, Lamb and Rump were in Christina Hughes' apartment. She asked them to leave and they apparently did so. Minutes later, at about 11:30 p.m., she heard a single gunshot. (RT 3:1403-1407, 4:1601.) At the

same time, a neighbor, Luis Mauras heard a single gunshot followed 15 to 20 seconds later by the sound of screeching tires. (RT 3:1390-1391.)

Miller was shot once in the back of the head behind Hughes' condominium complex. A soft drink can and cap found under his body indicated that he had fallen at the spot where he was shot. (RT . (RT 3:1411-1415, 1417, 1419-1421, 1431, 1438-1440, 1443-1445, 1448.)

Afterward, appellant told Donald McLachlan that he drove with Miller to Anaheim after telling Miller -- Miller was described by McLachlan as a "dope fiend" -- that they were going to score drugs. (RT 4:1578-1581, 1585.) Appellant said that he was walking next to Miller in an alley just before Miller was shot and when they heard footsteps from behind, Miller asked appellant, "Are those PEN1 guys?" Appellant said he introduced Lamb and Rump to Miller and that Miller appeared resigned to the idea something was going to happen to him. (RT 4:1581, 1592.) Appellant told McLachlan that Lamb shot Miller, but appellant was upset with Lamb because Miller had been appellant's dear friend in the past, and appellant wanted Lamb to look Miller in the eyes before shooting and tell him, "You had a good run, you ran afoul of the rules, it is time to go." Appellant said he had words with Lamb about it. (RT 4:1582-1583.) Appellant claimed the reasons Miller had to be killed were the Fox 11 news segments and Miller's actions in the neighborhood. (RT 4:1583.)

At the prior trial of Lamb and Rump, appellant had testified that he arrived at Raphoon's party at about 4:00 or 5:00 p.m. He said that Miller had arrived at about 5:30 to 7:00 p.m., and that they spoke to each other.(RT 4:1608-1610, 1694-1697.) Appellant knew about the news story, was mad at Miller about it, and knew that it made Miller a "dead man." Appellant had not seen Miller since the news stories aired. (RT 4:1611-1616, 1699-1701, 1707-1708, 1766-1767, 1772.) Appellant had a short conversation with Miller, telling him he would kill him for not abiding by

gang rules and sometime between 8:00 and 10:00 p.m., they left the party together to buy heroin and went to the area where Miller's connection was located. (RT 4:1611-1612, 1616, 1676-1677, 1703-1707, 1773, 1779.) On the way, they stopped at a strip mall and Miller used the telephone. Miller got back in and they drove to an alley, where appellant parked his grey Chevrolet Silverado truck, and walked down the alley. (RT 4:1616, 1708-1709, 1769.) As they neared the rear entrance of an apartment complex, appellant testified he reached into his waistband, grabbed his nine millimeter handgun, shot Miller, then ran back to his truck and returned to the party so he would have an alibi. Miller was one-and-a-half to two feet in front of appellant when appellant shot him. (RT 4:1617, 1668, 1674, 1710, 1775.)

The prosecutor argued to the jury that appellant's role in the killing was to drive Miller to the site where Lamb and Rump were present and that Lamb shot him. According to the prosecutor, appellant set up the killing and lured Miller to the alleyway where he was executed with his guard down. (RT 5:1949, 1956-1957.)

B. SUFFICIENCY OF THE EVIDENCE STANDARD

The presumption of innocence and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that the prosecution prove every element of a crime charged beyond a reasonable doubt. (§ 1096; *Sandstrom v. Montana* (1978) 442 U.S. 510, 520; *In re Winship* (1970) 397 U.S. 358, 364; *Jackson v. Virginia* (1979) 443 U.S. 307.)

The federal standard for sufficiency of evidence is set out in *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319:

> [T]he 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. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

The standard set out in *Jackson* is applicable to California cases. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In *Johnson*, this court stated:

> In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence." [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent. As *People v. Bassett* (1968) 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the *whole record* -- i.e., the entire picture of the defendant put before the jury -- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.'"

(*Id.* at pp. 576-577.)

To be "substantial," the evidence must reasonably inspire confidence. (*People v. Morris* (1988) 46 Cal.3d 1, 19, overruled on other grounds, *In re Sassounian* (1995) 9 Cal.4th 535, 544, fn. 5.) "[T]he more serious the charge -- and murder is considered the most serious charge of all -- the more substantial the proof of guilt should be in order to reasonably inspire confidence." (*People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837.)

The prosecution's evidence must be capable of convincing the trier of fact to a "near certainty." (*People v. Hall* (1964) 62 Cal.2d 104, 122.)

The prosecution must present "evidence so complete as to overcome reasonable theories of innocence" (*People v. Alkow* (1950) 97 Cal.App.2d 797, 801), such that the trier of fact has "reasonably rejected all that undermines confidence." (*People v. Hall*, *supra*, 62 Cal.2d at p. 112.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." (*People v. Redmond* (1969) 71 Cal.2d 745. 755.) Mere speculation cannot support a conviction. (*People v. Reyes* (1974) 12 Cal.3d 486, 500.) "'A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.[¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'" (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002 [quoting *People v. Tran* (1996) 47 Cal.App.4th 759, 772].) The substantial evidence test neither requires nor permits the reviewing court to take incriminating evidence at face value. A conviction cannot rest on incredible, false, or unreliable evidence. (*People v. Mayfield* (1997) 14 Cal.4th 668, 735.)

The federal and California rules for determining sufficiency of evidence are equally applicable to challenges aimed at enhancement allegations that increase punishment beyond the prescribed statutory maximum of the underlying crime. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-330.)

C. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S LYING-IN-WAIT MURDER AND SPECIAL CIRCUMSTANCE FINDINGS

Pursuant to section 190.2, subdivision (a)(15), the death penalty may be imposed when a defendant "intentionally killed the victim *by means of* lying in wait." (Italics added.) While a former version of the statute re-

quired proof of an intentional killing "*while*" lying in wait, effective March 8, 2000 -- approximately two years prior to the killing in this case -- Proposition 18 modified the language of section 190.2, subdivision (a)(15), by replacing the word "while" with the term "by means of." This change brought the statutory language of the lying-in-wait special circumstance into conformity with the language of section 189, defining one form of first degree murder as being committed "by . . . lying in wait."

The jury was instructed on lying-in-wait as a form of first degree murder with CALCRIM No. 521, providing in pertinent part:

> The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:
>
> 1. He concealed his purpose from the person killed;
>
> 2. He waited and watched for an opportunity to act; and
>
> 3. Then, from a position of advantage, he intended to and did make a surprise attack on the person killed or aided and abetted another person who made such a surprise attack.
>
> The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. Deliberation means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with premeditation if the decision to commit the act is made before the act is done.
>
> A person can conceal his purpose even if the person killed is aware of the person's physical presence.
>
> The concealment can be accomplished by ambush or some other secret plan.

(CT 17:4385-4386; RT 5:2034-2035.) The court gave the same definition for the lying-in-wait special circumstance allegation, adding an element of intent to kill. (CT 17:4403-4404; RT 5:2047-2049.)

Lying-in-wait cases are primarily concerned with the elements of concealment and watchful waiting. (*Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1008, cited with approval in *People v. Lewis* (2008) 43 Cal.4th 415.) Actual physical concealment is not necessary. "The concealment which is required, is that which puts the defendant in a position of advantage, from which the factfinder can infer lying-in-wait was part of the defendant's plan to take the victim by surprise." (*People v. Morales* (1989) 48 Cal.3d 527, 555, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

To the extent that the prosecutor addressed a lying-in-wait theory of both first degree murder and the special circumstance allegation during argument, he urged that appellant set up the murder and drove Miller to the spot where Lamb executed him. The evidence did not support either theory.

If appellant had merely driven Miller to the spot where he was shot, with concealed purpose and nothing more occurred, appellant concedes that this court's jurisprudence would support both first degree murder and a special circumstance premised on lying-in-wait. But there was more.

This court has observed:

> [W]e do not mean to suggest that a mere concealment of purpose is sufficient to establish lying in wait - many "routine" murders are accomplished by such means, and the constitutional considerations raised by defendant might well prevent treating the commission of such murders as a special circumstance justifying the death penalty. . . .[¶] The question whether a lying-in-wait murder has occurred is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances.

(*People v. Morales*, *supra*, 48 Cal.3d at pp. 557-558.)

In the present case, no evidence that appellant concealed his purpose from Miller, that either Lamb or appellant watched and waited for an opportune time to act, or that either Lamb or appellant made a surprise attack on Miller from a position of advantage was presented to the jury.

What was put before the jury was ample evidence that Miller was always on guard because he realized the eventual deadly consequences of his media interview. Prior to the night of the party, he had made comments to Marnie Simmons on a couple of occasions that he was concerned for his safety. At the party, Miller commented to Andrea Metzger that he had to keep his guard up. At about 10:30 p.m. -- about one hour before he was killed -- Miller left a voice message for Simmons in which he sounded concerned and a voice she heard in the background could have been appellant.

While it was undisputed that Miller was killed by one gunshot to the back of his head, the only evidence presented to the jury of what actually occurred at the murder site was the alternate versions found in appellant's statements to Donald McLachlan and appellant's prior testimony from the Lamb and Rump trial.

Appellant told McLachlan that Miller heard footsteps from behind, asked whether they were members of the gang, appellant introduced Miller to Lamb and Rump, and Miller appeared to be resigned to the fact that he was to be killed. Under this version of the facts, none of the elements of lying-in-wait are present. While appellant may have told Miller that they were going to buy heroin, there was no actual concealment of purpose. Miller was justifiably on guard -- he had understandably been vigilant for the past year -- expressed his nervousness at the party to a person present and made a telephone call either from the party or on the road with appellant in which he sounded concerned for his safety. At the scene, Miller heard footsteps and knew what they were, and was then introduced to the people that were to execute him. Moreover, appellant expressed his frustra-

tion with the manner of killing because he wanted Miller killed by a shot to the face after an admonition, not from behind. And the introduction of Lamb and Rump destroyed the element of surprise or position of advantage, for there was no evidence that Miller was restrained or that he could not have fought in an attempt to escape.

Similarly, appellant's prior testimony indicated that appellant spoke with Miller at the party and told him up front that he was going to kill him because Miller had not abided by gang rules. While it is only a matter of conjecture why Miller would go with appellant to buy heroin with that knowledge -- perhaps ultimately, the needs of a junkie overcame the necessity to protect himself, or perhaps Miller believed that appellant would not actually harm him due to his long relationship with appellant -- it cannot be claimed that appellant was concealing a purpose when they departed. And while the method of execution utilized by appellant certainly demonstrated a surprise attack from a position of advantage, there was no concealment of purpose as appellant advised Miller what was going to happen well in advance.

There were no other witnesses to what occurred. While there was evidence of two possible scenarios for the killing, the evidence did not demonstrate that appellant concealed his purpose in either scenario or that Miller was killed in a surprise attack from a position of advantage in appellant's statement to McLachlan. Only sheer speculation allows a finding of lying-in-wait as a theory of either first degree murder or as a special circumstance.

> We may *speculate* about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.[¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence." In the absence of any sub-

> stantial evidence . . . , we must conclude that the evidence will not support a conviction . . . .

(*People v. Morris*, *supra*, 46 Cal.3d at p. 21, italics in original, internal citations omitted.)

Did Miller not suspect what was going to occur? Was Miller shot by Lamb from behind without warning? There simply is a dearth of evidence suggesting these scenarios. And, given that lack of evidence, the trier of fact is left to speculate about what actually happened.

Viewed in light of all the other evidence at the trial, there simply was no evidence reasonable in nature, credible, and of solid value, that appellant concealed his purpose, watched and waited for an opportune moment to strike, and that Miller was killed by a surprise attack from a position of advantage, and only surmise would permit a finding that Miller was murdered by means of lying-in-wait. (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576.) As such, no reasonable trier of fact could find appellant guilty of first degree murder or a special circumstance premised on lying-in-wait. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1127.)

The findings of first degree murder by lying-in-wait and the lying-in-wait special circumstance allegation must be reversed.

II. THE VERSION OF THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE ALLEGATION APPLICABLE TO THE TRIAL IN THIS CASE IS INDISTINGUISHABLE FROM THE LYING-IN-WAIT THEORY OF FIRST DEGREE MURDER AND IS THEREFORE UNCONSTITUTIONALLY VAGUE, CREATING AN ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY BY FAILING TO NARROW THE CLASS OF DEATH-ELIGIBLE DEFENDANTS

The information in this case charged appellant with murder (§ 187, subd. (a), together with numerous special circumstance allegations, including lying-in-wait (§ 190.2, subd. (a)(15)). The capital murder of Scott Miller occurred on March 8, 2002. While appellant's prior testimony in the Lamb and Rump trial that he personally killed Miller was offered by the prosecutor in the guilt phase of appellant's trial (RT 4:1617, 1668, 1674, 1710, 1775), the prosecutor argued to the jury that appellant was merely the person that drove Miller to the location where he was killed and that Lamb was the actual killer (RT 5:1949, 1961).

Two years before Miller was killed, on March 7, 2000,[18] California voters passed Proposition 18, modifying the lying-in-wait special circumstance statute. The special circumstance applicable at the time of Miller's killing and at trial is now proven by showing that the defendant intentionally killed the victim "by means of" lying-in-wait. The prior version of the statute required the prosecution to prove the murder was committed "while" lying-in-wait.

The Eighth Amendment prohibits the death penalty from being "imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Instead, "[a] capital sentencing

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[18] The amendment became effective on March 8, 2000.

scheme must . . . provide 'a meaningful basis for distinguishing'" the few cases where it is imposed from the cases where it is not. (*Ibid*, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 188.)

California is therefore obligated to "define the crimes for which the death penalty may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" (*Godfrey v. Georgia*, *supra*, 446 U.S. at p. 428, quoting *Gregg v. Georgia*, *supra*, 428 U.S. at p. 196, fn. 7.)

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357 [defining and applying the void-for-vagueness doctrine under the Fourteenth Amendment], most recently cited with approval in *Skilling v. United States* (2010) 561 U.S. 358, ___, 130 S.Ct. 2896, 2904.)

The 2000 amendment to section 190.2, subdivision (a)(15), defining the lying-in-wait special circumstance, rendered it identical to the crime of first degree murder by means of lying-in-wait found in section 189. The only substantive difference is that the special circumstance requires an intentional killing, but because lying-in-wait first degree murder must be committed intentionally, there is no meaningful difference. A specific intent to kill must be proven where a defendant who did not personally commit a homicide is convicted of first degree murder. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265.)

Accordingly, the amendment to the lying-in-wait special circumstance rendered it unconstitutional in that it is impermissibly vague, creates a substantial risk of arbitrary and capricious application of the death penalty, and fails to narrow the class of death-eligible defendants. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1147 (conc. opn. of Kennard, J.); *People v.*

Green (1980) 27 Cal.3d 1, 61 (overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3); *People v. Catlin* (2001) 26 Cal.4th 81, 90; *People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1265.)

Prior to the statute's 2000 amendment, Justice Mosk recognized that the lying-in-wait special circumstance must be sufficiently distinctive so as to 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. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J).)

In *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906-907, the court addressed the issue before the statute was amended. The court found that the only reason the section 190.2, subdivision (a)(15), special circumstance was not void for vagueness was that there was a subtle, but important difference between the first degree murder lying-in-wait statute and the lying-in-wait special circumstance. Specifically, the difference was between the meaning of "while" lying-in-wait and "by means of" lying-in-wait. The court distinguished the two phrases, finding that that the special circumstance "while lying-in-wait" required a continuous temporal relationship between the concealment and the act, while the first degree murder language "by lying-in-wait" did not. (*Id.* at p. 907; and see, *Domino v. Superior Court*, *supra*, 129 Cal.App.3d at p. 1006 [discussing the definition of "lying-in-wait"].)

However, Proposition 18 removed the distinction. By doing so, it removed the definite guidelines needed to prevent arbitrary and discriminatory enforcement of the law. The statute no longer defines the special circumstance offense with sufficient precision that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. (*People v. Flack* (1997) 52 Cal.App.4th 287, 293; *Kolender v. Lawson*, *supra*, 481 U.S. at p. 357.)

By removing the distinction, the statute now allows prosecutors and juries to make an identical finding without any statutory guidance. There is no longer any direction set forth in the statute to assist in determining if an intentional first degree murder by lying-in-wait should also subject a person to the death penalty based on the same finding.

The amended version of section 190.2, subdivision (a)(15), and the first degree murder qualification of section 189 create an unconstitutionally vague statutory scheme which allows for standardless sentencing discretion by the jury and the court, resulting in arbitrary and discriminatory enforcement of the death penalty.

This court should find that section 190.2, subdivision (a)(15), as amended by Proposition 18 and used in this case, is unconstitutional and requires reversal of the true finding on the lying-in-wait special circumstance allegation.

III. THE TRIAL JUDGE PREJUDICIALLY ERRED BY INSTRUCTING THE JURY WITH CALCRIM NO. 400 THAT AN AIDER AND ABETTOR OF A CRIME IS EQUALLY GUILTY WITH THE ACTUAL PERPETRATOR

A. THE ERROR

In the prosecution's theory of the capital crime, appellant drove Scott Miller to the location where he was shot by Michael Lamb. Appellant was found guilty of the first degree murder of Miller. Lamb was tried in a prior proceeding.

Appellant was tried for first degree murder on different theories that (1) he premeditated and deliberated the killing as one of the killers or that the killing was committed by lying-in-wait; and (2) he directly aided and abetted the killing, either by premeditating or by lying-in-wait. The jury was also instructed on unpremeditated second degree murder. (CT 17:4377-4379, 4383-4386.)

The jury was instructed on the general principles of aiding and abetting with CALCRIM No. 400 as follows:

> A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he committed it personally or aided and abetted the perpetrator who committed it.

(CT 17:4377; RT 5:2029 [italics added].)

In the context of this case, it was prejudicial error to instruct in the language of CALCRIM No. 400 because the "equally guilty" language was misleading as an aider and abettor's culpability may be greater or lesser than that of the actual perpetrator depending on the mens rea of the aider and abettor. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118, 1121; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165; *People v. Nero*

(2010) 181 Cal.App.4th 504, 515-516.) Appellant was entitled to have the jury consider his culpability in light of his own mens rea in deciding his guilt of the crime of murder and, if found liable for murder, in determining the degree of murder for which he was liable. (*People v. Concha* (2009) 47 Cal.4th 653, 663.)

In *People v. McCoy*, *supra*, 25 Cal.4th 1111, two defendants were tried together on murder and attempted murder charges. This court concluded that in a homicide case in which the degree of the crime was dependent on various possible mental states, an aider and abettor "may be guilty of greater homicide-related offenses than those the actual perpetrator committed" if the aider and abettor possessed a more culpable mens rea than the actual perpetrator. (*Id.* at p. 1114.) "[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that person's mens rea is more culpable than another's, the person's guilt may be greater even if the other might be deemed the actual perpetrator." (*Id.* at p. 1122.)

In *People v. Samaniego*, *supra*, 172 Cal.App.4th 1148, a jury found three gang member defendants guilty of two counts of first degree murder. The jury also found a multiple murder special circumstance and gang allegations to be true. Because it was unknown who the shooter was in each murder, all defendants were tried on a theory of aiding and abetting. The defendants had a motive and a preconceived plan to kill each of their victims. In the first killing, the defendants intended to kill a person that they believed was fueling rumors that a fellow gang member was a snitch. The defendants, one of whom had a gun, had a meeting, then drove around looking for the person they wanted to kill. When they arrived at the house where they expected to find him, he was not present, so they shot and killed someone else. In the second killing, the defendants learned the victim was

selling drugs, but not paying taxes to their gang. The defendants staked out the victim's apartment and killed him to send a message to other drug dealers in the gang's territory. (*Id.* at pp. 1154-1161.) The defense presented evidence that the crimes were not gang related. (*Id.* at p. 1162.) The jury was instructed on the general principles of aiding and abetting in the standard language of CALCRIM No. 400, providing that "a person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." The jury was also instructed on both premeditated first degree murder and unpremeditated second degree murder, thus allowing the jury to find the defendants guilty of either killing with deliberation or without deliberation on the spur of the moment. (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1162-1163.) Relying on *People v. McCoy*, *supra*, 25 Cal.4th 1111, the Court of Appeal held that in the context of the case, the "equally guilty" language of CALCRIM No. 400 was misleading because an aider and abettor's guilt may be less than the perpetrator's if the aider and abettor has a less culpable mental state. The offending language thus eliminated the need to prove the aider and abettor's mental state for murder. (*Id.* at pp. 1163-1165.) The court explained that the "equally guilty" language in CALCRIM No. 400 "misdescribes the prosecution's burden in proving the aider and abettor's guilt of first degree murder by eliminating its need to prove the aider and abettor's own (1) intent, (2) willfulness, (3) premeditation and (4) deliberation, the mental states for murder." (*Id.* at p. 1165.) However, the court concluded the error was harmless beyond a reasonable doubt because the jury also found true a special circumstance allegation that the defendant acted willfully with the intent to kill. (*Ibid.*)

In *People v. Nero*, *supra*, 181 Cal.App.4th 504, defendant Nero stabbed the victim to death with a knife that the prosecution argued defendant Brown had handed to him. During deliberations, the jury asked if it

could find an aider and abettor guilty of a greater or lesser crime than the direct perpetrator. The trial court replied that principals in a crime are equally guilty. Both of the defendants were convicted of second degree murder. The court determined that the trial court's response was erroneous because an aider and abettor may be found guilty of a lesser homicide related offense than the actual perpetrator. It observed that even in unexceptional circumstances CALCRIM No. 400 can be misleading and suggested that the pattern instructions on aider and abettors should be modified. The appellate court determined it could not find beyond a reasonable doubt that Brown would have been found guilty of second degree murder in the absence of the erroneous response to the jury's question. (*Id.* at pp. 515-516.)

CALCRIM No. 400 was amended in 2010, changing the last line of the first paragraph to make optional the word "equally" and now reads: "A person is [equally] guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." The accompanying Bench Notes to CALCRIM No. 400 explain the amendment: "Before instructing the jury with the bracketed word "equally," the court should ascertain whether doing so would be in accord with the controlling principles articulated in *People v. McCoy* (2001) 25 Cal.4th 1111, 1115–1116 [108 Cal.Rptr.2d 188, 24 P.3d 1210] and *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 [91 Cal.Rptr.3d 874]."[19]

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[19] Similarly, CALJIC No. 3.00 was revised to read, in relevant part: "Each principal, regardless of the extent or manner of participation is [equally guilty.] [guilty of a crime.] [] [¶] [When the crime charged is [either] [murder] [or] [attempted murder] [_____], the aider and abettor's guilt is determined by the combined acts of all the participants as well as that persons own mental state. If the aider and abettor's mental state is more culpable than that of the actual perpetrator, that person's guilt may be greater than that of the actual perpetrator. Similarly, the aider and abettor's guilt may be less than the perpetrator's, if the aider and abettor has a less

Here, there were clear differences in the various perpetrators' culpability levels.

The prosecutor consistently argued that Lamb was the person that actually killed Miller. On the other hand, appellant's involvement was less culpable because he only had to get Miller to the scene of the crime. (RT 5:1956--1957, 1961-1962, 1969.)

Premised on the faulty instruction, the jury was never told that it could convict appellant of a lesser crime premised on appellant's mental state. Instead, the jury was told that they must find appellant equally guilty with Lamb, the triggerman in the alley. While there was clear evidence that Lamb premeditated and deliberated prior to the killing, appellant's actions demonstrated far less culpability than Lamb. Thus, the "equally guilty" language wrongly used in CALCRIM No. 400 misdescribed the prosecutor's burden and permitted the jury to convict appellant of first degree murder without consideration of his own mental state. (*People v. Nero*, *supra*, 181 Cal.App.4th at p. 518; *People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.)

If the jury believed Lamb premeditated and deliberated, it was duty bound under CALCRIM No. 400 to find appellant guilty of the same crime -- first degree murder -- even if the jury believed appellant did not premeditate and deliberate.

Moreover, the flawed language in CALCRIM No. 400 was neither negated nor cured by other instructions given. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [appellate court must consider instructions given as a whole in determining whether there is a "reasonable likelihood" the jury

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culpable mental state.]" The accompanying use note discusses the holdings in *McCoy*, *Samaniego*, and *Nero* and directs that, when appropriate, the alternative bracketed material be used in place of the "equally guilty" language.

applied the challenged instruction in a way that violates the Constitution]; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237 [consider instructions as a whole to determine whether instruction is ambiguous or misleading and whether there is reasonable likelihood the jury misconstrued or misapplied the instruction].) CALCRIM No. 401 defining aiding and abetting does not undermine appellant's argument because it did not eliminate the error created by the "equally guilty" language and did not preclude the jury from finding appellant guilty premised only on Lamb's state of mind. (*People v. Nero, supra*, 181 Cal.App.4th at p. 518.)

Hence, it was error to instruct with CALCRIM No. 400, as phrased, in the context of this case.

Misinstruction on elements of a crime is federal constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 144; *People v. Sengpadychith, supra*, 26 Cal.4th at p. 324.) The erroneous jury instruction was a misapplication of a state law that constitutes a deprivation of a liberty interest in violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Coleman v. Calderon* (9th Cir. 1998) 150 F.3d 1105, 1117; *Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Appellant's right to a jury instruction in line with clearly established state law was a constitutionally-protected liberty interest of "real substance." To uphold his conviction with the improper instruction, would be arbitrary and capricious and thus violate due process. (*Vitek v. Jones* (1980) 445 U.S. 480, 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"]; *Hicks v. Oklahoma, supra*, 447 U.S. 343.) Finally, the error described above so infected the trial with unfairness as to render the convictions a denial of due process of law. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Darden v. Wainwright* (1986) 477 U.S. 168, 181-182.)

B. THIS CLAIM WAS NOT FORFEITED

Appellant anticipates that respondent will aver that the issue is forfeited because trial counsel failed to request modification of CALCRIM No. 400 to exclude the word "equally." Indeed, in *People v. Samaniego*, *supra*, 172 Cal.App.4th 1148, the Court of Appeal found that there was forfeiture of the issue, stating:

> Generally, "'[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Hart* (1999) 20 Cal.4th 546, 622, 85 Cal.Rptr.2d 132, 976 P.2d 683; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134, 40 Cal.Rptr.3d 118, 129 P.3d 321.) As discussed below, CALCRIM No. 400 is generally an accurate statement of law, though misleading in this case. Samaniego was therefore obligated to request modification or clarification and, having failed to have done so, forfeited this contention.

(*Id.* at p. 1163.) If the Court of Appeal's position is correct, appellant contends that the doctrine of forfeiture does not prohibit an appellate court from reaching a claim; it merely allows the court not to reach the claim. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.)

However, appellant submits that the issue was not forfeited. The opinion in *Samaniego* was filed on April 6, 2009. Trial in this case commenced on October 5, 2009, approximately one-half year post-*Samaniego*. "[A] court may give only such instruction as are correct statements of the law. [Citation]." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) This duty requires the trial court to correct or tailor an instruction to the particular facts of the case even though the instruction submitted was incorrect. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110; see also *People v. Castillo* (1997) 16 Cal.4th 1009 [even when a trial court instructs on a matter on which it has no *sua sponte* duty to instruct, it must do so correctly].) When the prosecutor relies on aiding and abetting as a theory of culpability,

the trial court must *sua sponte* instruct on it. (*People v. Beeman* (1984) 35 Cal.3d 547, 560 560–561.) Hence, appellant has not forfeited this issue because the trial court was required to instruct on the law of aiding and abetting culpability and to do so correctly.

Moreover, jury instructions are reviewable on appeal without request or objection at trial. (§ 1259 [allowing appellate review of any instruction affecting the defendant's "substantial rights"]; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; *People v. Harris* (1981) 28 Cal.3d 935, 956; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) This court can only determine whether appellant's substantial rights were affected by determining whether there was error and prejudice. In other words, if appellant's claim has merit, it was not forfeited.

Accordingly, appellant submits that this issue has not been forfeited by the failure to request a modification of CALCRIM No. 400 to eliminate the word "equally."

C. IF THE CLAIM WAS FORFEITED, DEFENSE COUNSEL WAS INEFFECTIVE

If defense counsel did waive or forfeit the issue, trial counsel was ineffective in failing to request the modification at trial. Hence, the issue should be reached for the first time on appeal both because counsel was ineffective, cognizant on direct appeal, and to avoid any further necessity of pursuing this line of inquiry later. (*People v. Cox* (1991) 53 Cal.3d 618, 682; *People v. Martin* (1995) 32 Cal.App.4th 656, 661.)

"Thus, appellant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates . . . result[ing] in the withdrawal of a potentially meritorious defense." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "A convicted defendant's claim that counsel's assistance was so defective as to require reversal

of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) California has adopted the *Strickland* test. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) The burden of proof that a defendant must meet in order to establish his entitlement to relief on an ineffective assistance claim is a preponderance of the evidence. (*Id.* at pp. 217-218.)

Here, there was new case law that issued prior to the trial in this case. That new case law was sufficient to later trigger a change in the official version of CALCRIM No. 400. Given the critical nature of the instructional modification -- improperly allowing appellant's culpability to be based on that of a co-defendant rather than his own mens rea -- and the obvious need for modification, there was no possible explanation for failure to raise the point argued here other than a simple lack of knowledge of recent case law. Without any plausible or possible explanation for why defense counsel here did not seek modification, the failure to do so was ineffective assistance of counsel cognizable on direct appeal.

D. APPELLANT WAS PREJUDICED BY THE MISLEADING INSTRUCTION THAT HE SHARED THE SAME LEVEL OF CULPABILITY AS THE ACTUAL SHOOTER

> Though we find CALCRIM No. 400 to be misleading as applied to the unique circumstances presented here, we must still determine if the error was prejudicial. An instruction that omits or misdescribes an element of a charged offense violates the right to jury trial guaranteed by our federal Constitution, and the effect of this violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. (*People v. Williams* (2001) 26 Cal.4th 779, 797, 111 Cal.Rptr.2d 114, 29 P.3d 197.) Under that test, an appellate court may find the error harmless only if it determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Neder v. U.S.* (1999) 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35.) CALCRIM No. 400 misdescribes the prosecution's burden in proving the aider and abettor's guilt of first degree murder by eliminating its need to prove the aider and abettor's (1) intent, (2) willfulness, (3) premeditation and (4) deliberation, the mental states for murder.

(*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.)

A defendant cannot be convicted unless the prosecution has proven beyond a reasonable doubt every fact essential to prove the charged crime and every element necessary to constitute the crime. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Apprendi v. New Jersey*, *supra*, 530 U.S. 466; *Neder v. United States*, *supra*, 527 U.S. 1; *United States v. Gaudin* (1995) 515 U.S. 506; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-281; *Carella v. California* (1989) 491 U.S. 263, 265-266; *Cabana v. Bullock* (1986) 474 U.S. 376, 384-386.) "If the Sixth Amendment right to have a jury decide guilt and innocence means anything . . . it means that the facts essential to conviction must be proven beyond the jury's reasonable doubt . . . ." (*United States v. Voss* (8th Cir. 1986) 787 F.2d 393, 398.)

A jury verdict based on an instruction that allows the jury to convict without properly finding the facts supporting each element of the crime is error. (*Neder v. United States*, *supra*, 527 U.S. at p. 12; *Sandstrom v. Montana*, *supra*, 442 U.S. 510; *United States v. Hayward* (D.C. Cir. 1969) 420 F.2d 142, 144 [by instructing the jurors that they must find the defendant guilty if they determine that the evidence placed him at the scene of the crime, the court took from the jury an essential element of its function].)

An instruction that removes an element from the jury's consideration also lessens the prosecution's burden to prove beyond a reasonable doubt every element of the charged offense. Such an instruction lessens the prosecution's burden of proof and violates both the state and federal constitutional guarantees of due process and the rights to a jury trial and proof beyond a reasonable doubt. (*People v. Thompson* (2000) 79 Cal.App.4th 40, 59-60.)

By instructing the jury that an aider and abettor is necessarily *equally guilty* with the actual perpetrator of the crime, the error here powerfully impacted the jury's ability to find appellant guilty of a crime less than first degree murder if it found Lamb committed first degree murder and appellant aided and abetted Lamb in the killing of Scott Miller.

To the extent that the case against appellant addressed his level of culpability, it was entirely based on appellant's differing prior testimony and his statement to Donald McLachlan, and the prosecutor chose to rely on appellant's statement to McLachlan to the extent that appellant implicated Lamb in the killing. Other than appellant's statements, the only evidence of what occurred in the alley was forensic and consisted of evidence that Miller was shot once in the back of the head.

In appellant's statement, appellant conceded foreknowledge of what was to occur to Miller, but acknowledged solely that he drove Miller to the site -- almost the bare minimum required for aiding and abetting liability in

a murder. Lamb was culpable for first degree murder, but appellant was entitled to an independent determination of the level of his culpability and the erroneous inclusion of the words "equally guilty" in CALCRIM No. 400 deprived appellant of that determination by the jury once it settled on Lamb's culpability. Hence, the jury was required to find appellant guilty of first degree murder without separately assessing his level of culpability and appellant was found guilty of first degree murder without the jury ever considering whether he intended to kill or premeditated and deliberated.

Because the jury was allowed to premise appellant's level of culpability on that of his co-defendant without ever considering appellant's personal mens rea, respondent will be unable to demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24,)

Reversal of appellant's conviction of first degree murder is mandated.

IV. THE TRUE FINDING ON THE PRIOR MURDER SPECIAL CIRCUMSTANCE MUST BE STRICKEN BECAUSE THE INTERPRETATION OF PRIOR MURDER IN THIS CASE VIOLATES THE FEDERAL CONSTITUTION

The information in this case charged appellant with murder (§ 187, subd. (a)), together with numerous special circumstance allegations, including a prior murder conviction (§ 190.2, subd. (a)(2)). The victim of the prior murder conviction was Cory Lamons. The murder occurred on April 4, 2004, and appellant pleaded guilty to second degree murder on June 30, 2006. In contrast, the capital murder of Scott Miller in the present case occurred on March 8, 2002 -- two years before Lamons was killed -- and appellant was tried in 2009, well after pleading guilty in the Lamons case.

This court has repeatedly held that a murder may qualify as a prior murder special circumstance when it occurs later in time than the killing charged as capital murder. (*People v. Rogers* (2013) 57 Cal.4th 296, 342-345; see also *People v. Hinton* (2006) 37 Cal.4th 839, 879; *People v. Gurule* (2002) 28 Cal.4th 557, 636; *People v. McLain* (1988) 46 Cal.3d 97, 107–108; *People v. Grant* (1988) 45 Cal.3d 829, 848; *People v. Hendricks* (1987) 43 Cal.3d 584, 596.) Appellant seeks reconsideration of this court's prior decisions to the extent that they are inconsistent with federal constitutional principles.[20]

Historically, federal constitutional challenges to recidivist legislation are premised on double jeopardy, ex post facto, and due process grounds, and are overcome by reasoning that the greater punishment is imposed for the second offense, with the fact of the previous offense only aggravating the seriousness of the second offense, and by reasoning that the conviction

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[20] This issue is briefed in abbreviated form in accordance with *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.

of the previous offense puts the offender on notice that a subsequent offense will be punished more severely. (See *Graham v. West Virginia* (1911) 224 U.S. 616, 623-625; *In re Foss* (1974) 10 Cal.3d 910, 922; *People v. Dutton* (1937) 9 Cal.2d 505, 507.)

Based on a previous conviction, an increased penalty imposed for a subsequent offense is a consequence "which being fully apprised of in advance, the offender was left free to brave or avoid." (*People v. Stanley* (1874) 47 Cal. 113, 116, quoting *Rand v. Commonwealth* (1852) 50 Va. (9 Grattan) 738, 744.) These requirements of notice under substantive due process are equally applicable to special circumstances as they are to penal statutes in general (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 801, 803), including "fair notice" of what the statute forbids to those seeking to avoid its proscriptions. (*Id.*; see also *People v. Mirmirani* (1981) 30 Cal.3d 375, 387; *People v. McCaughn* (1957) 29 Cal.2d 409, 414; *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.)

Here, appellant was sentenced to death for the Miller killing, and at the time of that killing, no facts permitting invocation of a prior murder special circumstance -- the Lamons killing -- had occurred. Thus, the interpretation of "prior murder" as applied in this case deprived appellant of due process as he could not have had notice at the time of the Miller killing that he was subjecting himself to prosecution for a "prior" murder special circumstance.

Prior to its decision in *People v. Hendricks*, *supra*, 43 Cal.3d 584, this court considered the meaning of "prior conviction," as used in paragraph 1 of section 190.3, reaching a result consistent with federal constitutional requirements. (*People v. Balderas* (1985) 41 Cal.3d 144, 201-204.) The court recognized that interpreting "prior conviction" in that section as meaning any conviction returned before the penalty hearing, as opposed to prior to the capital crime, would render the term "prior" meaningless. The

situation here is identical. If "previously convicted" means nothing more than "convicted before the trial of the special circumstance allegation," the term "previously" becomes superfluous as all convictions proved at the trial must necessarily have come beforehand.

Appellant respectfully submits that the departure from the reasoning of *Balderas* represented by this court's decisions in *Hendricks* and the cases following it constitutes a departure from both prior state law and established principles of stare decisis and statutory construction, thus depriving appellant of his rights to due process and equal protection. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Hewitt v. Helms* (1983) 459 U.S. 460, 466; *Ballard v. Estelle*, *supra*, 937 F.2d at p. 456; *Wasko v. Vasquez* (9th Cir. 1987) 820 F.2d 1090, 1091, fn. 2.)

In addition, application of the special circumstance to appellant's case rendered the statute unconstitutionally vague and overbroad. (*Stringer v. Black* (1992) 503 U.S. 222; *Maynard v. Cartwright* (1988) 486 U.S. 356.) As it does not limit the prior murder special circumstance to cases in which the "prior" murder occurred before the capital murder, the special circumstance does not sufficiently guide sentencing juries, channeling their discretion in particular cases. (See *Godfrey v. Georgia*, *supra*, 446 U.S. at p. 428.) The special circumstance charge was improper and it injected impermissible arbitrariness and capriciousness into the sentencing determination in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (*Ibid.*)

A criminal defendant is not eligible for the death penalty due to his generally bad character; the death penalty is exacted as punishment for commission of a particular offense of first degree murder. (See *Tison v. Arizona* (1987) 481 U.S. 137; *Enmund v. Florida* (1982) 458 U.S. 782, 788-790; *Coker v. Georgia* (1977) 433 U.S. 584, 592.)

> In the California scheme the special circumstance is not just an aggravating factor; it is a fact or set of facts which changes the crime from one punishable by imprisonment of 25 years to life to one which must be punished by either death or life imprisonment without possibility of parole.

(*People v. Superior Court (Engert)*, *supra*, 31 Cal.3d 797 at p. 803.)

A special circumstance which elevates a first degree murder to a capital offense must bear some relationship to the offense itself. Otherwise, neither of the purposes of the death penalty -- retribution and deterrence -- can be served. It is illogical to reason that the commission of a capital murder can be deterred by imposing death eligibility on the basis of an offense which has yet to occur.

Accordingly, the prior murder special circumstance found true must be reversed.

V. THE TRIAL COURT ERRED BY FAILING TO LIMIT THE SCOPE OF VICTIM IMPACT EVIDENCE TO THE CAPITAL OFFENSE, MANDATING REVERSAL OF APPELLANT'S DEATH VERDICT

A. INTRODUCTION AND PROCEDURAL BACKGROUND

Appellant was charged and convicted at the guilt phase of the murder of Scott Miller.

Prior to trial, the prosecutor filed a motion seeking, among other things, to allow introduction at the penalty phase of victim impact evidence relating to the uncharged and noncapital murder of Cory Lamons. (CT 1:222-241.) Defense counsel filed a response objecting to introduction of the evidence. (CT 15:3773-3777.) When the motion was heard, the prosecutor repeated his request to admit victim impact evidence relating to the Lamons killing and the defense repeated its objection. (RT 2:1002-1006.) The trial judge overruled the objection. (RT 2:1007.)

The trial court failed to limit the prosecution's victim impact evidence to the circumstances of the capital offense against Scott Miller under section 190.3, factor (a). Instead, the court also allowed the prosecutor to introduce victim impact evidence regarding the emotional effects of the collateral, noncapital murder of Cory Lamons that served both as the predicate crime for the prior murder special circumstance and was proven under section 190.3, factor (b), allowing evidence of "other violent criminal activity." Because the trial court failed to limit victim impact evidence to the circumstances of the capital offense, exceeding the permissible scope permitted under *Payne v. Tennessee* (1991) 501 U.S. 808, thus allowing the jury to consider highly emotional but irrelevant evidence, the court violated appellant's rights to due process, trial before a fair and impartial jury, and a

reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts. Under the circumstances, the trial court's error is not harmless beyond a reasonable doubt and requires reversal of appellant's judgment of death.

B. TESTIMONY ABOUT THE IMPACT OF THE CORY LAMONS KILLING WAS INADMISSIBLE BECAUSE THE ELECTORATE NEVER INTENDED TO PERMIT VICTIM IMPACT TESTIMONY ABOUT CRIMES UNRELATED TO THE CAPITAL CRIME

The victim impact evidence relating to the noncapital murder of Cory Lamons was admitted pursuant to section 190.3, factor (b), which permits introduction of evidence relating to "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence."

There is a split of authority around the country as to whether admission of victim impact evidence relating to crimes other than the capital crime for which the defendant is on trial is improper. State courts in Texas, Nevada, Illinois, Tennessee and Colorado have uniformly held such evidence is inadmissible. This court has reached inconsistent results as to whether such evidence is admissible.

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

such evidence, and that such admission did not violate the federal constitution. *Benson* did not discuss *Boyde*.

This court should resolve this conflict in its own case law. Based on the very different language used in section 190.3, factor (a) -- which authorizes victim impact evidence relating to the capital crime -- and section 190.3, factor (b), there is no need to reach the constitutional question here. As a straightforward matter of statutory construction, this court should reiterate *Boyde* and reconsider those decisions holding that section 190.3, factor (b) reflected an intent to admit this kind of tangential victim impact evidence.

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

Under the 1978 law, the jury is authorized to consider three categories of evidence in aggravation. Section 190.3, factor (a) authorizes the introduction of evidence showing "the circumstances of the crime of which the defendant was convicted in the present proceeding . . . ." Factor (b) of the 1978 law authorizes introduction of evidence showing "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . . ." Finally, factor (c) authorizes introduction of evidence showing "the presence . . . of any prior felony conviction." This court has long made clear that evidence which does not fall into these three specific categories cannot be considered in aggravation at the penalty phase of a capital trial. (See, e.g., *People v. Wright* (1991) 52 Cal.3d 367, 425;

People v. Burton (1989) 48 Cal.3d 843, 859; *People v. Boyd* (1985) 38 Cal.3d 762, 774.)

The question to be resolved here is whether the electorate intended that section 190.3 authorize admission of victim impact testimony about the impact of a defendant's crime that is totally unrelated to the homicide for which the defendant is death eligible. Obviously, evidence regarding the impact of a crime unrelated to the homicide does not come within section 190.3, factor (a) as evidence about "the circumstances of the crime *of which the defendant was convicted in the present proceeding*." (See *People v. Davis* (2009) 46 Cal.4th 539, 617-618.) Nor does such evidence come within factor (c) as evidence showing "the presence . . of any prior felony conviction." Instead, the only possible basis for admission of such testimony under state law is section 190.3, factor (b), authorizing admission of evidence showing "the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . . ."

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

In trying to determine the intent of a statute, the court should look first to the words of the statute, "as these are usually the best indicator of the [lawmakers'] intent." (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 152.) If the statutory language is clear, the plain meaning of the words is determinative and there is no need to look beyond the statute itself. (*People v. Benson* (1998) 18 Cal.4th 24, 30.) On the other hand, if the language is ambiguous and reasonably susceptible to two interpretations, then a re-

viewing court must construe the statute and adopt the interpretation more favorable to the defendant. (*People v. Davis* (1981) 29 Cal.3d 814, 828.)

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

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

This court was correct in *Boyde* and its sensible and straightforward conclusion is directly supported by later developments in the subject area of victim impact evidence. Prior to 1991, the United States Supreme Court held that victim impact evidence was barred by the Eighth Amendment. (*Booth v. Maryland* (1987) 482 U.S. 49.) In *Payne v. Tennessee*, *supra*, 501 U.S. at p. 827, the court overruled *Booth* and held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar."

After *Payne*, the question became whether the California electorate had chosen to "permit the admission of victim impact evidence . . . ." This court answered the question in *People v. Edwards* (1991) 54 Cal.3d 787,

holding that the electorate expressed its intent to allow victim impact testimony by authorizing admission of evidence concerning "the circumstances of the crime of which the defendant was convicted in the present proceeding." (*Id.* at pp. 833-836.)

Significantly, however, the specific language which this court held reflected the electorate's intent to authorize admission of victim impact evidence -- use of the phrase "circumstances of the crime" in factor (a) -- does not appear in factor (b) describing the evidence admissible in connection with prior crimes of violence. Had the electorate provided in factor (b) for admission of evidence showing "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence *and the circumstances of that criminal activity*," under *Edwards* it would be clear the electorate intended to permit victim impact testimony under state law in connection with the prior crimes. But the electorate used very different language in describing the evidence admissible under factor (b). As this court has often made clear, when drafters of legislation use very different language in similar statutes, "the normal inference is that the [drafters] intended a difference in meaning." (*People v. Trevino* (2001) 26 Cal.4th 237, 242; accord, *People v. Drake* (1977) 19 Cal.3d 749, 755.)

Given the clarity of the language which the electorate elected to use in factor (b), and the sharp difference between that language and the language of factor (a) (which *Edwards* had held reflected the electorate's intent to authorize victim impact evidence), there should be little doubt that the electorate did not intend factor (b) to also authorize admission of victim impact evidence about other crimes. But to the extent that there is some lingering doubt about the construction -- if this court believes factor (b) could reasonably be subject to a construction authorizing other-crime victim impact evidence despite its use of language so different from factor (a) -- two additional principles of statutory construction require a conclusion that

factor (b) should not be construed to authorize admission of other-crime victim impact evidence. First, "[w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute." (*People v. Snyder* (2000) 22 Cal.4th 304, 314; accord, *People v. Overstreet* (1986) 42 Cal.3d 891, 896.)

Separate and apart from the reasonable doubt principle, there is a "familiar jurisprudential principle that statute should be interpreted, if reasonably possible, to avoid constitutional questions." (*People v. Sutton* (2010) 48 Cal.4th 533, 539; accord, *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.) In *Tuilaepa v. California* (1994) 512 U.S. 967, section 190.3, factor (b) was challenged as unconstitutionally vague under the Eighth and Fourteenth Amendments. The United States Supreme Court rejected the challenge because "factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact." (*Id.* at p. 976.) If factor (b) is now construed to permit evidence plainly outside the scope of its "conventional and understandable terms" -- permitting evidence which does not involve "matters of historical fact" -- then there is a serious question whether factor (b) is vague either (1) under the standards of the Eighth Amendment as a guide for exercising discretion in determining penalty (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 361-362) or (2) under the standards of the Fourteenth Amendment in providing adequate notice to the defendant to prepare for such arcane evidence (see *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1238). Because statutes should be interpreted to avoid constitutional questions, section 190.3, factor

(b) should not now be interpreted to raise either of these constitutional issues.

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

In making this argument, appellant is aware that two years post-*Boyde*, this court reached a result squarely at odds with *Boyde*. As noted above, in *People v. Benson*, *supra*, 52 Cal.3d 754, this court held -- without citing *Boyde* -- that "[the Supreme Court decisions precluding victim impact evidence in] *Booth* and *Gathers* do not extend to evidence or argument relating to the nature and circumstances of other criminal activity involving the use or threat of force or violence or the effect of such criminal activity on the victims." (*Id.* at p. 797.) In the years since *Benson*, this court has on several occasions cited it for the proposition -- rejected in *Boyde* -- that "[a]t the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of

those acts." (*People v. Price* (1991) 1 Cal.4th 324, 479; see, *People v. Taylor* (1990) 52 Cal.3d 719, 741.)[21]

Boyde and *Benson* are plainly inconsistent; both cannot be correct. In *Boyde*, this court held that "testimony by victims of other offenses about the impact that the event had on their lives" was *inadmissible* under section 190.3, factor (b). (*People v. Boyde*, *supra*, 46 Cal.3d at p. 249.) In *Benson* -- and the cases that follow it -- this court held that such testimony is admissible.

Significantly, it does not appear that either *Benson* -- or any of the cases which rely on it to reach a similar result -- either resolved or were presented with the statutory construction argument raised here. *Benson* and its progeny did not consider any of the principles of statutory construction discussed here. As this court has often made clear, "cases are not authority for propositions not considered." (See, e.g., *People v. Williams* (2004) 34 Cal.4th 397, 405; *People v. Barragan* (2004) 32 Cal.4th 236, 243.)

In light of the statutory construction argument raised here, this court should follow *Boyde* and reiterate the clear rule set forth in that case: sec-

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[21] In a literal sense, reliance on *Benson* for the proposition that "[a]t the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts" is wrong. *Benson* merely held that neither *Booth* nor *Gathers* applied to other-crimes victim impact evidence. (*People v. Benson* (1990) 52 Cal.3d 754, 797.) Contrary to the reading given *Benson* in *Price*, a holding that the Eighth Amendment does not bar certain evidence -- the precise holding of *Benson* -- is not the same as a holding that state law affirmatively authorizes admission of such evidence. Assuming *Benson* was correct that the Eighth Amendment permits other-crime victim impact evidence, the question still remains whether the electorate intended to authorize admission of such evidence under state law. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 821 ["We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, 'the Eighth Amendment erects no per se bar.'"][conc. opn. of O'Connor, J.].)

tion 190.3, factor (b) does not authorize admission of "testimony by victims of other offenses about the impact that the event had on their lives."

C. INTRODUCTION OF VICTIM IMPACT EVIDENCE RELATING TO THE NON-CAPITAL MURDER OF CORY LAMONS WAS FEDERAL CONSTITUTIONAL ERROR

In *Payne v. Tennessee*, *supra*, 501 U.S. 808, the United States Supreme Court stated in its majority opinion:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that *evidence about the victim and about the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

(*Id.* at p. 827, emphasis added.)

In so holding, the Court overruled its decisions in *Booth v. Maryland*, *supra*, 482 U.S. 496, which created a per se bar to victim impact evidence, and *South Carolina v. Gathers* (1989) 490 U.S. 805, which prohibited prosecution argument on the subject.

In *Payne*, a mother and her two year old daughter were killed with a butcher knife in the presence of the mother's three year old son. The son survived critical injuries suffered in the attack. The prosecution presented the testimony of the boy's grandmother that the boy missed his mother and sister, then argued that the boy would never have his "mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 816.) The court warned that there are limits to victim impact evidence and observed that it would violate the Due Process Clause

of the Fourteenth Amendment to introduce victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (*Id.* at p. 825.)

In a concurring opinion Justice O'Connor, joined by Justices Kennedy and White, wrote that the absence of any due process violation in *Payne* was established by the distinctly limited quantity of otherwise irrelevant victim impact evidence presented in the case:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." *Ante,* at 2609. If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.
>
> That line was not crossed in this case. The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony-who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime: Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived-only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process.

(*Id.* at pp. 831-832 (conc. opn. of O'Connor, J.).) Justice Souter concurred, joined by Justice Kennedy, adding the following warning:

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not delib-

> eration. Cf. *Penry v. Lynaugh,* 492 U.S. 302, 319-328, 109 S.Ct. 2934, 2947-2952, 106 L.Ed.2d 256 (1989) (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring)); *Gholson v. Estelle,* 675 F.2d 734, 738 (CA5 1982) ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). But this is just as true when the defendant knew of the specific facts as when he was ignorant of their details, and in each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal. See *Darden v. Wainwright,* 477 U.S. 168, 178-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed.2d 144 (1986) (due process standard of fundamental fairness governs argument of prosecutor at sentencing); *United States v. Serhant,* 740 F.2d 548, 551-552 (CA7 1984) (applying due process to purportedly 'inflammatory' victim impact statements); see also *Lesko v. Lehman,* 925 F.2d 1527, 1545-1547 (CA3 1991); *Coleman v. Saffle,* 869 F.2d 1377, 1394-1396 (CA10 1989), cert. denied,, 494 U.S. 1090, 110 S.Ct. 1835, 108 L.Ed.2d 964 1990); *Rushing v. Butler,* 868 F.2d 800, 806-807 (CA5 1989). With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." *Burger v. Kemp,* 483 U.S. 776, 785, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987).

(*Id.* at pp. 836-837 (conc. opn. of Souter, J.).)

Notably, the only type of victim impact evidence addressed in *Payne* was one witness's evidence describing the impact of the capital crimes on a family member personally present during, and immediately affected by, the capital murders.

This court has consistently held that during the penalty phase of a capital trial, the prosecution may present evidence regarding not only the physical and emotional effects of the capital offense being tried under sec-

tion 190.3, factor (a), but also the effects of a defendant's violent criminal activity under section 190.3, factor (b), on victims and survivors of that activity. (*People v. Lester* (2011) 51 Cal.4th 1210, 1275-1276; *People v. Davis*, *supra*, 46 Cal.4th at p. 618; *People v. Bramit* (2009) 46 Cal.4th 1221, 1241; *People v. Price*, *supra*, 1 Cal.4th at p. 479.) According to this court, the prohibition against victim impact evidence at the sentencing phase of a capital trial has largely been overruled and thus is not barred by the federal constitution. (*People v. Holloway* (2004) 33 Cal.4th 96, 143, fn. 13, citing *People v. Garceau* (1993) 6 Cal.4th 140, 201-202, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) Appellant seeks reconsideration of this court's prior decisions to the extent that they are inconsistent with federal constitutional principles.

California, like some other states, allows the introduction of victim impact evidence related to the capital case being tried. Unlike California, these other states do not allow the introduction of victim impact evidence regarding the effect of crimes or violent activity that are collateral and unrelated to the capital offense. Based on the persuasive rationale from the Supreme Courts of Illinois, Nevada, and Tennessee[22] limiting victim impact evidence to the capital offense being tried, this court should follow that rationale and find the victim impact evidence regarding the collateral and unrelated criminal activity against Cory Lamons was irrelevant and its admission violated appellant's rights to due process, trial before a fair and impartial jury, and a reliable penalty determination under the Fifth, Sixth,

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[22] As discussed below, Tennessee has changed its statutory death penalty scheme to mandate the consideration of victim impact evidence related to collateral and unrelated criminal activity. That change, however, does not affect the argument raised here because the former Tennessee scheme is consistent with the version of section 190.3 applicable to appellant's case.

Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

In *People v. Hope* (1998) 184 Ill.2d 39, 49-53 [702 N.E.2d 1282, 1287-1289], the Illinois Supreme Court considered the admissibility of victim impact evidence relating to crimes other than those for which a capital defendant is being sentenced under both Illinois statutory law and the United States Supreme Court's decision in *Payne*. The court stated that:

> the *Payne* court defined "[v]ictim impact evidence" as "simply another form or method of informing the sentencing authority about the specific harm caused by *the crime in question.*" (Emphasis added.) *Payne*, 501 U.S. at 825, 111 S.Ct. at 2608, 115 L.Ed.2d at 735.

(*People v. Hope*, *supra*, 702 N.E.2d at p. 1288.) The court held:

> We therefore agree with defendant that *Payne* clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried. [Citation.]

(*Ibid.*) Because the court found that the victim impact evidence from the collateral and unrelated prior murder violated the scope of such evidence under *Payne* and Illinois statutory law, it held that the trial court erred by admitting the evidence. Given the highly emotional nature of the evidence at issue and a capital defendant's federal constitutional right to be sentenced on the basis of reason rather than emotion, the court reversed the defendant's death sentence. (*Id.* at pp. 1288-1289.)

In *Sherman v. State* (1998) 114 Nev. 998, 1012-1014 [965 P.2d 903, 913-914], the Nevada Supreme Court considered the defendant's claim that certain testimony by a police officer about the effect of a collateral and unrelated prior murder on the community should have been excluded under *Payne* at his capital sentencing hearing. Unlike the high court in Illinois, the Nevada Supreme Court held that *Payne* did not expressly exclude victim impact evidence regarding collateral and unrelated prior crimes, instead

holding that it was error to admit the testimony because Nevada's statutory death penalty scheme did not expressly direct capital sentencing juries to consider the effects of collateral and unrelated criminal activity in deciding appropriate punishment for the capital crime being tried. Given the brief and unemotional nature of the evidence at issue in *Sherman*, the Nevada Supreme Court found the error harmless.

In *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, the Tennessee Supreme Court cited Justice O'Connor's concurring opinion in *Payne*, holding:

> Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family. [Citations.]

(*Id.* at p. 891, fn. omitted.) In a footnote appended to the prior quote, the court stated:

> We reiterate that victim impact evidence of another homicide, even one committed by the defendant on trial, is not admissible. *Bigbee*, 885 S.W.2d at 812.

(*Id.* at p. 891, fn. 11.)

In *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, the defendant claimed that the prosecutor's argument during the penalty phase violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions in the Tennessee Constitution. The Tennessee Supreme Court agreed and held that evidence about the circumstances of an unrelated prior murder and the prosecutor's argument that the death penalty was appropriate to punish the defendant for the current and prior crimes was improper and prejudicial, reversing the death judgment. (*Id.* at pp. 811-812.)

At the time of the defendant's sentencing in *Bigbee*, Tennessee Code Annotated, section 39-13-204(c) provided:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; *any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i);* and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted.

(*State v. Odom* (Tenn. 1994) 137 S.W.3d 572, 580.)[23]

Section 190.3, as applicable to the penalty phase of appellant's trial, is phrased, in pertinent part, as follows:

> In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

The Tennessee statute in *Bigbee*, the Nevada statute in *Sherman*, and the California statute are identical in the sense that they all refer to the relevancy of other crimes evidence in establishing the existence of an aggra-

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[23] In 1998, the statute was amended to mandate that other violent crimes evidence be considered by the jury in deciding penalty and the weight to be given to that evidence. (*State v. Odom* (Tenn. 1994) 137 S.W.3d 572, 581.)

vating circumstance. Similarly, these statutes do not expressly mandate that victim impact evidence from collateral and unrelated criminal conduct be considered in deciding punishment for the capital crime for which he is being tried. Given the absence of specific, statutory direction in California mandating consideration of victim impact evidence arising from collateral and unrelated crimes, such evidence should be found irrelevant and inadmissible in California under the same rationale used in the other states.[24]

The prosecution in appellant's case introduced evidence from Sharon Thompson, the mother of Cory Lamons, to prove the aggravating circumstance relating to other violent criminal activity, specifically, the murder of Lamons. All of this evidence was irrelevant and exceeded the permissible scope of victim impact evidence under *Payne* and section 190.3 because it involved victim impact evidence relating to a murder other than the capital crime. Thompson's testimony explicitly laid out Lamons' history growing up and the devastating impact his killing had on Thompson.

Under the rationale of the above out-of-state cases, Thompson's testimony not only violated the scope of victim impact evidence under *Payne*, but also allowed the jury to hear evidence that was irrelevant and inadmissible under California's statutory death penalty scheme. Admission was error.

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[24] The courts of numerous other states have also held that other-crime victim impact evidence is inadmissible. (*State v. White* (1999) 85 Ohio. St.3d 433, 445-446 [709 N.E.2d 140, 154]; *People v. Dunlap* (Colo. 1999) 975 P.2d 723, 744-745 & fn. 14; *Cantu v. State* (Tex.Cr.App. 1997) 939 S.W.2d 627, 637; *Wilson v. State* (Tex. 1999) 15 S.W.3d 544; *Gilbert v. State* (Okla.Crim.App. 1997) 951 P.2d 98, 117; *Andrews v. Commonwealth* (2010) 280 Va. 231, 292-293 [699 S.E.2d 237, 272]; *State v. Jacobs* (La. 2004) 880 So.2d 1.)

D. THE ERROR WAS PREJUDICIAL AND MANDATES REVERSAL

A trail court's erroneous admission of victim impact evidence is analyzed under the harmless error standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24. (See *People v. Clark* (1990) 50 Cal.3d 583, 629; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 824.)

In his penalty phase argument to the jury, the prosecutor repeatedly referred to Thompson's victim impact testimony about the killing of her son. He spoke about how life changed for the worse for Thompson and Lamons' sister after Lamons was killed. (RT 9:2698.) He again asked the jurors to consider the impact of the crime on Thompson after describing the manner in which Lamons was killed. (RT 9:2700-2701.) The prosecutor demonstrated how important the victim impact evidence from the Lamons' killing was to a penalty determination when he argued that no weighing of aggravating and mitigating factors could give a higher value than the impact of the murders on Millers' mother and Lamons' mother. (RT 9:2715.) Finally, near the close of his argument, the prosecutor urged the jury to return a verdict of death premised on this same evidence, asking the jurors, "Do you feel what Sharon [Thompson] and her daughter feel?"

Under the totality of circumstances, because the evidence at issue was highly emotional and urged by the prosecutor as a significant reason why death was the only appropriate punishment, respondent will be unable to demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

VI. PROSECUTORIAL MISCONDUCT IN REFERRING TO INDIVIDUAL JURORS DURING PENALTY PHASE ARGUMENT MANDATES REVERSAL OF APPELLANT'S DEATH SENTENCE

A. PROCEDURAL BACKGROUND

Close to the end of his penalty phase jury argument, the prosecutor stated:

> Justice will be served when those who are not injured by crime feel as indignant as those who are. That's when justice is served. When people who are not directly injured by the crime feel as indignant as those that are.
>
> Are you indignant yet, sir?
>
> Are you indignant yet?
>
> How about you, sir? Are you indignant yet?
>
> How about you, sir? Are you indignant yet?
>
> How about you, sir? Are you indignant yet?
>
> How about you, sir?
>
> How about you, sir? Are you indignant yet?
>
> How about you, ma'am?
>
> How about you, sir?
>
> How about you, ma'am?
>
> How about you, ma'am?
>
> How about you, ma'am?
>
> Enough is enough. Do you feel what Bonnie and Calvin and Bruce and Grandma feel? Do you feel what Sharon and her daughter feel?
>
> Don't say yes, because you don't unless you lost a daughter or a son. You don't. Put a value on it. Put a value on it. Is it enough yet?
>
> Put a value on that. Is it enough yet?

(RT 9:2723-2724.)

B. CONSTITUTIONAL AND LEGAL BASIS OF A PROSECUTORIAL MISCONDUCT CLAIM

"A prosecutor has a duty to prosecute vigorously. 'But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' [Citation.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 691, citing *Berger v. United States* (1934) 295 U.S. 78, 88; see *People v. Hill* (1998) 17 Cal.4th 800, 820.) "'It is a prosecutor's duty "to see that those accused of crime are afforded a fair trial."[Citation.] "The role of the prosecution far transcends the objective of high scores of conviction; its function is rather to serve as a public instrument of inquiry and, pursuant to the tenets of the decisions, to expose the facts." [Citation.]' [Citation.]" (*People v. Daggett* (1990) 225 Cal.App.3d 751, 759.) "As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citation.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 820, citing *Berger v. United States*, *supra*, 295 U.S. at p. 88.) "What is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant." (*People v. Benson*, *supra*, 52 Cal.3d at p. 793; see *People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823 [bad faith not required].)

Prosecutorial misconduct in argument violates the Due Process Clause of the Fourteenth Amendment when it "infect[s] the trial with unfairness." (*Darden w. Wainwright*, *supra*, 477 U.S. at p. 181, quoting *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) "The applicable federal and state standards regarding prosecutorial misconduct are well established.

"'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct only under state law if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

On appeal, the court must "review prosecutorial remarks to determine whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the prosecutor's remarks." (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

C. REFERRING TO JURORS INDIVIDUALLY DURING ARGUMENT WAS PROSECUTORIAL MISCONDUCT

The fact that a prosecutor may not appeal to the passion or prejudice of the jury has been long established. (*People* v. *Talle* (1952) 111 Cal.App.2d 650, 675.)

This court has long condemned the practice of attorneys addressing their arguments to individual jurors. (*People v. Wein* (1958) 50 Cal.2d 383, 395-396, overruled on other grounds in *People v. Daniels* (1969) 71 Cal.2d 1119.) Similarly condemned is the practice of addressing individual jurors as "sir" or "ma'am." (*People v. Sawyer* (1967) 256 Cal.App.2d 66, 78.)

The problem with referring to each juror individually in argument is that such arguments appeal to the passions and prejudices of the jurors. (*See People v. Davis* (1970) 46 Ill.2d 554, 560 [264 N.E.2d 140, 143] [prosecutor attempted to play upon individual jurors' fears when they were referred to by name]; *State v. Ryerson* (1955) 247 Iowa 385, 392–393 [73 N.W.2d

757, 762] [prosecutor referred to individual jurors by name and compared their children to the crime victims].)

Whether a prosecutor refers to jurors by their names in argument or, instead, as addresses them individually as "sir" and "ma'am" -- as the prosecutor did here -- the argument must be equally condemned. The unanimous criticism of this tactic does not merely turn on the usage of the jurors' names by the prosecutor, but is premised on the prosecutor singling the jurors out as individuals and appealing to each juror's passions and prejudices. Similarly, doing so is also improper because it appeals to jurors as individuals when they are mandated to act as a group.

An appeal to known or suspected prejudices or arousal of passions may render unlikely a fair consideration of the evidence. (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 594, p. 851.)

While the prosecutor here was entitled to urge that the emotional anguish felt by the surviving family members of appellant's killings was a circumstance of the crimes to which the jurors could assign weight as part of their penalty determination, he went much farther than allowed. Instead, he went over-the-top, attempting to enrage each individual juror by speaking directly to him or her instead of arguing to the jury as a whole. He attempted to create a one-on-one relationship between each juror and the survivors of the killings. The improper argument was intended to appeal to the deepest levels of each juror's passion -- a passion not otherwise allowed in a rational determination of penalty. In short, this was an improper argument of an inflammatory nature and constituted clear misconduct..

D. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTORIAL MISCONDUCT WAS INEFFECTIVE ASSISTANCE OF COUNSEL COGNIZABLE ON DIRECT APPEAL

Appellant acknowledges that defense counsel failed to object to the argument constituting prosecutorial misconduct. As a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Berryman* (1993) 6 Cal.4th 1048.)

"Thus, appellant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates . . . result[ing] in the withdrawal of a potentially meritorious defense." (*People v. Pope*, *supra*, 23 Cal.3d at p. 425.) "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) California has adopted the *Strickland* test. (*People v. Ledesma*, *supra*, 43 Cal.3d at pp. 216-218.)

"We conclude that in cases in which a claim of ineffective assistance of counsel is based on acts or omissions not amounting to withdrawal of a defense, a defendant may prove such ineffectiveness if he establishes that his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings. (*People v. Pope, supra*, 23 Cal.3d at p. 425; *People* v. *Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)" (*People v. Fosselman* (1983) 33 Cal.3d 572, 584.)

"We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, quoting *People v. Wilson* (1992) 3 Cal.4th 926, 936, quoting *People v. Pope*, *supra*, 23 Cal.3d at p. 426.)

Appellant acknowledges that defense counsel was neither asked to nor provided an explanation for his failure to object. However, appellant submits that there could not be a satisfactory explanation for the failure.

An objection and request for admonition would not have highlighted anything adverse to appellant. Instead, it would have diffused an incredibly damaging and improper argument coming at the end of the prosecutor's argument. If defense counsel objected, the prejudicial pandering to passion and prejudice would have ended at that point. Specific adverse evidence would not have been highlighted by an objection, inflammatory misconduct would have ceased and the jury would have learned that the argument was improper.

Given the fundamental and obvious nature of the misconduct, it would appear that defense counsel was unaware of the misconduct and did not object for that reason. Instead, defense counsel stood oddly and com-

pletely mute "like the now proverbial potted plant" (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313) despite the clearly devastating impact of the prosecutor's argument.

Because there can be no reasonable explanation here for why defense counsel did not specifically object to any of the prosecutorial misconduct arising during argument, defense counsel was by definition ineffective given the obvious nature of the misconduct. (See, e.g., *Copeland v. Washington* (8th Cir. 2000) 232 F.3d 969, 975 [trial counsel ineffective for failing to object to multiple instances of prosecutorial misconduct including improper victim impact argument; reference to facts not in evidence; and, appeals to prejudice and fear]; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1216 [ineffective assistance where trial attorney failed to object to impermissible vouching].)

E. THE MISCONDUCT WAS PREJUDICIAL

Prosecutorial misconduct rises to the level of a due process violation if the conduct is so egregious it renders the trial fundamentally unfair. (*Darden v. Wainwright, supra,,* 477 U.S. at p. 181.) This occurs when a prosecutor makes inappropriate comments that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Ibid* [quoting *Donnelly v. DeChristoforo, supra*, 416 U.S. 637].)

Here, the prosecutor sought to compel a penalty phase verdict of death by posing questions to individual jurors near the very end of his argument. The obvious and clearly stated purpose was to ramp up individual anger so that jurors would set aside their required rational weighing process and substitute emotion in its place.

The defense urged a penalty of life without the possibility of parole by arguing appellant's humanity with his family and friends, an emotional

makeup that almost required him to act as he did, and institutional failure in the sense that the prison system itself created the monster that he became.

"[N]o aspect of [trial] advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." (*Herring v. New York* (1975) 422 U.S. 853, 862.)

The evidence in favor of death was not overwhelming and the prosecutor's egregious conduct resulted in a denial of due process. (*Darden v. Wainwright, supra,,* 477 U.S. at p. 181.)

Appellant's sentence of death must be reversed.

VII. THE CUMULATIVE EFFECT OF THE ERRORS IN THE GUILT AND PENALTY PHASES WERE PREJUDICIAL AND REQUIRE REVERSAL OF THE VERDICT OF DEATH

This Court must assess the combined effect of all the errors, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without the possibility of parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Holt* (1984) 37 Cal.3d 436.) Moreover, "the death penalty is qualitatively different from all other punishments and . . . the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 (citing *Ford v. Wainwright* (1986) 477 U.S. 399, 411); *Zant v. Stephens* (1983) 462 U.S. 862, 885.) Appellant has shown that there were errors at both the guilt and penalty phase trials.

This was not a case lacking mitigation. There was powerful evidence that appellant had had spent most of his life in prison and had learned behaviors necessary to his own survival that resulted in his violent behavior, and was looked upon as a caring, loving person by his family and friends. The errors in appellant's trial substantially and adversely impacted appellant's mitigating evidence.

Skewing the scales of justice in favor of death creates a constitutionally-impermissible risk that the death penalty will be imposed in spite of factors calling for a less severe penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) All of the errors pled here did so individually. Cumulatively, the errors multiplied the harm, vitiating the mitigating evidence and magnifying the aggravating evidence, creating an atmosphere in which only a death verdict could be rendered.

Under these circumstances, the verdict was far from reliable. The events at appellant's trial were contrary to the established principle that the right to a fair trial includes the right to be judged on one's "personal guilt" and "individual culpability." (*United States v. Haupt* (7th Cir. 1943) 136 F.2d 661, cited in *People v. Massie* (1967) 66 Cal.2d 899, 917, fn. 20.) The errors cited violated the Eighth and Fourteenth Amendment requirements of an individualized capital sentencing determination. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

Moreover, respondent will be unable to demonstrate beyond a reasonable doubt that a different result would not have been obtained absent the numerous and compounded errors. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

As a result of these errors, appellant was denied a fair trial, the verdicts are inherently unreliable, and reversal of the death penalty is required.

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) 548 U.S. 163, 179, fn. 6;[25] see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

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[25] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (*Kansas v. Marsh* (1984) 548 U.S. 163, 178.)

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 section 190.2, the "special circumstances" section of the statute -- but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

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

and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

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

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.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 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained thirty-three special circumstances[26] 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.

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[26] 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.

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 United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[27]

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

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3, FACTOR (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, factor (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.[28] 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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408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[28] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88, par. 3; CALCRIM No. 763, par. 3.

weeks after the crime,[29] or having had a "hatred of religion,"[30] or threatened witnesses after his arrest,[31] or disposed of the victim's body in a manner that precluded its recovery.[32] 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.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

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, supra*, 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.

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

[30] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, cert. den., 505 U.S. 1224 (1992).

[31] *People v. Hardy* (1992) 2 Cal.4th 86, 204, cert. den., 506 U.S. 987 (1992).

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

(*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 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*, *supra*, 486 U.S. at p. 363 [discussing the holding in *Godfrey v. Georgia*, *supra*, 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, THEREFORE VIOLATING THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§

190.3). Section 190.3, factor (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, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHT TO A JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL FACTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY

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*, *supra*, 530 U.S. 466 [*Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior convic-

tion) 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 p. 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 p. 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 p. 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 p. 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 af-

ter finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 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 p. 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*, 549 U.S. at p. 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (549 U.S. at p. 282.)

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.[33] 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 (CT 19:4770-4775; RT 9:2752), "an aggravating circumstance or factor is *any fact, condition or event relating to the commission of a crime, above and beyond the elements of the crime itself,*

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[33] 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.)

that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime." (CALCRIM No. 763 [italics 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.[34] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[35]

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* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th

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[34] 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)

[35] 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.)

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 p. 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[36] 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. (549 U.S. at pp. 276-279.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* 549 U.S. at pp. 290-291.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based find-

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[36] *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 p. 1253; *Cunningham, supra,* 549 U.S. at p. 289.)

ings 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. 293.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely*, 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,* 549 U.S. at pp. 291.) In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

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

This holding is simply wrong. As section 190, subdivision. (a),[37] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 279.)

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*, 536 U.S. at p. 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of

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[37] Section 190, subdivision (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."

one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604.) Section 190, subdivision (a), provides that the punishment for first degree murder is 25 years to life imprisonment, life imprisonment without the possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC No. 8.88; CALCRIM No. 766.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

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* (Nev. 2002) 59 P.3d 450).)[38]

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"].)[39] As the high court stated in *Ring*, *supra*, 536 U.S. at p. 609:

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[38] 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].

[39] 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 sen-*

> 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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tencing 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.' [Citations.]" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, and *Addington v. Texas* (1979) 441 U.S. 418, 423-424.)

2. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS 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 SUBSTANTIALLY OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY

a. FACTUAL DETERMINATIONS

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to Califor-

nia'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* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* [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 er-

> roneous 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.' [Citations.]" (*Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added], quoting

Bullington v. Missouri (1981) 451 U.S. 430, 441, and *Addington v. Texas*, (1979) 441 U.S. 418, 423-424.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

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*, *supra*, 479 U.S. 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.* at p. 267.)[40] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) 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. 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.

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[40] 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.)

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th 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.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra*, 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review -- a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 [emphasis added], the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. 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.* The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra,* 548 U.S. at pp. 177-178), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (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. 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., THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY, AND EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The U.S. Supreme Court's 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 constitu-

tionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY

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

7. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVEN-HANDED ADMINISTRATION OF THE CAPITAL SANCTION

As a matter of state law, each of the factors introduced by a prefatory "whether" -- factors (d), (e), (f), (g), (h), and (j) -- were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "no" answer as to any of these "whether" sen-

tencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

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

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

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, 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* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[41]

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest -- the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) -- and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; *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

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[41] See also *People v. Cruz* (2008) 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State-as represented by the trial court [through the giving of CALJIC No. 8.85]-had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

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 CALCRIM No. 763 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 United States 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. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. 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*,[42] as in *Snow*,[43] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sen-

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[42] "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].)

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

tenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge makes a sentencing choice in a non-capital case, the court's "reasons ... must be stated orally on the record." (California Rules of Court, rule 4.42(e).)

In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. 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. These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[44] (*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* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

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[44] 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.)

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

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States 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, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa -- with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 – "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) [found at www.amnesty.org].

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established

among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. 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. 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, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [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. Article VI, Section 2 of the International Covenant on Civil and

Political Rights limits the death penalty to only "the most serious crimes."[45] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

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

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

CONCLUSION

For the foregoing reasons, appellant respectfully requests that this Honorable Court reverse his judgment of conviction and sentence of death.

Dated: December 23, 2013.

Respectfully submitted,

MARK D. LENENBERG
Attorney for Appellant
BILLY JOE JOHNSON

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.630(b)(2)

I certify that this Appellant's Opening Brief contains 39,389 words, including footnotes, but not including this page, attachments, and tables, as counted by Microsoft Word for Windows 2003.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration is executed this 23rd day of December, 2013, at Simi Valley, California.

MARK D. LENENBERG
Attorney for Appellant
BILLY JOE JOHNSON

DECLARATION OF SERVICE BY MAIL

I, MARK D. LENENBERG, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 940327, Simi Valley, California; I served one copy of the attached APPELLANT'S OPENING BRIEF on the following, by placing same in an envelope addressed as follows:

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Each envelope was then, on December 23, 2013, sealed and deposited in the United States mail at Simi Valley, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on December 23, 2013, at Simi Valley, California.

MARK D. LENENBERG
Declarant