ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PHILIAN EUGENE LEE, Defendant and Appellant.	No. S080550 (Riverside County Superior Court No. CR-67398)

APPEAL FROM THE SUPERIOR COURT COUNTY OF RIVERSIDE

Honorable, Christian F. Thierbach, Judge

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Pen. Code, § 1239, subd. (b)[1].)

CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 87,165, not including tables, and thus is within the limits (95,200 words) of California Rules of Court, rule 36, subdivision (b).

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1 All references are to the Penal Code, unless otherwise noted.

INTRODUCTION

This capital case, as well as appellant's first degree murder conviction, is premised upon a purported single act of attempted rape committed by Appellant Phillian Lee at the age of 18. The state of the evidence for attempted rape was such that even the trial judge was prompted to remark that he would not have been surprised if the jury found that the attempt had not been made. (RT 3081.) Appellant had no prior felony record. The prosecution's premise is false for four reasons. First, there was insufficient evidence that rape was attempted. Second, the trial court failed to *sua sponte* adequately define consent for the defense to attempted rape. Third, even if the definition of consent accurately reflected California law at the time of appellant's trial, it violated due process in three ways—it failed to provide adequate notice and opportunity to defend, it was an improper first-time application of a new definition for consent, and it excluded a *mens rea* for the crime of rape offending fundamental principles of justice. Fourth, the definition of consent provided the jury violates due process by creating a presumption that a rape victim has not consented unless she expresses her cooperation in the sexual act in some perceptible way.

These flaws in the prosecution's case were exacerbated by the improper introduction of appellant's nickname of "Point Blank" that suggested gang affiliation and characteristics of character that were irrelevant to any issue in the case coupled with the prosecution's egregious exaggeration during closing argument of its evidence of lack of consent as well as the court's imprimatur placed on that exaggeration, and other instructional errors.

In the penalty phase of the trial, the defense developed the life forces that setup 18 year old Philian Lee to act as he did. It provided a history of a repetitive failure of his family, school, and support systems to provide him the succor and control that should have been his right and was certainly his need. To overcome this compelling account, the prosecution was improperly permitted to compound

their false premise of attempted rape with four incidents committed by appellant when he was a juvenile, three of which were committed when he was 15 years old or less, and a misdemeanor judgment predicated on impermissible hearsay.

STATEMENT OF THE CASE

By information filed July 3, 1996, appellant was charged with the murder of Mele Kalani, in violation of section 187. It was alleged that the offense was committed with malice aforethought; that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a); and that the offense was committed while appellant was engaged in the commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime of rape in violation of section 261, subdivision (a)(2), within the meaning of the special circumstance in section 190.2, subdivision (a)(17)(iii). (CT[2] 21-22.)

Appellant pled not guilty and denied the allegations. (CT 219.)

Immediately before trial, the prosecution agreed to proceed solely upon the theory that the murder was committed while appellant was engaged in the *attempted* commission of rape. (RT 335-336.) Pretrial motions were heard on February 23 and March 2, 1999. (CT 671-378, 757-758.) Jury selection began on the latter date and a jury was impaneled on March 18, 1999. (CT 5847.) On the first day of the evidentiary portion of the trial, appellant's mother collapsed in the

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[2] The record on appeal consists of 41 volumes of Clerk's Transcripts, designated 1 through 41, and Supplemental Clerk's Transcripts designated THIRD through FIFTH. These will be cited as CT and 2-41CT, as appropriate, and CT2 through CT5, respectively.

The record also includes Reporters' Transcripts consisting of 18 volumes, designated 1 through 18, and a volume designated "PRE-TRIAL." These will be cited as RT and 2-18RT, as appropriate, and PreTrialRT, respectively.

courtroom and shortly thereafter passed away. (CT 5948, RT 826-843.) A defense motion for mistrial was granted. (CT 5951.)

Selection of a new jury began on March 29, 1999 (CT 5953-5944) and a jury was impaneled on April 6, 1999 (CT 10829.) Evidence was heard over the course of six court days. (CT 10830-10837, 10841-10844.) Jury deliberations on the guilt phase began at 1:50 p.m. on April 20, 1999. (CT 10855.) The next day at 1:00 p.m., the jury found appellant guilty of first degree murder and found true the allegations that appellant personally used a firearm within the meaning of section 12022.5 and that the murder was committed while appellant was engaged in the commission of the crime of attempted rape (§ 261, subd. (a)(2)), within the meaning of section 190.2, subdivision (a)(17)(iii). (CT 10857, 10860-10862.)

The evidentiary portion of the penalty phase began on April 26, 1999 and consumed four court days. (CT 10878-10880, 10888-10891, 10894-10895.) Jury deliberations began at 2:18 p.m. on May 3, 1999, and two days later at 1:15 p.m., the jury fixed the penalty at death. (CT 10878-10880, 10888-10891, 10894-10895, 10937-10938, 10942-10943.)

On July 9, 1999, the court denied appellant's motion to modify the verdict and imposed a sentence of death. (CT 11032-11041.)

STATEMENT OF FACTS

A. Guilt Phase

1. PROSECUTION'S CASE

In the early morning hours of February 22, 1996, Mele Kekaula, aged 17, was killed while in the company of three school friends, appellant, Jarrod Gordon,

and Devin Bates. The prosecution's case rested principally upon the testimony of the latter two companions.[3]

Devin Bates lived with his parents in Mead Valley; he was 18 years old at the time of the homicide. (RT 1441.) In the evening of February 21, 1996, he was home with three male friends when he received a telephone call from Jarrod Gordon. (RT 1441-1442, 1710-1711.) He had not seen Jarrod for three months; they were friends from school, but not good friends. (RT 1442, 1708.)

As a result of the call, Devin and three of Devin's friends drove to Jarrod's house where Jarrod lived with his great-aunt. (RT 1443-1444, 1686, 1711-1712.) Jarrod was 17 years old at the time. (RT 1687, 1704.) Jarrod had broken his back in December 1995 and had to wear a hard plastic brace that ran from his neck to his hips and required him to use a wheelchair. He could not move his left hand and wore leg braces. He could not walk, although he could stand if he had something to lean against. (RT 1687-1688, 1704-1707.)

Jarrod had just purchased a four-door Nissan Sentra with an automatic transmission. (RT 1374, 1709-1710, People's Exh. 12.) The group, now five, left Jarrod's home in two vehicles, with Devin driving Jarrod's car. Jarrod was not permitted to drive, and the other boys followed in the vehicle in which they had arrived. (RT 1712-1713.) Jarrod's wheelchair was in the trunk. (RT 1714.)

At Jarrod's suggestion, they drove to where appellant was staying with his father, arriving shortly after 10:00 p.m. (RT 1367-1369, 1714.) Devin had not met appellant before, and Jarrod told Devin that appellant was a very good friend whom he had known for a couple of years. (RT 1449-1450, 1709.) Jarrod introduced appellant as Point Blank. (RT 1446, 1448.) Appellant lived at his

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[3] Jarrod Gordon and Devin Bates had suffered prior felonies involving moral turpitude, Jarrod had accumulated eight and Devin Bates had two. Two of Jarrod's prior felonies involved sexual assault. (RT 1523-1524, 1538-1540, 1591, 1925A, 1783-1785.)

father's house on Wintergreen Court in Moreno Valley, which was shared with his stepmother, his girl friend, and his brother, his brother's girlfriend, and their child. (RT 1366-1367, 1375, 1395, 1412-1413, 1448.) Appellant kept a .22 caliber handgun in his room. (RT 1379, 1390-1392, 1405-1407, 1528.) Appellant was going to show Jarrod where to hang out in Moreno Valley. (RT 1449.)

After about an hour, the group, now six, left with appellant seated in the rear seat of Jarrod's car. Devin drove, and Jarrod sat in the front passenger seat. The other boys followed in their vehicle. (RT 1383-1385, 1450-1451, 1715.) The plan was to pick up a couple of girls. (RT 1452, 1566-1567, 1569, 1575-1576.) None of them had had anything to drink. (RT 1452-1453.) While they were driving around the Moreno Valley area, the second vehicle was involved in an accident. (RT 1453-1455, 1570-1571, 1719-1720.) After confirming that there were no injuries, the occupants of Jarrod's car left their friends to deal with the accident. (RT 1454-1455.)

During their wanderings, Jarrod told them that he knew some girls they could pick up who would strip for them. (RT 1568.) At Jarrod's suggestion, they drove to Mele's house, apparently prompted by the fact that it was within a few blocks of the accident. (RT 1455-1457, 1721, 1793-1794.) It was after midnight. (RT 1462.) Jarrod had met Mele in high school and since his release from the hospital had seen her "[a] whole bunch of times." (RT 1792.) He drank with her and they had a relationship. (RT 1722, 1724, 1792-1793.)

Jarrod discussed with his companions Mele's reputation for being easy and told them that he had been sexually intimate with her two days before. (RT 1457, 1577-1578, 1581, 1596, 1722.) There was a rumor that she had the AIDS virus (RT 1458, 1580), and he had worn two condoms when he had sex with her (RT 1580-1581.) Devin had known her since he was in the fifth grade (RT 1461, 1587-1588) and appellant knew her (RT 1585-1586.) When they arrived at her

house, or possibly later, Jarrod offered his companions condoms, which they accepted. (RT 1458-1460, 1550, 1577, 1584, 1641.) Devin denied planning to have sex with her (RT 1458-1459, 1584) and testified that appellant too did not express any desire to do so (RT 1460.) There was no talk about raping her or forcing her to have sex, or getting her drunk so they could have sex with her. (RT 1585.)

Mele came out of the house and hugged all three boys. (RT 1460-1462, 1795, 1955.) They invited her to hang out with them, and she accepted the invitation. (RT 1462-1463, 1724.) She got into the backseat with appellant (RT 1464, 1725) and they drove around with no particular destination in mind (RT 1464.) Appellant suggested a couple places where there was a view of the valley; the first was Pigeon Pass and appellant directed them there. (RT 1465-1466, 1725-1726.) It was a fairly secluded place and they stayed there about 20 minutes; no alcohol was drunk and no one was physically intimate with Mele. (RT 1466.) Jarrod fired appellant's handgun into the air while they were there (RT 1562-1564, 1593, 1651, 1728-1730) and saw appellant reload it (RT 1729.)

They returned to the city area of Moreno Valley and went to a grocery store to get something to eat. (RT 1467-1468, 1731.) Jarrod bought a large bottle of Bacardi rum. (RT 1469-1470, 1716, 1718, 1733, 1793.) Devin testified that this was the only alcohol in the car that night (RT 1470), but at the preliminary hearing Jarrod testified that appellant had also bought some alcohol that was subsequently consumed (RT 1733-1734.) They all drank, except for Devin. (RT 1470-1471, 1483, 1734.) Mele drank more than the others did. (RT 1471, 1609, 1669A.) They drank from the bottle. (RT 1610, 1670A.)

At some point, Mele took over the driving and Devin sat in the backseat with appellant. (RT 1473, 1735.) Devin testified that while she was driving, Jarrod was leaning towards her most of the time, although Devin could not see

what Jarrod was doing. (RT 1474-1475.) He saw them kissing when the car was stopped. (RT 1474.) Jarrod testified that he stuck his hand down her pants and she never indicated that she wanted him to stop, to which Devin attested. (RT 1597-1598, 1735-1736.)

At a gas station, while Mele was in the restroom, Jarrod told his companions that he had been "finger-banging" her. (RT 1476-1478, 1596-1597, 1736, 1796.) Devin and Jarrod testified that appellant replied that this was nothing—he too had also done it while she was in the back seat with him. (RT 1598-1600, 1796-1797.) Devin and Jarrod never heard Mele express any reaction to appellant, seem upset, or ask to go home. (RT 1600, 1798.)

When Mele returned, Devin took over the driving and she sat in the back seat with appellant while Jarrod maintained his position in the front passenger seat. (RT 1478-1479, 1605.) One of them suggested another lookout area on Cactus Avenue, to which they drove. (RT 1479-1482, 1601-1603, 1737-1739, 1817.) Cactus Avenue runs east and west through a remote area and comes to an end at a water tower. (RT 1482, 1485, 1829, 1832, 1908; People's Exhs. 1-2.) As they turned on to Cactus, they observed another car parked. Mele suggested they stop, which they did. (RT 1482, 1485, 1603-1604, 1671; People's Exh. 60.) When the other car left, they drove to the end of the Avenue, turned around, and parked on the north side of the road. (RT 1483, 1485-1486, 1603-1605; People's Exh. 1.) No other cars or people were around. (RT 1485.)

By this point, Mele's speech was slurred. (RT 1487, 1743.) She continued to drink. (RT 1487.) Jarrod (RT 1611, 1671A-1672A, 1744, 1748-1749, 1800) and appellant were also intoxicated (RT 1800-1801.) The four discussed the rumor that Mele had AIDs. She denied it was true and said she had gotten a bad rap from women who were jealous of her; she wanted to leave the area so she could start over. (RT 1582-1584, 1647-1648.)

While they were parked, they all got out of the car. (RT 1486.) Mele and appellant were in and out of the car a lot. (RT 1615, 1674A-1675A.) Devin estimated they were there for approximately an hour and a half. (RT 1486-1487.) Mele developed other signs of intoxication. (RT 1487.) She became more incoherent, as Devin described it, "out of it completely. Not passed out, but not aware of her surroundings." (RT 1487-1488.) Appellant fired the gun once or twice into the air. (RT 1945-1946, 1956, 1967.) Eventually all but Devin vomited. (RT 1491, 1610-1611, 1670A-1671A, 1743-1745, 1800.) As a result, the car was moved 20 paces forward. (RT 1491-1492.)

Twice while they were parked, once inside and once outside, Mele tried to slap or hit them all. (RT 1617-1619, 1676A-1679A.) At another point, Mele and Jarrod were in the front seat of the car kissing. (RT 1672A.) Once, when Mele was outside the car, she fell and, at her request, Devin helped her get up and ushered her to the backseat of the car, on the driver's side. (RT 1492-1495, 1745, 1747.) She dropped to the seat as if she was tired (RT 1495) and lay back with her legs hanging out of the side of the car (RT 1496-1497, 1748.)

Devin walked around to the passenger side of the car and sat in the front passenger's seat; Jarrod at this point was in the driver's seat. (RT 1497, 1537, 1747.) Devin's door was closed, but the rest of the doors were open. (RT 1497-1498.)

Devin testified that at some point, he saw appellant by Mele's open door, on the driver's side of the car. (RT 1498, 1623.) He was fondling her breasts over the top of her clothes. (RT 1498-1499, 1673A.) However Devin acknowledged that he had not mentioned this when interviewed by the police or at the preliminary hearing. (RT 1673A.) Devin did not hear her say anything. (RT 1499, 1626, 1686A.) Devin testified that she was "if not completely out of it, very close to." (RT 1499, 1548, 1626, 1686A.) Appellant took off Mele's shoes and

pants (RT 1499, 1619, 1679A, 1750) and threw them by Devin's feet (RT 1499-1500, 1619, 1679A.) Devin said that, Jarrod was looking back to see what was going on from his position in the driver's seat. (RT 1620, 1679A.) When interviewing officers asked Devin if she was fighting, he replied, "Nuh uh, she wasn't at all." (RT 2161.) When asked if she was passed out, he replied, "Nah, she was talkin' the whole time." (RT 1629, 1688A-1689A, 2162.) Devin testified that Jarrod leaned towards the rear and assisted in removing her shoes and pants (RT 1620, 1680A), a fact that Jarrod denied (RT 1750.) As her clothes were being removed, Mele repeatedly said she was drunk, so Jarrod told her to squeeze his finger, which she did. (RT 1630-1631, 1690A.) That, according to Devin, prompted Jarrod's comment, "No, you're not drunk..., you can still squeeze my finger." (RT 1630, 1690A.) At some point, after her pants had been removed, she called Devin's name and he turned around and asked what she wanted. (RT 1629, 1689A.)

Jarrod told the officers that he did not know how her clothes came off. (RT 1957.) However, at trial, when Jarrod was asked what Mele was doing as appellant was taking off her clothes, he replied, "Pushing him away" (RT 1754,) but later he testified that he did not remember whether he saw appellant take off her shoes and pants (RT 1801.)

Devin testified that he heard a package being opened and appellant say that he had a condom on, which appellant referred to as a "hat" (RT 1500, 1547-1549, 1634, 1756, 1805), although Devin did not see this (RT 1551) and Jarrod did not remember it (RT 1805.) Devin testified that appellant said, "'He was about to get it, get some....'" (RT 1501.) Devin looked back over his left shoulder, and he saw appellant lower his zipper and straddle Mele; his pants were six inches below his waist, his belt was hanging loose, but Devin said that he was not able to see appellant's penis or any part of his body bared. (RT 1501-1502, 1620-1625,

1682A-1684A, 2169.) At the preliminary hearing, Devin testified that he was not able to see whether appellant had his pants or his zipper pulled down. (RT 2169.) Devin testified that he assumed appellant had his penis out based on the placement of his left hand. (RT 1635-1636.) Mele did not move during all of this. (RT 1626-1627.)

Jarrod told interviewing officers that appellant's pants were up when he was on top of her and he did not know if they were zipped or unzipped. (RT 1804, 1957-1958.) At the preliminary hearing he testified, "I did see him pull his pants down and stuff" (RT 1756-1757, 1803-1804,) but at trial he first testified that he did not remember the position of appellant's pants (RT 1756), later did not remember because he was not paying attention (RT 1801), and finally said he saw them down below his waist (RT 1803-1804.) Jarrod told the officers she was "like, awake and stuff." (RT 1958, 1968.)

Devin and Jarrod testified that they saw appellant's chest touch hers (RT 1502, 1757-1758) and he moved his hips up and down (RT 1503, 1759-1760.) Devin testified that Mele did not say anything or move for at least three minutes. (RT 1503, 1537, 1627, 1687A.) Jarrod estimated that appellant was not on Mele long; it was rather quick. (RT 1806.) Jarrod never said he saw her resist. (RT 1962.)

Devin initially testified (and later confirmed) that Mele then seemed to snap out of it and "forced him off of her ... [w]ith a mere push." (RT 1503-1504, 1663-1664.) She said something like, "What do you guys take me for? Do you think I'm a toss-up whore or something?" (RT 1504-1505, 1631, 1655-1656, 1664-1665, 2163-2164.) At another point, Devin testified that appellant was still on her when (RT 1655-1656) she seemed almost to be in "a fit of rage, as if she was disgusted by what was going on" (RT 1504, 1507-1508.) Interviewing officers asked Devin what appellant said, and Devin replied, "He was sayin', no I—you

mistakin' me. You mistakin' me. He said somethin' about how you know what we came up on the hill for." (RT 2162-2163.) Appellant then "got right off." (RT 1504-1505, 1537, 2162.) "Devin said something to try to calm her down and he turned on the dome light (RT 1632, 1692A), but appellant turned it off and said he was going to straighten her out. (RT 1657.) Devin had no doubt that appellant had attempted to have sex with her. (RT 1528-1529.)

Jarrod testified that she said in a loud voice words to the effect that she wanted appellant off her, and she pushed him off. (RT 1754, 1760-1761, 1806-1807, 1969-1971.) Appellant immediately got off. (RT 1807.) Jarrod said she was not so drunk that she did not know what was she was doing. (RT 1807.)

Devin testified that he saw her panties and never saw them removed. (RT 1633.) When her body was found, she was wearing her underwear. (People's Exhs. 4-7.) Appellant never got back on Mele or made any other sexual advances. (RT 1537-1538.) Appellant did not get out of the car; they just sat down in the back seat and "she sort of was primping herself." (RT 1505-1507.) They talked for a while and there was a lot more said. (RT 1506-1507, 1546, 2162.) During the evening, Mele never asked, or mentioned that she wanted, to go home. (RT 1588-1589.)

Appellant got out of the car and said he wanted to talk to Mele. (RT 1553.) Devin testified that appellant or Jarrod said, "We're just going to leave her here." (RT 1553-1554, 2163-2614.) Appellant walked around to the rear door on the passenger side of the car. (RT 1508-1510, 1552.) He reached inside and took hold of Mele's arm above the elbow. (RT 1510, 1650, 1762-1763.) She resisted a little. (RT 1555, 2164.) He pulled her out of the car. (RT 1510, 1661, 2164.) As they went to the rear of the car, she fell onto her knees, and he held her by her forearm to assist her. (RT 1510-1512, 1555-1558, 1650.)

On the dirt shoulder at the rear of the car, they could be seen talking—not loudly—and she was making some hand or head gestures. (RT 1512-1513, 1515, 1558-1559.) Jarrod was still in the driver's seat. (RT 1512.) Devin heard appellant say, "Is that it? Is that how it was gonna be.?" (RT 1513.) Jarrod heard, "It's like that, huh." (RT 1766.) Appellant put his left arm around Mele with her neck in the crook of his arm. (RT 1512-1513, 1559, 2150-2151.) She was facing him. (RT 1513-1514.) He pulled a gun from his back pocket, put it to her face (RT 1514-1515), and fired (RT 1515, 1560-1561, 1766-1767.) She fell motionless to the ground. (RT 1515.) Appellant straddled her and put the gun within six inches of her face, and then fired six or seven times more. (RT 1516, 1767-1769.)

Appellant then raced back to the car and got in the back seat. (RT 1516-1517, 1769.) Devin testified that he asked appellant why he had done that, but appellant did not respond and said, "Drive." (RT 1517, 1770.) Jarrod testified that appellant said he shot her because she would not have sex with him. (RT 1770-1771.) Jarrod drove to where Cactus Avenue meets the road they came on. At appellant's suggestion, Devin drove from then on because he was sober. (RT 1517-1518, 1770, 1772-1773.)

During the drive, Jarrod asked appellant if he was sure that she was dead. (RT 1519, 1658.) Appellant did not reply. (RT 1519.) Jarrod said, "'So is that why they call you Point blank?'" (RT 1659.) Appellant did not respond. (RT 1659.) Appellant's demeanor was calm. (RT 1519, 1660, 1773-1774.) Devin testified that at some point, appellant started singing, "almost like verses of rap music, like making gestures towards what he had just done" (RT 1519), "[s]ort of like giving himself praise. I'm not sure what he said, but he was making it up as he went along" (RT 1520.) He said something about how "he had to do what he done because he didn't get his nut off," meaning he did not have an orgasm. (RT 1520.) Devin testified that appellant said, "'They're never gonna really have to

make a rap about my name being Point Blank.'" (RT 1659.) Jarrod recalled the song, "I didn't want to shoot you, didn't want to kill you, bitch, but you wouldn't give me any pussy." (RT 1775-1776, 1786, 1789.)

Devin testified that appellant never told them why he shot Mele (RT 1565) and said he believed appellant said he had been able to have "some kind of sex or penetrate Mele" (RT 1642-1644.)

On the way home, Jarrod and appellant threw Mele's clothes out of a car window. (RT 1520, 1775, 2155-2157.) They also threw out the bottle of alcohol, which Devin testified was still a third full. (RT 1520-1521, 2159-2160.) During the drive, Devin testified that appellant asked him where he was from and he replied, "Nowhere." (RT 1521.) Then appellant told him, "Put it on your mother that you won't tell...." (RT 1521, 1771.) Appellant made the same request of Jarrod. (RT 1522.) At some point, appellant said he would trade the gun for marijuana. (RT 1522.) He said he wanted to pin the murder on someone else. (RT 1523.)

At about 5:00 a.m., they arrived at Devin's home where he lived with his parents and siblings. (RT 1417-1418, 1523, 1540.) Devin told his parents what he had witnessed. (RT 1421, 1523, 1540.) His mother testified that he was crying and very upset. (RT 1418-1419, 1421.) He took a shower and changed his clothes, leaving the clothes he had worn on his bedroom floor. (RT 1540, 1649.) He never called 911 or the police, but that morning his parents took him to see his probation officer; he was on juvenile probation at the time. (RT 1421-1422, 1523-1524, 1541.) Devin spoke with a probation officer and told him what had happened, during which Devin broke down and cried. (RT 1423, 1433-1435.) Later that morning he was taken to the Moreno Valley Police Department, where he remained until midnight, a period of 14 hours during which he was interviewed extensively. (RT 1421-1425, 1427, 1432, 1437-1439, 1525-1526, 1543, 2148-

2149.) He gave the police permission to seize the clothes he had been wearing, and he showed them where Jarrod lived. (RT 1426, 1527.) A sealed Trojan condom was found in the pocket of the pants Devin had been wearing that night. (RT 1893-1896.)

Jarrod returned to his great-aunt's house, with appellant driving. (RT 1690-1691, 1776-1777.) Jarrod got into bed without changing his clothes, and appellant lay down on the floor beside him. (RT 1692, 1780.) Jarrod's great-aunt told appellant she would take him home when she took Jarrod to therapy. (RT 1693.) She woke them around 7:00 a.m. (RT 1693.) Appellant called his girlfriend at his father's house and told her he was coming home and to unlock the door for him. (RT 1400-1401.) Jarrod's great-aunt dropped appellant off at his father's home. (RT 1694.) Appellant took off his pants, but not his shirt, and went to bed. (RT 1402.) His girlfriend, on her own initiative, washed his pants. (RT 1402, 1409.)

To his great-aunt, Jarrod seemed to be sort of dazed that day; he did not talk or do much, and his therapist had trouble getting him to respond during their session. (RT 1694.)

That morning, Mele's body was found by a jogger, lying on its back on the north side of the road. (RT 1672, 1674, 1832.) She was wearing only a shirt, a Pendleton type jacket, green panties, and socks. (RT 1674-1675, 1833-1835; People's Exhs. 2, 4-7.) Casings from .22 cartridges were found near her body, and five more were found about 30 yards to the east. (RT 1836-1850, 1852-1854; People's Exhs. 4, 40-51.) A criminalist testified that in his opinion, all of the casings had been fired by the same firearm. (RT 1870-1873.) Vomitus fluid was found near the latter casings. (RT 1854-1855.)

At about 6 p.m. that evening, officers contacted Jarrod. (RT 1678, 1694.) He volunteered, "I didn't do it. I can't go to jail." (RT 1679.) The following day, police searched the residence of appellant's father. (RT 1681.) Officers executing

the search warrant found appellant's pants and a sealed Trojan condom inside the dryer. (RT 1389, 1410-1412, 1898-1901, People's Exh. 39.) Appellant was not at home at the time. (RT 1682.) His brother, Lenier, told police appellant would turn himself in, and he did. (RT 1682-1683, 2157-2158.) The gun was never found. (RT 1859-1860, 1863, 2157.)

A blood sample was collected from Mele's body. (RT 1960, 2021.) The pathologist looked for indications of trauma consistent with a sexual assault, but found none. There was no indication of trauma to the breast area, upper inner thigh area, external vaginal area, or the internal aspect of the genital organs. (RT 2021, 2025, 2031-2033, 2052, 2059-2060.) No substance transfer to the vaginal or upper thigh areas could be seen with the naked eye. (RT 2029-2030, 2032.) The introitus was swabbed so that it could be examined with a microscope (RT 2029-2030), but the outcome was not disclosed.

Mele had seven gunshot wounds to the head, fired from close range by a .22 caliber handgun. (RT 1607, 1675, 1708, 1979, 1981, 1992-1993, 1996, 2000, 2002-2006, 2008-2009, 2023-2024, 2037-2040; People's Exhs. 13-14, 17, 19-20, 72.) She had bruises on her left arm that were consistent with their having been sustained as she was being pulled by the arm. (RT 2010-2013, 2020, 2042, 2046-2050; People's Exhs. 22, 26.)

2. DEFENSE'S CASE

A toxicologist examined the blood sample collected from Mele and found it to contain .14 percent alcohol. (RT 2219, 2220-2222.) That would accurately reflect the level at the time of her death. (RT 2231.) The toxicologist testified that one would need a blood alcohol level of over .20 and closer to .25 to be rendered unconscious. (RT 2224-2225.) A person at that level would not readily be roused. (RT 2225.) A person experienced with alcohol may be able to drive with a .14

level; others with less experience might fall asleep or be unsteady on their feet. (RT 2229-2230.)

Jarrod Gordon had an extensive criminal record of eight crimes of moral turpitude from 1991 thorough 1998, approximately half of which were committed when he was a juvenile. (RT 1783-1785.) In October 1991, it was petty theft from a school. (RT 1783.) In November 1991, it was touching a girl in her crotch. (RT 1783-1784.) In December 1992, it was auto theft. (RT 1784.) In March 1993, it was petty theft from a department store. (RT 1784.) In June 1994, it was possession of methamphetamine. (RT 1784.) In March 1997, it was assault on his girlfriend. (RT 1784.) In September 1997, it was destruction of property at his aunt's home. (RT 1784-1785.) In January 1998, it was providing a false name to a police officer. (RT 1785.) In April 1988, it was an attempt to cash a stolen check. (RT 1785.) In July 1998 it was possession of stolen property. (RT 1785.)

Devin Bates had a criminal record of two crimes of moral turpitude, one as a juvenile in 1995 and the other as an adult in 1996. (RT 1523-1524, 1538-1540, 1591, 1725A.) The former was receiving stolen property (RT 1524) and the latter was an attempt to pass a forged check (RT 1539.)

B. Penalty Phase

1. CASE IN AGGRAVATION

a. Prior Bad Acts

On February 6. 1992, when appellant was 14 years old,[4] three men (a school resource officer, the school's dean, and a campus supervisor) approached appellant on the campus of Moreno Valley High School and asked him to leave. (RT 2461-2462, 2468-2469, 2472-2473.) Appellant told them that he would not leave until he talked to his brother. (RT 2464, 2469.) When one of them took him

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[4] Appellant was born on June 16, 1977. (RT 2664.)

by the arm, appellant pulled away and reportedly said, "You touch me and we're going to start swinging." (RT 2463-2465.) He was told he would be arrested for trespassing. (RT 2465-2466, 2469.) When appellant walked away, he was again taken by the arm, and ultimately he was wrestled to the ground and handcuffed. (2463. 2466, 2470-2471, 2475.) During the process, one of the men was hit in the eye by appellant's flailing arm. (RT 2466, 2475-2476.)

Later in the year, on October 23, 1992, two brothers, 11 and 13 year old, were riding their bicycles to school when they were stopped by appellant and another boy. They demanded that the brothers get off their bikes, which they did, and the two older boys took the bicycles and rode them away. (RT 2560-2567, 2569-2576.)

Three months later, on January 11, 1993, appellant participated with two other boys in the robbery of two large pizzas from a pizza delivery man. (RT 2577-2578, 2582-2585.) Norwood Jones, one of the participants, testified that the plan was appellant's. (RT 2578-2579.) They ordered the pizzas and gave the address of Norwood's apartment. (RT 2579-2581.) They waited for the driver at the entrance gate to the apartment complex, struck him from behind with sticks, and then ran off with the pizzas. (RT 2580-2583, 2587, 2589-2591.) The driver drove back to the restaurant and was taken to a medical clinic for treatment of a lump on his forehead and a small laceration on the back of his skull. (RT 2592-2593, 2908-2909.)

Two and one-half years later, on July 31, 1995, a family was having a barbeque in front of their home on Aristotle Court, a cul-de-sac in Moreno Valley. (RT 2477-2478.) Their adolescent sons and other attendees were there. (RT 2478-2480.) A small car with two people in it entered the cul-de-sac and drove slowly down the middle of the street. (RT 2479-2480, 2488-2489.) The driver's face, a Black male, reportedly held a cold gaze as he looked at the assemblage of

teenagers. (RT 2480, 2457-2488.) The car turned, accelerated, and came towards them (RT 2481-2486, People's Exh. 2,) up and over the curb, and ran into a split rail fence in the middle of the yard. (RT 2486-2487, 2489, 2504-2506, 2508, 2516.) No one was hurt. (RT 2487, 2516-2518.) The car then drove off through the neighbors' yard. (RT 2489-2490, People's Exh. 2.) Apparently, ppellant's name was mentioned by one of the attendees, but his role was not identified. (RT 2488, 2491-2494, 2507-2508.) The court took judicial notice that on January 10, 1996, appellant entered a plea of guilty to a charge of violating Penal Code section 245, subdivision (a)(1), a misdemeanor. (RT 2661-2662.)

b. Victim Impact Evidence

Mele's father, Alan Kekaula, her mother, Linda Kekaula, and her sister, Lisa Kekaula, eleven years her senior, testified. (RT 2601, 2615, 2630.) Mele and her sister are part Hawaiian from their father's side of the family. (RT 2601.) Mele was born on July 12, 1978. (RT 2615.) A lifetime of photographs and a videotape of Mele were displayed to her family members to prompt their accounts of their fond memories of her. (RT 2603, 2612, 2616-2622, 2628, 2633-2637.) They described her best qualities (RT 2603, 2634); their funniest memories of her (RT 2602-2603, 2633-2634); their last memories of her (RT 2624-2627, 2633); their hardest moments since her passing (RT 2609-2610, 2612, 2624); the void they felt particularly on holidays (RT 2610-2611); the difficulty they had identifying her body and informing other members of the family (RT 2604-2610); and how they learned about her death (RT 2606-2610, 2622-2623, 2637.)

2. CASE IN MITIGATION

The constant in appellant's short life has been abuse and neglect. It began in the womb during his gestation by his mother inordinate consumption of alcohol and drugs to self-medicate her own substantial problems. It was compounded by life-threatening deprivation of oxygen during his delivery. It produced an un-

consolable infant and child with needs that went for years undiagnosed and unmet. It was further compounded by two separate head injuries. It was exacerbated by parents who terrified their boys with inter-parent violent arguments and were ill-prepared and ill-suited to nurture their needy child. It resulted in significant, measurable brain damage that has left him ill-equipped to modulate his behavior.

a. Appellant's Family's Account

Appellant's 18-year-life was described through the testimony of his father, Edward Lee, his paternal grandmother, Mildred Thomas, his girlfriend, Khristina Windom, his older brother, Lenier Lee, and Lenier's girlfriend, Wendie Brown. (RT 2664, 2770, 2783-2784, 2909-2910, 2928.)

Appellant's parents were married in 1974. (RT 2665.) His mother was Jimmie Rose Lee.[5] (RT 2655.) Lenier was born that same year. (RT 2664, 2928, 2928.) Sometime after Lenier's birth, his mother complained about never feeling good. (RT 2666-2667.) Appellant's father discovered that she was taking Valium and had numerous prescriptions from a like number of doctors. (RT 2665-2666.) He discarded the medications, but soon others appeared. (RT 2666.) Her complaints and drug consumption continued during her pregnancy with appellant. (RT 2667.) In addition she used alcohol and was smoking. (RT 2667.) He found that she had stashes of airline-sized bottles hidden around the house and confronted her about her consumption. (RT 2667-2668.) She was always defensive and angry, and told him it was none of his business. (RT 2668.)

Appellant was born on June 16, 1977. (RT 2664.) The air flow to his brain was temporarily stopped by the umbilical court wrapped around his neck. (RT

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[5] Appellant's mother died four days after collapsing in the courtroom on the first day of the evidentiary portion of appellant's trial. The court declared a mistrial. (CT 5948, 5951; RT 826-843, 2924-2925.)

2674-2675.) When appellant's father saw him, he looked very pale, like a white baby. (RT 2675.)

When his parents brought appellant home from the hospital, he cried constantly, day and night, and loudly like someone was beating him. (RT 2675-2676, 2725, 2773-2774.) He cried so hard his face turned white. (RT 2773.) This crying lasted four or five years. (RT 2677.) Numerous trips to the doctor ultimately produced the diagnosis that he had colic. (RT 2677, 2725, 2773-2774.) Medication was prescribed, but it did not help. (RT 2677.) Later, appellant's condition was attributed to the Valium, alcohol, and other drugs his mother had taken when she was pregnant with him. (RT 2773-2774.)

Appellant never really recovered until he went into preschool. (RT 2677.) During these years, appellant was much bigger than his brother had been at a similar age and appellant's torso was out of proportion to the small size of his head. (RT 2678.) Appellant's father reported that appellant learned slower than his brother and other children. (RT 2678.)

After appellant's birth, his parents bought a new house and, according to appellant's father, the verbal arguments with his wife continued. (RT 2669.) There were also physical fights, but only about her "medicine" consumption. (RT 2669.) One time she slapped him pretty hard and he slapped her back, but she was not injured. (RT 2670.) That was the only time he struck her, whereas she struck him four to six times. (RT 2670.) Appellant was present during only one of these; when he was four years old. (RT 2671.)

Appellant's brother provided a different account. Lenier testified that his parents argued and fought a lot. (RT 2929.) Physical fights occurred regularly. (RT 2929-2930.) His earliest memories of them were when he was about four. (RT 2929.) His father had the upper hand in the fights. (RT 2929.) Sometimes they involved no more than a slap, but on other occasions his mother was hurt.

(RT 2930.) Appellant saw more of these fights than Lenier, because he would awaken Lenier to tell him, "Mommy and Daddy are fighting." (RT 2930.)

Lenier recalled seeing appellant try and stop his parents by crying and jumping between them. (RT 2931.) The first time when appellant was four or five, and the last when he was nine or ten. (RT 2931.) Lenier recalled that when he (Lenier) was six or seven years old, he and appellant discussed how to stop their parents from fighting. (RT 2930-2931.) These fights and arguments continued until Lenier was 12. (RT 2931.)

Appellant's father was employed as a grocery clerk during this time. (RT 2671.) They lived in South Central Los Angeles. (RT 2671, 2951.) He usually worked from late afternoon until midnight or 2:00 a.m. (RT 2671.) After work, he would go to bars with his friends and drink alcohol for an hour or so before he came home. (RT 2672.) He would find his wife asleep on the sofa, but would be unable to awaken her. (RT 2673.)

By 1979, according to appellant's father, the demeanor of appellant's mother changed; she was much more hostile and she became more dependent on drugs. (RT 2672-2673.) His father was still finding alcohol bottles in the house. (RT 2673.) She would fall asleep with the kids in the house, even with something cooking on the stove. (RT 2673-2674.) Appellant's paternal grandmother testified that when she would come by the house she would frequently find appellant's mother sleeping. (RT 2772.) Appellant's grandmother thought appellant's mother appeared depressed, but learned from her that her demeanor was the result of the Valium she was taking. (RT 2772.) Lenier remembered seeing her drinking alcohol during this period and her sleeping a lot after she got home from work. (RT 2939-2940.) She told Lenier to pull her hair if he really needed. (RT 2939-2940.) Lenier recalled unsuccessfully trying to wake her by shaking her. (RT 2940.) In one incident, the boys were in the den watching

television and their mother was with them, but asleep. (RT 2940.) No one else was home. (RT 2940-2941.) They heard a loud noise on the opposite side of the house. (RT 2940-2941.) The boys were frightened and tried to awaken her. (RT 2941.) She told them that she thought it was the garbage man and nodded back to sleep. It took them 15 minutes to finally get her up. (RT 2941.) When they went into the other room, they saw that a van had driven through their bedroom wall. (RT 2941-2942.)

Appellant started preschool in 1981, when he was four years old. (RT 2680.) Eventually, the teachers asked his parents not to bring him because of the aggressiveness he displayed. (RT 2681, 2683, 2774-2775.) His father testified that appellant constantly had problems obeying the school's rules. (RT 2683.) Lenier testified that appellant did not get along with the other kids. (RT 2936.) The school did not have any explanation for his behavior and just thought he was "a bad seed." (RT 2684.) Similar problems plagued appellant throughout his school years. (RT 2684, 2777.)

When appellant was five or six years old, his teacher told his parents that he was already using profanity. (RT 2686.) His father took him to Kaiser, where he met with a psychiatrist and told her the problems they were having. (RT 2687.) She asked him if he disciplined his children, and he said that he did. (RT 2687.) She said she had to report this to the police because she thought he was a child abuser, and he never went back. (RT 2687.) Appellant's father testified that he paddled appellant "three or four licks" and tried to get him to understand that his behavior was wrong, but he did not do this very often because he did not believe it was having any effect. (RT 2685-2686.) He testified that his wife never laid a hand on appellant. (RT 2685.) Lenier testified that her approach was to talk to appellant and pray with him. (RT 2934-2935.) Appellant looked up to her and would do anything for her. (RT 2937.)

During this same period, appellant suffered two head injuries. One occurred when he was six years old when he fell out of the car his mother was driving. Lenier was playing with the door and it flew open as she turned a corner. Appellant's face was badly scraped and he suffered a large bruise on his forehead. (RT 2678-2679, 2943.) The second occurred when appellant was seven or eight years old. (RT 2944.) The boys and their cousin were playing with an uncle's golf clubs, and while swinging a club at a ball, the cousin hit appellant in the back of the head, producing a large knot. (RT 2679-2680, 2944.) His mother took appellant to the doctor on both occasions. (RT 2679-2680.)

Until the third grade appellant got passing grades in school, but his father believed that was only because the teachers wanted to advance him through the grades to get him out of their classes. (RT 2681-2682, 2684.) Appellant's father testified that almost daily the teachers or student aids would report to them the things that appellant had done in school. (RT 2685-2686.) His mother's response was to attack the teacher instead of trying to address, what his father perceived as the problem. (RT 2685, 2775.) She was very protective of appellant and never blamed him. (RT 2685, 2775-2776.) Appellant's father testified that he never had problems with appellant when he was around him. (RT 2684.)

Defense Exhibit B contains two photographs of appellant, one when he was less than 10 months old and the other when he was two or three years old. (RT 2690-2691, 2955.) Defense Exhibit C is a photograph that shows Lenier (on the left) and appellant, when the latter was three or four years old. (RT 2691, 2956-2957.) Defense Exhibit A shows appellant and Lenier, appellant on the bottom right, when, as reported by his father, he was six or seven years old.[6] (RT 2691,

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[6] If the date that appears in the bottom right margin of Defense Exhibit A is correct, appellant was four years and ten months when the photograph was taken. (Def. exh. A, RT 2664.)

2956-2957.) As these photographs reflect, appellant never appeared happy. (RT 2691, Def. Exhs. A-C.)

At some point, appellant's mother learned that appellant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and obtained a prescription for Ritalin for him. (RT 2697-2699, 2821.) She provided it to him for two or three weeks and then stopped after a teacher she consulted told her that his behavior was better. His mother wrongly assumed that he no longer needed the medication. (RT 2821-2822.)

Appellant's parents separated in 1985 and divorced the following year. (RT 2669, 2688-2670, 2945.) His mother was initially awarded custody of appellant and his brother. (RT 2689, 2945.) Lenier testified that things were better for them after their parents split. (RT 2945.) There was no more arguing and fighting. (RT 2945.) That lasted for about a year. (RT 2945-2946.) Then they were evicted from their apartment and moved in with an aunt for two weeks. (RT 2946.) They were crowded into one small room. (RT 2946.) Around Christmas, their mother brought the boys over to their father's house. (RT 2689.) They did not want to go. She told them the move was just temporary, but she never returned them to live with her. (RT 2689, 2946-2947.)

After that they stayed with their paternal grandmother for a year and one-half or two years. (RT 2949-2950.) They did see their mother, who daily took them out for breakfast and then to school. (RT 2949.) They stayed with their grandmother for a year and one-half or two years. (RT 2950.)

Lenier testified that during this period his father was still working nights and did not return home until early in the morning, when he would sleep. (RT 2931-2932.) Lenier recalled that in later years when they saw their father he was or had been drinking. This was daily; his preference was peach brandy. (RT 2937, 2942.) Their father appeared to be very depressed; he rambled a lot, and his

eyelids were low. (RT 2942.) Lenier reported that their father beat appellant regularly, using a belt or extension cord. (RT 2937-2938.)

When appellant was seven or eight, his father was called to the school for his "cutting up" in class. (RT 2688.) He took appellant into the hallway in full view of the children and spanked him to see if he could shame him into behaving correctly. (RT 2688.) When appellant made no noise of distress, his father decided the problem was "even deeper than [he] thought." (RT 2688.)

Appellant's father testified that when they were at home, appellant behaved nicely and was well-behaved. (RT 2689, 2727.) Appellant's father and paternal grandmother testified that they did not have these problems with Lenier. (RT 2683, 2777.)

In 1988, after the school incident, appellant's father decided to move to Moreno Valley, hoping that a change of environment would help. (RT 2682, 2688, 2692.) The boys came with him. (RT 2692, 2950-2951.) Appellant's father took the boys to their mother's home every week. (RT 2692.)

His father testified that when appellant was 10 or 11, he found that appellant was drinking alcohol and twice he found bottles in appellant's room. (RT 2702.) Appellant's brother testified that appellant began using alcohol when he was about; usually Jack Daniels, Old English Malt Liquor, and Thunderbird. (RT 2961-2962.) Lenier reported that appellant drank daily. (RT 2962.) Their father "whooped" appellant, but appellant did not stop. (RT 2962.) His father testified that when appellant was 12 or 13, his father smelled marijuana residue, but did not talk to him about it or discipline him. (RT 2702-2703.) He had stopped disciplining him because it was not doing any good. (RT 2694, 2703.)

In 1989 or 1990, appellant's father married Patricia. (RT 2693, 2951-2952.) He continued to work in Los Angeles and working the same hours, and commuted to Moreno Valley. (RT 2695, 2952.) Lenier testified that Patricia

attempted to set down some rules, but appellant resented them. (RT 2952.) Patricia worked during the day, which left Lenier in charge. (RT 2953.) Af first when she came home she stayed downstairs with the boys, but eventually she would get something to eat and go up to her room for the rest of the evening. (RT 2953.) If anything happened during the day, she would not deal with it and save it for their father when he came home; he generally gave them a "whooping." (RT 2954.)

Appellant's father and brother testified that appellant had the same problems in school in Moreno Valley that he had had in Los Angeles. (RT 2694, 2954.) Appellant's father testified that no one ever told him what to do to correct appellant's problems. (RT 2694.) When appellant was 14, his father sought a psychiatric consult at Kaiser and was referred to Canyon Crest Medical Group. (RT 2694-2695, 2698, 2724.) He took appellant there and was told that appellant had Attention Deficit Disorder (ADD) and they gave him some kind of medicine to calm him down, the name of which he did not recall. (RT 2694, 2698.) That was the first time his father had been told that appellant had such a diagnosis. (RT 2698.) The medication seemed to calm him down when he took it. (RT 2695.) Appellant saw Dr. Santos Nana-Diego and another doctor a half dozen times over a six month period (RT 2724), although they missed some of appellant's appointments on days when his father had to work. (RT 2695.)

Although appellant's father was home when appellant got up, his father would be asleep. (RT 2695.) His step-mother set out appellant's medicine on the counter, and his father assumed he took it. (RT 2695-2696.) Lenier testified that appellant took the drug only for "a little bit." (RT 2944.) It made appellant seem a lot more mellow; without it, he was very compulsive. (RT 2963.)

Appellant's father testified continued to provide no problems at home. (RT 2697.) However, his father did not notice any improvements at school. (RT

2696.) He tried disciplining appellant by taking away his privileges and a couple of times he slapped him with the palm of his hand to the "upside of his head." (RT 2696.) It did not seem to have an effect. (RT 2697.) His father did not approve of "Just about all the boys he hung around with ...." (RT 2728.) Lenier testified that their father began to drink a lot more at home. (RT 2955.) His relationship with appellant grew worse and appellant would leave he attempted to impose discipline. (RT 2955.)

Appellant's father testified that in 1994 appellant was arrested and put in the Guadalupe Boy's Home in Yucaipa. (RT 2697.) He visited appellant weekly. (RT 2697.) Appellant went there twice. (RT 2699.) Appellant got good progress reports. (RT 2697.) His father was aware that appellant had been diagnosed with something to do with the brain, but did not recall what they told him. (RT 2697-2698.) Appellant was given home weekend visits. (RT 2700.) The facility did not provide any medications for appellant to take while he was at home. (RT 2700.)

Appellant's father testified that appellant started hanging with those "no-count boys" again. (RT 2701.) Until then, appellant had never been confrontational with his father. (RT 2703.) On July 5, 1994, appellant had friends at the house listening to rap music on the boom-box in front of the garage. (RT 2703, 2732-2733.) His father could not stand it and told appellant not to bring "nobody to the house." (RT 2703.) His father, who had been drinking, told the other boys to leave and told appellant to come inside—he wanted to talk to him. (RT 2703, 2733.) Appellant was defiant and picked up the telephone to call someone. (RT 2703, 2734.) That really ticked his father off. (RT 2703.) His father grabbed the telephone and threw it on the counter. (RT 2703.) Appellant jumped up with the palm of his hand and slapped his father on the side of his face. (RT 2703-2704, 2734-2735.) His father testified, "We knew another level had

occurred. And I do believe in his heart that he did not mean to do that because immediately after this happened he broke for the back door and out the door he ran." (RT 2704, 2734.) Appellant had never hit him before, or since, and appellant later apologized for the incident. (RT 2704, 2735.)

Lenier's girl friend, Wendie Brown, moved in with appellant and his father's family in the early part of 1994. (RT 2910.) She reported that appellant's step-mother worked during the day and was home by 6:00 p.m. (RT 2913.) When she came home in the evening, she usually fixed dinner just for herself and ate it in her room. (RT 2914.) Wendie never saw appellant's step-mother sit down with appellant to eat or talk. (RT 2914-2915.) Appellant's father, who was still working in Los Angeles, would sometimes there with his mother for a couple of days. (RT 2916.) When he came home from work, it was about 2:00 a.m. and he would drink a couple shots of his favorite alcohol. (RT 2917-2918.)

Lenier's son was born in February of 1995. (RT 2919.) Appellant was very good with his brother's baby and cared for him like he was his own. (RT 2701, 2920, 2964-2965.) He acted as the child's primary babysitter for the last four or five months before his arrest. (RT 2920, 2964.)

About this time appellant's mother learned that she had diabetes that had been misdiagnosed for years. (RT 2692.) She subsequently had heart attacks and her legs were amputated. (RT 2692, 2960.) In about 1995, she too moved to Moreno Valley. (RT 2693-2694, 2960.) Lenier found her an apartment and moved in with her. (RT 2960.)

When appellant got out of the group home, he initially went to live with his mother. (RT 2699-2701, 2919.) Her apartment had only one bedroom, but, according to their father, the boys preferred their mother. (RT 2701.) The facility did not give them any medications for appellant to continue taking. (RT 2700.) Appellant spent some time at his father's house, but his father did not know if he

was taking any medication. (RT 2700.) His father testified that when he asked the facility if appellant needed medication, they told him he was cured and doing all right. (RT 2700-2701.)

Appellant returned to live with his father at the end of January or the beginning of February 1996. (RT 2919.) Although Wendie knew that appellant drank alcohol while he lived with his mother, he did not do that in his father's household because he abided by his father's rules. (RT 2918-2919.) Lenier testified that at this point appellant was using marijuana almost daily. (RT 2962-2963.)

Appellant's own son was born in June 1996. (RT 2784, 2911; Def. Exh. H.) Khristina Windom, the child's mother, testified that she visits appellant in jail once or twice a week and talks to him on the telephone. (RT 2785.) She and Lenier testified that appellant loves his child and she intends to have the child maintain contact with his father. (RT 2786, 2965-2966.)

Wendie testified that she takes her child to visit appellant as often as she can, and she often talks with appellant on the telephone. (RT 2920-2922, 2965.) The child wants appellant to come home. (RT 2965.) She believes that appellant has matured since his arrest. (RT 2922.) Wendie testified that she and her son would suffer if appellant were given the death penalty because he is very important to them. (RT 2926-2927.)

Appellant's father testified that he was devastated by the jury's guilty verdict and had become a recluse. He was not going to come to the court and only changed his mind the day before he testified. (RT 2704-2706.) He told the jury that he would be most devastated if they rendered a verdict of death. (RT 2706.) He expressed empathy for Mele's mother and said he would change places with her if he could. (RT 2706.) Appellant's father testified that he has been visiting appellant since his arrest. (RT 2737.)

It was stipulated that since appellant's incarceration on February 23, 1996, he had not been prescribed or given any medication. (RT 2991-2992.)

b. Professional Assessments of Appellant

Dr. Santos-Nana Diego, a child adolescent psychiatrist at Kaiser Permanente's Canyon Crest facility in Riverside, testified that she first saw appellant in March 1992, when he was 14 years old, at which time she did a clinical interview, assessment, and evaluation. (RT 2708, 2710-2711, 2717.) The doctor also relied on information provided from his parents and the medical charts from Kaiser. (RT 2710-2711.) The doctor found that appellant suffered from Attention Deficit Disorder (ADD), conduct disorder, and learning disabilities. (RT 2711, 2717-2718.) Symptoms of ADD include having difficulty staying focused, being easily distracted, having difficulty finishing work on time, having difficulty following commands in a row, impulsivity and fidgety-ness, and being disruptive in the classroom. That diagnosis requires that the symptoms must be present before the age of seven. (RT 2711.)

Dr. Santos-Nana Diego explained that in 75 percent of the cases of ADD there is no particular cause or etiology. (RT 2711-2712.) The other 25 percent include those cases caused by problems during pregnancy, delivery, infections, head trauma, instability in the home, and physical or sexual abuse. (RT 2712.) An example of problems during pregnancy or delivery includes fetal distress, where the baby was not breathing at the time of delivery, as well as exposure to drugs and alcohol during pregnancy. (RT 2712-2713.) Where there is lots of chaos or abuse in the home, the child might manifest hyperactivity, but not necessarily ADD. (RT 2713-2714.)

Treatment for ADD involves medication and counseling. (RT 2714.) The doctor prescribed the medication Cylert for appellant. (RT 2714, 2718-2719.) It works like Ritalin, which is used for elementary school-aged children and

stimulates the attention center of the brain with the hope that it will improve attention span and focusing. (RT 2714-2715.) It has a paradoxical effect: the majority of children settle down and are less hyperactive. (RT 2715, 2719.) She usually recommended keeping a child on the medication at least through high school. (RT 2716.) The response rates to such treatment is only 70 percent, so a lack of response is not necessarily an indication that the child does not have ADD. (RT 2719.) Only 30 percent of those diagnosed with ADD naturally grow out of the disease. (RT 2721.)

Dr. Santos-Nana Diego testified that it takes at least four weeks before the medication takes effect, so she scheduled an appointment to see appellant in April 1992. (RT 2719-2720.) The doctor was told then that appellant was complaining that he could not sleep until early in the morning and that he felt somewhat jumpy. (RT 2720.) The doctor ordered that he continue taking Cylert and come back in four weeks. (RT 2721.) She also prescribed Benadryl to help with the sleep issue. (RT 2723.) Kaiser's records did not reflect any further visits by appellant. (RT 2721.)

In 1992 Kay Palush, was a teacher in the Guided Independent Study Program with the Moreno Valley Unified School District. (RT 2739-2740.) She had 12 to 15 special education students placed with her from two weeks to a semester, while their status was being determined following an expulsion hearing. (RT 2740-2742.) The school's records for this period had been destroyed, but she recalled that appellant had been enrolled with her twice in 1992. (RT 2742-2743.) The first time was for a short period at the beginning of the school year. (RT 2743.) They decided not to expel him and he was returned to his previous program. (RT 2743.) She believed the second time was in the second semester of the same school year; and he stayed until almost the end of the semester, which was an unusually long time. (RT 2743, 2747.)

Appellant came to her with an assessment of ADHD. (RT 2744.) She adjusted his program for that. (RT 2744.) Such students need continual monitoring. (RT 2744.) She believed that his academic abilities were at least two to two and a half years below his grade level. (RT 2744.)

Ms. Palush testified that appellant gradually adapted to her and the program, commensurate with his disorder. (RT 2745.) She gave him personal attention and he became quite cooperative and began retaining more information. His attendance was very good. (RT 2745-2746.) She recalled at the time that he was taking medication for his hyperactivity. (RT 2746.) When he was taking the medication, he could concentrate longer, he could complete assigned activities, and it was easier for him to cooperate. (RT 2746.) If he did not take the medication for more than a day, she would see quite a difference in him. (RT 2746.) Overall there was probably more improvement in his behavior than in his academic achievement. (RT 2746.) She felt his progress was better than average. (RT 2748.)

Steven Lashawn Hobson, a senior social worker and unit supervisor for Guadalupe Homes, Yucaipa Campus, testified that they accepted appellant into their program for a 30-day assessment in May 1993. (RT 2751-2752, 2755.) Guadalupe Homes was a residential facility that provided psychological treatment and other services to abused and neglected boys between the ages of 12 to 18, who may be wards of the court. (RT 2751-2753.) Mr. Hobson acted as liaison between the clinical director and the other social workers, he worked with the treatment team for a unit of 27 kids. (RT 2752.) The treatment team consisted of a social worker, a primary therapist, a primary counselor, a psychologist, a psychiatrist, and the clinical director. (RT 2752-2753.)

Prior to his admission, appellant, like all their referrals, was assessed to see if he was appropriate for the facility. (RT 2753-2754.) A goal of the facility was

to provide the court with a nine-month to one-year treatment plan. (RT 2754-2755.) Those admitted to the facility all attended school on the grounds. (RT 2755.) Initially they did not have enough information about appellant to provide them with a psychological diagnosis. (RT 2756.) After 45-60 days of inadequate progress with appellant, they had appellant see a psychiatrist who assessed him for psychotropic medication. (RT 2756.)

Following another 45-60 days of lack of success with appellant, they recommended that he revisit the psychiatrist for another assessment for psychotropic medication. (RT 2756.) Mr. Hobson recalled that they were treating him for aggression and depression, and were concerned that he might have the symptomatology of ADHD. As a result of that reassessment, he was medicated for anger and depression, but Mr. Hobson believed they had not adequately substantiated the ADHD. (RT 2757.) The medication produced a change in appellant within a week. (RT 2757.) It slowed him down and he was more manageable. (RT 2758.) There had not been any physical aggression. (RT 2758.)

In the second week, Mr. Hobson saw that appellant was better able to focus on the assigned tasks and his motivation to do school work improved. (RT 2758-2759.) Mr. Hobson did not remember precisely how long appellant was there, but it must have been for nine months. (RT 2759.) In that period, appellant developed the ability to show leadership. (RT 2760.) He had initially been more of a follower and gravitated toward children who were negative leaders. (RT 2760.) In the middle of his term, he did a U-turn. (RT 2760, 2766-2767.) After they addressed the depression, which was affecting his self esteem, he was able to show leadership inside the unit and on the campus, and was able to resolve conflicts appropriately. (RT 2760-2761.)

At the end of appellant's term, Mr. Hobson thought that reunifying appellant with his family was not the appropriate next step. (RT 2762.) Mr.

Hobson suggested that he continue treatment throughout his high school graduation and then move into one of their emancipation community homes until his 18th birthday. (RT 2762.) The emancipation program is for children who have no other permanent source and provides them with independent living skills to acquire the knowledge base for vocational skills and upper academia, and to transition into the mainstream appropriately. (RT 2765.) Mr. Hobson believed that appellant was definitely academically eligible for a college program. (RT 2763.)

One of the requirements of the program is that the parents become involved. (RT 2763.) Mr. Hobson testified that appellant's mother and step-mother did not participate. (RT 2763.) His father came to the monthly family therapy sessions. (RT 2763-2764.) They had not been able to accomplish teaching the father how to parent a child who had these types of problems. (RT 2767-2768.) Mr. Hobson believed that the type of parenting that was being implemented in his home was going to be counterproductive for the problems appellant had. (RT 2767.) Mr. Hobson made his recommendation to the father, but, after appellant went home on a few weekend passes, the father opted to have him come home permanently. (RT 2764-2765, 2768.) Mr. Hobson believed that appellant's community social skills were low, and he felt that his parents did not have the skills needed to parent or supervise a child lie appellant. (RT 2765.) He believed that he had convinced appellant of the need to stay, but not his father. (RT 2768-2769.)

Dr. Roberto Moreno, M.D., a forensic psychiatrist, was a consulting psychiatrist at Guadalupe Boys Home in 1993. (RT 2898-2900.) He testified that he saw appellant in July 1993, and weekly thereafter until at least January 1994. (RT 2901-2902, 2906.) He had been provided a form completed by the staff that informed him, "The client has a history of hyperactivity and present depression

with low attention span. Please assess for medication." ... "The patient is 16 years old. He was taking Cylert up to one year prior to [the July 1993] visit." (RT 2903-2905.)

Dr. Moreno found that appellant manifested the symptoms of ADD and hyperactivity, and prescribed Thorazine, 50 milligrams twice a day. (RT 2903-2906.) The drug, which was used to treat those suffering from ADD or hyperactivity, would calm down appellant's attitude, behavior, and impulse. (RT 2905, 2907.) There was a note from appellant's supervisor on August 19, 1993 that appellant was responding to the medication. (RT 2906.)

Dr. Cecil C. Whiting, Ph.D, a clinical neuropsychologist (RT 2796, 2800), saw appellant over the course of four days in February and March 1999 (RT 2851-2852) and administered a battery of neurological tests (RT 2803, 2836, 2851.) He also interviewed appellant's family members, including his mother and brother, Lenier. (RT 2852.) Dr. Whiting testified that neuropsychological testing discloses and pinpoints the location of brain damage. (RT 2801-2802.) Enough is known today about brain function to know that certain parts of the brain are responsible for certain behaviors and activities. (RT 2801.) Consequently, when it can be seen that a certain part of the brain is damaged, one can assess whether the person evidences behavior consistent with that seen in others with like damage. (RT 2801.)

From his assessment Dr. Whiting determined that appellant had brain damage in three areas. (RT 2809.) He had damage to the right and left parietal/occipital area on the back of the head. (RT 2809-2810, 2812.) This area deals with vision and memory. (RT 2811.) From experimentation, it has been determined that 80 percent of children with dyslexia have damage in this area. (RT 2810.) A child with damage there has a diminished ability to read efficiently. (RT 2811.) They also may have difficulty in visual scanning: where a person is,

and what a person is doing, and distinguishing between figure and ground. (RT 2812.) Damage in this area would cause a person to have trouble learning in the primary school years. (RT 2812.)

Dr. Whiting also found damage in the right temporal region of appellant's brain. (RT 2812-2813.) That is the area of the brain that participates in sequential processing: what came first, ordering, and sequencing of events. (RT 2813.) Children with damage in this area cannot follow a sequence of instructions and thus have learning problems. (RT 2813-2814.) These children are described as not following instructions. (RT 2814.)

The most significant damage Dr. Whiting found was in appellant's left temporal lobe. (RT 2814, 2829.) This is the part of the brain that mediates the impulses that come from the midbrain. (RT 2808-2809.) The midbrain is the source of those very primitive functions that have to do with survival. (RT 2806.) The midbrain may produce aggressive impulses that are transmitted automatically and without pause. (RT 2806-2808.) These are important to our defensive needs. (RT 2806-2807) The left frontal lobe is the only restraining element to offset such impulses, particularly aggressive and violent impulses. (RT 2815-2816.) Damage to the left frontal lobe impairs a person's ability to put the brakes on his impulses. (RT 2816.) It does not mean that the individual is always out of control. (RT 2816.) Rather, the person's response is a direct function of events in the environment. (RT 2816-2817.) The frontal lobe injects judgment and reasoning into one's behavior. (RT 2809.) From childhood to adulthood, this part of the brain is developing, which explains why one's ability to control the impulses of the midbrain improves as the individual gets older, at least for one without damage to the frontal lobe. (RT 2809, 2829.)

Thus, appellant does not have the same ability as someone who does not have such damage to keep in control the typical impulsive aggressive feelings that

come from the midbrain. (RT 2829.) So, in a setting where he may be angered by something, his ability to control that anger is not as strong as that of a normal person. (RT 2829.) Damage to the frontal lobe can be treated with medication that will assist the person in controlling midbrain impulses. (RT 2829.)

Conduct disorder was one of the diagnoses that had been attributed to appellant (RT 2859) by Dr. Santos-Nana Diego at Kaiser Permanente (RT 2711, 2717-2718.) It is a diagnosis given to children before the age of 18 based upon behavior that is inconsistent with instructions from one's parents, school, and society. (RT 2859-2860.) Dr. Whiting explained that by industry convention, an organic disorder, such as the brain damage found here, supersedes a clinical diagnoses such as conduct disorder. (RT 2885.) The finding of organic brain damage that accounts for appellant's symptoms demonstrates that conduct disorder was and is not a proper diagnosis for him. (RT 2884-2887.) Appellant's limited ability to learn from past experiences was the result of brain damage, not choice. (RT 2897.)

Dr. Whiting testified that not all brain damage affects one's IQ; it depends on where the damage is. A person can have significant brain damage and yet have a normal, or even above normal, IQ. (RT 2890.) Frontal lobe damage cannot be feigned in the tests that Dr. Whiting administered, not even by most neuropsychologists. (RT 2880-2881.)

Dr. Whiting explained that alcohol exacerbates the effects of the brain damage in an almost a direct correlation: the more alcohol, the more the brain damage is exacerbated. (RT 2817-2818.) A person with such damage who consumed one or two ounces of 80 proof alcohol in a one-two hour period would be much less able to suppress or control his midbrain impulses. (RT 2815.) That disability would worsen as the alcohol consumption increased. (RT 2818-2819.)

Dr. Whiting testified that brain damage can be the product of a number of sources, including prenatal problems, drug abuse (including Valium) or alcohol abuse by the mother, or a blow to the head. (RT 2819-2819, 2823-2824.) Frequently, brain damage goes undetected. (RT 2820.) Appellant's constant crying as an infant and young child, as well as his ADHD diagnosis, are consistent with his brain damage. (RT 2822-2823.)

Ritalin is commonly used to tread ADD or ADHD. (RT 2824-2825.) Appellant's positive response to his brief period taking Ritalin supports his diagnosis of ADHD. (RT 2821-2822.) A child's reaction to Ritalin is almost diagnostic. If a child who is given Ritalin calms down, he likely has ADHD. If he speeds up, he does not. (RT 2826.) Children with this disorder have difficulty learning and interfere with other children. (RT 2827.) The other children do not like them, and they are isolated. (RT 2827.)

For one with brain damage like that suffered by appellant, reduced class size, particularly a one-on-one relationship with a teacher, provides the environment they need. It gives them the necessary stimulation and interaction to quell their disruptive and aggressive impulses. (RT 2827-2829.)

ARGUMENT

I. THE SPECIAL CIRCUMSTANCE FINDING WAS UNCONSTITUTIONALLY PREMISED ON INSUFFICIENT EVIDENCE THAT THE MURDER WAS COMMITTED AFTER AN ATTEMPTED RAPE

A. Introduction

The prosecution proffered the jury two theories for first degree murder—one was felony murder premised on the felony of attempted rape. The sole special circumstance alleged was also premised on attempted rape. That commonality and the insufficient evidence to support it is the focus of this and Argument *II.*

The site of the homicide was a lover's lane. It was secluded. Excessive alcohol consumption had reduced inhibitions. Mele's friend Jarrod, with whom she had a sexual relationship, was present and had suggested to his friends, Devin and appellant, that she was promiscuous. She openly discussed with the three adolescent males her reputation. By no account, direct or circumstantial, had she resisted any of appellant's advances. Then, she effectively communicated that she wanted him to stop. Appellant immediately stopped. She was still wearing her underpants, shirt, and jacket. There was no evidence that appellant had penetrated her.

There was no evidence that appellant intended to have sexual intercourse with her by force or otherwise against her will. There was no evidence that he overcame her resistance. Thus, there was no attempted rape. There was no evidence to support the special circumstance. The state of the evidence is such that even the trial judge was prompted to remark that a not true verdict would not have surprised him. (RT 3081.)

The legal failing in the prosecution's case is that it required an expansion of criminal liability for rape to inculpate appellant beyond that authorized by California law. That expansion negated the defense of consent even where there was passive acquiescence to the defendant's acts.

As a result, appellant was denied his Fifth and Fourteenth Amendment rights to due process and a fair trial by a finding based on insufficient evidence that an attempted rape, the special circumstance, was true.

B. The Facts and Procedural Background

1. THE CHARGE

The charge was murder (§ 187) accompanied by the allegation that the offense was committed while appellant was engaged in the attempted commission

of the crime of rape (§ 261, (a)(2)[7]), a special circumstance (§190.2, (a)(17)(iii).) (CT 21-22, RT 335-336.)[8]

2. THE FACTS

The events were described by two of the participants, Devin Bates and Jarrod Gordon. Jarrod had a sexual relationship with Mele Kekaula and discussed with appellant and Devin that she had a reputation for being easy. (RT 1457, 1577-1578, 1581, 1596, 1722, 1724, 1792-1793.) He told them that there was a rumor that she had the AIDS virus (RT 1458, 1580) and he had worn two condoms when he had sex with her (RT 1580-1581.) The other boys knew her. (RT 1461, 1585-1588.)

Sometime after midnight they arrived at her house. (RT 1462.) She came out of the house and hugged all three boys. (RT 1460-1462, 1795, 1955.) They invited her to hang out with them, and she accepted the invitation. (RT 1462-1463, 1724.) She got into the backseat with appellant. (RT 1464, 1725.) At some point after she had joined them, Jarrod provided his companions with condoms. (RT 1458-1460, 1550, 1577, 1584, 1641.) Devin testified that appellant did not express any desire to have sex with her (RT 1460) and there was no talk about raping her or forcing her to have sex, or getting her drunk so that they could have sex with her (RT 1585.)

They drove around with no particular destination in mind (RT 1464), and bought food and a large bottle of Bacardi rum (RT 1467-1470, 1716, 1718, 1731, 1733, 1793), which they drank from the bottle with Mele consuming more than the others (RT 1470-1471, 1483, 1609-1610, 1669A, 1670A, 1734.) At some point,

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[7] The applicable portion of section 261, subdivision (a)(2) is set forth in Part D, below.

[8] The trial court rejected late efforts by the prosecutor to amend the information to expand the charge to include additional forms of rape. (RT 1700, 2067, 2070, 2078-2079, 2082-2083.)

when Mele took over driving, Jarrod later told the others that he had used this opportunity to put his hand into her pants and "finger-bang..." her. (RT 1473-1475-1478, 1597-1598, 1735-1736.) Devin and Jarrod testified that appellant replied that that was nothing, he had also done that while she was in the back seat with him. (RT 1598-1600, 1796-1797.) Devin and Jarrod never heard Mele express any reaction to appellant, seem upset, or ask to go home. (RT 1600, 1798.)

Ultimately, one of them suggested that they drive to a remote area on Cactus Avenue that provided a view of the valley. (RT 1479-1482, 1485, 1601-1603, 1737-1739, 1817, 1829, 1832, 1908; People's Exhs. 1-2.) At Mele's suggestion, they waited until another car left before parking where they did. (RT 1482-1483, 1485-1486, 1603-1604, 1671; People's Exhs. 1, 60.) There were no other cars or people around. (RT 1485.)

a. Devin's Account

Devin testified that they were there for about an hour and a half. (RT 1486-1487.) All four of them got out of the car at some point (RT 1486, 1554, 1615,) and Mele was in and out of the car a lot. (RT 1615, 1674A-1675A.) They talked about the rumor that she had AIDS. (RT 1582-1584, 1647-1648.) When they first arrived, her speech was slurred and she continued to drink. (RT 1487.) At some point, both she and appellant vomited. (RT 1491, 1611, 1671A.) As a result, they moved the car forward 20 paces. (RT 1491-1492.) Jarrod was also intoxicated. (RT 1671A-1672A.)

Twice, Mele tried to slap all of them, once when they were in the car (RT 1617-1618, 1676A-1678A) and once when they were out (RT 1619, 1679A.) At another point, Mele and Jarrod were kissing in the front seat. (RT 1672A.) She ultimately became more incoherent, and fell while she was outside the car. (RT 1487-1488, 1492-1493.) Devin helped her up, but "she was pretty fine to get up

on her own...." (RT 1492-1494.) He ushered her to the back seat of the car on the driver's side. (RT 1494-1495.) She sort of plopped down on to the rear seat as if she was tired and lay on her back with her legs hanging out the side of the car. (RT 1495-1497.)

Devin got into the front passenger's seat (RT 1497); Jarrod was in the driver's seat. (RT 1497, 1537.) Devin did not recall where appellant was. (RT 1498.)

At some point, Devin saw appellant by Mele's open door on the driver's side of the car; he was touching her breasts over her outer clothes. (RT 1498-1499, 1623.) Devin had not told the police about this during his interview and at the preliminary hearing he testified that appellant did not make sexual advances prior to getting on her. (RT 1673A.) Devin did not hear Mele say anything. (RT 1499, 1626, 1686A.) He testified that she was "if not completely out of it, very close to." (RT 1499, 1548, 1626, 1686A.)

Appellant took off her shoes and pants and threw them by Devin's feet. (RT 1499-1500, 1619, 1679A.) She did not move as he did this. (RT 1626-1627.) Jarrod was looking back from the driver's seat to see what was going on. (RT 1620, 1679A.) Jarrod leaned towards the back and assisted in removing her shoes and pants. (RT 1620, 1680A.) Devin speculated that she was going in and out of consciousness. As her clothes were being removed, she kept saying that she was drunk. So, Jarrod said, "Squeeze my finger" and she did. (RT 1630-1631, 1690A.) Jarrod said, "No, you're not drunk..., you can still squeeze my finger." (RT 1630, 1690A.) Devin acknowledged that her eyes must have been open because she was able to see Jarrod's finger. (RT 1630-1631, 1690A.) At some point, after her pants had been removed, she called Devin's name and he turned around and asked what she wanted. (RT 1629, 1689A.)

Then, Devin heard a package being opened. (RT 1634.) Either before or after appellant straddled her, appellant said "'[H]e had one on,'" a condom that he referred to as a "hat, gym hat, something like that." (RT 1500, 1502, 1547-1549.) Devin did not recall appellant making any other statements other than "'He was about to get it, get some....'" (RT 1500-1501.) Devin looked back and saw that appellant's pants were six inches below his waist, but he did not see appellant's penis or any part of his bare body (RT 1501, 1620-1621, 1625), but assumed that he had his penis out because that was where his left hand was (RT 1635-1636.) Devin testified that he could clearly see that his zipper was down when he was attempting to get on her and when he was on her. (RT 1621, 1623, 1683A.) It was stipulated that at the preliminary hearing, Devin when asked if he was able to see whether or not appellant had the zipper of his pants pulled down or pants pulled down at all, Devin responded, "No." (RT 2169.)

Devin testified that he saw appellant's chest area touched Mele's chest area and he moved his hips up and down. (RT 1502-1503.) Mele did not say anything or move. (RT 1503, 1537, 1627.) Devin testified that he glanced back more than ten times and never saw Mele's panties removed. (RT 1633.)

Devin was interviewed the following day over a period of 14 hours. (RT 1688A.) Officer Fernandez who had interviewed him, testified that Devin was asked if she was fighting, and Devin said, "Nuh uh, she wasn't at all." (RT 2161.) When asked if she was passed out, Devin said, "'Nah, she was talkin' the whole time.'" (RT 2162.) At appellant's trial he denied that answer and testified that he had been confused by the question. (RT 1629, 1688A-1689A.) Devin was asked by Officer Fernandez what she was saying and replied, "Um, you guys are tryin to mistake me for toss-up punk bitch. She said somethin' about, I'll give it away when I wanna give it away." (RT 2162.) Fernandez asked what appellant said. Devin told the officer, appellant said, "'you mistakin' me. You mistakin' me.' He

said somethin' about how you know what we came up on the hill for." (RT 2162-2163.) Then Devin said she pushed appellant off of her. (RT 2162.)

Devin testified that while appellant was still on her, "With a mere push" she "forced him off of her." (RT 1503-1504, 1655-1656, 1663-1664.) She said something like, "'What do you guys take me for? Do you think I'm a toss-up whore or something?'" (RT 1504, 1631, 1655-1656, 1664-1665.) She seemed almost to be in "a fit of rage, as if she was disgusted by what was going on." (RT 1504.) Devin testified that appellant "got right off." (RT 1504-1505, 1537.) At another point, Devin testified somewhat inconsistently that appellant did not get off of her immediately. (RT 1655-1656.) Devin was then asked how appellant was positioned and what appellant was doing when Mele was saying "those things" and "she was not a whore." Devin replied, "He was looking down at her." (RT 1656.)

Devin said something to try and calm her down and turned on the dome light. (RT 1632, 1692A.) Appellant turned it off and said he was going to straighten her out. (RT 1657.) Yet, appellant never got back on her nor made any other sexual advances. (RT 1537-1538.) They just sat down in the back seat and "she sort of was primping herself." (RT 1505.) They talked for a while and a lot more was said. (RT 1506, 1546.)

At the preliminary hearing, Devin testified that once she pushed appellant off of her, appellant got out of the car. (RT 1506.) Devin was asked and affirmed that it was immediate. (RT 1506-1507.) At trial, he testified that that was "Sort of" the truth. (RT 1507.) "She said a couple more things before ... he got out of the car." (RT 1507.) She said them in an angry, loud way. (RT 1507-1508.)

Devin testified that there was no doubt that appellant did attempt to have sex with her. (RT 1528-1529.)

Devin described appellant's demeanor during the drive home as "calm and collective." (RT 1519.) At some point, appellant started singing, "almost like verses of rap music, like making gestures towards what he had just done." (RT 1519.) "Sort of like giving himself praise. I'm not sure what he said, but he was making it up as he went along." (RT 1520.) He said something about "he had to do what he done because he didn't get his nut off." (RT 1520.) Meaning he did not have an orgasm. (RT 1520.)

b. Jarrod's Account

Jarrod testified that while they were parked there, he scooted over to the driver's seat because he was cold and turned on the engine and the heater. (RT - 1739-1740.) The others got out of the car at different times while they were there. (RT 1740.) They had not consumed all of the alcohol, but Mele, Jarrod, and appellant were intoxicated and Jarrod and Mele vomited. (RT 1743-1745, 1748-1749, 1800-1801, 1945-1946, 1956, 1967, 1969-1970.) Mele was stumbling drunk (RT 1743-1744) and at some point she fell and called for help. (RT 1745.) Devin helped her back to the back seat of the car. (RT 1745, 1747.) Devin got into the front passenger seat and Jarrod was still in the driver's seat. (RT 1747.)

Mele was lying on the back seat with her legs hanging out of the car, but Jarrod did not remember where appellant was. (RT 1748-1749.) Jarrod testified that he was physically unable to turn around, but he could observe the back by turning his head, but he did not watch continuously. (RT 1808-1809.) He recalled appellant removing her clothes. (RT 1750.) Jarrod did not remember telling the police that he did not see her clothes come off because he was not paying attention. (RT 1801-1802.) Jarrod testified that he (Jarrod) did not take off any of her clothes. (RT 1750.)

Jarrod testified that he saw appellant pull his pants down "and stuff" (RT 1756), but he had apparently told the police that appellant's pants were not below

his waist when he was on her (RT 1803-1804.) Officer Thompson affirmed that the latter was what Jarrod had told him. (RT 1957-1958.) Jarrod testified that he did not remember if he ever saw appellant with a condom or hear him open a condom package. (RT 1805.) He did not remember appellant making any motions like putting on or taking off a condom. (RT 1805.) However, he did recall appellant mentioning "Jimmy hat." (RT 1755-1756.)

Mele was on her back and appellant was on top of her; they were chest to chest. (RT 1757-1758.) Officer Thompson testified that Jarrod told him, she was "'like, awake and stuff.'" (RT 1958, 1968.) Jarrod testified that appellant was moving like he was having sex with her. (RT 1759.) His groin area was in a position where her vagina was. (RT 1759-1760.) Officer Thompson testified that Jarrod told him "'she wasn't, like, making no big attempt'" to get him off. (RT 1958, 1970.) She was not so drunk that she did not know what she was doing, and he told the police that. (RT 1807.)

Jarrod testified that appellant was not on her long, it was rather quick. (RT 1805-1806.) She said in a loud voice to the effect that she wanted him off of her. (RT 1760, 1969-1971.) She said something like, get off. (RT 1806-1807, 1969-1971.) She pushed with her hands and he got off. (RT 1754, 1760-1761, 1806-1807.) Jarrod testified that after she pushed appellant, "he didn't get right off." (RT 1806.) Yet, a moment later, Jarrod testified that Mele did not make a big effort to tell appellant to get off of her, "It wasn't like she was hitting him or something like that. She just pushed him" and he immediately got off. (RT 1807.)

Jarrod testified at the preliminary hearing that appellant said he had intercourse with her, but Jarrod also said that appellant shot her because she would not have sex with him. (RT 1786, 1789.)

Jarrod testified that during the drive home, appellant sang words from a song of the rap group The Bone Thugs: "'I didn't want to shoot you, didn't want

to kill you, bitch, but you wouldn't give me any pussy.'" (RT 1775-1776, 1786, 1789-1790.)

c. Physical Evidence

The victim, when found, was wearing a shirt, a Pendleton type jacket, green panties, and socks. (RT 1674-1675, 1833-1835; People's Exhs. 2, 4-7.) The pathologist who examined her body looked for indications of trauma consistent with a sexual assault, but found none. There was no indication of trauma to the breast area, upper inner thigh area, external vaginal area, and the internal aspect of the genital organs. (RT 2021, 2025, 2031-2033, 2052, 2059-2060.) No substance transfer to the vaginal or upper thigh areas could be seen with the naked eye. (RT 2029-2030, 2032.) The introitus was swabbed so that it could be examined with a microscope (RT 2029-2030,) but the outcome was not disclosed.

A blood sample was collected from her body. (RT 1960, 2021.) A toxicologist examined the blood and found it to contain .14 percent alcohol. (RT 2219, 2220-2222.) That would accurately reflect the level at the time of her death. (RT 2231.) The toxicologist testified that one would need a blood alcohol level of over .20 and closer to .25 to be rendered unconscious. (RT 2224-2225.) Such a person would not be readily roused. (RT 2225.) A person experienced with alcohol may be able to drive with a .14 level; others with less experience might fall asleep or be unsteady on their feet at that level. (RT 2229-2230.) .)

d. The 1118.1 Motion

The court denied the defense section 1118.1 motion that there was insufficient evidence to support the special circumstance. (RT 2170-2171.)

3. THE CLOSING ARGUMENTS

Half way through her closing argument, the prosecutor addressed the special circumstance allegation. She argued that in assessing whether appellant had the specific attempt to commit attempted rape:

> I would submit to you that his actions, when you look at his actions, in the totality—you ever hear the expression, seeing the forest through the trees? ¶ You don't look at one tree in order to understand the forest. You need to look at the totality of what occurred this night. (RT 2263.)

She acknowledged that this was not a completed rape. (RT 2263.) She argued that the fact that he did not ejaculate or penetrate her did not undermine the fact that he was attempting to rape her. (RT 2263-2264.) She itemized the elements of attempt:

> In order to prove attempt rape you must prove that the defendant had the specific intent to (1) engage in an act of sexual intercourse; (2) that it was against the will of Mele Kekaula; (3) that he accomplished this act of sexual intercourse by a means of force—now notice the or—or violence or duress. I'm going to leave off menace. I don't think that's there. Or fear of immediate and unlawful bodily injury. (RT 2264.)

She acknowledged that he did not remove her panties. (RT 2266.)

She then went into great detail to demonstrate that he intended to have sexual intercourse with her. (RT 2264-2268.) Finally on this point, she argued:

> Put this all together. And what does he do? He's trying to either manipulate his penis, either he can't sustain an erection or manipulate his penis into her, or he's trying to manipulate the underwear which she still has on; right? But that's what he's doing when he is on top of her, which clearly shows his intent to have sexual intercourse. The fact that he's not successful, the fact he is unable to, as he so graphically put it, "get his nut off" or ejaculate does not undermine the act that he is committing when he is on top of her. (RT 2267-2268.)

She then told the jury that this was the point where they would need to address the "against the will" element of rape. She explained:

> That simply means without consent. Without consent. Consent requires positive cooperation—let me focus in on that a little better—requires positive cooperation in an act or attitude as an exercise of free will. In order to find consent, as defined, in attempt to rape Mele, must have acted freely and voluntarily and have had

knowledge of the nature of the act or transaction involved. (RT 2268.)

The prosecutor illustrated with a proffered analogous example involving a dating relationship with a wealthy woman who gave her boyfriend some of her valuable things. The boyfriend tells two friends and tells them that he is sure that they could take whatever they wanted. They go to her house, drink alcohol, become intoxicated, and one of them takes a valuable object. She sees him do it and then "literally have a tug-of-war over this precious item." She eventually regains possession. This, the prosecutor argued is what happened to Mele. (RT 2269-2271.)

Later, the prosecutor after recounting all of the parties' foolish behavior over the course of the evening (RT 2271-2273) asks:

> Does that mean she's consented to sex? No. She has the right to say no, even if the defendant chooses not to listen. ... ¶ She falls over into the back seat. And ... how did Maureen Black [the toxicologist] characterize that? Sort of sedated, I think she said. ... [A] sedated state. Left to herself she probably would have fallen asleep. But the defendant had other intentions. ...
>
> And so what happens? She's completely out of it. And the defendant comes over, and he takes off her shoes. And he takes off her pants. Jarrod recalled that Mele was like pushing at him. At that point Devin recalls that Mele wasn't moving. She was just literally out of it. Show consent? He is "going to get at it" is what he says; right? Right"
>
> Her feet are hanging out of the car. He puts on a condom, and he gets on top of her. All 270 pounds 6'4" of him on top of Mele Kekaula. She consented. It is—is it reasonable for him to believe that she's consented to what he is doing to her? Has she said, Sure? Has she spoken to him? (RT 2274.)

At this point, the prosecutor addressed Mele's expression of her wishes:

> And [what] does she do absolutely, unequivocally, according to both Devin and to Jarrod? She starts pushing. She like comes to come out of it, remember that testimony, and starts pushing at the

> defendant. "I'm not like this." And you may not like the word she uses. Acknowledge that. What words does she use? She uses word that he will understand. That he will understand that she's not like this. And she means no. Unequivocal.
>
> Does he get off of her? Does he get off of her? Look back at the testimony, recall it, because Devin Bates is asked and Jarrod is asked. What do they say? Not immediately. And if that took 10 seconds, 15 seconds, 20 seconds, anything other than "get off of me," what do we know about the situation? The defendant doesn't care.
>
> She says no, and he is still on top of her, still attempting to get what he wants when he wants it from her because she is not a woman, she's not a young woman to him. She's an ends to a means. "You know what we came up here for," he says. Now, isn't that interesting. "You know what we came up here for." Right? What was Jarrod Gordon and Devin Bates' reaction when the defendant takes off Mele pants and gets on top of her and she starts to scream and struggle? No badges of merit for either one of them at all. (RT 2275.)

At this point, defense counsel objected on the grounds that there was no evidence that anybody was screaming or that there was any kind of violent struggle. (RT 2275.) The court replied that there was evidence that her voice was raised and overruled the objection. The court added that the struggle was open to interpretation and the jury could recall the testimony. (RT 2276.) The prosecutor continued:

> The defendant wants sex. With or without Mele Kekaula's consent he wants sex. That's what we know. And he doesn't get off of her.
>
> The fact that he eventually is pushed off of her or she gets him off balance or somehow she's managed to put up enough of a fight, even with him on top of her, the act right then when she's saying no and he's remaining on top of her is attempted rape. Make no mistake about it. (RT 2276.)
>
> Mele is resisting as much as she can at that point with a 270 pound man on top of her, and she's pushing and she is saying what she's

saying and making it very clear she wants no part of this. Does the defendant say, oh, my mistake and get off of her? (RT 2277.)

Defense counsel told the jury that the law did not require that she say yes to appellant's preliminary acts. (RT 2294.) Defense counsel succinctly argued that there was a difference between a man who has not been told yes, but stops when he is told no, and a man who does not care about consent. (RT 2307-2309.) Counsel noted that there was no evidence that anything of a sexual nature occurred after she had said "No." (RT 2293.)

In rebuttal, the prosecutor argued, "Consent does not matter to the defendant." (RT 2354.) She continues, "Does he do a direct but ineffectual act at having sex? Even after he knows that she is saying no. Absolutely." (RT 2354.)

4. THE JURY INSTRUCTIONS

The jury was instructed on the requisite elements for a finding of the alleged special circumstance.[9] The jury was told that a commonality of the special

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[9] Using the language of CALJIC 3.31, 4.21, and 8.80.1, the court instructed the jury:

> In ... the Special Circumstance, there must exist a union or joint operation of act or conduct [and] a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime or allegation to which it relates is not committed or is not true.
>
> The specific intent required is included in the definition of the crime or allegations set forth in these instructions. (RT 2379, CT3 63, CALJIC 3.31.) ...
>
> In the crime of murder and the special circumstance of which the defendant is accused, a necessary element is the existence in the mind of the defendant of the specific intent to kill and to rape and the mental states of express malice aforethought, premeditation and deliberation.
>
> If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether the defendant had the required specific intent or mental state.

circumstance with the charge of murder was that it was alleged that appellant was engaged in the commission of attempted rape.[10] The law of attempt was defined for the jury.[11] The jury was then provided the following instructions defining rape,

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If from all of the evidence you have a reasonable doubt whether the defendant formed that specific intent or mental state, you must find that he did not have that specific intent or mental state. (RT 2380, CT3 65, CALJIC 4.21.) ...

If you find the defendant in this case guilty of murder in the first degree, you must then determine if the following special circumstance is true or not true. That the murder was committed during the attempted commission of the crime of rape.

The People have the burden of proving the truth of the special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied. (RT 2384-2385, CT3 76-77, CALJIC 8.80.1.)

[10] Using the language of CALJIC 8.81.17 and Defendant's Special Instruction No. B, the court instructed the jury:

To find that the special circumstance referred to in these instructions as murder in the commission of the attempted rape is true, it must be proved:

1. That the murder was committed while the defendant was engaged in the attempted commission of the crime of rape. (RT 2385, CT3 78, CALJIC 8.81.17.)

In the special circumstance allegation it is alleged that murder was committed during the commission of an attempted rape.

It is also alleged that the defendant is criminally liable for first degree murder on the theory that the alleged victim was killed during the commission of an attempt[ed] rape. (RT 2385-2387, CT3 79-80, Defendant's Special Instruction No. B.)

[11] Using the language of CALJIC 8.81.17 and Defendant's Special Instruction No. B, the court instructed the jury:

The following instruction defines the law of attempt and the offense of attempted rape.

consent, and the requisite intent for attempted rape. Using the language of Defendant's Special Instruction No. B, and CALJIC 1.23.1, and 10.65, the jury was told:

> Rape is defined as follows: ¶ Every person who engages in an act of sexual intercourse with another person who's not the spouse of the perpetrator accomplished against that person's will by means of force, violence, duress or fear of immediate and unlawful bodily injury to that person is guilty of rape.
>
> Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required.
>
> "Against the person's will" means without the consent of the alleged victim.
>
> "Force" means that amount of physical force required in the circumstances to overcome the victim's resistance.
>
> "Duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which she would not have otherwise performed or acquiesce in an act which she otherwise would not have submitted. The total circumstances, including the

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> An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done towards its commission.
>
> In determining whether such an act was done, it is necessary to distinguish between mere preparation on the one hand, the actual commencement of the doing of the criminal deed on the other. Mere preparation which may consist of planning the offense or devising, obtaining, or arranging the means for its commission is not sufficient to constitute an attempt. However, acts of a person who intend to commit a crime will constitute an attempt where those acts clearly indicate a certain unambiguous intent to commit that specific crime. These acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design. (RT 2385-2386, CT3 79, Defendant's Special Instruction No. B.)

age of the alleged victim and her relationship to the defendant are factors to consider in apprising the existence of duress.

The fear of immediate and unlawful bodily injury must be actual and reasonable under the circumstances.

In order to prove the offense of attempted rape, each of the following elements must be proved:

1. A direct but ineffectual act was committed by the defendant towards the commission of rape of the alleged victim;

2. At the time of the act, the defendant had the specific intent to rape the alleged victim;

[I]n order to prove the defendant had the specific intent to rape, each of the following elements must be proved:

1. The defendant had the specific intent to engage in an act of sexual intercourse with the alleged victim;

2. The defendant had the specific intent to engage in an act of sexual intercourse against the will of the alleged victim; and

3. The defendant had the specific intent to accomplish an act of sexual intercourse by means of force, violence, duress, menace or fear of immediate or unlawful bodily injury. (RT 2385-2387, CT3 79-80, Defendant's Special Instruction No. B.)

In rape prosecutions under Penal Code Section 261(a)(2), which is the basis of the special circumstance in this case, the word "consent" means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (RT 2387, CT3 81, CALJIC 1.23.1.)

In the crime of attempted rape, criminal intent must exist at the time of the commission of the attempted rape. There's no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse. Therefore, a reasonable and good faith belief that there is voluntary consent is a defense to such a charge.

However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress or fear

of immediate and unlawful bodily injury on the person or [sic] another is not a reasonable good faith belief.

If after a consideration of all of the evidence you have a reasonable doubt that the defendant had the criminal intent at the time of the attempted act of sexual intercourse, you must find the special circumstance not true. (RT 2387-2388, CT3 82, CALJIC 10.65

Finally, the jury was instructed on the use of circumstantial evidence in revolving the special circumstance allegation.[12]

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[12] Using the language of CALJIC 8.83, and 8.83.1, the court instructed the jury:

You are not permitted to find a special circumstance alleged in this case to be true based on circumstantial evidence unless the proved circumstance, is not only (1) consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt.

In other words before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of the special circumstance and other to its untruth, you must adopt the interpretation which points to it[s] untruth and reject the interpretation which points to its truth.

If, on the other hand, one interpretation of that evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (RT 2388-2389, CT3 83, CALJIC 8.83.)

The specific intent to with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true, unless the proved surrounding circumstances are on not only (1)

5. THE VERDICTS

Evidence was heard over the course of six court days. (CT 10830-10837, 10841-10844.) Jury deliberations on the guilt phase began at 1:50 p.m. on April 20, 1999. (CT 10855.) The next day at 1:00 p.m., the jury found appellant guilty of murder, found that it was in the first degree, and found true the allegations that appellant personally used a firearm within the meaning of section 12022.5 and that the murder was committed while appellant was engaged in the commission of the crime of attempted rape (§ 261, subd. (a)(2)), within the meaning of section 190.2, subdivision (a), (17), (iii). (CT 10857, 10860-10862.)

At the commencement of the penalty phase, the defense moved to strike the special circumstance or alternatively moved for a new trial based on the insufficient evidence of attempted rape. The motion was summarily denied. (RT 2444.)

C. General Principles of Appellate Review

The constitutionally mandated test to determine a claim of insufficiency of the evidence in a criminal case is whether, on the entire record, a rational trier of fact could find a defendant guilty beyond a reasonable doubt. (*People v. Johnson*

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consistent with the theory the defendant had the required specific intent, but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to the absence of the specific intent, you must adopt that interpretation which points to the absence of the specific intent.

If on the other hand, one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (RT 2389, CT3 84, CALJIC 8.83.1.)

(1980) 26 Cal.3d 557, 576-578 [162 Cal.Rptr. 431]; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) In making this determination the appellate court must view the evidence in the light most favorable to the prosecution and presume in support of the judgment of conviction the existence of every fact the trier of fact *could reasonably deduce* from the evidence. However, the appellate court must resolve the issue of sufficiency of the evidence in light of the *whole* record. Furthermore, the appellate court must judge whether the evidence of each of the essential elements of the offense of which the defendant stands convicted is *substantial* and of *solid value*. (*People v. Johnson, supra; People v. Barnes* (1986) 42 Cal.3d 284, 303 [228 Cal.Rptr. 228]; *People v. Hernandez* (1988) 47 Cal.3d 315, 345-346 [253 Cal.Rptr. 199]; *People v. Ochoa* (1994) 6 Cal.4th 1199, 1206 [26 Cal.Rptr.2d 23].) Speculation or conjecture alone is not substantial evidence. (*People v. Morris* (1988) 46 Cal.3d 1, 21 [249 Cal.Rptr. 119], overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543 [37 Cal.Rptr.2d 446].)

These principles preclude this court from upholding a conviction merely because there is *some* evidence, no matter how weak, to support the elements of the prosecution's case. Rather, "'implicit in ... [the appellate court's] duty to determine the legal sufficiency of evidence to sustain a verdict is ... [the appellate court's] obligation, in a proper case, to appraise the sufficiency and effect of evidence admitted or otherwise indubitably established as precluding or overcoming, as a matter of law, inconsistent inferences sought to be derived from weak or inconclusive sources.'" (*People v. Reyes* (1974) 12 Cal.3d 486, 499 [116 Cal.Rptr. 217], quoting *People v. Holt* (1944) 25 Cal.2d 59, 70 [153 P.2d 21].) Thus the testimony of witnesses that is inherently insubstantial, and that is contradicted by other solid and believable evidence, is an inadequate foundation to support a criminal conviction. (*People v. Reyes, supra,* 12 Cal.3d at pp. 499-500.)

Furthermore, the evidence must be capable of supporting a finding as to every fact required for conviction *beyond a reasonable doubt.* "[T]he trier of fact must be reasonably persuaded to a near certainty" (*People v. Hall* (1964) 62 Cal.2d 104, 112 [41 Cal.Rptr. 284]) or "evidentiary certainty" (*Cage v. Louisiana* (1990) 498 U.S. 39, 41 [112 L.Ed. 2d 339, 111 S.C. 328].) It is therefore *not* enough that there is *some* evidence based upon which a trier of fact might *speculate* that the defendant is in fact guilty. (*People v. Thomas* (1992) 2 Cal.4th 489, 545 [7 Cal.Rptr.2d 199], Mosk, J. dissenting.)

D. Passive Acquiescence Alone Does Not Equate With Lack of Consent, an Essential Element of Attempted Rape

1. INTRODUCTION

Society "grades the pressures to have sex according to their legitimacy—from pressures to have sex that are perfectly moral, to those that are immoral but not criminal, to those that are criminal, to those that constitute crimes of the most serious sort. (Donald A. Dripps, *Beyond rape: An essay on the difference between the presence of force and the absence of consent*, 92 Columbia Law Review (1992) 1780, 1788.) In the instant case, the prosecution has blurred the distinction between the immoral and the criminal.

The Parts that follow (*D, 2-3*) will demonstrate that passive acquiescence to a sexual touching does not equate with a lack of consent, a requisite element of the crime of rape.

As charged[13] and relevant to this case, "Rape is an act of sexual intercourse ... with a person not the spouse of the perpetrator" "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person." (§ 261, subd. (a)(2); *People v. Griffin*

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[13] The trial court rejected last-minute efforts by the prosecutor to amend the information to expand the charge to include additional forms of rape. (RT 1700, 2067, 2070, 2078-2079, 2082-2083.)

(2004) 33 Cal.4th 1015, 1022 [16 Cal.Rptr.3d 891]) To convict one of rape, the People must prove *beyond a reasonable doubt* the victim's nonconsent to intercourse (*People v. Key* (1984) 153 Cal.App.3d 888, 895 [203 Cal.Rptr. 144]), the defendant's lack of a good faith belief that the victim consented (*People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr. 745]; *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1142 [222 Cal.Rptr. 630), and whether the use of force served to overcome the will of the victim to thwart or resist the attack (*People v. Griffin, supra,* at p. 1027.)

We begin with the premise that "there is no rape if a female of sufficient capacity consents to sexual intercourse." (*People v. Mayberry, supra,*15 Cal.3d 143, 154.) The question that follows is "[w]hat constitutes consent: what the woman said, what she did, or the totality of circumstances? Even if consent should be defined so that 'no means no,' did the woman say 'no' ...? What did 'no' mean in that context? Was she crying? What does the evidence show?" (Robert Garcia, *Rape, Lies and Videotape*, 25 Loy.L.A.L.Rev. 711, 738 (1992).)

The Legislature and the courts have been wrestling with these issues for many years. In 1980 the Legislature amended Section 261 so that a lack of resistance is no longer a defense to rape[14] (*People v. Barnes, supra,* 42 Cal.3d 284, 304), although, that lack may be probative of whether the defendant honestly and reasonably believed he was engaging in consensual sex (*id. at* p. 306, fn. 19.)

In 1982 the Legislature directly refined the concept of "consent" in a new definition. Section 261.6 now provides in pertinent part:

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[14] "The elimination of the resistance requirement from the rape statute was the Legislature's response to concerns that rape victims who resisted their attackers oftentimes suffered greater physical injuries than victims who did not resist, and to the further circumstance that prosecutors were increasingly either unable or unwilling to file rape charges where victim resistance could not be proved." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1024-1025 [16 Cal.Rptr.3d 891].)

> In prosecutions under Section 261... in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (§ 261.6.)

Since that amendment, the courts have resolved that "without the victim's consent" equates with "against the victim's will." (*People v. Cicero* (1984) 157 Cal.App.3d 465, 475 [204 Cal.Rptr. 582]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 460 [98 Cal.Rptr.2d 315].)

Nonetheless, in certain contexts, "against the victim's will" must be distinguished from submission. For instance, a victim's decision to submit to an attacker's sexual demands out of fear of bodily injury is not consent (*People v. Guldbrandsen* (1950) 35 Cal.2d 514, 520 [218 P.2d 977]; *People v. Peterman* (1951) 103 Cal.App.2d 322, 325 [229 P.2d 444]) because the decision is not freely and voluntarily made (*People v. Giardino, supra,* 82 Cal.App.4th 454, 460.) However, as the legislative history of section 261.6 will demonstrate below, the Legislature rejected equating lack of consent with mere assent, i.e., the alleged victim's submission or passive acquiescence *alone* is not enough to prove an act was committed without the victim's consent.[15]

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[15] When the language of a statute is susceptible of more than one reasonable interpretation, this Court looks to a variety of extrinsic aids, including the historical context of the statute (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 733 [114 Cal.Rptr. 460]; *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1158 [70 Cal.Rptr.2d 769]), the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94 [86 Cal.Rptr.2d 893].) The legislative history includes committee reports (*In re John S.* (2001) 88 Cal.App.4th 1140, 1145, fn. 2 [106 Cal.Rptr.2d 476]; *Perez v. Smith* (1993) 19 Cal.App.4th 1595, 1598 [24 Cal.Rptr.2d 186]), bill analysis prepared for the Committee shepherding the bill (*People v. Ledesma* (1997) 16 Cal.4th 90, 98, 100 [65 Cal.Rptr.2d 610]; *Pacific Bell v. California State Consumer Services Agency* (1990) 225 Cal.App.3d 107,

2. THE LEGISLATIVE HISTORY OF SECTION 261.6 AND THE SEARCH FOR A DEFINITION OF "CONSENT"

As the historical context set forth above and the legislative history of 261.6 set forth below, suggest, an evil to be prevented was a defendant avoiding criminal liability where the "victim's" uncommunicated decision to submit was the result of some improper factor brought to bear by or in behalf of the defendant.

Penal Code section 261.6 was enacted in 1982 following legislative passage of Assembly Bill 2721. (West's Ann. Penal Code, § 261.6, Appellate Exhibit 1d.[16]) Assembly member McCarthy introduced the bill on February 22, 1982.

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116 [275 Cal.Rptr. 62]), reports of legislative committees (*Hutnick v. U.S. Fidelity and Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7 [253 Cal.Rptr. 236]; *Conley v. Roman Catholic Archbishop* (2000) 85 Cal.App.4th 1126, 1134, fn. 3 [102 Cal.Rptr.2d 679]), and memorandum to the committee from effected parties (see, e.g., *People v. Snyder* (2000) 22 Cal.4th 304, 309 [92 Cal.Rptr.2d 734]; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, fn. 3 [88 Cal.Rptr.2d 19]; *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 917, 926 [64 Cal.Rptr.2d 814]; *Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 878-880 [64 Cal.Rptr.2d 319].) "[I]t is reasonable to infer that those who actually voted on the proposed measure read and considered the materials presented in explanation of it, and that the materials therefore provide some indication of how the measure was understood at the time by those who voted to enact it." (*Hutnick v. U.S. Fidelity and Guaranty Co., supra,* 47 Cal.3d at p. 465, fn. 7.)

The object sought to be achieved by the statute as well as the evil to be prevented is of prime consideration. (*Leslie Salt Co., v. S.F. Bay Conserv. And Develop. Comm.* (1984) 153 Cal.App.3d 605, 614 [200 Cal.Rptr. 575].)

[16] Counsel for appellant has received from the Legislative Intent Service 11 exhibits that make up the legislative history of the initial passage of section 261.6 Some of the exhibits have subparts. These exhibits will hereafter be referred to as Appellate [App.] Exhibits 1 through 11. Immediately following these exhibits as Appellate Exhibit 12 is a declaration under penalty of perjury from the attorney employed by the Legislative Intent Service attesting to the authenticity of these documents.

Counsel, contemporaneously with the filing of the instant *Appellant's Opening Brief*, is submitting appellant's motion to take judicial notice of this history pursuant to Evidence Code sections 452 through 454 and is lodging with the court with that request the original copy of these documents.

(App. Exh. 1a.) The bill created new sex crimes and expanded the definition of existing sex crimes. (App. Exhs. 1a, 10 PE-4.) As relevant here, the bill added section 261.6 which was proposed to provide:

> In every case prosecuted under Section 261, 286, 288a, or 289 in which consent is a defense, the jury shall be instructed as to the following definition: "To constitute consent on the part of a person to a criminal act or transaction:
>
> (a) The victim must act freely and voluntarily and not under the influence of force, violence, duress, menace, or fear induced by threat, express or implied, to use force or violence either immediately or in the future on the victim or on another person.
>
> (b) The victim must have knowledge of the true nature of the act or transaction involved.
>
> (c) Consent means a free will and positive cooperation in act or attitude. Assent, however, means mere passivity and does not amount to consent. ¶. (App. Exh. 1a [AB 2721 p. 3].)

In the "Staff Comments" of the Assembly Committee on Criminal Justice, apparently published prior to a March hearing on the Bill, the Staff stated:

> Distinction Between Consent and Assent. The definition makes a distinction between consent and assent, but it is unclear how that would be applied to a factual situation. Does this mean the jury may not find the victim consented unless she verbally agreed to the act? What is the purpose of this distinction? (App. Exh. 3, p. 4.)

Two amendments were subsequently made to the bill. (See App. Exhs. 1b, 1c, & 2.) The first of these was on April 15, 1982 that rewrote the entire section 261.6. (App. Exh. 1b.) This amendment dropped the distinction between "consent" and "assent." The amended section provided:

> In prosecutions under Section 261, 286, 288a, or 289, in which consent is at issue, the jury shall be instructed in a manner consistent with the following definition: "Consent means positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of

the true nature of the act or transaction involved. (App. Exh. 1b [AB 2721 p. 4].)

The analysis of the Bill as amended prepared for the Senate Committee on Judiciary noted in the *Comment* section that the "consent" provision of the Bill was the most contested part of the bill. (App. Exh. 5, p. 3.) The *Comment* continued:

> The instruction is borrowed in part from existing CALJIC instruction on "Consent." ¶ Proponents assert that this instruction is necessary to counter a CALJIC instruction often given in sex offense cases in which consent is raised as an issue. That instruction, CALJIC 10.23, generally states that it is a defense to the charge that the defendant entertained a reasonable and good faith belief that the accuser voluntarily consented to engage in the sexual conduct. The instruction further provides that if from all the evidence a juror has a reasonable doubt whether the defendant reasonably and in good faith believed that the accuser voluntarily consented to engage in sexual conduct, the juror must give the defendant the benefit of the doubt and issue an acquittal. (App. Exh. 5, p. 3.)[17]

In the Senate Committee on Judiciary's Legislative Bill File for the Bill is a letter from The Committee on Human Rights of the State Bar of California that stated:

> While consent is a legitimate defense, existing law, particularly in rape prosecutions, has been interpreted so that victims and prosecutors have to—or believe that they have to—offer

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[17] The *Comment* continues:

> Both the prosecution and the defense bar have expressed strong concern over this provision. The California District Attorneys Association believes that it is unwise to codify an instruction into law and to require that it be given in every case. They prefer the flexibility under the current procedures.
>
> The defense bar voices the same concerns and additionally contends that the bill would require the instruction in inappropriate cases to a defendant's detriment, such as in cases where the accuser was mentally diminished but was not a moron or legally incapable of giving consent. (App. exh. 5, p. 4.)

tangible evidence of a victim's physical resistance to a sexual assault.

By expressly limiting the consent defense to "positive cooperation in act or attitude pursuant to an exercise of free will", AB 2721 will assure that a victim's fear or safety-intended passivity will not be construed as consent to a sexual assault." (App. Exh. 6, p. 9.)

The next and last amendment to Assembly Bill 2721, dated August 3, 1982, made further changes in the language of section 261.6 bringing it to its current form, which made the changes illustrated below—additions are italicized and deletions are struck through:

In prosecutions under Section 261, 286, 288a, or 289, in which consent is at issue, ~~the jury shall be instructed in a manner consistent with the following definition: "Consent means~~ "*consent*" *shall be defined to mean* positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the ~~true~~ nature of the act or transaction involved. (App. Exh. 1c [AB 2721 p. 2].)

As the historical context of section 261.6 and its legislative history make clear, the evil to be remedied was that the victim's fear or safety-intended passivity would not be construed as consent to a sexual assault. (*People v. Guldbrandsen, supra,* 35 Cal.2d 514, 520; *People v. Peterman, supra,* 103 Cal.App.2d 322, 325; *People v. Giardino, supra,* 82 Cal.App.4th 454, 460; App. Exh. 6, p. 9.) The Legislature's rejection of the language of the statute as first proposed provides compelling evidence that mere passivity or assent on the part of the "victim" was not excluded from the meaning of "consent" as long as it was not a product of force, violence, duress, menace, or fear [18] (App. Exh. 1a [AB 2721 p. 3].)

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[18] For the court to adopt an interpretation of the statutory language that was rejected by the Legislature, in the absence of a constitutional infirmity, would be an act squarely in contravention of the fundamental principles of a democratic

3. PASSIVE ACQUIESCENCE ALONE DOES NOT EQUATE WITH "WITHOUT THE PERSON'S CONSENT" OR "AGAINST A PERSON'S WILL"

Four years after section 261.6's passage, this Court explained:

> Although resistance is no longer the touchstone of the element of force, the reviewing court still looks to the circumstances of the case, including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim, to ascertain sufficiency of the evidence of a conviction under section 261, subdivision (2). (*People v. Barnes, supra,* 42 Cal.3d 284, 304; accord *People v. Griffin, supra,* 33 Cal.4th 1015, 1028.)
>
> In the words of one commentator, the trier of fact "should be permitted to measure consent by weighing both the acts of the alleged attacker and the response of the alleged victim, rather than being required to focus on one or the other." (*People v. Barnes, supra,* at p. 304, quoting *Consent Standard,* U.Chi.L.Rev. (1976) 613, 627.)

Thus, now when the defendant describes noncommunicative conduct by the alleged rape victim from which consent is inferred, the testimony is relevant to prove actual consent and, also, to prove that the defendant had reason to believe that the victim consented. (*People v. Burnham, supra,* 176 Cal.App.3d 1134, 1144-1145.) The critical inquiry is whether the alleged victim's "refusal" is reasonably manifest to the defendant. (*People v. Guthreau* (1980) 102 Cal.App.3d 436, 441 [162 Cal.Rptr. 376]; *State v. Guzman* (Wash. 2003) 79 P.3d 990, 994-995 [the victim must express her lack of consent by words or conduct; failure to indicate agreement is not enough].)

Recently, this Court in *In re John Z* (2003) 29 Cal.4th 756 [128 Cal.Rptr. 783] observed:

> One can readily imagine situations in which the defendant is able to obtain penetration before the victim can express an objection or attempt to resist. Surely, if the defendant thereafter ignores the

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form of government. (*Wiley v. So. Pacific Trans. Co.* (1990) 220 Cal.App.3d 177, 192, fn. 8.)

> victim's objections and forcibly continues the act, he has committed "an act of sexual intercourse accomplished .... [¶] ... against a person's will by means of force ...." (*Id.* at p. 762, quoting § 261, subd. (a)(2).)

This observation provides the implicit acknowledgment that a defendant's intent to engage in sexual intercourse and efforts made to accomplish that end do not in themselves equate with an attempted or accomplished rape. The *sin qua non* of rape is some expression, either verbal or nonverbal, of the alleged victim's objections *and* the defendant's failure to stop. (*People v. Griffin, supra,* 33 Cal.4th 1015, 1028; cf. *In re John Z, supra*, at p. 762.) After all, section 261.6 equates consent with positive cooperation, but does not require that the positive cooperation be verbally or nonverbally expressed.[19]

Where there is only the alleged victim's passive acquiescence, a rape has not been committed, otherwise any man or woman whose sexual partner passively acquiesces, rather than positively cooperates when he or she preferred to be left alone, might be guilty of rape. (See *People v. Gonzalez* (1995) 33 Cal.App.4th 1440, 1443–1444 [39 Cal.Rptr.2d 778].)[20] The elements of a statute must have reasonable limits. (*People v. Davis* (1998) 18 Cal.4th 712, 719 [76 Cal.Rptr.2d 770].) If this were not the rule, the results would be numerous and absurd. The reviewing court must presume that the Legislature did not intend absurd results. (*In re Head* (1986) 42 Cal.3d 223, 232 [228 Cal.Rptr. 184]; *People v. Salemme* (1992) 2 Cal.App.4th 775, 784 [3 Cal.Rptr.2d 398].) The *sin qua non* of rape is the joinder of the absence of positive cooperation with an act accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the alleged victim. (Cf. *People v. Gonzalez, supra,* 33 Cal.App.4th 1440, 1443-1444 [rejecting a due process challenge to the new definition of *consent* on the basis that

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[19] If section 261.6 were construed otherwise, it would be unconstitutional, as will be discussed in Arguments IV and V, below.

[20] This point is further illustrated in Argument IV, C, below.

it effectively eliminated the force element required for culpability for rape where the alleged victim merely passively acquiesced to the act].)

Sexual intercourse is not transformed into rape merely because of an uncommunicated change of the alleged victim's mind; rape is only committed if the sexual intercourse is continued as a result of compulsion. (*State v. Robinson* (Me. 1985) 496 A.2d 1067, 1070; *People v. Roundtree* (2000) 77 Cal.App.4th 846, 851 [91 Cal.Rptr.2d 921]; *State v. Bunyard* (Kan. App. 2003) 75 P.3d 750, 754, 756 [alleged victim did not want to have sex with the defendant, but she did not say anything to him about it until after he penetrated her].)

E. There Was No Evidence that the Preliminary Acts Were Against the Victim's Will, that Appellant Intended to Have Sexual Intercourse Against Her Will, or that Appellant Intended to or Accomplished the Sexual touching by Means of Force, Violence, Duress, or Menace

As detailed in Part *A, 1*, above, appellant was charged with the special circumstance that the murder was committed while appellant was engaged in the attempted commission of rape. The People must prove this charge beyond a reasonable doubt. (§ 1096; U.S. Const., 14th Amend.)

The elements of rape were defined in Part *D*, above. Whether these elements were proved is within the exclusive province of the jury. (*People v. Burnham, supra,* 176 Cal.App.3d at p. 1142.) As noted earlier, the weakness of the prosecution's case was reflected in the trial court's assessment of the evidence of rape: "I will tell you, frankly, when the jury went out I felt fairly strongly that I would not be surprised if they returned with a 'not true' verdict on the special circumstance." (RT 3081.) For good reason. The failings in the instant case are that there is no evidence of any verbal or non-verbal expression of objection by Mele, no evidence that appellant intended to have sexual intercourse against Mele's will, and no evidence of victim acquiescence capitulated by force, violence, duress, menace, or fear of immediate and unlawful bodily injury.

1. MELE'S PASSIVE ACQUIESCENCE ALONE DID NOT EQUATE TO A LACK OF CONSENT

In the instant case, the analysis is somewhat simplified by the fact that no intercourse was consummated. The pathologist found no indications of trauma consistent with a sexual assault (RT 2021, 2025, 2031-2033, 2052, 2059-2060); Mele's body was found clothed in a shirt, a Pendleton type jacket, green panties, and socks (RT 1674-1675, 1833-1835; People's Exhs. 2, 4-7); and no substance transfer to the vaginal or upper thigh areas could be seen with the naked eye (RT 2029-2030, 2032.)[21] The charge as well as the prosecution's theory were all premised on an *attempt* to commit rape. (CT 21-22, RT 335-336, 2263-2269.)

It is helpful for discussion to divide the facts into two periods—the period before Mele effectively said "No" and the period after.

In the former period, as detailed in Part *B, 2*, above, Devin's assistance at Mele's request, the late hour, and a blood alcohol level of .14 percent had collectively contributed to her prone position lying on her back on the backseat of the car with her legs extended through the opening of the rear car door. At her level of intoxication, an experienced drinker might have been able to drive; a level of .20 and closer to .25 would be needed to render one unconscious.[22] [23] Varying expectations had been influenced by these adolescents' perceptions of the unfortunate girl's reputation enhanced by Jarrod's ungallant tales and earlier distribution of condoms, her willingness to join the three boys late at night in this secluded spot, and their intimate discussions over the course of the night.

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[21] The introitus was swabbed so that it could be examined with a microscope (RT 2029-2030,) but the outcome was not disclosed.

[22] There was no evidence of what level of experience Mele had with alcohol.

[23] This case was explicitly not prosecuted on the theory that she had been prevented from resisting by any intoxicating substance or that she was unconscious of the nature of the act. (See § 261, subd. (a)(3) & (4); see fn. 13, page 59, above.)

At some point, according to Devin, but denied by Jarrod, Jarrod assisted appellant in removing her shoes and pants. During this process, Devin testified that she kept saying that she was drunk and, at Jarrod's suggestion, squeezed Jarrod's finger as an impromptu test for sobriety. (RT 1630-1631, 1690A.) At another point, she called Devin's name. (RT 1629, 1689A.) According to both Devin and Jarrod, appellant then made some comment that they believed meant that he was putting on a condom (RT 1500, 1502, 1547-1549, 1755-1756), whereupon, appellant lowered himself on top of her. Devin testified that appellant had lowered his pants six inches below his waist, but Devin did not see his penis or any part of his bare body (RT 1501, 1620-1621, 1625, 2169), but assumed that he had his penis out because that was where his left hand was (RT 1635-1636.) Jarrod provided inconsistent accounts, but one was that appellant pulled his pants down. (RT 1756, 1803-1804, 1957-1958.)

According to Devin and Jarrod, they could see appellant and Mele's chests touch and he was moving his hips up and down. (RT 1502-1503, 1757-1760.) Devin testified that Mele did not say anything. (RT 1503, 1537, 1627.) Yet, Devin told an officer that "'she was talkin' the whole time'" (RT 1629, 1688A-1689A, 2162) and she was not fighting at all (RT 2161.) Devin never saw her panties removed. (RT 1633.) Jarrod told an interviewing officer "'she wasn't, like, making no bit attempt" to get him off. (RT 1958, 1970.)

Up to this point, on Mele's part she had exhibited nothing other than complete passive acquiescence to appellant's acts. On appellant's part, he had done absolutely nothing more than that required for the sexual touching he was undertaking. There is not even any indication that he intended intercourse.[24] That would have certainly have been a wise precaution in light of their earlier concern that she had AIDS and was consistent with his election not to remove her panties.

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[24] An intent to ejaculate is not an equivalent of an intent to have intercourse.

Thus, to this point there is no attempted rape. (See *In re John Z, supra,* 29 Cal.4th at p. 762; *People v. Gonzalez, supra,* 33 Cal.App.4th at pp. 1443-1444.)

This brings us to the second period, the period after she effectively said "No." Again, as detailed in Part *B, 2*, above, Devin testified initially that when Mele protested, appellant "got right off." (RT 1504-1505, 1537.) Later, he testified somewhat inconsistently that appellant did not get off her immediately. (RT 1655-1656.) However, when he was then asked how appellant was positioned and what he was doing when Mele protested, Devin replied, "He was looking down at her." (RT 1656.) Thus, by neither of these accounts did appellant continue the sexual touching. She communicated that she wanted him to stop; he stopped. Her passive acquiescence was at an end; he went no further.

Jarrod testified that appellant was not on her long; it was rather quick. (RT 1805-1806.) Then, she loudly expressed that she wanted him *off* her. (RT 1760, 1806-1807, 1969-1971.) At this point, Jarrod's accounts, as had Devin's, varied. First, he testified that she pushed and appellant got off. (RT 1754, 1760-1761.) Then he testified that "he didn't get right off." (RT 1806.) A moment later, Jarrod testified that Mele did not make a big effort to tell appellant to get off her, "It wasn't like she was hitting him or something like that. She just pushed him," and he immediately got off. (RT 1807.) As in Devin's accounts, she communicated that she wanted him to stop; he stopped. Her passive acquiescence was at an end; appellant went no further.

At no point, either before or after she communicated that she wanted him to stop, were verbal or nonverbal threats of any kind made or any other of the proscribed influences detailed in section 261, subdivision (a)(2) brought to bear. Before she communicated her unwillingness that appellant continue, Mele's verbal and nonverbal acts were completely consistent with *positive* cooperation, if not *active* cooperation, with appellant's acts. Her passive acquiescence was

inadequate as a matter of law to establish her lack of consent. On these facts, as a matter of law there was no attempted rape. (See *In re John Z, supra,* 29 Cal.4th at p. 762.)

As can be seen in Parts *B, 3* and *4*, above, at no point in the prosecutor's closing arguments or the trial court's jury instructions was the jury advised that "consent" did not require more than passive acquiescence. At no point was the jury advised that "positive cooperation" did not mean or require active cooperation or preclude mere passive acquiescence. In fact, the prosecutor explicitly told the jury that "Consent requires positive cooperation... in an act or attitude as an exercise of free will." (RT 2268.) She illustrated, "Has she said, Sure? Has she spoken to him?" (RT 2274.) Although defense counsel argued to the jury that the law did not require her to say yes to appellant's acts (RT 2294), the trial court's instructions failed to authorize or include passive acquiescence as a form of "consent" (RT 2387, CT3 81.)

The jury was not told that a lack of "positive cooperation" meant that a reasonable person would have perceived some expression from the alleged victim, either verbal, nonverbal, or a combination thereof, that the act was against the alleged victim's will.[25]

2. THERE IS NO EVIDENCE THAT APPELLANT ACCOMPLISHED THE SEXUAL TOUCHING BY MEANS OF FORCE, VIOLENCE, DURESS, MENACE, OR FEAR OR INTENDED TO DO SO

An attempt to commit a crime has two elements. There must be (a) the specific intent to commit the particular crime and (b) a direct ineffectual act done toward its commission. (*People v. Carpenter* (1997) 15 Cal.4th 312, 387 [63 Cal.Rptr.2d 1]; *People v Miller* (1935) 2 Cal.2d 527, 530 [42 P.2d 308]; *People v.*

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[25] Argument III addresses the trial court's failure to adequately define consent for a determination of guilt pursuant to section 261, subdivision (a)(2).

Stites (1888) 75 Cal. 570, 575 [17 P. 693].) The failing here is in the first element, there is no evidence that appellant intended to rape Mele.

More specifically, the crime of rape, under the theory employed in the instant case, section 261, subdivision (a)(2), defines rape as "sexual intercourse accomplished with a person not the spouse of the perpetrator [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person." (§ 261, subd. (a)(2); *People v. Griffin, supra,* 33 Cal.4th 1115, 1022.) In the instant case, there is no dispute that appellant intended a sexual touching.[26] The failing here is that all the evidence indicates that appellant did not intend to accomplish the sexual touching against her will by *any* of the proscribed means of section 261, subdivision (a), (2).

Recently, this Court resolved that "force," as used in section 261, subdivision (a)(2), did not require any special clarification.

> [I]t has long been recognized that "in order to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]." (*People v. Griffin, supra,* 33 Cal.4th at p. 1023-1024, quoting *People v. Young* (1987) 190 Cal.App.3d 248, 257-258 [235 Cal.Rptr. 361].)
>
> "'[F]orce' plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will." (*Id.* at p. 1025, quoting *People v. Cicero, supra,* 157 Cal.App.3d at p. 475.)

It is readily acknowledged that whatever force is employed, it need not cause physical harm to satisfy this element of rape. (*People v. Cicero, supra,* 157

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[26] As noted in Part *1*, above, there is little indication that he intended intercourse in light of the fact that he did not remove her panties and the concern the boys had expressed that night that she was infected with the AIDS virus.

Cal.App.3d 465, 475.) Yet, implicit in this Court's decision *In re John Z, supra,* 29 Cal.4th 756, 762-763 is the observation that penetration alone will not satisfy the elements of rape without an adequate showing that the intercourse was against the will of the victim. (*Id.* at pp. 762-763.)

In Part *1*, above, it was demonstrated that up to the point when the victim effectively communicated "no," appellant had done absolutely nothing more than that required for the sexual touching he was undertaking. After she had communicated that her passive acquiescence was at an end, by no account did appellant continue the sexual touching. Devin testified initially that when Mele protested, appellant "got right off." (RT 1504-1505, 1537.) Later, he testified somewhat inconsistently that appellant did not get off of her immediately. (RT 1655-1656.) However, when he was then asked how appellant was positioned and what he was doing when Mele protested, Devin replied, "He was looking down at her." (RT 1656.) Thus, by neither of these accounts did appellant continue the sexual touching. She communicated that she wanted him to stop; he stopped. Her passive acquiescence was at an end; he went no further.

Jarrod, in turn, provided varying accounts describing what immediately followed her loud expression that she wanted him *off* her. (RT 1760, 1806-1807, 1969-1971.) First, he testified that she pushed and appellant got off. (RT 1754, 1760-1761, 1806-1807.) Then he testified that "he didn't get right off." (RT 1806.) A moment later, Jarrod testified that Mele did not make a big effort to tell appellant to get off of her, "It wasn't like she was hitting him or something like that. She just pushed him" and he immediately got off. (RT 1807.) As in Devin's accounts, she communicated that she wanted him stop; appellant stopped. Her passive acquiescence was at an end; he went no further.

Once again, on these facts, all the evidence was completely inconsistent with the fact that appellant intended to force his intentions on her at any point or

that he did force them upon her. When she made clear that she wanted him to stop, he stopped. Thus, as a matter of law, there was no attempted rape.

F. The Remedy is a Reversal of the Special Circumstance with Directions to Enter a Judgment of Acquittal and Dismiss the Special Circumstance from the Information

Since no rational trier of fact could have found true beyond a reasonable doubt that appellant attempted to rape the victim, the special circumstance finding accompanying the murder charge as well as appellant's death sentence must be reversed and appellant resentenced. (*People v. Johnson, supra,* 26 Cal.3d 557, 576-578; *Jackson v. Virginia, supra,* 443 U.S. 307, 318-319.) To do otherwise would deny appellant his constitutional right to due process and a fair trial in violation of the Fifth and Fourteenth Amendments and Article I, section 15 of the California Constitution. (*Jackson v. Virginia, supra,* 443 U.S. 307, 313-324; *People v. Rowland* (1992) 4 Cal.4th 238, 269 [14 Cal.Rptr.2d 377].)

Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141]), the trial court should be directed to dismiss the allegation from the accusatory pleading with prejudice.

II. APPELLANT'S FIRST DEGREE MURDER VERDICT WAS UNCONSTITUTIONAL AS IT WAS LIKELY BASED ON A FELONY MURDER THEORY PREMISED ON INSUFFICIENT EVIDENCE OF THE FELONY OF ATTEMPTED RAPE

The prosecution proffered the jury two theories for first degree murder—felony murder premised on a killing during the felony of attempted rape or a killing premised on a finding there was a willful, deliberate and premeditated intent to kill.[27] However, as demonstrated in Argument *I*, there was insufficient

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[27] In *Argument VI*, following, it is demonstrated that there was also insufficient evidence of deliberation and premeditation.

evidence of attempted rape as a matter of law. Since the felony on which the felony murder theory was premised upon was the same attempted rape the special circumstance was premised upon, the felony murder too is necessarily supported by insufficient evidence.

As well be demonstrated in Part *D*, below, since appellant likely has been convicted on a theory for first degree murder based on insufficient evidence, he has been denied his Fifth and Fourteenth Amendment rights to due process and a fair trial.

A. The Facts and Procedural Background

1. THE CHARGE

Appellant was charged with the murder of Mele Kalani in violation of section 187. It was alleged that the offense was committed with malice aforethought; that appellant personally used a firearm within the meaning of section 12022.5, subdivision (a); and that the offense was committed while appellant was engaged in the attempted commission of the crime of rape in violation of section 261, subdivision (a), (2). (CT 21-22.)

2. THE FACTS

The facts regarding the alleged attempted rape were detailed in Argument *I*, Part *B, 2*, above, and are here incorporated by reference.

After appellant got off Mele, he did not get out of the car; they sat together in the back seat. "She sort of was primping herself." (RT 1505-1507.) They talked for a while and there was a lot more said. (RT 1506-1507, 1546, 2162.) At some point, appellant got out of the car and said he wanted to talk to her. (RT 1553.) Devin testified that appellant or Jarrod said, "We're just going to leave her here." (RT 1553-1554, 2163-2614.) Appellant walked around to the rear door on the passenger side of the car. (RT 1508-1510, 1552.) He reached inside and took hold of her arm above the elbow. (RT 1510, 1650, 1762-1763.) She resisted a

little. (RT 1555, 2164.) He pulled her out of the car. (RT 1510, 1661, 2164.) As they went to the rear of the car, she fell onto her knees, and he held her by her forearm to assist her. (RT 1510-1512, 1555-1558, 1650.)

On the dirt shoulder at the rear of the car, they could be seen talking; not loudly, and she was making some hand or head gestures. (RT 1512-1513, 1515, 1558-1559.) Jarrod was still in the driver's seat. (RT 1512.) Devin heard appellant say, "'Is that it? Is that how it was gonna be.?'" (RT 1513.) Jarrod heard, "'It's like that, huh.'" (RT 1766.) Appellant put his left arm around her with her neck in the crook of his arm. (RT 1512-1513, 1559, 2150-2151.) Her face was facing him. (RT 1513-1514.) He pulled a gun from his back pocket, put it to her face (RT 1514-1515), and fired (RT 1515, 1560-1561, 1766-1767.) She fell motionless to the ground. (RT 1515.) Appellant straddled her and put the gun within six inches of her face and fired six or seven times more. (RT 1516, 1767-1769.)

3. THE CLOSING ARGUMENTS

Argument *I*, Part *B, 3*, above, is here incorporated by reference.

4. THE JURY INSTRUCTIONS

The trial court's instructions to the jury regarding the alleged attempted rape and special circumstance were detailed in Argument *I*, Part *B, 4*, above, and are incorporated here. In addition, the court, using the language of CALJIC 8.10, 8.11, and 8.20, defined murder, malice aforethought, and deliberate and premeditated murder, explaining that a willful, deliberate, and premeditated killing with express malice aforethought was murder of the first degree. (RT 2380-2383, CT3 67-70.) Immediately thereafter, the jury was instructed using the language of CALJIC 8.21, 8.70, and 8.71:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the attempted

commission of the crime of rape is murder of the first degree when the perpetrator had the specific intent to commit that crime.

The specific intent to commit rape and the commission or attempted commission of such crime must be proved beyond a reasonable doubt. (RT 2383, CT3 71.)

As you've already gathered, murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree.

If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by the defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, and you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree. (RT 2384, CT3 74-75.)

5. THE VERDICTS

The length of the jury's deliberations and their ultimate verdicts are detailed in Argument *I*, Part *B, 5* and are here incorporated by reference. The jury inserted "FIRST" into a blank provided in the verdict for murder indicating their decision that they had fixed the degree of murder as murder in the first degree. (CT 10861.) Nothing in their finding indicates upon which theory they premised their decision.

B. General Principles of Appellate Review

Argument *I*, Part *C*, above, is incorporated here.

C. There Was No Evidence to Support the Felony upon which the Felony Murder Was Premised

Argument *I*, Part *E*, above, is here incorporated by reference. In brief, as a matter of law there was no attempted rape because the evidence was insufficient to prove that the acts were against the victim's will, that appellant intended to have sexual intercourse against her will, or that appellant intended to accomplish or accomplished, the sexual touching by means of force, violence, duress, or menace.

D. The Remedy is a Reversal of the Conviction for First Degree Murder with Directions to Enter a Judgment for Second Degree Murder, and Resentence Appellant

The jury's verdict does not disclose upon which theory of first degree murder it relied: premeditated murder or felony murder. Appellant need not prove that the jury relied upon the erroneous theory where that theory is the result of legal error. Legal error in this context means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence. (*Griffin v. United States* (1991) 502 U.S. 46, 59 [116 L.Ed.2d 371, 112 S.Ct. 466]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1122, 1125, 1128-1129 [17 Cal.Rptr.2d 365]; *People v. Harris* (1994) 9 Cal.4th 407, 419 [37 Cal.Rptr.2d 200].) As demonstrated in Argument *I*, above, that was the case; the jury's finding that appellant had attempted to commit rape was premised on a legal error—an overly limited definition for consent[28] and evidence insufficient as a matter of law that appellant had attempted the felony of rape.

When the prosecution presents its case to the jury on alternate theories, one of which is legally correct and the other legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand. (*People v. Green* (1980) 27 Cal.3d 1, 67 [164 Cal.Rptr. 1]; *People v. Guiton, supra,* 4 Cal.4th 1116, 1122, 1125, 1128-1129.) Under these circumstances, reversal is required unless it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory. (*People v. Guiton, supra,* at p. 1130.)

Here, that is not possible. The attempted rape was the focus of and dominant theme addressed by both sides during their closing arguments. In fact, felony-murder was the only theory for first degree murder argued by the prosecution. (RT 2283-2284.) Once the jury found that appellant had attempted

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[28] This is the topic of Argument III, to follow.

rape, that finding immediately resolved for them whether this was first or second degree murder. It obviated the need to ponder when appellant first resolved to shoot Mele, what role his alcohol consumption played in that decision, or how long appellant's consideration of that decision had to be needed to rise to the requisite level of a willful, deliberate, and premeditated killing. The jury deliberated but a single day, from 1:50 p.m. on April 20th to 1:00 p.m. on April 21st, a fair indication that they took the shortest route to first degree murder.

Since no rational trier of fact could properly have found true beyond a reasonable doubt that appellant intended to rape the victim, appellant's first degree murder conviction and death sentence must be reversed with directions to enter a verdict of second degree murder and resentence appellant. (*People v. Johnson, supra,* 26 Cal.3d 557, 576-578; *Jackson v. Virginia, supra,* 443 U.S. 307, 318-319.) To do otherwise would deny appellant his constitutional right to due process and a fair trial in violation of the Fifth and Fourteenth Amendments and Article I, section 15 of the California Constitution. (*Jackson v. Virginia, supra,* 443 U.S. 307, 313-324; *People v. Rowland, supra,* 4 Cal.4th 238, 269.)

Furthermore, since double jeopardy considerations bar a retrial for felony murder (*Burks v. United States, supra,* 437 U.S. 1), the trial court should be directed to dismiss the felony murder allegation from the accusatory pleading with prejudice.

III. THE TRIAL COURT'S FAILURE TO ADEQUATELY DEFINE CONSENT *SUA SPONTE* FOR THE DEFENSE TO ATTEMPTED RAPE WAS UNCONSTITUTIONAL

As discussed in the preceding two arguments, appellant was prosecuted for first degree murder on alternative theories—felony murder premised on a killing during the felony of attempted rape or a killing premised on a finding there was a willful, deliberate and premeditated intent to kill.

That portion of the jury instructions for attempted rape that defined consent and a defendant's reasonable belief that the alleged victim consented effectively permitted the jury to convict if Mele merely passively acquiesced to an attempt to have intercourse without communicating in any way her unwillingness to engage in such an act.

Here this meant that appellant's jury was authorized to find appellant guilty of attempted rape if it believed all of the following: (a) Mele did not want to have sexual intercourse; (b) appellant attempted to have sexual intercourse with her; (c) something in the moment or in her innate makeup prompted her to initially acquiesce in the face of his desire or for any other reason (other than *any* of the proscribed means of section 261, subdivision (a), (2)); and, (d) appellant neither knew nor could reasonably be expected to know (from his own conduct or hers) that she did not want to have sex. The last point unlawfully eliminated a requirement of *mens rea.*[29]

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[29] There was no objection to the instructions as given. However, the court had a sua sponte duty to instruct correctly on the elements of the offense. (*People v. Iverson* (1972) 26 Cal.App.3d 598, 604-605 [102 Cal.Rptr. 913], disapproved on other grounds in *In re Early* (1975) 14 Cal.3d 122, 130, fn. 11 [120 Cal.Rptr. 881].)

Jury instructions are an exception to the general waiver rule. An appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant were affected. (§§ 1259, 1469.) Substantial rights are equated with reversible error, i.e., did the error result in a miscarriage of justice. (Cal. Const., Art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978 [125 Cal.Rptr. 419].) Lowering the prosecution's burden of proof for an element of an offense manifests a miscarriage of justice.

In any event, constitutional claims may be considered when presented for the first time on appeal when the error fundamentally affected the validity of the judgment, or important issues of public policy are at stake (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [149 Cal.Rptr. 375]; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173 [13 Cal.Rptr. 176]), all factors that are present here. Further, a

The result improperly reduced the prosecution's burden of proof and denied appellant due process of the law, a fair trial, the right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and non-arbitrary determination of guilt, death eligibility, and penalty in violation of his rights under Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the analogous provisions of the California Constitution (Cal. Const., Art. I, §§ 1, 7, 15, 16, 17.)

A. The Jury Instructions Provided

As demonstrated by the parties' closing arguments detailed in Argument *I*, Part *B*, *3*, above, and incorporated here, whether Mele consented to appellant's sexual touchings, let alone whether she consented to sexual intercourse, was the principal focus of both the prosecution and defense.

Jury instructions were given following those arguments. In regard to the resolution of whether first or second degree murder had been committed, the court instructed the jury on the concept of felony murder:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the attempted commission of the crime of rape is murder of the first degree when the perpetrator had the specific intent to commit that crime.

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reviewing court may consider a claim despite a lack of objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 843, fn. 8 [72 Cal.Rptr.2d 656].) Again, lowering the prosecution's burden of proof for an element of the offense manifestly provides an unfair trial.

Moreover, the fact that a state court may legitimately refuse to hear tardily based constitutional challenges does not mean that the state court is obliged as a matter of federal law to refrain from reaching the federal constitutional questions. (*Orr v. Orr* (1979) 440 U.S. 268, 275, fn. 4 [59 L.Ed.2d 306, 99 S.Ct. 1102].)

> The specific intent to commit rape and the commission or attempted commission of such crime must be proved beyond a reasonable doubt. (RT 2383, CT3 71, CALJIC 8.21.)

In regard to the special circumstance allegation, the court instructed the jury: "A necessary element is the existence in the mind of the defendant of the specific intent ... to rape. (RT 2380, CT3 65, CALJIC 4.21.)

In regard to rape, as applicable here, the court instructed:

> Rape is defined as follows: ¶ Every person who engages in an act of sexual intercourse with another person who's not the spouse of the perpetrator accomplished against that person's will by means of force, violence, duress or fear of immediate and unlawful bodily injury to that person is guilty of rape. ¶ ...
>
> "Against the person's will" means without the consent of the alleged victim.
>
> "Force" means that amount of physical force required in the circumstances to overcome the victim's resistance. ...
>
> In order to prove the offense of attempted rape, each of the following elements must be proved:
>
> 1. A direct but ineffectual act was committed by the defendant towards the commission of rape of the alleged victim;
>
> 2. At the time of the act, the defendant had the specific intent to rape the alleged victim;
>
> [I]n order to prove the defendant had the specific intent to rape, each of the following elements must be proved:
>
> 1. The defendant had the specific intent to engage in an act of sexual intercourse with the alleged victim;
>
> 2. The defendant had the specific intent to engage in an act of sexual intercourse against the will of the alleged victim; and
>
> 3. The defendant had the specific intent to accomplish an act of sexual intercourse by means of force, violence, duress, menace or fear of immediate or unlawful bodily injury. (RT 2385-2387, CT3 79-80, Defendant's Special Instruction No. B.)

> In rape prosecutions under Penal Code Section 261(a)(2), which is the basis of the special circumstance in this case, the word "consent" means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (RT 2387, CT3 81, CALJIC 1.23.1.)
>
> In the crime of attempted rape, criminal intent must exist at the time of the commission of the attempted rape. There's no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse. Therefore, a reasonable and good faith belief that there is voluntary consent is a defense to such a charge.
>
> However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief.
>
> If after a consideration of all of the evidence you have a reasonable doubt that the defendant had the criminal intent at the time of the attempted act of sexual intercourse, you must find the special circumstance not true. (RT 2387-2388, CT3 82, CALJIC 10.65.)

The trial court failed in its *sua sponte* obligation to adequately instruct on the elements of the offense.

B. The Error

In brief, the jury was told that rape involved an act of sexual intercourse accomplished against the person's will. The jury was told that "against the person's will" meant without the consent of the alleged victim. The jury was told that "consent" meant positive cooperation in act or attitude as an exercise of free will. The error here is that the jury was not told that "positive cooperation" did not mean or require some verbal or nonverbal expression of cooperation. The jury was not told that a lack of "positive cooperation" meant that a reasonable person would have perceived some expression from the alleged victim, either verbal, nonverbal, or a combination thereof, that the act was against the alleged victim's

will. The jury was not told that consent did not require something more than the victim's mere unexpressed assent. (*State v. Jackson* (N.H. 1996) 679 A.2d 572, 574; *People v. Griffin, supra,* 33 Cal.4th 1015, 1028; *In re John Z, supra,* 29 Cal.4th 756, 762; *People v. Roundtree, supra,*77 Cal.App.4th 846, 851; *People v. Gonzalez, supra,* 33 Cal.App.4th 1440, 1443-1444; *People v. Guthreau, supra,* 102 Cal.App.3d 436, 441; *State v. Guzman, supra,* 79 P.3d 990, 994-995; *State v. Robinson, supra,* 496 A.2d 1067, 1070.)

C. The Erroneous Definition of Consent Unquestionably Influenced the Outcome

Instructional error misdescribing an element of an offense is federal constitutional error. (*People v. Hagen* (1998) 19 Cal.4th 652, 670 [80 Cal.Rptr.2d 24].) With federal constitutional error, respondent has the burden of showing harmlessness. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) That is, respondent must demonstrate beyond a reasonable doubt that the error did not contribute to the guilty verdict. (*People v. Williams* (1971) 22 Cal.App.3d 34, 50 [99 Cal.Rptr. 103].) The issue is not whether a hypothetical properly instructed jury would have convicted, but whether the case was in a posture such that appellant's jury was somehow actually uninfluenced by the error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281 [124 L.Ed.2d 182, 113 S.Ct. 2078].); *Chapman v. California*, supra, 386 U.S. at pp. 23-24.)

Here the prosecutor's closing argument built upon the inadequate instructions and effectively encouraged the jury to find the special circumstance and the felony for felony murder on the legally erroneous theory. The prosecutor told the jury that "against the will" "simply means without consent." (RT 2268.) She argued that consent required positive cooperation which she illustrated with: "Has she said, Sure? Has she spoken to him?" (RT 2274.)

In this case it is highly likely that the error influenced the outcome. The entire defense pivoted on the jury's proper understanding of multiple complex

legal terms of "against the person's will" and "without consent" and resolution of whether the form of Mele's passive acquiescence fit those definitions. Yet, the instructions and the prosecutor's argument recounted above permitted resolution of the issue against appellant merely because the victim did not say "Sure." (RT 2274.) As defense counsel succinctly argued, there is a difference between a man who has not been told yes, but stops when he is told no, and a man who does not care about consent. (RT 2307-2309.) Because of the inadequate instructions and the prosecution's argument, the jury was given a far lower standard that for appellant meant guilt of first degree felony murder with a special circumstance, when it should have meant innocence of attempted rape, a not true finding of the special circumstance, and not guilty of felony murder.

Here there is nothing in the evidence, instructions, or verdicts that manifests that the jury necessarily excluded the scenario of a girl whose will momentarily collapsed in the face of appellant's sexual advances, under circumstances where the initiator could not be expected to know that she was unusually passive at the moment and would not communicate her wishes.

The special circumstance, the murder conviction, and appellant's death sentence must be reversed, and the matter retried to a properly instructed jury.

Alternatively, as argued in Argument II, appellant's conviction must be reversed with directions to enter a verdict of second degree murder and resentence appellant.

IV. APPLICATION TO APPELLANT OF A NEWLY LIMITED DEFINITION OF CONSENT FOR RAPE RESULTED IN THREE ADDITIONAL DUE PROCESS VIOLATIONS

Arguments *I* and *II* challenge the sufficiency of the evidence of attempted rape; and more particularly that the sufficiency of the evidence that appellant's acts were without the victim's consent and that any force had been employed.

Argument *III* alternatively asserts challenges that the trial court failed to adequately define consent. The instant argument addresses the next logical contentions. If the instructions provided here adequately defined consent, and pursuant to these instructions there was sufficient evidence that appellant proceeded without the victim's consent before she expressed her unwillingness to go further, i.e., before she actually said no, then the definition of consent has been substantially limited or diminished in California and its application to appellant's case violates his federal and state constitutional rights of due process on at least three grounds,[30] as well as failing to provide the heightened reliability and scrutiny required by the Eighth Amendment.[31] (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [65 L.Ed.2d 392, 100 S.Ct. 2382].)

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30 Argument V raises an additional due process challenge.

31 No objection was made below on these specific grounds. However, an appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant are affected. (§§ 1259, 1469.) Substantial rights are equated with reversible error, i.e., did the error result in a miscarriage of justice. (Cal. Const., Art. VI, § 13; *People v. Watson, supra,* 46 Cal.2d 818, 836; *People v. Arredondo, supra,* 52 Cal.App.3d 973, 978.) Each of the three due process claims raised here manifest a miscarriage of justice.

In any event, constitutional claims may be considered when presented for the first time on appeal when the error fundamentally affected the validity of the judgment, or important issues of public policy are at stake (*Hale v. Morgan, supra,* 22 Cal.3d 388, 394; *People v. Blanco, supra,* 10 Cal.App.4th 1167, 1172-1173), all factors present here. Further, a reviewing court may consider a claim despite a lack of objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill, supra,*17 Cal.4th 800, 843, fn. 8.) Again, each of the three due process claims here manifest that appellant's trial was unfair.

Moreover, the fact that a state court may legitimately refuse to hear tardily based constitutional challenges does not mean that the state court is obliged as a matter of federal law to refrain from reaching the federal constitutional questions. (*Orr v. Orr, supra,* 440 U.S. 268, 275, fn. 4.)

A. Denial of Adequate Notice and Opportunity to Defend

In Argument *III*, above, appellant argued that under the jury instructions provided, the jury was impermissibly permitted to find that appellant had attempted the felony of rape if Mele merely passively acquiesced to an attempt to have intercourse without communicating in any way her unwillingness to engage in such an act. That is, the jury could find that a rape was committed if appellant neither knew nor reasonably could have been expected to know—from his own conduct or hers—that she did not want to have sex. Should it be concluded that in prosecutions for rape the definition of consent in section 261.6[32] indeed meant that passive acquiescence was not consent, then such a definition applied to appellant violates the federal due process clause. Since no California statute or prior decision has found that a rape has been committed under such circumstances, appellant's conviction of first degree felony murder and special circumstance premised on such a definition for rape would violate the Fourteenth Amendment Due Process Clause's requirement of notice and an opportunity to defend. (*Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 721; *LaGrand v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1260 ["[T]he Due Process Clause ... protects criminal defendants against novel developments in judicial doctrine"]; *Cole v. Arkansas* (1948) 333 U.S. 196 [92 L.Ed. 644, 68 S. Ct. 514] [Due Process Clause prohibits state from upholding conviction under theory that defendant violated an uncharged statutory offense]; *In re Oliver* (1948) 333 U.S. 257, 273, 278 [92 L.Ed. 682, 68 S.Ct. 499] [no principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal].) "A judicial construction of a statute may violate due process if the defendant was 'unfairly surprised in a way

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32 The text of section 261.6 is set forth at page 65, above.

that affected his legal defense.'" (*Clark v. Brown, supra,* at p. 721, quoting *Darnell v. Swinney* (9th Cir. 1987) 823 F.2d 299, 301.)

As a result, the murder conviction, the special circumstance, and appellant's death sentence must be reversed, the murder conviction for the reasons stated in Argument *II*, Part *D*, above, and incorporated here, because the most likely theory upon which the jury rested the first degree murder conviction was that of felony murder. The matter must, therefore, be retried after appellant has been provided adequate notice of the scope of the charges. Alternatively, appellant's conviction must be reversed with directions to enter a verdict of second degree murder and resentence appellant.

B. Improper First-Time Application of a New Definition for Consent

Appellant has demonstrated that under the jury instructions provided the jury was permitted to find that appellant had attempted the felony of rape if Mele merely passively acquiesced to an attempt to have intercourse without communicating in any way her unwillingness to engage in such an act. Assuming for the sake of the instant argument that section 261.6 authorizes such an interpretation of the definition of consent and the statute as so applied otherwise passes constitutional muster, it cannot be applied for the first time against appellant.

A criminal statute enacted with a retroactive application is invalid as an ex post facto law if it punishes an act innocent when done, or increases the punishment, or takes away a defense related to an element of the crime or an excuse or justification for the conduct, or alters the rules of evidence so that a conviction may be obtained on less or different testimony than was required when the crime was committed. (See *Beazell v. Ohio* (1925) 269 U.S. 167 [70 L.Ed. 216, 46 S.Ct. 68]; *Collins v. Youngblood* (1990) 497 U.S. 37 [111 L.Ed.2d 30, 110 S.Ct. 2715]; *People v. Frazer* (1999) 21 Cal.4th 737 [88 Cal.Rptr.2d 312].) Ex

post facto laws are prohibited by the federal Constitution (Art. I, §§ 9, 10) and the California Constitution (Art. I, § 9). (Witkin, *California Criminal Law 1, Nature of Criminal Law*, (3rd ed. 2000) § 10, p. 21.) "The California ex post facto provision affords the same protection as the federal provision." (*Id.* at p. 23.)

However, where the courts make such a change in the law, the Due Process Clause of the Fifth Amendment has been violated.

> The Ex Post Facto Clause is a limitation upon the powers of the legislature... and does not of its own force apply to the Judicial Branch of government.... But the principle on which the clause is based the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty.... As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. [Citations omitted.] (*Marks v. United States* (1977) 430 U.S. 188, 191-192 [51 L.Ed.2d 260, 97 S.Ct. 990]; accord *Clark v. Brown, supra,* 442 F.3d 708, 721-722.)

In Argument *I*, Part *D*, above, and incorporated here, the efforts of numerous authorities in defining the parameters of "consent" were discussed. In none had it been explicitly or implicitly held that that a person's mere neutrality or passive acquiescence to a sexual act was enough in itself to prove rape or attempted rape, that is, to prove a lack of consent. Such a change in the law has taken away a defense. As a result, its first application to appellant is proscribed by the Due Process Clause of the Fifth Amendment. (See *Beazell v. Ohio, supra,* 269 U.S. 167; *Marks v. United States, supra,* 430 U.S. 188, 191-192; *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [19 Cal.Rptr.2d 520].)

Thus, the special circumstance, the murder conviction, and appellant's death sentence must be reversed; the murder conviction for the reasons stated in Argument *II*, Part *D*, above, and incorporated here, because the most likely theory upon which the jury rested the first degree murder conviction was that of felony

murder. The matter must be remanded with directions to enter a verdict of second degree murder and resentence appellant.

C. Excluding a *Mens Rea* for Rape Offends Fundamental Principles of Justice

There is a third due process violation here. Although a state is free to define the elements of crimes as it sees fit (*McMillan v. Pennsylvania* (1986) 477 US 79, 85 [91 L.Ed.2d 67, 106 S.Ct. 2411]), the Supreme Court has cautioned that "'there are obviously constitutional limits beyond which the States may not go in this regard....'" (*Ibid.*) Those limits set by the due process clause are reached where a statute "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [Citation.]" (*Ibid.*)

The principle violated here is that the newly limited or diminished definition of consent for rape provided in section 261.6, as applied to appellant's case, has removed the requirement of a culpable mental state, a *mens rea* for the actor. Indeed, Penal Code section 20 requires: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." "So basic is this requirement that it is an invariable element of every crime unless excluded expressly or by necessary implication." (*People v. Vogel* (1956) 46 Cal.2d 798, 801 [299 P.2d 850].) "'The existence of *mens rea* is the rule of, rather than the exception to, principles of Anglo-American criminal jurisprudence.'" (*People v. Simon* (1995) 9 Cal.4th 493, 519 [37 Cal.Rptr.2d 278], quoting *Dennis v. United States* (1951) 341 U.S. 494, 500 [95 L.Ed. 1137, 71 S.Ct. 857].) Strict liability offenses generally are permissibly employed only where the penalty is small and the conviction does not do grave damage to the offender's reputation. (*People v. Simon, supra,* at pp. 519-520.) However, abandonment of a *mens rea* requirement is not permitted where the statue, as here, involves conduct that would constitute a common law *malum in se* offense. (*Id.* at p. 520.)

Thus, a finding that section 261.6's definition of consent excludes any case where the alleged victim merely passively acquiesced to a sexual act violates federal due process.

The common law has always held that rape does not occur unless the sex act is against the person's will. (*People v. Barnes, supra,* 42 Cal.3d 284, 297.) The law proscribing rape protects the victim against the "outrage" of being sexually violated. (*People v. Vela* (1985) 172 Cal.App.3d 237, 243 [218 Cal.Rptr. 161].) Notwithstanding these traditional notions, section 261.6 as newly limited in appellant's case has drastically altered the nature of consent. Previously, society protected a victim against acts which were imposed on him or her contrary to his or her will. Now, the law would provide that a person's mere neutrality or passive acquiescence about a sex act can turn the act into a criminal violation.

As the instant case demonstrates, this discussion is not just theoretical. The penumbra of this new interpretation is even farther reaching, as the following hypothetical demonstrates. Assume that a couple has been together for a number of years. During this time, one of the parties (hereinafter party one) has had no desire for sexual acts with the other (hereinafter party two.) However, on a regular basis, party one has engaged in sexual acts with party two. On these occasions, party one has not protested. Moreover, party one has always remained very stationary during the sex act. Although not expressed to party two, party one's attitude about these events is that it is part of their relationship although party one does not enjoy participating.[33]

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[33] Professor Dripps, in his article *Beyond rape: An essay on the difference between the presence of force and the absence of consent*, 92 Columbia Law Review, *supra,* 1780, 1789 illustrated such a hypothetical:

> Ellen married Frank because she finds him a boon companion—caring, thoughtful, sophisticated, well-heeled, and well-established in trendy circles. He is rather ugly and a dreadful, piggish lover. Whenever Frank initiates love-making, Ellen cooperates for several

Clearly, under the common law, party one has not been raped. While party one did not enjoy the sex acts, party one manifestly consented since the acts were not against party one's will (i.e. party one believed that it was an aspect of their relationship to participate). However, under the newly limited definition of consent under section 261.6, party one is a victim of rape insofar as party one did not expressly manifest a "positive attitude" about having sex and did not "positively cooperate" in the sex acts. (See also *State v. Bunyard, supra,* 75 P.3d 750, 754 [alleged victim did not want to have sex with the defendant, but she did not say anything to him about it until after he penetrated her].)

Notwithstanding the importance of requiring a culpable mental state, a *mens rea*, for acts that would impose serious criminal sanctions, there are other compelling reasons for requiring the alleged victim to express his or her refusal.

> [S]exual encounters ought not to be lived or analyzed as sequences of particular touchings. In practice couples do not discuss in advance each specific sex act that one or another might initiate, and there is no strong reason why the law should attempt to compel them to do so. ... If uncertainty and spontaneity can enhance the pleasures of love-making, people of either sex might prefer not being asked—so long as they can be sure that behavior they don't like will be stopped on demand. The interest in freedom from wrong guesses by one's bedmates is not so great as to call the criminal law into play. (Donald A. Dripps, *Beyond rape...*, *supra,* at p. 1793, fn. 41.)

Under the facts in this case as well as in those of the hypothetical, section 261.6 does not pass muster under the federal constitution. (*McMillan v. Pennsylvania, supra,* 477 US 79, 85; *People v. Vogel, supra*, 46 Cal.2d 798, 708; *People v. Simon, supra,* 9 Cal.4th 493, 519-520; *Schad v. Arizona* (1991) 501 US

> reasons. These include a sense of reciprocity, of doing a favor for her best friend; fear that he might seek satisfaction elsewhere, perhaps leading to a break-up with devastating financial and social consequences; and the more immediate fear that if rebuffed, Frank will be in a predictable snit for days thereafter. (*Ibid.*)

624, 640 [115 L.Ed.2d 555, 571, 111 S.Ct. 2491] (plurality opn. of Souter, J.) ["a freakish definition of the elements of a crime that finds no analogue in history or the criminal law of other jurisdictions will lighten the defendant's burden" of showing a due process violation].)

As a result, the special circumstance, the murder conviction, and appellant's death sentence must be reversed. The matter must be remanded with directions to enter a verdict of second degree murder and resentence appellant.

V. THE DEFINITION FOR CONSENT PROVIDED BY SECTION 261.6 VIOLATES DUE PROCESS BY CREATING A PRESUMPTION THAT A RAPE VICTIM HAS NOT CONSENTED UNLESS SHE EXPRESSES HER COOPERATION IN THE SEXUAL ACT IN SOME PERCEPTIBLE WAY

The preceding four arguments raise a number of constitutional challenges to the charge that appellant attempted to rape Mele. This argument raises the alternative claim that the definition for consent provided by section 261.6 violates due process by creating a presumption that a rape victim has not consented unless she has expressly communicated by act or attitude that she is cooperating in the sexual act.

Section 261.6 provides in relevant part:

> In prosecutions under section 261..., in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (§ 261.6.)

Appellant's jury was instructed in the language of CALJIC 1.23.1:

> In rape prosecutions under Penal Code section 261 (a)(2), the word "consent" means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (RT 2387, CT3 81.)

The statute, as well as the instruction, ignores the possibility that a woman may passively acquiesce to a sexual act, even though she does not perceptibly express her willingness to proceed ("consent") in act or attitude. According to the statute and instruction, where there is no perceptible expression of willingness to participate in the act, let alone a reasonably perceptible expression, the jury is required to presume that the woman did not consent, even though the sex act was not against her will.

This presumption removes from the prosecution its burden to show that the intercourse was against the will of the victim. Accordingly, the statute and interpretive CALJIC instruction are unconstitutional burden-shifting mandates, and their application to appellant's case violates his federal and state constitutional rights of due process, as well as the heightened reliability required by the Eighth Amendment.[34] (See *Beck v. Alabama, supra,* 447 U.S. 625, 637-638.)

A. Passive Consent Is a Defense to a Charge of Rape

The law with respect to resistance and consent in the context of sexual assault cases has shifted significantly since 1980. The common law required that the female complainant demonstrate "utmost resistance" to the act of intercourse. *People v. Barnes, supra,* 42 Cal.3d 284, 297.) In California, until the amendment of section 261 in 1980, it was required that the rape victim "resists, but the person's resistance is overcome by force of violence." (Former § 261, subd. (2); *People v. Barnes, supra,* 42 Cal.3d 284, 292, 296.) Only such resistance was required as would reasonably manifest refusal to consent to the act of sexual intercourse. (*People v. Hunt* (1977) 72 Cal.App.3d 190, 194 [139 Cal.Rptr. 675].) Nevertheless, some degree of resistance was required, and a feeble or equivocal

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[34] There was no objection made below on these specific grounds. However, for the reasons stated in footnote 29, page 81, above and incorporated here, this does not preclude this Court's review of this constitutional claim.

resistance was deemed insufficient to sustain a rape charge. (See cases cited in *People v. Barnes, supra,* 42 Cal.3d 284, 297-298.)

This state of the law was justifiably criticized on the grounds that a terrorized woman might not physically resist at all, and that resistance itself often increased the woman's risk of physical harm or death. (See Note, *Recent Statutory Developments in the Definition of Forcible Rape* (1975) 61 Va.L.Rev. 1500; Comment, *Towards a Consent Standard in the Law of Rape* (1976) 43 Univ.Chi.L.Rev. 613.) Accordingly, in 1980 Section 261 was amended. (Stats. 1980, ch. 587.) All reference to resistance was deleted. Rape was redefined as sexual intercourse "where it is accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person of another." (§ 261, subd. (2); *People v. Barnes, supra,* at p. 301.)

Although consent was still recognized as a defense, there was initially no definition of consent specifically tailored for sex crimes. In 1982, The Legislature adopted Penal Code section 261.6, which defines consent as "positive cooperation in act or attitude pursuant to an exercise of free will." (Stats. 1982, ch. 1111.) The section was adopted as part of a bill changing the definitions and penalties of certain sex crimes; the legislative history provides no illumination of its purpose. (See *Boro v. Superior Court* (1985) 163 Cal.App.3d 1224, 1230 [210 Cal.Rptr. 122].)[35] The apparent purpose, or at least the effect, of section 261.6 is to provide

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[35] There is speculation that section 261.6 was adopted as a response to this Court's decision in *People v. Mayberry, supra,* 15 Cal.3d 143, which establishes a reasonable and good faith belief in consent as a defense to rape. (See *Review of 1982 Legislation* (1983) 14 Pacific L.R. 357, 547; *Boro v. Superior Court, supra,* at p. 1230.) There may be some truth in this observation, but the section applies wherever consent (not merely belief in consent) is in issue. Consent is in issue in every rape prosecution, for lack of consent is an element of the prosecution's case. For this reason CALJIC 1.23.1 has become a standard instruction for all rape prosecutions, and is not linked to the *Mayberry* defense. (CALJIC 1.23.1 (6th ed. 1996) *USE NOTE*, p. 27.)

a definition of consent for use in all rape prosecutions. Now, whatever is not actively consented to is deemed to be against the person's will.

The error in the definition is that it denies the defendant the consent defense unless the victim manifests "positive cooperation in act or attitude" in the act of sexual intercourse, or other sexual act. A person may engage in sexual intercourse willingly yet passively, and not display any sign of "positive cooperation;" the person may not outwardly respond to the defendant's advances, and yet may welcome or tolerate the sexual act. A jury which has a reasonable doubt whether the victim manifested a reasonably perceptible expression of her lack of consent should be instructed to acquit.

The critical nature of the "consent" definition is apparent from its role in the definition of rape (as employed here and as a part of CALJIC 10.00): "Rape is defined as ... an act of sexual intercourse with another ... accomplished against that person's will.... ¶ 'Against that person's will' means without the consent of the alleged victim." (RT 2385, CT 79, CALJIC 10.00 (6th ed. 1996) pp. 711-712.) The jury is thus referred immediately to the consent definition as provided here, and there is no consent unless there is "positive cooperation in act or attitude."

Since the act may not be against the will of the "victim," even though she manifests no sign of "positive cooperation", section 261.6 creates an irrebuttable presumption of lack of consent and guilt.

B. The Presumption of Non-Consent Embodied in Section 261.6 Violates Due Process as Guaranteed by the State Constitution and the Fourteenth Amendment

Lack of consent is an element of the People's case in any rape prosecution. The defendant need not prove consent. Whether the defendant testifies or stands silent, the prosecution must establish the victim's non-consent, along with all other elements of the corpus delicti beyond a reasonable doubt. (*People v. Key, supra,* 153 Cal.App.3d 888, 895; *People v. Degnen* (1925) 70 Cal.App. 567, 591 [234 P. 129].) The definition of "consent" in section 261.6 relieves the prosecution of the

burden of showing non-consent, where the victim passively assents but does not show "positive cooperation."

The United States Supreme Court summarized the law with respect to conclusive or burden-shifting instructions in *Carella v. California* (1989) 491 U.S. 263, 265 [105 L.Ed.2d 218, 109 S.Ct. 2419]:

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. *In re Winship,* 397 U.S. 358, 364 [25 L.Ed.2d 368, 90 S.Ct. 1068] (1970). Jury instructions relieving States of this burden violate a defendant's due process rights. See *Francis v. Franklin*, 471 U.S. 307 [85 L.Ed.2d 344, 105 S.Ct. 1965] (1985); *Sandstrom v. Montana*, 442 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2540] (1979). Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases. (*Carella v. California, supra*, at p. 265.)

Carella held that California Vehicle Code section 10855 created an unconstitutional mandatory presumption by presuming that a person who keeps a rental car over 20 days from the date of written demand by the owner necessarily does so with the intent to commit theft. The prejudicial effect of the instruction was left to the lower court on remand. The concurring opinion in *Carella*, together with the plurality opinion in *Connecticut v. Johnson* (1983) 460 U.S. 73 [74 L.Ed.2d 823, 103 S.Ct. 969], would hold that a *conclusive* presumption of guilt contained in jury instructions would seldom be deemed harmless error unless the issue had been resolved against the defendant in another context. (*Carella v. California, supra,* at p. 271-272, conc. opn., Scalia, J.)

As will be seen in the following section, the conclusive presumption that a willing but passive participant in the sexual act has not given legal consent requires reversible in appellant's case.

C. The Impermissible Conclusive Presumption of Lack of Consent Unquestionably Influenced the Outcome

As discussed in the context of prejudice in Argument *III*, Part *C*, the prosecutor's closing argument built upon the impermissible conclusive presumption permitted by the jury instructions and effectively encouraged the jury to find the felony for felony murder and the special circumstance on a constitutionally infirm theory. The prosecutor told the jury that "against the will" "simply means without consent." (RT 2268.) Consent required positive cooperation which the prosecutor illustrated with: "Has she said, Sure? Has she spoken to him?" (RT 2274.)

Again in this case, as it was demonstrated in Argument *III, C,* above, it is highly likely that the error influenced the outcome. The entire defense pivoted on the jury's determination of the requisite level and form of Mele's response in resolving whether she consented and whether appellant actually and reasonably believed she consented. As defense counsel succinctly argued, there was a difference between a man who has not been told yes, but stops when he is told no, and a man who does not care about consent. (RT 2307-2309.) Because of the improper instructions and the prosecution's argument, the jury was given an improper presumption that there was no consent unless the "victim" expressed her willingness to proceed. The result meant for appellant guilt of first degree murder with special circumstances, when it should have meant innocence of that charge.

Here, nothing in the evidence, instructions, or verdicts manifests that the jury necessarily excluded the scenario of a girl who was initially ambivalent or passively acquiescent to appellant's sexual advances.

Accordingly, the murder conviction, special circumstance, and appellant's death sentence must be reversed and retried to a properly instructed jury.

VI. APPELLANT'S FIRST DEGREE MURDER VERDICT WAS UNCONSTITUTIONAL BECAUSE IT WAS ALSO BASED ON INSUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION

As discussed in Argument *II*, the prosecution proffered two theories for first degree murder—felony murder premised on a killing during the felony of attempted rape or a killing premised on willful, deliberate and premeditated intent to kill. However, as demonstrated in Arguments *I* and *II*, there is insufficient evidence of attempted rape as a matter of law and therefore insufficient evidence of felony murder premised upon that attempted rape. Here, it will be demonstrated that there is also insufficient evidence that the killing was committed with a willful, deliberate and premeditated intent to kill.

Since neither theory for first degree murder is based on sufficient evidence, appellant has been denied his Fifth and Fourteenth Amendment rights to due process and a fair trial.

A. The Facts and Procedural Background

Arguments *I,* Part *A,* and *II*, Part *A,* above, are here incorporated by reference.

With the exception of Devin, all of the parties had been drinking alcohol that evening (RT 1470-1471, 1483, 1734) to the point that they vomited (RT 1491, 1610-1611, 1670A-1672A, 1743-1745, 1800), prompting them to move the car forward 20 paces (RT 1491-1492.)

The court explained premeditation as the term is used for first degree murder, using the language of CALJIC 8.20:

> All murder which is perpetrated by any kind of willful deliberate and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willful" as used in this instruction means intentional. ¶ The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of

considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill is not premeditation and deliberation as will fix an unlawful killing of the first degree.

To constitute a premeditated and deliberate killing, the slayer must consider and weigh the question of killing and reasons for and against such a choice and having in mind the consequences he decides to and does kill. (RT 2382-2383, CT3 69-70.)

The prosecutor in closing argument to the jury provided her own test for premeditation:

> What do you look at when you're trying to decide if something is premeditated and deliberate murder? You look at the type of weapon that is used. How and when the gun was acquired; how the weapon was used; the nature of the wound, where the injury was located, in this case injuries; whether the victim was armed or vulnerable. And what do we have here? We have a traditional weapon or gun or firearm used. (RT 2256.)

B. General Principles of Appellate Review

Argument *I*, Part *C,* above is incorporated here.

C. There Was No Evidence of Premeditation and Deliberation

Although the number of shots fired may have resolved for the jury whether they were fired with the intent to kill, the question remained whether that intent was with willful premeditation and deliberation, the requisite element to distinguish first degree murder from second degree murder under Penal Code section 189.

The state's case for premeditation was non-existent. Both Mele and appellant had been intoxicated to the point that they had vomited, prompting movement of the car 20 paces to where they were ultimately parked. (RT 1491-1492, 1611, 1671A.) After Mele had communicated to appellant that she wanted him off her, he took her to the rear of the car to talk. (RT 1510-1512, 1553, 1555-1558, 1650, 1661, 1762-1763, 2164.) Once there, they could be seen talking, not loudly, while she made hand or head gestures. (RT 1512-1513, 1515, 1558-1559.) Devin heard appellant say, "Is that it? Is that how it was gonna be.?" (RT 1513.) Jarrod heard, "It's like that, huh." (RT 1766.) Appellant then pulled a gun from his back pocket, put it to Mele's face (RT 1514-1515), and fired (RT 1515, 1560-1561, 1766-1767.) Appellant then straddled her body, put the gun within six inches of her face, and fired six or seven times more. (RT 1515-1516, 1767-1769.) In this context, the clear interpretation of the barrage of shots is that they manifested an outburst of rage rather than an act of premeditated murder (*People v. Cash* (2002) 28 Cal.4th 703, 727 [122 Cal.Rptr.2d 545]; *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 165 [77 Cal.Rptr.2d 576] ["spontaneous rage is normally second degree murder"]; *People v. Salaz* (1924) 66 Cal.App. 173, 182 [255 P. 777] [the five shots were fired in a volley or in rapid succession, as though by the convulsive hand of an hysterical person wrought to a pitch of excitement].)

This Court in *People v. Anderson* (1968) 70 Cal.2d 15 [73 Cal.Rptr. 550] provided the framework for assessing whether the evidence supports an inference

that a killing resulted from preexisting reflection and weighing of considerations. (*People v. Thomas, supra,* 2 Cal.4th 489, 517.) The Court said in *Anderson*:

> The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2). [¶] Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3). (*Anderson, supra,* at pp. 26-27.)

In this case, there is no type (1) evidence (planning) to support a finding of premeditation. All of the evidence establishes that the argument and shooting erupted simultaneously in the aftermath of frustrated sexual passion, not from planning activity. (See, e.g., *People v. Mendes* (1950) 35 Cal.2d 537, 544-545 [219 P.2d 1] [the incident occurred within six to eight seconds, judgment modified to second degree]; *People v. Fields* (1950) 99 Cal.App.2d 10, 13 [221 P.2d 190] [the "killing occurred as a result of one of those sudden and unconsidered impulses upon which men in the condition of appellant [intoxicated] not uncommonly act, and which they regret after even slight reflection;" judgment modified to second degree]; compare *People v. Hernandez, supra,* 47 Cal.3d 315,

349, 351 [manner of killing distinguished itself from an explosion of violence rather than calculated killing].)

There also is no type (2) evidence (motive) to support such a finding. Mele and appellant knew each other and she had a favorable view of him; she hugged appellant and the other two boys when she first joined them that evening. (RT 1460-1462, 1585-1586, 1795, 1955.) As demonstrated in Arguments *I* and *II*, above, no rape had been attempted, or other crime committed, for which appellant had a plausible motive to eliminate a witness. (See, *People v. Lucero* (1988) 44 Cal.3d 1006, 1019 [245 Cal.Rptr. 185]; *People v. Alcala* (1984) 36 Cal.3d. 604, 627 [205 Cal.Rptr. 775].) Where motive is absent, there would have to be extremely strong evidence of planning as required to compensate (*People* v. *Alcala, supra,* 36 Cal.3d 604, 626), but, as demonstrated, here there is no evidence of planning, let alone extremely strong evidence of it.

Finally, there is no type (3) evidence; a preconceived design coupled with tangible steps to further the plan, illustrated by a particular and exacting method of killing according to that preconceived design. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1209 [259 Cal.Rptr. 669].) As this Court has observed, "proof of a sudden killing in the course of an argument and struggle between defendant[] and the [victim] would not prove a deliberate and premeditated murder." (*People v. Valasquez* (1980) 26 Cal.3d 425, 435 [162 Cal.Rptr. 306].)

Thus, none of the factors required by this Court in *Anderson* have been met.

D. The Remedy is a Reversal of the Conviction for First Degree Murder with Directions to Enter a Judgment for Second Degree Murder, and Resentence Appellant.

Argument *II,* Part *D*, above is here incorporated by reference.

Here, again, it is not possible to determine from the jury's verdict that they necessarily found appellant guilty of first degree murder on a proper theory. In fact neither theory of first degree murder was valid.

Since no rational trier of fact could properly have found beyond a reasonable doubt that the homicide was committed with a willful, deliberate and premeditated intent to kill, appellant's first degree murder conviction and death sentence must be reversed, with directions to enter a verdict of second degree murder and resentence appellant. (*People v. Johnson, supra,* 26 Cal.3d 557, 576-578; *Jackson v. Virginia, supra,* 443 U.S. 307, 318-319.) To do otherwise would deny appellant his constitutional right to due process and a fair trial, in violation of the Fifth and Fourteenth Amendments, and Article I, section 15 of the California Constitution. (*Jackson v. Virginia, supra,* 443 U.S. 307, 313-324; *People v. Rowland, supra,* 4 Cal.4th 238, 269.)

Furthermore, since double jeopardy considerations bar a retrial for felony murder (*Burks v. United States, supra,* 437 U.S. 1), the trial court should be directed to dismiss the felony murder allegation from the accusatory pleading with prejudice.

VII. INTRODUCTION OF APPELLANT'S NICKNAME OF "POINT BLANK" SUGGESTED GANG AFFILIATION AND ASPECTS OF HIS CHARACTER THAT WERE IRRELEVANT TO ANY ISSUE AND HIGHLY PREJUDICIAL TO APPELLANT'S DEFENSE

During the guilt phase of the trial, over defense objection, the prosecution introduced evidence that appellant's nickname was Point Blank. That fact had no relevancy to any issue in the case, other than its improper use as propensity evidence which the prosecution repeatedly linked to the manner of the victim's killing. As a result, the trial was overshadowed by the irrelevant and unsupported inference that he had a propensity to kill in the manner employed here, by the mere fact that appellant bore the appellation "Point Blank." The moniker also implicitly suggested to the jury that it had gang origins.

The trial court deprived appellant of an unbiased jury determination by admitting this highly inflammatory evidence that had no relevance to any issues in

the case. Admission of this evidence violated appellant's federal right to a fair trial, due process, right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and non-arbitrary determination of guilt, death eligibility, and penalty in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of the California Constitution, Article I, sections 1, 7, 15, 16, 17. Further, the deprivation of a state-created right (Evid. Code, §§ 352, 1101) constitutes an additional due process violation. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227].)

A. The Facts

Shortly before the commencement of jury selection, counsel for appellant filed a motion to exclude any reference to appellant's nickname. Counsel argued that the evidence was irrelevant, constituted impermissible character evidence, and additionally should be excluded under Evidence Code section 352. Counsel added that there was no evidence that appellant had ever previously acted in conformity with the nickname. (CT 761-774.)

In hearings on the motion, the defense argued that the nickname would suggest to the jury that appellant was a gang member, with all of the negative implications that association would bring, and that gang membership was not relevant to any issue in the case. The prosecutor conceded that any "gang evidence would be very, very remote in terms of any relevance at all." (RT 27.) There was "no indication that he committed crimes as a member of [a] gang." (RT 28.) The court agreed that gang evidence should not come in. (RT 29.)

Yet the court then opined without explanation, "The nickname Point Blank is certainly relevant." (RT 29.) Defense counsel, Mr. Aquilina, replied that the nickname had no relevance to any issue of identity, since it was undisputed who was present during the incident. (RT 29-30.) Mr. Aquilina continued:

> But especially in light of the ... evidence of the manner in which the victim was shot in this case, the defendant's nickname, which, as best we can tell, he assumed some months, if not some years earlier, has no relevance or bearing and is extremely prejudicial as far as the jury's consideration of the evidence in the guilt phase. (RT 30.)

The court responded:

> Bates or Gordon ... made the statement..., Well, I guess that's why they call you Point Blank, is certainly, while prejudicial, I agree with you, is relevant to the issue of intent. This was an execution-style murder. The shots were fired from very close range into the head, and it would seem to me that's highly probative on the issue of the intent. (RT 30.)

Mr. Aquilina replied:

> The intent ... is obviously shown by the actions of the shooter. [It would be different if Mr. Lee] had said, Now you know why they call me Point Blank.... However, this is someone else who is saying [it]. ¶ [T]he defendant doesn't even respond....
>
> [M]y concern of what the jury's going to infer and now it's going to necessitate us bringing in additional evidence that the name Point Blank was generated some months, if not years, earlier, over a totally unrelated account, had nothing to do with any criminal activity whatsoever, to prove what? To prove intent when this woman has six or more bullets... at close range to the head. Intent in this case of the manner in which she was killed is certainly not in issue.
>
> And the fact that one of the witnesses in this case is going to infer, Oh, I guess you did this because of your name, now we're asking the jury to make the same inference. And I think that that shows the prejudice right there. So, I simply do not see any relevance whatsoever to this moniker. I mean, if his moniker was Killer, would it be admissible? I don't think so, not any more than if his moniker was Philly or any other name that someone could come up with. (RT 30-32.)

The prosecutor responded:

> This was his nickname. This was what people called him. He was proud enough of this nickname that he has it tattooed on his arm. He

had a hat he wore that had the name "Point Blank" on there, as well. That's what he was known by. ¶ ... If his nickname was Killer and it had "Killer" on his arm, it would be absolutely relevant for the same reason. ... ¶ The fact that he made no statements in response to Jarrod Gordon's comments, I see that's why they call you Point Blank, in some respects is an adopted admission. (RT 32.)

Defense counsel, Mr. Myers, replied:

> [A]re we to infer our client's murder intent because of his nickname? We can have the most serious ... serial killer [on trial] and his nickname could be Popeye or something very nonthreatening or nonviolent, and even a compliment, and it would have no bearing on whether or not he intended to kill someone. (RT 33.)
>
> Labeling him Point Blank is very damning for the very reason counsel is saying, because the jury's going to infer from that he's some sort of killer, that he's earned his moniker by doing some prior act of shooting somebody. ¶ I don't think there's really any other way to draw an inference from what Point Blank means except that he's fired a gun some time prior to that. And there's no evidence of that, none whatsoever. ... [T]his moniker... doesn't prove what the People want to use it for because there's no evidence he's ever done anything like this before and identity is not an issue at all. ...
>
> So, I think the only reason counsel wants this in is because of the inflammatory nature of the moniker. If his moniker were Suzie, we wouldn't even be having this hearing.... (RT 34.)
>
> The court ruled:
>
> Well, we engage once again in the same weighing process under 352 and Court agrees that the evidence is prejudicial, harkening back to my earlier statement all incriminating evidence is prejudicial. ¶ The test is whether the prejudice outweighs the probative value, and I conclude that it does not. (RT 34.)

The following court day, defense counsel asked the court to reconsider its decision. Mr. Aquilina argued:

> [T]his name is really a character reference. It may not even be an earned character reference because Court does not have before it the origin of this name or why he was given this name or why he adopted this name, even if he did. So, I think that what we're

looking at is under the area of 1101. And I think by his name we infer a character which coincides with some of the facts of this case.

And I think that whether the moniker is "Point Blank," whether the moniker is "Killer," whether the moniker in... a manslaughter case is "Lush," or in a rape case perhaps the victim was known as "Easy," none of this really depicts the person's character. Even if it did, it's not relevant to prove that the person committed the crime in one fashion or another because under 1101 and so forth the character is not admissible. Not any more admissible than if Mr. Lee's nickname was "Scooter" would prove anything.

The name a person is given or name that is adopted by a person doesn't prove that person's actions in the past, let alone in the future.

Secondarily, ... this is not a gang case. Gang references have nothing to do with this case and should be ruled inadmissible. But this is a case where, as Ms. Levine said the other day, not only does he have this moniker "Point Blank," but he has a tattoo of "Point Blank" on his arm and he has a hat with the name "Point Blank."

Maybe in the 1960s we would think, Well, ... his mom gave him his nickname. But in the 1980s and 1990s, the natural inference is if he has this kind of nickname its gang related. Even if we don't hear any more evidence of gangs, we know what this is all about. This guy is a gang member. Which... is ... certainly extremely prejudicial. ¶ ...

We have no evidence that this name was earned in any fashion, that Mr. Lee in the past has acted in a fashion that's consistent with his name "Point Blank." So, how do we disprove that he's of this character? How do we disprove that he has earned this moniker, to disprove that his name has no connection with what occurred to the victim in this case? (RT 267-269.)

Mr. Aquilina expressed his belief that any attempt at providing the jury a limiting instruction on the use it could make of the nickname would be counter-productive and highlight exactly what the defense was trying to avoid. (RT 270.)

The court opined:

> Seems to me there are two compelling reasons why this is relevant. The defense in this case appears to be centered around two possible theories: One's somebody else did it.... (RT 271.)

Yet, as the defense explained, identity was not in issue. (RT 272, 274.) Defense counsel's opening statement (RT 1353-1364) and closing argument (RT 2292) exemplified that.

The court provided its opinion for its second theory:

> I'm addressing this one because from one of the questions that you posed in the questionnaire about voluntary intoxication, taking away the specific intent required, the intent issue. So, it would seem to me that this nickname, number one, is certainly probative. And, I grant you, it's prejudicial, as I discussed with you last week, any incriminating evidence is prejudicial.

Defense counsel Mr. Aquilina made the point that by talking about a name they were implicitly talking about character. Mr. Aquilina explained:

> I think that what the Court is referring to is one of character. If Mr. Lee's character was a person who acts without thinking, a person who acts intentionally, a person who acts at close range, a person who acts at point-blank range, that's his character, then that's relevant to proving he's the one who committed this offense. ¶¶ ... [I]f we take the person's character, his past reputation, his past actions, to prove that he had the intent or that this must be the person who committed the crime to prove identity, I would be in agreement with the Court. We're not talking about character. We're talking about a name. (RT 273.)

The court responded that it disagreed that this was character evidence. (RT 275.) Mr. Aquilina replied: "If it's not character evidence, then the only thing it is is a name, a label. (RT 275.) The court agreed. (RT 275.) Yet, Mr. Aquilina pointed out:

> And either the label is an accurate reflection of the person and his actions or it's not. And if a label is an accurate reflection or is an effort to reflect upon his actions, then it is character.
>
> We're saying that the person acted in conformity with his name. And I know of no law or authority that permits a jury to infer

> that a person acted in conformity with a label or with a name. (RT 275-276.)

The court asked, "[I]sn't the name being offered to show results of his actions?" (RT 276.) Mr. Aquilina replied, "[I]f he was ... given the name after his actions, I would agree. ... [T]hen afterwards that name would reflect the person's character, his actions." (RT 276.) "[W]hether his nickname is Point Blank or not isn't going to solve the question of whether he formed the intent to kill." (RT 277.) "[The moniker] doesn't say he wasn't intoxicated." (RT 278.)

The prosecutor offered, "The fact that this shooting happens after the fact he's adopted this name, ... is very relevant to the defendant deciding to earn that name." "[I]t does go to intent and premeditation and deliberation." (RT 280.) Defense counsel replied:

> "[A]ll I heard from Ms. Levine is our fears, and that is, Philian Lee acted in conformity with his name. And I don't care what you call it, that's character: He acted in conformity with his name, he acted in conformity with his character. ¶ And the Evidence Code doesn't permit that unless it comes under 1101.
>
> And, secondarily, ... [when any of us] heard "Point Blank," the first thing that we thought of was gang membership. This is not something that the center on the basketball team in high school adopts as a name. And that's exactly what the jury is being asked not to consider. (RT 281.)

The court ruled without further explication that the nickname was "certainly relevant" and its probative value outweighed its prejudicial value. (RT 282.) The court expressed a willingness to provide the jury with a limiting instruction, but cautioned that if the jury were told not to consider the nickname as character or propensity evidence, it would undo any value the cautionary instruction might have. (RT 282.)[36]

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[36] At the commencement of appellant's second trial, after the mistrial prompted by the death of appellant's mother, the court denied his motion for a

As a result, appellant's nickname permeated the trial. In the prosecutor's opening statement, the first time she referred to appellant by any name, she addressed him as Point Blank. (RT 1342.) She described the wounds that were inflicted, "[S]hooting her point blank in her forehead...." (RT 1348.) She quickly tied this to appellant's nickname: [Jarrod asked appellant,] "'I guess that's why they call you Point Blank.' No response." (RT 1349.)

The prosecutor asked the mother of the child of appellant's brother if appellant had a hat that bore the words "Point Blank." (RT 1371.) The prosecutor introduced into evidence, through Devin Bates testimony, that appellant had been introduced to him as Point Blank (RT 1446); that Jarrod, during the drive home, said to appellant, "So is that why they call you Point blank" (RT 1659); and that appellant rapped, "'They're never gonna really have to make a rap about my name being Point Blank'" (RT 1659.) She repeatedly referred to appellant as Point Blank. (RT 1481, 1738.) She introduced into evidence through Jarrod Gordon that he knew appellant by the names of Phil and Point Blank. (RT 1708-1709

During her closing argument, the prosecutor again linked up appellant's nickname with how the wounds were inflicted. (RT 2253-2254.) She wrung every emotion she could out of this appellation:

> [Appellant] discloses to you the essence of who he is. He introduces you to the man you have come to understand during the course of this trial. He introduces you to the man that was introduced to Devin Bates on February 21st. He introduced you to Point Blank. (RT 2993.)

Thereafter, the court instructed the jury:

> Evidence has been introduced for the purpose of showing that the defendant had a nickname. This evidence, if believed, was introduced for a limited purpose and may only be considered by you

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rehearing of his pretrial motions made prior to his first trial. (RT 847-848, CT 5955-5958.)

for that purpose. *The limited purpose for which this evidence was introduced was to prove that* (1) defendant was the person introduced to Devin Bates on February 21, 1996, and (2) *the defendant intended to kill Mele Kekuala.*

You are not to consider this evidence for any other purpose. *You are not permitted to consider this evidence as proof that defendant killed*, raped or attempted to rape Ms. Kekuala. Further, this evidence may not be considered by you to prove that the defendant is a person of bad character, has a disposition to commit crimes, or has ever acted in a manner consistent with this nickname. No evidence has been presented that on any prior occasion defendant acted in a manner referenced by this nickname.

For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. [Emphasis added.] (RT 2371-2372, CT3 40.)

B. The Nickname Had No Probative Value

"A shot aimed or fired straight at a target;" "in a direct, plain, and unequivocal manner;" and "bluntly" are all definitions of "point blank." (Webster's Third International Dictionary (1976), p. 1750.) The court first told the jury that they could use this nickname to prove that "the defendant intended to kill Mele Kekuala." (RT 2371-2372, CT3 40.) It then told the jury not to consider the nickname to prove that he killed Mele or ever acted in a manner consistent with this nickname. (*Ibid.*) No juror could understand or follow such conflicting instructions. First the court suggests through its instruction that his nickname is relevant to whether he intended to kill and then tells the jury that they are not to ponder how he could have acquired such an appellation or that he had a disposition to kill. Either appellant's "disposition" was relevant or irrelevant, but it could not be both.

The carte blanche granted the prosecutor to use the appellation, coupled with the court's instruction, left the jury free to use appellant's nickname for exactly the purpose argued by the prosecutor: to conclude that appellant was a

person of bad character who was disposed to commit egregious crimes, like the attempted rape and murder at issue at trial.

Relevant evidence is defined as evidence having any tendency in reason to prove any material fact. (*People* v. *Lint* (1960) 182 Cal.App.2d 402, 415 [6 Cal.Rptr. 95]; Evid. Code, § 210[37].) The test of relevancy is whether the evidence tends, logically, naturally, or by reasonable inference, to establish a material fact, not whether it conclusively proves it. (*People* v. *Yu* (1983) 143 Cal.App.3d 358, 376 [191 Cal.Rptr. 859].) Here, the nickname was introduced for the irrelevant purpose, a fact not in dispute, that appellant was the person introduced to Devin Bates. The trial court had no discretion to admit irrelevant evidence. (*People* v. *Turner* (1984) 37 Cal.3d 302, 321 [208 Cal.Rptr. 196], Evid. Code, § 350[38].)

And, the nickname was introduced for an improper purpose, that appellant intended to kill Mele. The jury instructions were hopelessly confusing, so even if the nickname were admitted for a legitimate purpose, we cannot know that the jury understood that purpose. The prosecutor seized upon these ambiguities in the jury instructions to argue to the jury that they should use the nickname to determine the essence of appellant's character.

It was error to admit evidence that had no legitimate purpose and presented a blatant appeal to the jury's emotions (*People* v. *Smith* (1973) 33 Cal.App.3d 51, 69 [108 Cal.Rptr. 698].)

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37 Evidence Code section 210 provides,

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

38 Evidence Code section 350 provides, "No evidence is admissible except relevant evidence."

C. Any Relevance of the Nickname Was Far Outweighed By the Danger of Unfair Prejudice from Its Repeated, and Court-indorsed Improper Use

Evidence Code section 352 provides in pertinent part that "the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against a party as an individual that has very little effect on the issues. (*People v. Cole* (2004) 33 Cal.4th 1158, 1197 [17 Cal.Rptr.3d 532].) In applying section 352, "prejudicial" is not synonymous with damaging. (*People v. Karis* (1988) 46 Cal.3d 612, 638 [250 Cal.Rptr. 659]; *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009 [62 Cal.Rptr.2d 164].) The statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958 [17 Cal.Rptr.2d 122].) As this Court has cautioned, "[E]vidence which ... contains within itself a substantial degree of prejudice should be received with "extreme caution," its admissibility "examined with care," and in the event of uncertainty as to its connection with the offense charged "the doubt should be resolved in favor of the accused. [Citations.]" (*People* v. *Anderson* (1978) 20 Cal.3d 647, 651 [143 Cal.Rptr. 883].)

> In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose. (*Vorse v. Sarasy, supra,* at p. 1009.)

Such is the case of prior crimes (*People v. Kelley* (1967) 66 Cal.2d 232, 238-239 [57 Cal.Rptr. 363]; *People v. Haston* (1968) 69 Cal.2d 233, 244-245 [70

Cal.Rptr. 419]; *People v. Anderson, supra,* 20 Cal.3d 647, 651; *People v. Alcala* (1984) 36 Cal.3d 604, 631 [205 Cal.Rptr. 775]; *People v. Guzman* (1975) 47 Cal.App.3d 380, 389 [121 Cal.Rptr. 69]) as well as evidence of gang activity (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [16 Cal.Rptr.3d 880].) As the defense argued and the court's instructions suggested, appellant's appellation suggested both gang affiliation as well as prior criminal activity.

The weighing process performed under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanical rules. (*People v. Yu, supra,* 143 Cal.App.3d 358, 377; *accord, People v. Schader* (1969) 71 Cal.2d 761, 773-774 [80 Cal.Rptr. 1].) It is the province of the trial court to weigh the balance between probative value and prejudicial effect. (*People v. Scheid* (1997) 16 Cal.4th 1, 18 [65 Cal.Rptr.2d 348]) This ruling will be upset only if there is a clear showing that the trial court abused its discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609 [25 Cal.Rptr.2d 390].)

Where, as here, the court has been asked to exercise its discretion under section 352, the record must affirmatively show that the trial judge weighed the possibility of prejudice against the probative value of the evidence. (*People v. Leonard* (1983) 34 Cal.3d 183, 188 [193 Cal.Rptr. 171].) Here, there is no indication that the judge made any effort to weigh the substantial prejudice that flowed from the use, in particular the repeated use, of appellant's nickname. Once the court reached the conclusion that the nickname was relevant, that ended its inquiry.

D. The Prosecution's Repeated and Frequent Referral to the Nickname and Its Purported Link to the Manner of Killing Establishes Its Prejudice

The jury's perception of appellant's character for violence and criminality would greatly influence their resolution of the two central issues of the prosecution's case. The question for the jury was whether appellant acted with willful premeditation and deliberation, the requisite elements to distinguish first

degree from second degree murder. (§ 189.) As demonstrated in Argument *VI,* Part *C,* above, and incorporated here, the prosecution's case for premeditation was non-existent. In such cases, the jury will be more likely to be influenced by the error and wrongfully convict the defendant. (*See People v. Wagner* (1975) 13 Cal.3d 612, 621 [119 Cal.Rptr. 457]; *People* v. *Collins* (1968) 68 Cal.2d 319, 332 [66 Cal.Rptr. 497].)

In addition, the jury's perception of appellant's character for violence and criminality undoubtedly greatly influenced their resolution of whether he intended to rape Mele. As demonstrated in argument *I,* above, and incorporated here, the prosecution's case for attempted rape was also nonexistent.

This unreliable, irrelevant and prejudicial evidence violated appellant's right to due process, to be tried only on the basis of relevant evidence, to an impartial jury, and to reliable determinations of guilt, death eligibility, and penalty in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and Article I, sections 7, 15, 16, and 17 of the California Constitution. (*See McKinney* v. *Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385.) The repeated improper referents to appellant's nickname improperly lessened the prosecution's burden of proof by biasing the jury and rendered the trial fundamentally unfair, in violation of appellant's constitutional right to due process. (*Duncan v. Henry* (1995) (*per curiam*) 513 U.S. 364, 366 [130 L.Ed.2d 865, 115 S.Ct. 887] [evidence so inflammatory as to prevent a fair trial]; *Maurer v. Department of Corrections* (8th Cir. 1994) 32 F.3d 1286, 1289-1291 [admission of testimony by prosecution witness that complainant seemed sincere when she said she was raped]; *Tucker v. Makowski* (10th Cir. 1989) 883 F.2d 877, 878, 881 (per curiam) [improper admission of "other crimes" evidence]; *Stidum v. Trickey* (8th Cir. 1989) 881 F.2d 582, 583-584, *cert. denied*, 493 U.S. 1089 [same]; *Amos v. Minnesota* (8th Cir. 1988) 849 F.2d 1070, 1073, *cert. denied*, 488 U.S. 861 [error

so prejudicial that it constituted a denial of due process]; *Cooper v. Sowders* (6th Cir. 1988) 837 F.2d 284, 286-287 [police officer expressed personal opinion that defendant was guilty]; *Thomas v. Lynaugh* (5th Cir. 1987) 812 F.2d 225, 230, *cert. denied*, 484 U.S. 842 [improper admission of evidence that is crucial, critical, or a highly significant factor in the context of the entire trial].)

The prosecution's repeated and frequent references to appellant's nickname and linkage with the manner of killing so fatally infected the proceedings as to render them fundamentally unfair. (*See Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1465, *cert. denied,* 479 U.S. 1068 [93 L.Ed.2d 1006, 107 S.Ct. 958] (1987).)

Federal constitutional error committed by a state trial court requires reversal unless the reviewing court concludes that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California, supra,* 386 U.S. 18, 20-21, 24; *People* v. *Louis* (1986) 42 Cal.3d 969, 993 [232 Cal.Rptr. 110].)

This Court should consider this evidence to be as crucial to the conviction as did the prosecutor. (*People* v. *Powell* (1967) 67 Cal.2d 32, 56-57 [59 Cal.Rptr. 817].) The only conceivable purpose of offering this "evidence" was to inflame the minds of the jurors against appellant, to attribute a propensity to him, and to preclude their dispassionate and unbiased consideration of other relevant evidence. The state cannot prove beyond a reasonable doubt that appellant was not prejudiced by this evidence.

Denial of appellant's claim would constitute a deprivation of a state created-right (Evid. Code, §§ 352, 1101) and amount to an additional due process violation. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.)

As a result, the special circumstance, the murder conviction, and appellant's death sentence must be reversed.

VIII. THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana, supra,* 498 U.S. at pp. 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497 [189 Cal.Rptr. 501].) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 317 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6 [127 L.Ed.2d 583, 114 S.Ct. 1239].) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions On Circumstantial Evidence (CALJIC 2.90, 2.01, 2.02, 8.83, and 8.83.1) Undermined The Requirement Of Proof Beyond A Reasonable Doubt

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (RT 2379; CT3 62.)

These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (RT 2379; CT3 62.)

The jury was given four interrelated instructions - CALJIC 2.01, 2.02, 8.83, and 8.83.1 - that discussed the relationship between the reasonable doubt requirement and circumstantial evidence.[39] They were directed at different evidentiary points, and advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you *must* accept the reasonable interpretation and reject the unreasonable. [Emphasis added.]" (RT 2368-2368, 2384-2385; CT3 36-37, 83-84.) These instructions essentially informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty - even if they entertained a reasonable doubt as to guilt. This four times-repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., Amend. XIV; Cal. Const., art. I, 7 & 15), trial by jury (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, 16), and a reliable capital trial (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, 17). (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella*

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39 CALJIC 2.01 [sufficiency of circumstantial evidence – generally] (RT 2368, CT3 36); CALJIC 2.02 [sufficiency of circumstantial evidence to prove specific intent or mental state] (RT 2369, CT3 37); CALJIC 8.83 [special circumstances – sufficiency of circumstantial evidence – generally] (RT 2384, CT3 83); and CALJIC 8.83.1 [special circumstances – sufficiency of circumstantial evidence to prove required mental state] (RT 2385, CT3 84).

v. California, supra, 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find appellant guilty of murder and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty" [italics added].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 [85 L.Ed.2d 344, 105 S.Ct. 1965] [italics added, fn. omitted].) Mandatory presumptions, even those that are explicitly rebuttable, are

unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana, supra,* 442 U.S. at p. 524.)

Here, the instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (RT 2368-2369.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. All the more, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crime supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of reversing the burden of proof, since it required the jury to find appellant guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. Further, the instructions were prejudicial with regard to guilt in that they required the jury to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict appellant because he likely intended to penetrate the victim regardless of her will, rather than because they believed the special circumstance allegation true beyond a reasonable doubt. In addition, the constitutional defects in the circumstantial evidence instructions were particularly likely to have affected the jury's deliberations in this case, since there was no direct evidence of appellant's intentions.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he

accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215 [275 Cal.Rptr. 729], citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684 [44 L.Ed.2d 508, 95 S.Ct. 1881]; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893 [258 Cal.Rptr. 208].)

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

B. Other Instructions (CALJIC 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51 and 8.20) Also Vitiated The Reasonable Doubt Standard

The trial court gave seven other standard instructions that individually and collectively further diluted the constitutionally mandated reasonable doubt standard: CALJIC 1.00, regarding the respective duties of the judge and jury (RT 2365-2366, CT3 30-31); CALJIC 2.21.1, regarding discrepancies in testimony (RT 2374 CT3 47); CALJIC 2.21.2, regarding willfully false witnesses (RT 2374, CT3 48); CALJIC 2.22, regarding weighing conflicting testimony (RT 2374, CT3 49); CALJIC 2.27, regarding sufficiency of evidence of one witness (RT 2375, CT3 52); CALJIC 2.51, regarding motive (RT 2375, CT3 53); and CALJIC 8.20, defining premeditation and deliberation (RT 2382, CT3 69.) Each of these instructions, in one way or another, urged the jury to decide material issues merely by determining which side had presented the relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated appellant's constitutional rights as enumerated at the beginning of this argument by

misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty beyond a reasonable doubt, or not guilty. Additionally, CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (RT 2365-2366.) CALJIC 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (RT 2368.)

In addition, the jury was instructed under former CALJIC No. 2.51 (5th ed.):

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. (RT 2375; CT3 53.)

This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Further, CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on

appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. The instruction also violated the Eighth Amendment's requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

Similarly, CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (RT 2374 [italics added].) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822-825 [CALJIC 2.50.01 contrary to *Winship* and *Sullivan* and, under *Boyde v. California* (1990) 494 U.S. 370, 384-385 [108 L.Ed.2d 316, 110 S.Ct. 1190], error not cured by correct reasonable doubt and presumption of innocence instructions]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [25 Cal.Rptr.2d 602] [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"];.)[40] The essential mandate of *Winship* and its progeny - that

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[40] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157 [123 Cal.Rptr. 903], wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt. (But see *Gibson v. Ortiz, supra,* at p. 822-825 ["'the unconstitutionality of any of the theories requires that the convictions be set aside.'")

each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt - is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence. (RT 2374, CT3 49.)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC Nos. 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (RT 2375, CT3 52), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is required only to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697 [268 Cal.Rptr. 706].) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation ...." (RT 2382, CT3 69 [italics added].) Jurors would reasonably interpret "precluding" to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [79 Cal.Rptr. 65] [recognizing that "preclude" can be understood to mean "absolutely prevent"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt."

Taking the instructions together, no reasonable juror could have been expected to understand - in the face of so many instructions permitting conviction on a lesser showing - that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth at the beginning of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions.

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [96 Cal.Rptr.2d 1] [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [36 Cal.Rptr.2d 474] [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [15 Cal.Rptr.2d 400] [addressing CALJIC 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [279 Cal.Rptr. 780] [addressing circumstantial evidence instructions].)[41] While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean

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[41] Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of appeal have echoed the pronouncements by this Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at pp. 155-157 [challenge to former version of CALJIC 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC 2.90]; *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739 [citing *People v. Wilson* (1992) 3 Cal.4th 926, 943] [CALJIC 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC 2.90].)

that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC 2.90 regarding the presumption of innocence. There are several reasons that the Court's analysis should be reassessed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution. (*Estelle v. McGuire, supra,* 502 U.S. at p.72.) There certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale - that the flawed instructions were "saved" by the language of CALJIC No. 2.90 - requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [53 Cal.Rptr.2d 207] [citing *People v. Westlake* (1899) 124 Cal. 452, 457] [57 P. 465] [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [193 Cal.Rptr. 799] [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative

instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395 [70 Cal.Rptr.2d 427].)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[42] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one - rather than the opposite - the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard seven separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: Penal Code Section 1096 as set out in CALJIC 2.90. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943 [13 Cal.Rptr.2d 259], citations omitted.) Under this principle, it cannot be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

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[42] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was held not to cure the harm created by the impermissible mandatory presumption.

Most recently, the Ninth Circuit Court of Appeals agreed with the foregoing analysis. In *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 the Court found in the context of CALJIC 2.50.01 (governing the use of other crimes by the defendant) that the instruction violated *Winship* and *Sullivan*, and further held that under *Boyde v. California, supra,* 494 U.S. at pp. 379-380, the error was not cured by CALJIC 2.90, because "[w]hen a court gives the jury instructions that allow it to convict a defendant on an impermissible legal theory, as well as a theory that meets constitutional requirements, 'the unconstitutionality of any of the theories requires that the convictions be set aside.'" (*Gibson v. Ortiz, supra,* at p. 825 [citation].)

D. Reversal Is Required.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error that is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282; *Gibson v. Ortiz, supra*, 387 F.3d 812.)

Even if the erroneous instructions are viewed as only burden-shifting, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California, supra*, 491 U.S. at pp. 266-267.) Here, as set forth above, that showing cannot be made. Further, under CALJIC No. 2.51, the prosecutor was relieved of proving an element of first degree premeditated murder. Rather, the instructions permitted the prosecution to only establish motive in order for the jury to conclude that appellant was guilty.

The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed per se reversible error. (See *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana, supra*, 498 U.S. at p. 41; *People v. Roder, supra,* 33 Cal.3d at p. 505.) The instructions also violated the

Eighth Amendment's requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) Accordingly, appellant's conviction and death sentence must be reversed.

IX. DURING CLOSING ARGUMENT, THE PROSECUTION'S EGREGIOUS EXAGGERATION OF ITS EVIDENCE OF LACK OF CONSENT, A PREREQUISITE FOR ATTEMPTED RAPE, AND THE COURT'S IMPRIMATUR PLACED ON THAT EXAGGERATION, DENIED APPELLANT OF HIS RIGHT TO A FAIR TRIAL

A. The Facts and Procedural Background

During closing argument, the prosecutor pressed her position that appellant acted without regard to whether Mele consented to any sexual touching. (RT 2274-2275.) She told the jury, "defendant takes off Mele [sic] pants and gets on top of her and she starts to scream and struggle." (RT 2275-2276.) Defense counsel immediately objected: "there's no evidence that anybody is screaming, or there's any kind of violent struggle as being described by counsel." (RT 2275.) The court responded:

> Well, there's evidence that her voice was raised. Overruled on that point. The struggle is open to interpretation. The jury can recall the testimony. (RT 2276.)

The facts regarding this moment in the alleged attempted rape are detailed in Argument *I*, Part *B, 2, a* and *b*, above, and incorporated here by reference. In summary, when appellant got on top of Mele there was neither evidence that she started to scream nor evidence that she started to struggle.

B. Failure to Correct the Prosecution's Egregious Exaggeration Was a Patent Abuse of Discretion and Denied Appellant His Right to Due Process and a Fair Trial

A trial judge has the responsibility to limit the argument of counsel to theories supported by substantial evidence. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386 [52 Cal.Rptr.2d 422].) "In exercising its discretion under section 1044[[43]], a trial court must be impartial and must assure that a defendant is afforded a fair trial. [Citation.] When there is no patent abuse of discretion, a trial court's determinations under section 1044 must be upheld on appeal. [Citation.]" (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1334 [71 Cal.Rptr.2d 41].)

Here the prosecutor improperly went well beyond what the evidence supported. The prosecutor's function is to seek justice, not convictions. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 55 S.Ct. 629]; *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 [137 Cal.Rptr. 476].) It is a prosecutor's duty to fairly present evidence material to the charges, and the trial judge's duty to see that facts material to the charge are fairly presented. (*In re Ferguson* (1971) 5 Cal.3d 525, 531 [96 Cal.Rptr. 594].) A prosecutor's position is such that any improper acts "are apt to carry much more weight against the accused when they properly should carry none." (*Berger v. United States, supra*, at p. 88; *People v. Talle* (1952) 111 Cal.App.2d 650, 677 [245 P.2d 633].) Obviously, the prosecutor clearly made these improper remarks for the very purpose of influencing the jury. Otherwise, she would not have made them. To

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[43] Section 1044 provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

conclude that the jury was not influenced by them is to ignore the very reason for which the remarks were made. The misconduct aimed at the key issue of consent touched "a live nerve in the defense." (*People v. Modesto* (1967) 66 Cal.2d 695, 714 [59 Cal.Rptr. 124].)

Here the court shored up the lack of evidentiary support for the prosecutor's false representations by telling the jury that the prosecution's statement of the facts could properly be inferred from the evidence. "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. ...." (*People* v. *Mahoney* (1927) 201 Cal. 618, 626-627 [258 P. 607].) "[J]urors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." (*Bollenbach* v. *United States* (1946) 326 U.S. 607, 612 [90 L.Ed. 350, 66 S.Ct. 402].) This is particularly true where the ruling is on a vital issue. (*Ibid.*) "Words of instruction of the trial judge are more likely to effect prejudice than the words of argument of the prosecutor." (*People* v. *Morse* (1964) 60 Cal.2d 631, 650 [36 Cal.Rptr. 201].)

As this Court observed in *People v. Evans* (1952) 39 Cal.2d 242 [246 P.2d 636], "In a case such as this where the crime charged is of itself sufficient to inflame the mind of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence and the conduct of the trial." (*Id.* at p. 251.)

C. The Cumulative Impact of This and Other Guilt Phase Errors Was Prejudicial

The cumulative impact of multiple errors may result in prejudice in a case where any one individual error, standing alone, might be deemed harmless. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 815 [273 Cal.Rptr. 757]; *People v. Hudson* (1981) 126 Cal.App.3d 733, 741 [179 Cal.Rptr. 95].)

Here the prosecution's case was not only substantially enhanced by the improperly introduced evidence of appellant's irrelevant and grossly prejudicial

nickname (the topic of Argument *VII*), as well as the improper and egregious exaggeration of the merits of the prosecution's case for rape (the topic of the instant Argument), but the prosecution's burden was at the same time lightened by an array of jury instructions that required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt (the topic of Argument *VIII*.) In particular, the linchpin of the prosecution's entire case for first degree murder, the special circumstance, and the death penalty relied upon convincing the jury of Mele's nonconsent to intercourse and appellant's lack of a good faith belief that she had consented.

The prosecutor's perception of the weakness of her case in this regard is best illustrated in her resort to such an egregious exaggeration of Mele's actions. Indeed, as demonstrated in Argument *I*, Part *E*, above, incorporated here by reference, as a matter of law there was no attempted rape because the evidence was insufficient to prove that the acts were against the victim's will, that appellant intended to have sexual intercourse against her will, or that appellant intended to accomplish or accomplished, the sexual touching by means of force, violence, duress, or menace.

The fact that the court not only refused to correct the prosecutor's misstatement, but put its imprimatur on the notion that such an exaggeration was an available interpretation of the evidence, vastly lessened the jury's burden to resolve the issue against appellant.

The foregoing clearly demonstrates that the cumulative effect of these errors so infected the trial with unfairness as to make the resulting conviction a denial of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 643 [40 L.Ed.2d 431, 94 S.Ct. 1868]; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L.Ed.2d 144, 106 S.Ct. 2464]; *See, e.g., People v. Mendoza* (1974) 37 Cal.App.3d 717, 727 [112 Cal.Rptr. 565].) These errors violated appellant's constitutional

rights under the Fifth, Eighth, and Fourteenth Amendments. The Eighth Amendment and the due process clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [100 L.Ed.2d 575, 108 S.Ct. 1981] (Eighth Amendment); *Zant v. Stephens, supra,* 462 U.S. 862, 885 (Fourteenth Amendment due process).)

The due process clause also protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 344.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of life without due process. Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case necessarily establishes a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321 [112 L.Ed.2d 812, 111 S.Ct. 731].)

Apart from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors that taint the fairness of the trial and present an "unacceptable risk, ... of impermissible factors coming into play." (*Estelle v. Williams* (1976) 425 U.S. 501, 505 [48 L.Ed.2d 126, 96 S.Ct. 1691]; *accord, Holbrook v. Flynn* (1986) 475 U.S. 560 [89 L.Ed.2d 525, 106 S.Ct. 1340]; *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828.)

In light of the significance of, and cumulative effect of, each of the errors detailed above, the prosecution cannot establish beyond a reasonable doubt that the cumulative effect of these errors had no effect in bringing about the guilty verdict and special circumstance finding. As a result, appellant's convictions must be reversed. (*Chapman* v. *California, supra,* 386 U.S. 18, 20-21, 24; *People* v.

Louis, supra, 42 Cal.3d 969, 993; *see People* v. *Garceau* (1993) 6 Cal.4th 140, 186 [24 Cal.Rptr.2d 664]; *People v. Mendoza, supra,* 37 Cal.App.3d 717, 727.)

X. APPELLANT'S PENALTY PHASE VERDICT WAS IMPROPERLY PREMISED ON FOUR INCIDENTS COMMITTED WHEN APPELLANT WAS A JUVENILE, THREE OF WHICH WERE COMMITTED WHEN HE WAS 15 YEARS OLD OR LESS, IN VIOLATION OF NUMEROUS CONSTITUTIONAL PROSCRIPTIONS

Appellant's sentence of death was unlawfully and unconstitutionally imposed—in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, due process, effective representation, to be free from cruel and unusual punishment, and to a reliable and individualized sentencing determination by a fair and impartial jury—because evidence of petitioner's adjudicated and unadjudicated juvenile misconduct was admitted into evidence during the penalty phase of his trial.

As abstracted from the more detailed account in the Statement of the Facts, Penalty Phase, and incorporated here, appellant was not a hardened criminal with a string of prior felony convictions. Before his arrest in this case, appellant had no prior felony convictions and only a single misdemeanor conviction for assault with a deadly weapon (a car) committed when he was 18 years old. (CT 5926-5928.) Thus, the prosecution was reduced to urging that five relatively minor altercations, one when he was 14 years old, two when he was 15, and one in an incident with his father when he was 17 warranted the jury to sentence appellant to death. The latter incident involved a heated confrontation with his father, who had been drinking, that resulted in appellant slapping him once on the head. (RT 2703-2704, 2733-2735.) This occurred in the context of a relationship in which appellant's father routinely beat him, often by "whooping" appellant to the "upside" of his head. (RT 2688, 2696, 2937-2938, 2954, 2962.)

The use of these "acts of violence" committed when appellant was a minor, in particular those committed when he was 15 years of age or younger, as aggravating evidence pursuant to section 190.3 violates well-established constitutional principles. The United States Supreme Court consistently has held that the Eighth Amendment requires that a state's death sentencing scheme "genuinely narrow the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 877 [77 L.Ed.2d 235, 103 S.Ct. 2733]; *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364 [100 L.Ed.2d 372, 108 S.Ct. 1853] [overbroad aggravating factor violates Eighth Amendment].) The death penalty is unconstitutionally imposed when there is an unacceptable risk that it may have been imposed arbitrarily or capriciously or through whim or mistake. (*California v. Ramos* (1983) 463 U.S. 992, 999 [77 L.Ed.2d 1171, 103 S.Ct. 3446].) Such is the case when the decision is largely premised on the behavior of a child where the real fault for that behavior lies largely elsewhere.

Last year, the United States Supreme Court found that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits the imposition of a death sentence on a juvenile who is under the age of eighteen at the time of the crime. (*Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1, 125 S.Ct. 1183, 1196-1198].) The Court recognized that three general differences between juveniles under 18 and adults required this outcome:

> First, as any parent knows and as the scientific and sociological studies ... cite[d] tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." [Citation.] ... ¶ The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. [Citation.] ... ¶ The third broad difference is ... [t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is

> evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. (*Id.* at pp. 569-570.)

Earlier in *Thompson v. Oklahoma* (1988) 487 U.S. 815, 837 [101 L.Ed.2d 702, 108 S.Ct. 2687]), the Court recognized:

> [In the important] "experience of mankind, as well as the long history of our law, ... there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." (*Id.* at p. 823, quoting *Goss v. Lopez* (1975) 419 U.S. 565, 590-591 [42 L.Ed.2d 725, 95 S.Ct. 729] Powell, J., dissenting.)

Pointing to the illustrative legislative efforts of the states, the Court concluded:

> All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult. (*Id.* at pp. 824-825.)

"Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae.*" (*Id.* at p. 825, fn. 23, quoting *Schall v. Martin* (1984) 467 U.S. 253, 265 [81 L.Ed.2d 207, 104 S.Ct. 2403].) Thus, "'youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'" (*Id.* at p. 834, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 [71 L.Ed.2d 1, 102 S.Ct. 869].)

The Court found no need to explicate the obvious:

> Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles

> are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. (*Id* at p. 834.)

Appellant's childhood experience and later experience in the juvenile justice system is sadly illustrative of the result of the failure of his family, school, and support systems to provide him the succor and control that should have been his right and was certainly his need.[44] It is precisely because juveniles in such context are "less mature and responsible than adults," and because his juvenile

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[44] Prior to *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1, 125 S.Ct. 1183] [holding that execution of individuals who were under 18 years of age at the time of there capital crimes is prohibited by the Eighth and Fourteenth Amendments], appellant's adolescent peers on death row had a great deal in common. Justice Brennan, in dissent in *Stanford v. Kentucky, supra,* 492 U.S. 361, 398, explained:

> Adolescents on death row appear typically to have a battery of psychological, emotional, and other problems going to their likely capacity for judgment and level of blameworthiness. A recent diagnostic evaluation of all 14 juveniles on death rows in four States is instructive. Lewis et al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 145 Am.J. Psychiatry 584 (1988). Seven of the adolescents sentenced to die were psychotic when evaluated, or had been so diagnosed in earlier childhood; four others had histories consistent with diagnoses of severe mood disorders; and the remaining three experienced periodic paranoid episodes, during which they would assault perceived enemies. *Id.,* at 585, and Table 3. Eight had suffered severe head injuries during childhood, *id.,* at 585, and Table 1, and nine suffered from neurological abnormalities, *id.,* at 585, and Table 2. Psychoeducational testing showed that only 2 of these death-row inmates had IQ scores above 90 (that is, in the normal range)--and both individuals suffered from psychiatric disorders--while 10 offenders showed impaired abstract reasoning on at least some tests. *Id.,* at 585-586, and Tables 3 and 4. All but two of the adolescents had been physically abused, and five sexually abused. *Id.,* at 586-587, and Table 5. Within the families of these children, violence, alcoholism, drug abuse, and psychiatric disorders were commonplace. *Id.,* at 587, and Table 5.

conduct had no bearing whatsoever on his culpability in the crime with which he was charged, that this State's aggravation of his murder conviction with these four juvenile acts is unconstitutional. (*California v. Brown* (1987) 479 U.S. 538, 545 [86 L.Ed.2d 231, 107 S.Ct. 2633] O'Connor, J., concurring ["punishment should be directly related to the personal culpability of the criminal defendant"); *Zant v. Stephens, supra,* 462 U.S. 862, 885 [state may not attach an "'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process"].)

The use of appellant's transgressions as a minor, particularly those occurring when he was 15 years of age or younger, deprived appellant of a fair penalty phase hearing and undermined the reliability of the death penalty determination. Their admission into evidence at the penalty phase of his trial violated appellant's right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as his Eighth and Fourteenth Amendment rights to a reliable penalty phase determination. In *Gardner v. Florida* (1977) 430 U.S. 349 [51 L.Ed.2d 393, 97 S.Ct. 1197] the United States Supreme Court stated in relevant part:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. [Citations.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. [I]t is now clear that the sentencing process ... must satisfy the requirements of the Due Process Clause. (*Id.* at pp. 357-358.)

Thus, for a death decision to be based on reason, due process requires that it be based on reliable information. (*Id.* at p. 359.) Moreover, the death penalty "may not be imposed under sentencing procedures that create a substantial risk

that the punishment will be inflicted in an arbitrary and capricious manner." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [64 L.Ed. 2d 398, 100 S.Ct. 1759] [plur. opn.].)

In *Ake v. Oklahoma* (1985) 470 U.S. 68 [84 L.Ed.2d 53, 105 S.Ct. 1087], the Supreme Court stated "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." (*Id.* at p. 79.) The unreliability and unfair prejudice inherent in a system that allows the prosecution to introduce evidence about appellant's frailties as a minor, largely the result of systemic failures to intercede and to address problems that were not of his making, to persuade the jury to vote for a death sentence creates a "strategic disadvantage" of the type condemned in *Ake v. Oklamhona* and *Roper v. Simmons*.

Because the ultimate penalty of death is irreversible, the Constitution requires that a state seeking to execute one of its citizens take every step to ensure that its process is free from inaccurate and unreliable results. The use of evidence of the inadmissible incidents that occurred when appellant was a minor in the penalty phase of appellant's trial does not comport with the Eighth and Fourteenth Amendments' mandate of accuracy and reliability.

In the instant case, as abstracted from the more detailed account in the Statement of the Facts, Part *B*, *1*, a, as an adult appellant had suffered a single misdemeanor conviction for assault with a deadly weapon—the result of his guilty plea in an incident where it was alleged that he drove a vehicle over the curb and into a fence in the front yard of a residence where a group was gathered for a barbeque. He had no other adult convictions. (See *People v. Crandall* (1988) 46 Cal.3d 833, 884 [251 Cal.Rptr. 227] [the absence of prior felony convictions is a "significant" mitigating circumstance, since defendants in capital cases frequently have extensive criminal pasts].) Thus, the prosecution cannot establish beyond a

reasonable doubt that appellant's death verdict was not based in substantial part on these four incidents when appellant was a minor, three of which occurred before his 16th birthday.

Allowing the jury to consider this evidence as factors in aggravation violated appellant's rights under both the state and federal constitutions. It improperly bolstered the prosecution's theme that appellant was a violent and threatening person. Because the prosecutor heavily relied upon that evidence during jury argument,[45] these violations cannot be deemed harmless beyond a reasonable doubt. (*Johnson v. Mississippi, supra*, 486 U.S. at p. 586; *Chapman v. California, supra*, 386 U.S. at p. 24.) Therefore, appellant's death sentence should be vacated.

XI. APPELLANT'S PENALTY PHASE VERDICT WAS PREDICATED ON IMPERMISSIBLE HEARSAY IN THE FORM OF A MISDEMEANOR JUDGMENT THAT WAS INADMISSIBLE AT THE TIME OF THIS OFFENSE

A. The Facts

The prosecution introduced as factor (b) evidence the incident on the cul-de-sac, Aristotle Court, where it was alleged that appellant drove a vehicle over the curb and into a fence in the front yard of a residence where a group was gathered for a barbeque. (See Statement of the Facts, Part *B, 1, a.*) The prosecution called three witnesses to the incident, Ronald Gaither, Walter Fuller, and Joseph Scruggs. (RT 2477, 2497, 2512.) None of them was able to identify appellant as either the driver or occupant of the car.

To overcome this failing, the prosecution, over defense objection, requested that the court take judicial notice that on January 10, 1996, appellant had entered a

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[45] The prosecutor repeatedly reminded the jury about appellant's prior juvenile acts. (RT 2996-2997, 2999, 3005-3009.)

plea of guilty to a charge of violating Penal Code section 245, subdivision (a)(1), a misdemeanor, and that the victim was Joseph Scruggs. Defense counsel confirmed that appellant had entered the plea to the misdemeanor, was given credit for time served, and was granted summary probation. (RT 2424.) Defense counsel told the court that appellant drove at the group, lost control of the car, hit the curb, and came to rest "some distance from this group of individuals." Defense counsel added that no one knew whether this was merely a prank or whether he intended to hit anyone. (RT 2424.)

The defense argued that misdemeanor convictions were not admissible, citing *People v. Wheeler* (1992) 4 Cal.4th 284 [14 Cal.Rptr.2d 418]. (RT 2519-2520.) The prosecutor in turn sought to employ the holding in *People v. Ray* (1996) 13 Cal.4th 313 [52 Cal.Rptr.2d 296], decided May 6, 1996, two and one-half months after the commission of the homicide.[46] (RT 2521-2522.) Later in the day, the court, after having read *People v. Ray*, concluded that it applied only to felonies and ruled that he would not permit the introduction of the misdemeanor conviction. (RT 2538.) The prosecutor responded that she was only attempting to use appellant's plea agreement as an admission, but the court reasoned that it could not see any way to accomplish that without informing the jury about the misdemeanor conviction. (RT 2538-2543.)

At the beginning of the following day, the parties returned to the issue. (RT 2544.) The court expressed the view that the plea agreement was a confession and did not become a conviction until sentence was imposed. (RT 2547.) After

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[46] In *Ray,* in a concurring opinion, the Chief Justice concluded that a misdemeanor conviction is admissible for impeachment purposes. The concurring opinion was joined by Justices Baxter, Werdegar, Lucas, and Arabian. (*Id.* at p. 369.) The majority opinion was authored by Justice Baxter and was joined by Chief Justice George and Justices Kennard, Werdegar, Lucas, and Arabian. (*Id.* at p. 363.)

reconsidering *People v. Ray, supra,* the court believed the plea was admissible. (RT 2547-2549.) Defense counsel responded that the nature of a misdemeanor plea was different than a felony plea; no factual basis for the plea was set out, and no court reporter was present; appellant had merely filled out a "*Tahl* Waiver." (RT 2549-2550.) Defense counsel argued that this was an example of assembly-line justice employed in the county to get rid of the case, especially where the defendant is in custody, is offered credit for time served, and is released that afternoon. (RT 2551.) Defense counsel noted that the Legislature acknowledged the different nature of a misdemeanor plea as reflected in section 1016[47] that prohibits it use as an admission in any civil suit. (RT 2551.) Defense counsel suggested that the court was carving out a new exception just because the prosecutor had not adequately prepared her case. (RT 2550-2551.) The court disagreed and stated that it was merely applying *Ray, supra.* (RT 2554-2556.)

The defense then moved to strike the testimony of the three witnesses who had testified about the assault, on the basis that there was insufficient evidence that

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[47] Section 1016 provides in pertinent part:

> There are six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction:
>
> 1. Guilty.
>
> 2. Not guilty.
>
> 3. Nolo contendere, subject to the approval of the court. The court shall ascertain whether the defendant completely understands that a plea of nolo contendere shall be considered the same as a plea of guilty and that, upon a plea of nolo contendere, the court shall find the defendant guilty. The legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based. ...

appellant had committed the offense. (RT 2556.) For the same reason, defense counsel also moved for a mistrial. (RT 2557.) The court denied both motions. (RT 2556-2557.)

The following day the prosecutor proposed that the court take judicial notice of the salient points of the plea to prevent the jury from viewing other improper matters contained in the plea agreement and immediately thereafter instruct the jury on the limited use they could make of that evidence. (RT 2644.) Defense counsel replied that this would be using the judicial record for a hearsay purpose, contrary to the holding in *Wheeler*. (RT 2645.) Defense counsel argued that it was double hearsay. Since the court did not have appellant's plea before it, all the court had was a statement by a court clerk stating what had occurred in court. (RT 2647, 2654-2656.)

Without addressing defense counsel's assessment, the court granted the prosecution's request (RT 2656) and shortly thereafter advised the jury that appellant had entered a plea of guilty to a charge of violating Penal Code section 245, subdivision (a)(1), a misdemeanor, and that the victim was Joseph Scruggs.[48] (RT 2661-2662.) The court agreed with defense counsel that the plea did not indicate whether appellant was the driver or the passenger, and thus appellant's

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[48] Immediately following this advisement, the court instructed the jury:

> Now, by taking judicial notice of this fact, the Court is in effect admitting this into evidence, but it's admitted for a very limited purpose. And you're instructed that that limited purpose is simply as it relates to the identity of the individual who may have been involved in the incident involving the car at the barbecue that you heard testimony about the other day. It is offered for no other purpose other than what I have just described to you.
>
> It s not, and I emphasize "not" to be considered by you as a factor in aggravation that you may wish to consider in determining the appropriate penalty. It again is offered for the limited purpose of assisting you in determining the identity of the individual involved in that incident. (RT 2662.)

role was not mentioned to the jury. (RT 2657-2658.) This is confirmed by the misdemeanor file in Riverside County Municipal Court, Case Number 329002.[49]

B. The Trial Court Improperly Misapplied *People v. Ray* by Extending Its Holding to a Misdemeanor Conviction

In *People v. Wheeler, supra,* 4 Cal.4th 284, this Court addressed whether Proposition 8 permitted the introduction of a prior misdemeanor conviction to impeach the credibility of a witness. (*Id.* at p. 287-288.) The Court held that although courts have "broad discretion to admit or exclude acts of dishonesty or moral turpitude 'relevant' to impeachment, whether a misdemeanor or a felony, "the *fact of conviction of a misdemeanor* remains inadmissible under traditional hearsay rules...."[50] (*Id.* at p. 288, italics in the orig.)

In general, a judgment offered to prove the matters determined by that judgment is hearsay. It is in substance a statement by the court that determined the previous action, i.e., by other than a testifying witness, that is offered to prove the truth of the matter stated. (*Id.* at p. 298.) However, the Legislature has enacted certain exceptions for felony convictions because, as explained by the California Law Revision Commission (Commission), that the seriousness of a *felony* charge "encourages its full litigation." (*Ibid.*)

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[49] Counsel, contemporaneously with the filing of the *Appellant's Opening Brief*, is moving the court to take judicial notice of this file pursuant to Evidence Code sections 452 through 453 and is lodging with the court a certified copy of these documents.

[50] This Court rejected the People's suggestion that misdemeanor convictions were admissible under the business or official records exceptions to the hearsay rule. (See Evid. Code §§ 1271, 1280.) The Court reasoned, "An admissible record is competent only to prove the *act it records.* Thus, while the documentary evidence of a conviction may be admissible to prove that the conviction occurred, the business or official records exceptions do not make the abstract of judgment admissible to show that the witness committed the underlying criminal conduct." (*People v. Wheeler, supra*, at p. 300, fn. 13.)

The *Wheeler* Court concluded, "Evidence of a misdemeanor *conviction,* whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness' credibility." (*Id.* at p. 300.) The Court observed that nothing precluded the Legislature "from creating a hearsay exception that would allow use of misdemeanor convictions for impeachment in criminal cases." (*Id.* at p. 300, fn. 14.) In the 1996 Legislative session, the Legislature did just that in enacting Evidence Code section 452.5.[51] (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460 [119 Cal.Rptr.2d 272].) The new Evidence Code section 452.5 went into effect on January 1, 1997, 10 months after the offense herein. (Gov. Code, § 9600 ["a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed"].)

Thus, until Evidence Code Section 452.5 became effective in 1997, misdemeanor conduct could not be proven by evidence of the misdemeanor conviction, whether by document or testimony. (*People v. Santos* (1994) 30 Cal.App.4th 169, 177, 179 [35 Cal.Rptr.2d 719]; *People v. Steele* (2000) 83 Cal.App.4th 212, 222-223 [99 Cal.Rptr.2d 458].)

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51 Section 452.5 now provides:

(a) The official acts and records specified in subdivisions (c) and (d) of section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

People v. Ray, supra, 13 Cal.4th 313, was decided on June 26, 1996, four months after the offense herein. In *Ray* the prosecution below had relied solely upon four prior Michigan felony judgments of conviction as criminal activity involving the use or threat of violence to be considered by the jury under factor (b). (*Id.* at p. 348.) Ray contended on appeal that these "convictions violated the hearsay rule insofar as such evidence was offered under section 190.3, factor (b) to prove that the conduct adjudicated therein actually occurred." (*Id.* at p. 349.) Ray argued that his trial counsel was incompetent when he failed to seek to exclude the convictions on this ground. (*Ibid.*) The majority rejected the claim because the Court found that there was a reasonable tactical reason for counsel's omission in that the prosecution would have been able to prove these violent crimes through the testimony of victims and witnesses that would have been far more damaging to the defense. (*Id.* at p. 350.)

In a concurring opinion,[52] the Chief Justice went one step further and concluded: "The prosecution may rely upon a prior *conviction* of a crime involving the use or threat of force or violence to establish the presence of criminal activity involving the use or threat of force or violence for purposes of section 190.3, factor (b)." (*Id.* at p. 369, conc. opn., George, C.J.) Although Ray cited *Wheeler* as authority for claiming that his prior felony convictions were inadmissible hearsay (*Id.* at p. 369), the Chief Justice disagreed:

> *Wheeler* did not consider the permissible use of evidence of a prior conviction in a sentencing context, and did not examine the history of the use of prior convictions in California penalty phase proceedings or the language or legislative intent of section 190.3. Whatever may be true with regard to the limitations on the use of prior convictions in other contexts, I believe it is clear that, under the provisions of the governing death penalty statute, the prosecution may rely upon a prior *conviction* of a crime involving the use or

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52 See fn. 46, page 144, above.

> threat of force or violence to establish the presence of criminal activity involving the use or threat of force or violence for purposes of section 190.3, factor (b). (*Ibid.*, italics in the orig.)

In *People v. Ray, supra,* the prior convictions were all felonies. (*Id.* at p. 348.) This Court did not have before it the question of the admissibility of a misdemeanor conviction for factor (b). Thus, neither the majority nor the concurring opinion of the Chief Justice expressly applied their analysis or conclusions to prior misdemeanor convictions. Cases, of course, are not authority for questions not considered. (*Id.* at p. 378.)

Thus, the law in effect at the time of the commission of the homicide in the instant case was that a misdemeanor conviction was inadmissible hearsay because it did not bear with it the trustworthiness of a felony, the latter assured by the seriousness of a *felony* charge. (*People v. Wheeler, supra,* at p. 298.) Indeed as pointed out by defense counsel, misdemeanor pleas in this county were frequently reflective of nothing more than an effort to get rid of the case, especially where the defendant was in custody, was offered credit for time served, and was released that afternoon. (RT 2551.) As here, no factual basis for the plea was required, no court reporter was present, and the defendant merely filled out a "Tahl Waiver." (RT 2549-2550, see Riverside Co. Municipal Court, case # 329002.)[53]

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[53] Even if it were concluded that *People v. Wheeler, supra,* extended to misdemeanor convictions, since it was decided after the instant offense, to apply it against appellant would be a denial of his constitutional right of due process. A criminal statute enacted with a retroactive application is invalid as an ex post facto law if it alters the rules of evidence so that a conviction may be obtained on less or different testimony than was required when the crime was committed. (See *Beazell v. Ohio, supra,* 269 U.S. 167; *Collins v. Youngblood, supra,* 497 U.S. 37; *People v. Frazer, supra,* 21 Cal.4th 737.) Ex post facto laws are prohibited by the federal Constitution (Art. I, §§ 9, 10) and the California Constitution (Art. I, § 9). (Witkin, *California Criminal Law 1, Nature of Criminal Law*, (3rd ed. 2000) § 10, p. 21.) "The California ex post facto provision affords the same protection as the federal provision." (*Id.* at p. 23.)

C. The Error Influenced The Death Verdict

The error here effectively lightened the State's burden of proof and violated appellant's constitutional right to federal due process. (*Carella v. California, supra,* 491 U.S. 263, 265.) Furthermore, misapplication of this state's law is an additional due process violation of the federal constitution's Fourteenth Amendment. (*Ballard* v. *Estelle* (9th Cir. 1991) 937 F.2d 453, 456.; *Vitek v. Jones* (1980) 445 U.S. 480 [63 L.Ed.2d 552, 100 S.Ct. 1254].)

In addition, the court's failure to properly instruct the jury arbitrarily denied appellant's application of this state's own domestic rules, also a violation of Fourteenth Amendment due process principles. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *People v. Marshall* (1996) 13 Cal.4th 799, 850-851 [55 Cal.Rptr.2d 347].) This too was reversible error. (*People v. Robinson, supra,* 61 Cal.2d 373, 394; *People v. Zapien, supra,* 4 Cal.4th 929, 982.)

Here, the prosecution introduced five criminal acts as aggravating factors. Four were particularly petty offenses in the context of capital penalty phase litigation. One was committed when appellant was 14 years old, two when he was 15, and a fourth when he was 17. Only one of the incidents involved acts after appellant had reached his majority, and that was the misdemeanor act introduced in violation of *Wheeler,* the act the jury should never have heard. Without evidence of the misdemeanor conviction, the three witnesses the prosecutor introduced to describe the incident were irrelevant and would have been excluded, since none could identify the occupants of the car. Just as a defendant is not entitled to present any form of evidence in mitigation, including hearsay, out of

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However, where the courts make such a change in the law, the Due Process Clause of the Fifth Amendment has been violated. (*Marks v. United States, supra,* 430 U.S. 188, 191-192 ["[P]ersons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty.... As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment"].)

simple fairness the prosecution should not have the right to present any evidence of this sort in any form they desire in aggravation. (*People v. Ray, supra,* 13 Cal.4th 313, 379, conc. opn., Mosk J.) This error requires the reversal of appellant's judgment of death. (*Johnson v. Mississippi, supra,* 486 U.S. 578 [aggravating circumstance that relies on an invalid prior conviction requires that death judgment be set aside].)

In mitigation, appellant's case began with the absence of any prior felony convictions, a "significant" mitigating circumstance, since defendants in capital cases frequently have extensive criminal pasts. (*People v. Crandall, supra,* 46 Cal.3d 833, 884.)

Also on the mitigation side of the scale upon which the jury was to do their balancing, as detailed in the Statement of the Facts, Part *B, 2* and incorporated here, was appellant's very compelling life story. Appellant's life began burdened by multiple risk factors for brain damage, misdiagnosed or undiagnosed mental disabilities, parental neglect, and inadequate nurturing and supervision. He was left to raise himself; his parents were too burdened, by distant employment and medical and substance abuse issues, to provide the nurturing that their substantially disabled child needed.

Appellant was ultimately found to have damage to three areas of his brain. (RT 2809.) All three would have substantially disrupted and diminished his ability to learn and participate in school (RT 2810-2814, 2806-2809, 2815-2817, 2829) and provide the ready explanation for appellant's inability to participate in any normal school program. The most significant damage was in appellant's left temporal lobe. (RT 2814, 2829.) This is the part of the brain that mediates the impulses that come from the midbrain. (RT 2808-2809.) The midbrain is the source of those very primitive functions that have to do with survival. (RT 2806.) The midbrain may produce aggressive impulses that are transmitted automatically

and without pause. (RT 2806-2808.) These are important to one's defensive needs. (RT 2806-2807) The left frontal lobe is the only restraining element to offset such impulses, particularly aggressive and violent impulses coming from the midbrain. (RT 2815-2816.) Damage to the left frontal lobe impairs one's ability to put the brakes on one's impulses. (RT 2816.) It does not mean that the individual is always out of control. (RT 2816.) Rather, it is a direct function of events in the environment. (RT 2816-2817.) The frontal lobe injects judgment and reasoning into one's behavior. (RT 2809.) From childhood to adulthood, this part of the brain is developing, which explains why one's ability to control the impulses of the midbrain improves as the individual gets older, at least for one without damage to the frontal lobe. (RT 2809, 2829.)

Thus, appellant does not have the same ability as one without such damage to keep in control the typical impulsive, aggressive feelings that come from the midbrain. (RT 2829.) So, in a setting where he may be angered by some development, his ability to control that anger is not as strong as that of a normal person. (RT 2829.) Alcohol exacerbates the effects of his brain damage in almost direct correlation; the more that alcohol is consumed, the more the brain damage is exacerbated. (RT 2817-2818.) The defense expert testified that one with such damage who consumed one or two ounces of 80 proof alcohol in a one to two hour period would be much less able to suppress or control his midbrain impulses. (RT 2815.) That disability would worsen as the alcohol consumption increased. (RT 2818-2819.)

Indicative of the difficulty the jury had in resolving which of the sentences to impose is the length of their deliberations. The comparison of the length of the jury deliberations at the conclusion of the penalty phase with other capital cases compels the conclusion that this was a very close case. Jury deliberations began at 2:18 p.m. on May 3, 1999 and ended two days later at 1:15 p.m., when the jury

fixed the penalty at death. (CT 10878-10880, 10888-10891, 10894-10895, 10937-10938, 10942-10943.) In *People v. Murtishaw* (1981) 29 Cal.3d 733, 775 [175 Cal.Rptr. 738], two days of deliberation at the penalty phase was considered to be indicative of a close case. In *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163, three days of penalty deliberations were descried as "lengthy" and indicative of a close case in which instructional error was not harmless.[54]

The attempt to gauge prejudice at the penalty phase is always a hazardous task even in the presence of compelling aggravating factors. (*People v. Easley* (1983) 34 Cal.3d 858, 885 [196 Cal.Rptr. 309].) In a close case, any substantial

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[54] In *People v. Sandoval* (1992) 4 Cal.4th 155, 194 [14 Cal.Rptr.2d 342], affd. (1994) 511 U.S. 1, the jury reported a deadlock alter four days; the next day they returned LWOP verdicts on three counts and a death verdict on one count. The Court concluded that prosecutor's erroneous closing argument was not prejudicial. In the circumstances of *Sandoval*, which are very different from the present case, the lengthy deliberations and split verdicts, while indicating that the case was close, also demonstrated that the jury had not been stampeded by the improper closing argument.

Most of the reported cases on this point concern guilt phase deliberations of significantly shorter length than the penalty deliberations at issue here. (See *People v. Taylor* (1990) 52 Cal.3d 719, 732 [276 Cal.Rptr. 391] [10 hours not unduly lengthy in a case with felony special circumstances]; *In re Martin* (1987) 44 Cal.3d 1, 51 [241 Cal.Rptr. 263] [five days' deliberations "practically compels the conclusion" that the case was "very close"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [184 Cal.Rptr. 165] (plur. opn.) [deliberations of 12 hours "a graphic demonstration of the closeness of this case"]; *People v. Collins* (1968) 68 Cal.2d 319, 332 [66 Cal.Rptr. 497] [eight hours suggests a close case (not a special *circumstances* case)]; *People v. Adcox* (1988) 47 Cal.3d 207, 242 [253 Cal.Rptr. 55] [deliberations of virtually identical length to those in *Collins* suggest the case was not close (special circumstances case)].)

A penalty jury need not address numerous individual, subordinate, findings like a guilt phase jury considering multiple counts, enhancements, and special circumstances. Therefore, if a distinction is to be made, the threshold at which the length of deliberations is indicative of a close case should be substantially earlier at penalty phase than at a guilt phase with special circumstances.

error is likely to require reversal, and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62 [123 P.2d 478]; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [15 Cal.Rptr.2d 112].)

In *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 620-622, the Ninth Circuit affirmed the grant of habeas relief to a defendant who had been sentenced to death for 13 murders. The prosecution argued that penalty phase error was harmless in the face of such a strong case in aggravation, even though the error prevented the jury from learning about significant facts in mitigation. The federal district court and the Ninth Circuit disagreed. They concluded that there was a reasonable probability that the mitigating evidence might have prevented a unanimous verdict for death. *Mak* demonstrates that even overwhelming evidence in aggravation is an inappropriate basis on which to conclude penalty phase error was harmless, even in cases with many victims.

In these circumstances *Chapman v. California, supra,* 386 U.S. 18 can not be satisfied. (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [28 Cal.Rptr.2d 335].) As previously noted, the prosecution introduced five incidents involving acts of "force or violence." Four were committed when appellant was a juvenile, one when he was only 14, and two when he was 15. The only incident committed when he was adult, and just by a month, the jury should never have heard. The State cannot prove beyond a reasonable doubt that that error did not contribute to the jury's sentencing decision. Thus, appellant's sentence of death must be reversed.

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

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 [77 L.Ed.2d 1134, 103 S.Ct. 3418] [plurality opinion, alterations in original], quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 [49 L.Ed.2d 913, 96 S.Ct. 2960] [opinion of Stewart, Powell, and Stevens, J.].)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 [79 L.Ed.2d 29, 104 S.Ct. 871] the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Pulley v. Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself

noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley, v. Harris*, *supra,* 465 U.S. at p. 52, fn. 14.)

That greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants, and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia* (1972) 408 U.S. 238 [33 L.Ed 346, 92 S.Ct. 2726]. (See Argument *XVII,* Part *A*, below.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Argument *XIII,* below), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Argument *XV,* below). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304 [153 L.Ed.2d 335, 122 S.Ct. 2242, 2248-2249]; *Thompson v. Oklahoma, supra,* 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [73 L.Ed.2d 1140, 102 S.Ct. 3368]; *Coker v. Georgia* (1977) 433 U.S. 584, 596 [53 L.Ed.2d 982, 97 S.Ct. 2861].)

The vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[55] By statute Georgia requires that the Georgia Supreme Court determine whether "the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards "further against a situation comparable to that presented in *Furman*..." (*Gregg v. Georgia, supra,* 428 U.S. 153, 198.) Toward the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida, supra,* 428 U.S. 242, 259].)

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173 [3 Cal.Rptr.2d 426]; *People v. Farnam* (2002) 28 Cal.4th 107, 193 [121 Cal.Rptr.2d 106].) The statute also does not

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[55] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947 [269 Cal.Rptr. 269].)

Given the tremendous reach of the special circumstances that make a defendant eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

The present case exemplifies why intercase review should be mandatory in a capital case. This was a single victim felony murder committed while appellant was 18 years old which in other counties in this state would have never been charged as a capital offense. The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the United States Supreme Court in *Pulley* had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris, supra,* 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in the arguments that follow. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 [White, J., conc.].) The absence of inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings which are conducted in a constitutionally arbitrary, unreviewable manner, or which are skewed in favor of execution.

XIII. CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO REQUIRE THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. As discussed herein, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Argument *XII*, above.) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose

death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (§ 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [220 Cal.Rptr. 637], rev'd. on other grounds, *California v. Brown*, *supra,* 479 U.S. 538; see also *People v. Cudjo, supra,* 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[56]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ...." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [69 Cal.Rptr.2d 784]; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842

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[56] There are two exceptions to this lack of a burden of proof. The special circumstances (§ 190.2) and the aggravating factor of unadjudicated violent criminal activity (§ 190.3(b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3(b), below.

[42 Cal.Rptr.2d 543]; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774 [239 Cal.Rptr. 82].) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428], and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531].

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on the one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639 [111 L.Ed.2d 511, 110 S.Ct. 3047], the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona, supra*, 536 U.S. at p. 609.)[57] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating

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[57] Justice Scalia thus distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[58] Only California and four other states

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[58] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no

(Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [14 Cal.Rptr.2d 133] [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[59] As set forth in California's "principal sentencing instruction"

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mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

[59] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on

(*People v. Farnam, supra,* 28 Cal.4th at p. 177), which was read to appellant's jury, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (RT 3065-3066, CT 10995, CALJIC 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[60]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589 [47 Cal.Rptr.2d 165] this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Penal Code 190.2(a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 [133 Cal.Rptr.2d 18] ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase

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the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

[60] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen, supra,* 42 Cal.3d at pp. 1276-1277; *People v. Brown, supra,* 40 Cal.3d at p. 541.)

proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43 [132 Cal.Rptr.2d 271].)

This holding in the face of the United States Supreme Court's recent decisions is not tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2551, (dis. opn. of Breyer, J.), original italics.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of

death (Cal. Pen. Code § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.)].) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494)) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered.[61] This Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly rejected *Ring*'s applicability by comparing the capital sentencing process in California to "a

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

sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. In both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *Prieto*, this Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines "whether a defendant eligible for the death penalty should in fact receive that sentence." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263 (italics is added).)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred—otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978 [281 Cal.Rptr. 273].)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[62]

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the

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

State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S. Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[63]

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[63] In *People v. Griffin, supra,* 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437 [149 L.Ed.2d 674, 121 S.Ct. 1678], for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights? (*Leatherman*, *supra*, 532 U.S. at p. 429.)

This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* follow. (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to recast the high court's recognition of the irrevocable nature of the death penalty:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 606 (quoting with approval *Apprendi v. New Jersey*, *supra,* 530 U.S. at 539 (dis. opn. of O'Connor, J.)).)

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factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

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

> Capital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment .... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Require That The Jurors Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. FACTUAL DETERMINATIONS

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521 [2 L.Ed.2d 1460, 78 S.Ct. 1332].)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship, supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." (*Gardner v. Florida, supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14 [58 L.Ed.2d 207, 99 S.Ct. 235].) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. IMPOSITION OF LIFE OR DEATH

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423 [60 L.Ed.2d 323, 99 S.Ct. 1804].) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship, supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors ... the private interests affected by the proceeding; the risk of error created by the State's chosen

procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [71 L.Ed.2d 599, 102 S.Ct. 1388]; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335 [47 L.Ed.2d 18, 96 S.Ct. 893].)

Looking at the "private interests affected by the proceedings," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall, supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship, supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley, supra,* 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [[121 Cal.Rptr. 488]] [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [[139 Cal.Rptr. 594] [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [[152 Cal.Rptr. 425] [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," in *Santosky v. Kramer, supra*, 455 U.S. at p. 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such

> magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755 (quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427).)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [49 L.Ed.2d 944, 96 S.Ct. 2978].)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) In *Monge v. California*, *supra*, 524 U.S. at p. 732 the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[*I*]n *a capital sentencing proceeding*, as in a criminal trial, 'the

interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [101 S.Ct. 1852, 68 L.Ed.2d 270]] [emphasis added].) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See e.g., *People v. Griffin, supra,* 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite

> common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment. (*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363].)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236 [23 Cal.Rptr.2d 403]), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643 [276 Cal.Rptr. 874].) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose

different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida*, *supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [100 L.Ed.2d 384, 108 S.Ct. 1860] [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see § 190.3), and may impose

such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[64]

A fact could not be established—i.e., a fact finder could not make a finding—without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Cal. Evid. Code § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant.

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64 As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374) □ that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.) Without an instruction on the

burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate to the case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in the penalty phase would continue to believe that. This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is – or, as the case may be, is not – is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and

unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona, supra,* 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147 [2 Cal.Rptr.2d 335]; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 [276 Cal.Rptr. 391] ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, and slanted the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234 [55 L.Ed.2d 234, 98 S.Ct. 1029]; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[65]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 [104 L.Ed.2d 728, 109 S.Ct. 2055]– should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same

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[65] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272 [15 L.Ed. 372]; *Griffin v. United States* (1991) 502 U.S. 46, 51 [116 L.Ed.2d 371, 112 S.Ct. 466].)

as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[66]

Applying the *Ring* reasoning here, jury unanimity is required 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 [108 L.Ed.2d 369, 110 S.Ct. 1227] (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [65 L.Ed.2d 159, 100 S.Ct. 2214].) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732; *accord Johnson v. Mississippi, supra,* 486 U.S. at p. 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also

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66 Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto, supra*, 30 Cal.4th at 265.) Appellant raises this issue both to ask this Court to reconsider its previous holding and to preserve his rights to further review. See *Smith v. Murray* (1986) 477 U.S. 527 [91 L.Ed.2d 434, 106 S.Ct. 2661] [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

People v. Wheeler (1978) 22 Cal. 3d 258, 265 [148 Cal.Rptr. 890] [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[67] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [115 L.Ed.2d 536, 111 S.Ct. 2680]) – 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. Ylst, supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live

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[67] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k). In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., ɔ 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).

or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764 [47 Cal.Rptr.2d 165]), 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.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816 [119 S.Ct. 1707, 143 L.Ed.2d 985], the United States Supreme Court interpreted 21 U.S.C. section 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire. (*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk that (a) the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do; and (b) the jurors, not being forced to do so, will fail

to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

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

Compounding the error from the failure of the jury instruction to inform the jurors about the burden of proof was the trial court's rejection of the defense's requested instructions. (See Argument *XVI*, *infra*.) This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 98 S.Ct. 2954]; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v. California, supra,* 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of

misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is permitted to consider it." (*Lashley v. Armountrout* (8th Cir. 1992) 957 F.2d 1495, 1501, *rev'd. on other grounds* (1993) 501 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

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 convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable

likelihood that the jury erroneously believed that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the equal protection and due process clauses of the Fourteenth Amendment.

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, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams, supra,* 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 [122 L.Ed.2d 620, 113 S.Ct. 1222].)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const.

Amend. XIV; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. VIII & XIV; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. XIV; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 13 Cal.4th 92 [51 Cal.Rptr.2d 770], 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 subsections of this argument demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction was constitutionally required.

G Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and unanimity requirements regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

XIV. THE TRIAL COURT'S INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

A. Introduction

At appellant's penalty trial, the trial court committed prejudicial error both in the jury instructions it gave (RT 3046-3066, CT 10946-10997) and in the defense requested jury instructions it refused or failed to give (CT 10898-10926.) The instructions misinformed the jury about its central task in deciding appellant's fate. They misled the jury about their sentencing discretion and the applicability

and inter-relation of the sentencing factors. In addition, the instructions contained several procedural and substantive defects. These errors and deficiencies taken individually or in combination, rendered appellant's death sentence unconstitutional.

Most penalty phase errors implicate a defendant's federal constitutional rights. (1) The Eighth Amendment and the due process clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585 [8th Amendment]; *Zant v. Stephens, supra,* 462 U.S. 862, 885 [14th Amendment due process].) (2) The due process clause of the Fourteenth Amendment also protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 344.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of life without due process. (3) Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger, supra,* 498 U.S. 308, 321.) (4) Separate from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors that taint the fairness of the trial and present an "unacceptable risk ... of impermissible factors coming into play." (*Estelle v. Williams, supra,* 425 U.S. 501, 505; accord *Holbrook v. Flynn, supra,* 475 U.S. 560; *Norris v. Risley, supra,* 918 F.2d 828.)

This Court has rejected some of the claims appellant asserts below. However, the federal courts have not explicitly resolved those arguments.

Appellant asserts these claims to give this Court an opportunity to reconsider its prior rulings in light of the facts of appellant's case and to permit him to preserve the claims for federal review. Given the extensive briefing which has been submitted to this Court on some of these issues in other cases and the Court's rulings, appellant will not offer detailed argument on them at this time. However, should the Court desire further briefing or conclude that appellant's arguments are insufficient to preserve these claims for federal review, appellant requests the opportunity to submit further written argument in a supplemental brief.

B. CALJIC 8.88 As Given Defining the Scope of the Jury's Sentencing Discretion and the Nature of Its Deliberative Process Violated Appellant's Constitutional Rights[68]

The jury was instructed on its sentencing discretion pursuant to CALJIC No. 8.88 (1989 Revision).[69] (RT 3065-3066, CT 10995.)

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[68] This Court has rejected similar claims to those asserted here. (*People v. Ochoa* (2003) 26 Cal.4th 398, 452 [110 Cal.Rptr.2d 324]; *People v. Johnson* (1993) 6 Cal.4th 1, 52 [23 Cal.Rptr.2d 593].)

[69] The instruction provided:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of

1. THE INSTRUCTION ON THE JURY'S SENTENCING DISCRETION WAS IMPERMISSIBLY VAGUE AND MISLEADING

CALJIC 8.88 (1989 Revision), which offered the core guidance for the penalty deliberations, was defective in several ways. First, it failed to inform the jurors that unless they found that the factors in aggravation outweighed the factors in mitigation, they could not impose a sentence of death. (*People v. Easley, supra,* 34 Cal.3d 858, 883-884.) Thus, appellant's jury was not adequately informed of "what they must find to impose the death penalty." (*Maynard v. Cartwright, supra,* 486 U.S. 356, 361-362.) Second, the penalty charge failed to give any instruction at all on returning a life sentence. (Pen. Code § 190.3.) This error arbitrarily deprived appellant of a state-created liberty interest in violation of the due process clause of the Fourteenth Amendment (*Hicks v. Oklahoma, supra,* 447 U.S. 343) and his right to a reliable penalty determination under the Eighth Amendment (*Maynard v. Cartwright, supra*). Reversal of his death sentence is required.

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an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom. (RT 3065-3066, CT 10995.)

As the following parts demonstrate, CALJIC 8.88 was defective in numerous other ways.

2. 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

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[70] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*See Boyde v. California, supra,* 494 U.S. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88, which directly addresses only the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

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[70] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction misinformed the jury regarding its role, and has disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (*See Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281, original italics.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan, supra,* 53 Cal.3d 955, 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529 [275 P.2d 485]; *People v. Costello* (1943) 21 Cal.2d 760 [115 P.2d 164]; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014 [170 Cal.Rptr. 392]; *People v. Mata* (1955) 133 Cal.App.2d 18, 21 [283 P.2d 372]; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [131 Cal.Rptr. 330] [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [39 L.Ed. 709, 15 S.Ct. 610].)[71]

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[71] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 [37 L.Ed.2d 82, 93 S.Ct. 2208], the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's

People v. Moore, supra, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. ... There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. (*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan, supra,* the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

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ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22 [18 L.Ed.2d 1019, 87 S.Ct. 1920]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [9 L.Ed.2d 799, 83 S.Ct. 792]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377 [285 Cal.Rptr. 231]; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 YALE L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there Amust be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra,* 412 U.S. at p. 474.) *Wardius* involved reciprocal discovery rights, and the same principle should apply to jury instructions.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465 [280 Cal.Rptr. 609]; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401 [83 L.Ed.2d 821, 105 S.Ct. 830]; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction and not one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (*See* U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217 [72 L.Ed.2d 786, 102 S.Ct. 2382].)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [34 L.Ed.2d 335, 93 S.Ct. 354] [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well, and reversal of his death sentence is required.

3. THE "SO SUBSTANTIAL" STANDARD CREATED A PRESUMPTION IN FAVOR OF DEATH

The error detailed above was compounded by the additional error of using the "so substantial" standard of CALJIC 8.88 that provides,

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (RT 3066, CT 10995.)

The term is purely subjective, and so unconstitutionally vague that it invited each juror to engage in the standardless, arbitrary and unreliable decision-making condemned under the Eighth and Fourteenth Amendments in *Furman v. Georgia* (1972) 408 U.S. 238, 288-289 [33 L. Ed. 2d 346, 92 S.Ct. 2726]; *Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362; s*ee, Stringer v. Black* (1992) 503 U.S. 222, 230-231 [117 L.Ed.2d 367, 378, 112 S.Ct. 1130].)

Irrespective of the meaning jurors might have given to "so substantial," the standard does not convey the threshold requirement that aggravation outweigh mitigation. Additionally, by juxtaposing the substantiality of the aggravating evidence against mitigating circumstances, the instruction impermissibly skewed the jury's penalty decision in favor of death; that is, it effectively told the jury that the aggravating factors were *substantial.* As recognized by this Court, a defendant at the penalty phase has already been convicted of first degree murder with at least one special circumstance. (*People v. Brown, supra,* 40 Cal.3d 512, 541, fn. 13.) Both the circumstances of the murder and the existence of the special circumstance will count in aggravation in the weighing process. Under these circumstances, the "aggravating evidence" will always remain substantial. From the starting point, then, it "... would be rare indeed to find mitigating evidence which could redeem such an offender or excuse his conduct in the abstract." (*Ibid.*)

Penalty phase mitigating evidence is therefore unlikely to make the aggravating evidence appear *unsubstantial,* particularly in light of the instruction's implied skew toward death discussed above. This is particularly true when, as here, by some juror or jurors' interpretation, much mitigating evidence may be unrelated to the circumstances of the crime and to the existence of the special circumstance, according to section 190.3, subdivision (a). Consequently, merely being found death eligible gives rise to an imbalance in which pre-existing aggravating factors will necessarily, from the outset, appear *substantial* in comparison to all but the most extreme showing of mitigating evidence. (*But see, People v. McPeters* (1992) 2 Cal.4th 1148, 1193-1194 [9 Cal.Rptr.2d 834].)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance that asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*See Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the

imposition of the death penalty compels a different result. (*Arnold*, *supra*, 224 S.E.2d at p. 392, fn. omitted.)[72]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14 [3 Cal.Rptr.2d 81].) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the correctness of this Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of

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[72] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*See Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In summary, CALJIC 8.88 unconstitutionally misled the jury to conclude that appellant bore the burden of proof that death was not appropriate and that aggravation was insubstantial in comparison to mitigation. This instructional defect created an impermissible presumption in favor of death and the imposition of a mandatory death sentence. There is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra,* 503 U.S. at p. 222.)

Therefore, the resulting death judgment violated appellant's rights to due process, a fair trial, an impartial jury, and an individualized and reliable penalty determination, in violation of the Fifth, Six, Eighth and Fourteenth Amendments and the California Constitution's analogous provisions (Art. 1, §§ 1, 7, 15, 16, 17) and must be reversed. (*Adamson v. Ricketts* (9th Cir. 1988) (en banc) 865 F.2d 1011, 1041-1044 [Eighth Amendment]; *Jackson v. Dugger* (11th Cir. 1988) 837 F.2d 1469, 1473-1474 [same].)

4. THE INSTRUCTIONS FAILED TO INFORM THE JURORS THAT THE CENTRAL DETERMINATION IS WHETHER THE DEATH PENALTY IS THE APPROPRIATE PUNISHMENT, NOT SIMPLY AN AUTHORIZED PENALTY, FOR APPELLANT

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037 [254 Cal.Rptr. 586].)

Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948 [39 Cal.Rptr.2d 547]; *People v. Milner* (1988) 45 Cal.3d 227, 256-257 [246 Cal.Rptr. 713]; see also, *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death was "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permissible. That is far different from the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is

the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 [108 L.Ed.2d 255, 110 S.Ct. 1078]), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the previous phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464 [24 Cal.Rptr.2d 808].) Using the term "warranted" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warranted" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (RT 18444.) That sentence did not tell the jurors they could return a death verdict only if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty, as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII and

XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and must be reversed.

5. THE TERMS "AGGRAVATING" AND "MITIGATING" CIRCUMSTANCES ARE VAGUE AND AMBIGUOUS

The terms "aggravating" and "mitigating" are not commonly understood terms, and they are not adequately defined for jurors. This presents a serious constitutional issue because the terms "aggravating" and "mitigating" are an integral part of the instructions given jurors to make a penalty determination. The penalty determination is unreliable if jurors may not understand what the terms are supposed to mean, or if there is a reasonable possibility the terms will confuse jurors or fail to dispel fundamental misconceptions they bring to their jury services.

A substantial body of literature establishes that jurors are very likely not to know what those terms mean or how to apply them, and are confused by those terms. (*See, e.g.*, Haney, Sontag and Costanzo, *Deciding To Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 J. Social Issues 149, 168-168; Haney and Lynch, "*Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*" (1994) 18 L. Hum. Beh. 411, *passim*.)

The trial court's attempts to define "aggravating factor" and "mitigating circumstance" were even more confusing than not attempting definitions. In particular, the trial court defined "mitigating circumstance" as "any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (RT 3065-3066, CT 10995.) The court did not, however, define an "extenuating circumstance in determining the appropriateness of the death penalty", and did not tell the jurors what "may be considered" as such, leaving them to guess at that—assuming they could decipher

all the terms. These are lawyers' terms, not lay terms, and they are unclear on their face for purposes of a lay jury determining matters of life and death.

As a matter of fundamental law, jury instructions should be clear and not create the possibility of confusion or fundamental misconception, since jury instructions are the only guidance jurors will ever get on the law. California law requires jurors to make their determinations based on aggravating and mitigating circumstances. (§ 190.3, last paragraph.[73]) Because it is highly probable that the instructions given in appellant's case led to juror confusion about the terms "aggravating" and "mitigating" circumstances, and because those terms are an integral part of California's capital sentencing scheme, this sentencing scheme, on its face and as applied to appellant is unreliable and ambiguous, violates appellant's rights to due process, a fair trial, an impartial jury, and an individualized and reliable penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and violates the California Constitution's analogous provisions (Art. I, §§ 1, 7, 15, 16, 17.) Reversal of his death sentence is thus required.

6. CONCLUSION

As set forth above, the trial court's main sentencing instruction, CALJIC 8.88, failed to comply with the requirements of the due process clause of the

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73 The applicable section of 190.3 provides:

> After having heard and received all of the evidence and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. (§ 190.3.)

Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

C. These Multiple Errors Individually and Collectively Influenced the Outcome

To determine whether a jury may have been misled by improper or inadequate instructions to a defendant's prejudice, this Court examines the entire record. (*People v. Cooper* (1991) 53 Cal.3d 771, 845 [281 Cal.Rptr. 90].) In *Boyde v. California, supra,* 494 U.S. 370, 380 the Court held that where a jury instruction is ambiguous and therefore subject to an erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. The Court added,

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. [Fn. omitted.] Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting. (*Id.* at pp. 380-381.)

However, where the disputed instruction is erroneous on its face, the court is not free to assume that the jurors inferred the missing element from their general experience or from other instructions, for the law presumes that jurors carefully

follow the instructions given to them. (*Wade v. Calderon* (9th Cir. 1994) 29 F3d 1312, 1320-1321, cert den. 513 U.S. 1120.)

This latter context is more analogous to the instant case. The very import of the instructions is premised on the fact that it could not be assumed that a juror would have inferred their content without the court's guidance. Thus, without these instructions the jury had inadequate direction, or no direction at all.

Appellant incorporates here Argument *XI*, Part *C*, above, commencing with paragraph 4 (page 182), which summarizes the detailed and compelling mitigating evidence proffered by the defense through lay and expert witnesses. However, because the court failed to provide adequate instructions on how this evidence, if found true, could be used in mitigation, or its proper weight and use as mitigation, the jurors had no framework for considering this compelling evidence. This failure biased appellant's penalty phase in favor of a death sentence, and rendered the result arbitrary and unreliable. These errors individually and collectively resulted in a fundamentally unfair and unreliable death sentence.

In a close case any error of a substantial nature requires a reversal, and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Zemavasky, supra,* 20 Cal.2d 56, 62; *People v. Von Villas, supra,* 11 Cal.App.4th 175, 249.) In these circumstances neither *People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243] nor *Chapman v. California, supra,* 686 U.S. 18 standard for harmless error can be satisfied. (*People v. Filson, supra,* 22 Cal.App.4th 1841, 1852.) Appellant's sentence of death must be reversed.

Even if there is some doubt or uncertainty as to the prejudice suffered by appellant due to these errors, such uncertainty or doubt must be resolved in his favor. (See *Eddings v. Oklahoma, supra,* 455 U.S. at p. 119 [O'Connor, J., concurring].) The precise point which prompts the death penalty in the mind of any one juror is not only unknowable to the reviewing court, but may even be

unknown by the juror. (*People v. Hines* (1964) 61 Cal.2d 164, 169 [37 Cal.Rptr. 622].) "Thus *any* substantial error in the penalty [phase] of the trial ... must be deemed to have been prejudicial." (*Id.* at pp. 169-170.)

XV. THE TRIAL COURT'S INSTRUCTIONS ABOUT MITIGATING AND AGGRAVATING FACTORS AND THEIR APPLICATION RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

A. Introduction

Appellant incorporates here the *Introduction* from Argument *XIV*, Part *A*, above.

B. The Death Penalty Statute Is Invalid As Applied Because it Allows Arbitrary and Capricious Imposition of Death in Violation of the United States Constitution.

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[74] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to

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[74] *People v. Dyer* (1988) 45 Cal.3d 26, 78 [246 Cal.Rptr. 209]; *People v. Adcox* (1988) 47 Cal.3d 207, 270 [253 Cal.Rptr. 55]; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

conceal evidence,[75] or had a "hatred of religion,"[76] or threatened witnesses after his arrest,[77] or disposed of the victim's body in a manner that precluded its recovery.[78]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [129 L.Ed.2d 750, 114 S.Ct. 2630]), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

> a. Because the defendant struck many blows and inflicted multiple wounds[79] or because the defendant killed with a single execution-style wound;[80]

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[75] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10 [253 Cal.Rptr. 863], *cert. den.*, 494 U.S. 1038 (1990).

[76] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582 [286 Cal.Rptr. 628], *cert. den.*, 505 U.S. 1224 (1992).

[77] *People v. Hardy* (1992) 2 Cal.4th 86, 204 [5 Cal.Rptr.2d 796], *cert. den.*, 506 U.S. 987 (1992).

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

[79] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[80] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[81] or because the defendant killed the victim without any motive at all;[82]

c. Because the defendant killed the victim in cold blood[83] or because the defendant killed the victim during a savage frenzy;[84]

d. Because the defendant engaged in a cover-up to conceal his crime[85] or because the defendant did not engage in a cover-up and so must have been proud of it;[86]

e. Because the defendant made the victim endure the terror of anticipating a violent death[87] or because the defendant killed instantly without any warning;[88]

f. Because the victim had children[89] or because the victim had not yet had a chance to have children;[90]

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[81] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[82] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[83] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[84] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[85] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[86] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[87] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[88] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[89] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

g. Because the victim struggled prior to death[91] or because the victim did not struggle;[92] or

h. Because the defendant had a prior relationship with the victim[93] or because the victim was a complete stranger to the defendant.[94]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[95]

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[90] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[91] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[92] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[93] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[94] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

[95] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire.[96]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[97]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day.[98]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[99]

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efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[96] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[97] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[98] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[99] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[100]

In practice, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra,* 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia, supra,* 446 U.S. 420.)

C. The Instruction On Section 190.3, Subdivision (b) And Application Of That Sentencing Factor Rendered Appellant's Death Sentence Unconstitutional

1. INTRODUCTION

Factor (b), which tracks Penal Code Section 190.3(b), permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." Pursuant to that factor,

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100 The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See Part *C*, below.)

the prosecution in this case presented evidence of four prior acts of alleged violence. (See Statement of Facts, Part *B, 1, a.*)

The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if appellant should be executed. (RT 3057-3058; CT 10973.) The jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that appellant did in fact commit the criminal acts alleged. (RT 3057-3058; CT 10973.) Although the jurors were told that all 12 must agree on the final sentence (RT 3065-3066, CT 10995-10996), they were not told that during the weighing process, before they could rely on the alleged unadjudicated crimes as aggravating evidence, they had to unanimously agree that, in fact, appellant committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation. (RT 3058; CT 10973.)

Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on appellant's guilt, the degree of the homicide, if any, and the special circumstance allegation.

As set forth below, the unadjudicated crimes evidence should not have been admitted. But even assuming the evidence was constitutionally permissible, the aspect of section 190.3, subdivision (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

2. THE USE OF UNADJUDICATED CRIMINAL ACTIVITY AS AGGRAVATION RENDERS APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The admission of evidence of previously unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth Amendment. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated appellant's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst, supra,* 897 F.2d at p. 421.) And because the State applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated appellant's state and federal rights to due process of law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; U.S. Const., Amend. VI; Cal. Const., art. I, §§ 7 and 15.)

3. THE FAILURE TO REQUIRE A UNANIMOUS JURY FINDING ON THE UNADJUDICATED ACTS OF VIOLENCE RENDERS APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

Even assuming, arguendo, that the evidence of the prior unadjudicated offenses was constitutionally admissible at the penalty phase, the failure of the instructions pursuant to section 190.3, subdivision (b) to require juror unanimity on the allegations that appellant committed prior acts of violence renders his death

sentence unconstitutional.[101] The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [32 L.Ed.2d 184, 92 S.Ct. 1628] [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [32 L.Ed.2d 152, 92 S.Ct. 1620] [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [26 L.Ed.2d 446, 90 S.Ct. 1893] [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia, supra,* 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana, supra,* 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130 [60 L.Ed.2d 96, 99 S.Ct. 1623].) Thus, when the Sixth Amendment applies to a factual finding at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[102]

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[101] The trial court refused the defense request for just such an instruction. (CT 10917.)

[102] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama, supra,* 447 U.S. 625; *Gardner v. Florida, supra,* 430 U.S. at p. 357.) It is arguable, therefore, that where the State seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona, supra,* 497 U.S. at p. 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178 [113 Cal.Rptr.2d 827]; *People v. Lines* (1997) 15 Cal.4th 997, 1077 [64 Cal.Rptr.2d 594]; *People v. Ghent, supra,* 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent, supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona, supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exists"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to determine if all 12 jurors would have agreed that appellant committed

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instructions in this case did not even require a super-majority of jurors to agree that appellant committed an alleged act or acts of violence, there is no need to reach this question here.

the alleged prior offenses. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [182 Cal.Rptr. 536] [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Decliner* (1985) 163 Cal.App.3d 284, 302 [209 Cal.Rptr. 503] [same].)[103]

4. ABSENT A REQUIREMENT OF JURY UNANIMITY ON THE UNADJUDICATED ACTS OF VIOLENCE, THE INSTRUCTIONS ON SECTION 190.3, SUBDIVISION (B) ALLOWED JURORS TO IMPOSE THE DEATH PENALTY ON APPELLANT BASED ON UNRELIABLE FACTUAL FINDINGS THAT WERE NEVER DELIBERATED, DEBATED, OR DISCUSSED

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida, supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio, supra,* 438 U.S. at p. 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct. 2150]; *Lockett v. Ohio, supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida, supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence

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[103] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California, supra,* 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (§ 190.3, subd. (b).) Before the factfinder may consider such evidence, it must find that the State has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. (CALJIC No. 8.87.) This instruction was given here. (RT 3057-3058, CT 10973.)

Thus, as noted above, members of appellant's jury were permitted individually to rely on this – and any other – aggravating factor any one of them deemed proper as long as all the jurors agreed on the ultimate punishment. Because this procedure totally eliminated the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364, a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous agreement reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further

consideration is not required ... even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas, J.).)

The Supreme Court subsequently embraced Justice Douglas' observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 [41 L.Ed. 528, 17 S.Ct. 154] ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of Douglas, J.)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a

procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi, supra,* 486 U.S. at p. 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

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

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors utilized here introduced by a prefatory "whether or not" – factors (d) and (h) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701]; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15 [245 Cal.Rptr. 185]; *People v. Melton* (1988) 44 Cal.3d 713, 769-770 [244 Cal.Rptr. 867]; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289 [221 Cal.Rptr. 794].) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Zant v. Stephens, supra,* 462 U.S. 862, 879; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585.)

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

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d) or (h) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d) or (h) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California, supra,* 512 U.S. 967, 973 quoting *Gregg v. Georgia, supra,* 428 U.S. 153, 189 [joint opinion of Stewart, Powell, and Stevens, J.]) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.)

E. The Use of a Restrictive Adjective in the List of Potential Mitigating Factors Impermissibly Acted as a Barrier to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of the adjective "extreme" – as used in factor (d)[104] – acted as a barrier to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

F. California Law Violates the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra,* 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195 [49 L.Ed.2d 859, 96 S.Ct. 2909].) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [9 L.Ed.2d 770, 83 S.Ct. 745].) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859 [9 Cal.Rptr.2d 24].) Ironically, such findings are otherwise considered

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[104] Section 190.3, factor (d) provides: "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance."

by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258 [113 Cal.Rptr. 361].) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefore." (*Id.* at p. 267.)[105] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [229 Cal.Rptr. 131] [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

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

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland, supra,* 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[106]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections

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[106] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

G. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants which Are Afforded to Non-capital Defendants

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

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17

Cal.3d 236, 251 [131 Cal.Rptr. 55] (emphasis added).) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights .... It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles* [(1958) 356 U.S. 86, 102 [2 L.Ed.2d 630, 78 S.Ct. 590]." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668 [367 Mass 440].)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839].) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [86 L.Ed. 1655, 62 S.Ct. 1110].)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto, supra*,[107] as in *Snow*,[108] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally

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

[108] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's

discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.420, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See Argument *XIII,* above.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See Part *F*, above.) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital

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traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, 30 Cal.4th at p. 126, fn. 32.)

defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288 [232 Cal.Rptr. 849].) However, there is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures.

In *People v. Allen, supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen, supra*, 42 Cal. 3d at 1286.) Though this may be true, the larger point that is missed by this observation is that the basic requirement for any death penalty scheme is to ensure that capital punishment is not imposed in a random and capricious fashion. It seems somewhat amiss that there is a settled way to assure that this type of randomness does not occur in noncapital cases, but no way to ensure that it does not occur in capital cases.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305 [95 L.Ed.2d 262, 107 S.Ct. 1756].) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia, supra*, 433 U.S. 584) or offenders (*Enmund v. Florida, supra,* 458 U.S. 782; *Ford v. Wainwright*

(1986) 477 U.S. 399 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *Atkins v. Virginia*, *supra*, 536 U.S. 304.) Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit a sentencer's consideration of any factor that could cause it to reject the death penalty, it can and must provide rational criteria that narrow the decision-maker's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez, supra,* 42 Cal.3d 730, 792-794.) Thus, the absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the

United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.]; see also *Reid v. Covert* (1957) 354 U.S. 1, 77 [1 L.Ed.2d 1148,77 S.Ct. 1222] [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [4 LEd.2d 268, 80 S.Ct. 297] [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.]; *Gardner v. Florida, supra,* 430 U.S. 349, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama, supra,* 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28 [90 L.Ed.2d 27, 106 S.Ct. 1683] [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 103 S.Ct. 3446]; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[109] The

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109 The *Monge* court developed this point at some length:
The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also

qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98 [148 L.Ed.2d 388, 121 S.Ct. 525, 530].) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding"). (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at p. 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra*.)[110] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra,* 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

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[110] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. ... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at pp. 589, 609.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra.*) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

H. Conclusion

For all the reasons set forth above, appellant's death sentence must be reversed.

XVI. THE TRIAL COURT'S DENIAL OF DEFENSE REQUESTED APPLICABLE AND ESSENTIAL JURY INSTRUCTIONS RENDERED APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

A. Introduction

Appellant incorporates here the *Introduction* from Argument *XIV*, Part *A,* above.

B. The Trial Court Improperly Denied Essential Defense Requested Instructions

The trial court rejected 17 of 21 jury instructions requested by the defense for the penalty phase of the trial. (CT 10898-10926.) The court reasoned that the content of the defense's requested instructions was "adequately covered in the pattern CALJIC" instructions. (RT 2988-2990.) Defense counsel responded that the pattern instructions of CALJIC were meant only to provide "a helpful framework" and did not preclude more specific instructions, citing this Court's decisions in *People v. Dyer* (1988) 45 Cal.3d 26, 78 [246 Cal.Rptr. 209] and *People v. Adcox* (1988) 47 Cal.3d 207, 269 [253 Cal.Rptr. 55]. (RT 2988.) The trial court disagreed and rejected a host of defense requested instructions (CT 10898-10926), many of which addressed the inadequacies of CALJIC 8.88, as discussed in Part *A,* above.

The trial court must give "no less consideration" to instructions requested by counsel than to those contained in CALJIC. (Calif. Rules of Court, Appendix, Div. I, § 5.) Pattern instructions are not themselves the law, but are merely attempts at a statement thereof. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217 [58 Cal.Rptr.2d 385].) "[T]he so-called CALJIC stereotyped instructions are no more sacrosanct than any others. Unless a particular instruction fits the evidentiary situation and presents a fair and impartial picture of the issues, it should not be given." (*People v. Mata, supra,* 133 Cal.App.2d 18, 21.) Thus, the rote recitation of general form instructions will not always suffice to fulfill the court's instructional obligations. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250, 256-257 [240 Cal.Rptr. 516]; accord Calif. Rules of Court, Appendix, Div. I, § 5 [no preference to CALJIC instructions over those submitted by the attorneys for the respective parties]; *United States v. Lofton* (10th Cir 1985) 776 F.2d 918, 922; *Wright v. United States* (D.C. Cir. 1957) 250 F.2d 4, 11.) "Where ... the need for more appears, it is the duty of the judge to fill in the sketch, as may be appropriate on the basis of the evidence, to provide the jury with light and guidance in the performance of its difficult task." (*Wright v. United States, supra,* 250 F.2d at p. 11.)

The court "'should not require a party to rely on abstract generalities in presenting its legal theory of the case to the jury, but should instruct the jury in terms that relate to the particular case before it.' [Citation]." (*Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 Cal.App.3d 620, 642 [128 Cal.Rptr. 807]; accord *People v. Rollo* (1977) 20 Cal.3d 109, 123, fn. 6 [141 Cal.Rptr. 177].)

> [T]he fact that pattern jury instructions are available should not preclude a judge from modifying or supplementing a pattern instruction to suit the particular needs of an individual case.... The thrust of such objection goes not to the use of pattern instructions themselves, but rather to the practice of rote reliance upon such instructions without modification, a practice that may develop

> simply by virtue of their existence.... [P]attern instructions should be modified or supplemented by the court when necessary to fit the particular facts of a case. (*ABA Standards for Criminal Justice, Discovery and Trial by Jury* (3rd Edition 1996) Standard 15-4.4 pp. 236-237.)

"Although the CALJIC pattern instructions perform an invaluable service to the bench and bar, that those instructions are not sacrosanct is apparent from their treatment by the appellate courts." (*People v. Vargas* (1988) 204 Cal.App.3d 1455, 1464 [251 Cal.Rptr. 904]; see, e.g., *People v. Eckstrom* (1974) 43 Cal.App.3d 996, 1006 [118 Cal.Rptr. 391]; CEB, *Cal. Criminal Law Procedure and Practice*, Third Ed. (1996) 32.19, p. 844.) "[T]he trial court is not obligated, necessarily, to repeat the words chosen by the CALJIC Committee however helpful they may be. Instead, the trial court's obligation is to state the law correctly." (*People v. Runnion* (1994) 30 Cal.App.4th 852, 858 [36 Cal.Rptr.2d 203]; see also *People v. Alvarez, supra,* 14 Cal.4th at p. 217 ["CALJIC 1.00 is not itself the law. Like other pattern instructions, it is merely an attempt at a statement thereof."] Nor do the CALJIC Use Notes have any force of law. (*Alvarez, supra,* at p. 223, fn. 28).)

There are other appropriate sources for jury instructions. For example, language taken verbatim from an appellate court decision is deemed to be a correct statement of the law. (*People v. Jones* (1971) 19 Cal.App.3d 437, 447 [96 Cal.Rptr. 795].) Obviously, *instructional* language which is specifically approved by the reviewing court is a valid source of instruction language. (See e.g., *People v. Wharton* (1991) 53 Cal.3d 522, 569-570 [280 Cal.Rptr. 631]; *People v. Gonzales, supra,* 51 Cal.3d 1179, 1222-1223.) The fact that a requested defense instruction is duplicative of standard CALJIC instructions is an insufficient reason for its rejection where a defendant offers "pinpoint" instructions intended to supplement or amplify more general instructions. (*People v. Thompkins, supra,* 195 Cal.App.3d 244, 256-257.)

Thus, the rote recitation of general form instructions will not always suffice to fulfill the court's instructional obligations. (*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 840, *cert.* denied (1998) ___ U.S. ___ [140 L.Ed.2d 807, 118 S.Ct. 1575]; *People v. Thompkins, supra,* 195 Cal.App.3d at pp. 250, 256-257 [240 Cal.Rptr. 516]; accord Calif. Rules of Court, Appendix, Div. I, § 5; *United States v. Lofton, supra,* 776 F.2d 918, 922; *Wright v. United States, supra,* 250 F2d 4, 11.)

The Ninth Circuit has sent a clear message to the California courts that judges who solely rely upon CALJIC risk reversal for prejudicial abridgement of a defendant's constitutional rights. "A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions." (*McDowell v. Calderon, supra,* 130 F3d 833, 836.)

Also, the standard pattern instructions, no matter how respected and established, are *not* always sufficient to assure that the jury will "accomplish its constitutionally mandated purpose."

> Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of "standard" jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong. (*Id.* at p. 840.)

Accordingly, judges, prosecutors and defense attorneys in California should understand both the value of CALJIC recommendations, *and their limitations*. (*Id.* at p. 841.)

> The "'[Standard instructions] are not a substitute for the individual research and drafting that may be required in a particular case, nor are they intended to discourage judges from using their own forms and techniques for instructing juries.' 9th Cir. Man. of Model Jury Instr., Introduction (West 1996))" (*McDowell v. Calderon, supra*, 130 F.3d at p. 841.)

The following six contentions illustrate instances in which the trial court failed to heed the above admonitions.

1. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT THEY MAY FIND MITIGATION IF THERE IS ANY EVIDENCE TO SUPPORT IT, NO MATTER HOW WEAK

The defense requested Instruction H that provided:

> The mitigating circumstances which have been read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. As a juror you should pay careful attention to each of those factors, however, you should not limit your consideration of mitigating circumstances to the factors specified.
>
> In addition to these specific factors, a juror may consider any other circumstance relating to the case or to the defendant, as shown by the evidence presented, as a reason for not imposing the death penalty.
>
> A juror may find that a mitigating circumstance exists if there is any evidence to support it, no matter how weak the evidence is. (Instruction H, CT 10907.)

The requested instruction was a correct statement of the law, was not argumentative, and is supported by the authority cited by counsel. (*People v. Wharton, supra,* 53 Cal.3d 522, 600, fn. 23.) The trial court believed that the pattern instruction from CALJIC adequately covered the issue. (RT 2988, 2989-

2990.) Of course, neither CALJIC 8.85[111] nor 8.88[112] conveyed the specific points of the requested instruction.

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111 The text of CALJIC 8.85 as given provided:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true;
>
> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
>
> (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> The age of the defendant at the time of the crime.
>
> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instructions given to you in the guilt or innocence phase of this trial which conflicts with this principle. (RT 3056-3057, CT 10971-10972.)

112 The text of CALJIC 8.88 as given is set out in the first paragraph of Part A, above.

Instruction upon the principles of the first two paragraphs of the defense proffered instruction was necessary to assure that the jury understood the breadth of the scope of circumstances that could be considered in mitigation. The third paragraph assured that the jury understood that the defense did not have to meet any standard of proof to establish a mitigating factor. Without specific instructions on these principles, there was the danger that the jury would not understand from the standard CALJIC instructions that it may return a verdict of life for anything it found mitigating, no matter what level of proof had been provided or was available. The entire focus of the CALJIC instructions are upon a weighing and comparison of the aggravating circumstances with the mitigating circumstances. As discussed in Part *A*, above, CALJIC 8.88 tips the scale in favor of the aggravating factors. The requested instructions were essential to help offset that improper advantage.

By promoting a reliable, non-arbitrary, and individualized sentencing determination, the requested instruction protected the defendant's federal constitutional rights to be free from cruel and unusual punishment and to due process and equal protection. (Eighth and Fourteenth Amendments.) (See, e.g., *Sochor v. Florida* (1992) 504 U.S. 527, 532 [119 L.Ed.2d 326, 112 S.Ct. 2114]; *Penry v. Lynaugh* (1989) 492 US 302, 318 [106 L.Ed.2d 256, 109 S.Ct. 2934]; *Clemons v. Mississippi* (1990) 494 U.S. 738 [108 L.Ed.2d 725, 110 S.Ct. 1441]; *McCleskey v. Kemp, supra,* 481 U.S. 279.)

Failure to instruct on the defendant's theory of the case where there is evidence to support the instruction violates the defendant's right to present a defense and to trial by jury as guaranteed by the Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process. (*See United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372; *Bennett v. Scroggy* (6th Cir. 1986) 793

F2d 772, 777-79; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F2d 1196, 1201-02.)

The proffered instruction is not duplicative of CALJIC 8.85, factor "k" for three reasons. First, factor "k" does not include the concepts set forth in the proposed instruction, as explained above.

Second, the defendant has a federal constitutional right to have the jury instructed on his or her theory of the case. (*People v. Wharton, supra,* 53 Cal.3d 522, 570-571; *United States v. Escobar de Bright, supra,* 742 F2d 1196.) This rule should be equally, if not more, applicable when that theory of the case relates to the defendant's attempt to persuade the jury to return a verdict of life rather than death. (See *Beck v. Alabama, supra,* 447 U.S. 625, 637-638 [Eighth Amendment requires heightened reliability and scrutiny].) Therefore, the defendant should be permitted to clarify and pinpoint legal principles upon which the theory of the defense is founded when those principles, even though arguably included within a more general instruction, are not specifically stated to the jury in the instructions.

Third, it is now recognized that the jury may be given "unbridled" discretion in determining penalty under the federal constitution. (See *Buchanan v. Angelone* (1998) 522 U.S. 269, 276-277 [139 L.Ed.2d 702, 118 S.Ct. 757].) It was just such discretion that the proffered instruction addressed.

Because there is no question that the proposed instruction is a correct statement of the law, and because the point is not specifically and directly covered in the standard instructions, the instruction should have been given upon the defenses' request. Since the defense requested instruction accurately stated the law and supported a defense theory to avoid a death decree, the Fourteenth Amendment due process principles are implicated by the state's arbitrary denial of its own domestic rules. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *People v. Marshall, supra,* 13 Cal.4th at pp. 850-851.)

The error in refusing the proffered instruction resulted in a fundamentally unfair and unreliable death sentence. For this reason, appellant's death sentence should be reversed.

2. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION PINPOINT INSTRUCTIONS ADDRESSING SPECIFIC DEFENSE ISSUES

The defense requested Instructions I and J provided:

> In determining whether any circumstance has been presented which extenuates the gravity of the present offenses, even though not a legal excuse for said crimes, you may consider, but are not limited to any of the following:
>
> 1. Whether the manner in which the crime was carried out demonstrated a lack of premeditation, deliberation or intent;
>
> 2. Whether the manner in which the crime was carried out demonstrated a lack of sophistication or professionalism on the part of the defendant;
>
> 3. Whether the defendant did not attempt to flee or escape when accused of the crime, or attempt to use force or violence in an effort to avoid arrest; ¶ ...
>
> 5. Whether the defendant committed the crime while under the influence of a mental or emotional disturbance, even though the disturbance was not extreme, nor that it amounted to legal insanity or an inability to form a specific intent; ¶¶ ....
>
> As instructed, mitigating factors include any sympathetic, compassionate, merciful or other aspect of the defendant's background, character, record or social, psychological or medical history, which is offered as a basis for a sentence less than death, whether or not related to the offenses for which he stands convicted.
>
> Among the mitigating factors which you may consider, and which relate to the defendant, are the following:
>
> 1. Whether the defendant's psychological growth and development affected his adult psychology and personality;
>
> 2. Whether the defendant suffered any emotional or psychological problems as an adolescent that prevented him from acquiring necessary social skills and maturity;

3. Whether the defendant was a loving and helpful person in his relationships with his friends and relatives;

4. The likely effect of a death sentence on the defendant's family and friends;

5. Whether facts in the defendant's upbringing, early family life, and childhood contributed to his conduct;

6. Whether the defendant had a history of alcohol and/or drug abuse or addiction, and whether such abuse and/or addiction had an effect on his behavior and which contributed to his criminal conduct;

7. Whether the defendant has positively adjusted to the type of structured and institutionalized environment in which he will live the rest of his life if given a sentence of life in prison without the possibility of parole;

8. Whether the defendant's age evidenced a lack of maturity or emotional development at the time of the commission of the crime;

9. Whether the defendant has the willingness and ability to comply with the terms of a sentence of life without the possibility of parole;

10. Whether the defendant has the potential for rehabilitation and for contributing affirmatively to the lives of his family, friends, and fellow inmates;

11. Whether or not the defendant will be a danger to others if sentenced to life imprisonment without the possibility of parole;

12. Whether any other facts exist which may be considered as extenuating or reducing the defendant's degree of moral culpability for the crime committed, or which might justify a sentence of less than death even though such facts would not justify or excuse the offense. (Instruction I, CT 10908-10910.)

The second paragraph of Instruction J provided:[113]

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[113] The first paragraph was covered by CALJIC 8.85 and the third paragraph was covered by CALJIC 8.88.

> [In mitigation] you must consider the defendant's background, character, history, and any devotion or affection for his family and they for him. You must also consider anything favorable to him during his life or any other mitigating circumstance.
>
> In considering this evidence, you are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you find are relevant. (Instruction J, CT 10912.)

The requested instructions were a correct statement of the law, were not argumentative, and are supported by the authority cited by counsel. (*People v. Marshall, supra,* 13 Cal.4th 799 [it was proper for the jury to consider as a mitigating factor that the defendant was legally intoxicated at the time of the offense]; *People v. Livaditis* (1992) 2 Cal.4th 759, 781-782 [9 Cal.Rptr.2d 72] [the jury may consider "'defendant's background, character, history and any devotion and affection for his family and they for him and anything favorable to him during his life or any other mitigating circumstance'"]; *People v. Haskett* (1990) 52 Cal.3d 210, 228-229 [276 Cal.Rptr. 80] [the jury may not be precluded from considering any relevant mitigating evidence, such as any mental deficiency of the defendant because of low intelligence or use of drugs]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 107-108 [270 Cal.Rptr. 817] [the jury is to consider the defendant's background and may consider the deprivations in his life, parental abuse, and the lack of the normal salutary influences of a stable family]; *People v. Montial* (1985) 39 Cal.3d 910, 928 [218 Cal.Rptr. 572] [the defendant has "the right to have the jury consider any relevant 'sympathy factor' in his behalf"]; *People v. Lanphear* (1984) 36 Cal.3d 163, 166-167 [203 Cal.Rptr. 122] ["under controlling federal precedent instructions must eliminate 'any legitimate basis for finding ambiguity concerning the factors actually considered by {the jury}'"] [the jury is to consider any aspect of the defendant's background "precisely because that evidence may arouse 'sympathy' or 'compassion' for the defendant"] [that requires consideration of any of the diverse frailties of humankind that may be in

that background]; *People v. Robertson* (1982) 33 Cal.3d 21, 58 [188 Cal.Rptr. 77] [the jury may not be precluded from considering any aspect of the defendant's character or background that he proffers as a basis for a sentence less than death].)

The trial court believed that the pattern instruction from CALJIC adequately covered the issues. (RT 2988, 2989-2990.) Of course, neither CALJIC 8.85[114] nor 8.88[115] conveyed the specific points of the requested instruction, and all non-trivial aspects of a defendant's character or circumstances of the crime constituted relevant mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, 285-287 [159 L.Ed.2d 384, 124 S.Ct. 2562.]

The trial court's refusal to instruct the jury with a specific list of circumstances that could be considered in mitigation violated his constitutional rights to have the jury consider all mitigating circumstances offered as a basis for a sentence less than death, as well as his state right to have the jury given an instruction that relates particular facts to the legal issues. Appellant was entitled to these instructions because they related potential mitigating circumstances surrounding appellant and the offense to the legal principles involved in the jury's selection of the appropriate penalty; and appellant was prejudiced by the trial court's refusal to give these instructions because the jury was not told that they could consider these special circumstances in mitigation.

The United States Supreme Court has repeatedly held that the death penalty is qualitatively different from any other punishment, and that systems for determining who shall be condemned to death must be structured to avoid any substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner. (*Gregg v. Georgia, supra,* 428 U.S. at p. 189; *Godfrey v.*

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114 The text of CALJIC 8.85 as given is set out in Part B, 1, above.

115 The text of CALJIC 8.88 as given is set out in the first paragraph of Part A, above.

Georgia, supra, 466 U.S. at p. 431.) The Supreme Court has consistently required that penalty phase juries be allowed to consider *any* circumstance offered by the defendant to justify a sentence of less than death. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [57 L.Ed.2d 973, 98 S.Ct. 2954].)

Further, under California law, a criminal defendant is entitled, upon request, to an instruction relating particular facts shown by the evidence to the legal issues, or which "pinpoint" the crux of his defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [84 Cal.Rptr. 711]; *People v. Rincon Pineda* (1975) 14 Cal.3d 864, 885 [123 Cal.Rptr. 119].) Failure to provide such requested instruction is error. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1136-1142 [248 Cal.Rptr. 600].)

In *People v. Wright, supra,* the defendant was charged with armed robbery and related offenses in connection with a robbery committed by several masked men. The sole evidence against the defendant was eyewitness identification testimony, and the defendant requested five special instructions on eyewitness testimony. (*Id.* at pp. 1136-1142.) One of the proposed instructions listed certain factors that were supported by the evidence and relevant to the jury's evaluation of eyewitness identifications. The trial court refused to give any of the proposed instructions, and the defendant was found guilty on all counts. (*Ibid.*)

On appeal, the defendant contended, among other things, that the trial court had erred in refusing to give his proposed instruction listing factors relevant to the jury's evaluation of the eyewitness testimony, and the *Wright* court agreed. (*Id.* at pp. 1138-1142.) The Court held that in a case where a crucial issue is eyewitness identification, and instruction that lists, in a neutral manner, the relevant factors to consider in evaluating such identification, and which are supported by the evidence, must be given upon request. (*Ibid.*)

In this case, to inform the jury that they could consider certain specific circumstances in mitigation, and how to consider them, appellant requested two instructions which listed the relevant circumstances of the offense and his background. These instructions related specific facts to the legal principles applicable to selecting the appropriate penalty. Thus, appellant was entitled to these instructions under California law. (*People v. Sears, supra,* 3 Cal.3d at p. 190.)

On the federal side, the Ninth Circuit has required instruction on mitigating factors, in addition to the factor (k) instruction, pinpointing evidence of circumstances such as the defendant's potential for future improvement and good behavior in custody (*Belmontes v. Woodford* (9th Cir. 2003) 335 F.3d 1024, 1061) and the defendant's jailhouse religious conversion (*Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204, 1211-1212.) The United States Supreme Court in *Penry v. Lynaugh, supra,* 492 U.S. 302 vacated a death sentence because the trial court's instructions to the jury did not allow the jury to consider as a mitigating factor evidence of the defendant's mental retardation and childhood abuse.

Moreover, the Eighth Amendment of the Untied States Constitution required that appellant's requested instruction be given. Without these instructions, appellant was being denied his right to have the jury consider any evidence that he offered for imposition of a sentence less than death in determining the appropriate penalty.

Therefore, the trial court clearly erred in refusing to give appellant's requested instructions under both California law and the federal constitution.

In addition, appellant incorporates here the last seven paragraphs of Part *B, 1*, above.

3. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT THE JURORS WERE NOT REQUIRED TO AGREE ON ANY FACTOR IN MITIGATION

The defense requested Instruction N provided:

> With regard to the applicable factors in mitigation, each juror must make his or her own individual assessment of the weight to be given to such evidence.
>
> A factor in mitigation need not be proven beyond a reasonable doubt, nor even by a preponderance of the evidence.
>
> *Unlike a factor in aggravation*, there is no requirement that all jurors agree on any factor in mitigation. Each juror must make an individual evaluation of each factor offered in mitigation, and each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors. [Italics added.] (Instruction N, CT 10918.)

With the exception of the italicized section noted,[116] the requested instruction was a correct statement of the law, was not argumentative, and was supported by *McCoy v. North Carolina, supra,* 494 U.S. 433 and *Mills v. Maryland* (1988) 486 U.S. 367 [100 L.Ed.2d 384, 108 S.Ct. 1860]. The trial court believed that the pattern instruction from CALJIC adequately covered the issue. (RT 2988, 2989-2990.) Of course, neither CALJIC 8.85[117] nor 8.88[118] conveyed the specific points of the requested instruction.

At no point in the instructions was the jury told that unanimity was not required for a determination of whether a factor was mitigating. Yet, they were told, in the context of the aggravating factor (b), other criminal activity of the defendant, that it was not necessary for all jurors to agree that the criminal activity

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116 The italicized text is contrary to existing state law. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1151 [124 Cal.Rptr.2d 373].)

117 The text of CALJIC 8.85 as given is set out in Part B, 1, above.

118 The text of CALJIC 8.88 as given is set out in the first paragraph of Part A, above.

occurred for a juror to use it in aggravation.[119] By implication, a juror or jurors could have reasoned that if a similar rule were true for mitigating factors, they would have been so instructed.

Four years before the trial in the instant case, the Court in *Mills v. Maryland, supra,* made it clear that imposition of the death penalty is arbitrary and invalid if it requires the jury to unanimously agree on the existence of a particular mitigating circumstance before giving the evidence any effect whatsoever. (*Mills v. Maryland, supra,* 486 U.S. 367.) Two years later the Court reaffirmed that holding in *McCoy v. North Carolina, supra,* 494 U.S. 433 and found that a unanimity requirement as to mitigating circumstances violated the Eighth Amendment by preventing the sentencer from considering all mitigating evidence, as it prevented jurors from giving effect to evidence that they believed called for a sentence less than death—even if all jurors agreed that some mitigating circumstances existed—unless they unanimously found the existence of the same mitigating circumstance. (*Id.* at pp. 435-444.)

Here, the trial court deprived appellant of applicable jury instructions designed to inform the jury that unanimity was not required in the determination of the existence of a particular mitigating circumstance. The error was compounded by the court's instruction that unanimity was not required for the aggravating factor of other criminal activity. (RT 3057-3058, CT 10973.) The result was to unconstitutionally lessen the prosecution's burden to convince the jury that the aggravating factors outweighed those in mitigation and this violated

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119 The jury was instructed:

> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose. (RT 3057-3058, CT 10973.)

appellant's state and federal constitutional rights provided by the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California Constitution's analogous provisions (Art. 1, §§ 1, 7, 15, 16, 17) It also violated appellant's right to due process by improperly restricting the jury's sentencing decision to evidence and considerations less than the scope of its statutory discretion. (*See Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.)

In addition, appellant incorporates here the last seven paragraphs of Part *B, 1*, above.

4. THE REFUSAL OF THE DEFENSE REQUEST THAT THE JURY BE INSTRUCTED THAT A SINGLE MITIGATING FACTOR MAY OUTWEIGH MULTIPLE AGGRAVATING FACTORS IMPERMISSIBLY CONVEYED TO THE JURY THAT MULTIPLE FACTORS IN MITIGATION WERE REQUIRED TO AVOID A DEATH VERDICT

The defense requested Instruction P that provided in pertinent part:[120]

> The relative weight of the applicable factors in aggravation and mitigation, when considered as a whole, are for you to determine. In this regard, a single factor in mitigation may outweigh any number of factors in aggravation, and may be sufficient to support a decision that death is not the appropriate punishment in this case.
>
> If you are not persuaded beyond a reasonable doubt that the factors in aggravation substantially outweigh those factors presented in mitigation, then you must render a verdict of life without the possibility of parole.[[121]]
>
> If you should conclude that the circumstances in mitigation are equal to or outweigh those in aggravation, you must render a verdict of life imprisonment without the possibility of parole.

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120 The first four paragraphs of the proposed instruction, not included above, were covered by CALJIC 8.88 as given. (RT 3065-3066, CT 10995.)

121 The propriety of this paragraph of Defense Instruction P is the topic of Argument *XIII*, above.

> Even if the factors in aggravation outweigh those presented in mitigation, or you find that there are no applicable factors in mitigation, you may still reject a verdict of death and render a verdict of life imprisonment without the possibility of parole, if you feel that life without parole is the appropriate punishment to be imposed. (CT 10920-10921.)

The requested instruction was a correct statement of the law, was not argumentative, and is supported by the authority that follows. (*People v. Sanders* (1995) 11 Cal.4th 475, 557-558 [46 Cal.Rptr.2d 751]; *People v. Duncan, supra,* 53 Cal.3d 955, 979; *People v. Keenan* (1988) 46 Cal.3d 478, 516-517 [250 Cal.Rptr. 550]; *People v. Myers* (1987) 43 Cal.3d 250, 276 [233 Cal.Rptr. 264].) The trial court believed that the pattern instruction from CALJIC adequately covered the issue. (RT 2988, 2989-2990.) Of course, neither 8.85[122] nor 8.88[123] conveyed these essential points.

In *People v. Boyde* (1988) 46 Cal.3d 212, 253 [250 Cal.Rptr. 83], affd. on other grounds sub nom *Boyde v. California* (1990) 494 U.S. 370 [108 L.Ed.2d 316, 110 S.Ct. 1190] this Court acknowledged concern that the jury might confuse the nature of the weighing process, which is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. (*Ibid.*) In *Boyde* this Court noted with approval that counsel on both sides told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. In *People v. Grant* (1988) 45 Cal.3d 829 [248 Cal.Rptr. 444] this Court characterized as proper an instruction that stated, inter alia, that "'[o]ne mitigating circumstance may be sufficient to support a decision that death is not appropriate punishment in this case.'" (*Id.* at p. 857, fn. 5.) In *People v. Visciotti* (1992) 2

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122 The text of CALJIC 8.85 as given is set out in Part B, 1, above.

123 The text of CALJIC 8.88 as given is set out in the first paragraph of Part A, above.

Cal.4th 1, 64 [5 Cal.Rptr.2d 495] among the instructions that negated an inference that the weighing process was mechanical was an instruction that informed the jury that one factor alone could save the defendant's life even though all of the others were overwhelmingly aggravated, if by itself it weighed more than the other factors. (*Id.* at pp. 63-65.)

However, in the instant case the concluding instruction, CALJIC 8.88,[124] conveyed to the jury that *multiple* factors in mitigation were required to avoid a death verdict. The instruction's use of "*the totality of the mitigating circumstances*" provided the clear inference that more than one factor in mitigation was required to overcome aggravating circumstances and a verdict of death. The instruction told the jury that it must consider "the totality of the mitigating circumstances," whereas one mitigating factor is sufficient to outweigh all others. (*People v. Grant, supra,* 45 Cal.3d at p. 857, fn. 5; *People v. Boyde, supra,* 46 Cal.3d at p. 253; *People v. Hayes, supra,* 52 Cal.3d 577, 642-643; *People v. Cooper, supra,* 53 Cal.3d 771, 845; *People v. Visciotti, supra,* 2 Cal.4th at p. 64.)

In *People v. Hayes, supra* 52 Cal.3d 577 the jury was instructed,

> "It is not intended that you should decide the issue [of penalty] by the simple process of counting the factors that may tend to point in the direction of aggravation or mitigation and then decide the question by choosing the side with the greatest number of factors. You may decide that a certain factor or factors are entitled to greater weight than others. The weight to be given to any or all considered factors is entirely within the province of the jury. The final test is not in the relative number of factors, but in the relative weight to which you feel they are entitled." (*Id.* at p. 642.)

The saving result in *Hayes* was that the jury was told that the penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to

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[124] The text of CALJIC 8.88 as given is set out in the first paragraph of Part A, above.

decide the weight to be assigned to each individual factor. It was thus clear that this was a weighing process and not a counting process. (*Id.* at pp. 642-643.) In *People v. Cooper, supra,* 53 Cal.3d at p. 844 it was made even clearer for the jury:

> "For instance, you could find that one specific factor on one side weighs so heavily in your consideration that it outweighs all of the determined factors on the other side." (*Id.* at p. 845.)

In the instant case, the court's use of CALJIC 8.88 and the concept of "totality" without the defense's clarifying instruction was misleading. It left the jury with the inference that more than one factor in mitigation was required to avoid a verdict of death. The term "total" in common parlance means the adding of quantities to arrive at a statement of the aggregate of those quantities, or a sum. The use of the word "totality" implies that such quantities of factors be tallied to arrive at a "total" for each type of factor, aggravating or mitigating. It implies a counting mechanism and undermines the view that one mitigating factor can outweigh all other factors and warrant a sentence of life without possibility of parole.

In short, the instruction is death oriented because it tells the jury what warrants death, but does not inform the jury what warrants life without possibility of parole. The jury is not informed that one mitigating factor can be deemed sufficient to outweigh all other aggravating factors no matter how substantial. If the law is to the effect that one mitigating factor can outweigh all other factors, then the jurors must be instructed in this manner. The subject should not be disguised in terms like "totality" from which the reasonable likelihood of the jury's interpretation cannot be determined in any meaningful review.

In *People v. Berryman* (1993) 6 Cal.4th 1100 [25 Cal.Rptr.2d 867], cert. den. 513 U.S. 1076 [115 S.Ct. 720] this Court addressed a similar challenge to the defect in CALJIC 8.88. The Court acknowledged that an instruction containing an implication that more than one factor in mitigation was required would indeed

have been erroneous. (*Id.* at p. 1099.) However, the Court concluded that there was no reasonable likelihood that the jury misconstrued or misapplied the instruction in violation of the Eighth or Fourteenth Amendment to the United States Constitution or any other legal provision or principle. (*Id.* at pp. 1099-1100.) The Court believed that a juror would not have interpreted or used the instruction's language referring to the "totality" of the aggravating and mitigating circumstances in a "death oriented" fashion to relate solely to the quantity of the factors and not to their quality, or to entail a mere mechanical counting of factors on each side of the imaginary scale. (*Id.* at p. 1099.) But, that is not the complaint. The complaint here is that the use of the language referring to the "totality of mitigating circumstances" and the repetition of the plural in the next sentence's use of "mitigating circumstances" provided the inference that more than one circumstance in mitigation was required. Thus, a juror may well have been cognizant of the fact that the quality of the factors was important, but nevertheless have believed that something more than one factor in mitigation was required. The refused defense instruction properly removed this impermissible inference. Notably, in *Berryman*, there was no comparable defense corrective request and the defense there had requested the faulted instruction.

Failure to instruct on the defendant's theory of the case where there is evidence to support the instruction violates the defendant's right to present a defense and to trial by jury as guaranteed by the Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process. (*See United States v. Unruh, supra,* 855 F.2d 1363, 1372; *Bennett v. Scroggy, supra,* 793 F2d 772, 777-79; *United States v. Escobar de Bright, supra,* 742 F2d 1196, 1201-02.)

In addition, appellant incorporates here the last seven paragraphs of Part *B, 1*, above.

5. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT IF THEY WERE IN DOUBT AS TO WHICH PENALTY TO IMPOSE, THEY MUST IMPOSE LIFE WITHOUT THE POSSIBILITY OF PAROLE

The defense requested Instruction R that provided:

> If you should have a doubt as to which penalty is appropriate, death or life imprisonment without the possibility of parole, you must give the defendant the benefit of that doubt, and render a verdict fixing the punishment as life without the possibility of parole. (Instruction R, CT 10923.)

The requested instruction was a correct statement of the law, was not argumentative, and is supported by the authority counsel provided. (*People v. Keenan, supra,* 46 Cal.3d 478, 517.) The trial court believed that the pattern instruction from CALJIC adequately covered the issue. (RT 2988, 2989-2990.) Of course, neither 8.85[125] nor 8.88[126] conveyed these essential points.

Whenever the jury is instructed on a lesser and greater offense at the guilt phase of a trial, and the evidence is sufficient to support either finding, the trial court must instruct the jury that if they entertain a reasonable doubt about which offense has been committed, they must give the defendant the benefit of the doubt, and find him guilty of the lesser offense. (*People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852]; *People v. Reeves* (1981) 123 Cal.App.3d 65, 69-70 [176 Cal.Rptr. 182]; *People v. Aikin* (1971) 19 Cal.App.3d 685, 703-706 [97 Cal.Rptr. 251].) This requirement protects defendants from an indiscriminate finding of guilt on the greater offense, when the jurors actually have a reasonable doubt about guilt on the greater offense.

At a penalty phase hearing of the death penalty case, neither penalty is generally favored. (*People v. Daniels* (1991) 52 Cal.3d 815, 890 [277 Cal.Rptr. 122].) The jury may impose death if they find that the aggravating circumstances

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125 The text of CALJIC 8.85 as given is set out in Part B, 1, above.

126 The text of CALJIC 8.88 as given is set out in the first paragraph of Part A, above.

are so substantial in comparison to the mitigating circumstances that the case warrants death. (See CALJIC 8.88; § 190.3.)

However, the United States Supreme Court has consistently found that the punishment of death is different from any other penalty that can be imposed, and should only be imposed in appropriate cases. (See *Gardner v. Florida* (1977) 430 U.S. 349, 357 [51 L.Ed.2d 393, 97 S.Ct. 1197]; *Gregg v. Georgia, supra,* 428 U.S. at pp. 181-188, 231-241.) The uniqueness of death as a penalty is obviously shown by its finality. Thus, since great care must be taken in imposing the death penalty, the Untied States Constitution requires that where there are doubts about whether a defendant should live or die, the choice should be for life.

Further, a requirement that any doubts should be resolved in favor of imposition of the lesser sentence is a proper requirement. This merely requires the trier of fact to impose the death penalty only where it is clearly appropriate, and furthers the principle that it is not to be imposed indiscriminately. Thus, this legal principle is established in our jurisprudence, and the jury must be instructed on this principle upon request under California law. (See §§ 1127, 1093, subd. (f).)

The instruction requested by the defense presented a proper principle of law, was pertinent to the issues before the jury, and was not covered by any other instruction. The trial court was required to give it upon request under the California Penal Code and the United States Constitution.

In addition, appellant incorporates here the last seven paragraphs of Part *B, 1*, above.

6. THE COURT IMPROPERLY DENIED FROM JURY CONSIDERATION THAT THE LAW CONSIDERED DEATH THE WORST PUNISHMENT

The defense requested Instruction T that provided:

> In determining whether the appropriate penalty in this matter is death or life imprisonment without the possibility of parole, regardless of your personal opinions and beliefs, you are instructed that the law considers the more extreme punishment to be the death

penalty, and not life imprisonment without the possibility of parole. (Instruction T, CT 10928.)

The requested instruction was a correct statement of the law, was not argumentative, and is supported by the authority counsel provided. (*People v. Hernandez, supra,* 47 Cal.3d 315, 362.) The trial court believed that the pattern instruction from CALJIC adequately covered the issue. (RT 2988, 2989-2990.) Of course, neither 8.85[127] nor 8.88[128] conveyed these essential points.

Death is qualitatively different from all other punishments and is the most severe penalty the law can impose. (See *Caldwell v. Mississippi, supra,* 472 U.S. 320, 329; *Woodson v. North Carolina, supra,* 428 U.S. 280, 305.) In *People v. Hernandez, supra,* 47 Cal.3d 315, the defense complained that the prosecutor argued that life without the possibility of parole could be found to be the ultimate penalty. Implicit in this Court's assessment of the issue was that it would be improper for a juror to vote for the death penalty because the juror considered it a more severe penalty than life without parole. (*Id.* at pp. 362-363.)

The defense proposed instruction here only clarified the principle that the jury was to regard death as the most severe penalty. This Court has recognized that it is not uncommon for jurors to think that life without the possibility of parole is a more serious penalty than death. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 946, 964 [4 Cal.Rptr.2d 131].) The requested instruction was not inconsistent with the principle that jurors should accord whatever weight they deemed appropriate to the aggravating and mitigating circumstances. The proposed instruction did not even address the issue of what weight should be accorded to particular circumstances. The requested instruction was entirely consistent with the court's version of CALJIC 8.88, which stated that a juror could vote for the death penalty

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127 The text of CALJIC 8.85 as given is set out in Part B, 1, above.

128 The text of CALJIC 8.88 as given is set out in the first paragraph of Part A, above.

only if he or she found that aggravating circumstances are so substantial in comparison with the mitigating circumstances. If a juror were to vote for the death penalty because he or she regarded it as a less severe punishment than life without parole, that juror would in effect be voting for the death penalty because mitigation outweighed aggravation. The requested instruction clarified the principle that a juror could not properly vote for the death penalty as an act of mercy. The trial court erred in refusing the instruction requested.

That death is the more severe punishment, however, is not necessarily apparent to all jurors. (*People v. Bloom, supra,* 48 Cal.3d 1194, 1223, fn. 7 ["While qualitatively different from the death penalty, the punishment of life without hope of release has been regarded by many as equally severe"]; *Holman v. Page* (7th Cir. 1996) 95 F.3d 481, 487 ["Natural life imprisonment is a stern punishment, for some perhaps worse than death"]; *Holland v. Donnelly* (S.D.N.Y. 2002) 216 F.Supp.2d 227, 242 ["Life imprisonment without any hope of parole or other release is a particularly harsh sentence, thought by some to be a fate as bad as, or possibly even worse than, death itself"].) Thus, appellant's proposed instruction should have been given in order to ensure that the jury understood the pertinent law.

In the absence of an instruction that execution was the more severe punishment, some jurors may well have voted for death in the mistaken belief that such a sentence was, under California law, more lenient, thereby rendering appellant's death sentence unreliable. The Eighth and Fourteenth Amendments to the United States Constitution require that a death penalty statute meaningfully and rationally distinguish between those few cases in which a death sentence is appropriate and the many cases in which it is not. (*Furman v. Georgia, supra,* 408 U.S. at p. 313 (conc. opn. of White, J.); *McCleskey v. Kemp, supra,* 481 U.S. at pp. 305-306; *Godfrey v. Georgia, supra,* 446 U.S. at 428.) Further, the defendant's

right to a fundamentally fair proceeding under the Due Process Clause of the Fourteenth Amendment is violated when the jury is not in agreement that death is the more severe punishment.

In addition, appellant incorporates here the last seven paragraphs of Part *B, 1*, above.

C. These Multiple Errors Individually and Collectively Influenced the Outcome

To determine whether a jury may have been misled by improper or inadequate instructions to a defendant's prejudice, this Court examines the entire record. (*People v. Cooper, supra*, 53 Cal.3d at p. 845.) In *Boyde v. California, supra,* 494 U.S. 370 the Court held that where a jury instruction is ambiguous and therefore subject to an erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. The Court added,

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. [Fn. omitted.] Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting. (*Id.* at pp. 380-381.)

However, where the disputed instruction is erroneous on its face, the court is not free to assume that the jurors inferred the missing element from their general experience or from other instructions, for the law presumes that jurors carefully follow the instructions given to them. (*Wade v. Calderon, supra,* 29 F3d 1312, 1320-1321, cert den. 513 U.S. 1120.)

This latter context is more analogous to the instant case, certainly as to the defense requested instructions discussed in Part *B*. Their very import is premised on the fact that it could not be assumed that a juror would have inferred their content without the court's guidance. Thus, without these instructions the jury had inadequate or no direction at all.

Appellant incorporates here Argument *XI*, Part *C*, commencing with paragraph 4 (page 182) that summarizes the detailed and compelling mitigating evidence proffered by the defense through lay and expert witnesses. However, because the court refused appellant specific instructions on how his evidence, if found true, could be used in mitigation and the proper weight and use of mitigating evidence, the jurors had no framework for considering this compelling evidence. This failure biased appellant's penalty phase in favor of a death sentence, and rendered the result arbitrary and unreliable.

If the requested defense instructions had been given, the jury would have most likely found substantial mitigating factors and that those mitigating factors justified imposition of life without the possibility of parole. Coupled with the other instructional errors cited in Arguments *XIII* through *XV*, above, these errors have individually and collectively resulted in a fundamentally unfair and unreliable death sentence.

In a close case any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Zemavasky, supra,* 20 Cal.2d 56, 62; *People v. Von Villas,*

supra, 11 Cal.App.4th 175, 249.) In these circumstances neither *People v. Watson, supra* 46 Cal.2d 818 nor *Chapman v. California, supra,* 686 U.S. 18 standard for harmless error can be satisfied. (*People v. Filson, supra,* 22 Cal.App.4th 1841, 1852.) Appellant's sentence of death must be reversed.

Even if there is some doubt or uncertainty as to the prejudice suffered by appellant due to these errors, such uncertainty or doubt must be resolved in his favor. (See *Eddings v. Oklahoma, supra,* 455 U.S. at p. 119 [O'Connor, J., concurring].) The precise point which prompts the death penalty in the mind of any one juror is not only unknowable to the reviewing court, but may even be unknown by the juror. (*People v. Hines* (1964) 61 Cal.2d 164, 169 [37 Cal.Rptr. 622].) "Thus *any* substantial error in the penalty [phase] of the trial ... must be deemed to have been prejudicial. (*Id.* at pp. 169-170.)

XVII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to

perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach. (See Part *A*, below.)

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. (See Argument *XIV*, Part *B*, below.)

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death. (See Parts B-C, below.)

A. The Death Penalty Statute Is Invalid Because it Fails to Narrow Eligibility for the Death Penalty[129]

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia*, (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].) (*People v. Edelbacher, supra,* 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states

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[129] Counsel for appellant raised this issue below and it was summarily denied. (CT 5851, 5857-5864, RT 2410.)

use in their capital sentencing statutes." (*People v. Bacigalupo, supra,* 6 Cal.4th 457, 468.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant, the statute contained 30 special circumstances[130] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1983) 34 Cal.3d 441

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

[194 Cal.Rptr. 390].) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515 [117 Cal.Rptr.2d 45]; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575 [257 Cal.Rptr. 64].) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1324-1326.)[131] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for

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131 The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley, supra,* 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris, supra,* 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[132] (See Argument *XVIII*, below).

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[132] In a habeas petition to be filed after the completion of appellate briefing, assuming that habeas counsel is ever appointed to represent appellant, appellant intends to present empirical evidence confirming that section 190.2 as applied, as

B. The Administration Of California's Death Penalty Is So Arbitrary As To Constitute Cruel And Unusual Punishment

The circumstances of California's administration of the death penalty, especially as they exist at this time, are strikingly similar to those in Arizona discussed in Judge Noonan's dissenting opinion in *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 425-428. The ultimate selection of who lives and who dies is arbitrary for numerous reasons—the rarity and unpredictable order in which the death penalty is carried out, the necessary lengthy and multi-tiered review process, the lack of any viable solution to expedite or make more orderly the review process, and the simply symbolic role the death verdict has become. (*Ibid.*) Compounding the problem is the increasing backlog of death cases in state courts, which can only serve to truncate the review eventually provided the cases caught in the backlog (and this is one). (*See id.* at p. 426.) In any event, a death penalty so irrationally applied is an Eighth and Fourteenth Amendment violation. (*See id.* at p. 428.)

C. The Death Penalty Statutes Unconstitutionally Permits Unbounded Prosecutorial Discretion

In this State, the prosecutor has sole authority to make what is literally a life or death decision, without any legal standards to be used as guidance. Irrespective of whether prosecutorial discretion in charging is constitutional in other situations, the difference between life and death is not at all analogous to the

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

usual prosecutorial discretion situation, *e.g.*, the difference between charging something as a burglary or a theft.

As it stands, an *individual prosecutor* has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox, supra,* 47 Cal.3d 207, 275-276, this creates a substantial risk of county-by-county arbitrariness. Under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, or simple arbitrariness.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme—in charging, prosecuting and submitting a case to the jury as a capital crime—merely compounds, in application, the effects of vagueness and arbitrariness inherent on the face of the California statutory scheme. (See Part *A*, above, illustrating the vast discretion permitted prosecutors by the failure of California's death penalty statute to meaningfully narrow the pool of murderers eligible for the death penalty.) Just like the "arbitrary and wanton" discretion condemned in *Woodson v. North Carolina, supra,* 428 U.S. at p. 303, such unprincipled discretion is contrary to the principled decision-making mandated by the Sixth, Eighth and Fourteenth Amendments. (*Furman v. Georgia, supra,* 408 U.S. 238.)

In general, state action that is bereft of standards, without anything to guide the actor and nothing to prevent the decision from being completely arbitrary, is a violation of a person's right to due process of law. (*Kolender v. Lawson* (1983)

461 U.S. 352, 358 [75 L.Ed.2d 903, 103 S.Ct. 1855].) This standard applies to prosecutors as much as other state actors. (*Ibid.*)

Here, the offense with which appellant was charged, a single count of murder, was certainly an awful offense. So is any charge that is potentially capital. However, prosecutors sometimes do not seek the death penalty for capital offenses even those including multiple murders. (*See, e.g., People v. Walker* (1993) 17 Cal.App.4th 1189 [21 Cal.Rptr.2d 880] [negotiated plea bargain to two counts of first-degree murder, with sentence of 25 years to life]; *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1421-1422 [3 Cal.Rptr.2d 747] [defendant convicted of arson and three counts of first-degree murder (by stabbing); death penalty not sought]; *People v. Moreno* (1991) 228 Cal.App.3d 564, 567-568 [279 Cal.Rptr. 140] [defendant convicted of two counts of first-degree murder, burglary and attempted robbery; death penalty waived].) The absence of standards to guide such decisions falls under *Kolender* and other vagueness cases.

For these reasons as well, appellant's death sentence violates the Sixth, Eighth and Fourteenth Amendments.

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

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3, subdivision (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, as explained in detail in Argument *X*, above, the prosecution presented extensive evidence of unadjudicated misconduct. Indeed, a significant portion of the prosecution's case

in aggravation consisted of unadjudicated misconduct committed when appellant was a juvenile.

The United States Supreme Court's recent decisions in *Blakely v. Washington, supra, Ring v. Arizona, supra,* and *Apprendi v. New Jersey, supra,* (see Argument *XIII*, above) confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of *Blakely, Ring,* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

E. Inability Of Postconviction Relief To Balance Considerations Essential In Imposition Of Death Penalty

The limitations of the federal postconviction administration of the death penalty are "fraught with arbitrariness, discrimination, caprice, and mistake." (*Callins v. Collins* (1994) 510 U.S. 1141 [127 L.Ed.2d 435, 114 S.Ct. 1127] [opn. of Blackmun, J., dissenting from denial of cert.].) "Experience has taught ... that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death [citation] can never be achieved without compromising an equally essential component of fundamental fairness-individualized sentencing. [Citation.]" (*Ibid.*) Searching appellate review of this process has been sacrificed by substituting constitutional requirements with mere esthetics. (*Id.* at p. 1145.) "The problem is that the inevitability of factual, legal, and moral error gives us a

system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution. [Fn. Omitted.]" (*Id.* at pp. 1145-1146.)

The limitations of California's postconviction administration of the death penalty, especially as they exist at this time, are strikingly similar to those cited by Justice Blackmun.

F. Insufficiency Of Available Postconviction Relief In Federal And State Courts

Appellant incorporates by reference Justice Blackmun's concurrence in *Sawyer v. Whitley* (1992) 505 U.S. 333, 357-360 [120 L.Ed.2d 269, 112 S.Ct. 2514], in which he grappled with the likely reality that the ever-increasing procedural barriers to meaningful federal habeas corpus relief "undermine[] the very legitimacy of capital punishment itself." However, the procedural barriers have continued to mount since *Sawyer*. Furthermore, they have now been joined by an ever-growing set of procedural barriers in state court as well. (*See, e.g., In re Clark* (1993) 5 Cal.4th 750 [21 Cal.Rptr.2d 509].) The severe diminution of the availability of federal habeas corpus relief and the labyrinth a petitioner must navigate to try to obtain it, as well as the ever-increasing creation of new procedural barriers in California and the combination of the two, operate to render the system of review of capital convictions and sentences more arbitrary and less reliable than was contemplated when capital punishment was resumed in 1976 (*Gregg v. Georgia, supra,* 428 U.S. 153), and more arbitrary and less reliable than is necessary for there to be meaningful post-conviction review.

In this context, it is highly noteworthy that federal habeas corpus relief was much more readily available in 1976, the year *Gregg v. Georgia, supra,* was decided, than it is now; the federal system as it existed then was adequate to guard against arbitrary or capricious imposition of the ultimate sentence in violation of

federal constitutional law. (*See Sawyer v. Whitley, supra,* 505 U.S. at pp. 357-360 [conc. opn. of Blackmun, J.].) With its severe compression, it is not any more.

G. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and as a Result Violates the United States Constitution

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. ... The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. ... Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Five years after that article was written, South Africa abandoned the death penalty.)

Nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [106 L.Ed.2d 306, 109 S.Ct. 2969] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website www.amnesty.org].)[133]

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[133] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Ibid.*)

This country has relied from its beginning on the customs and practices of other parts of the world to inform our administration of the criminal justice system. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227 [40 L.Ed. 95, 16 S.Ct. 139]; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [31 L.Ed. 430, 8 S.Ct. 461]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. 238, 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. 86, 100; *Atkins v. Virginia, supra*, 122 S.Ct. at 2249-2250.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 122 S.Ct. at 2249, fn.

21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 315-316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]; See Argument *XVIII*, below.)

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

XVIII. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND APPELLANT'S CONVICTION AND SENTENCE OF DEATH MUST BE SET ASIDE

Appellant was denied his right to a fair trial by an independent tribunal and his right to minimum guarantees for the defense under principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). For reasons set forth previously, appellant contends that his rights under the state and federal constitutions have been violated. However, he further submits that these errors also violate principles of international law and provisions of treaties which are co-equal with the United

States Constitution and binding upon the judges of the courts of all the states pursuant to the Supremacy Clause. (U.S. Const., art. VI, cl. 2.) In addition, these contentions are being raised here as the first step in exhausting administrative remedies in order to bring appellant's claim in front of the Inter-American Commission on Human Rights on the grounds that the defects in the judgment are violations of the American Declaration of the Rights and Duties of Man.

A. The United States and this State Are Bound by Treaties and by Customary International Law

1. BACKGROUND

The two principal sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with the constitution and federal statutes as the supreme law of the land.[134] Customary international law is equated with federal common law.[135] International law must be considered and administered in United States courts whenever questions of a right which depends upon it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700 [44 L.Ed. 320, 20 S.Ct. 290].) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner, Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118 [2 L.Ed 208].) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456

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134 Article VI, section 1, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

135 Restatement Third of the Foreign Relations Law of the United States (1987), p. 145, 1058; see also *Eyde v. Robertson* (1884) 112 U.S. 580, 597-600 [28 L.Ed. 798, 5 S.Ct. 247].

U.S. 25, 33 [71 L.Ed.2d 715, 102 S.Ct. 1510].) The United States Constitution also authorizes Congress to "define and punish ... offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corporation* (1984) 466 U.S. 243, 252 [80 L.Ed 2d 273, 104 S.Ct. 1776].)[136]

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[137] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal

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136 See also *Oyama v. California* (1948) 332 U.S. 633 [92 L.Ed 249, 68 S.Ct. 269], which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* At 673.) See also *Namba v. McCourt* (1949) 185 Or. 579 [204 P.2d 569], invalidating an Oregon Alien Land Law. "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed.... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat. 1031, 1046.)" (*Id.* at p. 604.)

137 See generally, Sohn and Buergenthal, International Protection of Human Rights (1973), p. 137.

maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[138]

This doctrine was further developed in the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[139] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[140] It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[141]

2. TREATY DEVELOPMENT

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions are seen in the United Nations Charter which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and

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138 Buergenthal, International Human Rights (1988), p. 3

139 *Id.* at pp. 7-9.

140 Restatement Third of the Foreign Relations Law of the United States. (1987), Note to Part VII, vol. 2 at p. 1058.

141 *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco* (1923) P.C.I.J., Ser. B, No. 4

observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[142] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights[143] and the Convention on the Prevention and Punishment of the Crime of Genocide.[144] The Universal Declaration is part of the International Bill of Human Rights,[145] which also includes the International Covenant on Civil and Political Rights,[146] the Optional Protocol to the ICCPR,[147] the International

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142 Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, became effective October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security in the world. (Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).)

143 Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

144 Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, became effective January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. (See generally, Buergenthal, International Human Rights, *supra*, p. 48.)

145 See generally Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

146 International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, became effective March 23, 1976.

147 Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, became effective March 23, 1976.

Covenant on Economic, Social and Cultural Rights,[148] and the human rights provisions of the UN charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[149] In 1948 the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[150]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation

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148 International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, took effect January 3, 1976.

149 OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

150 OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration.[151] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[152]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[153] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and through the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[154]

Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties.

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151 Buergenthal, International Human Rights, *supra*. As previously indicated, this appeal is a necessary step in exhausting appellant's administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

152 Buergenthal, International Human Rights, *supra*.

153 Sohn and Buergenthal, International Protection of Human Rights (1973), pp. 506-509.

154 Buergenthal, International Human Rights, *supra*, p. 230.

The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination,[155] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[156] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[157] All of these treaties were ratified and in effect at the time of appellant's trial and comprise part of "the supreme Law of the Land" which is binding upon "the Judges of every State." (U.S. Const, art. VI.)

3. CUSTOMARY INTERNATIONAL LAW

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[158] The United States, through signing and ratifying the ICCPR, the Race Convention, and

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155 International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, took effect January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. (See, http://www.hri.ca/

156 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, became effective on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong. 2d Sess., 136 *Cong. Rev.* 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 21, 1994. (See http://www.un.org/Depts/Treaty/ final/ ts2/newfiles/part_boo/iv_boo/iv_9.html.)

157 Buergenthal, International Human Rights, *supra*, p. 4.

158 Restatement Third of the Foreign Relations Law of the United States, section 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state and empirical evidence of the extent to which the customary law rule is observed.

the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified a treaty it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[159]

Customary international law is "part of our law." (*The Paquete Habana*, *supra*, 175 U.S., at p. 700.) According to 22 U.S.C. section 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[160] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[161] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga* v. *Pena-Irala* (2d Cir. 1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights ...." (*Id.* at p. 882.) The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos

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159 Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731, 737.

160 22 U.S.C. section 2304(a)(1).

161 *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts and Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[162] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[163]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation (MFN) trade status with the United States unless China improved its record on human rights. Though President Bush vetoed this legislation,[164] in May 1993 President Clinton tied renewal of China's MFN status to progress on specific human rights issues in compliance with the Universal Declaration.[165]

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[162] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

[163] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).

[164] See Michael Wines, "Bush, This Time in Election Year, Vetoes Trade Curbs Against China," *N.Y. Times*, September 29, 1992, at A1.

[165] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China* (1993) 14 Nw. J. Int'l L. & Bus. 66, 79. Though President Clinton decided on May 26, 1994 to sever human rights conditions from

The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the covenant though we in the United States are not bound."[166]

B. The Numerous Due Process Violations and Other Errors which Occurred in this Case Are also Violations of International Law

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[167] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[168] Implicit in the court's opinion linking non-derogability and incompatibility is the view that the

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China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use MFN status to influence China's compliance with recognized international human rights. (See Kent, *China and the International Human Rights Regime: a Case Study of Multilateral Monitoring, 1989-1994* (1995) 17 H. R. Quarterly, 1.)

166 Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L.Rev. 1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

167 International Covenant on Civil and Political Rights, *supra*, 999 U.N.T.S. 717.

168 Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[169]

Appellant's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration and customary international law, were violated throughout his trial and sentencing phase. For example, appellant's convictions premised on insufficient evidence, and the other due process violations enumerated herein, all violated petitioner's right to a fair hearing as guaranteed by Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article XXVI of the American Declaration, and Article 8 of the American Convention.

Accordingly, appellant is entitled to relief not only pursuant to individual provisions of the United States and California Constitutions, but also pursuant to international treaties which are co-equal with the United States Constitution and binding upon the judges of this state through the Supremacy Clause. The United States must honor its role in the international community by recognizing the

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169 Edward F. Sherman, Jr. *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation* (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction." (Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am. Ct.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983).) These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

human rights standards in our own country to which we hold other countries accountable.

XIX. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS WHICH OCCURRED DURING THE GUILT AND PENALTY PHASES OF TRIAL COMPELS REVERSAL OF THE DEATH SENTENCE EVEN IF NO SINGLE ISSUE, STANDING ALONE, WOULD DO SO.

The cumulative impact of the numerous penalty phase errors requires reversal of the death penalty even if no single error does so independently. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487 & fn. 15 [56 L.Ed.2d 468, 98 S.Ct. 1930]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [208 Cal.Rptr. 547]; *Mak v. Blodgett, supra,* 970 F.2d 614, 622.) In addition, a number of guilt-phase errors also had a considerable impact on the penalty determination and the impact of these errors must also be assessed in evaluating the prejudice resulting from the penalty phase errors.[170]

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of a conviction based on sufficient evidence, of his right to confront the witnesses against him, of his right to trial by a fair and impartial jury and to a unanimous jury verdict, and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence; but even if that were not the case,

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[170] An error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [3 Cal.Rptr.2d 727].) Indeed, the effect of guilt phase errors on the penalty phase must be considered. (Pen. Code, § 190.4, subdivision (d)) and as a matter of federal law (*Magill v. Dugger, supra,* 824 F.2d 879, 888.)

reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

A. Introduction

Appellant's mitigating evidence was compelling, as detailed in Argument *XII*, Part *C*, pages 152-153, and incorporated here. The prosecution's case for death rested on the circumstances of the offense and four juvenile acts, three while appellant was 15 years old or younger, and a misdemeanor.

The penalty phase of appellant's trial was tainted by the errors, set forth in Arguments *X* through *XVI*. The discussion of each error briefly identifies the way in which the error prejudiced appellant and so requires reversal of the death judgment. "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888; *see generally* Goodpaster, *The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases* (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled "Guilt Phase Defenses And Their Penalty Phase Effects"].)

The Court must also assess the combined effect of all the errors, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett, supra,* 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Holt, supra,* 37 Cal.3d 436, 459; *People v. Buffum* (1953) 40 Cal.2d 709, 729 [256 P.2d 317]; *People v. Zerillo* (1950) 36 Cal.2d 222, 233 [223 P.2d 223]; *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1681 [1 Cal.Rptr.2d 778]; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470 [174 Cal.Rptr. 67]; *see also People v. Phillips* (1985) 41 Cal.3d 29, 83 [222 Cal.Rptr. 127] (lead opn.); *People v. Pitts* (1990) 223 Cal.App.3d 606, 815 [273

Cal.Rptr. 757].) Moreover, "the death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 (citing *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *Zant v. Stephens, supra,* 462 U.S. 862, 885; *Gardner v. Florida, supra,* 430 U.S. 349, 358.)

B. Prejudicial Federal Constitutional errors

Most penalty phase errors implicate a defendant's federal constitutional rights. (1) The Eighth Amendment and the due process clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585 (Eighth Amendment); *Zant v. Stephens, supra,* 462 U.S. 862, 885, (Fourteenth Amendment due process).) (2) The due process clause of the Fourteenth Amendment also protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 344.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of life without due process. (3) Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger, supra,* 498 U.S. 308, 321, citing other cases.) (4) Separate from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors which taint the fairness of the trial and present an "unacceptable risk, ... of impermissible factors coming into play." (*Estelle v.*

Williams (1976) 425 U.S. 501, 505 [48 L.Ed.2d 126, 96 S.Ct. 1691]; *accord, Holbrook v. Flynn, supra,* 475 U.S. 560; *Norris v. Risley, supra,* 918 F.2d 828.)

The test for prejudice from federal constitutional errors is familiar: reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. 18, 24; *see generally Yates v. Evatt* (1991) 500 U.S. 391, 402-406 [114 L.Ed.2d 432, 111 S.Ct. 1884]; *see also Clemons v. Mississippi, supra,* 494 U.S. 738, 754 [noting that state appellate courts are not required to consider the possibility that penalty phase error may be harmless, and recognizing that harmless error analysis will in some cases be "extremely speculative or impossible"].) "The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279 (Scalia, for a unanimous Court).) When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors, constitutional and otherwise, was harmless. (*People v. Williams, supra,* 22 Cal.App.3d 34, 58-59.)

C. Prejudicial Errors-Under-State Law

The errors in this case also compel reversal of the penalty on the basis of the state-law prejudice test for non--constitutional errors at the penalty phase.

In *People v. Brown (John)* (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr. 604], this Court reaffirmed the "reasonable possibility" harmless error standard articulated in *People v. Hines, supra,* 61 Cal.2d 164, 168-170, disapproved on another ground in *People v. Murtishaw, supra,* 29 Cal.3d 733, 774-775, fn. 40, and *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137 [32 Cal.Rptr. 4]. This is an

extremely high standard under which it is very difficult for the prosecution to establish that any error, let alone a combination of errors, was harmless with respect to the penalty verdict. It is "the same in substance and effect" as the "reasonable doubt" standard of *Chapman v. California*. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [2 Cal.Rptr.2d 112]; *see People v. Brown, supra*, 46 Cal.3d at p. 467 (conc. opn. of Mosk, J.).) It is a "more exacting standard" than the standard of *People v. Watson, supra,* 46 Cal.2d 818, 836, used for assessing guilt phase error. (*People v. Brown, supra*, 46 Cal.3d at p. 447.) While a trivial or hypertechnical possibility that an error affected the outcome is insufficient for reversal (*id.* at p. 448), only in an "extraordinary" case can a death sentence be affirmed under this test if penalty phase error has occurred. (*People v. Hines, supra,* 61 Cal.2d at p. 170.)

Given the nature of the decision entrusted to the jury at penalty phase, the standard for assessing prejudice could not be otherwise. The decision at penalty phase is different not in degree but in kind from the decision whether or not the defendant has been proven guilty; this difference significantly reduces the basis for a reasoned appellate judgment about the effect of errors. (*See* White, *The Death Penalty in the Nineties* (1991) pp. 74-76 (U. Michigan Press).) "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 330.) "Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp, supra,* 481 U.S. 279, 311.) At the same time the need for reliability is heightened, because of the consequences of a judgment of death. As this Court stated in *People v. Hamilton, supra*:

> [I]n determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that

> evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related in the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming ... or that the crime involved was ... particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial. (*People v. Hamilton, supra*, 60 Cal.2d at pp. 136-137; *accord, People.v. Hines, supra,* 61 Cal.2d at p. 169; *see generally Mills v. Maryland, supra,* 486 U.S. 367; R. Traynor, *The Riddle of Harmless Error* (1970) pp. 72-73.)

To police the integrity of the statutory requirement for sentencing by unanimous verdict of a jury, this Court has recognized that reversal must be the rule and affirmance the extraordinary exception when error infects the penalty phase. (*People v. Hamilton, supra*, 60 Cal.2d at p. 138.) If the test of penalty phase prejudice were any less stringent, the Court could not have confidence that its judgment necessarily would reflect the judgment of all twelve jurors at an error-free penalty trial. The Court would run the risk of consigning appellant to his death based on the conjecture of an appellate court that was not present at trial. (*See Carella v. California, supra,* 491 U.S. 263, 268-269 (conc. opn. of Scalia, I.).) As the Supreme Court put it, "No one on this Court was a member of the jury that sentenced [defendant], or of any similarly instructed jury." (*Mills v. Maryland, supra*, 486 U.S. at p. 383.)

Also apropos are the words of Justice Cardozo that this Court has quoted in evaluating the prejudice from guilt phase error in a death penalty case:

> "The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others." (*People v. Spencer* (1967) 66 Cal.2d 158, 169 [57 Cal.Rptr. 163], quoting *DeCicco v. Schweizer* (1917) 221 N.Y. 431,438 [117 N.E. 807]..)

In assessing prejudice, errors must be viewed through a juror's eyes, not the Court's. This conclusion is an implicit part of the rationale for the strict standard adopted in *Hines* and *Hamilton*. The Court necessarily brings to each case what it has learned about murder cases generally from the dozens of others it has seen (even if it does not conduct "proportionality review" of the type engaged in by many state appellate courts). A juror has no equivalent perspective. A juror's exposure to the dynamics of murder is limited to the single case on which he or she serves.[171] Virtually any error or combination of errors which affects what the jurors learn about the case or the defendant therefore affects a sizeable part of the limited pool of information upon which they must act. Virtually any error or combination of errors therefore presents the reasonable possibility of significantly altering their individual weighing of aggravation and mitigation, even errors that might appear trivial from the Court's very different perspective.

As the language quoted from *People v. Hamilton* makes clear, a reasonable possibility that an error may have affected any single juror's view of the case compels reversal. (*See also Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669; *Mak v. Blodgett, supra,* 970 F.2d at pp. 620-621; *Kubat v. Thleret* (7th Cir. 1989) 867 F.2d 351,371; 2 LaFave & Israel, Criminal Procedure (1984) § 19.5(a), p. 535.) The decision to be made at penalty phase requires the personal moral judgment of each juror. (*People v. Brown, supra,* 40 Cal.3d 512, 541 [220

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171 In a related context, a Court of Appeal has spoke of jurors as "well meaning but temporary visitors in a foreign country attempting to comprehend a foreign language." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 [240 Cal.Rptr. 516].)

Cal.Rptr. 637], revd. on other grounds (1987) 479 U.S. 538.) The United States Supreme Court's decisions in *McKoy v. North Carolina, supra,* 494 U.S. 433, 442-443, and *Mills v. Maryland, supra*, 486 U.S. 367, are predicated on the fact that different jurors will assign different weights to the same evidence. (*See also Stone v. United States* (6th Cir. 1940) 113 F.2d 70, 77 ["If a single juror is improperly influenced, the verdict is as unfair as if all were"], quoted in *United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603; *People v. Cato* (1988) 46 Cal.3d 1035, 1057 [251 Cal.Rptr. 757] [no unanimity requirement for prior criminal activity under aggravating factor (b); some jurors may find and consider a particular incident which others do not]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1111-1112 [269 Cal.Rptr. 530] [exposure of a single juror to prejudicial extrajudicial information requires reversal].)

Intrusion of improper considerations into a discretionary sentencing decision usually requires reversal of the sentence, even in noncapital sentencing by a judge. (E.g., *People v. Morton* (1953) 41 Cal.2d 536, 545 [261 P.2d 523]; *see* also *United States v. Tucker* (1972) 404 U.S. 443, 447-449 [30 L.Ed.2d 592, 92 S.Ct. 589]; *People v. Smith* (1980) 101 Cal.App.3d 964, 967-968 [161 Cal.Rptr. 787]; *People v. Lawson* (1980) 107 Cal.App.3d 748, 758 [165 Cal.Rptr. 764]; *People v. Brown* (1980) 110 Cal.App.3d 24, 41 [167 Cal.Rptr. 557].) These cases recognize that determining whether improper considerations affect the sentencing decision is impossible. The resultant uncertainty compels reversal. A fortiori, a conclusion of harmlessness is far less appropriate, and less likely, in a capital case in which the jury imposes sentence.

Use of a standard more forgiving of error than the one adopted in *People v. Hamilton, supra*, 60 Cal.2d at pp. 135-137, would also violate a defendant's federal due process rights under *Hicks v. Oklahoma, supra,* 447 U.S. 343. The *Hamilton* rule itself is part of the procedural scheme created by California law for

judicial deprivation of life, so under the doctrine of *Hicks*, a California defendant's right to the benefit and protection of the *Hamilton* rule is protected by the federal due process clause.

Hicks dictates this result for a second reason as well. Although *Hicks* does not use the phrase "harmless error," its holding is that an excessively speculative harmless error analysis, or one which relies on the mere fact that the result could have been the same in the absence of error, establishes a federal due process violation. *Hicks* rose out of a jury sentencing scheme for non-capital cases. Hicks' jury was instructed that the mandatory sentence for his offense was 40 years, so that was the term they imposed. A subsequent decision held that the jury was entitled to impose any sentence of ten or more years. The state appellate court held that Hicks was not prejudiced by the mandatory-40-years instruction, because a properly instructed jury could have fixed the sentence at 40 years. The United States Supreme Court reversed, saying:

> In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law. (*Id.* at p. 346; *see also Fetterly v. Paskett* (9th Cir. 1994) 15 F.3d 1472, 1479-1480 (conc. opn. of Trott, J.).)

People v. Hines and *People v. Hamilton* teach that a conclusion of harmless penalty phase error in any but an "extraordinary" case would be what *Hicks* calls a "frail conjecture." *Hicks* teaches that such a lax harmless error standard violates the Fourteenth Amendment due process clause. The narrow holding of *Hicks*, as well as its broader principle concerning state-created liberty interests, dictates as a matter of federal constitutional law the extremely strict standard for assessing penalty phase prejudice which this Court adopted in *People v. Hamilton* and *People v. Hines*.

Clemons v. Mississippi, supra, 494 U.S. at pp. 753-754, makes a different but related point: Affirmance on the basis that penalty phase error is harmless requires a "detailed explanation" from the reviewing court, not merely an unexplained assertion that the error was harmless.[172] (*See also Sochor v. Florida, supra,* 504 U.S. 527, 541 (conc. opn. of O'Connor, J.); *Pensinger v. California* (1991) 502 U.S. 930 [116 L.Ed.2d 290, 112 S.Ct. 351] (dis. opn. of O'Connor and Kennedy, J.)

D. This Court's Assessment of the Strength of the Evidence in Aggravation Cannot be Relied Upon to Conclude that Penalty Phase Error is Harmless

By its very terms, *Chapman* precludes a court from finding harmlessness based simply "upon [its own] view of 'overwhelming evidence.'" (*People v. Sims* (1993) 5 Cal.4th 405, 476 [20 Cal.Rptr.2d 537] (dis. opn. of Mosk, J.), quoting *Chapman v. California, supra*, 386 U.S. at p. 23.)

A conclusion by this Court that the strength of the evidence in aggravation renders the penalty phase errors harmless would violate federal constitutional principles. Such a result would essentially be a mandatory death penalty: It would amount to a conclusion that any trier of fact presented with this aggravating evidence would necessarily return a verdict of death. It would have the same effect as the statutory scheme held invalid in *Sumner v. Shuman* (1987) 483 U.S. 66 [97 L.Ed.2d 56, 107 S.Ct. 2716], providing for a mandatory death penalty for murder when committed by a life-term prisoner. In *Sumner* the Court held that under the Eighth and Fourteenth Amendments, no aggravating fact or combination of aggravating facts justifies a refusal to consider mitigating evidence. Very significant mitigating evidence was presented to the jury in this case. If penalty

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[172] The principal holding of *Clemons*, that a state may, consistent with the Constitution, authorize appellate courts to reweigh aggravating and mitigating circumstances, has no application to California cases since California law makes no provision for such reweighing.

phase error could nevertheless be found harmless on a theory of overwhelming aggravating evidence, then, a fortiori, the invalidity of the statute in *Sumner* could have been found to be harmless error based on the aggravating force of perhaps the most powerful aggravating evidence imaginable: that the defendant was a life-term prisoner when he committed murder.

Even apart from the legal considerations, this was a close case at penalty phase. This was not a case in which the relative strength of the evidence in aggravation would warrant a conclusion that errors were harmless. This case was particularly close because there was significant affirmative evidence in mitigation, as discussed in Part *A*.

The jury plainly considered the case a close one, as demonstrated by the facts and authority cited in Argument *XI, C,* at page 153 and incorporated here where the deliberations lasted two days for a penalty phase tried over the course of four days. (CT 10878-10880, 10888-10891, 10894-10895; see *People v. Murtishaw, supra,* 29 Cal.3d 773, 775; *Hamilton v. Vasquez, supra,* 17 F.3d 1149, 1163; *Mak v. Blodgett, supra*, 970 F.2d at pp. 620-622.)

E. Summary

"The attempt to gauge prejudice at the penalty phase is always a hazardous task." (*People v. Easley, supra,* 34 Cal.3d 858, 885.) Here, commencing at the case's inception, the prosecution's case for the special circumstance was built on sand being premised on insufficient evidence as a matter of law and a defective concept for the defense of consent. These errors were exacerbated by irrelevant suggestions of gang affiliation and an improper characterization of appellant for a penchant for the manner in which the victim was killed.

These errors were compounded in the penalty phase by the improper introduction of hearsay to substantiate the only other criminal act committed by appellant after he turned 18 and the inaccurate and inadequate instructions to the

jury at the conclusion of the penalty phase as well as the numerous systemic deficiencies in California's death penalty process which violate not only the state and federal constitutions, but also the provisions of numerous treaties and customary international law. The cumulative effect of these errors rendered the judgment here highly suspect and unreliable.

These errors variously deprived appellant of his rights to liberty, a fair trial, an unbiased jury, effective assistance of counsel, due process, present a defense, heightened capital case due process, a reliable and non-arbitrary determination of penalty, and equal protection under the law, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and the analogous provisions of the California Constitution (Art. I, §§ 1, 7, 15, 16, 17). Taken together, these errors undoubtedly produced a fundamentally unfair trial setting and a new trial is required, due to the cumulative error. (*See Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Derden v. McNeel* (5th Cir. 1992) 978 F.2d 1453; *cf. Taylor v. Kennedy, supra,* 436 U.S. 478 [several flaws in state court proceedings combine to create reversible federal constitutional error].) Certainly it cannot be said that the errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 341.)

For reasons of both fact and law, the numerous errors committed during appellant's trial cannot be concluded to be harmless. Because the jury made no findings in the penalty phase, it is impossible to tell whether the verdict in the present case was based on the statutory factors listed in the Penal Code, or on the improper conclusion that no mitigation or a single factor in mitigation were insufficient to preclude death as the sentencing option. Because "the jury may conceivably [have] rest[ed] the death penalty upon any piece of introduced data or any one factor in this welter of matter," (*People v. Hines, supra,* at p. 169), this Court can neither know nor evaluate "[t]he precise point which prompt[ed] the

penalty in the mind of any one juror," and "this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner." (*Ibid.*) Furthermore, as the Eleventh Circuit stated in *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1269,

> [T]he rational appellate review of capital sentencing decisions contemplated by *Furman* and its progeny requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had it correctly applied the law. Such post hoc justification of a sentencing decision, which depends on a rationale distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities. (*Ibid.*)

The cumulative effect of the foregoing errors and others detailed in this brief was prejudicial to appellant and requires reversal of the penalty judgment.

As demonstrated, comparison of the length of the jury deliberations at the conclusion of the penalty phase with other capital cases compels the conclusion that this was a very close case. In a close case any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Zemavasky, supra,* 20 Cal.2d 56, 62; *People v. Von Villas, supra,* 11 Cal.App.4th 175, 249].) In these circumstances *Chapman v. California, supra,* 386 U.S. 18 can not be satisfied. (*People v. Filson, supra,* 22 CA4th 1841, 1852.) The state cannot prove beyond a reasonable doubt that the error did not contribute to the jury's sentencing decision and appellant's sentence of death must be reversed.

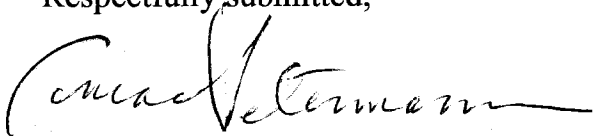
Thus, in the event that this court does not overturn the guilty verdict, the judgment of death must be reversed.

CONCLUSION

For the foregoing reasons, appellant's convictions and death sentence must be reversed.

Dated October 23, 2006

Respectfully submitted,



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DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served *APPELLANT'S OPENING BRIEF* by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 28, 2006, at Ojai, California.

Conrad Petermann