No. S045696

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RANDY EUGENE GARCIA, Defendant and Appellant.	L. A. Sup. Ct. No. BA077888

APPELLANT'S OPENING BRIEF

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

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TEXT AND OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)[1] This appeal is taken from a judgment which finally disposes of all of the issues between the parties.

STATEMENT OF THE CASE

On June 3, 1993, the Los Angeles County Grand Jury returned an indictment in case number BA077888 accusing appellant of Count I, first degree murder with special circumstances (murder during the commission or attempted commission of burglary, robbery, rape and oral copulation) (§§ 187, 190.2, subd. (a)(17)); Count II, attempted murder (§§ 664/187); Count

[1] All statutory references are to the Penal Code unless otherwise indicated.

III, burglary (§ 459); Count IV, robbery (§ 211); Count V, attempted rape (§§ 664/261, subd. (a)(2)); and Counts VI and VII, oral copulation (§ 288a, subd. (c)). It was further alleged as to each count that appellant was armed with and used a deadly weapon (§§ 12022, subd. (a)(1), 12022.5) and that each of the enumerated offenses was a serious felony (§ 1192.7, subd. (c)). It was alleged as to Counts II through VII that appellant inflicted great bodily injury (§ 12022.7). (I CT 213-220.)[2]

On September 7, 1993, appellant entered pleas of not guilty and denied all of the special allegations. (I CT 227.)

On November 30, 1993, an information was filed in the Los Angeles County Superior Court in case number BA084072 charging appellant with one count of burglary (§ 459). The information further alleged that the offense was a serious felony (§ 1192.7, subd. (c)(18)). (I CT 33-34.) On that date, appellant entered a plea of not guilty to this charge. (I CT 45.)

On May 12, 1994, at the People's request, case number BA084072 was consolidated into case number BA077888 as Count VIII. (I CT 55, 237-240.)

On November 4, 1994, appellant's section 995 motion challenging the Los Angeles County Grand Jury that indicted him was heard and denied. (II CT 307.)

On November 21, 1994, jury selection began. (II CT 317.) Jury selection was completed on November 30, 1994. (II CT 321.)

On December 1, 1994, the prosecution began presenting evidence. The prosecution rested on December 6, 1994. (II RT 323-325, 327-328.)

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[2] "CT" refers to the clerk's transcript on appeal; "SCT" refers to the clerk's supplemental transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

The defense rested on December 6, 1994, without presenting any evidence. (See 9 RT 1931.)

On December 7, 1994, appellant's motion pursuant to section 1118.1 was heard and denied. The People's motion to dismiss Count VII pursuant to section 1385 was granted. (II CT 328.)

On December 13, 1994, the jury found appellant guilty of Count I, first degree murder with special circumstances (murder during the commission/attempted commission of burglary, robbery, rape and oral copulation); Count II, attempted murder; Count III, burglary; Count IV, robbery; Count V, attempted rape; Count VI, oral copulation; and Count VIII, burglary. As to Counts I through VI, the jury found that appellant was armed with and used a deadly weapon. The jury further found that appellant inflicted great bodily injury as to Counts II through VI. (II CT 370-380, 388-391A.)

On January 9, 1995, the penalty phase of appellant's trial commenced. (II CT 418.)

On January 19, 1995, the case was submitted to the jury and it began its penalty phase deliberations. (II CT 425.) On January 24, 1995, the jury informed the court that it was unable to reach a unanimous verdict. The court asked the jury whether further deliberations would be fruitful and the jury indicated that they would. (II RT 430.) On January 26, 1995, the jury again informed the court that it was unable to reach a unanimous verdict. At the request of the trial court, the jury agreed to continue deliberating. (II CT 433A.) On January 27, 1995, the jury returned its verdict of death. (II CT 446, 450.)

On March 23, 1995, appellant's case came on for sentencing. The court denied appellant's motion for a new trial and his motion to modify the

verdict to life without the possibility of parole. (II CT 471-474.) The court sentenced appellant to death on Count I, violation of section 187 (first degree murder) with special circumstances (burglary, robbery, attempted rape and oral copulation) (§ 190.2, subd. (a)(17)). The court sentenced appellant to the upper term of five years consecutive for the section 12022.5 enhancement and stayed the one year term for the section 12022 enhancement. On Count II, violation of sections 664/187 (attempted murder), appellant was sentenced to life with the possibility of parole. All sentencing enhancements were ordered stayed pursuant to section 654. On Count III, violation of section 459, the court sentenced appellant to the upper term of six years plus three years for the great bodily injury enhancement (§ 12022.7); the court stayed all additional sentencing enhancements pursuant to section 654. On Count IV, violation of section 211 (robbery), the court imposed a consecutive sentence of one year and four months (one third the middle term) and stayed all additional sentencing enhancements. On Count V, violation of sections 644/261 (attempted rape), the court imposed a consecutive term of three years (one-third the middle term) and stayed all additional sentencing enhancements. On Count VI, oral copulation (§ 288a, subd. (c)), the court imposed the upper term of eight years, fully consecutive to the remaining sentence. On Count VIII, violation of section 459 (burglary), the court imposed a consecutive term of one year and four months (one-third the middle term). The court also imposed a $10,000 restitution fine pursuant to Government Code section 13967, subdivision (a). (II CT 471-475.)

Appellant's appeal to this Court is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

I. The Guilt Phase

On May 7, 1993, appellant and Edward Pierce (a.k.a. Bruce Pierce) set out to drive from Portland, Oregon, to Torrance, California. The two planned to meet and stay with George Aguirre in Torrance. (7 RT 1430-31; 8 RT 1629-1630.) They drove in Pierce's car, and arrived in Torrance at around noon on May 8, 1993. (8 RT 1629, 1632-1633.)

Appellant and Pierce had prearranged to meet with some acquaintances of Aguirre's in order to buy some marijuana. (7 RT 1431; 8 RT 1630.) Appellant had known Aguirre for some time, and had stayed with him in his apartment in Torrance previously. (7 RT 1429-1430.)

On May 8, 1993, Aguirre, Pierce, appellant, and two other men spent the afternoon and evening together smoking marijuana and hanging out at Aguirre's apartment. Pierce testified that his memory of that day included "looking at the different kinds of weed [marijuana] coming in and out" of the apartment. (7 RT 1431-1432, 1470; 8 RT 1633-1634.)

Aguirre testified that he gave appellant a ride in Pierce's car at around 10 p.m. on May 8, 1993, after appellant announced that he wanted to go out and "do a job." Aguirre interpreted appellant's statement to mean that he wanted to go steal things. (7 RT 1432-1433.) Pierce testified that when Aguirre and appellant left the apartment they were going to go break into a house to steal things. (8 RT 1634-1635.)

At the time appellant left the apartment, he was wearing a dark turtleneck, blue jeans, and black tennis shoes, and had on a waist or fanny pack. (7 RT 1434-1435; 8 RT 1638-1639.) Appellant also had a pair of gloves in the waist pack. (7 RT 1436-1437.) According to Pierce, appellant also had a little .25 caliber automatic in his waist pack when he left the

apartment. (8 RT 1638.)

Aguirre drove appellant some distance from the apartment, making several turns as he drove. (7 RT 1438, 1441.) Aguirre stopped on Fonthill Street, and appellant got out of the car. Aguirre waited for about 15 minutes for appellant to return. When appellant did not return, Aguirre left to return home. (7 RT 1441-1442.)

While Aguirre was driving, he saw appellant walking on the street. Aguirre picked him up, and noticed at that time that appellant was carrying a bag he had not had seen when appellant got out of the car 15 minutes earlier. (7 RT 1443-1444.) Appellant told Aguirre that the bag contained change. (7 RT 1444.) Appellant got back into the car, and Aguirre drove him around again, making a series of random turns before finally dropping him off on 180th Street. (7 RT 1445-1448.) Aguirre watched appellant jump over a wall and then drove back to his apartment. (7 RT 1448-1449.)

A. The Crimes Against Joe and Lynn Finzel (Counts I through VII)

On May 8, 1993, Lynn Finzel and her husband Joe lived at 3627 W. 180th Place in Torrance. Also living there were Joe's son Garrett from a previous marriage and Lynn and Joe's two-month-old daughter Brinlee. (9 RT 1867-1868.) At around 11:15 p.m., Lynn was home alone with Brinlee when a man entered her bedroom. (9 RT 1868-1870, 1875-1878, 1907.) Lynn identified appellant as being that man. (9 RT 1878.) The only light in the bedroom was that given off by the television screen, but it provided enough light to see inside the room. (9 RT 1874-1875.)

Appellant had a small silver gun in his hand, and threatened to hurt Brinlee if Lynn screamed. Appellant told Lynn that he had a friend "outside with a shotgun." (9 RT 1878-1879.) Appellant was wearing black

gloves, and a black shirt on his head which covered his hair. He also had on a gold cross and a pouch around his waist. (9 RT 1881-1882.) Appellant ordered Lynn to undress, and directed her to orally copulate him. She complied with his demands because he had a gun. (9 RT 1879-1880.) Appellant then ordered her to bend over, and attempted to penetrate her vagina from behind. He was unable to achieve an erection and never put his penis inside her vagina. (9 RT 1880-1881.)

After a time, appellant led Lynn down the hall to look in another room. He then had her return to her bedroom, and again tried unsuccessfully to penetrate her vagina with his penis. (9 RT 1882-1883, 1885.) Appellant asked Lynn for money and jewelry, and she told him where they could be found. (9 RT 1887-1888, 1895.) Appellant then gagged her, and tied her hands and feet together with a pair of nylons. (9 RT 1891, 1893.)

Appellant found Joe's loaded .357 magnum handgun in a drawer. (9 RT 1885-1887, 1890.) Appellant asked Lynn where her husband was, and she told him that he was at a restaurant named Texas Loosey's. (9 RT 1894.) At some point, Lynn noticed that there was a hard pack of Camel cigarettes in appellant's shirt pocket. (9 RT 1899.) She also observed that he pulled the bedroom door closed so that it stood open about five inches. (9 RT 1896-1897.)

Lynn heard Joe's truck. She then saw him come through the bedroom door. (9 RT 1897-1898, 1899-1900.) At that time, she was lying on the bed, facing the bedroom door. (9 RT 1901.) Immediately after Joe entered the bedroom, Lynn heard him scream and a lot of gunfire. She saw red coming from Joe's chest. She also felt pain. Appellant ran from the room, turning off the light, as Brinlee cried. (9 RT 1901-1902.)

Lynn tried to dial the phone. Appellant came back into the bedroom and ripped the phone out of the wall. (9 RT 1903.) Appellant went in and out of the bedroom several times, and twice touched Lynn while she pretended to be dead. (9 RT 1903-1907.) Appellant remained inside the house for several hours. (9 RT 1907.)

When she thought appellant had left the house, Lynn crawled from the bedroom to a nearby house. (9 RT 1909-1911.)

On May 9, 1993, at around 2:00 or 2:15 a.m., Johnny and Silvia Neville were awakened by their doorbell. When they answered the door, they found Lynn lying on their front porch, nearly naked and injured. (6 RT 1237, 1240-1242, 1244-1246.) Silvia dialed 911 to summon help. (6 RT 1240-1241.)

The paramedics arrived at approximately the same time as the police. (6 RT 1250-1251.) The paramedics found Lynn sitting on the porch, in an apparent state of shock. (6 RT 1252.) She had some type of cloth wrapped around her neck, and had sheer stockings wrapped around her hands and feet. (6 RT 1253.) One of the paramedics examined Joe at the scene and pronounced him dead. (6 RT 1265.)

Lynn was transported to the hospital, where she received treatment for her injuries from Dr. Carlos Donayre. (6 RT 1255.) Dr. Donayre testified that Lynn had been shot at least twice and almost died from her injuries. (6 RT 1221-1224, 1235.)

The police officers who arrived at the Finzel home in the early morning hours of May 9, 1993, found Lynn injured, and Joe dead, from gunshot wounds. (6 RT 1272-1274, 1289.) From the condition of the home, it appeared that it had been ransacked. Cabinets in the kitchen and living room were open as if someone had gone through them, and the

backdoor was left open. A purse was lying in the doorway, and objects "were strewn across the living room." (6 RT 1276.) In the back yard a baby bag was lying on the sidewalk in a puddle of water, two gates to the backyard were open, and a set of car keys was on the ground near the garage door. (6 RT 1277.) There was a bronzed-colored Corvette parked in the driveway of the house which had a key in its ignition. An investigating officer tried unsuccessfully to start the car; the battery was apparently dead. (6 RT 1282; 7 RT 1394.) Joe's truck was missing from the residence. (See 7 RT 1402.)

Joe had been shot twice, and had two bullet holes in his chest. (6 RT 1287-1289, 1338-1339.) The pockets of his shorts were turned out. (6 RT 1354.) No lights were turned on in the bedroom where Joe was found, but the television was on. (6 RT 1290, 1338.)

A hole in the door of the bedroom where Joe was found appeared to have been made by a bullet. (6 RT 1290.) Another bullet hole was observed in the entertainment center in the living room. That bullet hole was caused by a weapon fired from inside the master bedroom. (6 RT 1345-1346.) Several days after the shootings, Lynn's brother, Donald Murphy, found an expended bullet in the bedroom where the shootings took place, and turned it over to the police. (7 RT 1416-1418.)

J. W. Whitemarsh, a Los Angeles County deputy sheriff assigned to the firearms identification section of the scientific services bureau, testified about his comparison of various firearm evidence seized in this case. (9 RT 1853-1854, 1861.) Whitemarsh examined and test-fired the .357 magnum revolver that was marked as People's Exhibit 51. (9 RT 1856.) He then compared the test-fired bullets from that weapon with several expended shell casings recovered from Aquirre's house. (9 RT 1860.) In his opinion,

all four of the expended casings found at Aguirre's house had been fired in the revolver marked as People's Exhibit 51. (9 RT 1861.) Whitemarsh also testified that two expended bullets (Peo. Exhs. 4 and 18), were "consistent with the ammunition that would be fired out of" People's Exhibit 51. (9 RT 1862-1863.)

Torrance police officer Richard Long and his police dog, Assai, searched the area behind the Finzel house for evidence. With Assai's help, Long found footprints and a partially-smoked cigarette. (6 RT 1321-1322.) A similar partially-smoked cigarette was discovered on the back porch of the Finzel house. (6 RT 1323.) The latter of those two cigarettes was identified as being a Camel brand cigarette. (7 RT 1399-1400.)

The crime scene investigators tried to develop fingerprint evidence at the Finzel house. Officer Steven Badenoch was called to that location in the early morning hours on May 9, 1993, and tried to lift prints from "[a]ll the surfaces in the hallway that someone could have touched." (7 RT 1377-1378, 1380.) He observed several surfaces that appeared to have glove marks. (7 RT 1385.) However, he did not see any fabric particles on the latents recovered at the Finzel house. (7 RT 1390-1391.)

Dr. Susan Selser, the physician who performed the autopsy on Joe Finzel, testified that he received two fatal gunshot wounds to the chest. (6 RT 1300-1303.)

B. The Burglary of the Kozak Residence (Count VIII)

Archie and Winona Kozak lived at 17639 Kornblum in Torrance in May of 1993. On Mother's Day of that year, they were in Las Vegas. (9 RT 1804-1805.) When they returned home on the evening of May 9, 1993, they found the sliding door to their bedroom open, and discovered that a

number of personal items, including coins and jewelry, were missing. (9 RT 1805-1806.) One of those items was Archie's wedding ring. (9 RT 1809.) Sometime later, the Kozaks met with Torrance police officers and identified certain property, including the gold ring depicted in People's Exhibit 52C, which they identified as Archie's wedding ring. (9 RT 1809-1810.)

The Torrance police sought to recover fingerprints at the Kozak residence as part of their investigation. (7 RT 1385-1386.) Officer Badenoch identified several latent fingerprint lifts taken at the apparent point of entry at that location, and stated that those lifts showed "absolutely no ridge detail at all." (7 RT 1386-1387.) Badenoch stated that he observed what he thought were fabric particles on the lifts recovered at the Kozak house. (7 RT 1390.)

C. Appellant's Return to Oregon

George Aguirre testified that he returned to his apartment between 9 and 10 p.m. after he dropped appellant off for the second time on May 8, 1993. Aguirre estimated that he had been gone a total of between 45 and 60 minutes since first leaving with appellant (7 RT 1449.) Aguirre ultimately fell asleep in the living room, where Pierce was also sleeping, and was awakened at around 3:30 a.m. by the sound of appellant entering the apartment. (7 RT 1450-1451.) According to Aguirre, appellant walked into the room carrying a woman's leather purse, and announced that he was "going to Hell" because he shot two people. (7 RT 1451-1453.) Appellant also had with him a .357 magnum handgun. Aguirre and Pierce had never seen that handgun before. (7 RT 1452; 8 RT 1637-1638.) Pierce and appellant then began preparing to return to Oregon. (7 RT 1453.)

Appellant spread out the contents of the purse, and, according to

Pierce, Aguirre and appellant went through the purse's contents, arguing over "who was going to get what." (7 RT 1453; 8 RT 1641.) Aguirre testified that appellant asked him to get rid of the .357 magnum handgun, but that he refused. (7 RT 1453, 1474.) Appellant then took the .357 magnum and .25 caliber automatic handguns, the woman's purse and some jewelry, and left for Oregon with Pierce. Pierce testified that appellant threw some of the stuff he had taken with him out the car window as they drove on the freeway. (8 RT 1643-1645.)

According to Pierce, during the trip to Portland, appellant made statements about having shot or killed two people. (8 RT 1661.) Pierce testified that he told the police that appellant said something about the man coming home and walking into the room. He also told the police that appellant said something like "the husband came home and saw him so he shot him, [and] the woman started to freak out so he shot her also." (8 RT 1664.)

When they reached Portland, Pierce dropped appellant off at his brother's house. At that time, appellant gave Pierce the .357 magnum handgun. (8 RT 1646, 1648.) Pierce gave the handgun to his mother, Merry Anne Hamlin, on Mother's Day of 1993, the same day he and appellant returned to Oregon. (8 RT 1646, 1648, 1653-1654, 1723-1724.)

On May 10, 1993, appellant contacted his long-time friend Antonio Jackson at Jackson's workplace. (9 RT 1733, 1736-1739.) Appellant then picked Jackson up after he finished work. (9 RT 1739-1740.) Appellant and Jackson spent the day together, and he spent the night on Jackson's couch. (9 RT 1739-1742.) The next day, which was Jackson's birthday, appellant and Jackson spent the day "partying" with friends. (9 RT 1742-1743.)

At approximately 5:30 p.m. on May 11, appellant was paged at Jackson's house and spoke to someone on the telephone. When appellant got off the phone, he asked to speak to Jackson in private and, according to Jackson, made a number of incriminating statements. (9 RT 1743-1744.) Appellant first said he was "going to go to hell" because he had killed someone. Appellant also said he was going to go to prison "for the rest of his life," that he was going to kill himself, and that he had shot a man and a woman. Jackson testified that appellant said that he shot the woman because she "was screaming too loud." (9 RT 1744-1746.) Jackson and appellant then left Jackson's house and went to downtown Portland. (9 RT 1746.)

Jackson asked appellant to tell him more about what had happened. (9 RT 1749.) Jackson asked appellant whether the killings were "over drugs," and whether they were "in self-defense." Appellant responded affirmatively to both those questions. (9 RT 1750.) Jackson testified that appellant also said he had broken into a house and "shot a guy who walked in," that "he was high [at the time of the shooting] and it was a mistake," and that he "shot the bitch [because] she was screaming too loud." (9 RT 1751.) Finally, Jackson testified that appellant said he remained in the house for a "few hours" after he shot the people. (9 RT 1752.)

Jackson was concerned that appellant might kill himself because he felt that appellant "wasn't in the right frame of mind." (9 RT 1752-1753.) Jackson testified that appellant had a "chrome nickel-plated" .25 caliber handgun that he had never seen before. (*Ibid.*)

Appellant and Jackson returned to Jackson's house and talked some more about the crimes appellant had described. (9 RT 1753.) According to Jackson, appellant told him that he and Pierce had gone to Los Angeles

together, and that Pierce had driven him back to Portland. Appellant said nothing about whether Pierce was present when the shootings happened. (9 RT 1754.) Appellant also never said that he was concerned that Pierce would talk to the police about the shootings. (9 RT 1760.)

Jackson testified that appellant told him again that he "was real high" when he shot the two people. (9 RT 1756.) Appellant said that he shot the two people with a .357 magnum handgun that he later gave Pierce to give to Pierce's mother. (9 RT 1757.) Finally, appellant told Jackson that he tried to take a car at the house where he shot the people but he was unable to start it. (9 RT 1758.)

D. The Investigation of the Finzel Homicide and Appellant's Subsequent Arrest

At around 11:00 p.m., on May 9, Aguirre saw a newscast reporting that two people had been shot in a burglary in Torrance the night before. (7 RT 1455-1456.) Aguirre thought that appellant might be responsible so he called the police to report what he knew, and Detectives Mason and Nemeth came to his house. (7 RT 1404, 1456.) At first, Aguirre lied to the detectives, by not disclosing that he had driven appellant around and had dropped him off twice on the evening of May 8. But later Aguirre admitted that he had been involved in appellant's activities to that extent. (7 RT 1458.)

Aguirre testified that on May 9, 1993, he discovered a "box with earrings and some pendants" under the couch in his living room, and a bullet casing on the living room floor. He gave all of these items to the detectives. (7 RT 1406, 1459-1461.) Also, while Aguirre was sitting on his couch talking to Detective Mason on May 9, Mason found a turtleneck shirt that was "stuffed in the couch." Aguirre told Mason that it "was the shirt

[appellant] was wearing." (7 RT 1461-1462; 9 RT 1825-1826.) Either that evening or the next day, Aguirre gave the detectives a pack of Camel brand cigarettes he said had belonged to appellant. (7 RT 1462.)

Aguirre continued to find incriminating evidence around his residence after the detectives left. On May 10, he found four bullet casings and two complete bullets. Aguirre gave them to the detectives. (7 RT 1466-1467.)

The detectives returned to Aguirre's house on May 10, 1993. (7 RT 1462, 1826.) On that occasion, they accompanied Aguirre into the garage of his apartment complex, where they found a pair of black cotton gloves "sitting" on the back left wheel of Aguirre's car and a pair of black Nike tennis shoes. (7 RT 1463-1464; 9 RT 1827, 1829-1830.)

At some unspecified time, Joe Finzel's truck was discovered in the parking complex for an apartment building located in the 3500 block of Artesia Boulevard. Credit cards and other items belonging to him were found inside the truck. (7 RT 1402-1404.) A smashed Camel brand cigarette butt was found on the ground outside the truck. (7 RT 1402.)

On May 10, 1993, Detective Nemeth visited Lynn Finzel in the hospital to show her a photo lineup; appellant's photograph was photograph number three. (9 RT 1833, 1835.) At the time Nemeth saw Lynn, she had an oxygen tube in her nose and an airway in her mouth, and she was hooked up to a morphine pump. Prior to showing her the photo lineup, Nemeth showed her a written admonishment form for her to read. (9 RT 1837-1838.) Lynn nodded that she understood the form, and Nemeth then showed her the photos. Nemeth testified that Lynn pointed at photograph number three and said either "'that's him' or 'it looks like him.'" She also pointed at photograph number four "and indicated he had features like this

also." (9 RT 1839-1840.) Nemeth felt that, "[b]ased on her condition and the situation," he should stop the interview. He returned to the hospital on May 11 to show Lynn a second photo lineup. (9 RT 1842.) Nemeth testified that she "was more coherent and actually sitting up in bed." (*Ibid.*) Nemeth again gave her the admonition form to read, and asked her if she understood it. She indicated that she did. She then pointed at a photograph of appellant and said, "that's him." (6 RT 1343.)

Detective Paul Lazenby of the Washington County Sheriff's Department in Hillsborough, Oregon, testified about the investigation that led to appellant's arrest. Lazenby was contacted by the Torrance Police Department on May 11, 1993. (8 RT 1496-1497.) He was asked for information concerning appellant, and to provide a photograph of appellant. Lazenby agreed to assist the Torrance officers in their investigation, and took a leading role in locating and arresting appellant. (*Ibid.*)

Lazenby was told that appellant had reportedly driven back to Oregon with a man named Bruce, and was given a description of their car. (8 RT 1498.) By coincidence, Lazenby was already working on an investigation involving appellant when he was contacted by the Torrance officers. (*Ibid.*) Lazenby contacted a woman who was also involved in that investigation who knew appellant. Lazenby learned from her that appellant "ran with" a person by the name of Bruce Pierce. After obtaining Pierce's address, Lazenby spoke to Pierce's mother, Merry Hamlin. (8 RT 1498; 9 RT 1774-1775.) Lazenby told Hamlin that he was looking for appellant, who was a suspect in a homicide in Torrence. Hamlin said that appellant was one of Bruce's friends. Hamlin said that Bruce was on his way home and she would have him call Lazenby when he got home. Lazenby also told Hamlin that he was looking for a stainless steel .357 handgun with black

grips, and asked her if knew where it was. She told him that she did not know anything about this gun. (9 RT 1774-1776.) Based on information he got from Hamlin, Lazenby and other officers stopped Bruce Pierce on the highway, told him they were looking for appellant, and asked him about the .357 magnum handgun they were looking for. Pierce said that the handgun was in his mother's possession, and he turned over a Bulova watch that he said appellant had left in the glove compartment of his car. (8 RT 1644, 1656-1657.) Pierce told the officers that appellant had told him that he had killed two people. (8 RT 1501.) Pierce also said that appellant might be at the apartment of a woman named Suely Caramelo, who lived in downtown Portland. (8 RT 1502; 9 RT 1781.) Lazenby and other officers then went to Caramelo's residence, and, with her permission, "checked" the premises. (8 RT 1502-1503; 9 RT 1781.)

The officers at that point had three warrants for appellant's arrest, two from Oregon and one from Torrance. (8 RT 1503.) Lazenby asked Caramelo if appellant had given her any jewelry, and she gave Lazenby a ring she said appellant had given to her. Caramelo said that appellant told her he got the ring at a flea market. (8 RT 1504-1505, 9 RT 1705.)[3]

Lazenby also recovered a box of appellant's clothing and other possessions from Caramelo's apartment. (9 RT 1782.) Caramelo told Lazenby that she "didn't want" those things in her home, so he took them. (9 RT 1782) Among the items in that box of possessions was a bag which is depicted in People's Exhibit 52A. Lazenby photographed that bag because he felt it resembled a multicolored bag that he had been told

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[3] Lynn Finzel later identified the ring as one that had been taken from her the night she was shot. (9 RT 1924-1925.)

appellant reportedly "had the stuff in when he came back to [Aguirre's] house." (9 RT 1783.)

Caramelo also told the officers that appellant had called her that night and invited her to a party at a house where he was staying. The location of that party was supposed to be a blue house located "near 21st and Powell," with possibly a Volkswagen at the scene. (9 RT 1783.) The officers went to that intersection, arriving at around 6:00 or 7:00 a.m. on May 12, 1993. When they arrived, they observed a house with a blue Volkswagen in the driveway. (9 RT 1784.) They later learned that the house was Antonio Jackson's residence. (9 RT 1740, 1758-1760.)

After the officers developed a plan for getting into the residence without endangering others, they entered the house and arrested appellant. (8 RT 1507-1510.) Appellant was sleeping on a couch in the living room when they entered. Underneath him on the couch was a "black and turquoise blue fanny pack." (8 RT 1510.) The officers seized the fanny pack and other property in the living room that appellant identified as his. That property included a bag with "clothes and stuff in it." Lazenby found a bag of jewelry in that bag, which he turned over to the Torrance police. (8 RT 1520-1521.)

After appellant was handcuffed, Lazenby led him into the back bedroom "to explain what was going on." (8 RT 1510-1511; 9 RT 1788.) Lazenby directed other officers to check the contents of the fanny pack, and was told that it contained a gun. (8 RT 1511; 9 RT 1788.) Lazenby explained to appellant that he was under arrest on the three warrants, and told him the charges. (8 RT 1511, 1513-1514.) When Lazenby mentioned the "murder warrant out of Torrance," appellant told him "I'm the wrong guy." At that time, Lazenby noticed that appellant was wearing a man's

gold ring with four to five stones. When Lazenby asked appellant where he got the ring, appellant said he "got it from a flea market." (8 RT 1513-1514; 9 RT 1791-1793.)[4]

Lazenby helped transport appellant to jail. On the way, he asked appellant again about the shootings in Torrance. Appellant said that "four Mexican gang members" committed those crimes. (8 RT 1515; 9 RT 1794-1795.) Appellant said the gang members came up to him on the street and made him "take the gun and jewelry." Appellant also said that the gang members told him that "they [had] killed two people." (8 RT 1515.) Lazenby asked appellant why, if he was not involved in the murders, he told Pierce that he had shot somebody. Appellant said that what he told Pierce was that "they," not he, had shot somebody. (*Ibid.*; 9 RT 1795.)

Lazenby then told appellant that "there was one problem." He said that the female victim had been raped, and asked what appellant would "say if his DNA or blood type were matched to that found in her body cavity." Appellant reportedly "hung his head and shook it slowly back and forth saying nothing." (8 RT 1517; 9 RT 1798.) Lazenby then told appellant there was "one other problem." He told appellant that the female victim had survived, and had picked appellant "out of a laydown." According to Lazenby, appellant "turned pale, took a deep breath, and went, 'shit.'" (8 RT 1517-1518; 9 RT 1799.)

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[4] Lynn Finzel identified the ring as her husband's wedding ring. (8 RT 1519; 9 RT 1917.)

II. The Penalty Phase

A. The Prosecution's Evidence in Aggravation

1. Introduction

The prosecution's penalty phase presentation consisted almost entirely of evidence regarding the circumstances of the charged crimes and the impact of the charged crimes on Lynn Finzel and other family members. Only very limited evidence relating to any other statutory aggravating factors was presented to the jury by the prosecution.

Lynn Finzel was the sole source of the victim impact evidence. She offered both her compelling and heart-rending testimony. The prosecution also offered a variety of demonstrative exhibits. Those exhibits ranged in type, and thus in emotional impact, from the commonplace to the unprecedented. Those exhibits included family photographs of Joe Finzel as he appeared in life, and photographs of the Finzels' wedding. (12 RT 2388-2389) Other photographs were admitted that showed Joe playing and napping with his infant daughter, Brinlee. (12 RT 2406-2407.) Lynn also displayed a hand-drawn card that her eight-year-old stepson Garrett had left at his father's grave. (13 RT 2439-2440.)

But most significantly, the prosecution also played for the jury an 11-minute videotape that Lynn had prepared with the help of a skilled videographer for the purpose of presenting at the penalty phase of appellant's trial. (12 RT 2288-2290.) That video came complete with background music and narration, and used various cinematic techniques to emphasize the magnitude of the loss suffered by Lynn and other family members. (11 RT 2264-2267; 13 RT 2440-2441.)

2. Additional Evidence Concerning the Circumstances of the Crimes

George Aguirre testified about a statement appellant allegedly made two weeks before the crimes at issue, and that testimony was admitted as relating to the circumstances of those crimes. (11 RT 2248-2249.)

Aguirre testified that appellant stayed at his house in Torrance for approximately two weeks "a month before" Mother's Day of 1993. (12 RT 2330.) Sometime during that two-week period, appellant said to Aguirre: "Dude, I wonder what it would be like to rape a woman at gunpoint." Aguirre testified that he responded to that comment by saying, "That's sick." (12 RT 2331.) Aguirre testified that both he and appellant were "loaded" and "high" at the time of this conversation. In fact, he testified that he and appellant were "loaded all the time" during the period in which that conversation allegedly took place. (12 RT 2336.)

3. Victim Impact Evidence

a. Joe Finzel's Life and Family

i. Joe's Parents

Lynn testified that Joe was the only child of Joseph and Shirley Finzel. Joseph Finzel was in his 60s at the time of the trial, and Shirley was in her 50s. Joe helped his parents with maintenance and repairs on their home and vehicles, and they relied upon him greatly. (12 RT 2362-2363.) Shirley learned of her son's death on Mother's Day, and "just kept throwing up" afterward. (13 RT 2433.)

ii. Joe and Lynn's Relationship

On March 28, 1990, Lynn was introduced to her future husband by friends at a restaurant called Texas Loosey's in Torrence. (12 RT 2363-2364.) At first she thought Joe was not her "type," but before the evening

was over she realized that he was. (12 RT 2364-2365.) They began dating after that and fell in love. The two enjoyed doing the same things, like camping, boating and working with horses. (12 RT 2367.) Joe did romantic things like buying her flowers and gifts, and would sometimes make her candlelight dinners. (12 RT 2378-2379.)

The Finzels returned to Texas Loosey's on March 28th of every year of their marriage. (12 RT 2387.) Lynn displayed to the jury a photograph of the two of them taken at that restaurant on March 28, 1993, "two months before all this happened." (12 RT 2387-2388; Peo. Exh. 56A.)

Lynn testified that Joe was a romantic and thoughtful boyfriend. She described how he bought her presents (12 RT 2379-2381), took her on a surprise cruise (12 RT 2380), and collected "cute little cartoons" to give to her. (12 RT 2381-2382.) She displayed one such cartoon, which bore the caption: "Love is being her handyman." (12 RT 2382; Peo. Exh. 83.)

When they met, Joe was already living in the house in which the crimes took place. It was in the bedroom of that house, on Valentine's Day, that he proposed to her. Lynn testified that the memory of that event is "pretty haunting" to her. (12 RT 2368-2369.) At the time of the proposal, they were both very excited about the engagement, and talked about their plans to "have a lot of children" and move out of California. (12 RT 2369.)

Before they were married, they saw a marriage counselor and attended a weekend event designed to prepare engaged couples for marriage. (12 RT 2371, 2375-2376.) Lynn read for the jury a letter that her husband wrote to her at the engagement weekend. (12 RT 2377-2378.) The victim impact video also depicts Lynn reading aloud another of the letters her husband wrote that weekend. (12 RT 2375-2376.) The letter Joe wrote expressed his desire "to spend the rest of [his] life" with her, and

elaborated on the many qualitites about her that he found endearing. (12 RT 2377-2378.)

Lynn testified that she had never been married before, and had dreamed about her wedding ever since she was a little girl. Her dream had been to be married in the church she attended while growing up, and to wear a dress with a long train. (12 RT 2370-2371.) Her dream came true when she married Joe in that church on May 16, 1992. (12 RT 2385.) Joe's son, Garrett, was a part of the wedding. The Finzels got an inscribed bracelet for Garrett and put it on him during the ceremony, so Garrett would feel that he was "getting married also." (12 RT 2386-2387.) After the wedding, Joe and Lynn went on a honeymoon cruise to Mexico and had a great time. (12 RT 2390-2391.) Lynn testified that her wedding day was the happiest day of her life to that point. (12 RT 2390.)

Lynn showed a series of photographs of her wedding to the jury They included one of Joe, Lynn and Garrett (12 RT 2388; Peo. Exh. 56B), another of the wedding couple by a tree (12 RT 2389; Peo. Exh. 67A), and other photographs taken before and after the wedding reception. (12 RT 2389-2390; Peo. Exhs. 67B and 67C).

Lynn testified that Joe bought her a Swatch watch and a set of automobile tires for wedding presents. (12 RT 2385.) She later had to sell the car that had the tires on it, and she lost the watch. She may have been wearing the watch when she was shot, and it may have been lost at the hospital. (12 RT 2386.)

iii. Joe and Lynn's Married Life

After the wedding, Joe continued to be an attentive and devoted husband. Lynn was laid off from her job at Hughes Aircraft in November

of 1992. Both Lynn and her husband were "relieved" about that lay-off, because she could then stay home and raise a family. (12 RT 2393.) Lynn was planning to have three children before she turned 30. (*Ibid.*)

Joe worked for a computer company as a parts coordinator. (12 RT 2392.) He also helped his wife set up a business providing "pony parties" for children. They later expanded the operation to include a petting zoo. (12 RT 2394-2395.) Joe and Lynn were both involved with horses, and kept a goat in their back yard. (12 RT 2367, 2396.)[5]

Joe was very excited about becoming a father. He had tears in his eyes when his wife told him she was pregnant. She told him on the first Father's Day after they were married. (12 RT 2400.) When she told him that she wanted to have three children, he told her that he wanted to have four. (*Ibid.*) Lynn described her husband as an excellent father. (12 RT 2399.)

Joe and Lynn's daughter Brinlee was born on February 28, 1993. She was only two-months old when the crimes at issue occurred. (12 RT 2362.)[6] Joe was involved in Lynn's pregnancy every step of the way. He attended Lamaze classes with her, and was "there right next to" her during her "rough" labor. (12 RT 2401.) After the delivery, Joe brought Lynn 100 red roses. (12 RT 2405.) Lynn was ready to have another child "right away" after Brinlee's birth. (12 RT 2394.)

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[5] Lynn displayed to the jury photographs showing Joe along with the goat. (12 RT 2396.)

[6] Lynn held Brinlee in her arms at the start of her testimony so she could be displayed to the jury. (12 RT 2362.) Brinlee was then handed to the prosecutor, who in turn handed her to someone seated in the courtroom. (13 RT 2444.)

When Lynn was in a lot of pain during labor, she observed that Joe was "crying because there was nothing he could do to help" her. (12 RT 2402.) Brinlee was born with the umbilical cord "wrapped around her neck really tightly," and had to be "rushed" away to intensive care. (*Ibid.*) Lynn was released from the hospital before Brinlee, but spent most of her time at the hospital during the three days Brinlee was in intensive care. (12 RT 2403.)

Joe and Lynn did all they could to make sure Garrett felt included in the family after Brinlee was born. They reassured Garrett that they would always love him just as much. (12 RT 2400.) Joe made Garrett a hat and t-shirt bearing the legend "I'm a big brother." Garrett was "excited" to wear that shirt and hat to school. (12 RT 2403.) Garrett was not jealous of Brinlee; he was "thrilled" to have a sister. (12 RT 2404.) Lynn displayed a photograph showing Garrett proudly holding his little sister. (12 RT 2406; P's. Exh. 76.) Lynn felt close to Garrett. (12 RT 2383.)

Joe and Lynn lived happily with their two children. They remodeled their home, with Joe hanging new wallpaper, painting, and installing new carpets. (12 RT 2397.) They also enjoyed outdoor activities with the children, and both rented videos and went out to the movies. Part of their routine was to have family night once a week, when they would take turns deciding what to do that night. (12 RT 2398.) They also went on family camping trips together. (12 RT 2405-2406.)

Joe and Lynn had plans to celebrate their anniversary the weekend after May 8, 1993. They were planning to go to Disneyland with some friends who were married on the same date. (12 RT 2391.) Joe was also in the process of obtaining a job transfer to Arizona, and he had told Lynn that the prospects for the transfer looked "really good." They wanted to move to

Arizona because they wanted more space for horses and outdoor activities. (12 RT 2391-2392.)

4. Lynn's Pain and Suffering

Lynn could not describe what it was like to have a stranger in her room threatening her baby with a gun. But she said that when the intruder found her husband's gun, she felt like she was no longer a human being. Her greatest concern at that point was for Brinlee. (12 RT 2408.) When Lynn heard Joe arrive home, she thought he was going to come in and save her. (12 RT 2409.) She will always remember the horrified look on Joe's face when he was shot. (12 RT 2410.) She still feels "guilt for the things that [she] should have done to save" Joe that night. She will always feel that guilt. (13 RT 2430.)

After she was shot, Lynn was thinking that she had to get through the ordeal. She was listening to Brinlee cry, and hoping her cries would drive the intruder away. (12 RT 2410.) She also recited prayers. (12 RT 2411.) Lynn was also trying to lie on her arm to stop the bleeding, and trying to keep track of the time. (12 RT 2411-2412.)

Lynn was in the hospital for about five days after the shooting. At the outset of that time, she was unable to speak, and therefore she wrote notes to communicate. (12 RT 2413.) Among other things, in those notes, she wrote that: she wanted to "give up"; "we were doing so good"; she "loved him so much"; and "Brinlee will never know her dad." (12 RT 2415.) She also wrote that her perfect life had been ruined. (*Ibid.*) Lynn testified that she felt like she was losing her mind when she wrote those notes. (12 RT 2417.)

Lynn had lived in around 10 different places in the year before her testimony. She has been afraid to live alone. (12 RT 2419, 2421.) It has

been hard moving so frequently with an infant. (12 RT 2419.) She has had difficulty adjusting to Joe's death; at the time of the trial, she "still [could not] believe he's gone." She has seen a counselor, and consulted a psychic in an attempt to talk to her husband. (12 RT 2421.)

Lynn has also had hallucinations in which she thought someone was looking at her around a corner or through a window. (12 RT 2421.) She has had nightmares about violence and about the crimes at issue, and has also experienced anxiety attacks. (12 RT 2422-2423.) In those attacks, she gets nervous and feels like she has a "vise grip" on her heart. (12 RT 2423.) In addition, she testified that she has suffered depression every day since the crimes at issue, and feels her loneliness more intensely as time goes by, because her situation is becoming more real. (13 RT 2429.)

As a result of Lynn's mental and emotional state, she has been prescribed a number of medications. At the time of the trial, she was taking the following prescription drugs every day: "Trazadone for depression, Ambien for sleeping, and Buspar for sleeping." Previously she had taken tranquilizers, but they made her more depressed. (13 RT 2432-2433.)

Lynn and Garrett have become estranged since Joe's death. She has never had a chance to talk to Garrett about it. She has visited Garrett's school a couple of times to talk to him, but Garrett is afraid of her and blames her for what happened. The thought of that "tortures" her. (12 RT 2416.)

Lynn said that testifying at the guilt phase was very difficult for her. She described it as like a nightmare that would not end. It was difficult for her to sleep because she "was fearing someone would try and kill" her. (13 RT 2433-2434.) It was also "humiliating" and "embarrassing" for her to testify at the penalty phase about very personal things. (13 RT 2434.)

5. The Victim Impact Video

At the conclusion of Lynn's direct testimony, the victim impact video was played for the jury. (13 RT 2443.)[7]

B. The Defense Evidence in Mitigation

1. Introduction

Appellant, who was only 22 when he was arrested on the charges involved in this case (18 RT 3106), presented extensive evidence in mitigation to demonstrate how the chaos and horror that scarred his early childhood and youth helped bring him to the point where he was on trial for his life. The testimony of appellant's family members, and from the juvenile justice system professionals who were involved in his life from the time he was first arrested at the age of 13 (14 RT 2563), clearly illustrated that appellant's mental and emotional development was deeply influenced by the manifold "risk factors" that permeated his childhood and adolescence. (16 RT 2804-2806.) The combined effect of all those factors caused appellant's personality to become "more and more deteriorated" as the years of neglect and abuse went by. (16 RT 2864.)

Dr. Nancy Kaser-Boyd, a psychologist who examined appellant in preparation for the penalty phase trial, defined "risk factors" as conditions that put a child at "risk for adult dysfunction, adult mental illness, [and] adult criminality." (16 RT 2804.)[8] Dr. Kaser-Boyd listed and explained the

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[7] The content of that videotape is fully described in Argument IV, *post*, at pages 146-152.

[8] Dr. Kaser-Boyd's field of specialization is "clinical psychology, which is the study and assessment and teaching of abnormal behavior." (16 RT 2766.) She previously had been a staff psychologist and member of the clinical faculty at UCLA, and later was the Director of Psychology at

(continued...)

variety of risk factors that existed in appellant's life. The testimony of several witnesses who knew appellant during his childhood and/or adolescence established that all of those factors had indeed been present in appellant's life, and had influenced the development of his personality. The factors, corroborated by the testimony of family members and other witnesses included, (a) unstable living and parenting arrangements (see, e.g., 14 RT 2615-2618, 2659; 16 RT 2807); (b) drug abuse within the family, including the fostering of appellant's own use of drugs by parental figures (see, e.g., 14 RT 2621-2623; 15 RT 2686-2688); (c) sadistic physical and psychological abuse of appellant, his mother, and his brothers (see, e.g., 14 RT 2619-2620, 2660-2661; 15 RT 2682-2684); and (d) appellant's sexual molestation by his stepfather (see, e.g., 18 RT 3028-3030, 3035-3036).

Another extremely significant risk factor Dr. Kaser-Boyd identified as having had a severe negative impact on appellant's development is the fact that he suffers from Attention Deficit Hyperactivity Disorder ("ADHD"). (See, e.g. 15 RT 2715-2718; 16 RT 2793-2796.)

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[8] (...continued)
Ingleside Hospital. (16 RT 2767-2768.) Subsequently, she became the Director of Assessment at a UCLA training clinic for graduate students, and then in 1988 went into private practice as a clinical psychologist. After moving to private practice, Dr. Kaser-Boyd continued to teach at least one class a year at both UCLA and USC. (16 RT 2768.)

Prior to her examination of appellant, Dr. Kaser-Boyd had consulted for both the defense and the prosecution in a variety of criminal cases. (15 RT 2770.) She had also served on the dependency court expert panel in Los Angeles. That court hears allegations of child abuse, neglect and sexual abuse. As a member of that panel, she evaluated thousands of cases in which children had been exposed to abuse and neglect. (15 RT 2787.)

The combined effect of all of these risk factors "create[d] such a stressful environment" for appellant that he was unable to properly mature and develop. (18 RT 2984.) Dr. Kaser-Boyd testified that a child with even one or two of the risk factors that existed in appellant's life would have a strong likelihood of "adult psychopathology." (18 RT 2985.) The combined effect of all these risk factors sent appellant on a "downward spiral" that led him into delinquency, drug use and eventually into adult crime. (18 RT 2987.)

2. Appellant's Childhood Was Marred by Instability, Abuse, and a Lack of Sustained Relationships

Appellant's mother, Suszanne Tugg, was married at 18 to Adolpho Dalisaya (Rudy) Garcia. (14 RT 2656; 15 RT 2671-2672.) Suszanne had three children during that marriage: Fredrick (Fred) Garcia, appellant, and Teodulo Dalisaya (Teodi) Garcia. (14 RT 2615, 2656; 15 RT 2671-2672.) Fred was born on June 19, 1969, in Beaumont, Texas (14 RT 2615), appellant on September 24, 1970, in Stuttgart, Germany (II CT 487; 15 RT 2672), and Teodi on January 24, 1972, in Jefferson County, Texas. (14 RT 2656)

Of the three boys, only Teodi is Rudy Garcia's biological son. Fred's father is Donald Baker, and appellant's father is Patrick Grandchampt. (15 RT 2672; 16 RT 2757.) Neither Fred nor appellant learned that Rudy Garcia was not his father until years later. Fred found that out when he was 25 years old; appellant when he was 13. (14 RT 2615-2616; 15 RT 2688-2689.) Fred testified that he does not know for certain who his father is. (14 RT 2616, 2629.)

Appellant's maternal grandfather, Fred Baumgarte, testified that

when appellant was three or four years old he saw Rudy Garcia touch appellant inappropriately. Appellant had his underpants off. "Rudy had Randy standing on a table or a bench in front of him and he was – he reached up and was playing with his little penis." (18 RT 3027-3028.) Rudy was holding appellant's penis between his thumb and a finger. Rudy immediately stopped what he was doing when he saw Fred, and Fred never saw Rudy do that again to appellant. (18 RT 3030, 3036-3037.) Fred said that what he saw Rudy do to appellant seemed wrong to him. But Fred did not tell anyone about what he had seen at that time because he did not think it was sexual. Fred said that years after the incident he began "to hear more and more about it on television and radio about children being molested." (18 RT 3030.) At that time, he recalled what he had witnessed and "realized it wasn't what he [Rudy] was supposed to be doing." (18 RT 3029.)

Suszanne divorced Rudy Garcia before appellant began kindergarten, and moved with her children to Boise, Idaho. (15 RT 2672-2673.) The family next moved in with Suszanne's parents in Vidor, Texas, where appellant finished kindergarten. They then moved to Alabama, where appellant started first grade. (*Ibid.*) The man Suszanne was seeing in Alabama, Bob Millsap, moved to Boise, and she followed him there, leaving the children in Alabama to finish the school year. Suszanne next moved to Vancouver, Washington, where her children continued going to school. Appellant lived in Vancouver through the third grade. (15 RT 2674.)

Fred Garcia recalled a lot of changes in the family's situation when he was a child, and a lot of "chaos." (14 RT 2618; 16 RT 2754.) That was partly a result of all the moving the family did, but also partly because of

the multiplicity of men in his mother's life. Fred did not remember his father, but did recall a number of other men, including Frank Poleta, Bob Millsap, Randy Newton, and Tim Tugg, who dated and/or lived with his mother for "long periods of time" when he was a young boy. (14 RT 2617.)

Suszanne said that Poleta was the man who came after Rudy Garcia. She and Poleta were together for four years, and were married for about the last six months of that time. For at least some of that time, Poleta lived with her and her children. Bob Millsap was the next man with whom Suszanne was involved, and he lived briefly with her and her children at her parents' house in Texas. (15 RT 2675.) Suszanne and Millsap apparently were also together in Boise and Vancouver as well. (15 RT 2674, 2678.) Later, when appellant was in the fifth grade, Suszanne dated and/or lived with Randy Newton in Aloha, Oregon. (14 RT 2617; 15 RT 2679.) Finally, when appellant was between the sixth and seventh grades, his mother settled down with the man who was to become her third husband, Tim Tugg. (15 RT 2682.)

Fred Garcia testified that when he was about seven or eight, when the family was living in Boise, was the "last happy time in our lives." (16 RT 2754.) But Fred also recalled that life with his mother was "always difficult." In fact, he found it so difficult to live with his mother and the various men she cohabited with that he moved around even more frequently as a child than the rest of the family, because on several occasions he left to live with relatives. (14 RT 2618.) Because appellant and Teodi were younger, they were not able to get away on their own, but they still moved frequently with their mother.

The first time the family moved was when Rudy Garcia and Suszanne divorced. Rudy obtained custody of the three children after the

divorce, but Suszanne "took off" with the children. (II CT 504; 15 RT 2678.) This was apparently when she was living with Poleta. (15 RT 2675.) After being awarded custody of the children, Rudy Garcia left them with their grandparents in Texas. When he came back to visit the children at Christmas in 1973, the grandparents told him they "had no idea where the children were." (II CT 504.)

Suszanne and the children apparently lived in Texas and in Alabama during the period after she "took off" with them. (15 RT 2673-2675.) Then, after she initially left the children behind in Alabama to follow Bob Millsap to Idaho, she took them to Idaho with her. (15 RT 2674.) Additional moves to Washington, Georgia, and Oregon followed over the next few years. (15 RT 2674, 2678-2679.)

Suszanne testified that Millsap was the "male influence" on the children for some period. (15 RT 2676.) She described Millsap as "extremely strict" with the children, yet also said that he refused to "take any responsibility at all for anything to do with them . . . [because] he didn't want any part of them." Suszanne and Millsap also argued a lot, because he "was extremely hurt from his first marriage and he [took] it out on [her]." (*Ibid.*) Nonetheless, she stuck it out for some time with Millsap, despite his cruelty to her and his aggressive indifference to her sons. Appellant was in first grade when Millsap came into the picture, and he was still a part of the family's life when the children were dropped off at the Georgia home of their "father," Rudy Garcia, during the summer after appellant finished the third grade. (15 RT 2673-2674, 2678.)

3. Appellant's Nightmarish Life with His Sadistic Stepmother, Cecelia Garcia

When the children were dropped off with Rudy Garcia in Georgia,

they had not seen their father for six years, because Suszanne "took off" with them after the divorce. Thus, according to Suszanne, appellant had never known Rudy Garcia. (15 RT 2678-2679.) But Suszanne decided that the children should be with Rudy Garcia, and accordingly she delivered them to his house. Suszanne and Bob Millsap drove the children to Rudy Garcia's house in Georgia, stayed there one night, and then drove off and left them there. The children stayed there with Rudy Garcia and his new wife, Cecelia, for the next two years. (14 RT 2659; 15 RT 2678-2679.) As Teodi recalled it, his mother just told them they would be going to stay with their dad, whom they had never met. (14 RT 2659.)

Rudy Garcia had by then married Cecelia. Fred Garcia described the children's life with Rudy and Cecelia as "hell." (14 RT 2624.) That was primarily because of the sadistic methods of punishment Cecelia used with them. Cecelia had sole charge of the children because Rudy refused to be involved in parenting, or to protect them from her. (14 RT 2624-2626, 2660-2662.) Teodi described Cecelia as the prototypical "wicked stepmother," and said she punished them in ways that were "not normal." (14 RT 2660.)[9]

Teodi's description scarcely does justice to the evidence of Cecelia's inventive sadism. Besides pinching the children for laughing too loud, and hitting them with broom handles (14 RT 2661), Cecelia also inflicted punishments that involved elements of both physical and psychological

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[9] Suszanne seems to have believed her children's accounts of Cecelia's abnormally malicious behavior. She recounted details of that behavior several years later to appellant's probation officer, and stated that the reason she "retrieved the children [from Rudy and Cecelia] in 1980" was that Cecelia was "physically abusive." (14 RT 2589.)

torture. Both Fred and Teodi testified that on at least one occasion Cecelia forced Teodi to eat food after he had vomited it up when he became ill at the dinner table. (14 RT 2640, 2661.) Fred also recounted how Cecelia intentionally slammed the car door "as hard as she could" on appellant's hand after he had accidentally closed the door on her hand. (14 RT 2625-2626.) And Teodi described being forced to eat feces as a punishment for "dirty[ing] his underwear." (14 RT 2662.)

Fred testified that Cecelia inflicted humiliating treatment on appellant because he was unable to control his "constant bed-wetting problem." (14 RT 2625.)[10] Thus, Cecelia forced appellant to walk up and down along the road outside the house wearing his urine-soaked underwear on his head and a sign proclaiming "I am a bed wetter." (14 RT 2625-2626.) Fred unsuccessfully tried to help appellant change the wet sheets and hide them so Cecelia would not find out that he had wet the bed. (13 RT 2526.)

Appellant pined for his mother while he was living with Rudy and Cecelia. Two letters appellant wrote to his mother during that time were read into the record. In those letters appellant wrote about how much he missed her, and asked her to "please answer this letter." (15 RT 2694-2695.) After appellant and his brothers had been in Georgia for approximately two years, Suszanne "sued for custody, claiming that [Cecelia] physically abused the three boys." (II CT 504; 14 RT 2554.)

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[10] That problem continued to plague appellant until he was at least 17. (18 RT 3020-3021.)

4. Appellant's Treatment for Attention Deficit Hyperactivity Disorder (ADHD)

When appellant was in the fifth or sixth grade, he and his brothers then returned to live with their mother in Aloha, Oregon. Suszanne was seeing Randy Newton at that time. (15 RT 2679-2680.) During that school year in Aloha, appellant's teacher, Jamie Reiser, told appellant's mother that she was having problems with appellant's disruptive behavior. Reiser said that appellant could not concentrate, and that all he did in class was prevent the other children from learning. On Reiser's recommendation, Suszanne had appellant evaluated by a doctor, who reported that he suspected appellant "might have hyperkinesis." After the doctor heard Reiser describe appellant's disruptive classroom behavior, he prescribed Ritalin for appellant. (15 RT 2680.)

After appellant had been taking Ritalin for "about three weeks," Reiser informed Suszanne that there had been a "360 degree [*sic*] turn" in his behavior. (15 RT 2680-2681.) Reiser reported that in that short time appellant had gone from "being her worst student, disrupting her class, to being one of her best, and she was extremely pleased with his behavior. . . [and she] felt that the medication made a total difference." Reiser even awarded appellant a certificate for having the "most improved grades" in the class. (15 RT 2681.)

Appellant took Ritalin for approximately two years, from age 11 to age 12, and during that time "function[ed] as a normal child." Then, after he complained about stomach problems, "he was taken off the medication and began acting out again." (II CT 498.) Years later, after learning from Suszanne that appellant had previously been diagnosed as hyperkinetic and

had been treated with Ritalin, Joan McCumby, appellant's juvenile court counselor, referred him for a psychological evaluation. (14 RT 2560-2561.) Dr. Robert Basham evaluated appellant and told McCumby that appellant did not need any medication for hyperkinesis. (14 RT 2561.)

5. Appellant's Life with His Abusive Stepfather, Tim Tugg

When Fred was in the sixth or seventh grade, and appellant in the fifth or sixth grade, Tim Tugg took Randy Newton's place as the man in Suszanne's life. (14 RT 2619, 2682.) She married Tim Tugg in 1980. She said that he was a "big strong man" who "was physically and emotionally abusive" toward her and her children. (II CT 505; 15 RT 2682, 2686.) He was also a heavy abuser of illegal drugs, and proceeded to involve her and appellant in that abuse. (15 RT 2686-2687.)

According to Fred Garcia, "things [in the family] seemed to go really downhill" when Tugg entered the scene. From that time on, "there was always a lot of yelling, a lot of screaming. [Tugg] was always violent towards [the boys] and towards [their] mother." (14 RT 2619-2620.) Fred testified that he had always been afraid of Tugg, and was still afraid of him at the time of trial, even though he was 25 years old at that time. (14 RT 2615, 2620.) Suszanne testified that her husband had episodes of violent behavior in which he became simply "insane." (15 RT 2691.)

She testified that Tugg made it clear from the beginning of the marriage that he refused to accept any parenting responsibility for her sons; the boys "weren't his blood, therefore, he didn't want them." (15 RT 2682.) Tugg already had a daughter of his own when he married Suszanne, and she was his favorite. He never treated Suszanne's children "like [they] were part of the family." (14 RT 2619, 2630.) Suszanne had a son with Tugg

named Matthew, and Tugg transferred most of his interest to Matthew. He "took total control of Matthew," and threatened to kill Suszanne if she tried to leave with him. (15 RT 2690-2691.) And, while Tugg behaved brutally toward all of Suszanne's sons, he treated appellant more harshly than he did Fred and Teodi. (14 RT 2624, 2629.)

Tugg also introduced the use of illegal drugs to the family, beginning with marijuana. (14 RT 2620; 15 RT 2686.) Suszanne testified that Tugg "smoked marijuana all day, all night," purportedly to control his epileptic seizures. (15 RT 2686.) When Tugg did not have marijuana he would drink alcohol, and would then become drunk and violent. When he drank alcohol he would "explode." (14 RT 2620, 2621-2622.) He made Suszanne smoke marijuana with him, and the two would sit in front of the television smoking it "[a]ll the time." Tugg also offered the drug to appellant, Fred and Teodi. (14 RT 2621; 15 RT 2686-2687.) Fred did not like marijuana, and never got involved in drug use, while Teodi would occasionally smoke marijuana. (14 RT 2621; 15 RT 2687.) Appellant got much more involved in using the drugs Tugg introduced into the household than his brothers did. (14 RT 2629-2630; 15 RT 2687-2688.)[11]

After a time, Tugg switched to cocaine as his drug of choice. Suszanne, deciding she "couldn't deal with this real world anymore," joined

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[11] Dr. Kaser-Boyd testified that individuals, like appellant, who suffer from ADDH are highly susceptible to becoming involved in substance abuse. (16 RT 2801; 17 RT 2896, 2960.) She said that there are two theories on why that is so: either that the drug abusers are "self-medicating" by taking drugs like methamphetamine and cocaine that are similar in effect to Ritalin, or simply that the adverse societal reaction to the manic behavior of ADDH sufferers causes them to be relegated to associating with "delinquent . . . kids [who] are also using drugs." (16 RT 2801.)

in using that drug because she wanted "to get away from reality." (15 RT 2686.) When the cocaine use began, Fred moved out of the house to live with relatives. (14 RT 2618, 2623.)

According to Suszanne, she and her husband began using cocaine on a daily basis; when they got "up in the morning, [the] first thing [they] did was a line [of cocaine] until it was all gone." (15 RT 2687.) And when the drugs were gone, "the fight was on because [Tugg would say that she] had done all of his drugs . . . after a while, that was all [she] lived for . . . [her] only purpose in life was to get another line so that [she] could get through that day." (*Ibid.*) Suszanne's weight dropped to 90 pounds, because she stopped eating as a result of her drug use. She "just hit bottom." (15 RT 2688.)

Appellant again followed the lead of his mother and Tugg in the matter of drug abuse, and appellant switched to using cocaine along with them. (15 RT 2687.) Suszanne recounted an incident where, after buying a quantity of cocaine that was more expensive than she could afford, she asked appellant to sell some of the cocaine for her so that she could consume the rest. However, appellant and a friend consumed the cocaine he was supposed to sell, and appellant tried to make back the money to pay for the cocaine by stealing. Appellant was caught and charged for those offenses, and told his mother "not to say anything, [because] he would take the rap for it." (15 RT 2687-2688.)

Another negative factor Tugg brought into appellant's life was irrational psychological and physical abuse, something appellant had only previously experienced to any significant degree while living with Cecelia Garcia. Tugg's violence was directed at everyone in the family except his blood relatives, but his primary targets were appellant and his mother. (14

RT 2620, 2622, 2624, 2629; 15 RT 2682, 2685-2686.) As Fred Garcia described it, Tugg "hit my mom, hit my brothers, hit me. I have seen him slam my brother Randy up against the wall." (14 RT 2620.)

Tugg physically abused Suszanne frequently, often in front of her children. According to Suszanne, "[her husband] didn't care [if the boys were present]. It didn't make any difference to him. As a matter of fact, I really believe he enjoyed the fact that they were seeing" her being beaten. (15 RT 2685.) Both Fred and appellant would sometimes try to protect their mother from Tugg's attacks, and, when they did, they would then face the brunt of his violent abuse. (14 RT 2624, 2645; 15 RT 2685-2686.)

Suszanne described a number of violent incidents where Tugg attacked her. She testified that his physical abuse was a matter of routine. She said that on one occasion he smashed a chair across a table, then picked up a broken chair leg and threatened her. Tugg "backed [her] up in a corner and shoved the point [of the chair leg] up to [her] throat," whereupon he threatened that if she tried to leave him and take Matthew, "somebody would die." (15 RT 2683.) On another occasion, Tugg shoved a butcher knife against her neck, again threatening to kill her if she tried to leave or to take Matthew away. (15 RT 2891.) And at a 16th birthday party for Fred Garcia, at which Randy Newton was also present, Tugg first tried to start a fight with Newton, then turned on Suszanne. First he slapped and hit her, then he ripped off her clothes in front of the party guests (14 RT 2620-2621; 15 RT 2683-2684.) It took two people to "tear [Tugg] off" Suszanne. (14 RT 2621.)

Unfortunately, such incidents of violence were routine in the household while appellant was growing up. Suszanne testified that her husband perpetrated those types of violent acts against her "on a daily

basis." "He would just grab [her], shove [her] back into the corner, [and] slap her around because [she] said the wrong thing. [Her husband continually said that she] was fat, ugly, stupid, incapable of doing anything." (15 RT 2684.) He would tell her that "[w]ithout him [she] couldn't even exist." (*Ibid.*) Tugg gave her several black eyes, punched her in the face, and, on one occasion, dragged her by the hair over a rocky surface, scraping "up [the] whole side of [her] body." (15 RT 2685.) He told her that everything that happened was her fault, and that she caused him to behave the way he behaved. (15 RT 2684.) Fred testified that his mother's response to being beaten and abused by Tugg was to "get stoned," drink alcohol," and "cry a lot." (14 RT 2622-2623.)

Appellant was the other main target of Tugg's irrational violence. Fred testified that appellant and Tugg "seemed to have the biggest conflict with each other." Thus, while Tugg was violent toward all the boys, "his hatred towards [appellant] was" the strongest. (14 RT 2624.) Because of that animosity, and because appellant would "step in the middle to prevent [Tugg] from physically abusing" his mother, "he would get the brunt of [Tugg's] anger and [Tugg] would beat on him." (15 RT 2685-2686.) On one occasion, when Tugg assaulted appellant with a belt, "it got so bad that" Fred called the police. (14 RT 2647; 15 RT 2684.)[12]

But Tugg did not restrict his abuse of appellant to physical violence. When appellant was about 13 years old, Tugg informed him, in the most

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[12] Fred testified that he called the police two or three times when Tugg was assaulting his mother and/or appellant. (14 RT 2647.) Suszanne also obtained a restraining order against Tugg, in which she declared that he had been physically abusing her for three years, and that he had threatened her life. (15 RT 2692-2693.)

brutal manner possible, that Rudy Garcia, the man appellant had always been led to believe was his father, was in fact not. Suszanne had always concealed the fact that Rudy Garcia was not appellant's real father, because she "didn't want to mess anything up." But Tugg decided one night that Suszanne's approach was wrong, and that she "was a lying cunt." Accordingly, Tugg proceeded to tell appellant the truth. (15 RT 2688-2689.) Tugg woke appellant up "in the middle of the night and told him that the father he had known all his life wasn't his father, that [his mother] had been lying to him all his life, [and] that [she] probably didn't know who his father was." (15 RT 2689.) Later that night appellant "stole [Tugg's marijuana] and ran away, [and] stole some three wheel vehicles." Appellant was arrested for theft, and, in his mother's words, "didn't know who he was. He just lost his identity at that point. . . . And that was the point where things in Randy's life just flew apart." (15 RT 2689-2690.) Appellant later disclosed to Steven Walker, a sympathetic juvenile probation officer, that he was "devastated" to learn "that the person he was led to believe was his natural father" was not. (13 RT 2543.)

Following that incident, appellant suffered a number of arrests as a juvenile for crimes which included the unauthorized use of a motor vehicle, theft and possession of a controlled substance. (II CT 493.) The first of those arrests came in November of 1983, when he was 13. In that incident, he was charged with the unauthorized use of a motor vehicle. (13 RT 2471-2473.)[13] As a result of those charges, appellant was made a ward of the

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[13] While the record is not completely clear, it appears that this was the same incident Suszanne described in her testimony in which appellant "stole some three wheel vehicles" when he ran away from home after Tugg (continued...)

court and "placed in various juvenile facilities." (II CT 493.)

Perhaps the most serious of those juvenile offenses occurred in 1986, when appellant was sent back to Georgia to live with Rudy and Cecelia Garcia. (14 RT 2604.) Suszanne attributed the problems he had in Georgia at least in part to the fact that he had found out Rudy Garcia was not his real father. (14 RT 2599.) At any rate, it is clear that, shortly after moving in with Rudy and Cecelia, appellant ran away. After returning to their house briefly he ran away again, and lived on his own for two months. He was ultimately found staying in an abandoned apartment and charged with burglary. (14 RT 2601, 2604-2605.) Appellant was then returned to Oregon and put back on probation. (13 RT 2465, 2490.)

Appellant's adult criminal history is minimal, consisting of a pair of theft convictions in 1989. One of those was for selling stolen car stereo equipment, the other for attempting to snatch a leather coat from a store. (See III CT 493-495.) The parties agreed that the only felony conviction appellant had suffered as an adult, and thus the only one admissible as evidence in aggravation under Penal Code section 190.3, subdivision (c), was for receiving stolen property. (18 RT 3103.)

6. Testimony from Juvenile Justice System Workers About Appellant's Home Life and Adjustment

a. Larry Tomanka

Larry Tomanka, a probation officer from Washington County, Oregon, was assigned as appellant's case officer in 1983. Tomanka's

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[13] (...continued)
had revealed to him the truth about his illegitimate birth. (15 RT 2688-2690.)

responsibilities required him to visit appellant's home, and thus to have contact with appellant's family. (13 RT 2459-2460.) When Tomanka was first assigned to appellant's case, appellant was around 13 years old. (13 RT 2471.) In working with appellant's family, Tomanka primarily had dealings with appellant's mother. He only met her a few times. (13 RT 2461, 2464.) Only appellant's mother showed up to deal with probation; appellant's stepfather, Tim Tugg, never did. (13 RT 2486.)

Tomanka testified that appellant's mother tried to be a good mother, but he found that she "just doesn't have parenting skills." (13 RT 2462-2463.) Appellant's mother exhibited "minimal" responsiveness to his efforts to work with her. She also "wasn't always faithful . . . in following through with some of the things she was asked to do," and did not do things she would promise to do. She "tried" to be a role model, and to create rules for appellant, "but there were no rules for [him] . . . the only rules [he] really had were the rules that the court or the judge imposed on him. [¶] [Appellant's mother] basically had no control." (13 RT 2462.)

On the occasions when Tomanka visited appellant's home, appellant's mother's primary focus appeared to be on maintaining a smooth relationship with Tugg. Tugg seemed to have no particular interest in Tomanka's purpose for being there. (13 RT 2463-2464.) Tomanka's impression was that appellant's mother's "attention was [directed to giving Tugg] whatever [he] wanted," because she needed to maintain that relationship. (13 RT 2499-2500.)

Tomanka worked with appellant from the ages of 13 through 17 and one-half, and during that entire time he never thought that appellant could get his life straightened out while staying in his home. (13 RT 2512.) All during that time, Tomanka felt that appellant's "home wasn't looking too

good. There was basically no parenting provided, I mean minimal." (13 RT 2514-2515.) Thus, Tomanka and his co-workers decided that appellant's parents would not "create a productive counseling environment." (13 RT 2467; see also 14 RT 2594.)

Tomanka concluded when appellant returned from living in Georgia the second time "that there was no need to return" him to living with his family. That decision was based on the fact that appellant "had no parental support for one thing . . . . And if there was any salvation for [appellant] at [that] point it was not to send him back home." (13 RT 2465.) Tomanka testified that the "optimum goal" in dealing with juvenile probationers is usually to reunite them with their families. (*Ibid.*) He said that it is only as "a last ditch effort [that juvenile counselors decide] to take a kid away from the family." (13 RT 2466.)

But the decision to take appellant away from his family was made in this case. Tomanka and his co-workers decided that reuniting appellant with his family "was not in the cards," because "[n]othing was going on in the home. He had no support from either one of his parents to speak of . . . it just wasn't a good place to send him back to." (*Ibid.*) Again, appellant's parents were just not the type who "would create a productive counseling environment." (13 RT 2467) In fact, Tomanka testified that one of the reasons appellant did not get any counseling was that neither his parents nor anyone else was willing to step forward and offer to "pay a small amount" for such services. (13 RT 2487.)

From November 1983 through August of 1985, it was a struggle for appellant to stay with his family, because "there was a continued . . . heightened conflict with Tugg during that time. And it progressively just got worse and worse and worse." (13 RT 2486.) Thus, Tomanka

recommended sending appellant to McClaren Boys Home, a training school, instead of trying to reunite appellant with his family. The reason Tomanka recommended McClaren Boys Home was that appellant had "no home to go to." (13 RT 2511.)

b. Steven Walker

Steven Walker was another juvenile probation officer from Washington County who had worked with appellant. Walker had appellant under his supervision twice at the Shelter Program in Portland in 1987. (13 RT 2518-2519, 2529-2530.) Walker explained that the Shelter Program is designed to evaluate whether juveniles involved with the juvenile justice system should be returned home or sent to another type of placement. As part of that evaluation program, the Shelter Program has a five-level system in which the juvenile can move up to higher levels, and earn expanded privileges, in return for following program rules and maintaining good behavior. (13 RT 2520.)

One of the privileges available to juveniles who progress upward in the five-level system, and one normally chosen by the participants, is the opportunity to spend time with their families; the chance to "to go home and spend an overnight stay or weekend." However, in appellant's case, even though he reached the highest level and thus was entitled to request additional time with his family, he never did so. (13 RT 2521-2522.)

Walker felt that appellant's relationship with his mother and stepfather was not the type where it was "conducive for him to have extended overnight visits," or any visits with his family. Walker believed "there was a lot of stress at home with [appellant's mother's] relationship with [appellant's] stepfather and it just wasn't a good situation" for appellant. (13 RT 2523.) Instead, appellant asked to be allowed to take

"extended walks," and to go shopping with staff members. (13 RT 2524.)

Walker was aware that appellant had a problem with bed-wetting. (13 RT 2524.) He discussed that problem with appellant and set up a meeting with his court counselor, Joan McCumby. He did not talk to appellant about going home. (13 RT 2525.) His discussions with appellant "focused on [the fact] that appellant's family wasn't really an active participant in terms of coming to shelter care and being supportive of [appellant]." Walker "felt strongly [that appellant] needed to be in a structured program that could get him directed and pointed toward independent living." (13 RT 2526.)

c. Joan McCumby

As appellant's court counselor, Joan McCumby's responsibility was to meet with appellant and his family. During the time she was his counselor, she had 10-to-15 scheduled meetings with the family in her office. Only appellant's mother attended; appellant's stepfather, Tim Tugg, did not. (14 RT 2547-2549.)

When McCumby visited the house where appellant lived, she observed that it was "very dark," and that the atmosphere seemed "very tense." McCumby made it clear to Tugg that he was welcome to be involved in her visits to the home, but he just left the room and refused to participate. (14 RT 2550.) McCumby also observed during those visits that appellant's mother and appellant appeared to be "very guarded [and] reserved" when she asked them to divulge information about appellant's life and background. (14 RT 2551.)

Notwithstanding the guarded attitude of appellant and his mother, McCumby did glean information about appellant's personal history and home life from speaking with him and his family members and also from

reviewing his probation file. (14 RT 2551, 2578.) Thus, she learned that appellant's mother had reported that Cecelia Garcia had abused appellant when he lived with his "father" Rudy Garcia in Georgia when he was nine to twelve years old. (14 RT 2554, 2578-2579, 2586-2587.) McCumby also learned that Tugg had previously revealed to appellant "that he was illegitimate and [that Rudy Garcia] was in fact, not his father." (14 RT 2551-2552.) McCumby had also read in a report written by the probation officer who had supervised appellant before her that Cecelia Garcia was "physically abusive" to appellant and his brothers when they lived with her as children. (14 RT 2588-2589.)

McCumby subsequently learned that appellant's mother suggested to the court that appellant should again go and live in Georgia with Rudy and Cecelia Garcia. McCumby was "annoyed and upset" that appellant's mother would make such a suggestion. Accordingly, she questioned her as to "how [she] could even suggest having [appellant] go" back to live with the Garcias. (14 RT 2554, 2556, 2601-2602.) Appellant's mother told her that she had made that suggestion because appellant was older now and "could handle" living with the Garcias. (14 RT 2557.) She said to her: "'Now that he's older the abuse wouldn't happen like it happened before. He was a little boy then and now he is like 16 and he can handle it.'" (14 RT 2601-2602.) Appellant was present during this discussion, and McCumby observed that his attitude and manner was "[v]ery quiet, flat. [He had a f]lat affect, too." (14 RT 2557.)

Despite McCumby's reservations about sending appellant back to live in a household where he had reportedly been abused in the past, with a "parent" who had not previously been told that he was not in fact appellant's biological father, appellant did return to Georgia to live with

Rudy and Cecelia Garcia. (14 RT 2554-2556.)

McCumby later learned that appellant was having a problem with bed-wetting at the shelter care program where he was sent when he returned from Georgia. (14 RT 2557-2558.) McCumby had previously asked appellant's mother whether appellant had any difficulty with bed-wetting, and she had responded that there was "no problem" with that. (14 RT 2565.) After McCumby received the report that appellant was wetting his bed at the shelter, she again asked appellant's mother whether he had a problem with bed-wetting. Appellant's mother then said that appellant had "had a problem [with bed-wetting] for several years." She further said that a doctor who saw appellant in elementary school said that appellant "did not have a kidney or bladder problem," and suggested that he would "outgrow it." (14 RT 2558.)

Appellant's mother also told McCumby that appellant and Tugg had a "pretty good" relationship. However, McCumby later learned that was not true. She found out that appellant had run away from home several times, and that on one occasion, after a dispute with Tugg, Tugg ordered appellant "to leave the home at 7:00 p.m. and not to come back until midnight." (14 RT 2559-2560.)

McCumby's impression of appellant's family was that "serious things" were going on within it. (14 RT 2601.) It was her impression that appellant and his family appeared to lack normal responses to situations. Thus, when she talked to appellant and his mother about the incident where Tugg confronted appellant about his illegitimacy, she got "nothing" from them in response. In McCumby's opinion, the way in which appellant's family responded, or did not respond, to these stressful situations was "very, very strange." (14 RT 2602.) One of the "very few times" appellant

showed McCumby any feelings was when he proudly reported that "he had gone two months without wetting his bed while he was on the run in Georgia." (14 RT 2611.) In McCumby's opinion, appellant would not have had any chance to succeed on probation if he stayed in his home. (*Ibid.*)

7. Expert Testimony Concerning Appellant's Mental Disabilities

a. Dr. Arthur Kowell

Dr. Arthur Kowell, a clinical professor of neurology at UCLA, and a board-certified specialist in clinical psychology, administered a BEAM study to appellant. (15 RT 2702-2703.) He explained that the BEAM study is a four-part test of brain activity that includes (1) a standard electro-encephalogram (EEG); (2) a computerized interpretation or enhancement of the EEG; (3) a "visual evoke potential test"; and (4) an "auditory evoke potential test." All four parts of the study are designed to test the subject's "brain electrical activity." (15 RT 2704-2706.)

The visual evoke test involves exposing the subject to hundreds of light flashes. Exposure to light flashes triggers a series of changes in brain activity, and the test equipment measures that activity after each flash. Similarly, in the auditory evoke test the subject is exposed to a series of clicking sounds, and a measurement is made of the electrical activity of the brain after each click. (15 RT 2705-2706.) The subject's scores on the various tests are then compared to the scores of the control group. If the subject's scores are more than three standard deviations from the average of the control group, it is "highly unlikely" that the subject's brain activity and function are normal; in fact, the likelihood of such a result is on the order of three in one thousand. (15 RT 2707-2708.)

Dr. Kowell testified that while the first two parts of the BEAM study

administered to appellant yielded normal results, the visual and auditory evoke tests both "demonstrate[d] abnormality." (15 RT 2710.) In interpreting appellant's visual evoke test, Dr. Kowell discovered "abnormalities in the mid frontal region [of appellant's brain], the vertex, [a region] which . . . encompasses the back part of the frontal lobes and the front part of the parietal lobes, and also [in] the right central region," which also involves the "frontal lobe . . . and the parietal lobe." (15 RT 2715.) The auditory evoke test revealed an "abnormality over [appellant's] left mid temporal region." (15 RT 2716.)

Dr. Kowell explained that the frontal lobes are the part of the brain that relate to "emotionality, impulse control, executive thinking, the idea [*sic*] to be able to carry through a plan and carry out a task." The temporal lobes are the area of the brain responsible for such functions as "memory . . . emotionality and impulse control . . . [a]nd also mood." (15 RT 2717-2718.)

Dr. Kowell testified that the findings from the brain function testing he administered in this case are compatible with appellant having Attention Deficit Hyperactivity Disorder (ADHD).[14] (15 RT 2717-2718.) In fact, Dr. Kowell has seen other patients who have been diagnosed with ADHD who, like appellant, "have abnormality areas [*sic*] of the brain temporal and frontal lobes." (15 RT 2718.) While Dr. Kowell's findings do not amount to "conclusive" evidence that appellant suffers from ADHD, patients with that disorder "frequently have abnormalities in [the same] parts of the brain [as appellant]." (*Ibid.*) Results like the ones Dr. Kowell obtained from his

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[14] The terms Attention Deficit Disorder Hyperactivity (ADDH) and Attention Deficit Hyperactivity Disorder (ADHD) are both used to describe the same disorder. (16 RT 2791.)

testing of appellant must be combined with other information about the patient in order to diagnose whether he was suffering from ADHD or some other brain disorder. (*Ibid.*)

Dr. Kowell testified that if a child had been described to him as being unable to sit still or follow through on a particular activity or was constantly restless, that this child had "tried Ritalin and it seemed to make a difference," and that the child's test results on the brain function test were similar to appellant's, Dr. Kowell would suggest to the parents of that child that they "explore" whether the child should be diagnosed as suffering from ADHD. (15 RT 2719.)

b. Dr. Nancy Kaser-Boyd

Dr. Kaser-Boyd testified concerning the conclusions she reached about appellant's mental condition, and the effect of various factors in his life and background on his functioning and thinking.

Dr. Kaser-Boyd confirmed Dr. Kowell's suspicion that appellant suffers from ADHD. (16 RT 2793, 2797; 17 RT 2915-2916.) In fact, she testified that she had no "doubt in [her] mind whatsoever" that appellant suffered from ADHD as a child, and that as an adult he suffers from Attention Deficit Disorder Residual ("ADDR"), which is the adult version of ADHD. (17 RT 2956-2957.) According to Dr. Kaser-Boyd, appellant's diagnosis is "so plainly evident . . . [that] you could take ten psychologists and line them up under oath and they would say this is a history of ADHD." (17 RT 2915-2916.) She further testified that in her professional opinion appellant "was born with ADHD," and that the disorder was inherited genetically from his parents. (17 RT 2797, 2807.)

Dr. Kaser-Boyd further testified that appellant not only suffers from the effects of ADHD, a condition which by itself made it significantly more

likely he would have difficulty complying with social norms, but also faced a variety of other serious "risk factors" growing up that predisposed him to mental illness and delinquency. (16 RT 2804.)[15] The other risk factors she identified in appellant's life included that he was sexually, psychologically, and physically abused as a child; that he observed the physical abuse of his mother by his stepfather; that he was exposed and habituated to the use of narcotics by his mother and stepfather; and that his primary living situation alternated between one home with a man who was not his father and a sadistic stepmother, and his other chaotic and dysfunctional home with his mother and stepfather, Tim Tugg. (16 RT 2804-2806; 18 RT 2983.)

Dr. Kaser-Boyd said that the combined facts that appellant suffered from ADHD, and that his life as a child and adolescent was marred by the "chaos" of his family life, contributed to his descent into criminality and drug abuse. (16 RT 2807-2808.) In particular, she found that the failure to provide appellant with adequate treatment for his mental disability, combined with the emotional and psychological shocks he suffered as a result of his horrendous home life, helped send him "spiraling in a downward direction" which led him to antisocial acts. (16 RT 2808.)

Dr. Kaser-Boyd outlined the variety of sources of information utilized in assessing appellant's psychological makeup, and also identified the data she relied upon in concluding that appellant has suffered from the effects of inherited ADHD since birth. The sources of data she listed included the following: (1) interviews with appellant and members of his

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[15] "Risk factors," as defined by Dr. Kaser-Boyd, are "conditions during childhood and adolescence that put people at risk for adult dysfunction, adult mental illness, adult criminality, and so forth." (16 RT 2804.)

family; (2) appellant's school, medical and juvenile probation records; (3) the brain function tests conducted by Dr. Kowell; and (4) her clinical evaluation of appellant, which included psychological testing. (16 RT 2770-2772, 2789-2790.)

Based on her assessment, Dr. Kaser-Boyd identified a personality profile of appellant. That profile emerged from the tests she administered, and was confirmed by the historical material she reviewed concerning him. (16 RT 2787.) The profile of appellant she identified was that of a hyperactive, driven, and manic individual. (16 RT 2846.)

Dr. Kaser-Boyd administered two of the most widely-used personality tests to appellant, the Minnesota Multiphasic Personality Inventory ("MMPI"), and the Rohrschach Psychodiagnostic Test. (16 RT 2770-2772, 2790.) In addition to the results of those tests, in forming her opinion, Dr. Kaser-Boyd also relied upon the results of some previous psychological tests appellant had taken. Those earlier test results were a previous MMPI appellant had completed in 1990, and summary statements included in a report about a third MMPI that was administered to appellant in 1986 or 1987. (16 RT 2776.)

The results of the MMPI Dr. Kaser-Boyd administered to appellant demonstrated an elevated result on Scale Nine of that test, the scale for "Mania." That scale is commonly "elevated in people who are restlessly hyperactive." (16 RT 2787-2788.) Dr. Kaser-Boyd also assessed appellant as high on the mania scale based on her personal interviews with him. (16 RT 2789.) Further, the computer-generated results Dr. Kaser-Boyd obtained relating to appellant's MMPI responses indicated that the "relative elevation" of his score on the mania scale showed "a very high profile definition." Such a high profile definition means that the reading is

unambiguous, and that the psychopathology indicated by the reading is "pretty clear." (17 RT 2947-2951.) Those results also indicated that appellant was "probably experiencing some psychological difficulties, [appeared] to be hyperactive . . . [and had] unrealistic plans and agitated behavior." (16 RT 2846.)

Dr. Kaser-Boyd did not rely solely on her assessment and testing of appellant in reaching her diagnosis that he suffers from ADHD. She also reviewed the historical material on appellant's life, and concluded that his is a "very clear history of ADHD." (16 RT 2793.) The information about appellant's childhood Dr. Kaser-Boyd obtained from appellant's mother "strongly suggest[ed]" that he meets the criteria for an ADHD diagnosis, as did certain school records she reviewed. (*Ibid.*)

Thus, appellant's school records show that he was prescribed Ritalin based on hyperactivity when he was in the fourth through the sixth grades. That is extremely important evidence that he suffered from ADHD as a young boy, because Ritalin is "the classic drug" given to children with that disorder. (16 RT 2793.) Similarly, the statements from appellant's brothers that appellant was "much more hyper" as a child than they were also fit with an ADHD diagnosis. A psychological evaluation done while appellant was still a teenager, included the opinion that appellant "still had symptoms of ADHD [at that time] and likely did have ADHD as a child." (*Ibid.*)

Dr. Kaser-Boyd found further support for her diagnosis in the extensive evidence that appellant had a significant problem with bed-wetting, or enuresis. (16 RT 2793-2794, 2807.) She said that enuresis and ADHD often go together, and that they are "thought of as signs of organic impairment that are probably related." (16 RT 2794.)

Dr. Kaser-Boyd's opinion that appellant inherited his ADHD was

based on the fact that a number of his relatives also have that disorder, including his biological father, Patrick Grandchampt. (16 RT 2797, 2807.) The idea that there is a genetic component to ADHD is supported by "twin studies and by the higher preference among people who are related, biologically related." (16 RT 2797.)

In addition to learning that appellant's father had ADHD, Dr. Kaser-Boyd also was informed that Grandchampt's sister, Kim, had exhibited a variety of behaviors associated with ADHD as a child. Moreover, Kim now "carries a diagnosis of manic depressive illness, which is a common adult diagnosis for ADD [*sic*] children." (16 RT 2800.) In addition, Grandchampt informed Dr. Kaser-Boyd that appellant's half-brother Patrick had also been described as "extremely hyperactive," and that he had been advised to have Patrick evaluated by a doctor for that problem. (*Ibid.*; 17 RT 2955.)

c. The Impact of ADHD and the Other "Risk Factors" on Appellant's Personality and Psychological Development

Dr. Kaser-Boyd testified that people who grow up suffering from the effects of the numerous risk factors she identified as existing in appellant's life are seriously at risk of falling into delinquent and antisocial behavior. (16 RT 2804.) In fact, she testified that "there are very few children who c[ould] survive" exposure to the manifold risk factors that impacted appellant's development without being seriously impacted. (18 RT 2985.) The combination of those risk factors "multipl[ies] the risk that any one of [them] would give." (*Ibid.*)

Dr. Kaser-Boyd explained that the kinds of disruptive and impulsive behavior and thinking that are common in children and adolescents with

ADHD frequently lead those individuals to experience school failure, social ostracism, and/or substance abuse. (16 RT 2804; 17 RT 2895-2896, 2934-2935.) When those types of undesirable behaviors are combined with the disordered thought patterns common to ADHD, and with the stressful effect of risk factors like those Dr. Kaser-Boyd detected in appellant's life, the effect can be overwhelmingly detrimental to the ability of the sufferer to develop impulse control and to conform to societal norms. (18 RT 2983-2985.)

Dr. Kaser-Boyd's diagnosis that appellant suffers from ADHD was based in part on the fact that individuals, like appellant, who fall into the "mania category" are generally impulsive, thoughtless and driven in their behavior. Thus, they tend to be "driven by short-term needs rather than long-term goals." (16 RT 2791.) That type of restless activity and impulsive behavior is an element of ADHD, a "mental disorder beginning in childhood where the child is unable to focus, unable to concentrate, has a lot of excess energy." (16 RT 2792.) ADHD is caused by organic, neurological abnormalities of the brain (16 RT 2794-2795), and is a "serious" disorder, no less so than "manic depressive, mental illness [*sic*], schizophrenic mental illness . . . ." (17 RT 2957).

The impulsive, thoughtless and driven behavior associated with ADHD causes the children who suffer from that disorder to have school problems and problems with behavior. "They may do things that get everybody upset." (16 RT 2792.) Dr. Kaser-Boyd said that clinicians expect children with ADHD to engage in behaviors that irritate teachers, such as fighting, exhibiting petty delinquency, stealing and lying. (17 RT 2934.) Children afflicted with ADHD will also tend to "stray into a network" of children who also have mental, emotional or behavioral

problems, because they are often rejected by their normal peers. (17 RT 2960.)

Dr. Kaser-Boyd testified that children with ADHD find it "very difficult . . . to conform [] because of the driven, restless impulsive quality of their disorder." (17 RT 2894-2895.) Because of that disorder they

> are uneasy, restless, they can't sit still, they can't concentrate, they feel pressured, they feel driven, they can't understand why they can't concentrate, they think they are mentally retarded or brain damaged in some way. They feel like failures. They feel bad like they are bad people or bad kids.

(17 RT 2958.) Those kinds of pressures and distractions in the lives of young ADHD sufferers cause them to experience substantially higher rates of school failure, poor grades, "delinquency, stealing, lying." (17 RT 2934-2935.)

As individuals with ADHD move into adulthood they are commonly described as

> impulsive, poor judgment [*sic*], a history of self-defeating kind of actions, getting themselves fired from work . . . . They are often involved in drug or alcohol abuse. They may well have histories of arrest, histories of illegal behavior. They may be self-destructive.

(17 RT 2935.) An adult with ADHD who suffers such behaviors would be said to have "ADD in remission." (17 RT 2936.)

Dr. Kaser-Boyd testified that there is a "known correlation" between ADHD and substance abuse. (16 RT 2800.) She said that people with ADHD "have a very difficult time staying sober . . . [and] very frequently get involved in . . . drug use, in drug sales." (17 RT 2896.) Dr. Kaser-Boyd explained that the current "understandings" for that correlation are that ADHD sufferers are attempting to "self-medicate" by taking drugs, like

cocaine and methamphetamine, that have effects similar to those produced by Ritalin, and/or that the hyperactive behavior of those individuals alienates them from their more mainstream peers, and forces them to associate with "delinquent" groups, among whom substance abuse is more prevalent. (16 RT 2801.)

Dr. Kaser-Boyd testified that the literature indicates that 10 to 20 percent of ADHD sufferers

> will have Antisocial Personality Disorder because of the ADDH and that a proportion of those will be involved in illegal things such as drug use, drug sales, and that a smaller proportion will be involved in aggression toward other people.

(17 RT 2937.) Thus, the percentage of incarcerated male adults who suffer from ADHD is "disproportionately high." (17 RT 2960.)

Appellant experienced almost all of the types of judgment and behavior problems that are common among individuals with ADHD. Dr. Kaser-Boyd testified that when those kinds of problems are combined with the effects of all the other risk factors that afflicted appellant as a developing child,

> there is just an extraordinary amount of stress there. The little person is so busy coping with all of this stuff going on, they can't focus on school as well as they should and also they are sort of lost in the turbulence. There is nobody really who has enough time to develop a sense of self-esteem, a sense of right and wrong behavior . . . . So there is a real impediment to the development of normal functioning.

(18 RT 2984.)

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS COUNTS I THROUGH VII ON THE GROUND THAT THE LOS ANGELES COUNTY GRAND JURY THAT INDICTED HIM ON THOSE COUNTS WAS THE PRODUCT OF A SELECTION PROCESS THAT SYSTEMATICALLY EXCLUDED HISPANICS AND WOMEN, AND THUS VIOLATED HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION. APPELLANT'S CONVICTIONS ON COUNTS I THROUGH VI MUST BE REVERSED AND HIS DEATH SENTENCE SET ASIDE[16]

A. Introduction

In a pre-trial motion, appellant challenged the composition of the grand jury that indicted him on Counts I through VII on the ground that the selection process employed by Los Angeles County for selecting grand jurors violated the equal protection clause of the Fourteenth Amendment to the United States Constitution due to the underrepresentation of both Hispanics and women on the grand jury. (1 SCT VIII 8-10; 2 RT 314, 449.) Appellant's challenge was based on the record of the grand jury challenge made in another Los Angeles County case – *People v. Vela, et al.*, Los Angeles County Superior Court Case No. BA027100,[17] which concerned the racial and ethnic composition of the grand juries selected for service for the years 1986 through 1993[18] – seven exhibits offered by appellant at the

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[16] Count VII was dismissed at trial pursuant to section 1385. (See II CT 328.)

[17] The portion of the record in *People v. Vela, et al., supra*, that was before the trial court is contained in SCT VII.

[18] The grand jury that indicted appellant was the grand jury selected for service in 1992. (See 1 SCT VII 126; I CT 213-222.)

hearing on his challenge, and the testimony of Gloria Gomez, the Manager for Juror Services for Los Angeles County. (2 RT 373, 377, 423.)

Defense counsel argued that the appropriate legal standard for his equal protection challenge to the grand jury that indicted appellant was the one set forth by the United States Supreme Court in *Castaneda v. Partida* (1977) 430 U.S. 482, 494. (2 RT 425-426.) He argued that "once I show that the jurors upon whom we are focusing are members of cognizable classes and that there is a disparity in the proportion of those persons represented in the grand jury as opposed to their representation in the population, that the burden shifts to the People to show that the system employed is not susceptible to abuse." (2 RT 425-426.)

The prosecutor argued that *Castaneda* had been superseded by the United States Supreme Court's decision two years later in *Duren v. Missouri* (1979) 439 U.S. 357, and that under *Duren*, the defense had to establish the following three things: first, that the community for which the challenge is based is a distinctive one within the community; second, that the representation is not fair and reasonable; and third, that the underrepresentation is due to systematic exclusion. (2 RT 427-428.) The prosecution further argued that the defense had the additional burden of proving intentional discrimination because *Duren* held that state challenges to grand juries can only be based on the Fourteenth Amendment and not on the Sixth Amendment. (2 RT 428.)

> So the People's position is *Duren* superseded *Castaneda*, and the defense has the burden of showing that three-part formula that *Duren* puts forth, and specifically has to prove under-representation due to systematic exclusion with . . . its own evidence on the issue of whether or not

there's been intentional discrimination.

(2 RT 429.)

The defense argued that the *Duren* standard was inapplicable in this case because that standard applied to petit juries and "that *Castaneda* speaks to grand juries." (2 RT 429-430.)

The trial court agreed with the prosecution that *Duren* had superseded *Castaneda*, and ruled that the burden of proving intentional discrimination rested with the defense. (2 RT 430.) The trial court denied appellant's grand jury challenge, stating:

> To the extent that the first prong is met, I don't think I even want to get into the second prong. On appeal that is going to be argued forever as to which numbers are right. [¶] I don't think the third prong has been met. I don't find there has been any discriminatory system in place by the superior court. I don't find any fault with the key man system to the extent that the key man system doesn't have the impact it could conceivably have as was described by one of the defense witnesses based on his . . . experiences 20 years ago in the South. [¶] Frankly, I don't think . . . the defense has met their burden. To the extent that you have argued under *Castaneda*, the burden is a little differently that the court sees it. I think you have protected your position, and the numbers are all there for somebody else to have fun with.

(2 RT 467-468.)

In applying the *Duren* standard to appellant's grand jury challenge based on the equal protection clause, the trial court committed error, as the correct standard for an equal protection challenge, like appellant's, is the one set forth in *Castaneda v. Partida*, *supra*, 430 U.S. 482.[19] (See *Vasquez*

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[19] The two standards are different in that they deal with different constitutional rights: *Duren*, the defendant's Sixth Amendment right to be

(continued...)

v. Hillery, supra, 474 U.S. at pp. 261, 264 [defendant's conviction set aside on the ground that Blacks had been excluded from grand jury service]; *Rose v. Mitchell* (1979) 443 U.S. 545, 565 [*Castaneda* applied to equal protection challenge to the selection of grand jury forepersons]; *People v. Brown* (1999) 75 Cal.App.4th 916, 923-924 [same].) Applying the *Castaneda* standard to the evidence in this case requires reversal of appellant's convictions of Counts I through VI and the sentence of death.[20]

(...continued)
tried by a jury drawn from a fair-cross-section of the community (*Duren v. Missouri, supra*, 439 U.S. 357), and *Castaneda*, the defendant's right under the equal protection clause of the Fourteenth Amendment to have members of his grand jury selected in a nondiscrimatory manner (see *Rose v. Mitchell* (1979) 443 U.S. 545 564-566), and different proof and prejudice requirements. Under *Duren* and the Sixth Amendment, the defendant need only show systematic exclusion, which is exclusion "inherent in the particular jury-selection process utilized." (*Duren*, supra, 439 U.S. at p. 366.) Under *Castaneda* and the Fourteenth Amendment, the defendant is required to show that the exclusion was intentional. The necessary inference of intentional discrimination can arise from an opportunity for discrimination in the operation of the jury selection system, coupled with a lesser degree of underrepresentation than that required in a Sixth Amendment fair cross-section claim. (See *Alexander v. Louisiana* (1972) 405 U.S. 625, 630; *United States v. Williams* (5th Cir. 2001) 264 F.3d 561, 569.) In the case of a successful Sixth Amendment challenge to the grand jury following conviction, the defendant must establish prejudice in order to be entitled to relief. (See *People v. Corona* (1989) 211 Cal.App.3d 529, 535.) However, in the case of a successful challenge to the grand jury under the equal protection clause, prejudice is presumed and automatic reversal is required. (*Vasquez v. Hillery* (1986) 474 U.S. 254, 260-264.)

[20] In denying appellant's grand jury challenge, the trial court did not rest its decision on any findings made by the court in *People v. Vela, et al., supra*, regarding the merits of the grand jury challenge in that case. Moreover, the findings of the *Vela* court were not before the trial court here, and are therefore not part of the appellate record in appellant's case.
(continued...)

B. Evidence Admitted By The Trial Court On Appellant's Grand Jury Challenge

1. The Evidence That Was Presented in *People v. Vela, et al.*, and Admitted by the Trial Court in Appellant's Case

People v. Vela, et. al., supra, was a multi-defendant case that challenged the composition of the Los Angeles County grand jury alleging, inter alia, the underrepresentation of Hispanics on Los Angeles County grand juries violated the defendants' equal protection rights guaranteed by the Fourteenth Amendment. The taking of evidence in that case began on February 28, 1992, and concluded over a year later on April 6, 1993. Below is a summary of the testimony offered in that case:

a. Testimony of Juanita Blankenship

Juanita Blankenship, the Director of Juror Management for Los Angeles County, testified that she has day-to-day responsibility for the jury system within Los Angeles County. She also sits on the committee of judges which oversees the grand jury selection process. (1 SCT VII 123-124.) Blankenship described her duties as follows:

> In that capacity I carried out the day-to-day responsibilities of overseeing the selection process which involved insuring that for the volunteer program the necessary

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(...continued)
Further, the trial court here purposefully made no findings as to which of the various competing experts' jury-eligible population numbers in *Vela* it found to be more accurate. (2 RT 467-468.) Thus, to the extent that the record below is comprised of the "cold record" in *Vela* and the seven exhibits offered by appellant in the trial court, the review of these materials by this Court on appeal is de novo. (Cf. *People v. Avila* (2006) 38 Cal.4th 491, 529 [when the trial court's ruling is based on a "cold record," deference to the trial court's ruling on appeal is unwarranted and review is de novo]; *People v. Stewart* (2004) 33 Cal.4th 425, 451 [same].)

> press releases were prepared, by our information officer and by . . . taking care of the matter of getting forms, necessary forms, providing those forms to judges for judicial nominations, compiling all that information and preparing the tentative and then the final lists and making preparation for the actual two draws that follow that, the nomination process.

(1 SCT VII 125-126.)

Blankenship said that in order to be a member of the grand jury, the person must be nominated by a judge of the superior court. There are two ways to become nominated: "you can either be known to the judge or make yourself known to the judge and ask to be nominated; or you can also volunteer to be a candidate for a nomination." (1 SCT VII 126.) Grand jury service is voluntary service. (*Ibid.*) Grand jurors serve for a full year from July 1 through June 30. (*Ibid.*) Grand jury service "may require upwards of five full days per week over a one-year period beginning July 1." (1 SCT VII 187.) Grand jurors are paid $25 a day. (2 SCT VII 432.) The qualifications for grand jurors are "virtually the same statutorily [as those for petit jurors] with [two] exceptions. You must have been a resident . . . of the county for a year and you cannot be an elected official." (1 SCT VII 128-129.)

The nominating procedures for selecting grand jurors lie exclusively with the judges of the superior court. (1 SCT VII 157, 188.) Each superior court judge can nominate a maximum of two people. (1 SCT VII 145.) A person nominated by a judge fills out an application, which is then signed by the nominating judge. (1 SCT VII 181.)

The pool of grand jury nominees varies in size from 150 to 200. "[L]ately it's been more like 150 to 175." (2 SCT VII 417.) Approximately 60 percent of the total number of prospective grand jurors are judge

nominated; the remaining 40 percent are volunteers. (1 SCT VII 147.)

Each of the prospective grand jurors – both those who volunteer and those who are nominated by a judge – fill out the same application which asks them their race and ethnicity. (1 SCT VII 160.) Prospective jurors are also asked to provide a brief biographical statement. (1 SCT VII 181, 182.)

Each of the volunteers is interviewed by a judge, who assigns a rating "based upon the individual judge's perception of that person's ability to serve as a grand juror." (1 SCT VII 182.) There is no established procedure for a judge to follow in determining whether the person is a qualified nominee. (1 SCT VII 183.) It is necessary that the nominees meet the minimum statutory qualifications for grand jury service, "but that again is an individual judge's discretion whether or not they will be nominated." (1 SCT VII 184.)

After the initial pool of grand jury nominees has been selected, the County publishes their names. At that time, the judges have the opportunity to raise an objection to any nominee if they wish. If there are no objections, or after any objections are resolved, an order is filed with that list and with the clerk of the court. (2 SCT VII 418.) Forty grand jury nominees and ten alternates are then selected by a random draw, and background checks are made by the sheriff's department. The sheriff checks with the C.I.I., the F.B.I, and the local police, and reports any statutory infirmity with respect to any of the nominees, such as a felony conviction. (2 SCT VII 418, 420-421.) After the background checks have been completed, 23 grand jurors are selected at random using a jury wheel. (2 SCT VII 423.)

The County requests volunteers for grand jury service by issuing

press releases and public service announcements.[21] (1 SCT VII 148.) According to Blankenship, efforts have been made by the County "to affirmatively pursue minority representation." (2 SCT VII 424.)

Blankenship's understanding is that case law requires that the pool (or group) from which the grand jury is drawn must be representative. (1 SCT VII 155.) Nevertheless, the County does not "adjust the pool of jurors to meet any criterion." (1 SCT VII 156.)

Blankenship's office does "not use demographic data to choose any kind of jury, grand or trial jury." (1 SCT VII 191.)

According to Blankenship, the following is a percentage breakdown of the racial and ethnic makeup of the nominees of the grand jury for the period 1986 to 1992:

For the year 1986-1987, the nominees by race were 75.5 percent White; 9.6 Black; 1.5 Asian; and 11.9 percent Hispanic. (2 SCT VII 431.) For the year 1987-1988, the nominees by race were 78.4 percent White; 4.7 percent Asian; 10.8 percent Black; and 4.7 percent Hispanic. (1 SCT VII 168-169.) For the year 1988-1989, the nominees by race were 74.5 percent White; 2.6 percent Asian; 14.7 percent Black; and 5.7 percent Hispanic. (1

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[21] Evidence was presented concerning a press release that was sent out by the County on Tuesday, November 21, 1989, calling for volunteers to serve on the grand jury; the deadline for the filing of the application was December 1, 1989. There were two County holidays between those two dates: Thanksgiving, Thursday, November 23, and the day after Thanksgiving, Friday, November 24. The press release was published in only one paper, the Los Angeles Daily Journal. As a result of that press release, eight Hispanics submitted applications. (5 SCT VII 1078-1081.)

Defense expert Dennis Willigan said that giving the public only one week to apply to serve on the grand jury would not, in his opinion, produce a very large public response. (6 SCT VII 1287-1289.)

SCT VII 167-168.) For the year 1989-1990, the nominees by race were 76.7 percent White; 2.7 percent Asian; 13 percent Black; and 6.2 percent Hispanic. (1 SCT VII 166-167.) For the year 1990-1991, the nominees by race were 85.7 percent White; 1.7 percent Asian; 9.2 percent Black; and 3.4 percent Hispanic. (1 SCT VII 164-165.) Finally, for the year 1991-1992, 75.3 percent of the nominees were White; 3.4 percent were Asian; 11.2 percent were Black; and 7.3 percent were Hispanic. (1 SCT VII 163-164.)

For the year 1991-1992, the grand jury was comprised of 21 Whites and 2 Hispanics; there were no Blacks or Asians. (1 SCT VII 211.)

b. Testimony of Dr. Nancy Bolton

Dr. Nancy Bolton is a demographer. She described her job as keeping track of people. (2 SCT VII 233.) She acknowledged that demographics is not an exact science. (2 SCT VII 378.)

In 1984, Bolton developed a system called "PEPS." PEPS stands for Population Estimate and Projection System, and was designed to estimate and project populations for the Los Angeles County Health Department. (2 SCT VII 314.) PEPS estimates the population for the County as a whole, and then by age, sex and race. The sources of data used were the number of deaths and births and the current population survey, which is a survey conducted by the Bureau of the Census every month. (2 SCT VII 310-311.) Her last PEPS estimate was done in 1987. (2 SCT VII 313.) County agencies, including the superior court system, have access to her data. (2 SCT VII 238-239, 310.)[22]

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[22] Defense expert Dennis Willigan studied the County's PEPS data and found it to be inaccurate. For example, he noted that the PEPS data showed a decline in the Hispanic population between 1990 and 1991 by

(continued...)

According to Bolton, between 1980 and 1990, the Hispanic population grew by roughly a million people. (2 SCT VII 241.) Hispanics were approximately 27 percent of the population in 1980, and approximately 40 percent in 1990. As the Hispanic population grew, the White population shrunk relative to the growth of the Hispanic, Black and Asian populations. (2 SCT VII 243.) Bolton has consulted with the Los Angeles County Superior Court. She has made them aware of the demographic changes in Los Angeles County "[m]any times." (2 SCT VII 265.) She has discussed these changes with both Blankenship and Blankenship's predecessor, Ray Arce. (2 SCT VII 266.).

Utilizing data from the 1980 census, Bolton estimated that the jury-eligible Hispanic population (i.e., citizens 18 years and over) for Los Angeles County was 14.2 percent. (2 SCT VII 279.) Her estimate, which

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(...continued)
approximately 80,000 age-eligible Hispanics. He contacted the Urban Research I.S.D. unit to find out how this could be so. He discovered that part of the reason for the decline was that they had removed all non-Caucasians from the Hispanic population. In Willigan's opinion, the County was confusing race and ethnicity. (3 SCT VII 476.)

Willigan also examined the 1990 census for Los Angeles County and broke down Hispanic origin by race. He said that approximately 58,000 Blacks and 47,000 Asian/Pacific Islanders also listed themselves as Hispanic on the census questionnaire. Willigan said that under the County's PEPS projections, none of these people is counted as Hispanic "and the overall effect [is] to reduce the Hispanic population." (4 SCT VII 754-755.)

was made in 1986, was based on PUMs data,[23] STF-4 census data,[24] and a study done by Jeffrey Passel, an employee of the Census Bureau, who opined that there was an overreporting of citizenship by Hispanics in the United States.[25] (2 SCT VII 278, 362.) Bolton's estimate excludes

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[23] "PUMS" is an acronym for Public Use Microdata Sample. (12 SCT VII 2694.)

[24] STF-4 is an acronym for Summary Take File Four data. This is data that is cross-tabulated by race. (2 SCT VII 278.)

[25] Bolton described Passel's study:

> Dr. Passel knew how many people had reported in the 1970 census that they were resident aliens, how many people had been born in the meantime from birth records. He knew how many people had died. By comparing all these records, he was able to determine how many people had been admitted to the country legally because they used the I-53 form [which the Immigration and Naturalization Service required all legal residents to fill out every January] to determine how many people had . . . immigrated at one point and then left the country. . . . From all these things, he made an estimate of how many people . . . should have shown up in the 1980 census as being . . . foreign born citizens, and how many should have showed up as being native born.

(14 SCT VII 3365.)

Bolton said that Passel's study, which was published in the mid-1980s, could not be replicated in 1990 because I-53 registration data is no longer collected. (14 SCT VII 3367.) Bolton also acknowledged that Passel's studies are not considered corrections to the decennial census. His studies were performed for research purposes. "Research purposes" means research based on national estimates with an unknown range of error. (2 SCT VII 388.)

Prosecution expert William Clark testified that Passel's methodology is not universally accepted in the scientific community. (9 SCT VII 1866.)

(continued...)

Hispanics who speak little or no English. She said that the percentage of Hispanic citizens who speak English well is 13.26 percent. (2 SCT VII 367.)

Bolton said that her statistical model counted only White Hispanics; she excluded from her calculations approximately 80,000 Blacks, American Indians, Eskimos and others who said they were also Hispanic. (2 SCT VII 367 326-329.) Bolton did not adjust the percentage of voter-eligible Hispanics based on the 1990 census data. (2 SCT VII 367.)

Bolton said that the Hispanic population in Los Angeles County has increased from 1980 to 1990, but the percentage of Hispanics who are citizens has actually decreased. (2 SCT VII 358.) She based her opinion on the number of undocumented Hispanics who registered under the Immigration Reform and Control Act and the fact that there is a high rate of immigration into Los Angeles. (2 SCT VII 359-360.) According to the 1980 census, 52 percent of the Hispanics who responded indicated that they were United States citizens. (2 SCT VII 361.)

Based on data from the 1990 census, and after applying Passel's findings from his study of the 1980 census to that data, Bolton opined that the "true" percentage of Hispanic citizens 18 years and over in Los Angeles

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(...continued)

> There has been considerable debate over it. The debate is both over the methodology and the estimates that come from it. There is little disagreement in the community that there us an undocumented population, that there is misreporting of citizenship. The arguments are over the magnitudes.

(9 SCT VII 1865.) Clark also testified that Passel has made statements in various publications that he doubts the validity of using his methodology in 1990. "[Passel] has made statements saying that he believes you'll require an alternate form of data than the I-53." (13 SCT VII 2733.)

is about 16.5 percent.[26] (14 SCT VII 3379.) She did not adjust this percentage figure for English-speaking ability (i.e., those adult Hispanics in Los Angeles County who did not speak English or did not speak English well). If she had made that adjustment, her 16.5 percent figure would be lower. (14 SCT VII 3383-3384.)

Bolton commented upon the way racial ethnic identification is collected in the census and on the grand jury questionnaire. The census asks two questions: identify your race – White, Black, Indian, or other. "And two questions later it is asked, is this person of Spanish or Hispanic

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[26] Bolton acknowledged that her application of Passel's nationwide population study, which was based on the 1980 census, to Los Angeles County in 1990 constitutes a "synthetic adjustment." She said that a "synthetic adjustment" is "where you take an estimate that you've made for a large population and applying it to a subset." (18 SCT VII 4441.) Bolton also acknowledged that synthetic adjustments are frowned upon in the scientific community. "You don't do them unless you have to." (*Ibid.*)

Defense expert Dennis Willigan criticized the validity of Bolton's use of a synthetic adjustment in this case based on Passel's study of the 1980 census. Willigan said that "the longer the time span that you move away from the point in which the actual study was done, the more likely confounding factors are going to enter in. The nature of the population is going to change, the motivation behind people's reasons for behaving the way they did." (19 SCT VII 4602.) For example, while many Hispanics may have been motivated at the time of Passel's study to lie about their citizenship, because they feared being deported, that fear no longer existed at the time of the 1990 census because of the SAW amnesty program which had been enacted in 1986. Approximately 700,000 Hispanics had applied for amnesty and would not have feared being deported based on citizenship. (19 SCT VII 4603.)

Prosecution expert Clark agreed that there is a dispute within the relevant scientific community of geographers and demographers concerning the use of synthetic rates taken from a national level when adjusted to a local level. (12 SCT VII 2719.)

origin? And there's a 'Yes' or 'No' with some detail. [¶] Whereas, in the jury questionnaire there is a single question with five categories – Caucasian, Black, Hispanic, Asian, or other. So that in the census a person may be classified as both Black and Hispanic. In the jury questionnaire, a person is one or the other." (15 SCT VII 3416-3417.) If the sum of all those racial ethnic populations reported in the census is totaled up they would add up to more than 100 percent. However, on the grand jury questionnaire, the racial and ethnic categories add up to 100 percent. Thus, in the census one can be double counted, while in the jury questionnaire one cannot be double counted. (*Ibid.*)

Bolton was provided a computer file containing all of the grand juror applications for the six-year period at issue here. She said that the file contained a total of 1197 applications. However, only 1179 were useable for her calculations because several of the applications were blank, and a few did not contain any information concerning the applicant's ethnicity. Of the 1179 applications where the applicant's ethnicity was indicated, 80 or 6.8 percent were Hispanic. (14 SCT VII 3342-3345.)

Using the 16.5 percent figure for Hispanic citizens 18 years and over and subtracting from that number the 6.8 percent figure representing the percentage of Hispanic representation on the grand jury pools for the period at issue here, Bolton said that the disparity in this case is 9.7 percent. (15 SCT VII 3466.)

Bolton acknowledged that having grand jurors selected by judges is a "key man" selection system. "But there's not one key man. There's [*sic*] many key men." (15 SCT VII 3489.) She also acknowledged that, assuming that all of the key men and key women who selected the grand jurors earned over $100,000 a year, that will affect whom the key men and

women come into contact with in their social relations, and that could affect the people that the key men and key women ask to become grand jurors. (15 SCT VII 3490.)

c. Testimony of Dr. William Clark

Dr. William Clark is a professor of geography at UCLA. He is an urban geographer and a professional demographer. (8 SCT VII 1709.) He was retained by the prosecution to do an analysis of the relationship of the Hispanic representation on the grand jury to the Hispanic population in Los Angeles County.[27] (8 SCT VII 1718.) Clark was asked to look at Hispanics on the grand jury pool and Hispanic citizens 18 years and over. (8 SCT VII 1722; 13 SCT VII 2877.) Clark examined 1980 and 1990 census data for Los Angeles County and adjusted that data based on Passel's studies on the misreporting of citizenship in the 1980 census. (8 SCT VII 1755-1758; 11 SCT 2507;[28] 12 SCT VII 2738.) Clark used the same methods for

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[27] At the hearing in *Vela*, the defense sought to show that Clark was strongly biased in favor of the County because of his professional relationship with one Peter Morrison of the Rand Corporation, a person with whom Clark has both consulted and coauthored several articles, and whom is married to Los Angeles Senior Assistant County Counsel Mary Wawro, the County attorney responsible for hiring Clark as an expert in several Los Angeles County cases, including *Vela*. (9 SCT VII 2017-2022; see also 10 SCT VII 2028 [letter, dated June 25, 1986, from Clark to Wawro formalizing "the work agreement between myself and the Los Angeles County Counsel's office"]; 12 SCT VII 2652 [defense allegation that "[Clark] is a ventriloquist for the county counsel's husband"]; 12 SCT VII 2755, 2758; 13 SCT VII 2941-2942 [Clark has received $203,822.62 from the County for his services for the period 1986 to April of 1992].) Clark denied that he was a partisan witness. (12 SCT VII 2856-2857.)

[28] Clark testified that he "utilized the methodology that Passel outlined and the material that he provided to [Dr.] John Weeks on the data (continued...)

estimating citizenship, including the use of synthetic methods to calculate the misreporting of citizenship, which he had used as an expert testifying for the County in *Garza v. County of Los Angeles* (C.D.Cal. 1990) 756 F.Supp. 1298.[29] (12 SCT VII 2839-2840.) Clark did not adjust for the undercount of Hispanics in Los Angeles County because the undercount "is an undercount which seems to be concentrated in the younger age groups and those younger ages [*sic*] groups are largely noncitizens. (11 SCT VII

(...continued)
for Los Angeles County." (11 SCT 2507; see also 11 SCT 2513 [Def. Exh. L. for identification (Passel letter to Weeks)].) At the time the letter was written, Weeks was a professor of sociology at San Diego State University. The material Passel provided to Weeks can be found at 9 SCT 1907-1916.

[29] At the hearing in *Vela*, the defense noted that Clark's testimony regarding his application of the Passel methodology to Los Angeles County had been specifically rejected by the district court in *Garza v. County of Los Angeles, supra*, a case in which Hispanic voters successfully challenged the 1981 redistricting plan adopted by the Los Angeles County Board of Supervisors on grounds that it violated their rights under the Voting Rights Act and the equal protection clause of the Fourteenth Amendment. (See 9 SCT VII 1872-1874.) For example, the *Garza* court held:

> The difficulty the Court has with the Clark application of the Passel methodology is that the estimates of misreporting of citizenship employed by Dr. Passel relied upon national correction factors applied to local data. These are referred to as synthetic assumptions. Because such a synthetic correction procedure applies a constant factor to all subareas, local variations in the underlying error will necessarily produce inaccurate results. The greater the local variation, the greater the inaccuracy.

(756 F.Supp. at p. 1324.) The *Garza* court rejected Clark's testimony, finding "that substituting Dr. Clark's . . . estimates of citizen voting age population for the official Census data would be inappropriate. (*Id.* at p. 1325.)

2565-2566; 12 SCT VII 2831.)

According to the 1990 census, there were 4,777,543 voting-age citizens (i.e., citizens 18 years and older) in Los Angeles County, of whom 946,476 or 19.8 percent were Hispanic. (8 SCT VII 1752.)[30] Clark reduced this number to 18.6 percent based on Passel's national studies. (8 SCT VII 1753, 1759; 12 SCT VII 2721.) Clark did not attach a confidence interval (margin of error) to the 18.6 percent number, or report "bands of error around those data." (12 SCT VII 2699-2700; 13 SCT VII 2930.)

Clark was unaware that Passel has said that his data should not be used with the 1990 census. (11 SCT 2508.) Clark acknowledged that applying Passel's methodology to county-level data is something which has been debated in the scientific community, and that Passel's methodology is "not universally accepted" in the scientific community. (9 SCT VII 1867, 1871.) Clark also acknowledged that Passel himself has never applied his methodology to Los Angeles County. (12 SCT VII 2722.) Finally, Clark acknowledged that the United States Census Bureau has never adjusted its official count of the number of Hispanic citizens based upon Passel's methodology. (12 SCT VII 2693; 13 SCT VII 2928 ["The simple statement is that the Passel data was not an official correction to the census data released by the census."].)

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[30] Clark testified that, in his professional opinion, Hispanics and Blacks under 30 years old are likely to have been undercounted in the 1990 census. (9 SCT VII 1853.) Nevertheless, he did not add in those missed Hispanics and Blacks in his calculations because "[t]here is no census data that is officially recognized that has been released on the undercount. It would be inappropriate to add in data when we do not know the magnitudes and we do not know any official data for the undercount." (9 SCT VII 1854.)

Clark provided a breakdown of the English-speaking abilities of the voting age Hispanic citizens in Los Angeles County according to the 1990 census: 28.7 percent speak English and no other language; 43.3 percent speak English very well; 15.1 percent speak English well; 9.6 percent speak English not well; and 3.5 percent do not speak English (8 SCT VII 1761-1762; 9 SCT VII 1783.) Thus, of all of the voting age citizens of Los Angeles County, 19.1 percent are Hispanic and speak some English; 17.2 percent speak English at least well, and 14.3 percent speak English at least very well. (8 SCT VII 1762, 1767; 9 SCT VII 1786-1787.) These figures are only estimates because they are based on the Census long form which was sent to and filled out by about 16 percent of the public. (12 SCT VII 2709-2710.) Clark explained that he made these calculations based on language skills because "if people are going to serve on a Grand Jury, they will need to speak English as it is phrased; and so we would certainly need to modify the number who do not." (9 SCT VII 1878, 1884.) Clark did not break down the number of Whites for English speaking abilities. (9 SCT VII 1879.) In fact, Clark did not make any "adjustment to the citizenship population for non-Hispanics." (9 SCT VII 1880-1881.)

Clark examined the 1990 voter registration records maintained by Los Angeles County and said that the total number of registrants in 1990 was 3,398,637, of whom 477,741 or 14.1 percent were Hispanic surname or Spanish surname registrants. (8 SCT VII 1763; 12 SCT VII 2761.)[31] Clark said that the 14.1 percent figure is a "good guide" or "estimate" as to the actual number of Hispanic persons registered to vote in 1990. (12 SCT VII

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[31] Clark acknowledged that a person does not have to be registered to vote to be a grand juror. (12 SCT VII 2607-2608.)

2766.) He looked at Hispanic voter registration because, in his opinion, "It says something about the likelihood of them coming forward and volunteering for the Grand Jury." (13 SCT VII 2937.) Clark said that although updated voter registration data was available for the period 1990 to 1993, he did not examine that data. (12 SCT VII 2765.) He acknowledged that the 14.1 percent figure does not represent an exact count. (12 SCT VII 2789.) He also acknowledged that the Spanish surname list which he used to arrive at that figure excludes a number of people that could be Hispanic. For example, it does not take into account all surnames that might be Spanish, Hispanics who have Americanized their surnames, or Hispanic women who are married to non-Hispanics and use their husband's surname. (12 SCT VII 2789-2796.) The Spanish surname list has not been updated since the 1980 census. (12 SCT VII 2808-2809.)

Clark reviewed information regarding the number of Hispanics on the grand jury pools in Los Angeles County for the years 1986 through 1992, and said that the average representation of Hispanics on the grand jury pools in Los Angeles County was 6.7 percent. (9 SCT VII 1793.)[32]

Clark offered the following calculations regarding the absolute disparity between the six-year average of Hispanic representation on the grand jury pools – 6.7 percent – and various different Hispanic voting groups: the absolute difference between the percentage of all Hispanic voting age citizens in 1990 – 19.8 percent – and the six-year average of Hispanic representation on the grand jury pool is 13.1 percent. (9 SCT VII 1801-1802.) The absolute difference between the percentage of Hispanic

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[32] Clark agreed on cross-examination that the correct figure for the six-year average was 6.5611 percent. (9 SCT VII 1833.)

voting age citizens who speak some English – 19.1 percent – and the six-year average of Hispanic representation on the grand jury pool is 12.4 percent. (9 SCT VII 1802.) The absolute difference between the percentage of Hispanic voting age citizens who speak English well – 17.2 percent – and the six-year average of Hispanic representation on the grand jury pool is 10.5 percent. (9 SCT VII 1802-1803.) Finally, the absolute difference between the percentage of Hispanic voting age citizens who speak English very well – 12.2 percent – and the six-year average of Hispanic representation on the grand jury pool is 7.6 percent. (*Ibid.*)

Clark reviewed the 1990 census data concerning the educational attainment of persons 25 years and older by ethnicity for Los Angeles County. Thirty-two percent of the White non-Hispanic population has had some college, and nearly 31 percent has a college degree. Similar figures for Hispanics are 16.1 percent with some college, and 6 percent with a college degree. (9 SCT VII 1803, 1805, 1807.)

Clark examined the 1990 census age data for Los Angeles County. Approximately 35.2 percent of the Hispanic population was less than 18, and 17.3 percent of the White non-Hispanic population was less than 18. Approximately 15.8 percent of the Hispanic population was 18 to 24 years old and 8.8 percent of the White non-Hispanic population was 18 to 24 years old. Approximately 34.2 percent of the Hispanic population and 35.6 percent of the non-Hispanic White population was 25 to 44 years old. Approximately 11.2 percent of the Hispanic population and 22.1 percent of the non-Hispanic White population was 45 to 64 years old. Finally, approximately 3.7 percent of the Hispanic population and about 16.2 percent of the non-Hispanic White population was 65 years and older. (9 SCT VII 1808-1809, 1812, 1815; see also 8 SCT VII 1682 [chart prepared

by Clark].)

Clark acknowledged that the Immigration and Reform Control Act Amnesty of 1986 (IRCA) would increase dramatically the number of Hispanic citizens. Clark said that recent data he saw was that there were about 800,000 pending applications. He did not know, however, how many were from Los Angeles County or how many Hispanics were going to have their amnesty approved in 1993. (12 SCT VII 2745-2744.) Clark said that, based on the population trends he has seen from 1980 to 1993, approximately 40 percent of the Los Angeles County population is Hispanic. (12 SCT VII 2746.)

Clark agreed that there is nothing random about the selection of the grand jury pool for Los Angeles County. (13 SCT VII 2883.) "The Grand Jury is a combination of people who are nominated by judges and volunteers." (9 SCT VII 1886, 1887.) He also agreed that most of the grand jurors came from the more affluent parts of Los Angeles County. (13 SCT VII 2902.) "I would say that the Grand Jury pool is likely to have, in comparison with the county as a whole, more affluent members than there are affluent people in the county as a whole." (13 SCT VII 2903.)

d. Testimony of Dr. Dennis Willigan

Dr. Dennis Willigan is an associate professor at the University of Utah, where he has taught for over 15 years. (3 SCT VII 452-453, 456.) His primary specialty is in the area of social demography with a historical emphasis. (3 SCT VII 454.)[33] As a result of his work in Utah regarding the

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[33] Willigan explained the difference between a formal demographer and a social demographer. The formal demographer collects census data and breaks down the numbers; the social demographer takes the work of the (continued...)

underrepresentation of Hispanics on juries, the state and federal jury selection processes for that state were corrected. His testimony was also responsible for changing how the courts in the federal district court for the Northern District of California select its jurors in order to obtain a fair cross-section of the community. (3 SCT VII 458-460.)

Willigan spent several hundred hours going over the data in this case. He reviewed all of the materials that he was able to locate that have been published by the Census Bureau since the 1980 census. He reviewed all of the materials released by the Census Bureau regarding the 1990 census for Los Angeles County, and obtained from Congress the undercount data for Los Angeles County by race and ethnicity. He reviewed the PUMS data that was released in 1992, and the coded jury questionnaire results provided by the superior court jury administrator. (13 SCT VII 3029-3030.) Willigan commissioned the California Department of Finance to do a "percentage breakdown for all ages and for those 18 and over by race and ethnicity Hispanic exclusive." (3 SCT VII 495, 496.) He interviewed numerous people, including Bolton and representatives of the Director's Office in the Department of Immigration and Naturalization for the Los Angeles district. He consulted with the Urban Research I.S.D. Division of Los Angeles County to discuss their data sources and methodology. He reviewed all of the important California and federal cases concerning jury selection. Finally, he reviewed materials related to the problems and deficiencies associated with the key man system. (3 SCT VII 461-465.)

(...continued)
formal demographer, puts it into its broader sociological context, and tries to explain what it means. (4 SCT VII 835-836.)

Willigan testified that his definition of a Hispanic is the same as the one used by the Census Bureau – i.e., self-definition. (3 SCT VII 468; 5 SCT VII 1096-1098.)

> The jury administrators in federal courts that I have met with in California all use the census bureau approach, which is the one that I have adopted in my analysis, and that is that Hispanics may be of any race, and persons who are Black or Asian or American Indian who also designate themselves as Hispanic on either juror questionnaires or in the U. S. Census are treated as Hispanics when you do your statistical comparison.

(3 SCT VII 493.)[34] Hispanics are an ethnic group. They are not a racial group. (3 SCT VII 469.) Thus,

> Hispanics can be of any race and therefore when one tabulates data that includes Hispanic, it's very important to keep that distinction in mind. If you don't do that, you will systematically undercount the true Hispanic population.

(3 SCT VII 467-468.)

Willigan noted that Bolton's practice of removing non-Caucasian Hispanics from the Hispanic pool (see fn. 22, *ante*), is a practice that is done only by Los Angeles County, and departs from the accepted academic and United States Census practice of keeping ethnicity and race separate. (3 SCT VII 476-477, 497-498.) Willigan is unaware of any other

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[34] The Department of Commerce, Bureau of the Census, explains what it means by Hispanic. "It says Mexican, Puerto Rican, Cuban, Central and South American and other Hispanic." The Census definition of a Hispanic is a person who says he or she is Hispanic: 58.1 percent of the Hispanics are Mexicans; 13.6 percent are Central and South Americans; 6.7 percent are Cubans; and 12.6 percent are Puerto Ricans. Regardless of where the respondents come from – e.g., Central or South America – they would have to say they were Hispanic to be counted as Hispanic. (5 SCT VII 1094-1098.)

governmental entity that follows this practice. A consequence of this practice is the substantial under reporting of age-eligible Hispanics. (3 SCT VII 470, 475-477, 482.)

According to Willigan, the White non-Hispanic population is 39.5 percent of the total population of Los Angeles County, and the Hispanic population is 38.6 percent. (3 SCT VII 480.)

According to data from the 1990 United States Census Public Law 94171-S, Hispanics 18 years and older comprise 34.2 percent of the population of Los Angeles County.[35] (3 SCT VII 483.)

Willigan examined 1980 census data concerning the age structure of the Hispanic population in California. He examined two groups: citizens and non-citizens. He testified that

> one of the sources of change between 1980 and 1990 that needs to be considered is the aging of the Hispanic population which has a very high fertility rate, a very young age structure so children who were born in the United States from either Hispanics or citizens or off and on citizens, as they age, the distribution that we see here will shift upwards and they will then become age eligible.

(3 SCT VII 484-485.)

Willigan was asked for his opinion about Passel's methodology. Willigan said that he agreed with the conclusion that was reached by the federal court in *Garza*, that

> if you tried to use what he [Passel] did to argue that we should further decrease the sizes of the juror eligible population, without taking undercount data into consideration, that this would be inappropriate . . . .

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[35] Willigan noted that Public Law 94171-S lists the undercount for Los Angeles County by race and ethnicity. (13 SCT VII 3030.)

(3 SCT VII 486.) Thus, "if you want to use Dr. Passel's estimates, you want to use the undercount estimates and then they cancel." (*Ibid.*)

For the year 1991, the unofficial unadjusted population of Los Angeles County was 37.8 percent Hispanic, and of the population of Los Angeles County 18 years and older, 33.3 percent was Hispanic. (3 SCT VII 496.)

According to Willigan, jury eligible Hispanics were undercounted by approximately 151,656 for the year 1990. In his opinion, this is a very significant undercount. (3 SCT VII 502.)

Willigan was asked what he attributed the disproportionate underrepresentation of Hispanics on the Los Angeles County grand juries to, and he replied:

> I thought about this a lot and I think it's simply due to the fact that the judges in the nominating process nominate people who are known to them, and that most of the judges – we've gone through the list and we try to figure out where judges live and what their race ethnicity are and because of historical factors, most of the judiciary is nonHispanic White, and in fact the pie charts that were up here before for the grand jury composition look exactly like the pie chart where the racial composition of the judiciary, so it makes a lot of sense to me, people draw out of the same social network that they operate within and that, that to me explains the disparity.

(3 SCT VII 506-507.)

In Willigan's opinion, the economic ability to serve as a grand juror is not a cause of the underrepresentation. (3 SCT VII 505-506, 514.)

Willigan said that in the federal jury system, federal grand jurors are chosen from the same random jury pool that federal petit jurors are chosen from. (3 SCT VII 523.) In Los Angeles County, the key man system is used to select grand jurors,

> and that means that there's a group of people who come together and nominate individuals to serve, and this is what is traditionally referred to in the literature as the key man system in contradiction to the method used in federal courts which is based on random selection from lists or merged lists.

(3 SCT VII 510.)

The key man selection system, as used by Los Angeles County, is an example of a discretionary jury selection system. (3 SCT VII 650.) Willigan said that studies of the key man system have characterized it as highly subjective, giving tremendous discretion to the decision makers in how they go about selecting jurors. He said that "the persons who select or nominate the grand jurors tend to draw from individuals who are well known to them and in fact in some jurisdictions, I believe that's what the decision makers are instructed to do." He noted that the problem with the key man system is that "if the judges [] only know a certain segment of a community or are more familiar with certain racial or ethnic groups part of the people who they are not familiar with get left out." (3 SCT VII 540-541.) Hispanics would fare far better under a random draw jury selection system rather than the key man system that was used in this case. (3 SCT VII 729, 736.)

Willigan reviewed the property records of the 11 judges sitting on the grand and petit jury committee for 1989 to discover their residential addresses. Ten of the eleven judges lived in the areas with the lowest percentages of Hispanics (i.e., upper-middle class neighborhoods). (3 SCT VII 553-554.)

Willigan said that over the last five years the average percentage of

Hispanics nominated by the judges to the grand jury pool was 5.4 percent,[36] and 6.5 percent of the total number of people on the grand jury were of Hispanic origin. (3 SCT VII 565.)[37] During that same period of time,

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[36] Willigan's calculation did not include data about the racial and ethnic composition of the 1986-1987 grand jury, because he was told to look only at the past five years. If data from the 1986-1987 grand jury is included, the average percentage of Hispanics nominated to the grand jury pool is 6.52 percent. (4 SCT VII 911.)

[37] Willigan testified that the total number of Hispanics directly nominated by judges for the five-year period 1987 through 1992 was nine. (4 SCT VII 811.) He provided the following breakdown:

For the year 1987-1988, of the people directly nominated by judges, 7.1 percent were Blacks, 82.8 percent were non-Hispanic Whites, 6.1 percent were Hispanics, and 3 percent were Asians. In the volunteer pool for that year, 18.8 percent of the volunteers were Blacks, 70.8 percent were Whites, 2.1 percent were Hispanics, and 8.3 percent were Asians. (4 SCT VII 810-811.)

For the year 1988-1989, of the 100 people directly nominated by judges, none or zero percent were Hispanic, 88 percent were non-Hispanic Whites, 6.9 percent were Blacks, and 3 percent were Asians. In the volunteer pool for that same year, 28.7 percent were Blacks, 49.12 percent were non-Hispanic Whites, and 15.79 percent Hispanics. (4 SCT VII 809-810.)

For the 1989-1990 grand jury, a total of 84 people were directly nominated by judges. Only one person or 1.2 percent was Hispanic, 81 percent were non-Hispanic Whites, and 13.1 percent were Blacks. In the volunteer pool for that year, Hispanic volunteers made up 12.9 percent, Blacks 12.9 percent and non-Hispanic Whites 70.97 percent. (4 SCT VII 806-807.)

For the 1990-1991 grand jury, judges directly nominated 61 people. Of that number, 96.8 percent were non-Hispanic Whites, 1.6 percent were Asians and 1.6 percent were Blacks. No Hispanics were nominated. (4 SCT VII 798-799.) In the volunteer pool for that year, 72.4 percent were non-Hispanic Whites, 8.62 percent were Hispanic, 17.36 percent were

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according to the official 1990 census, Hispanics made up 20.297 percent of the total population of Los Angeles County "if we don't correct for undercount and 20.977 percent if we correct for undercount." (13 SCT VII 3066.)[38] Hispanic citizens of all ages make up 27.86 percent of the population of Los Angeles County. (*Ibid.*)[39] Hispanics 18 years and older, regardless of citizenship, constitute 33.3 percent of the adult population of Los Angeles County. Adjusted for undercount, the percentage increases to 34.2 percent. (13 SCT VII 3070.)[40] Finally, Hispanics, regardless of age or citizenship, constitute 37.8 percent of the population of Los Angeles County. (See 13 SCT VII 3072.) Based on PUMS data, the percentage of

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(...continued)
Black, and 1.72 percent were Asian. (4 SCT VII 800.)

Finally, for the 1991-1992 grand jury, of the 102 people directly nominated by judges, approximately 6.9 percent were Blacks, 2 percent were Hispanics, 3.9 percent were Asians, and 84.3 percent were non-Hispanic Whites. (4 SCT VII 806-807.)

[38] Willigan noted that it is universally agreed within the scientific community that proportionately more Hispanics than non-Hispanic Whites and other groups were undercounted. (13 SCT VII 3068.)

[39] Non-Hispanic Whites make up 58.203 percent of all the voting age citizens in Los Angeles County. (13 SCT VII 3045.)

[40] According to the 1990 census, the total population of Los Angeles County in 1990 was 8,863,164 unadjusted for undercount. Of that number, 6,537,054 were 18 years and older; 4,768,925 were 18 years and older and United States citizens; and 4,733,151 were 18 years and older, United States citizens and spoke English. For the Hispanic population in Los Angeles County, the total number of Hispanics unadjusted for undercount was 3,351,242. Of that number, 2,177,546 were 18 years and older; 947,923 were 18 years and older and United States citizens; and 916,451 were 18 years and older, United States citizens and spoke English. (13 SCT VII 3082-3084.)

Hispanic adult citizens who speak some English is 19.36 percent,[41] the percentage of voting age Hispanic citizens who speak English at least well is 17.98 percent, and the percentage of voting age Hispanic citizens who speak English at least very well is 15.85 percent. (13 SCT VII 3086, 3089, 3091.)[42]

Willigan defined the terms "absolute disparity" and "comparative disparity" as follows: "A disparity is a measure of the difference between two things." (3 SCT VII 582.) "Absolute disparity" measures the difference between the proportion in the population of a cognizable class (here Hispanics) and the proportion of that class on the grand jury pools. Willigan noted that, at this time, in order to establish a prima facie case for jury challenges, many courts require that the disparity be 10 percent or greater. (3 SCT VII 586-587, 588, 686-687.)[43] "Comparative disparity" relates the size of the absolute disparity to the size of the community

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[41] Bolton had hypothesized that this number would be 14.6 percent. (14 SCT VII 3283.)

[42] Willigan was asked whether the misreporting of citizenship by Hispanics had any affect on the validity of the 1990 census data. He said that he had asked various people at the Census Bureau about this very subject, and was told that they did not believe that this was a problem. (14 SCT VII 3266-3268.)

[43] Willigan criticized the use of the 10 percent threshold used by some courts for establishing jury claims, noting that such a threshold permits the total elimination of minority groups from the grand jury where they constitute 10 percent or less of the total jury eligible population. For example, use of the 10 percent absolute disparity standard in this case would sanction the total elimination of non-Hispanic Blacks and non-Hispanic Asians, 18 years and older, who constitute 10.2 percent and 10.3 percent of the adult population of Los Angeles County, respectively. (3 SCT VII 595-601.)

percentage of the cognizable class. "It is used to help understand and measure the degree of underrepresentation by looking at it from a probabilistic point of view." (3 SCT VII 601, 686; 13 SCT VII 3073.)

In this case, the comparative disparity for age-and citizen-eligible Hispanics for grand jury service in Los Angeles County over five years is 74.8 percent for the pool of grand jury nominees. (13 SCT VII 3055.) In all of the literature he has reviewed in preparation for his testimony in this case, he has never seen a comparative disparity in the juror eligible population greater than the one in this case. (3 SCT VII 602.)[44]

Willigan calculated the absolute disparities in this case by subtracting the average percentage of Hispanics who served as grand jurors for the five-year period 1987 through 1992 – 5.7 percent – from the percentages presented by three different Los Angeles County Hispanic population groups. He calculated the following disparities: for all Hispanics in Los Angeles County regardless of age or citizenship, the absolute disparity is 32.1 percent; for all Hispanics 18 years and older regardless of citizenship, the absolute disparity is 27.6 percent; and finally, for all Hispanics 18 years and older who are also citizens of the United States, the absolute disparity is 14.6 percent. (13 SCT VII 3071-3072.)

Willigan discussed the racial and ethnic composition of the grand jury pools for the period 1987 through 1992, and compared the number of jury-eligible Hispanics on those pools with the number of jury-eligible

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[44] Willigan noted that a report prepared by representatives of the superior court examining its minority jury selection practices in selecting petit juries showed that Los Angeles County was aware in the early 1980s that its jury selection practices discriminated against minority groups. (3 SCT VII 705-708, 710.)

Hispanics he would have expected to find under the decision in *Castaneda v. Partida, supra*, 430 U.S. 482. For the year 1987-1988, there were 7 jury-eligible Hispanics on the grand jury pool; under *Castaneda*, he would have expected to see 26. (3 SCT VII 604.) For the year 1988-1989, there were 9 jury-eligible Hispanics on the grand jury pool; under *Castaneda*, he would have expected to see 29. (*Ibid.*) For the year 1989-1990, there were 9 jury-eligible Hispanics on the grand jury pool; under *Castaneda*, he would have expected to see 27. (*Ibid.*) For the year 1990-1991, there were 4 jury-eligible Hispanics on the grand jury pool; applying *Castaneda*, he would have expected to see 25. (*Ibid.*) Finally, for the year 1991-1992, there were 13 jury-eligible Hispanics on the grand jury pool. Under *Castaneda*, he would have expected to see 37 jury-eligible Hispanics. (3 SCT VII 603-604.)[45]

Finally, Willigan offered some suggestions as to how the Los Angeles County grand jury selection system could be changed to produce a more representative cross section of the community: increasing grand juror pay, shortening the amount of time required for grand jury service, and/or relaxing some of the required professional qualifications, such as accounting skills, for some of the grand jurors. The County could also remove the restriction barring County and state employees from serving as grand jurors. Governmental agencies are the largest employers of minorities and, based on what he has learned through his work, governmental agencies would be willing to pay their employees to serve as grand jurors. (3 SCT VII 745-748.)

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[45] Willigan also testified that for the year 1991-1992, there were no Hispanics on the grand jury itself, and under *Castaneda*, he would have expected to see five. (3 SCT VII 605.)

2. Additional Evidence Offered by Appellant in the Trial Court

a. The Testimony of Gloria Gomez

Gloria Gomez was called as a witness at the hearing on appellant's grand jury challenge. Gomez testified that she has been the Manager for Juror Services, and administers the programs involving the impanelment of the grand jury. (2 RT 431.) She has been in that position for approximately two and a half years, and could not comment on how things were done by the County prior to her tenure. (2 RT 439.) She testified how individuals now become nominees to the grand jury. (2 RT 432-434.) Her testimony on this subject was essentially the same as that of Juanita Blankenship in *Vela*. (See *ante* at pp. 64-68.)

Gomez also testified about the various efforts that have been employed by the County to get more people to volunteer for grand jury service. (2 RT 438-439.) However, most, if not all, of those efforts post-date the selection of the grand jury that indicted appellant, and the trial court ruled that the County's current efforts do not apply to appellant's case. (2 RT 463, 467.)

b. Evidence Presented by Way of Exhibits Concerning Hispanics and Women

According to the 1990 census, the population of Los Angeles County 18 years and over was 49.4 percent men and 50.6 percent women. (SCT V 4-13.)

The composition of the grand jury nominee pools for the years 1986-1987 through 1993-1994 by gender, race and ethnicity was as follows: For the year 1986-1987, the nominee pool was made up of a total of 133 people, of which 66 were men and 67 women. Of that number, 2 were Asian, 13

were Black, 101 were Caucasian, 15 were Hispanic, and 2 were "no response." For the year 1987-1988, there was a total of 152 people, of which 84 were men and 68 women. Of that number, 6 were Asian, 17 were Black, 120 were Caucasian, 7 were Hispanic, 1 was "other," and 1 was "no response." For the year 1988-1989, there was a total of 157 people, of which 94 were men and 63 women. Of that number, 4 were Asian, 23 were Black, 117 were Caucasian, 9 were Hispanic, 1 was "other," and 3 were "no response." For the year 1989-1990, there was a total of 146 people, of which 83 were men and 63 women. Of that number, 4 were Asian, 19 were Black, 112 were Caucasian, 9 were Hispanic, and 2 were "no response." For the year 1990-1991, there was a total of 121 people, of which 69 were men and 52 women. Of that number, 2 were Asian, 11 were Black, 103 were Caucasian, 4 were Hispanic, and 1 was "no response." For the year 1991-1992, there was a total of 178 people, of which 102 were men and 76 women. Of that number, 6 were Asian, 20 were Black, 134 were Caucasian, and 18 were Hispanic. For the year 1992-1993, there was a total of 175 people, of which 113 were men and 62 women. Of that number, 4 were Asian, 23 were Black, 128 were Caucasian, 13 were Hispanic, and 7 were "other." Finally, for the year 1993-1994, there was a total of 183 people, of which 121 were men and 62 women. Of that number, 4 were Asian, 31 were Black, 126 were Caucasian, 17 were Hispanic, 1 was "other," and 4 were "no response." (SCT V 14.)[46]

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[46] Evidence was also presented concerning the gender composition of the actual grand juries for the years 1990-1991 through 1993-1994: For the year 1990-1991, of the 23 members of the grand jury, 16 were men and 7 were women. Three of the four alternates were men and one was a woman. For the year 1991-1992, the grand jury was made up of 14 men

(continued...)

C. Appellant Established A Prima Facie Case Of Discrimination In The Selection Of The Grand Jury That Indicted Him

Few principles of federal constitutional law have been more consistently and uniformly applied over time than the Supreme Court's pronouncement in *Strauder v. West Virginia* (1879) 100 U.S. 303, 307-310, that excluding otherwise qualified persons from service on grand juries solely on the basis of their race violates the equal protection guarantee of the Fourteenth Amendment. (See *Vasquez v. Hillery*, *supra*, 474 U.S. at pp. 261-262 [recognizing that indictment of a criminal defendant by a grand jury from which members of a racial group purposefully have been excluded violates the defendant's right to equal protection of the laws]; *Rose v. Mitchell*, *supra*, 443 U.S. at p. 556 [because discrimination on the basis of race in selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole," indictment by a grand jury from which members of a racial group purposefully have been excluded violates equal protection principles]; *Castaneda v. Partida*, *supra*, 430 U.S. at p. 492 [it is a denial of equal protection to try a defendant under an indictment issued by a grand jury from which all persons of his race or color have, solely because of that race or color, been excluded by the state]; *Alexander v. Louisiana*, *supra*, 405 U.S. at p. 628 ["For over 90 years, it has been established that a criminal conviction of a Negro cannot stand under

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and 9 women. One of the alternates was a man and three were women. For the year 1992-1993, 14 members of the grand jury were men and 9 were women. Two alternates were men and two were women. Finally, for the year 1993-1994, 15 members of the grand jury were men and 8 were women. Two of the alternates were men and one was a women. There was no information concerning the gender of the fourth alternate. (SCT V 16.)

the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race."] In fact, invidious discrimination in the selection of grand jurors so undermines the structural integrity of the criminal tribunal that such claims are not amenable to harmless error analysis. (See *Vasquez v. Hillery*, *supra*, 474 U.S. at pp. 263-264.)

As noted previously, in denying appellant's equal protection challenge, the trial court erroneously held that the appropriate standard for deciding appellant's grand jury challenge was the standard for jury fair-cross-section challenges set forth in *Duren v. Missouri*, *supra*, 439 U.S. 357, rather than the standard of *Castaneda v. Partida*, *supra*, 430 U.S. 482, which had been urged by appellant in the court below. Applying the correct *Castaneda* standard to the facts in this case establishes a prima facie equal protection violation in the selection of appellant's grand jury.

In order to establish a prima facie equal protection violation under the *Castaneda* standard, the defendant must show that the procedure employed in selecting the grand jury "resulted in substantial under-representation" of the members of a race or another identifiable group. (*Castaneda v. Partida*, *supra*, 430 U.S. at p. 494; see also *Rose v. Mitchell*, *supra*, 443 U.S. at p. 565.) The test for determining whether this standard has been satisfied has four components: first, the defendant must establish that the excluded group is a recognizable, distinct class, singled out for different treatment under state law, as written, or as applied; second, the defendant must establish that the degree of under-representation was substantial, usually by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors over a significant period of time; third, a selection procedure that is susceptible of

abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing; and finally, once the foregoing prima facie case is established, the burden shifts to the state to rebut the prima facie case. (*Castaneda, supra*, 430 U.S. at pp. 494-495; see also see *Rose v. Mitchell, supra*, 443 U.S. at p. 565.) In order to rebut the presumption of unconstitutional action, the state must show "'that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" (*Castaneda, supra*, 430 U.S. at p. 494, quoting *Alexander v. Louisiana, supra*, 405 U.S. at p. 632.)

Appellant clearly satisfied the first prong of *Castaneda*, as both Hispanics (see *Castaneda v. Partida, supra*, 430 U.S. at p. 495 [Mexican-American surnames in case arising in Texas]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154 ["Whether characterized on the basis of Spanish surname or self-identification, Hispanics are a cognizable population within the community"]; *People v. Morales* (1989) 48 Cal.3d 527, 543 [Hispanic surnames]) and women (see *Duren v. Missouri, supra*, 439 U.S. at p. 364; *Taylor v. Louisiana* (1975) 419 U.S. 522, 531) are cognizable groups. This was not disputed by either the trial court or the parties below.

Appellant also satisfied the second prong of *Castaneda*, i.e., the requirement that he show that the degree of the underrepresentation of Hispanics and women was substantial.

For Hispanics, whether one takes the numbers generated by prosecution expert Clark or defense expert Willigan, appellant established that jury-eligible Hispanics were underrepresented on the grand jury pools in Los Angeles County for the six years at issue here – 1986 to 1992. As noted previously, according to their respective calculations, jury-eligible

Hispanics who spoke some English made up either 19.1 percent (Clark) or 19.36 percent (Willigan) of the entire population in Los Angeles County, and jury-eligible Hispanics who spoke English at least well made up either 17.2 percent (Clark) or 17.98 percent (Willigan) of the County's population.[47] However, for the six years at issue here, Hispanics made up an average of only 6.56 percent of the grand jury pools, thus yielding an average absolute disparity of either 12.54 percent (Clark) or 12.8 percent (Willigan) for jury-eligible Hispanics who speak some English and an average absolute disparity of either 10.6 percent (Clark) or 11.42 percent (Willigan) for jury-eligible Hispanics who speak English at least well. For these same two Hispanic population groups the comparative disparity is either 65.7 percent (Clark) or 66.1 percent (Willigan) for jury-eligible Hispanics who speak some English and either 61.9 percent (Clark) or 63.5 percent (Willigan) for jury-eligible Hispanics who speak English at least well. The various disparities in this case demonstrate that jury-eligible Hispanics have been consistently and substantially underrepresented on the grand jury pools in Los Angeles County over a significant period of time.

For women, the figures show that while women comprised approximately 50 percent of the population of Los Angeles County 18 years and older according to the 1990 census (see SCT V 4-13; 2 RT 450), for the

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[47] Clark and Willigan's numbers of jury-eligible Hispanics differ slightly because Clark relied on the census long form which was sent to and filled out by about 16 percent of the public to estimate Hispanic English-speaking abilities. (12 SCT VII 2701-2702.) Clark also reduced his 1990 census numbers based on Passel's nationwide study of the 1980 census, a practice criticized by Willigan and the *Garza* court as being inapplicable to the 1990 census. Willigan used PUMS data to get a more accurate estimate of adult Hispanic English-speaking abilities. (13 SCT VII 3086, 3089, 3091.)

period 1987-1988 to 1993-1994, women comprised only between 34 and 45 percent of the grand jury nominee pools each year, for an absolute disparity of 5 to 16 percent and a comparative disparity of 10 to 32 percent (see 2 RT 450).

In *Hernandez v. Texas* (1954) 347 U.S. 475, an absolute disparity of 14 percent was deemed sufficient to establish discrimination, and in *Whitus v. Georgia* (1967) 385 U.S. 545, 550, a disparity of 16 percent was held to be sufficient. (See also *United States v. Rogers* (8th Cir. 1996) 73 F.3d 774, 776 [absolute disparity of only .579 percent and comparative disparity of 30.96 percent showed that "Iowa's jury-selection system underrepresented the African-American community by over thirty percent."]; *Alston v. Manson* (2nd Cir. 1986) 791 F.2d 255, 258 [equal protection violation found where the absolute disparity was 1.58 percent]; *United States v. Rodriguez-Lara* (9th Cir. 2005) 421 F.3d 932, 944 ["A 14.55% absolute disparity falls within the range of disparities that we have recognized as significant for the purpose of establishing underrepresentation in the context of a prima facie case."]; *Rideau v. Whitley* (5th Cir. 2000) 237 F.3d 472 [13.5 percent disparity sufficient]; but see *People v. Ramos*, *supra*, 15 Cal.4th at p. 1156 [citing cases in which less than 10 percent absolute disparity insufficient to raise prima facie case].)

As noted above, the trial court erroneously relied on *Duren*, and thus held that appellant had to show not only substantial underrepresentation of both Hispanics and women, but that their underrepresentation was due to some systematic efforts to create that underrepresentation. While such a showing is required to establish a prima facie challenge based on the fair cross-section requirement of the Sixth Amendment, it is not the test for an equal protection challenge. Under *Castaneda*, what is required is a showing

that the selection procedure is subject to abuse – not that there is purposeful or systematic exclusion of either Hispanics or women.

Here, the grand jury selection procedures employed by Los Angeles County were subject to abuse sufficient to raise a prima facie case. As noted above, the final grand jury list upon which the grand jurors are selected is screened by the superior court judges, who nominate grand juror candidates either from a list of volunteers or "directly," based on their own criteria. As opposed to the selection of petit jurors, which is wholly random and accurately reflects the racial and ethnic makeup of the population, for every year documented in this case, the grand jury selection process has been disproportionately weighted against Hispanics and women.

The subjective nature of the selection process, which relied on judges to evaluate and/or nominate prospective grand jurors, was clearly susceptible to abuse. In *Castaneda*, for example, the United States Supreme Court noted that the "key-man" system, which relies on jury commissioners to select prospective grand jurors from the community at large rather than a random selection method, is "highly subjective" and susceptible of abuse. (*Castaneda v. Partida*, *supra*, 430 U.S. at pp. 495-497; see also *Smith v. Texas* (1940) 311 U.S. 128, 132 ["Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who knew no negroes as well as from commissioners who know but eliminate them."]; *Scott v. Walker* (5th Cir.1966) 358 F.2d 561, 573-574 [discrimination found where "[i]t is plain from the record here that the commissioners put on the list only those personally known to them"].)

In addition, the fact that the grand juror applicant's race, gender and ethnicity were listed on the applications provided further potential for

abuse. For example, the Fifth Circuit has observed in the context of racial discrimination, which applies equally to gender discrimination, that "[i]n cases in which the jury commissioners have had access to the racial identity of potential grand jurors while engaged in the selection process, the Supreme Court has repeatedly found that the procedure constituted a system impermissibly susceptible to abuse and racial discrimination." (*Rideau v. Whitley*, *supra*, 237 F.3d at p. 488, citing *Castaneda v. Partida*, *supra*, 430 U.S. at p. 495 [finding that the non-random selection of names of grand jurors was susceptible to abuse because Mexican-Americans were easily identifiable by their Spanish surnames]; *Alexander v. Louisiana*, *supra*, 405 U.S. at p. 630 ["[W]e do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves are not racially neutral. The racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination."]; *Whitus v. Georgia*, *supra*, 385 U.S. at pp. 548-549 [finding a selection system was susceptible to abuse where potential grand jurors were selected from segregated tax digest lists, which also coded Blacks with a "c" behind each name]; cf. *Avery v. Georgia* (1953) 345 U.S. 559, 562 [finding that the practice of placing potential petit jurors' identification on yellow cards if they were Black and on white cards if they were White "[o]bviously . . . makes it easier for those to discriminate who are of a mind to discriminate."].)

The use of the key-man system in appellant's case, by which the judges on the superior court selected applicants who were identified by their race, gender and ethnicity, which persistently underrepresented Hispanics and women despite the availability of a random selection process,

establishes a prima facie case of discrimination.

Thus, the trial court, utilizing the wrong legal standard, abused its discretion in finding that appellant failed to establish a prima facie case.

D. The Trial Court's Denial Of The Motion To Quash The Indictment Requires Reversal Of Appellant's Convictions On Counts I Through VI And His Death Sentence

Once a prima facie showing of an equal protection violation has been made, the burden shifts to the state to explain adequately the racial exclusion. In some cases, the appropriate remedy on appeal is to remand the case back to the trial court in order to give the state the opportunity to rebut the defendant's showing of discrimination. (See *People v. Johnson* (2006) 38 Cal.4th 1096, 1099-1104 [limited remand with regard to *Wheeler* motion ordered where jury selection took place between seven and eight years earlier].) However, given the great passage of time since the various grand juries at issue here were selected – between 14 and 21 years ago for the grand juries selected for the years 1986 through 1993 – it is highly unlikely that a full and fair hearing could be held in this case. It is unrealistic to believe that any of the judges who participated in the grand jury selection process for the years 1986 through 1993, if even available,[48]

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[48] Most of the judges who participated in the grand jury selection process at issue here are no longer listed as active judges on the Los Angeles County Superior Court. (See generally Arnold, California Courts and Judges Handbook (2006).) For the year 1986-1987, of the 14 judges who participated in the selection process (17 SCT VII 4202), only 4 – Judges Hiroshige, Martinez, Montes and Workman – are listed as active. For the year 1987-1988, of the 14 judges who participated in the selection process (17 SCT VII 4201), only 5 – Judges Hiroshige, Martinez, Mireles, Montes and Workman – are listed as active. For the year 1988-1989, of the (continued...)

will be able to give, much less recall, the specific reasons for their grand juror decisions made so long ago. In addition, the grand juror questionnaires, which were filled out by all of the grand jury volunteers and nominees and relied upon by the judges in making their selection decisions (2 SCT VII 415-416), probably no longer exist (see 2 SCT VII 415-416), so there is nothing to refresh the memories of the participating judges in the event of a remand. In this respect, the present case is different from *People v. Johnson*, *supra*, where this Court noted that "the court and the parties have the jury questionnaires and a verbatim transcript of the jury selection proceedings to help refresh their recollection." (*Johnson*, *supra*, 38 Cal.4th at p. 1102.)

In any event, given the strong showing of discrimination in this case, the state would be unable to rebut the prima facie case. It was undisputed that the small group of judges who participated in the grand jury selection process persisted in using a highly subjective procedure for selecting grand jurors that consistently underrepresented Hispanics and women year after year, despite the availability of a system used for petit juries which more accurately mirrored the population. At most, the state, if given an

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17 judges who participated in the selection process (17 SCT VII 4200), only 5 – Judges Hiroshige, Mireles, Revel, Swart and Workman – are listed as active. For the year 1989-1990, of the 17 judges who participated in the selection process (17 SCT VII 4199), only 5 – Judges Albracht, Connor, Hight, Mireles and Swart – are listed as active. For the year 1990-1991, of the 19 judges who participated in the selection process (17 SCT VII 4198), only 7 – Albracht, Connor, Hight, Hiroshige, Mireles, Parnell and Swart – are listed as active. Finally, for the year 1991-1992, of the 14 judges who participated (17 SCT VII 4197), only six – Judges Connor, Hight, Hiroshige, Mireles, Parnell and Swart – are listed as active.

opportunity, could proffer testimony from the superior court judges that they did not intentionally seek to discriminate against either Hispanics or women. However, this would be insufficient to overcome the strength of appellant's prima facie case. (*Castaneda v. Partida*, *supra*, 430 U.S. at p. 498, fn. 19; see also *Rideau v. Whitley*, *supra*, 237 F.3d at pp. 488-489, citing *Norris v. Alabama* (1935) 294 U.S. 587, 598 ["If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the [Equal Protection Clause] would be but a vain and illusory requirement"]; *Alexander v. Louisiana*, *supra*, 405 U.S. at p. 630 [finding the racial identification in the selection process impermissible "although there is no evidence that the commissioners consciously selected by race"]; *Whitus v. Georgia*, *supra*, 385 U.S. at p. 551 ["While the commissioners testified that no one was included or rejected on the jury list because of race or color this has been held insufficient to overcome prima facie evidence"]; *Eubanks v. Louisiana* (1958) 356 U.S. 584, 587; *Reece v. Georgia* (1955) 350 U.S. 85, 88 ["[M]ere assertions of public officials that there has not been discrimination will not suffice."]; *Jefferson v. Morgan*, *supra*, 962 F.2d at p. 1191 [same];[49] *People v. Brown*, *supra*, 75 Cal.App.4th at p. 926 [same].)

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[49] For example, in *Jefferson v. Morgan*, *supra*, the state argued that it had rebutted defendant's prima facie case based on the testimony of the two judges who were primarily responsible for selecting grand jurors during the relevant time period. Both of the judges denied that they excluded jurors on the basis of race. They said that in order to recruit grand jurors they depended on first-hand knowledge and on recommendations from friends and civic groups. The judges also said that they used supposedly objective guidelines to select grand jurors, including citizenship activities,

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"Neither is the State entitled to rely on a presumption that the officials discharged their sworn duties to rebut the case of discrimination." (*Castaneda, supra*, 430 U.S. at p. 498, fn. 19, citing *Jones v. Georgia* (1967) 389 U.S. 24, 25.)

In California, the general rule is that a conviction will not be reversed due to an irregularity in grand jury proceedings absent a showing that the irregularity deprived the defendant of a fair trial or otherwise resulted in actual prejudice relating to the conviction. (*People v. Corona, supra*, 211 Cal.App.3d at p. 535, citing *People v. Towler* (1982) 31 Cal.3d 105, 123.) However, where, as in the present case, the claim involves discrimination in violation of the equal protection clause, no actual prejudice need be shown and reversal is required. (*Vasquez v. Hillery, supra*, 474 U.S. at pp. 260-264; *Rose v. Mitchell, supra*, 443 U.S. at p. 551 ["[W]here sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed."]; *People v. Corona, supra*, 211 Cal.App.3d at pp. 536-537.)

Accordingly, appellant's convictions on Counts I through VI must be reversed and his death sentence set aside.

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maturity, work experience, and standing in the community. In finding this rebuttal evidence to be insufficient, the Court of Appeals held:

> We believe the judges' testimony constitutes no more than affirmations of good faith, which are insufficient to rebut the prima facie case established by Jefferson.

(*Jefferson v. Morgan, supra*, 962 F.2d at p. 1191.)

II

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, A FAIR AND RELIABLE CAPITAL SENTENCING HEARING, AND DUE PROCESS BY ERRONEOUSLY EXCUSING FOR CAUSE PROSPECTIVE JUROR DIANNA GREER BASED ON HER VIEWS ON THE DEATH PENALTY

A. Introduction

Over appellant's objection, the trial court granted the prosecutor's challenge for cause to prospective juror Dianna Greer based on her views on the death penalty. The record fails, however, to establish that Greer's views on the death penalty would have prevented or substantially impaired the performance of her duties as a juror. As such, the trial court's erroneous excusal of Greer violated appellant's rights to an impartial jury, a fair and reliable capital sentencing hearing, and due process under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution, and reversal of appellant's death sentence is required.

B. The Facts And The Trial Court's Ruling

Below is a summary of prospective juror Greer's answers to the questions in her juror questionnaire and her responses during voir dire examination by the court and counsel that are relevant to appellant's showing that she was erroneously excused by the trial court under the governing legal precedents.

1. Greer's Juror Questionnaire Answers

Greer filled out a lengthy juror questionnaire. In her questionnaire, she indicated that she did not have any feelings about the nature of the charges that would make it difficult for her to be a fair and impartial juror. (1 CT Supp IV 221.) She also said that she did not have any moral or

religious feelings that would prevent her from sitting in judgment. (*Ibid.*) Greer expressed no reluctance to serving as a juror in a case involving violence and graphic depictions of the victim. (1 CT Supp IV 222.)

In response to a question about her general feelings on the death penalty, Greer indicated that she did not believe in the death penalty. (1 CT Supp IV 223.) She explained that she believed that a person should be imprisoned for life if they commit a violent crime. (*Ibid.*) She also indicated that she has always felt this way. (*Ibid.*)

When asked whether her feelings about the death penalty were "very strong," Greer circled both "Yes" and "No." (*Ibid.*) The next question asked Greer to explain her answer, and she wrote that she did not believe "a human being should die at the hands of the death penalty." (*Ibid.*) When asked whether she believed in "an eye for an eye," Greer chose, "No." (1 CT Supp IV 224.)

The juror questionnaire included a simple explanation of the guilt and penalty phases in a capital case:

> In the first trial, the jury must decide (1) whether or not the defendant is guilty of first degree murder and (2) whether or not the "special circumstances" are true. Only if the jury finds a first degree murder and finds the "special circumstances" to be true, is the jury required to make a decision on the sentence. This will be in a second trial, based on ADDITIONAL EVIDENCE relating to the penalty. This additional evidence may include circumstances relating to the crime and the background of defendant.

(*Ibid.*, original emphasis.) The next question asked, "Do you understand that ONE of the choices is the death penalty?," and Greer circled, "Yes." (*Ibid.*, original emphasis.) The following question asked, "Do you understand that the ONLY OTHER choice is life in prison WITHOUT the

possibility of parole?," and again Greer circled, "Yes." (*Ibid.*, original emphasis.)

The questionnaire continued:

> If the defendant was found guilty of first degree murder and the special circumstance that "the murder was committed during the commission of a felony" was found to be true, would you always vote for Death, and reject Life Without Parole, regardless of the evidence presented at the penalty trial?

(1 CT Supp IV 225.) Greer chose, "No." (*Ibid.*)

The next question asked:

> If the defendant was found guilty of first degree murder and the special circumstance that "the murder was committed during the commission of a felony" was found to be true, would you always vote Life Without Parole, and reject Death, regardless of the evidence presented at the penalty trial?

(*Ibid.*) Greer again circled, "No." (*Ibid.*) In response to the question, "In what cases do you believe the Death Penalty may be appropriate?," Greer left the answer-space blank. (*Ibid.*) When asked, "In what cases do you believe the Death Penalty may not be appropriate?," Greer wrote, "all cases." (*Ibid.*)

When asked whether she belonged to any organization that either supported the increased use of the death penalty or its abolition, Greer said that she did not. (*Ibid.*) In response to the question, "What is the view, if any, of your religious organization concerning the death penalty?," Greer wrote, "None." (1 CT Supp IV 226.) She indicated that she would accept as true the court's instruction that the penalties of death and life without the possibility of parole mean exactly that, and that the punishment chosen by the jury would be carried out. (1 CT Supp IV 225.) Greer indicated that

jurors should hear all of the facts and circumstances surrounding a case and the defendant and his background before deciding between the two possible penalties. (1 CT Supp IV 226.)

The juror questionnaire included the following statement that a jury is never required to impose the death penalty:

> There are no circumstances under which a jury is instructed by the court to return a verdict of death. No matter what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole.
>
> A. Given the fact that you have two options available to you, can you see yourself, in the appropriate case, **rejecting the death penalty** and choosing life imprisonment without the possibility of parole instead?
>
> B. Given the fact that you have two options available to you, can you see yourself, in the appropriate case, **rejecting life imprisonment** without the possibility of parole and choosing the death penalty instead?

In response to both questions, Greer circled "No." (1 CT Supp IV 226-227, original emphasis.)

The next two questions asked Greer whether she agreed or disagreed with two statements. As to the first statement, which read: "Anyone who commits murder, attempted murder and sexual assaults should always get the death penalty," Greer checked the box indicating that she "strongly disagree[d]" with this statement and explained, "I don't believe in the death penalty." (1 CT Supp IV 227.) As to the second statement, which read: "Anyone who commits murder, attempted murder and sexual assaults should never get the death penalty," Greer checked the box indicating that she "strongly agree[d]," and referred back to her previous explanation. (*Ibid.*)

Greer repeatedly indicated that, if selected as a juror, she would obey and apply the law. In the "Evaluating Testimony" portion of the questionnaire, Greer continually affirmed that she would follow the court's instructions in evaluating evidence.[50] (1 CT Supp IV 228-230.) She indicated that she would neither refuse to vote for guilt in order to avoid making a penalty decision nor always vote for guilt in order to make a decision at the penalty phase. (1 CT Supp IV 224.)

Greer affirmed that she would follow an instruction by the court to refrain from discussing the death penalty until the penalty phase of the trial was complete. (1 CT Supp IV 226.) Greer said that she would follow the court's instruction that the death penalty could only be imposed if, after weighing and balancing all the evidence in the case, the individual juror was persuaded that the aggravating factors substantially outweighed the mitigating factors. (1 CT Supp IV 228.) Greer did not answer the question that asked what kind of information would be meaningful or significant to her in deciding the penalty. (*Ibid.*)

Greer indicated that she would freely discuss the law and evidence with her fellow jurors during deliberations. (1 CT Supp IV 231.) When asked if she would inform the court if another juror refused to deliberate, she circled, "Yes." (1 CT Supp IV 232.) She expressed an amenability to changing her vote during deliberations if persuaded to do so, but said that she would not change her position merely because other jurors disagreed with her. (1 CT Supp IV 231.) When asked, "Is there any reason why you

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[50] However, when asked whether she could set aside any sympathy, bias, or prejudice she might feel towards any victim, witness, or defendant, Greer circled, "No," although she later disavowed this sentiment. (1 CT Supp IV 230; 3 RT 655.)

would prefer not to serve as a juror in this case?," Greer answered, "No." (1 CT Supp IV 233.) Finally, she indicated that she would be a fair and impartial juror to both parties. (*Ibid.*)

A fair reading of Greer's juror questionnaire shows that she was committed to following the law and the court's instructions. Nothing in her questionnaire justified her excusal as a juror in this case.

2. The Voir Dire Examination

The subsequent voir dire of Greer by the court and counsel also shows that, while she was personally opposed to the death penalty, she was willing to set aside those feelings and follow the court's instructions and the law. At the beginning of voir dire by the court, the court noted that Greer had espoused in her juror questionnaire strong feelings about the death penalty. Greer candidly admitted that she did not personally believe in the death penalty, and that her feelings about the death penalty were not changed by the court's explanation of the trial process. (3 RT 652-655.)

The court asked Greer about some of the responses in her juror questionnaire. The court noted that Greer had circled "No" in response to questions asking whether she could see herself voting the penalty of life imprisonment and whether she could see herself voting to impose the death penalty. (*Ibid.*) Greer explained, "Oh, I can vote for life." (*Ibid.*) In response to a question asked by the court inquiring whether she could imagine any circumstances where the death penalty would be appropriate, she said that she could not. (*Ibid.*) The exchange continued:

THE COURT:	Charlie Manson, serial killer?
GREER:	Could be but I don't know about Charlie Manson. I just, you know, heard a few things on TV, but I don't know.

(3 RT 653-654.) The court then asked Greer whether she could vote to impose the death penalty on Jeffrey Dahmer. (3 RT 654.) Greer responded, "No, I couldn't. I am just one that don't believe in the death penalty." (*Ibid.*)

Next, the court asked Greer whether she would have any difficulty deciding guilt or innocence, and Greer said she would not. (*Ibid.*) The court's voir dire examination of Greer continued:

THE COURT:	If we get to the penalty phase and the bad substantially outweighs the good, is there anything about that situation that suggests that it's possible you could vote for death? I am asking you the same questions in as many different ways that I can think of? [*sic*]
GREER:	It would be hard for me to, you know, vote that way. But again, I just don't believe in the death penalty. That is just my belief. I believe that we are put here on this Earth to remain here unless otherwise, you know, from an illness or some other act we are taken away from here. I just can't see it. I just don't believe in it.
THE COURT:	Other than that, in terms of the guilt phase, is there anything about the nature of the charges that would make it hard to be neutral?
GREER:	No, I could be fair.

(3 RT 654-655.)

The court asked Greer about her questionnaire response in which she indicated that she could not set aside any sympathy, bias, or prejudice she felt towards any victim, witness or defendant. (3 RT 655.) Greer said that she had probably misunderstood the question. (*Ibid.*) With that, the court concluded its examination of Greer.

Greer was then examined by defense counsel (Mark Zavidow).

Defense counsel began his examination by asking Greer whether she understood that a defendant was entitled to a "jury of his peers," i.e., a jury composed of members who hold different views. (3 RT 710.) She said that she understood this. (3 RT 710-711.) Responding to additional questions from defense counsel, Greer said that she understood that nothing about a potential juror's views would prevent that person from serving as a juror so long as they agreed to follow the law; that she would not be made to vote for the death penalty; and that she could impose life imprisonment and still follow the law. (3 RT 711.) She agreed that everyone has a duty to serve as a juror and that both the judge and jury were required to follow the law. (*Ibid.*)

The following exchange then took place:

ZAVIDOW:	Do you understand that it is every citizen's duty to set aside his or her personal opinion about the law and apply the law as it is written and given to you?
GREER:	Yes, I do.
THE COURT:	If you were selected as a juror, the judge would tell you that you must set aside your personal opinions and follow the law as she gives you [*sic*] and render a fair and impartial verdict. Do you understand that?
GREER:	Yes, I do.
THE COURT:	And you would follow that, wouldn't you?
GREER:	Yes, I would.
THE COURT	So that in spite of your feelings about capital punishment in particular – we are talking obviously now about the death penalty – is it fair for me to take it from your answers that you would fulfill your civic duty in this case and fairly and impartially weigh the evidence and

follow the law according to the court's instructions?

GREER: I would follow the law, although I still would – don't believe in the death penalty.

(3 RT 711-712.) Defense counsel resumed his examination of Greer:

ZAVIDOW: If you don't believe in the death penalty, that is your right, and it is wonderful that you express it. The question is that regardless of that belief, serving your duty as a citizen, would you follow the law as the judge gives it to you if you were to remain as a juror?

GREER: Sure I would.

ZAVIDOW: And if the law tells you that there is a certain point at which you may consider the death penalty, if the bad sufficiently outweighs the good at a penalty phase, would you honor that instruction?

GREER: Yes, I would.

ZAVIDOW: Would you consider the death penalty?

GREER: I would then, yes. I would have to, yes.

ZAVIDOW: So you would follow that law?

GREER: Yes, I would.

(3 RT 712-713.)

The prosecutor's voir dire examination of Greer followed that of defense counsel and was very brief. The prosecutor began her examination by asking Greer whether she felt uncomfortable or forced into the position of voting for the death penalty. (3 RT 722.) Greer denied that she felt uncomfortable. (*Ibid.*) The prosecutor then asked:

> Now, you understand that, that you talked to Mr. Zavidow about how you would follow the law. In terms of your own personal feelings, however, you have indicated that

you could not personally vote for the death penalty. Is that how you feel?

(*Ibid.*) Greer responded, "That's exactly how I feel." (*Ibid.*) Finally, the prosecutor asked, "So it does not matter what the case is; you could not do that?," and Greer said, "Yes." (3 RT 723.)

3. The Prosecutor's Challenge to Greer and the Trial Court's Granting of That Challenge

After Greer was examined by the court and counsel, the prosecutor challenged her for cause. (3 RT 739.) Defense counsel objected, arguing that Greer said that she would consider the death penalty despite her personal opposition and follow the court's instructions and the law. (3 RT 739-740.) He made the following statement:

> I do want to tell the court I don't think that cause challenge should be granted. I think that Miss Greer walked through the questions that had to do with her civic duty and her recognition of a jury of one's peers is something that would include people of all viewpoints, and she said that she would follow the law, that she would consider the death penalty and that the instructions of the court would be preeminent with her, and her personal feelings would be set aside. The fact that she said she is against the death penalty, I think does not mean that she cannot follow the law.

(3 RT 739-740.) In response, the court stated:

> I don't think she [Greer] walked through it. She was carried through it, Mr. Zavidow, very well carried. Even with her being carried through, she slipped out a little burst of independent thought there that she was not in favor of the death penalty. I think her feelings are clearly strong enough to interfere with following the court's instruction.

(3 RT 740.) The court then granted the prosecutor's challenge for cause and excused Greer. (*Ibid.*)

C. The Controlling Law

Under the federal Constitution, "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 421, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) The same standard is applicable under the state Constitution. (See, e.g., *People v. Gray* (2005) 37 Cal.4th 168, 192; *People v. Jones* (2003) 29 Cal.4th 1229, 1246.)

The prosecution, as the moving party, bears the burden of proof in demonstrating that a juror's views would "prevent or substantially impair" the performance of his or her duties. (*People v. Stewart* (2004) 33 Cal.4th 425, 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423; see also *People v. Stewart*, *supra*, 33 Cal.4th at p. 445.)

As decisions of this Court and the United States Supreme Court make clear, "a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case. . . ." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) The focus of any inquiry is and must be on the juror's ability to honor his or her oath as a juror. Thus, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476

U.S. 162, 176; see also *Witherspoon v. Illinois* (1968) 391 U.S. 510, 514, fn. 7 [recognizing that a juror with religious or conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State"]; *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [neither *Witherspoon* nor *Witt*, "nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty"].)

The exclusion of "all jurors who express conscientious objections to capital punishment . . . violates the defendant's Sixth Amendment-based right to an impartial jury and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (2000) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) Thus, all the state may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

In applying the *Witherspoon-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. (*People v. Heard* (2003) 31 Cal.4th 946, 958; *People v. Ashmus* (1991) 54 Cal.3d 932, 962; see also *Wainwright v. Witt*, *supra*, 469 U.S. at p. 433 [ruling that the question is whether the trial court's finding that the substantial-impairment standard was met is fairly supported by the record considered as a whole].) On appeal, where the prospective juror has made conflicting or ambiguous statements, the reviewing court must accept as binding the trial court's determination as to the juror's true state of mind. (*People v. Heard*, *supra*, 31 Cal.4th at p. 958.) Finally, the exclusion of even a single prospective

juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (*Gray v. Mississippi* (1987) 481 U.S. 648, 659-668; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454.)

D. The Trial Court Erred In Excusing Greer Under *Witt* And Its Progeny

In excusing Greer, the trial court found that her personal opposition to the death penalty was strong enough to interfere with her ability to follow the court's instructions. (3 RT 740.) The court's finding was erroneous because it is not supported by the record. (See *People v. Heard*, *supra*, 31 Cal.4th at p. 958.) Nothing Greer said on voir dire or in her questionnaire indicated that her views on capital punishment would prevent or substantially impair the performance of her duties as a juror. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 421.) On the contrary, Greer consistently and unequivocally affirmed both in her juror questionnaire and during voir dire examination that she could and would set aside her personal feelings about the death penalty and apply the law as given by the court. The record here shows that Greer never said anything that would disqualify her under *Witt*, and her excusal was error.

From the beginning, Greer was candid with the court about her personal opposition to the death penalty. (3 RT 653-654.) When the court asked Greer whether she could possibly impose the death penalty, Greer responded, "It would be hard for me to, you know, vote that way." (3 RT 655.) Similarly, when asked whether she could vote to impose the death penalty on someone like Charles Manson, Greer said, "Could be but I don't know. . . ." (3 RT 654.) Comments by a juror that he or she would find it very difficult to impose the death penalty do not show a substantial

impairment under *Witt* unless the juror is unwilling or unable to follow the law. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.) Both of these comments show Greer to be a conscientious juror, not one who was unable to follow the law.

Nothing in the United States Supreme Court's jurisprudence suggests that only prospective jurors who can condemn another human being to death without hesitation are qualified to serve on a capital jury. (*Adams v. Texas*, *supra*, 448 U.S. at pp. 49-50 [holding improper the trial court's exclusion of all jurors who would be "affected" by the possibility of imposing the death penalty]; *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515 [holding the trial court erroneously excused a juror who said that she would not like to be responsible for deciding that someone should be put to death].) Further, as recognized by this Court in *People v. Stewart*, *supra*, the fact that a prospective juror would experience difficulty imposing the death penalty is not enough to disqualify that person from jury service in a capital case:

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote for the death penalty. . . . [H]owever, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.

(33 Cal.4th at p. 446 [holding improper the trial court's excusal of several jurors who expressed reservations about the death penalty].)

As a matter of law, prospective jurors, like Greer, with a personal opposition to the death penalty may serve as capital jurors so long as they

are willing to set aside their personal feelings and follow the court's instructions. (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.) "Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt* . . . ." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446; accord, *Adams v. Texas*, *supra*, 448 U.S. at pp. 48-49.)

During voir dire examination, Greer said that it would be hard for her to impose the death penalty because "I just don't believe in the death penalty." (3 RT 655, 712.) Greer also told the prosecutor that, because of her own personal feelings, she felt that she could not "vote" for the death penalty. (3 RT 723.) At the same time, however, Greer assured the prosecutor, as she did when questioned by defense counsel, that she would follow the law. (*Ibid.*)

The fact that Greer did not personally believe in the death penalty was not a sufficient ground for her exclusion under *Witt*. (See, e.g., *People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) A juror's statement that he or she does not believe in the death penalty is not equivalent to an unwillingness to impose the death penalty and is not sufficient in and of itself to disqualify a juror under *Witt*. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 448 [a juror's statement that he or she "does not believe that a person should take a person's life" shows only generalized opposition to the death penalty, not substantial impairment under *Witt*]; *Szuchon v. Lehman* (3rd Cir.2001) 273 F.3d 299, 329 [a prospective juror's statement that he or she "does not believe" in the death penalty – taken alone – provides no evidence that the juror is prevented or substantially impaired in her ability to follow the law];

Stevens v. Horn (W.D. Penn. 2004) 319 F.Supp.2d 592, 602 [same].)

Given that Greer could not be properly excluded merely on the basis of her personal objection to the death penalty, it was incumbent upon the court to determine whether she could set aside her personal feelings concerning the death penalty and follow the court's instructions. (Cf. *Szuchon v. Lehman*, *supra*, 273 F.3d at p. 330 [finding no evidence that juror was biased when he was never asked if he could set aside his personal feelings]; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1271-1272 [same]; *Stevens v. Horn*, *supra*, 319 F.Supp.3d at pp. 602, 604 [holding a juror was improperly excused when "she never stated or equivocated about whether she could set aside her beliefs"].) The "crucial inquiry" for the trial court here was whether Greer could follow the court's instructions and apply the law. (See *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 ["those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law"]; *United States v. Chanthadara*, *supra*, 230 F.3d at p. 1270 [same].) The trial court here lost sight of this standard.

Here, Greer consistently and explicitly expressed both in her juror questionnaire and throughout voir dire that she could set aside her personal feelings about the death penalty and consider imposition of the death penalty in appellant's case. Greer made that clear during the following exchange with defense counsel:

ZAVIDOW:	The question is that regardless of that belief [against the death penalty], serving your duty as a citizen, would you follow the law as the judge gives it to you if you were to remain as a juror?
GREER:	Sure I would.

ZAVIDOW: And if the law tells you that there is a certain point at which you may consider the death penalty, if the bad sufficiently outweighs the good at a penalty phase, would you honor that instruction?

GREER: Yes, I would.

ZAVIDOW: Would you consider the death penalty?

GREER: I would then, yes. I would have to, yes.

ZAVIDOW: So you would follow that law?

GREER: Yes, I would.

(3 RT 713.)

Greer understood that it was every citizen's duty to set aside his or her personal opinions. (3 RT 711-712.) She understood that if selected as a juror, she would have to set aside her personal feelings and follow the law as given by the court, and she said that she would do so. (3 RT 712.) Moreover, when specifically asked whether she would consider the death penalty, she more than once said that she would. (1 CT Supp IV 225; 3 RT 713.)

Furthermore, Greer indicated in her juror questionnaire that she could be fair and impartial. (1 CT Supp IV 221.) When asked if she would always choose life imprisonment, regardless of the evidence, she answered, "no" (1 CT Supp IV 225). (*People v. Heard*, *supra*, 31 Cal.4th at p. 964 [holding that where juror made clear that he would not "automatically" vote for either penalty regardless of the evidence, court erred in excusing him].) She indicated that she would not try to avoid having to make a penalty determination. (1 CT Supp IV 224.) She also indicated that she would be able to follow the court's instructions concerning deliberations and the evaluation of evidence. (1 CT Supp IV 226, 228-232.) Most importantly,

Greer indicated that she would follow the court's instructions in deciding whether the death penalty should be imposed. (1 CT Supp IV 228.)

In many ways, Greer's statements to the trial court were similar to those made by the prospective juror who this Court held had been erroneously excused by the trial court in *People v. Heard*, *supra*. In *Heard*, the prospective juror (H) stated that he would not "automatically" vote for life imprisonment, that he was not reluctant to find the defendant guilty or decide the appropriate penalty, and that he would do "whatever the law states." (31 Cal.4th at p. 964; see 1 CT Supp IV 224-225, 228; 3 RT 713.) This Court determined that nothing Prospective Juror H had said supported his excusal for cause under *Witt* (*People v. Heard*, *supra*, 31 Cal.4th at p. 964), and the same is true here of prospective juror Greer.

Greer's statements were also like the statements of the erroneously excused prospective juror in *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265. In that case, the prospective juror (Correll) had informed the trial court that his mind was not closed to imposing the death penalty; he felt that the death penalty may be appropriate in certain factual scenarios; and he believed he could and would follow the law as instructed. As held by the *Gall* court:

> These statements showed that he was not "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its" death penalty scheme, the standard that *Witt* requires for exclusion.

(*Gall v. Parker*, *supra*, 231 F.3d at p. 331.) Similarly, although Greer expressed her personal opposition to the death penalty, she repeatedly indicated that she would consider the death penalty and follow the court's instructions. (1 CT Supp IV 225, RT 711-713.)

The *Gall* court also held that "Correll's uncertainty as to how the option of a death sentence would affect his decision should not have led to

his exclusion" because, under *Adams v. Texas*, *supra*, 448 U.S. at pages 50-51, jurors may not be excluded for taking their responsibilities seriously or acknowledging that they might be affected by the process. (*Gall v. Parker*, *supra*, 231 F.3d at p. 331.) Like prospective juror Correll, Greer's expressions of uncertainty were not a proper basis for her exclusion.

Finally, the *Gall* court distinguished prospective juror Correll from those prospective jurors who indicate that their beliefs about the death penalty would interfere with their duties as jurors, noting that "Correll not once stated that his beliefs would deter him from serving as an impartial juror." (*Gall v. Parker*, *supra*, 231 F.3d at p. 331.) In the present case, Greer, like prospective juror Correll, never once said that her beliefs about the death penalty would interfere with her impartiality; in fact, she assured the trial court that she could set her feelings aside. (1 CT Supp IV 221, 225, 233; 3 RT 711-713, 722.)

In light of Greer's statements during the entire course of voir dire, the court's remark that she was "carried through" voir dire by defense counsel is not supported by substantial evidence. Greer consistently responded to the court's questioning by saying that she could set aside her personal feelings about the death penalty and follow the law. This is all the law requires of capital jurors. (See *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 ["those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law"]; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699 [a "prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law"].)

THE COURT: If you were selected as a juror, the judge would

tell you that you must set aside your personal opinions and follow the law as she gives you and render a fair and impartial verdict. Do you understand that?

GREER: Yes, I do.

THE COURT: And you would follow that, wouldn't you?

GREER: Yes, I would.

THE COURT: So that in spite of your feelings about capital punishment in particular – we are talking obviously now about the death penalty – is it fair for me to take from your answers that you would fulfill your civic duty in this case and fairly and impartially weigh the evidence and follow the law according to the judge's instructions?

GREER: I would follow the law, although I still would – don't believe in the death penalty.[51]

(3 RT 711-712.)

Had Greer said that she was not only personally opposed to the death penalty, but also that she could never consider imposing the death penalty under any circumstances, then her excusal would have been lawful under *Witt*. But that is not the case here, as Greer made it clear that she would consider the death penalty (3 RT 711-713), that she would not always vote

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[51] As noted previously, the fact that Greer did not personally believe in the death penalty is not a sufficient ground for her exclusion. (See *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522; *People v. Stewart*, *supra*, 33 Cal.4th at p. 448 [a juror's statement that he or she "does not believe that a person should take a person's life" shows only generalized opposition to the death penalty, not substantial impairment under *Witt*]; *Szuchon v. Lehman*, *supra*, 273 F.2d at p. 329 [a prospective juror's statement that he or she "does not believe" in the death penalty – taken alone – provides no evidence that the juror is prevented or substantially impaired in her ability to follow the law].)

for life imprisonment without the possibility of parole (1 CT Supp IV 225), and, of great importance here, that she would follow the court's instructions (1 CT Supp IV 228-230; 3 RT 711-712). Thus, the prosecutor simply failed to meet her burden of showing that Greer was prevented or substantially impaired in her ability to follow the law, and the trial court's excusal of Greer was error under *Witt*. (See *People v. Stewart*, *supra*, 33 Cal.4th at p. 445.)

In conclusion, nothing Greer said in either her juror questionnaire or during voir dire justified her excusal under *Witt*. In both her juror questionnaire and during voir dire, Greer made it clear that even though she was personally opposed to the death penalty, she was willing to set aside those views, consider the death penalty, and follow the law and the court's instructions. As such, the court's excusal of Greer violated *Witt*.

E. The Trial Court's Erroneous Exclusion Of Greer Requires Reversal Of The Death Judgment

The trial court's erroneous excusal of Greer under *Witt* violated appellant's rights to a fair and impartial jury, to due process, and to a reliable penalty determination as guaranteed by the federal and state Constitutions. Because this error is reversible error per se and not subject to harmless error analysis, appellant's death sentence must be reversed. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668; *Davis v. Georgia*, *supra*, 429 U.S. at p. 123; *People v. Stewart*, *supra*, 33 Cal.4th at p. 445; *People v. Heard*, *supra*, 31 Cal.4th at p. 146.)

III

APPELLANT'S CONVICTION AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE PROSECUTOR IMPROPERLY STRUCK THREE PROSPECTIVE WOMEN JURORS IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS

A. Introduction

During jury selection, the prosecutor exercised her first three peremptory challenges against prospective jurors Tammy Barner, Marietta Esquival and Nanah Finley. Appellant objected to these challenges and moved for a mistrial under the authority of *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79, arguing that the prosecutor had unlawfully excused these three women on the basis of their gender. (3 RT 756; 4 RT 811.) The court found no prima facie case of discrimination. (4 RT 813.) Nevertheless, it invited the prosecutor to state her reasons for excusing these potential jurors. The prosecutor gave her reasons as to Esquival and Finley, but not as to Barner. (4 RT 812-813.) Because it did not find that appellant had established a prima facie case, the court never evaluated the genuineness of any of the prosecutor's reasons.

Because the prosecutor failed to give any reasons to support the exercise of her peremptory challenge against prospective juror Barner, appellant's conviction and death sentence must be reversed. Alternatively, if appellant's case is not reversed outright by this Court, it must be remanded to the trial court for further proceedings to require the prosecutor to state her reasons for excusing Barner. If the prosecutor is able to provide reasons for her excusal of Barner, then the trial court will have to decide whether the prosecutor's stated reasons for excusing Barner and the other two prospective women jurors are genuine and not pretexts for gender

discrimination. If the prosecutor is unable to provide reasons for excusing Barner, or if the trial court determines that the prosecutor's stated reasons for excusing any of the three women are pretexts for gender discrimination, then appellant's conviction and death sentence must be reversed.

B. The Controlling Law

Under article I, section 16 of the California Constitution, a defendant's right to trial by a representative jury is violated by the use of peremptory challenges to exclude jurors solely on the ground of group bias. (*People v. Wheeler*, *supra*, 22 Cal.3d 258, 276-277.) The Equal Protection Clause of the federal Constitution similarly proscribes discriminatory challenges. (U.S. Const., 14th Amend.; *Powers v. Ohio* (1991) 499 U.S. 400, 409; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 97.) Thus, the removal of potential jurors on the basis of their gender also violates both the state and federal Constitutions. (*J.E.B v. Alabama ex. rel. T.B.* (1994) 511 U.S. 127, 130-131; *People v. Jurado* (2006) 38 Cal.4th 72, 104.)

Under both *Batson* and *Wheeler*, the defendant has the initial burden of establishing a prima facie case of discrimination by showing that the facts give rise to an inference that peremptory challenges are being exercised for discriminatory reasons. (*Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-97; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) The threshold for establishing a prima facie case is "quite low." (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1145 [holding the state court erred in denying an indigent defendant's request for a full transcript of voir dire where he raised a "plausible" *Batson* claim].) Once the defendant has made a prima facie showing, the burden shifts to the prosecution to show that it had genuine nondiscriminatory reasons for the challenges in question. (*Batson v. Kentucky*, *supra*, 476

U.S. at pp. 97-98; *People v. Fuentes* (1991) 54 Cal.3d 707, 714; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) Finally, if a nondiscriminatory explanation is offered, the trial court must assess whether intentional discrimination has been proven anyway. "[T]o sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses – i.e., for reasons of specific bias. . . ." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282; accord, *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 97-98.)

This three-stage process was succinctly summarized by the United States Supreme Court in *Purkett v. Elem* (1995) 514 U.S. 765 as follows:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

(*Id.* at p. 767.)

The final step of the process imposes a special obligation on the trial court to carefully evaluate the prosecutor's explanation for the peremptory challenge. Although this Court acknowledged the necessity of relying "on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination" (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282), this Court has said that "[t]his demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168), and that "every questioned peremptory challenge must be justified. . . ."

(*People v. Fuentes*, *supra*, 54 Cal.3d at p. 715).

If the trial court finds that the burden of justification has not been met as to any of the challenged peremptory challenges, the presumption of their validity is rebutted and the trial court must dismiss the entire venire and begin jury selection anew. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282.) The exercise of just one improper challenge is sufficient to establish a violation and is reversible per se. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 100; *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 715-716, fn. 4.)

C. The Trial Court Erred In Failing To Find A Prima Facie Case

Here, in violation of *People v. Wheeler*, *supra*, and *Batson v. Kentucky*, *supra*, the prosecutor exercised her first three peremptory challenges against women. (3 RT 742-743.) Inexplicably, the court found no prima facie case of discrimination (3 RT 756), and by so doing committed error.

In order to establish a prima facie case of gender discrimination, appellant had only to point to facts that gave rise to an inference of discrimination. (*Johnson v. California*, *supra*, 545 U.S. at p. 170.) He was required to demonstrate that:

> (1) the prospective juror is the member of a "cognizable . . . group,"
> (2) the prosecutor used a peremptory strike to remove the juror, and
> (3) the totality of circumstances raises an inference that the strike was motivated by race [or some other cognizable trait].

(*Boyd v. Newland*, *supra*, 467 F.3d at p. 1143; see also *Johnson v. California*, *supra*, 545 U.S. at p. 169.)

In this case, appellant established a prima facie case of gender discrimination by showing that the prosecutor excused three prospective jurors who were members of a cognizable class (women). (See *J.E.B. v.*

Alabama, *supra*, 511 U.S. at pp. 130-131; *People v. Jurado*, *supra*, 38 Cal.4th at p. 104 [exercise of peremptory strikes against potential jurors based on their gender constitutes a violation of both the federal and state Constitutions].) Appellant also established that the totality of circumstances raised an inference of discrimination. The three prospective women jurors were excused during the prosecutor's first pass at the panel. (3 RT 742-743.) "[A] defendant can make a prima facie case showing based on statistical disparities alone." (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091 [considering both the percentage of jurors in the suspect class who were removed and the percentage of peremptory challenges exercised against such jurors]; see also *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107 [noting cases in which a prima facie showing was based solely on a statistical disparity].) The prosecutor removed 25 percent of the potential women jurors who were seated in the box and used all of her early peremptory challenges against women. This gives rise to an inference of discrimination. As such, the trial court erred in failing to find a prima facie case.

D. Appellant's Case Must Be Reversed By This Court. If Appellant's Case Is Not Reversed Outright By This Court, His Case Must Be Remanded To The Trial Court For Further Proceedings

The prosecutor offered reasons why she excused prospective jurors Esquival and Finley. She never offered any reasons, however, to support her excusal of prospective juror Barner. (4 RT 812-813.) Because the prosecutor did not give any reasons for excusing Barner, appellant's case must be reversed outright by this Court. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 16; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283, [*Wheeler* error "prejudicial per se"]; see also *People v. Johnson* (2006) 38 Cal.4th

1096, 1105, fn. 2 (conc. opn. of Werdegar, J.) [same]; *People v. Fuentes*, *supra*, 54 Cal.3d at p. 721 [reversal "compelled"]; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 ["reversible per se"]; *People v. Hall*, *supra*, 35 Cal.3d at pp. 170-171 [same]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 6 [same].)[52]

If this Court decides not to reverse appellant's case outright based on the prosecutor's failure to state reasons to support her excusal of prospective juror Barner, appellant's case must be remanded to the trial court in order to require the prosecutor to state her reasons for excusing Barner, and to permit the trial court to determine whether the prosecutor's reasons for challenging Barner and prospective jurors Esquival and Finley were improperly based on group bias. (See *People v. Johnson*, *supra*, 38 Cal.4th 1096, 1103-1104.)

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[52] In her concurring opinion in *People v. Johnson, supra*, Justice Werdegar agreed to a limited remand, as opposed to an outright reversal of the entire judgment, because it was her "understanding that the error in [*Johnson*] was a federal, not a state constitutional error." (*Id.* at p. 1105.) Hence, Justice Werdegar wrote:

> Because *Wheeler* was based on state law, nothing we decide today implicates the rule of automatic reversal this court has applied for state constitutional *Wheeler* error. Although some appellate courts have employed remand as a remedy for *Wheeler* error, we leave the correctness of those decisions for another day.

(*Ibid.*, fns. omitted.)

The error in appellant's case was raised as *both* state and federal constitutional error (see 3 RT 756 [*Wheeler*]; 4 RT 811 [*Batson-Wheeler*]; therefore, appellant is entitled to an outright reversal of the judgment of conviction under state law. (See *People v. Johnson*, *supra*, 38 Cal.4th at p. 1105, fn. 2 (conc. opn. of Werdegar, J.).)

In *People v. Johnson*, *supra*, 38 Cal.4th 1096, on remand from *Johnson v. California*, *supra*, 545 U.S. 162, this Court held that where the trial court had erroneously failed to find a prima facie case under federal law (*Batson*) and the prosecutor had failed to give any reasons to explain his or her exercise of peremptory challenges, the appropriate remedy is to remand the case back to the trial court so that the trial court can consider the prosecutor's actual reasons and decide whether the inference of discrimination has been rebutted. (Accord, *Williams v. Runnels*, *supra*, 432 F.3d at pp. 1108-1109 [remanding case for an evidentiary hearing because prosecutor never gave reasons for the use of peremptory challenges]; *Paulino v. Castro*, *supra*, 371 F.3d at p.1092 [same].)

As implicitly recognized by this Court in *People v. Johnson*, *supra*, in a case like the present one, where the trial court failed to find a prima facie case and the prosecutor failed to state her reasons for one of her peremptory challenges, a reviewing court may not speculate as to why the peremptory challenge was exercised against that particular prospective juror.[53] This is because "it does not matter that the prosecutor might have had good reasons to strike the prospective jurors. What matters is the *real* reason they were stricken." (*Paulino v. Castro*, *supra*, 371 F.3d at p. 1090, original italics, cited with approval in *Johnson v. California*, *supra*, 545

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[53] *People v. Johnson*, *supra*, 38 Cal.4th 1096, seemingly disapproved sub silentio prior decisions of this Court which had permitted the reviewing court to review the appellate record in order to find reasons to justify the prosecutor's peremptory challenges where the trial court found no prima facie case and the prosecutor gave no reasons for the exercise of the challenge in the trial court. (See *People v. Panah* (2005) 35 Cal.4th 395, 439-442; *People v. Roldan* (2005) 35 Cal.4th 646, 702-703; *People v. Yeoman* (2003) 31 Cal.4th 93, 116.)

U.S. at p. 172; see also *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 282 ["[a]pparent or potential reasons" provide no indication of whether the prosecutor acted discriminatorily]; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1253 ["The arguments that the State has made since the evidentiary hearing do not form part of the prosecutor's explanation"]; *United States v. Alvarado* (2nd Cir. 1991) 951 F.2d 22, 25 [same].) As the high court said in *Johnson v. California*, *supra*, "the *Batson* framework is designed to produce actual answers." (545 U.S. at p. 172.) Hence, the focus of the court's inquiry must be the reasons actually offered by the prosecutor. (*Riley v. Taylor*, *supra*, 277 F.3d at p. 282 ["The inquiry required by *Batson* must be focused on the distinctions actually offered by the State in the state court"].)[54]

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[54] The impropriety of searching the trial record for reasons that might support a juror's dismissal was perhaps best explained by the court in *Williams v. Runnels*, *supra*, 432 F.3d 1102. In *Williams*, the court determined that the state court of appeal had relied on the wrong standard in evaluating whether petitioner had established a prima facie case. (*Id.* at p. 1105.) Applying the correct standard, the *Williams* court determined that petitioner had established a statistical disparity in the prosecutor's use of peremptory challenges. (*Id.* at p. 1107.) Because the prosecutor had given no reasons to support his peremptory challenges, the *Williams* court held that it could not determine whether the prosecutor's challenges were reasonable, i.e., not discriminatory. (432 F.3d at p. 1108.) The *Williams* court noted that both the district court and the state court of appeal had determined that race-neutral reasons could support the prosecutor's use of peremptory challenges. (*Id.* at p. 1108-1109.) While acknowledging that this determination may have been reasonable, the *Williams* court nonetheless rejected this mode of analysis, holding that it failed to protect the defendant's equal protection rights. (*Ibid.*) The court stated:

> The district court and the California Court of Appeal also reviewed all the evidence in the record concerning the

(continued...)

Thus, because the prosecutor failed to state reasons for excusing prospective juror Barner, in the event that appellant's case is not reversed outright by this Court in the instant proceedings, it must be remanded to the trial court to require the prosecutor to state her reasons for challenging prospective juror Barner, if she is able to do so, and to permit the trial court to evaluate the genuineness of those reasons. The trial court on remand should also determine the genuineness of the prosecutor's stated reasons for excusing prospective jurors Esquival and Finley, since it has never done

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(...continued)

> challenged jurors and determined that the record contained evidence for each juror that would support peremptory challenges on non-objectionable grounds. This, however, does not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges.

(432 F.3d at p. 1109.)

The *Williams* court noted that the United States Supreme Court in *Johnson v. California*, *supra*, 545 U.S. 162, held that the inquiry must focus on the real reasons underlying the prosecutor's peremptory challenges; it matters not that there might have been good reasons why the prosecutor excused the juror at issue. (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1107, citing *Johnson v. California*, *supra*, 545 U.S. at p. 172.) The *Williams* court also noted that the same concern was reiterated in *Miller-El v. Dretke* (2005) 545 U.S. 231, where the high court held that the question is whether the prosecutor's given reasons for excusing the juror hold up to scrutiny. (*Williams v. Runnels*, *supra*, 432 F.3d at p. 1108, citing *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252 ["a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives"].)

The *Williams* court concluded that its review of the trial record failed to disclose anything that could refute the evidence of bias, and remanded the matter to the district court to determine whether the inference of discrimination could be rebutted. (*Id.* at pp. 1108-1110.)

so.[55] If the prosecutor cannot carry her burden of dispelling the inference of discrimination as to Barner, Esquival and Finley, reversal of appellant's conviction and sentence of death will be necessary, as the exercise of just one improper challenge is sufficient to establish a violation of appellant's rights and is reversible per se. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 100; *People v. Johnson*, *supra*, 38 Cal.4th at p. 1103.)

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[55] Although, the prosecutor offered reasons to support her use of peremptory challenges against prospective jurors Esquival and Finley, the trial court never determined whether the prosecutor's reasons for excusing Esquival and Finley were both genuine and nondiscriminatory.

IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE

A. Introduction

The prosecutor was allowed, over repeated defense objection, to present at the penalty phase excessive, irrelevant, cumulative and highly prejudicial victim impact evidence, including a professionally prepared victim impact video. The erroneous admission of this evidence denied appellant his right to a fair and reliable determination of penalty under both the state and federal Constitutions. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17). Because this was a close case as to penalty, as evidenced by the fact that appellant's jury deliberated over seven court days and twice announced that it was hopelessly deadlocked as to penalty (II CT 425-433A, 450), the erroneous admission of this evidence was not harmless error and reversal of appellant's death sentence is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

B. The Proceedings Below

Prior to the start of the penalty phase, appellant filed a written motion seeking to exclude any victim impact evidence in this case. Appellant argued that the admission of victim impact evidence violated various provisions of both the state and federal Constitutions. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17). (II CT 393-400; 11 RT 2243.) Appellant also argued that, assuming arguendo that victim impact evidence is admissible at the penalty phase of a capital case, the prosecution's proposed evidence in the present case was unduly prejudicial and therefore inadmissible under the Due Process Clause of both the state

and federal Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and Evidence Code section 352. (II CT 400-403.) Finally, appellant argued that if the court decided to admit victim impact evidence, the court should hold a pretrial hearing under Evidence Code section 402 (402 hearing) to preview the testimony of the prosecution's victim impact witnesses so that it could determine whether the proposed victim impact evidence should be disallowed or limited. (II CT 403-405.)

Appellant's motion was summarily denied in its entirety by the trial court. (12 RT 2287.)

Defense counsel renewed his request for a 402 hearing concerning Lynn Finzel's testimony so that he could object outside the presence of the jury. Defense counsel explained that "I would like to know what she is going to talk about. I would like to make timely objections instead of looking like I am beating up someone in front of the jury." (11 RT 2260.) The court denied the request. (11 RT 2261.)

Defense counsel also moved to exclude a victim impact video (Peo.'s Exh. 61) which had been made by Lynn with the help of a skilled videographer for presentation at the penalty phase. (11 RT 2214; see 12 RT 2290.)[56] Defense counsel argued that the video should be excluded because there was no way he could overcome the sheer emotional impact of the video. (11 RT 2267; 12 RT 2293.)[57] He objected to the video on the

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[56] The prosecutor acknowledged that the video was made by Lynn "when she learned that she could present victim impact evidence. (12 RT 2290.)

[57] Defense counsel expressed his objection as follows:

> I don't doubt the genuineness of everything expressed

(continued...)

grounds that it contained hearsay, was inflammatory, was cumulative to other evidence in the case, and that it was highly "manipulative." (12 RT 2293.)[58] Defense counsel also objected to several portions of the video and

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(...continued)

> in that video, but I believe it is disingenuous to suggest that the rationale for it is that it is important for the jury to see the suffering that was being felt [one year ago] because, if anything, it is infinitely more suggestive of her pain and suffering a year removed. She is compelling and moving as it is. Her testimony during the guilt phase was utterly riveting. There was not one person in this room who did not feel tremendous pathos from her experience. [¶] To have that reiterated to the jury will geometrically increase the jury's awareness of her suffering. To add to it this production, as genuine as it is, absolutely takes the jurors away from the rational decision-making process and puts them into the realm of having been delivered emotionally to a preordained conclusion. [¶] The video is clearly excellently made. It has very excellent production qualities. It is very moving. It is moving beyond what the victim impact cases suggest is what the jury should be exposed to. And I could not say more genuinely how moving it is and how inappropriate it is.

(11 RT 2215-2216.)

Later in the proceedings, defense counsel said:

> May the court note in addition to the objections I have already made, I am making objections under the 8th and 14th Amendments regarding fairness, and lodging an objection based upon hearsay.

(11 RT 2243.) The court noted defense counsel's objections on those grounds, but declined to change its ruling admitting the video. (*Ibid.*)

[58] Defense counsel made the following statement:

> Needless to say, it's our belief in addition to [Lynn Finzel's] testimony in front of the jury, which was incredibly

(continued...)

asked that they be excluded: First, he objected to the introductory words on the video because they say that Joe Finzel's killing has affected the lives of friends, "and friends would not be people that would be under the ambit of what victim impact had contemplated. . . ." (12 RT 2288.) The court agreed with the defense, but denied defense counsel's request that they be

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(...continued)

> moving and which the court allowed her to include descriptions of her surgery without anesthesia and the two hours predicted by the People she would be in front of the jury in the penalty phase, that this video is cumulative. But that is almost insignificant compared to the professionally manipulative tenor of this video. It is something that could easily be on a television show like "20-20" or "48 Hours." [¶] If we look at old MGM movies and see the score was done by Bernard Herman or look at current movies and see all of the people who do scores for movies now, and read what the purpose of all of this is, which we all know intuitively, which is to direct people in emoting. It is a tried and true method that has worked forever as far as creating an impact on the viewed, as far as the producer and director to be the impact. [¶] This is a professional quality film. This is something that could have been done by any skilled crafts person in Hollywood. It's subliminal, if not overt. That is to say that the jury could look at it and they could know by watching it that they are being directed to a result. But if they are not particularly sophisticated, they can be impacted the same way that subliminal work is done in advertising or in film for other purposes, and that is to say without being aware of it they are being directed. [¶] The film . . . is beyond the pale of anything that was anticipated by victim impact evidence. So in addition to it being cumulative, it, in and of itself, it could not do anything but remove the jurors from any rational ability to weigh the circumstances in aggravation versus mitigation.

(11 RT 2267.)

deleted. (12 RT 2288-2289.) Second, defense counsel objected to the lyrics and the music on the video as well as the "death do us part" echo effect, and asked that they be edited out. (11 RT 2265, 2269, 2273.)[59] The trial court denied that request. (11 RT 2273.) Finally, defense counsel asked that the portion of the video showing a Christmas day visit to Joe's grave site be excluded. (12 RT 2289.) The court denied that request. (12 RT 2295.) Defense counsel reiterated his objections to the video both before and after it was played for the jury. (13 RT 2441, 2443-2444; 18 RT 3170.)

The trial court also overruled defense counsel's objections to exclude Lynn's testimony concerning Joe's reaction to Brinlee's birth and his reaction upon seeing a little pink dress which someone had purchased for Brinlee (12 RT 2309-2311);[60] to exclude the display of clothing that was purchased for Joe's son Garrett (12 RT 2311); and to exclude certain photographs (12 RT 2341-2345). Finally, the court denied defense counsel's request that Lynn not be allowed to display Brinlee to the jury from the witness stand (12 RT 2311-2312, 2355-2356), and overruled defense counsel's various objections to Lynn's testimony concerning 17 of the notes she wrote during her hospitalization (12 RT 2424).

C. Summary Of The Victim Impact Evidence

The victim impact evidence in this case consisted of, inter alia, the displaying of Lynn and Joe Finzel's two-year-old daughter Brinlee from the

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[59] The court acknowledged that the music and the echo of the wedding vows were two parts of the video "that show a little dramatization that is beyond what normally you would see." (11 RT 2221.)

[60] The court excluded the dress itself, stating: "The dress is sweet, and enough is enough." (12 RT 2311.)

witness stand, Lynn Finzel's victim impact testimony, which fills approximately 75 pages of the reporter's transcript, and the playing of the 11-minute victim impact videotape. Below is a summary of that evidence in the order in which it was presented at the penalty phase:

1. Displaying Brinlee from the Witness Stand

At the time Lynn Finzel took the witness stand and was sworn as a witness, she brought her daughter Brinlee with her. Lynn held her on her lap and identified her for the jury. Lynn said that Brinlee was born on February 28, 1993, and was two months and nine days old at the time Joe was shot. (12 RT 2362.) Lynn then handed Brinlee to the prosecutor, who in turn handed her to someone sitting in the "spectator section" of the courtroom. At the time Brinlee was taken from her mother's arms, she (Brinlee) said "Bye-bye." (12 RT 2362, 2444.) When Brinlee was handed to the person sitting in the courtroom, she called out "Mama." (12 RT 2444.)

2. Lynn Finzel's Victim Impact Testimony

Lynn began her testimony talking about Joe's parents. Joe was their only child and helped them whenever they needed help. His death was a tremendous loss for them. (12 RT 2362-2363.)

Lynn described in great detail how she met Joe, their courtship and wedding plans. (12 RT 2363-2371, 2387.) They went to a marriage counselor and to an engagement weekend. (12 RT 2371.)[61] Lynn read a letter (Peo.'s Exh. 81) that Joe had written to her during the engagement

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[61] Lynn explained that an engagement weekend "is where you go and the girls are in one building and the guys are in another, and you get together and they give you questions and then you go off by yourself and you write answers to the questions." (12 RT 2371.)

weekend.[62] (12 RT 2372-2376.)[63] She said that Joe gave her a Swatch

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[62] Joe's letter to Lynn reads as follows:

> I want to spend the rest of my life with you because of what you bring to my life. I could not imagine being without you. The sacrifices you have made are more than unbelievable. Even when you are grouchy I can't wait to see you at night.
>
> I love the fact that we have so much in common. We can overcome anything. Your concern for me and Garrett is remarkable. I love everything about you. I can truly feel how much you want to better our life together. You want everything. You have never left me wanting anything and you make me feel like a king.
>
> I love seeing your face first thing in the morning, the drool running out of the side of your mouth. It gives me strength and hope for the day.
>
> I love your enthusiasm over a new project or idea you or we may have. We seemed to become one almost instantly. I could not believe how comfortable I was with you, just like one of the guys, only with a great butt and good kisser.
>
> I like that we were friends first. I think that is what brought us so close together. We have been through so much in just a short time. It's hard to think what lies ahead for us but I look forward to our future with excitement and joy.
>
> You are a wonderful person. You will be a great mother. You have already proven that.
>
> I respect you for your patience in your time of confusion about instant family. I want to help you any way I can today and tomorrow and for the rest of your life. I love you.
>
> Joe

(12 RT 2377-2378.)

watch and a new set of tires for her car as wedding presents. (12 RT 2385.) She said she no longer has the set of tires because she had to sell the car. She does not know what happened to the watch. She thinks she had it on at the time she was shot and "the hospital might have it." (12 RT 2386.)

Lynn described the events surrounding their wedding, including the cutting of the wedding cake and Lynn "smash[ing] cake into [Joe's] face," spending their wedding night at the Sheraton in San Pedro, their honeymoon cruise to Mexico, and meeting other newlyweds while on their honeymoon. (12 RT 2388-2391.)

Lynn described the plans she and Joe had for their lives together. They wanted to move to a place where they had enough land so that she could have horses and Joe could ride motorcycles with his son Garrett. (12 RT 2392.)

Lynn talked about the things Joe would do for her and the gifts he would buy her. (12 RT 2378-2381.)

Lynn described Joe's relationship with Garrett, how much Joe loved him, and how Joe looked forward to doing father and son things with him. (12 RT 2382-2383.) Lynn, Joe and Garrett did many things together – camping, boating, watching televison and seeing movies. Joe was an "excellent father," and took Garrett to school on his first day of first grade. (12 RT 2399.) Garrett was included in their wedding and received during

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[63] The defense objected to the letter as follows:

> My objection is that the letter is cumulative. It is very heart rending for the purpose of what the People are trying to affect, which is an impact that we can't compete with. It's just piling on.

(12 RT 2372.)

the ceremony a bracelet with his name on it and an inscription from Lynn and Joe. (12 RT 2386-2387, 2388.) When Garrett lived with them, Lynn tried to be a good stepmother. (*Ibid.*) After Joe's death, Garrett went to live with his mother. Lynn has not seen him in over a year and misses "him terribly." (*Ibid.*)

Several photographs were described by Lynn and shown to the jury, including photographs of Joe and Lynn preparing for and attending their wedding (12 RT 2385, 2388-2390), several photographs of Joe and Brinlee together (12 RT 2407), and a photograph of Lynn, Joe, Garrett and Brinlee together. Lynn said that a copy of this latter photograph was buried with Joe. (12 RT 2438.)

Lynn testified that she found out that she was pregnant shortly after their wedding. She told Joe she was pregnant on Father's Day. She presented him with a Father's Day card that said, "Dear Dad, I'm not here yet but I will be soon." (12 RT 2399.) Both Lynn and Joe thought that the baby was going to be a boy. (12 RT 2401.) She described her pregnancy and Joe's involvement in the birth process. (12 RT 2400-2401.) When the baby arrived, they were both surprised that it was a girl. Lynn said that the umbilical cord was wrapped tightly around Brinlee's neck and she had to be resuscitated and rushed off to intensive care. Brinlee remained in the hospital for three days. (12 RT 2402-2403.) While Lynn was still in the hospital, Joe surprised her with 100 red roses. (12 RT 2405.)

Lynn described the baby clothes she had purchased before Brinlee's birth as well as some of the clothes given to them by a friend of Joe's family. Lynn said that when she showed Joe a little pink dress his "eyes just welled up with tears" because "he realized for the first time he had a little girl." (12 RT 2404-2405.)

Lynn said that after Brinlee was born, she and Joe decorated a hat for Garrett. Joe drew some little people on the hat and wrote: "I'm a big brother." They also decorated a t-shirt for Garrett. On the front it says "B.B." On the back it says, "I'm a big brother." (12 RT 2403.) Garrett was excited to wear this shirt to school. (*Ibid.*)

Lynn planned to stay home to raise her family. She wanted to have at least three children before she turned 30. She "turned 30 last August." (12 RT 2393.) Joe wanted to have four children with Lynn. (12 RT 2400.)

Lynn described how she and Joe had fixed up their house. Lynn planted flowers in the front yard. (12 RT 2397-2398.) Joe and Lynn purchased a pony and offered pony parties where they would bring the pony to birthday parties and give little kids rides. The proceeds from the pony parties helped pay for their wedding. (12 RT 2394.) They expanded the business and brought other small animals to the parties. Lynn also enrolled in a clown class and learned how to make balloon animals and "paint a clown face on." (12 RT 2395.) Photographs of the animals and Lynn in clown face were shown to the jury. (12 RT 2397.)

Lynn described the last weekend she spent with Joe when they went camping with Brinlee. (12 RT 2405-2406.)

Lynn discussed the various thoughts that went through her mind during the crime and her own struggle to live. (12 RT 2408-2413.) Lynn testified that she first learned that Joe was dead while she was in surgery when she overheard a doctor or nurse say "her husband has been murdered." (12 RT 2414.) She wanted to die when she heard this. (12 RT 2415.)

Lynn described her medical treatment and hospitalization. (12 RT 2413.) She was unable to speak during part of her hospitalization because

she had tubes down her nose and throat. She communicated to others by writing notes. Seventeen of the notes were read to the jury. (12 RT 2413-2419.)[64]

Lynn described Joe's funeral and how she felt at that time. (13 RT 2441-2442.) She described the various items that were buried with Joe, including a cookie "that Garrett gave him so he would have something to eat when he got down there." (13 RT 2438-39.) Lynn asked her brother to put a 12-pack of Keystone beer with a bow on it on Joe's grave. Lynn visits Joe's grave as often as she can, at least twice a week. (13 RT 2436.) Lynn testified that she and Brinlee visited Joe's grave on Christmas day. (12 RT 2435.) At that time, she found on Joe's grave a card which had been left by Garrett. Garrett had written, "I will see you some day." Attached to the card was Garrett's photograph. (13 RT 2439-2440.)

Lynn testified that she has tried to "wish it all away." (12 RT 2421.) She has tried everything to have Joe back, including going to a psychic so she could communicate with Joe. (*Ibid.*) She feels scared when she is alone. She is afraid that someone might be looking at her through "a crack in the window." (12 RT 2421.) She needs to keep all the lights and the television on. (12 RT 2421-2422.) She has nightmares about the night Joe was killed and about losing her daughter. She clenches her jaw, and her heart aches. (12 RT 2423.) She feels depressed, lonely and angry. (13 RT 2429.) She feels anger toward both appellant and herself. She feels "guilt for the things that I should have done to save Joe." (13 RT 2430.) She

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[64] The defense moved to strike Lynn's testimony regarding the notes, arguing that it was cumulative, highly prejudicial, and hearsay. (12 RT 2424.) The court denied that request, finding that this testimony was relevant to the circumstances of the crime. (12 RT 2425.)

never sees herself having a meaningful relationship with another man. (13 RT 2440.) She has sought counseling and goes to victim's group meetings. (13 RT 2431.) She takes medication for depression, anxiety, and to sleep. (13 RT 2431-2432.)

Finally, she said that having to testify at both the guilt and penalty phases in this case has been both humiliating and embarrassing. (13 RT 2434.)[65]

3. The Victim Impact Video

At the conclusion of Lynn's direct testimony, the 11-minute victim impact video was played for the jury. (13 RT 2443.) Below is a summary of the video's contents:

The video opens with the words: "On the eve of Mother's Day, 1993 an intruder entered the home of Joe and Lynn Finzel . . . " [the video fades to black and the next frame appears] "altering their lives, and the lives of their family and friends . . . " [the video again fades to black and the next frame appears] "Forever." [video fades to black].

Lynn then appears in the video. She is alone against a backdrop. The camera focuses on her from the shoulders up. Under Lynn appear the words: "Lynn Finzel – Survivor." Lynn begins her narrative:

"Before I was shot Joe walked into the bedroom and screamed this most terrible scream I have ever heard in my life and I just saw him shot right in front of me. And then after I was shot I laid there and all kinds of things went through my head. I prayed and I thought about waiting until the intruder left so I would go get help. And I don't know what gave me the

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[65] Defense counsel put on the record the fact that "during much of [Lynn's] testimony there were very audible tears. . . ." (13 RT 2444.)

strength to get up out of that bed and I think as – I think maybe Joe was – spirit was with me to help me 'cuz I don't know how I got up to get help."

[Video clips from Joe and Lynn's wedding showing Joe and Lynn dancing, Lynn feeding Joe wedding cake and rubbing wedding cake on his face, and Joe kissing Lynn with wedding cake on his face.]

Lynn continues her narrative:

"My life with Joe was – was really good. We got along really good – we were – we fell in love instantly and had a lot of fun together. We had everything in common. So we enjoyed [video clip of Lynn near a camper and another of Joe swimming near a motorboat] doing everything together like camping and water skiing and motorcycle riding. And he was thrilled to meet a girl that liked to do all of the things that he liked to do."

[Video clip of Joe with Brinlee]

"And we had a nice house and Joe has a wonderful son Garrett [video clip of Garrett holding a shirt and wearing a baseball cap with the words, "Big Brother"]. And we – [video clip of Joe, Lynn, Garrett and Brinlee. Lynn is feeding Brinlee with a bottle] we had a perfect family life."

[Video clips from Joe and Lynn's wedding. Joe is talking to someone off camera in the first clip. Video clip of Garrett dressed in a tuxedo. Video clip of Joe and Lynn walking down the aisle together; organ music is playing in the background. Video clip of Joe saying his wedding vows as follows.]

Joe: "I Joseph Raymond Finzel

Minister: "take you Lynn Marie Murphy

Joe: "take you Lynn Marie Murphy

Minister: "for my lawful wife

Joe: "for my lawful wife

Minister: "to have and to hold

Joe: "to have and to hold

Minister: "from this day forward

Joe: "from this day forward

Minister: "for better, for worse

Joe: "for better, for worse

Minister: "for richer, for poorer

Joe: "for richer, for poorer

Minister: "in sickness and in health

Joe: "in sickness and in health

Minister: "until death do us part

Joe: "until death do us part."

The video freezes on Joe and the words "until death do us part" are repeated two more times in an echo effect. The video then fades to black.

Lynn reappears and continues her narration.

"Um – I take a medication – antidepressant medication – and if I didn't have that medication I can't imagine how depressed I would be 'cuz I am so depressed now. And I take sleeping pills to help me sleep. And I take anxiety pills to help me from being anxiety [*sic*] when I go during the day and I am afraid somebody is going come up and – and assault me. [A baby can be heard crying off-camera.]

"I don't feel safe anywhere I go. I – I don't know what to do to protect myself. I mostly avoid going places and make sure I am always with somebody 'cuz I don't want to be alone and have something happen.

"I'm not working. My husband was supporting – supporting us the majority of the support – he was supporting us. And so now I'm on

disability and I don't know what I'm going to do when it comes time to get a job or a place of my own 'cuz I'm afraid to be alone. And I just don't know what I'm going to do.

"Right now I'm kinda living out of my car. I've stayed with family and I've stayed with my brother but they don't have much room. And then I went with my other brother and stayed in the bedroom with my nephew. And I got overwhelming [*sic*], and so I am staying with some friends. And it's hard with the baby crying at night, and they got to go to work. And so right now I'm planning on – I have all of my stuff in the car and I'm going to drive down and stay with my aunt for a little while. I just – I have moved a lot in the last month. And I don't know – I wish I had a room again – Brinlee's own room again so I could hang her clothes up and have a place for all her toys."

[Video clip of Lynn and Brinlee at Joe's grave site on Christmas Day. Joe's grave is adorned with flowers and a decorated Christmas tree. Brinlee plays with a Santa doll. As the clip is shown, Lynn, who is off screen as the video clip is shown, continues her narration.]

"Brinlee's first Christmas was the most miserable Christmas of my life. I was so looking forward to Garrett having a sister instead of him being an only child at Christmas so he would have somebody to share Christmas with. And they didn't get to see each other and me and Brinlee went and spent the day at the cemetery. She opened her – her toys in the morning and then we went to the cemetery. And then I boxed up all her toys to put in storage 'cuz I have no place for her to play with them. And I just wish Joe could have been with us on Christmas. Her – her first Christmas. Just so un – unfair that he's not there to enjoy her first Christmas. And so unfair that Garrett didn't get the chance to be with his

sister on Christmas."

[Video clip shows Joe's gravestone. The grave stone is adorned with Joe's name, a picture of a tree and a man on a motorcycle, the year of his birth and the year of his death. On the gravestone is an inscription which reads: "BELOVED SON HUSBAND – FATHER"]

Lynn is back on camera and continues her narration.

"I just had it all and – I had everything I wanted and someone came into my house and took it all away for some jewelry that's not worth nothing. And now I'm [*sic*] my life is ruined. [A baby can be heard off-camera.] My daughter will never know her father. She won't have her father to walk her down the aisle when she gets married. She won't – she won't ever know him. [Tears well up in Lynn's eyes and begin to fall.] And I don't think I will ever find a more perfect husband. And Garrett will never get to spend time with his father again. And it's all just so senseless."

[Video clip shown of Joe and Lynn at their wedding holding hands, looking at each other lovingly, and kissing.]

While the above-clip is shown, Lynn's voice says:

"I would give all the money in the world to have my husband back."

Lynn is back on camera and continues her narration:

"Joe and I went to an engagement encounter before we got married and they asked us to write a letter to our best friend and Joe wrote this letter to me and it goes like this:

> "To my best friend. I want to write you to let you know a few things. You have made such an impression on my life. I want you in it forever. You turned me around and gave me hope when I was in a time of despair. You showed me that my dreams are attainable and that I am a good person. You encouraged me to stop smoking when I thought I couldn't go without them and you put up with my grumpiness

while I was quitting. You showed me that I do have will power when I say I can't do something you make me try and most of the time I succeed because of the strength that your confidence gives me. We've had good times and bad, and we always seem to make it through both just fine. We define the word "couple." We can talk about anything, go anywhere, do anything together. We are true friends. You have shown that I can always count [music to the song "Hero" begins playing in the background] on you and look to you for support. I have learned many values from you that I never knew I had. Thank you for putting meaning back in my life."

[The lyrics to the song "Hero"[66] begin. While the song plays, a collection of five photographs followed by six video clips is displayed. The first photograph is of Joe as a very young child fast asleep on a couch. Lying next to him is a puppy which is also asleep. The second is a photograph of Joe as a young boy. The third is a photograph of Lynn and Joe next to a pony and a sign that says "Rent a Pony." The fourth is a photograph of Joe and Lynn together. The fifth is a photograph of Joe and Lynn sitting near a body of water exchanging a kiss. The first video clip is

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[66] The following are the lyrics that are heard on the video:

It was one of those great stories
That you can't put down at night
The hero knew what he had to do
And he wasn't afraid to fight
The villain goes to jail
While the hero goes free
I wish it were that simple for me
And the reason that she loved him
Was the reason I loved him too
And he never wondered what was
Right or wrong
He just knew
He just knew

from Joe and Lynn's wedding, showing someone pinning a white rose on Joe's lapel. The second is also from Joe and Lynn's wedding, showing them kissing after having just exchanged their wedding vows. The third and fourth video clips are of Joe taken on Joe and Lynn's honeymoon cruise. The fifth is of Joe with Brinlee. The final video clip shows Joe on a camping trip. The video freezes on Joe's face. The music and lyrics end.] [Video Ends.][67]

D. The Applicable Legal Principles

"It is a hallmark of a fair and civilized justice system that death verdicts be based on reason, not emotion, revenge, or even sympathy." (*Le v. Mullin* (10th Cir. 2002) 311 F.3d 1002, 1015.) Evidence that improperly encourages the jury to impose a sentence of death based on considerations of sympathy for the victims may constitute due process error. (*Ibid.*) "If, in a particular case, a witness' [victim impact] testimony . . . 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." (*Payne v. Tennessee* (1991) 501 U.S. 808, 831 (conc. opn. of O'Connor, J.)

In *Payne v. Tennessee*, *supra*, the United States Supreme Court upheld admission of evidence describing the impact of a state defendant's capital crimes on a three-year-old boy who was present and seriously

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[67] Defense counsel put on the record the fact that "during the showing of the video, many jurors were crying and also Miss Finzel was crying, and her crying was quite audible because she was still on the witness stand and microphone was on." (13 RT 2444-2445.) The court said that it saw only Juror Safer crying. "I just saw Miss Safer wipe some tears and Miss Finzel was crying softly with the microphone right in front of her at certain points in the video." (13 RT 2445.)

wounded when his mother and sister were killed. The Court held that the Eighth Amendment did not preclude admission of, and argument on, such evidence (*id.* at p. 827), thereby overruling the blanket ban on victim impact evidence and argument imposed by its earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805. The Court did not hold that victim impact evidence must, or even should, be admitted in a capital case, but instead merely held that if a state decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827; see also *id.* at p. 831 (conc. opn. of O'Conner, J.).) The Court was careful to note that the Due Process Clause of the Fourteenth Amendment would be violated by the introduction of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair. . . ." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see also *id.* at pp. 836-837 (conc. opn. of Souter, J.).)

Relying on *Payne*, this Court in *People v. Edwards* (1991) 54 Cal.3d 787, 832-835, upheld the admission of photographs of the victim while she was alive, and the prosecutor's argument referring to the impact of the crime on her family. In so doing, this Court held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim," but "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835.) This Court was careful to note that it was not holding that factor (a) encompasses all forms of victim impact evidence and argument. (*Ibid.*) Rather, there are "limits on emotional evidence and argument . . . [and] the trial court must strike a careful balance between the probative and the prejudicial. . . .

[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836.)

Thus, both *Payne* and *Edwards* recognize that while the federal Constitution does not impose a *blanket ban* on victim impact evidence, such evidence may violate the Fifth, Sixth, Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury.[68] (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) The admissibility of victim impact evidence therefore must be determined on a case-by-case basis. As Justice Souter explained in his concurring opinion in *Payne:*

> 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 deliberation. Cf. *Penry v. Lynaugh* [(1989)] 492 U.S. 302, 319-328 [] (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting *California v. Brown* [(1987)] 479 U.S. 538, 545 [](O'Connor, J., concurring)); *Gholson v. Estelle* [(5th Cir. 1982)] 675 F.2d 734, 738 ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). . . . 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."

(*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 836-837 (conc. opn. of Souter,

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[68] The highest courts of other states have articulated a similar view. (See, e.g., *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891; *Berry v. State* (Miss. 1997) 703 So.2d 269, 275; *Conover v. State* (Okl.Cr. 1997) 933 P.2d 904, 921; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180; *State v. Taylor* (La. 1996) 669 So.2d 364, 371-372;.)

J.), citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

The striking feature of the victim impact evidence that *Payne* and *Edwards* deemed appropriate as evidence of the circumstances of the crime, and not so inflammatory as to risk a verdict based on passion, is how extremely limited that evidence was.

Payne involved a single victim impact witness who testified about the effects of the murder of a mother and her two-year-old daughter on the woman's three-year-old son, who was himself present at the scene of the crime and suffered serious injuries in the attack. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 811-812.) The boy's grandmother testified that he cried for his mother and sister, that he worried about his sister, and that he could not seem to understand why his mother did not come home. (*Id.* at pp. 814-815.)

Thus, to be consistent with the facts and holding of *Payne*, the admission of victim impact evidence, if any is to be admitted, must be attended by appropriate safeguards to minimize the prejudicial effect of that evidence, and confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision.

Hence, victim impact evidence should be limited to those effects which were known or reasonably apparent to the defendant at the time he committed the crime or were properly introduced at the guilt phase of the trial to prove the charges. These limitations are consistent with *Payne v. Tennessee*, *supra*, where the victim impact evidence described the effect of the crime on the son and brother of the victims who was himself present at the scene of the crime, and whose existence and likely grief were therefore well-known to the defendant. These limitations are also necessary to make the admission of victim impact evidence consistent with the plain language

of California's death penalty statutes, and to avoid expanding the aggravating circumstances to the point that they become unconstitutionally vague.[69]

Further, to be relevant to the circumstances of the offense, the evidence must show the circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) The only type of victim impact evidence which meets this standard is evidence concerning the "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935), and evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence properly received during the guilt phase (*People v. Fierro*, *supra*, 1 Cal.4th at pp. 264-265 (conc. and dis. opn. of Kennard, J.)).

In the present case, the challenged victim impact evidence included numerous details about Joe's family life, none of which appellant could possibly have known anything about, such as Joe's relationship with his son Garrett or that Garrett blames his former stepmother (Lynn) for what happened to his father and this tortures her, the complications that attended Brinlee's birth, or facts about Joe's parents.

Finally, evidence concerning events that occurred many years before

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[69] In California, aggravating evidence is only admissible when it is relevant to one of the statutory factors (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776), and victim impact evidence is admitted on the theory that it is relevant to factor (a) of Penal Code section 190.3, which permits consideration of the "circumstances of the offense" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835).

or after the victim's death does not fall within any reasonable common-sense definition of the phrase "circumstances of the crime." (Pen. Code, § 190.3, factor (a).) Hence, if the victim impact evidence in this case was in fact admissible as "circumstances of the crime," then Penal Code section 190.3, factor (a), is unconstitutionally overbroad and vague. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17.)[70]

E. The Extensive Victim Impact Evidence In This Case Was Irrelevant And Unfairly Inflammatory

Although this Court has not established detailed guidelines for the admission of evidence about the victim's character, the cases in which the admission of such evidence has been approved generally involve brief, factual, and noninflammatory evidence. (See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 267 [evidence of the victim's plan to enlist in the Army at the time of her death]; *People v. Montiel* (1993) 5 Cal.4th 877, 934-935 [evidence that the victim was in excellent health at time of his death, that he needed to use a walker to get around, but could still enjoy life]; *People v. Edwards*, *supra*, 54 Cal.3d at p. 832 [photographs of the victims shortly before their deaths].)

Other states have established more specific standards. For example, the Supreme Court of Tennessee, has held that "Generally, victim impact evidence [about the victim's character] 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." (*State v. Nesbit* (Tenn.

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[70] See *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776) [the jury should be given clear and objective standards providing specific and detailed guidance]; *Tuilaepa v. California* (1994) 512 U.S. 967, 975 [sentencing factors must have a common-sense core of meaning that juries are capable of understanding].

1998) 978 S.W.2d 872, 891.) Similarly, the Supreme Court of New Jersey has held that victim character evidence "can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests," but "should be factual, not emotional, and should be free of inflammatory comments or references." (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.)

The Louisiana Supreme Court has also emphasized the need for restraint in the admission of victim character evidence. Although that court held that the prosecution could "introduce a limited amount of general evidence providing identity to the victim," it also warned that special caution should be used in the "introduction of detailed descriptions of the good qualities of the victim" because such descriptions create a danger "of the influence of arbitrary factors on the jury's sentencing decision." (*State v. Bernard* (La. 1992) 608 So.2d 966, 971.) The Supreme Court of New Mexico likewise held that "victim impact evidence, *brief and narrowly presented*, is admissible" in capital cases. (*State v. Clark* (N.M. 1999) 990 P.2d 793, 808, italics added.)

In the present case, the evidence about Joe Finzel far exceeded the "quick glimpse" of the victim's life approved in *Payne v. Tennessee*, *supra*, 501 U.S. at pages 822-823, or the "general factual profile of the victim" approved in *State v. Muhammad*, *supra*, 678 A.2d at page 180. The evidence here included detailed testimony by Lynn concerning her courtship and relationship with Joe, as well as Joe's relationship with his parents and his two children. In addition, Lynn illustrated her testimony with letters, photographs and a professionally-made video.

The video, which contained various special effects, including repeated flashbacks to scenes from Joe and Lynn's wedding; a photo

montage, including pictures of Joe as a young boy, one with him fast asleep on a couch next to a sleeping puppy; music; lyrics; echo effects; and voice-overs, was purposely designed to tug at the jurors' heartstrings in an effort to get them to vote for death. There can be no doubt that the video clearly succeeded in doing so. (See II CT 430-431 [jury asked to see victim impact video the day after it first announced that it was deadlocked]; II CT 452-459 [declaration of defense counsel in support of new trial motion that the playing of the video in the jury room during penalty deliberations caused several holdout jurors to change their vote to death].)

In *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, where similar life history evidence was introduced through the testimony of a single witness, the court noted that "portraying [the victim] as a cute child at age four in no way provides insight into the contemporaneous and prospective circumstances surrounding his death" (*id.* at p. 829), and found that the probative value of the life history evidence was substantially outweighed by its prejudicial effect (*id.* at p. 830). (Cf. *United States v. McVeigh* (10th Cir. 1999) 153 F.3d 1166, 1221 and fn. 47 [court noted that the prejudicial impact of the victim impact evidence had been minimized by the exclusion of wedding photographs and home videos].)

Extensive life history evidence was addressed by the Texas Court of Criminal Appeals in *State v. Salazar* (Tex.Crim.App. 2002) 90 S.W.3d 330.[71] In that case the victim impact testimony was very brief; only two witnesses testified and their testimony filled a total of five pages of the transcript. However, just as in the present case, the prosecution also

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[71] *State v. Salazar*, *supra*, was a non-capital case, but the court applied the principles that govern the admission of victim impact testimony in capital cases. (See *id.* at p. 335 and fn. 5.)

introduced a video montage prepared by the victim's father for his son's memorial service. The video covered the victim's entire life, from infancy to young adulthood. Almost half of the photographs depicted the victim's infancy and early childhood, and there were also photographs of his entire extended family. (*Id.* at pp. 333.)[72]

In a unanimous decision, the court held that the video had been improperly admitted because it was far more prejudicial than probative. Like the *Cargle* court, the *Salazar* court was particularly critical of the video's "undue emphasis on the adult victim's halcyon childhood," noting that the defendant had "murdered an adult, not a child," a fact the video tended to obscure (*State v. Salazar*, *supra*, 90 S.W.3d at p. 337), and that the video was "barely probative of the victim's life at the time of his death" (*id.* at p. 338).

The court also found that the life history evidence was prejudicial because of its sheer volume (*State v. Salazar*, *supra*, 90 S.W.3d at p. 337), and noted that a "'glimpse' into the victim's life and background is not an invitation to an instant replay" (*id.* at p. 336).[73] Echoing the objections

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[72] Music also accompanied the video.

[73] In *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, the prosecutor presented at the penalty phase of defendant's capital trial victim impact evidence from four witnesses whose testimony focused on the attributes of each of the two murder victims and the effects of the murders on the witnesses and their families. The prosecutor also introduced 22 photographs of the two victims in life. (*Id.* at 644-649.) Defendant argued on appeal that the admission of this evidence violated his due process rights under *Payne* and *Edwards*. This Court declined to reach the merits of defendant's argument, finding that it had been waived by his failure to either object or to bring an in limine motion to restrict the admission of this evidence in the trial court. (*Id.* at p. 652.) Nevertheless, in its discussion of

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made by defense counsel in appellant's case (18 RT 3087-3089), the *Salazar* court held that

> [T]he punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial.

(*Id.* at pp. 335-336.)[74]

In the present case, where there was a similar video montage, the net effect of admitting that evidence played unfairly to the emotions of appellant's jury, causing them to cry (see 13 RT 2445), and was clearly prejudicial. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358 ["It is of

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[73] (...continued)
the applicable law on victim impact evidence, this Court cited with seeming approval the decisions in *Cargle v. State*, *supra*, 909 P.2d 806, and *Salazar v. State*, *supra*, 90 S.W.3d 330, both discussed above, and provided an extended discussion of the facts and holdings in *Salazar*, specifically referring to that case as an "extreme example" of excessive victim impact evidence violating due process. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652.)

[74] The *Salazar* court remanded the case to the Court of Appeal with directions to assess the prejudice flowing from admission of both the audio and visual portions of the video, as the Court of Appeal had only considered the prejudicial impact of the audio portion and found it to be harmless. (*State v. Salazar*, *supra*, 90 S.W.3d at p. 339.) On remand, the Court of Appeal concluded that the admission of both the audio and visual portions of the victim impact videotape constituted reversible error and remanded the case to the trial court for a new sentencing hearing. (*State v. Salazar* (Tex.App.-Corpus Christi 2003) 118 S.W.3d 880, 885; see also *United States v. Sampson* (D. Mass. 2004) 335 F.Supp.2d 166, 191-193 [victim impact evidence, in the form of a 27 minute video on the victim's life, which included 200 still pictures and was accompanied by "evocative contemporary music," was inadmissible at the penalty phase of defendant's capital murder trial because it prejudicially provided more than the allowable "glimpse" of the victim's life].)

vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."].)

In addition to being highly prejudicial, much of the victim impact evidence in this case was also irrelevant (Evid. Code, § 350), but its emotional impact was devastating nonetheless. Therefore, its probative value was clearly outweighed by its prejudicial effect, and it should have been excluded on that ground. (Evid. Code, § 352.)

Such irrelevant and highly prejudicial evidence included, inter alia, displaying Brinlee from the witness stand, Lynn's testimony regarding the serious complications suffered by Brinlee at the time of her birth, evidence concerning Joe's funeral, and Lynn and Brinlee's staged visit to Joe's grave on Christmas Day, which appears on the victim impact video.[75]

First, displaying Brinlee from the witness stand at the start of Lynn's testimony and having the prosecutor take her into her arms and hand her to

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[75] The defense complained that this portion of the video was staged for inclusion in the victim impact video. (12 RT 2289-2290.) The court thought nothing of the fact that the video was specially prepared for presentation at the penalty phase, stating: "[I]t seems to me inappropriate to prevent the victim from presenting a visual portrayal of the depth of her relationship with the victim regardless of the fact that it was prepared for penalty purposes." (12 RT 2292.)

In addition to the staged video footage, Lynn described the significance of the markings on her husband's grave stone, and testified that she visited her husband's grave at least twice a week. (13 RT 2436-2437.) A closeup of Joe's gravestone also appears on the video. Lynn also testified about a note she found under the Christmas tree at Joe's grave. The note had been left by Garrett and contained some drawings, a photograph of Garrett, and the words, presumably written by Garrett, "I will see you some day." (12 RT 2374-2375; 13 RT 2439-2440.)

another caregiver in the courtroom was nothing less than a theatrical production calculated to inflame the passions of the jury against appellant. (Cf. *Young v. State* (Miss. 1977) 352 So.2d 815, 819 ["A trial is not, and should not be, a display of theatrics or tactics of counsel or the accused. It is, and should be, a decorous, orderly and fair search for truth, to the end that justice is served."].) There was absolutely no need to display Brinlee from the witness stand to inform the jury about Brinlee's existence; the jury already knew about Brinlee from Lynn's testimony at the guilt phase. (Compare 9 RT 1868 with 12 RT 2362.) Furthermore, assuming arguendo that some legitimate purpose was served by identifying Brinlee for the jury, that could have been accomplished in a much less prejudicial manner by either having Lynn identify Brinlee as she sat in the spectator section of the courtroom, or by having Lynn identify her from one of the many photographic exhibits offered at the penalty phase.

In addition, the prosecutor's act of taking Brinlee in her arms in the jury's presence presented the jury with the image that the prosecutor was acting on Brinlee's behalf, as opposed to her proper function of acting on behalf of the People. This constituted reversible error because it "led to a penalty verdict based on vengeance and sympathy as opposed to reasoned application of rules of law to facts." (*Fuselier v State* (Miss. 1985) 468 So 2d 45, 52-53 [allowing the victim's daughter to sit in close proximity to the prosecutor throughout the trial prejudiced defendant's right to a fair guilt and penalty trial because it "presented the jury with the image of a prosecution acting on behalf of [the victim's daughter"]; cf. *Walker v. State* (Ga. 1974) 32 Ga.App. 476, 208 S.E.2d 350 [mother of the victim sitting at the prosecution table "surely must have had an impact on the jury and we cannot say it was not harmful and prejudicial to the defendant's right to

have a fair trial"].)

Second, testimony concerning the difficulties experienced by Brinlee at the time of her birth had absolutely nothing to do with the circumstances of the crime.

Finally, the evidence concerning Joe's funeral and visits to Joe's grave by Lynn, Brinlee and others was particularly prejudicial because it inappropriately drew the jury into the mourning process. (See *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373; *State v. Storey* (Mo. 2001) 40 S.W.3d 898, 909.) In *Welch v. State*, *supra*, the court held that it was error to admit evidence that the victim's son put flowers on his mother's grave and brushed the dirt away because that evidence "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative." (2 P.3d at p. 373.)

Similarly, in *State v. Storey*, *supra*, the court held that a photograph of the victim's tombstone admitted as victim impact evidence was not relevant to show the impact of the victim's death, "and it inappropriately drew the jury into the mourning process." (40 S.W.3d at p. 909.)

The evidence offered in the present case concerning Joe's burial far exceeds the brief testimony in *Welch* and the single photograph in *Storey*. In the present case, the erroneously admitted evidence includes (1) Lynn's testimony concerning Joe's funeral, including her testimony about the various personal items that were buried with Joe, including certain photographs and a cookie that Joe's son, "Garrett[,] gave him so he would have something to eat when he got down there"; (2) Lynn's testimony describing the significance of the markings on Joe's gravestone; (3) Lynn's testimony concerning her twice weekly visits to Joe's grave; (4) the video depicting Lynn and Brinlee's staged visit to Joe's grave on Christmas Day,

showing Joe's grave adorned with flowers and a decorated Christmas tree and Brinlee playing with a Santa doll; and (5) Lynn's testimony concerning the note left by Garrett under the Christmas tree at Joe's grave, which contained some drawings, a photograph of Garrett, and the words, "I will see you some day." In addition to being both irrelevant and highly prejudicial, there was no way that defense counsel could counter the highly emotional effects this evidence undoubtedly had on appellant's jury and its penalty determination, effects which were skillfully exploited by the prosecutor in her penalty phase closing argument. For example, the prosecutor argued:

> And Garrett, you remember, Garrett thinks his stepmother is at fault. Lynn Finzel has to live with that and Garrett has to live with that. And when she saw him at the funeral, he couldn't understand why his father left him when he said he wouldn't ever do that. How do you explain that? How do you explain that, ladies and gentlemen? The last thing Garrett was able to do was to put a cookie in his father's casket so he could have something to eat when he got to heaven. [¶] The last words we have from Garrett Finzel is a card he left at Christmas. It's the only place he has to go at Christmas is to his father's grave. And bless his little heart, it says "I will see you some day." And it's so sweet. It's all water colored and it's got his little picture.

(18 RT 3162.)

Thus, the evidence concerning Joe's funeral and the visits to his grave by Lynn, Brinlee and Garrett was so inflammatory as to render the sentencing proceeding fundamentally unfair. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 831 (con. opn. of O'Connor, J.).)

F. Reversal Is Required

The victim impact evidence in this case was detailed, emotionally-charged, and highly manipulative. The erroneous admission of this

evidence, especially the victim impact video, violated appellant's right to a fair and reliable capital sentencing hearing and his right to the effective assistance of counsel, and denied him due process by making the penalty trial fundamentally unfair.[76] (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17; see *Tuilaepa v. California*, *supra*, 512 U.S. 967; *Payne v. Tennessee*, *supra*, 501 U.S. 808; *Booth v. Maryland*, *supra*, 482 U.S. 496; *Strickland v. Washington* (1984) 466 U.S. 668.)

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's rights under state law require reversal if there is any reasonable possibility that they affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) That the erroneous admission of the victim impact evidence in this case was not harmless under either the federal or state harmless error standards is demonstrated convincingly by the fact that the case for death was a close one. This is evidenced by the fact that appellant's jury deliberated for seven court days, asked to see various exhibits, including the victim impact video, asked for a rereading of certain testimony, and twice announced that it was deadlocked before returning its death verdict.[77] (See *People v. Cardenas* (1982) 31 Cal.3d

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[76] The prejudicial impact of the erroneously admitted victim impact evidence discussed herein must be viewed in light of the prosecutor's penalty phase misconduct where she engaged in name-calling by repeatedly referring to appellant as an animal, and where she read letters purportedly written by the victim's two young children describing their loss. (See Argument VI, *post*.)

[77] See II CT 425-433A, 450.

897, 907 [length of jury deliberations indicates that the case was close];[78] *Gibson v. Clanon* (9th Cir.1980) 633 F.2d 851, 855 [same]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [same]; *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 572-573 [same]; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 456 [same]; accord, *Parker v. Gladden* (1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference among them"]; *Dallago v. United States* (D.C. Cir. 1969) 427 F.2d 546, 559 [jury deliberated for five days before returning its verdict]; *United States v. Brodwin* (S.D.N.Y 2003) 292 F.Supp.2d 484, 497 ["the jury found this a close case, as reflected by their five and a half days of deliberations before returning their verdict"].)[79]

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[78] In *People v. Cardenas*, *supra*, this Court wrote:

> The prosecution's case against appellant was not overwhelming. The jury deliberated for 12 hours before returning its guilty verdicts. This court has held that jury deliberations of almost six hours are an indication that the issue of guilt is not "open and shut" and strongly suggest that errors in the admission of evidence are prejudicial. (See *People v. Woodard* (1979) 23 Cal.3d 329, 341 [152 Cal.Rptr. 536, 590 P.2d 391].) Here, the jury deliberated twice as long as the jury in *Woodard*, a graphic demonstration of the closeness of this case.

(31 Cal.3d at p. 907.)

[79] As stated by Witkin and Epstein,

> The rule is occasionally declared that, in a "close case," i.e., one in which the evidence is 'evenly balanced' or 'sharply conflicting,' a lesser showing of error will justify reversal than where the evidence strongly preponderates against the defendant.

(6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, §

(continued...)

Furthermore, there can be no question that the erroneously admitted victim impact video played an important role in breaking the deadlock and tipping the scales in favor of death. This is evidenced by the fact that the day after the jury first announced it was deadlocked, it asked to see the victim impact video again (Peo.'s Exh. 61). (II CT 430-431.) The victim impact video and the equipment necessary to view it were then provided to the jury so that it could view the video in the jury room during its penalty deliberations. (1 SCT VIII 64a-64b.)[80] While the record is silent as to how many times the victim impact video was played by the jury in the jury room

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(...continued)
45, pp. 506-507.)

[80] Earlier in the proceedings, defense counsel objected to the jury being allowed during its deliberations to view the video in the jury room:

> There is a comment you [the court] made. I would be objecting that the jury be invited to or allowed to view the video from the jury room. That would turn out to outrageously [*sic*] maudlin.

(12 RT 2318.) The court overruled the objection, stating:

> If it's admitted, it's admitted. It's up to them whether they want to review it or not. Otherwise, I wouldn't be admitting it all.

(*Ibid.*)

After the video was played for the jury, defense counsel again renewed his objection to the court admitting the video into evidence. He stated:

> Just to reemphasize it and say that I believe that there has been an improper admitting of it and to allow it in would simply compound the damages that have been done as far as prejudice is concerned.

(18 RT 3170.) The court overruled his objection. (*Ibid.*)

during its penalty deliberations, it can be safely assumed that it was played at least once in order to persuade those jurors who had voted for life without the possibility of parole to change their vote and vote for death.[81]

Accordingly, reversal of the death sentence is required.

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[81] That the playing of the victim impact video in the jury room played a critical and deciding role in this case finds support in the declaration filed by defense counsel in connection with appellant's "Motion to Reduce Penalty to Life Imprisonment with the Possibility of Parole." (II CT 452-459.) In his declaration, defense counsel stated that he had interviewed two members of appellant's jury after the case was over. Both of these jurors told him that there "were eight jurors who at one point and through much of the deliberations were in favor of Life Without Possibility of Parole." (II CT 459.) During their penalty deliberations, the "strongest advocate for death brought in and played the victim impact video and several jurors immediately switched from Life without the possibility of parole to death and a verdict was rendered very shortly thereafter." (*Ibid.*)

V

TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S REQUEST FOR A SHORT CONTINUANCE IN ORDER TO PERMIT HIM TO PRESENT SURREBUTTAL EVIDENCE TO REFUTE THE SURPRISE REBUTTAL EVIDENCE WHICH WAS OFFERED BY THE PROSECUTOR TO UNDERMINE THE CREDIBILITY OF APPELLANT'S KEY DEFENSE MITIGATION EXPERT, DR. NANCY KASER-BOYD. THE TRIAL COURT'S ERROR REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE BECAUSE IT VIOLATED HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND RELIABLE PENALTY DETERMINATION UNDER THE STATE AND FEDERAL CONSTITUTIONS

At the penalty phase, the defense presented the testimony of Dr. Nancy Kaser-Boyd, a clinical psychologist, who testified concerning appellant's family history and mental health issues. She testified, inter alia, that appellant had been sexually abused when he was three or four years old by Rudy Garcia, the person appellant believed to be his father, and the fact that he had been sexually abused was a significant risk factor in appellant's early development. (18 RT 2975.)[82] Dr. Kaser-Boyd based her conclusion

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[82] Dr. Kaser-Boyd explained how sexual abuse was a risk factor that can affect a child's early development.

> Well, first of all it teaches children something very inappropriate about sex. Secondly, it arouses them sexually at an age well before they are ready for those feelings and creates sexual drive in a child basically. [¶] In boy children who are molested by men, there often will result a lot of confusion about sexual identity. Does this mean I am gay? Umm, who am I as a boy? And it also puts a boy in the situation of being a victim and passive. Victims tend to feel passive and helpless and that is very difficult for anyone, boys or girls, but it is particularly troubling for boys who are needing to develop a sense of competence and more of that

(continued...)

that appellant had been the victim of sexual abuse on information she received from appellant's maternal grandfather, Fred Baumgarte, and appellant's maternal uncle, Reginald Baumgarte. (16 RT 2805.)

Recognizing the importance of Dr. Kaser-Boyd's testimony as well as her expert opinions to appellant's penalty defense,[83] the prosecutor attempted to discredit both Dr. Kaser-Boyd and her expert opinions. (See, e.g., 13 RT 2449 ["I think the psychologist is their most important witness and I need to be able to show when she is not accurate in taking notes."]; 18 RT 3033 [Dr. Kaser-Boyd "lied" about Fred Baumgarte's testimony]; 18 RT 3106 [prosecutor's closing argument that appellant's penalty defense rests almost exclusively on the testimony of Dr. Kaser-Boyd].) For example, in her cross-examination of Dr. Kaser-Boyd, the prosecutor repeatedly criticized Dr. Kaser-Boyd for not writing a report and for relying on her notes. (See, e.g., 16 RT 2811, 2814, 2816-2819; see also 18 RT 3133 ["She [Dr. Kaser-Boyd] gave me a bunch of notes I couldn't read. She didn't write a report. . . . And everybody writes reports except Dr. Kaser-Boyd."]; *ibid.* ["Her impressions and conclusions were not in any kind of a report, they were kind of thrown on a page in her handwritten

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(...continued)

masculine role model we talk about.

(18 RT 2975.)

[83] Before Dr. Kaser-Boyd testified as a witness, the prosecutor sought to prevent her from testifying about evidence that appellant had been sexually molested as a young boy. (See, e.g., 12 RT 2347-2352.) The court overruled the prosecutor's objection. (*Ibid.*)

notes."].)[84]

After Dr. Kaser-Boyd completed her testimony and was excused as a witness, the prosecutor called as rebuttal witnesses appellant's maternal grandparents, Fred and Dorothy Baumgarte, for the sole purpose of showing that "Dr. Kaser Boyd lied on his [Fred Baumgarte's] testimony." (18 RT 3033; see also 18 RT 3041.)[85]

Fred Baumgarte testified that when appellant was three or four years old, he saw Rudy and appellant. Appellant had his underpants off. "Rudy had Randy standing on a table or a bench in front of him and he was – he reached up and was playing with his little penis." (18 RT 3027-3028.) Rudy was holding appellant's penis between his thumb and a finger. Rudy immediately stopped what he was doing when he saw Fred, and Fred never saw Rudy do that again to appellant. (18 RT 3030, 3036-3037.) Fred said

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[84] Later, when the prosecutor presented her closing penalty argument, she tried to offer an innocent explanation for Rudy's handling of appellant's penis, and to downplay evidence that Rudy was also seen either with his mouth on appellant's penis or with his face in appellant's naked lap. (See, e.g., 18 RT 3146-3148.) However, there can be no innocent explanation for what Rudy was seen by appellant's grandfather and uncle doing to appellant, as such conduct amounted to clear violations of Penal Code section 288, subdivision (a) [lewd and lascivious acts upon a child under the age of 14].

[85] The prosecution's rebuttal case commenced approximately 10 minutes after Dr. Kaser-Boyd was excused and left the courtroom. (See 18 RT 3022-3024.) The prosecutor's first rebuttal witness was appellant's maternal grandfather, Fred Baumgarte. (18 RT 3024.) When the prosecutor announced that she was going to call Dorothy Baumgarte, the defense asked for an offer of proof. The prosecutor stated that Dorothy Baumgarte "doesn't remember talking to Dr. Kaser-Boyd on the phone." (18 RT 3041.) Defense counsel replied: "That is great because then we have to bring Kaser-Boyd back. This is actually legitimately in dispute[?]" The court ruled: "She has a right to call them." (18 RT 3041-3042.)

that what he saw Rudy do to appellant seemed wrong to him. But Fred did not tell anyone about what he had seen at that time because he did not think it was sexual. Fred said that years after the incident he began "to hear more and more about it on television and radio about children being molested." (18 RT 3030.) At that time, he recalled what he had witnessed and "realized it wasn't what he [Rudy] was supposed to be doing." (18 RT 3029.)

Fred could not remember talking to Dr. Kaser-Boyd, either in person or on the phone, and telling her about the Rudy incident. Fred also could not recall telling his wife about the incident. "I don't recall, but I'm sure I did. I don't know whether I did or not, but I'm sure I did." (18 RT 3030-3031.)

Fred was asked whether he recalled getting a phone call from Dr. Kaser-Boyd where his wife helped facilitate the call because he is hard of hearing. Fred said that he did not speak directly to Dr. Kaser-Boyd but communicated through his wife. (18 RT 3037.) When Fred spoke to the prosecutor he told her, "I don't remember giving any information whatsoever. I don't." (18 RT 3040.)

Dorothy Baumgarte "vaguely" remembered talking to Dr. Kaser-Boyd. (18 RT 3043.) Dorothy said she saw Dr. Kaser-Boyd at her daughter Suzanne's house. (18 RT 3043.) However, she did not remember talking to Dr. Kaser-Boyd about her husband having seen Rudy Garcia touch appellant inappropriately. "I don't remember discussing that at all." (18 RT 3043.) Dorothy recalled telling the prosecutor that the only one she spoke to about that incident was Amy York, the defense investigator. (18 RT 3043-3044.) Dorothy testified that her husband told her about Rudy having touched appellant inappropriately, "but when, exactly when or how,

exactly how I heard it, I can't remember. It's been too much that has happened." "I can't remember him telling me. I heard it, but I don't remember him ever telling me directly." (18 RT 3044.)

After the prosecutor completed her rebuttal case, and outside the presence of the jury, the defense stated that it needed to re-call Dr. Kaser-Boyd to refute the Baumgartes's testimony that they had not spoken to Dr. Kaser-Boyd about Rudy Garcia having fondled appellant's penis. Because he had not been informed by the prosecutor prior to the Baumgartes's testimony as to what they would say on the witness stand regarding Dr. Kaser-Boyd, defense counsel said that he would need some time to get ahold of Dr. Kaser-Boyd in order to present her testimony.[86] The court refused defense counsel's request to recall Dr. Kaser-Boyd, stating:

> We set aside today. She [Dr. Kaser-Boyd] testified there was a conversation. I think you made it very clear to the jury we have two elderly people who really don't remember the conversations. You set out your scenario in your cross-examination. I am not going to shut down the trial, we are proceeding.

(18 RT 3053.) Defense counsel protested the unfairness of the court's ruling:

> Every single underpinning of Dr. Kaser's testimony is now being deranged by this fallacious specious suggestion that she fabricated an interview with that person. The People didn't

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[86] The prosecutor knew at the time Dr. Kaser-Boyd was on the witness stand that the Baumgartes would say that they did not remember having spoken to Dr. Kaser-Boyd about Rudy Garcia having sexually abused appellant. But the prosecutor never cross-examined Dr. Kaser-Boyd on this subject. Such cross-examination by the prosecutor would have given Dr. Kaser-Boyd an opportunity to rebut that evidence at the time she was on the stand, and would have alerted defense counsel that this was to be made an issue in the case.

> tell me when I asked them what is the purpose of the rebuttal witnesses. The purpose was the discrepancy on the version given to Kaser-Boyd versus what they said to Ms. Thomas. It was never inferred that the conversation didn't occur.

(*Ibid.*) The court stood by its early ruling, stating:

> In the three or four days Dr. Kaser-Boyd was on the stand, she was asked who she talked to by both of you, who she talked to, exactly what the conversations were. I don't think it's necessary to have her recover what she has already stated. I think your argument to the court is a good one to make to the jury.

(18 RT 3053-3054.)

The court excused the jury for 15 minutes in order for the court and counsel to "discuss some last minute issues and hopefully put together the jury instructions." (18 RT 3055.) Just before the proceedings resumed in the jury's presence, defense counsel informed the court that he still had not been able to locate Dr. Kaser-Boyd. He requested a "slight delay to try to retrieve her and get her in the courtroom." (18 RT 3067.) The court denied the request, but stated that, "If at some point you find her, you can let me know and we will see where we are and if there is something we can do." (*Ibid.*) Defense counsel then asked to be allowed to offer Dr. Kaser-Boyd's contemporaneous notes of her interview with Fred and Dorothy Baumgarte. The court stated that it was "agreeable. Let me look at them and see if there is anything specifically that might be objectionable." (18 RT 3068.)

Later, the defense presented to the court a copy of Dr. Kaser-Boyd's notes of her interview of Fred Baumgarte. The court explicitly recognized defense counsel's "right to rebut" the Baumgartes's testimony, and admitted Dr. Kaser-Boyd's notes as Defendant's Exhibit T. (18 RT 3099.) Defendant's Exhibit "T" consists of a single piece of paper which says

"Fred Baumgarte" at the top, and refers to the details of Dr. Kaser-Boyd's conversation with Fred Baumgarte only; there is no mention of Dr. Kaser-Boyd having used Dorothy Baumgarte to facilitate the conversation because he was hard of hearing.[87]

Dr. Kaser-Boyd's interview notes, which, as the court noted, required some interpretation to understand,[88] and which were vigorously attacked by the prosecutor during her cross-examination of Dr. Kaser-Boyd as being incomplete, slanted and inaccurate, were not a fair substitute for appellant's right to present Dr. Kaser-Boyd's live testimony. Moreover, as noted by the prosecutor, "[w]hat [Dr. Kaser-Boyd] testified to is she talked to Dorothy Baumgarte, not Fred." (18 RT 3099.) In other words, Dr. Kaser-Boyd's notes were an inadequate substitute for her live testimony because they failed to address the heart of the prosecution's rebuttal case, namely, Dr. Kaser-Boyd's use of Dorothy Baumgarte to facilitate her interview of Fred Baumgarte.

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[87] The court and counsel attempted to interpret Dr. Kaser-Boyd's notes for the record: Defense counsel: "It reflects his name, his phone number, the date of the phone call and also has his wife's name circled." The court: "He is hard of hearing me, plus sexual molestation, Mr. – I can't read the rest." Defense counsel: "Something was – oh, naked – something – at the time. I see Rudy had him standing on a little table." The court: "And Rudy was playing with his privates. . . . I walked in and he stopped, three, four years old." Defense counsel: "I don't know what else." The court: "It says 'I' and then is a strange – " The prosecutor: "Something about unsure or something." Defense counsel: "I can't remember anymore. I let go of it, told my wife." (18 RT 3098-3099.)

[88] At the time Dr. Kaser-Boyd's notes were admitted into evidence, the court advised defense counsel that he was "going to have to interpret for the jury because I don't think they are going to be able to read it." (18 RT 3099.)

Because of Dr. Kaser-Boyd's importance as a defense witness, appellant had the right to present surrebuttal evidence to rebut the prosecution's rebuttal evidence concerning the circumstances surrounding her interview of Fred Baumgarte, and the trial court's denial of a short continuance in order to allow appellant to contact Dr. Kaser-Boyd and to present surrebuttal evidence was an abuse of discretion. Because the trial court's erroneous ruling denied appellant his state and federal constitutional rights to counsel, present evidence, due process, a fair trial, and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17), reversal of the death judgment is required.[89]

The prosecution's presentation of the testimony of Fred and Dorothy Baumgarte on rebuttal, that they did not remember ever discussing with Dr. Kaser-Boyd anything about Fred having seen Rudy Garcia sexually molest appellant when appellant was three or four years old, contradicted Dr. Kaser-Boyd's testimony, that when she interviewed Fred Baumgarte by phone concerning this incident, because he was hard of hearing she had Dorothy relay her questions to Fred about the incident and Fred's answers to those questions to her. Thus, the prosecution's rebuttal evidence injected a new issue in the case which clearly affected Dr. Kaser-Boyd's credibility as a witness. As such, appellant had the right to present evidence on surrebuttal to rebut the Baumgartes's testimony concerning the circumstances surrounding Dr. Kaser-Boyd's interview of Fred Baumgarte and to rehabilitate Dr. Kaser-Boyd's credibility as a witness. The trial court's insistence on rigidly adhering to its trial schedule, and its refusal to

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[89] This same error was also raised by appellant in his motion for a new trial, and denied by the trial court. (II CT 466; 20 RT 3269.)

give the defense adequate time to contact Dr. Kaser-Boyd and to present evidence on surrebuttal, was an abuse of discretion which denied appellant his right to a fair trial. (*People v. Carter* (1957) 48 Cal.2d 737, 754-758; *People v. Cuccia* (2002) 97 Cal.App.4th 785.)

In *People v. Carter*, *supra*, defendant was convicted of murder. At trial, the prosecution introduced, as rebuttal testimony, evidence that a red cap similar to one which defendant was seen wearing the night of the crime, had been found in a slough where the decedent's wallet and the alleged murder weapon, a wrench allegedly belonging to the defendant, had been found. After the prosecution presented this evidence, the defendant sought permission to reopen or for continuance to show that another similar cap had been found on the route which he had taken from the scene of the killing to his home, but his request was denied. This Court held that the trial court prejudicially abused its discretion in refusing to allow the defense to present this evidence, stating:

> Defendant had only just rested, argument had not begun and the jury had not been instructed, and it does not appear that granting defendant's request would have entailed any great inconvenience. In a trial that had already consumed thirteen days, it was not unreasonable to request an extension of a few hours to put before the jury evidence that in justice should have been considered. . . .

(48 Cal.2d at p. 757.)[90]

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[90] Courts from other jurisdictions also hold that it is an abuse of discretion for the trial court to deny a defendant the right to present surrebuttal evidence when, as in the present case, the prosecution's rebuttal testimony presents new issues not raised in the defendant's case-in-chief. (See, e.g., *United States v. King* (4th Cir. 1989) 879 F.2d 137, 138; *United States v. Sadler* (5th Cir. 1974) 488 F.2d 434 [prejudice may occur where

(continued...)

In *People v. Cuccia, supra*, 97 Cal.App.4th 785, defendant was convicted of five counts of selling unregistered securities, one count of misrepresenting a security, and one count of attempted grand theft. After

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(...continued)
prosecution "injects fresh issues on which the defendant is denied the right to present evidence"]; *Gregory v. United States* (D.C. 1978) 393 A.2d 132, 137, emphasis in original ["where new matters are introduced in rebuttal . . . the witness has a Right to surrebuttal."]; *People v. Terry* (Colo.1986) 720 P.2d 125, 129 ["It is well settled that trial courts should permit defendants to introduce evidence on surrebuttal that tends to meet new matter presented by the prosecution on rebuttal."]; *People v. Martinez* (Colo. 1973) 506 P.2d 744, 745 ["[a]s a general rule, defendants should always be permitted to introduce as surrebuttal, evidence which tends to meet New matter introduced by the prosecution on rebuttal" (emphasis in original)]); *People v. Cannon* (Ill. 1978) 378 N.E.2d 1339, 1344 ["[where the State is permitted to introduce new matter in rebuttal, the accused should be permitted to introduce evidence in surrebuttal to contradict or affect the credibility of the rebuttal testimony"]; *People v. White* (Ill. 1973) 303 N.E.2d 36, 37 [reversible error not to permit defendant to present surrebuttal evidence to counter the prosecution's attack on his defense and credibility as a witness]; *Edge v. State* (Miss. 1981) 393 So.2d 1337, 1341 ["[t]he rule is well settled in this state that where rebuttal evidence is introduced, surrebuttal should be allowed, particularly where to fail to do so would be prejudicial."]; *Kulbicki v. State* (Md. 1995) 649 A.2d 1173, 1178, citations omitted ["'Surrebuttal is essentially a rebuttal to a rebuttal.' Accordingly, surrebuttal testimony should be permitted when it explains, directly replies to, or contradicts a new matter brought into the case on rebuttal."]; *State v. Doe* (N.M.App. 1983) 659 P.2d 908, 911 ["a defendant should always be permitted to introduce in surrebuttal such evidence as tends to meet new matter introduced by the prosecution on rebuttal"]; *State v. Reynolds* (Or. 1997) 931 P.2d 94, 97-98 [holding that the trial court committed reversible error in refusing to allow defendant to offer surrebuttal testimony as to his character for truthfulness after the state had attacked it on rebuttal]; *State v. Harris* (Wash. 1974) 529 P.2d 1138, 1141 ["as a matter of right, the defendant in a criminal matter may impeach the credibility of the state's rebuttal witnesses or rehabilitate his own witnesses whose credibility has been attacked by the prosecution's rebuttal evidence"].)

both sides had rested and in the middle of closing argument, the prosecutor was allowed to reopen and offer as rebuttal evidence defendant's signed declaration obtained from court records in a bankruptcy case which concerned one of the securities. Following the receipt of this evidence, defense counsel informed the court that he would like to call additional witnesses to refute the declaration and would need some additional time to contact the attorney who prepared the declaration. The court asked defense counsel what witnesses he intended to call and "'[w]hat relevant testimony, if any, can they give or do you know?'" Defense counsel said that he was not certain, but thought he would call defendant and the attorney who had prepared the declaration to discover "the circumstances under which that document was drafted." The court denied defendant's motion to reopen surrebuttal "'for that purpose because I think the undue consumption of time given where we are in this case right now and the probative value to be ascertained or derived from that based on the representation you're making . . . .'" The Court of Appeal held that the trial court erred when it denied defendant an opportunity to offer surrebuttal. The appellate court noted that

> a brief continuance would have eliminated the possibility of any prejudice. Instead, the trial court insisted on rigidly adhering to the trial schedule to the detriment of defendant's right to a fair trial. This was error and a patent abuse of discretion. "'[T]he trial judge "has the responsibility for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." [Citation.]'" (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387 [52 Cal.Rptr.2d 422].) Simply put, the trial court's duty to conduct judicial business efficiently cannot

> trump defendant's right to present his defense in a manner he desires, particularly where accommodating him in the two instances here would have had only a slight impact on efficiency.

(*People v. Cuccia*, *supra*, 97 Cal.App.4th at p. 795.)

Based on this and another error (requiring defendant to testify out of order or rest his case when a scheduled defense witness could not be located), the Court of Appeal held that defendant's due process right to a fair trial had been violated and reversed his convictions. (*Ibid.*)

In the present case, the prosecution's presentation of Fred and Dorothy Baumgarte's testimony in its rebuttal case raised a new issue going to Dr. Kaser-Boyd's credibility as a witness which appellant had the right to rebut on surrebuttal. A short continuance would have given the defense time to locate Dr. Kaser-Boyd, to talk to her about the Baumgartes's testimony, and to present evidence on surrebuttal to corroborate her version of the circumstances surrounding her interview of Fred Baumgarte. Because the defense was not given any notice by the prosecutor that the Baumgartes would testify that they did not even remember talking to Dr. Kaser-Boyd about Rudy Garcia having sexually abused appellant (see 18 RT 3053), fundamental notions of fair play and substantial justice required that the defense be given a short continuance in order to contact Dr. Kaser-Boyd to let her know what the Baumgartes had just said, and to afford the defense the opportunity to present surrebuttal testimony from Dr. Kaser-Body or possibly others to corroborate Dr. Kaser-Boyd's version of the circumstances surrounding her interview of Fred Baumgarte.

Thus, as in both *People v. Carter*, *supra*, and *People v. Cuccia*, *supra*, the trial court's denial of a short continuance in order to allow the defense to speak to Dr. Kaser-Boyd and to present surrebuttal evidence

constituted an abuse of discretion and error was committed.

The trial court's erroneous ruling requires reversal of the death judgment because it violated appellant's federal constitutional rights to counsel, present evidence, due process, a fair trial, and to a reliable penalty determination.

The Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence regarding "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1981) 455 U.S. 104, 110; *People v. Frye* (1998) 18 Cal.4th 894, 1015; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117.)

This constitutional mandate contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 820-821; *People v. Whitt* (1990) 51 Cal.3d 620, 647; cf. *Lockett v. Ohio, supra*, 438 U.S. at pp. 602, 604 [noting that concept of individualized sentencing, including the traditionally wide range of factors taken into account by the sentencer, insures a greater degree of reliability in capital sentencing determinations].) A capital jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." (*Jurek v. Texas* (1976) 428 U.S. 262, 271.)

In addition, a defendant has the right under the Sixth and Fourteenth Amendments to present witnesses in his own defense, and this right includes the right to present the testimony of expert witnesses. (See *Ake v. Oklahoma* (1985) 470 U.S. 68, 83-84; *Webb v. Texas* (1972) 409 U.S. 95,

98; *Washington v. Texas* (1967) 388 U.S. 14, 19; *People v. San Nicolas* (2005) 34 Cal.4th 614, 661-662.) The *Ake* decision clearly established that the defendant's ability to present mitigating evidence or to rebut aggravating factors at the sentencing phase is essential. (*Ake v. Oklahoma, supra*, 470 U.S. at p. 86.)

Here, the trial court's refusal to allow appellant to present evidence on surrebuttal allowed appellant's jury to conclude that Dr. Kaser-Boyd willfully lied when she testified that she personally interviewed Fred Baumgarte about appellant's childhood sexual abuse and that Dorothy Baumgarte helped facilitate that interview. Not only did this undermine Dr. Kaser-Boyd's mitigating evidence concerning appellant's childhood sexual abuse, it also undermined Dr. Kaser-Boyd's credibility as an expert witness and hence the entirety of her expert testimony. Nothing could have been more devastating to appellant's penalty defense, as Dr. Kaser-Boyd was appellant's most important penalty witness, responsible for weaving the facts of appellant's life history together and providing an expert's mitigating explanation for appellant's alleged acts of violence. Dr. Kaser-Boyd's credibility as a witness was therefore of critical importance to the credibility of appellant's entire penalty defense.

The prosecutor clearly realized the importance of Dr. Kaser-Boyd's testimony, and presented the rebuttal testimony of Fred and Dorothy Baumgarte solely in order to paint Dr. Kaser-Boyd as a dishonest person whose testimony and expert opinions were bought by the defense and should not be trusted.[91] (13 RT 2449; 18 RT 3096 [prosecutor's closing

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[91] The prosecutor's motive for calling Fred and Dorothy Baumgarte was not lost on defense counsel, who remarked in his closing argument:

(continued...)

argument that "[t]he only experts that testified in this case were experts that were paid by the defense"].) That Fred and Dorothy Baumgarte's rebuttal testimony was of such critical importance to the prosecutor's penalty phase case and her attack on Dr. Kaser-Boyd's credibility as a witness is evidenced by the prosecutor's statements about Dr. Kaser-Boyd (see, e.g., 13 RT 2449 ["I think the psychologist is their most important witness"]; 18 RT 3131 [the prosecutor's closing argument that had Dr. Kaser-Boyd not testified the way that she did, "you wouldn't have heard from her"]; 18 RT 3106 [prosecutor's closing argument that appellant's mitigating background evidence is "the testimony you heard from Dr. Kaser-Boyd"]), and by the fact that the prosecutor went to the extraordinary effort and expense of forcing appellant's grandparents to come to Los Angeles all the way from Vidor, Texas. (II CT 408-417 [pleadings in support of the prosecution's request to compel the attendance of Dorothy Baumgarte]; 18 RT 3033-3035, 3038-3040.) (Cf. *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . .

(...continued)

> Ms. Thomas [the prosecutor] called Fred Baumgarte to the stand and said did you talk to Dr. Kaser-Boyd? I don't remember that. [¶] Then she called Mrs. Baumgarte to the stand. Do you remember talking to Dr. Kaser-Boyd? Not really. She wanted you to actually believe that Dr. Kaser-Boyd fabricated her conversation with Fred Baumgarte because if you believe she fabricated that conversation, maybe you will disregard everything she said. . . . But that is the suggestion that Ms. Thomas would have you accept in a matter of life or death. She would have you believe that Dr. Kaser-Boyd fabricated because she got these two people up there that had problems with recall.

(18 RT 3189.)

during closing arguments. . . ."]; *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless where the prosecutor relied on it in his closing argument]; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [the prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be"].)

If any of appellant's jurors believed, as the prosecutor wanted them to believe, that Dr. Kaser-Boyd willfully lied when she said she had interviewed Fred Baumgarte about Rudy Garcia having sexually abused appellant, then those jurors who believed Dr. Kaser-Boyd lied may well have rejected the entirety of her expert testimony, since they had been instructed in the language of CALJIC No. 2.21.2 (witness willfully false) that a witness who is willfully false in one material part of his or her testimony is to be distrusted in others and the witness's whole testimony may be rejected. (II CT 339; 10 RT 2028; 18 RT 3071.)[92]

In addition, the trial court's refusal to grant the defense a brief continuance was also prejudicial in that it very likely caused appellant's jury to distrust defense counsel and his entire presentation on appellant's behalf.

Thus, by denying the defense a short continuance in order to contact Dr. Kaser-Boyd and to present surrebuttal evidence concerning her contacts with Fred and Dorothy Baumgarte, the trial court denied appellant his right

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[92] Appellant's jury was instructed as follows:

> A witness who is willfully false in one material part of his or her testimony, [*sic*] is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, [*sic*] from all the evidence you believe that the probability of truth favors his or her testimony in other particulars.

(II CT 339; 10 RT 2028; 18 RT 3071.)

to offer additional evidence concerning Dr. Kaser-Boyd's contacts with the Baumgartes, and to specifically refute Dorothy Baumgarte's testimony that she did not help Dr. Kaser-Boyd in the interview of her husband concerning Rudy Garcia having sexually molested appellant. In essence, the trial court's erroneous ruling "tore the heart out of [appellant's] defense." (*Edge v. State*, *supra*, 393 So.2d at p. 1341.) The trial court's erroneous ruling also denied appellant his right to the effective assistance of counsel by preventing defense counsel from taking the steps necessary to protect appellant's rights to due process and a fair and reliable penalty determination.

Because it cannot be shown that the trial court's denial of appellant's right to present the surrebuttal testimony of Dr. Kaser-Boyd was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 36,[93] appellant's sentence of death must be reversed. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258 [holding that "the evaluation of the consequences of an error in the sentencing-phase of a capital case may be more difficult because of the discretion that is given to the sentencer"].)

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[93] *Chapman v. California*, *supra*, 386 U.S. 18, requires that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Id.* at p. 24.) The "burden of proof" as to prejudice rests on the state. "Certainly error, constitutional error, . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless. . . . [T]he beneficiary of a constitutional error [is required] to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid.*)

VI

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT AT THE PENALTY PHASE

A. Introduction

The prosecutor committed prejudicial misconduct during her closing argument at the penalty phase when, over defense objection, she repeatedly referred to appellant as an animal, and when she read two letters purportedly written by the murder victim's two young children. Such misconduct denied appellant his right to confront the witnesses against him, a fair trial, and a reliable determination of penalty under both the state and federal Constitutions. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17.) The prosecutor's reading of the letters also denied appellant his state and federal rights to confront the witnesses against him. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) Because this was a close case as to penalty, as evidenced by the fact that appellant's jury deliberated over seven court days and twice announced that it was hopelessly deadlocked as to penalty (II CT 425-433A, 450), the misconduct cannot be deemed harmless beyond a reasonable doubt and reversal of appellant's death sentence is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

1. The Prosecutor's Repeated References to Appellant as an Animal

The prosecutor referred to appellant's criminal conduct as "animalistic action." (18 RT 3155.) Defense counsel objected. (*Ibid.*) The court overruled defense counsel's objection, ruling that the word "animal" "is on the list of okay words in terms of the way argument is posed." (*Ibid.*) Following the trial court's ruling, the prosecutor made several additional

references to appellant as an animal. (*Ibid.* ["This man, this animal, after intending to deprive Brinlee of both parents."]; 3161 ["Lynn Finzel is living with a guilt that is unjustified because of the animal at the end of the table, Randy Garcia."] 3164 ["[Joe Finzel's] life was snuffed out, just like that, by that animal, and that's what he is. He acts like an animal, and that's what he is."].) Defense counsel again objected to the prosecutor's use of the word animal. His objection was overruled. (18 RT 3166.) Following this ruling, the prosecutor called appellant a "predator animal" who "was out seeking his sadistic passions." (18 RT 3168.)[94]

2. The Prosecutor's Reading of the Children's Imaginary Letters to Their Deceased Father

The prosecutor argued that, unlike appellant, who is able to correspond with both his natural father and his stepfather, the victim's two children, Garrett and Brinlee,[95] would never have the opportunity to correspond with their father. (18 RT 3164.) After saying this, the prosecutor purported to read letters that Garrett and Brinlee would have written to their dead father. (18 RT 3164–3168.)[96] The prosecutor first

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[94] The prosecutor argued that appellant "acted, not as a frightened animal but as a predator animal, as a hunter who has gotten his prey, trapped and killed it. He is a predator. He was out seeing [*sic*] his animalistic sadistic passions." (18 RT 3168.)

[95] Garrett was approximately seven years and two months old when his father was shot. He was nine years old at the time of the penalty trial. (12 RT 2382.) Brinlee was two months and nine days old when her father was killed, and a little over two years old at the time of the penalty trial. (12 RT 2362.)

[96] Based on defense counsel's objection to the reading of the first letter, Garrett's "letter," and the discussion that ensued between the trial

(continued...)

read Garrett's "letter":

> Dear dad, I love you very much. I miss you so very much. I know some day I'll see you again. But in the meantime, I remember how you were my best buddy, how you tucked me in at night, how we played together, camped together, and how you wanted to ride motorcycles together with me, and how you and mom included me in everything. I remember the wedding. And I remember Christmas's [*sic*] with you. I remember when you and mom took me to my first day of school. You were always there, dad. Then Randy Garcia took you away from me one weekend when I was visiting my real mother. I never got to say good-bye to you, dad. That hurts real bad. My heart aches so much I think it's worse than any pain I will ever know. Now you will never take me to school again. You will never come and watch any games I play, baseball, basketball, soccer, football. You will never see me graduate from elementary school, junior high school . . . or college. I won't have you to give me the kind of advice a dad gives his son while growing up. How will I talk to my mother about girls and boys kind of stuff. You will never be able to meet the woman that I marry. She won't even know you. And that breaks my heart, dad. And it hurts so badly that my children will never know their grandfather. And what a wonderful grandfather you would have been. But the thing that hurts the worst, and it hurts every day and I cry every day, I will never see you during my life here on earth, a life that could be very long. I will miss you, dad, and I'll think of you every day. I know you know how much I miss you because I know you miss me in the same way. So until we meet, dad, I love you with all my heart.

(18 RT 3165-3167.) Defense counsel objected to the prosecutor's

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(...continued)
court and counsel, it appears that the prosecutor was reading from a document that was meant to looked like a letter. (18 RT 3165-3166.)

argument, but his objection was overruled.[97] Following her reading of Garrett's "letter," the prosecutor read Brinlee's "letter":

> Dad, I am sorry that I never even got to know you. I will only get to know you from photographs and stories that mom and other people tell me about you. I will only know you from videos and things Mom saved, but I know how much you loved me. I wish I even had one hour with you that I could remember. But I have no memories at all because Randy Garcia took your life as I lay by you in my bassinet. I will never have you to walk me to school at all. I will never have you to walk me down the aisle and to give me away at my wedding. You will never know my children. Dad, why does Randy Garcia get to meet his dad and have a relationship with him when I'll never get that same opportunity?

(18 RT 3167-3168.)[98]

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[97] During the prosecutor's reading of Garrett's "letter," defense counsel asked to approach the bench and objected to the prosecutor's closing argument on the ground that it was improper. (18 RT 3165.) The trial court overruled the objection, stating:

> I think it's argument [the prosecutor] can make. I don't think it's inflammatory. I don't think it's unduly prejudicial.

(18 RT 3166.)

[98] Defense counsel did not object to the prosecutor's reading of Brinlee's "letter" to her father, which immediately followed the prosecutor's reading of Garrett's "letter" and the court's overruling of defense counsel's objection thereto. However, defense counsel's failure to object is excused here because any objection would have been futile in light of the trial court's earlier ruling with respect to the prosecutor's reading of Garrett's "letter." (See *People v. Antick* (1975) 15 Cal.3d 79, 95 ["Once having had this issue resolved against him, defense counsel was not required to repeat his objection"]; *Green v. Southern Pac. Co.* (1898) 122 Cal. 563, 565 ["Where a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising at

(continued...)

B. The Prosecutorial Misconduct In This Case Denied Appellant His Right To A Fair Trial And Requires Reversal Of The Judgment Of Death

Prosecuting attorneys are held to an elevated standard of conduct. (*People v. Hill* (1997) 17 Cal.4th 800, 819.) Their obligation is not just to win, but to win fairly. (*People v. Lee Chuck* (1889) 78 Cal. 317, 329; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) In the oft-quoted words of Justice Sutherland, it is as much the prosecutor's "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." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Prosecutorial misconduct 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 resulting conviction or sentence a denial of due process. (See *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 710; see also *People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Conduct by a prosecutor that does not meet this standard is still considered prosecutorial misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) In order to reverse on the basis of prosecutorial misconduct under state law, it must be shown that "had the prosecutor

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(...continued)
each examination of other witnesses; and his silence will not debar him from having the exception reviewed."]; *People v. Rios* (1985) 163 Cal.App.3d 852, 868 [futile for the defendant to specifically object to prosecutorial misconduct where the prosecutor's conduct was sanctioned by the court's erroneous ruling]. The improper reading of the fictionalized letters was also raised in appellant's motion for a new trial. (II CT 465.)

refrained from the misconduct, [it is] reasonably probable that a result more favorable to the defendant would have occurred." (*People v. Strickland* (1974) 11 Cal.3d 946, 955.)

It is misconduct for a prosecutor to make comments calculated to arouse passion or prejudice during penalty phase argument in a capital case. (*People v. Mayfield* (1997) 14 Cal.4th 668, 803.)

> A prosecutor's closing argument is an especially critical period of trial. Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective.

(*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.)

Thus, it is misconduct for a prosecutor to conduct a personal attack on the defendant or to make remarks in argument that have no apparent purpose but to denigrate and degrade the defendant before the jury. Arguments comparing defendants to animals have often been held to be unconstitutional or improper. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 149 [reference to defendant as an animal]; *People v. Fosselman* (1983) 33 Cal.3d 572, 580; see also *People v. Sanders* (1995) 11 Cal.4th 475, 527 [improper reference to defendant as a "monster"]; *People v. Hunter* (1942) 49 Cal.App.2d 243, 250-51 [reference to defendant as "vulture was inappropriate and . . . improper"]; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [prosecutor committed misconduct by characterizing defendant as an animal]; *Kellogg v. Skon* (8th Cir. 1999) 176 F.3d 447, 451-452 [prosecutor committed misconduct and created inflammatory prejudice by calling defendant "monster" and "sexual deviant"]; *Miller v. Lockhart* (8th Cir. 1995) 65 F.3d 676, 682-84 [prosecutor's "inflammatory" reference to defendant as a "mad dog" who should be "put to death," along with other statements, violated Eighth Amendment and required reversal of capital

conviction and sentence]; *Ippolito v. United States* (6th Cir. 1940) 108 F.2d 668, 670-671 [conviction reversed where prosecutor referred to defendant as "rattlesnake" and "skunk"]; *Ford v. Lockhart* (E.D. Ark. 1994) 861 F.Supp. 1447, 1468 [referring to defendant as a "beast" was improper]; *Childress v. Oklahoma* (Okla.Crim.App. 2000) 1 P.3d 1006, 1014 [prosecutor's reference to defendant as a "cornered rat" constituted "borderline argument"]; *Walker v. State* (Md.App. 1998) 709 A.2d 177, 186 [characterization of defendant as "an animal" was highly improper]; *Jones v. State* (Nev. 1997) 937 P.2d 55, 65 [prosecutor's reference to defendant as a "rabid animal" constituted misconduct]; *Commonwealth v. Collins* (Mass. 1978) 373 N.E.2d 969, 973 [the prosecutor's use of the term animal to refer to the defendant "was clearly an impermissible excess"].) Such "comments also create inflammatory prejudice" and "have no place in the courtroom." (*Kellogg v. Skon, supra*, 176 F.3d at p. 452.) "[D]ramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." (*Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 952.) "'[S]uch toying with the jurors' imagination is risky and the responsibility of the prosecutor is to avoid the use of language that might deprive a defendant of a fair trial.'" (*Jones v. State, supra*, 937 P.2d at p. 65, quoting *Pacheco v. State* (Nev. 1966) 414 P.2d 100, 104.)

It is also misconduct for the prosecutor to use a "golden rule" argument. A "golden rule" argument is "the suggestion by counsel that jurors should place themselves in the position of a party, a victim, or the victim's family members." (See *State v. McHenry* (Kan. 2003) 78 P.3d 403, 410.) Such arguments are improper and not permitted "because they encourage the jury to depart from neutrality and to decide the case on the improper basis of personal interest and bias." (*Ibid.*; see also *Lawson v.*

State (Md. 2005) 886 A.2d 876, 889-890 ["Such argument is impermissible because it 'improperly appeals to [the jurors'] prejudices and asks them to abandon their neutral fact finding role.'"]

Finally, it is misconduct "for the prosecutor to create an 'imaginary script' in order to create and arouse the prejudice and passion of the sentencing jury [in a capital case]." (*State v. Kleypas* (Kan. 2001) 40 P.3d 139, 287; see also *Hutchinson v. State* (Fla. 2004) 882 So.2d 943, 954 ["This type of argument is prohibited because it is an attempt to 'unduly create, arouse and inflame sympathy, prejudice and passions of [the] jury to the detriment of the accused.'"]; *Urbin v. State* (Fla. 1998) 714 So.2d 411, 421 [error for prosecutor to put imaginary words in victim's mouth]; cf. *Drayden v. White*, *supra*, 232 F.3d at pp. 712-713 [same rule in a non-capital case]; *White v. Commonwealth* (Ky. 2005) 178 S.W.3d 470, 491 ["The jury is required to decide a criminal case on the evidence as presented or reasonably deducible therefrom, not on imaginary scenarios."].)

In this case, the prosecutor's repeated references to appellant as an animal unfairly denigrated, dehumanized and degraded appellant in the eyes of the jury. Additionally, three of the prosecutor's five animal references were directed at appellant as he sat at counsel table. (18 RT 3155, 3161, 3164.) These three references by the prosecutor were improper and denied appellant his right to a fair and reliable penalty determination on the separate ground that he did nothing "apparent" in the courtroom to warrant this personal attack by the prosecutor. (Cf. *People v. Cunningham* (2001) 25 Cal.4th 926, 1023 [a prosecutor, at the penalty phase at which the defendant has placed his or her character in issue as a mitigating factor, may "make references to the defendant's facial demeanor apparent during the court proceedings"]; *People v. Heishman* (1988) 45 Cal.3d 147, 197

[same].)

The prosecutor's reading of the imaginary letters attributed to the victim's two young children was akin to an improper "golden rule" argument, and served only to inflame the sympathy and passions of the jury against appellant. (See *State v. McHenry*, *supra*, 78 P.3d at p. 410; *State v. Klepas*, *supra*, 40 P.3d at p. 293.) The prosecutor's tactic was apparent at the time she began reading the first letter, and the trial court should have sustained the defense objection to the prosecutor's argument and admonished the jury not to consider it.

The prosecutor's reading of the imaginary letters, in addition to being highly inflammatory, also violated appellant's right to a fair sentencing hearing in that the letters referred to future matters involving the victim's two children that were both speculative and irrelevant. (See *Lockett v. State* (Okla.Crim.App. 2002) 53 P.3d 418, 427 [statements about the victim's plans for the future are speculative and not relevant victim impact evidence]; *Phillips v. State* (Okla.Crim.App. 1999) 989 P.2d 1017 [same].)

In *Phillips*, *supra*, the victim's mother's testified at the penalty phase that defendant "had robbed her of seeing her son walk across the stage and get his high school diploma, of seeing her son go to his senior prom and to college and of being a grandmother." (989 P.2d at p. 1043.) The court said that the victim's mother's statements "concerning her desires for her son's future were speculative and may not have been relevant victim impact evidence." (*Ibid.*) The court upheld the death judgment but only after noting that the "victim impact evidence in this case comes very close to weighting the scales too far on the side of the prosecution by so intensely focusing on the emotional impact of the victim's loss." (*Ibid.*)

The prosecutor's "soliloquy in the voice of the victim['s children]" was also misconduct in that it "inappropriately obscured the fact that [her] role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim." (*Drayden v. White*, *supra*, 232 F.3d at pp. 112-113 [prosecutor delivered a soliloquy in the voice of the deceased victim during his closing argument, purporting to tell the jury what the victim would have said if he could have testified at the trial].)

Finally, by claiming to speak for the victim's two young children, the prosecutor improperly argued matters outside the record, and became an unsworn witness, presenting information to the jury that appellant had no way to challenge by way of cross-examination. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 827-828; *People v. Bell* (1989) 49 Cal.3d 502, 539; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825; *United States v. Beckman* (8th Cir. 2000) 222 F.3d 512, 527; *United States v. White* (7th Cir. 2000) 222 F.3d 363, 370.) "When this tactic is achieved in the guise of closing argument, the defendant is denied Sixth Amendment rights to confrontation and cross-examination." (*People v. Gaines*, *supra*, 54 Cal.App.4th at p. 825; see also *People v. Harris* (1989) 47 Cal.3d 1047, 1083 ["If a prosecutor's argument refers to extrajudicial statements not admitted at trial, the defendant may be denied his right under the Sixth Amendment to confrontation and cross-examination, thus requiring reversal of the judgment unless the court is satisfied beyond a reasonable doubt that the misconduct did not affect the verdict."]; *People v. Bolton* (1979) 23 Cal.3d 208, 213, 215, fn. 4 [same].)

C. Reversal Is Required

The prosecutor's unwarranted attacks on appellant's character, and her reading of the emotionally-charged fictionalized letters from the

victim's two young children undoubtedly caused appellant's jury to return a death verdict based on caprice or emotion, rather than on consideration of appellant's character and the circumstances of the crime.

The prosecutor's various acts of misconduct, both individually and collectively, require reversal of the death judgment because they violated appellant's state and federal constitutional rights to confrontation, due process and a fair and reliable penalty trial.[99]

In order to reverse on the basis of prosecutorial misconduct under state law, it must be shown that "had the prosecutor refrained from the misconduct, [it is] reasonably probable that a result more favorable to the defendant would have occurred." (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) In assessing a claim of prosecutorial misconduct, the reviewing court independently examines the record to determine whether there is a "reasonable likelihood" the jury misapplied the prosecutor's remarks during closing argument in violation of the federal or California constitutions. (See *People v. Clair* (1992) 2 Cal.4th 629, 662-663.) When, as here, the claim of misconduct focuses upon statements made by the prosecutor during closing argument, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; see also *People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Benson* (1990) 52 Cal.3d 754, 793.) Here, there can be no doubt

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[99] In evaluating the prejudicial impact of the prosecutor's misconduct at the penalty phase of appellant's trial, this Court must also take into account the prejudicial impact of the erroneously admitted victim impact evidence discussed herein. (See Argument IV, *ante*.) These two errors are inextricably linked to one another and together denied appellant his state and federal constitutional rights to a fair and reliable penalty trial.

that the jury construed the prosecutor's improper remarks "in an objectionable fashion." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.)

The prosecutor's improper closing argument denied appellant his right to a reliable penalty determination, and requires per se reversal of his death sentence under the Eighth and Fourteenth Amendments. The prosecutor's closing argument also involved deceptive and reprehensible methods of persuasion which rendered appellant's trial fundamentally unfair and violative of appellant's state and federal due process rights. Thus, reversal is required under both state and federal law. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

The penalty judgment in this case must be reversed. The case was a close one on penalty, as evidenced by the fact that appellant's penalty jury deliberated over seven court days, asked to see various exhibits and for a rereading of certain testimony, and twice announced that it was hopelessly deadlocked before returning its death verdict.[100] (See *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [jury deliberations of 12 hours indicate that the case was a close one]; accord, *Parker v. Gladden* (1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference among them"]; *Dallago v. United States* (D.C. Cir. 1969) 427 F.2d 546, 559 [jury deliberated for five days before returning its verdict]; *United States v. Brodwin* (S.D.N.Y 2003) 292 F.Supp.2d 484, 497 ["the jury found this a close case, as reflected by their five and a half days of deliberations before returning their verdict"].) Thus, the prosecutor's improper closing argument played an important role in convincing appellant's jury to return a

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[100] See II CT 425-433A, 450.

death verdict, just as the prosecutor intended. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments. . . ."].) Since the prosecutorial misconduct cannot be considered harmless beyond a reasonable doubt, the death judgment must be reversed. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 984.)]

VII

THE TRIAL COURT FAILED TO INSTRUCT THE JURY SUA SPONTE ON THE APPROPRIATE USE OF THE VICTIM IMPACT EVIDENCE IN THIS CASE

It is settled law that the trial court is responsible for ensuring that the jury is correctly instructed on the law. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The trial court must instruct sua sponte on the principles which are openly and closely connected with the evidence presented and necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Defense counsel did not request an instruction regarding the appropriate use of the extensive victim impact evidence that was admitted at trial. However, that did not relieve the trial court of its responsibility to provide the jury with the guidance it needed to properly consider the victim impact evidence in this case. An appropriate limiting instruction was necessary for the jury's proper understanding of the case, and therefore should have been given on the court's own motion. (See generally *People v. Murtishaw*, *supra*, 48 Cal.3d at p. 1022; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1085; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; see also *People v. Stewart* (1976) 16 Cal.3d 133, 138-140 [defendant's request for an instruction that was an incomplete statement of the law was sufficient to alert the trial court to give, sua sponte, a correctly worded instruction on defendant's theory].)

"Because of the importance of the jury's decision in the sentencing

phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that whenever victim impact evidence is introduced the trial court must instruct the jury on its appropriate use, and admonish the jury against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich, supra*, 776 A.2d at p. 181;[101] *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State, supra*, 486 S.E.2d 839, 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required cautionary instruction varies

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[101] In *State v. Koskovich, supra*, the New Jersey Supreme Court held:

> We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(776 A.2d at p. 177.)

in each state, depending on the role victim impact evidence plays in that state's statutory scheme, common features of those instructions include an explanation of how the evidence can properly be considered, and an admonition not to base a decision on emotion or the consideration of improper factors. An appropriate cautionary instruction would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(See *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159; see also *State v. Koskovich*, *supra*, 776 A.2d at p. 177.)[102]

In *People v. Ochoa* (2001) 26 Cal.4th 398, 455, this Court addressed a different proposed limiting instruction, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, which was also given in this case (II CT 436; 18 RT

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[102] The first four sentences of this instruction come from the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at page 159. The last sentence is based on the decision of the New Jersey Supreme Court in *State v. Koskovich*, *supra*, 776 A.2d at page 177.

3071-3072).[103] However, CALJIC No. 8.84.1 does not cover any of the points made by the instruction proposed here. For example, it does not tell the jury why victim impact evidence was introduced, and does not caution the jury against an irrational decision.

CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victims' relatives.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction appellant proposes here would have conveyed that message to the jury; none of the instructions given at the trial did that. Consequently, there was nothing to stop raw emotion and other improper considerations

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[103] CALJIC No. 8.84.1 reads in relevant part:

> You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

from tainting the jury's penalty decision. The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that they affected the penalty verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In view of the sheer volume and inflammatory nature of victim impact evidence admitted in this case (see Argument IV, *ante*, at pp. 139-152), and the manifest closeness of the case (see *id.* at pp. 166-167), the trial court's instructional error cannot be considered harmless, and therefore reversal of the death judgment 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 violate the United States Constitution. This Court, however, has consistently rejected arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's capital punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

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

A. The Broad Application Of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the penalty jury to consider in aggravation the "circumstances of the crime." (CALJIC No. 8.85; II CT 438; 18 RT 3076.) Prosecutors throughout California have used this factor to argue almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such

as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (See *People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges this Court to reconsider this holding.

B. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

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

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

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 530 U.S. 584, 604, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: the jury had to determine whether any mitigating or aggravating factors were present; the jury had to decide whether the aggravating factors outweighed the mitigating factors; and the jury had to decide whether the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; II CT 441-442; 18 RT 3087.) Because these additional

findings were required before the jury could impose the death sentence, *Ring*, *Apprendi* and *Blakely* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct appellant's jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.)

This Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), nor does it require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) This Court has also rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* o that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

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

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

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (II CT 438-439, 441-442; 18 RT 3075-3078, 3085-3087), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

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

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

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

Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his or her sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that jury unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks this Court to reconsider its decisions in *Taylor* and *Prieto*, and require jury unanimity as mandated by the federal Constitution.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether appellant's jury was "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (II CT 442; 18 RT 3087.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

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

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

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (*People v. Arias* (1996) 13 Cal.4th 92, 171 ["By advising that a death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' the instruction clearly admonishes the jury to determine whether the balance of aggravation

and mitigation makes death the appropriate penalty."].) These determinations are not the same.

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

This Court has previously rejected this claim (see *People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges this Court to reconsider its rejection of this claim.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

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

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014.) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life without possibility of parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Jury Instructions Failed to Inform the Jurors That Even If They Determined That Aggravation Outweighed Mitigation, They Still Could Return a Sentence of Life Without the Possibility of Parole

Pursuant to CALJIC No. 8.88, appellant's jury was instructed that a death judgment cannot be returned unless the jury unanimously finds "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (II CT 442; 18 RT 3087.) Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. Under *People v. Brown* (1985) 40 Cal.3d 512, 541, the jury retains the discretion to return a sentence of life without the possibility of parole even when it concludes that the aggravating circumstances are "so substantial" in comparison with the mitigating

circumstances. Indeed, under California law, a jury may return a sentence of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) The jury instructions in this case failed to inform appellant's jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346).

The decisions in *Boyde v. California* (1990) 494 U.S. 370, 376-377 and *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307, do not foreclose this claim. In those cases, the high court upheld, over Eighth Amendment challenges, capital-sentencing schemes that mandate death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. That, however, is *not* the 1978 California capital-sentencing standard under which appellant was sentenced to death. Rather, this Court in *People v. Brown*, *supra*, 40 Cal.3d at p. 541, held that the ultimate standard in California is the appropriateness of the penalty. After *Boyde*, this Court has continued to apply, and has refused to revisit, the *Brown* capital-sentencing standard. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 949, fn. 33; *People v. Hardy* (1992) 2 Cal.4th 86, 203; *People v. Sanders* (1990) 51 Cal.3d 471, 524, fn. 21.)

Appellant is aware that this Court has repeatedly rejected this claim. (See *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 170.) Nevertheless, he urges this Court to reconsider this claim.

8. The Jury Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

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

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

A requirement of jury unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had appellant's jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable

likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

9. The Penalty Jury Should Be Instructed on the Presumption of Life

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

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

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital

cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this argument demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

C. Failing To Require That The Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

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

D. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85, factors (d) and (g); see also II CT 438; 18 RT 3076-3077) acted as barriers to the

consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that this Court has rejected this very argument (see *People v. Avila* (2006) 38 Cal.4th 491, 614), but urges its reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Several of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case, such as factor (e) ["Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act."]; factor (f) ["Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct."]; factor (g) ["Whether or not the defendant acted under extreme duress or under the substantial domination of another person."]; and factor (j) ["Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."]. Nevertheless, the trial court failed to delete those factors from the instructions given to appellant's jury (II CT 438-439; 18 RT 3077-3078), likely confusing appellant's jury and preventing it from making a reliable determination of the appropriate penalty. Appellant is aware that this Court rejected this very argument in *People v. Cook* (2006) 39 Cal.4th 566, 618). Nevertheless, appellant urges this Court to reconsider its decision in *Cook*, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the

instructions given to appellant's jury advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. This Court has upheld this practice. (*People v. Cook, supra*, 39 Cal.4th at p. 618; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – 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. Davenport* (1985) 41 Cal.3d 247, 288-289). However, appellant's jury was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. As a result, appellant's jury was invited to aggravate his sentence based on non-existent or irrational aggravating factors thereby precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. As such, appellant asks this Court to reconsider its prior decisions that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

E. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

California's capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against

proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require inter-case proportionality review in capital cases.

F. California's Capital Sentencing Scheme Violates the Equal Protection Clause

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

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

G. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected numerous times the argument that the use of

the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or evolving standards of decency. (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions and declare unconstitutional California's use of the death penalty.

IX

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 436-437 [the cumulative effect of errors, none of which individually is significant, could be collectively significant]; *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].)[104] Reversal is thus required unless it can be said that the cumulative effect of all of the errors was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

In the present case, the combined effect of the errors committed at the penalty phase of appellant's trial includes the erroneous admission of highly prejudicial victim impact evidence (Argument IV); the erroneous denial of appellant's request for a short continuance in order to present

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[104] Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

surrebuttal evidence to support the credibility of key defense mitigation expert Dr. Nancy Kaser-Boyd (Argument V); prosecutorial misconduct (Argument VI); and numerous instructional errors that undermined the reliability of the jury's death verdict (Arguments VII and VIII). Because it cannot be shown beyond a reasonable doubt that these errors, either individually or collectively, had no effect on the penalty verdict, reversal of appellant's death judgment is required. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

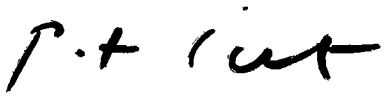
CONCLUSION

For all the reasons stated above, the entire judgment must be reversed.

DATED: January 17, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(b)(2))

I, Peter Silten, am the Deputy State Public Defender assigned to represent appellant in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is approximately 66090 words in length.

P. R. Silten

PETER R. SILTEN
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Randy Eugene Garcia* No. S045696

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed, respectively, as follows:

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Randy E. Garcia
(Appellant)

Each said envelope was then, on January 17, 2007, sealed and deposited in the United States mail at San Francisco, 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.

Signed on January 17, 2007, at San Francisco, California.

_____
DECLARANT