Number S081148
(Superior Court Number FVI-04195)

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

MARTIN CARL JENNINGS,

Defendant/Appellant.

On Automatic Appeal from a Judgment of Death
Rendered in the Superior Court of the County of San Bernardino

Hon. Rufus L. Yent, Judge

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

Number S081148
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Defendant/Appellant.	)

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

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

An information was filed March 28, 1996, alleging that on or about February 4, 1996, Martin Carl Jennings (appe1lant) and Michelle Lynn Jennings committed murder (Pen. Code, § 187) against Arthur Jennings. (C.T. 22.)

An amended information was filed June 7, 1996, adding two special circumstance allegations, to wit, murder by the administration of poison (Pen. Code, § 190.2, subd. (a)(19)), and

intentional murder involving the infliction of torture (*id*, subd. (a)(18)). (C.T. 232.) On the same date the prosecution notified the court and the defendants of its intent to seek the death penalty against both defendants. (C.T. 234; 1 R.T. 32-37.)

In September, 1997, both defendants moved to sever the trials from one another. (C.T. 259-295, 376-377, 1187-1197.) After hearing argument on the severance motions, the court denied them on March 20, 1998. (1 R.T. 103-152, passim.)

The cases were tried to a single jury. The voir dire occurred between November 9, 1998, and January 11, 1999. (C.T. 394-430; R.T. 233-2279.) The guilt trial began on March 8, 1999, and continued until April 19, 1999. (C.T. 433-472; R.T. 2281-3221.)

In the guilt phase the jury found both defendants guilty of first degree murder, and found the "poison" special circumstance allegation not true as to both defendants. The jury found the "torture" special circumstance true as to appellant, and deadlocked on this issue as to the co-defendant. (C.T. 471-477; R.T. 3217.)

The case proceeded to a penalty phase as to appellant only. The penalty trial started on May 7, 1999, and continued until May 20, 1999. (C.T. 625-635, 679-684; R.T. 3223-3526.) On May 20, 1999, the jury returned a verdict of death. (C.T. 683-685; R.T. 3524-3526.)

On June 28, 1999, appellant filed a motion for new trial, with an alternate request for reduction of penalty under Penal

Code section 190.4, subdivision (e). (C.T. 810; see also C.T. 822 [opposition], C.T. 832 [defense reply].)

On July 22, 1999, the court heard argument on the new trial motion, and denied it. (C.T. 835; R.T. 3545-3551.) The court proceeded to consider the application for modification of the sentence (Pen. Code, § 190.4, subd. (e)), and denied it also. (C.T. 835; R.T. 3552-3564.)

The court then pronounced judgment and imposed a sentence of death, granting credit for time served of 1,451 days. (C.T. 835, 875-878; R.T. 3573-3578.)

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STATEMENT OF FACTS

A. Introduction / Summary

In late 1995 appellant and Michelle Jennings were a married couple, 35 years old and 19 years old, respectively, who lived in a trailer near Apple Valley. The trailer had no utility links and no water service. The Jenningses had a newborn baby, Pearl. They also had a son, Arthur, who was born when Michelle was 14 years old. Largely because of Michelle's age at the time, the Jenningses had given Arthur to appellant's mother to raise when he was a baby. The mother died not long afterward, and Arthur ended up in the custody of appellant's half-sister Wilma, who lived in Montana.

After Pearl was born the Jenningses decided it was time to take custody of Arthur again. Wilma brought him to live with them. Things went harmoniously for a time, but not long after Arthur rejoined the household the parent-child relationship became pathological. Arthur was unhappy and was prone to disobedience. He was not properly toilet trained. The Jenningses, both of whom had been seriously abused as children themselves, began to address what they perceived as misconduct by Arthur with treatment that could only be described as child abuse. They inflicted a number of bruises and at least one serious burn as disciplinary measures. Also, over time Arthur lost a considerable amount of his body weight.

By the end of January, 1996, Arthur had become seriously debilitated. On at least one occasion the Jenningses discussed killing him. There was also evidence that they considered taking lawful steps to relieve themselves of the responsibility of raising him, but did not do so because it was manifest that he had been abused. Apparently intending to help Arthur, the Jenningses administered some small doses of pain killers that had been prescribed for appellant as a result of surgery he had undergone recently. On one occasion Michelle gave Arthur some over-the-counter sleeping aids.

During the first weekend in February, 1996, while Michelle was away from the trailer appellant became involved in a kissing session with a neighbor woman. Arthur came out of his bedroom and observed them, and it made appellant angry. He hit Arthur in the head with a fireplace shovel and put him back to bed. Arthur died not long afterward. But the shovel blow was not a cause of death. The main cause of death was the two over-the-counter sleeping pills which Michelle had administered earlier that day. Other drugs in Arthur's system, and malnutrition, were also factors in his death.

The Jenningses initially tried to evade responsibility for Arthur's death. They buried the body in a shallow grave, then shortly afterward exhumed it and put it in a mine shaft. About two days after Arthur died both appellant and Michelle confessed to the crime and led police to the body.

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B. Prosecution Guilt Phase Case-in-Chief Evidence

1. Observations of and about Arthur Jennings during the last weeks of his life

Wilma Sharp, appellant's half-sister, took custody of the Jenningses' baby, Arthur, when he was 4-1/2 months old. The baby had been born prematurely, and he had a lot of medical problems. He was pale, underweight, and sickly. Wilma perceived that Michelle, who was only 14, was not old enough mentally to raise a child.[1] As Arthur developed he had speech problems and motor problems, but the problems were mostly corrected by the time he approached his fifth year. (R.T. 2313-2315.)

In about November, 1995, appellant called Wilma. He told her he and Michelle had a new child, and he had a job, and they wanted their son back. Appellant paid for Wilma to bring Arthur from Montana to Victorville. Arthur was in good health at that time. He weighed 64 pounds. (R.T. 2316.)

Michelle and appellant's father, Art, Sr., met Wilma and Arthur at the bus station on November 8 or 9, and took her and Arthur to the Jenningses' trailer complex. Wilma thought the place was a dump, with a lot of junk around, but it was clean and neat inside. Wilma stayed for 10 days. During that time they went to Disneyland, went to swap meets, and ate out. Arthur was happy; it was a very happy time. (R.T. 2317-2318.)

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[1] Michelle was administered an IQ test as an adult, during the preparation for this trial, and her IQ was measured at 79, placing her in the eighth percentile of all adults.

Wilma explained Arthur's problems to the Jenningses: Arthur sometimes wet the bed, sometimes messed his pants. He was very strong-willed, and sometimes would run away to a neighbor's house. He was scared of the dark. Wilma told them she would take both children back to Montana if they became too much trouble. But she never heard from the Jenningses again after she left. (R.T. 2318-2321.)

Wilma testified that Art, Sr., and appellant's mother had engaged in serious physical and sexual abuse of all their children, including appellant. Art, Sr., had raped Wilma. (R.T. 2327-2328.)

A number of people in the area where the Jenningses lived saw Arthur during late 1995 and early 1996.

Bernard Romaine saw Arthur with Art Jennings, Sr., one day, and the little boy looked pretty beat up. He had black eyes and a bandaged hand that looked like it had been burned. One of his eyes appeared to need medical attention. He was very thin, and seemed undernourished. (R.T. 2463-2464.)

Pauline Morris was first introduced to Arthur in late 1995, and he looked fine. When she saw him in January, 1996, he had bandages on his head and on his hands, dried blood on his face, and blood in the whites of his eyes. He was very thin. Art, Sr., told her that Arthur had been injured when he fell against a wood stove. He gave Arthur some milk, and Arthur swigged it down. Morris reported what she saw to the children's protective service that same day. A couple of weeks later the office

contacted Morris and reported that they had not followed up on her complaint, although they had gone out to the area and taken a child away from a neighbor of the Jenningses. (R.T. 2470-2478.)

Louis Blackwood met Arthur on the day the child came to live with the Jenningses. He seemed to be a typical, healthy four-year-old. Blackwood saw Arthur again on Christmas. Arthur ate two plates of food, and asked for a third. He had a bandage on his hand that day. Another time Blackwood observed a bruise on the side of Arthur's face. Michelle told Blackwood that Arthur had fallen. The hand injury had something to do with the wood stove or something like that. The last time Blackwood saw the boy, in the back seat of a car, he looked "whipped," i.e., quiet, super quiet. He did not look very happy. A few days before Arthur was reported missing, appellant told Blackwood that Arthur had run off the previous night, and appellant had looked for him for two to three hours. Appellant finally found him behind a bush in the desert. (R.T. 2515-2521.)

Phillip Orand also saw Arthur in November, 1995, and thought he looked fine. But a few weeks later Orand visited the Jenningses with his brother, and he noted that Arthur had two black eyes and some kind of mark on his mouth. Appellant said Michelle had knocked Arthur out because he had hit her or kicked her, or something. Orand's brother, Kevin, recalled that Michelle had said, "I socked the damn little brat between the eyes, knocked him out." (R.T. 2660-2664, 2676-2678.)

Cora Mae Grein, a neighbor of the Jenningses, testified. About two days before Arthur was reported missing, Grein visited the Jenningses' trailer to get some cigarettes. She and appellant started watching a movie. Michelle was not there. Arthur was in his room. Appellant tried to kiss Grein, and she pushed him away and walked out, returning to her own trailer. When appellant made this attempt, Arthur came out of his room. Appellant told him to go back to his room. As Arthur started to go, appellant grabbed him and hit him with a shovel. Appellant picked Arthur up and threw him on the bed. Appellant told Grein that if she said anything she would see the bottom of a mine shaft. (R.T. 2682-2683.)

Previously Grein had only seen Arthur struck one time. On that occasion appellant told Arthur to stand in the front yard and hold a board over his head. Arthur dropped the board, and appellant hit him. (R.T. 2683.)

Grein acknowledged that her children had been taken from her by the Department of Children's Services, and she had heard rumors that it had been the Jenningses who turned her in. The Department of Children's Services people said the reason was that the Greins' trailer did not have proper water or heat. They had to haul water in, and had only propane for heat. (R.T. 2688-2690.)

A social services provider for the San Bernardino County Department of Children's Services confirmed that it had been Michelle Jennings who reported concerns about the Greins'

treatment of their children. Michelle made the call on January 5, 1996. Michelle reported that the Greins had no heat, no electricity, no water, and little food. Michelle said she herself took good care of her children, and the Greins did not deserve theirs. Michelle called back about the Greins several times, and eventually, on January 18, the worker did go out and take the Grein child. (R.T. 2694-2700.)

In that first call Michelle asked if the worker had any ideas about an adoptive home for her own five-year-old son. Michelle said the boy had been living with her for only about two months, and she could not manage him. The worker suggested possibly returning the boy to the relative with whom he had lived previously, or possibly engaging in some therapy. She also gave Michelle the phone number of an adoption worker. Michelle came to the DPS office on January 19, in connection with the Grein case, and on that occasion again inquired about adopting out her son. During that visit the worker noted that Michelle's baby daughter, Pearl, seemed well taken care of and happy, and very bonded to both parents. Both Jenningses asked for help in dealing with the five-year-old boy during that office visit. (R.T. 2700-2705.)

2. Testimony of police officers

On February 6, 1996, appellant reported to police that Arthur was missing. Appellant had last seen Arthur in his bed,

at about 2:00 a.m., and had noticed that Arthur was missing at about 6:00 a.m. Michelle reported that she had last seen Arthur at about 10:30 p.m. the previous night. (R.T. 2336-2344.)

A little later on February 6 appellant and Michelle acknowledged, in separate statements to police, that Arthur had died and they had put his body in an old mine shaft. They led police to the site, and officers recovered the body. (R.T. 2379-2380, 2406-2416, 2430.) Michelle said Arthur had been dead for two days, and acknowledged that she had bruised his face badly enough that she had been putting make-up on him to disguise the bruises when he went out to play. (R.T. 2387, 2389.)

Officers subsequently searched the Jennings property and trailer located at 22300 Flint Road in Apple Valley. The trailer had no electricity and no running water. Officers observed apparent blood in Arthur's bedroom. They seized a gun and some quantities of pills and medications — Unisom, Ibuprofen, Vicodin (i.e., Hydrocodone), and Valium (i.e., Diazepam). There were prescriptions in appellant's name for all the medications other than the over-the-counter Unisom sleeping pills. The Unisom package was a 32-pill box, and 30 of the pills remained in the box. There were also some pills remaining in the other containers. Officers also seized a fireplace shovel. (R.T. 2433-2461, passim.)

A criminalist testified about some 12 areas of blood spatter in Arthur's bedroom. Most of them reflected medium-velocity incidents, and a few reflected low-velocity incidents. There had

been no high-velocity events, such as gunshots or blows with a baseball bat. The criminalist could not say how many actual separate events were involved, or when they occurred. All of the events could have occurred within a few minutes of one another. (R.T. 2482-2511, passim.)

3. Forensic evidence

Frank Sheridan, M.D., performed the autopsy on Arthur. Most of Dr. Sheridan's testimony concerned physical injuries Arthur had suffered (*infra*); however, the main cause of death was acute drug toxicity. By far the main contributor was the antihistamine doxylamine, which goes under the trade name of Unisom. Other contributors were the pain killers hydrocodone, which has the trade name Vicodin, and diazepam, which has the trade name Valium. Dr. Sheridan also identified acute and chronic physical abuse and neglect as contributing causes. (R.T. 2603.)

Arthur was 46 inches tall and weighed 35 pounds. There were numerous injuries to his body: There was bruising and abrasion around the tip of the nose, and under the nose. There was bruising of the inner side of the lips, and the fenulum was torn. The tongue was slightly bruised. There were two injuries to the scalp — one of them healed and one of them fresh. The healed one was a cut that had been sutured. The fresh one occurred either at the time of death or shortly beforehand. There was a possible bruise to the chest. The right arm was very thin, and

there was a healing burn on the right palm. This had been a severe burn, causing a lot of tissue damage. There was possible bruising to the shoulder, and some bruising and an abrasion to the elbow. The left arm and hand had some abrasions. The legs were very thin, with no fat and very little muscle. There was a scar on the back of the right thigh. There were quite a lot of abrasions on the back. There was hardly any fat inside the skin. The internal organs were normal. There was no food in the stomach. There had been some sort of blow to the front of the head which occurred shortly before death. There was a subdural hemorrhage — i.e., bleeding between the brain lining and the brain — which was not fresh. There was hemorrhage around the optic nerves. These head injuries together indicated an acceleration/deceleration injury, such as violent shaking. (R.T. 2571-2595.)

The absence of fat tissue was noteworthy. The emaciation was very severe. There was no medical reason why the child would have been not eating or losing weight. There was patchy pneumonia in the lungs which was of recent origin. The pneumonia was probably the result of susceptibility to infections caused by emaciation. Microscopic examination confirmed the one head injury was weeks or a month or more old, and the other two head injuries were fresh, occurring in the last six hours before death. The lip injury was also fresh. The right arm bruises were fresh. The subdural hemorrhage was 10 days to a few weeks old, as was the injury around the optic nerve. (R.T. 2598-2608.)

The amounts of Vicodin and Valium were not toxic on their own, and these drugs played a minor role, if any, in the death. Unisom, the drug that was the main cause of death, can cause seizures in children. If taken in a large enough dose it causes cessation of breathing. (R.T. 2602, 2609.)

The parties stipulated that if called to testify, toxicologist Randall Baselt would say he reviewed relevant documents, and concluded that the drug concentrations were sufficient to account for the death of the child; that the two Unisom tablets could have caused death in the absence of the other two drugs; the Vicodin was a significant contributor; and the Valium played a relatively minor role. (R.T. 2563-2566.)

4. The defendants' recorded statement

In the late afternoon of February 8, 1996, two sheriff's detectives conducted a lengthy video- and audio-taped interview of both defendants.[2] The tapes were played to the jury. (R.T. 2727-2734). The central focus of the detectives in conducting the interview was to find out the truth about the blow to Arthur's head which had occurred not long before he died; this was apparently thought to be the cause of death at the time of the interview.

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[2] The tapes were entered in evidence as exhibits 132, 133, and 136. Transcripts of the interview, identified as exhibits 134 and 135, are included in the clerk's transcript on appeal at pages 691-809. References in this Statement of Facts denote the clerk's transcript page numbers.

Appellant said that both parents had disciplined Arthur, and both had probably been overzealous. But Arthur had died when appellant was there and Michelle was not. Appellant administered CPR, unsuccessfully. Both defendants acknowledged having talked of getting rid of Arthur, perhaps killing him. Michelle had suggested sending him back to Wilma. (C.T. 693-694.)

Michelle asked appellant if he had told police she hit Arthur with a shovel. Appellant said no, no one hit him with a shovel. Arthur hit his head on the kitchen table. Then appellant said Arthur hit his head against the shovel. (C.T. 695-698.)

Appellant acknowledged having gone driving, the previous Friday, looking for a place to dump Arthur's body. Michelle said appellant had not told her that; she thought they were just driving. Appellant said he was looking for a place to dump the body because he was scared. Neither of them had actually killed Arthur. They didn't mean for him to die. The autopsy would show Vicodin, some prescription drugs, which they gave Arthur in an effort to get him better. Appellant had not thought about the difference in size between himself and Arthur, although he did cut the pill or pills in half. (C.T. 699-705.)[3]

Michelle interjected that she had lied when she previously said she gave Arthur many of the pills. She lied to protect

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[3] There is a nearly identical transcript of the interview located in the clerk's transcript at pages 905-1017. One difference between the two is that in the alternate transcript appellant is quoted as saying that Arthur was starting to do better when given the drugs. (C.T. 917.)

"him" (appellant). In fact, she had only given Arthur one Valium pill and some Sominex [*sic*] sleeping pills. She reminded appellant of a time he threw Arthur and caused a bruise on his head. Appellant denied having thrown Arthur. Arthur was walking up the stairs and his foot caught and he fell. (C.T. 705-706.)

Michelle said the only things she had done were to spank Arthur, and put him in the corner. And when he had fits she smacked him in the face. The last couple of days appellant had gotten carried away, and had hit Arthur in the face with his fist. Appellant protested that he did not punch Arthur, he slapped him. Michelle countered that she had seen appellant punch Arthur. Appellant then said he honestly did not remember. He acknowledged that he probably had been abusive. (C.T. 706-707.)

Michelle then asked appellant to recall having kicked Arthur, slugged him, pulled his feet out from under him, and held his hand over the stove. Appellant acknowledged having done all these things, having been abusive. But he did not mean for Arthur to die, even if the things he had done did cause his death. (C.T. 707-710.)

Michelle accused appellant of having, on the previous Friday (February 2), reacted to one of Arthur's fits by bouncing Arthur off the wall and hitting him in the face. Appellant said he shook Arthur, but did not punch him. Arthur's head did hit the wall once or twice. Michelle did try to stop appellant and he pushed her away at first, but then he caught his senses and stopped. (C.T. 710-711.)

Michelle brought up an incident in which appellant put duct tape over Arthur's mouth and hands. Appellant acknowledged it, saying that Arthur had fits, like epileptic fits, and once got so bad that he almost took out his own eyes with his hands. Appellant had burned Arthur's sheets because they had blood on them, and he (appellant) was scared. He knew he had done wrong, and wondered aloud if he could live with this. (C.T. 711-717.)

Appellant said that Michelle went along with everything because she was afraid. He had threatened to beat her up, and told her that if they did not do what they needed to do, they would lose Pearl and his Dad and everybody. (C.T. 717-718.)

Again appellant acknowledged that he was going to have to pay for this, but insisted that Arthur fell down on the shovel. (C.T. 720.) He had talked about killing Arthur, and maybe he was responsible for Arthur's death, but he had not meant to kill him. He had changed his mind. He had given Arthur CPR, tried to save his life. Arthur had apparently fallen from the stairs up to the front door of the trailer. He was dizzy. Appellant gave him time out for bed-wetting, and made him stand in the corner. Then Arthur fell and hit his head on the shovel. (C.T. 724-728.)

One detective indicated that appellant had previously said he put Arthur to bed, Arthur complained of a headache, appellant gave him tylenol and milk, and later appellant discovered him there, not breathing. Appellant did not comment. (C.T. 730.)

The detectives continued to insinuate that appellant had hit Arthur with the shovel, and appellant continued to deny it.

During this discussion it emerged that previously Arthur had suffered a cut to his head, and appellant had stitched it himself. After a while appellant began to assert that he could not remember whether or not he had hit Arthur with the shovel. (C.T. 731-738.)

The detectives turned to the subject of the burned hand. Michelle volunteered that on Christmas, Arthur had been peeing the bed, lying, not listening, and appellant got tired of spanking him. Appellant took Arthur to the kitchen, turned on the burner, and held Arthur's hand over it. Appellant acknowledged that this was possible. (R.T. 738-739.)

Questions were asked about appellant's having said they did not need to put Arthur on their insurance policy because he would not be in the house very long. Appellant acknowledged that, but said he was referring to the idea of sending Arthur back to Wilma. In fact, appellant said, he was trying to heal him up so they could send him back. (C.T. 739.)

After a discussion of the decision to bury Arthur, then exhume the body and put it down the mine shaft, appellant repeated that he honestly had not wanted Arthur to die. He knew it did not look like it, but that was the truth. He thought Arthur was getting better. (C.T. 744-745.) Appellant knew everything he had done was wrong, and that he would probably get the death penalty. (C.T. 746.)

One detective asked if he was going to find a bullet in Arthur. Appellant said no, they would find some prescription

drugs. Appellant had tried to save his life and did not want him to die. The drugs may or may not have killed Arthur, but appellant gave them to him in an effort to make him better. (C.T. 747-748.)

At this point the detectives left the room. The defendants conversed between themselves. Appellant said he would take the blame for it, and he would probably go to death row. Michelle said she had told the detectives that appellant threatened her with a gun. Appellant said he had not; Michelle asked him please to do this for her. Appellant said he would cop to a manslaughter charge right now. Michelle asked him again to do this for her, and he agreed; he would have them type up a confession and would sign it. Appellant then said he had led them to the body, and if he had not, they would never have found the son of a bitch. He had passed a lie detector test, because he could memory block. (C.T. 750-758.)

The detectives returned and asked which of the defendants had killed Arthur. Appellant said Arthur just died; he had not intentionally done it, even if he had caused the death by the abuse and the medication. (C.T. 761-762.)

Again appellant was asked if he hit Arthur with the shovel, or with a board, a stick, or a wrench; again appellant said no. The detectives asked appellant if he had tried to suffocate Arthur. Appellant said maybe. (C.T. 764-765.)

The detectives returned to the subject of the shovel blow. Appellant volunteered that Cora was upset with Arthur. Asked if

Cora hit Arthur with it, appellant said he did not think so. But Cora had come to the house, to borrow cigarettes. At this point one detective took Michelle out of the room, and the other detective asked appellant if he had been having an affair with Cora.[4] Appellant said no, they were not doing anything. Then he acknowledged that they had been kissing. But things had happened as the detective guessed. Arthur came out of his room, Cora became very angry, and Cora grabbed the fireplace shovel and hit Arthur with it on the back of his head. Appellant told Cora to get out of the house. Arthur did not die right there. He laid back down in his bed and died about an hour later. (C.T. 774-781, 788-789, 806-808.)

The detective asked if appellant wasn't putting Cora in his own place in the story. Appellant seemed to admit it. Then he said "I hit him; I hit him hard, but . . .."[5] Appellant had hit Arthur out of anger and fear. (C.T. 789-792.)

The detective asked if this constituted appellant putting into full effect the plan (to kill Arthur) he had spoken of two weeks earlier. Appellant said no, actually, no. He took Arthur to the bathroom and cleaned his head off. He laid Arthur back down. He administered CPR. (C.T. 792.)

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[4] There was a gap in the videotape sequence, when one tape ran out, at this point. The audiotape equipment continued to run during this period. The transcript of the portion of the interview that was recorded only on audiotape is located at pages 806-809 of the clerk's transcript.

[5] The alternate transcript reads, " . . . I *didn't* hit him hard" (C.T. 1003, emph. added.).

The detective asked if it wasn't the case that after delivering the shovel blow, appellant knew it was damage that could not be fixed, and unless Arthur died, appellant was screwed. Appellant answered, half and half. The detective suggested that appellant now had to finish Arthur off. Appellant said, "I guess true. God." (C.T. 792-793.)

The detective recited a version in which Arthur came out of the bedroom, caught appellant with Cora, and appellant knew he had to finish Arthur off, so he hit Arthur with the shovel, and the cleaning off of the injury in the bathroom was irrelevant. Appellant replied, "I guess you're right. Oh Jesus Christ. Oh my God." (C.T. 797.)

The detective asked if appellant helped Arthur along by suffocating him as he laid in bed, or by hitting him again, or by shoveling medication into him. Appellant said no. (C.T. 798.)

At this point Michelle was brought back into the room. Appellant acknowledged to her that Arthur had caught him and Cora kissing, and appellant had hit him in the back of the head with the shovel. Then appellant took him to the bathroom, cleaned off the blood, and put him back to bed. Appellant gave Arthur some tylenol and milk. Arthur died a little while later. (C.T. 800-801.)

The detectives left the room. Michelle said "thank you" to appellant. Appellant said he was just trying to help her. He was now going to try to black out, as though he was crazy. Michelle asked why he had not told her this story, and he replied

that he had made it up. What he had just said was as good as a confession. He was doing this for Michelle because he loved her and Pearl. (C.T. 801-804.)

C. Appellant's Guilt Phase Evidence

The only witness for appellant's defense at the guilt phase was Joseph Lantz, a clinical psychologist who had interviewed and tested appellant extensively. (R.T. 2778 et. seq.)

Appellant's score on a nonverbal intelligence test put him in the 27th percentile. On a card-sorting test appellant scored in the first percentile, meaning he is severely impaired with respect to using the intelligence he has to solve problems. Appellant is the sort who keeps working the same plan even when all evidence tells him it is not working. (R.T. 2779.)

Other tests showed appellant has significant deficits in terms of personality structures and makeup and current emotional life. Dr. Lantz's diagnosis was personality disorder, which means a defect in personality development, a tendency to see things differently from most other people. (R.T. 2780-2794.)

Appellant grew up in horrific circumstances. There were severe difficulties with parental abuse. The home furnished an isolated emotional climate where appellant had to fend for himself to survive. He did not learn how to deal with other people, empathize with others, manage anger, or manage or

understand his own emotional life. Appellant showed some antisocial traits and some narcissistic traits. He is severely disabled in the sense of capacity to empathize. He ended up as a long-distance trucker, living a nomadic lifestyle. He married a 13-year-old girl who herself had been very severely abused. (R.T. 2794-2796.)

A person who is very severely abused as a child is much more at risk as an adult to perpetuate that pattern of abuse. And appellant became an angry, hostile, resentful man who uses his anger to get what wants from others — a very impulsive, explosive person. (R.T. 2797-2800.)

Appellant's mother had 14 to 16 children, none of whom she parented. She once said in court, when some of the children taken away, "Go ahead and take the bastards away." She physically abused the children, and stood by while a series of men abused them, too. She offered no protection whatsoever. (R.T. 2821.)

The tape of the interview with the two defendants (*supra*) reveals a very sick relationship. Neither defendant manifested concern or shock about the child, and neither of them seemed to be really aware of what the circumstances were. This is very typical of the kind of personality disorder appellant has. He has no empathy, cannot feel the pain of another, and cannot plan things out. The relationship between appellant and Arthur was like two children fighting. (R.T. 2800-2804.)

Appellant is not psychotic and does have a grasp of reality. (R.T. 2804, 2825.)

Dr. Lantz noted that Michelle had given birth to Arthur at age 14. The baby was two months premature, had cardiac problems, and was hospitalized for 30 days. The normal mother bonding did not happen; Michelle was just a child herself, a severely abused and horrifically damaged one. She had been raped many times by her own father, even impregnated by him. The first few weeks when Arthur was back with his parents were filled with joy and happiness. But shortly before that appellant had suffered an accident at work which resulted in surgery, and the taking of pain killers. Arthur did not adjust well to this situation, and did not bond with Michelle. He had no experience with being struck or abused or yelled at. The ways he had learned to get his own way were the worst possible things to do in this environment. In turn, the defendants' response of slapping, shouting, yelling, and forcing was the worst possible scenario for Arthur. (R.T. 2806-2817.)

In Dr. Lantz's opinion, both defendants knew something terrible was happening with Arthur, and appellant made up his mind the child had to go. But the medications reflected an attempt to provide some mercy or relief. Appellant's likely thinking was that he himself was in pain, and the medications were helping him, so they would help Arthur, too. In forming his opinion Dr. Lantz discounted appellant's self-serving statements,

but he did take into account the large number of pills that had not been administered to Arthur. The defendants had not held back in administering physical abuse, yet they had held back with the pills. Had there been any intention to kill Arthur with the pills, appellant would not have held back with them. (R.T. 2823, 2849.)

D. The Co-Defendant's Guilt Phase Evidence

An adoption services worker from the San Bernardino County Department of Social Services received a call from Michelle Jennings on January 18, 1996, in which Michelle said she had recently gotten a child back in the home, she was unable to manage him, and she wanted to discuss putting him up for adoption. By the end of the conversation it was agreed that Michelle would consider sending the boy back to the aunt with whom he had lived before, and would call back if that did not work out. Michelle never called back. (R.T. 2852-2856.)

Nancy Kaser-Boyd, a clinical psychologist, testified about her evaluation of Michelle. Michelle had grown up in a family that lived mostly in cheap motels. The father abused the mother and his several daughters. On Michelle's 12th birthday the father raped her, as a "birthday present." The sexual attacks continued after that, and eventually the father impregnated Michelle. Michelle ran away when she was 14. As a psychologist

might predict, she found a new relationship in which she was abused, this time with appellant, who was in his late 20s. They spent most of their time on the road, because appellant was a long distance truck driver. His abuse of Michelle diminished considerably in the last few years before Arthur returned to live with them. (R.T. 2860-2874.)

Michelle performed at the fifth percentile level in intelligence tests. She admitted to the psychologist that she had slapped Arthur when he had what Michelle described as fits. The "fits" sounded like epileptic seizures to the psychologist. Michelle said that appellant told her Arthur was doing these things on purpose, as a sort of temper tantrum. Michelle wanted to take Arthur to a doctor, but once he had bruises she feared this would lead to authorities coming and taking away the baby, Pearl. (R.T. 2878-2881.)

At one point appellant decided that hitting Arthur was not working, and suggested they try withholding food as a disciplinary measure. Michelle generally went along with that, but sometimes she sneaked food to Arthur. (R.T. 2882.)

The first time anyone had given Arthur medication was the Friday before he died. Arthur had been injured, and Michelle thought the medication would calm him and help with the pain. She gave him Valium, which appellant said was a muscle relaxant. On the Sunday, February 4, appellant told Michelle to go to the store and get sleeping pills. She did that, then returned and

gave Arthur two of the pills. She thought they would help him sleep and help with the suffering. That afternoon Arthur seemed to be having a hard time breathing, so Michelle gave him mouth-to-mouth resuscitation, and after that he was breathing better. By that time both Jenningses wanted to get Arthur help, but they did not because they feared that if someone saw Arthur they would take Pearl away. That was also why Michelle did not leave the situation, herself. (R.T. 2882-2887.)

Michelle had the classic personality profile of battered children. Michelle told the psychologist she should have stepped in and gotten beat up; that way Arthur would still have been alive. Michelle knew the sleeping pills were the main cause of death, so it was her fault that he died. She wished she had died, instead of Arthur. (R.T. 2888-2896.)

E. Prosecution Guilt Phase Rebuttal Evidence

A police investigator who interviewed Michelle on February 6, 1996, testified that in that interview Michelle said her relationship with appellant was excellent, that appellant beat her during the first part of the marriage but had not struck her since 1990. (R.T. 2936.)

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F. Defense Penalty Phase Evidence

Geraldine Butts Stahly, a social psychologist, testified at length about the history of appellant's family of origin. A major part of her source material was testimony from the penalty phase trial of a California death penalty case in which the defendant, Richard Foster, was a half-brother of appellant's. (R.T. 3263-3269.)

Appellant's mother, Pearl, was married to Richard Foster's father until some time in the 1950s. Among other things, Foster sexually molested his daughters. His sons came to idolize him, primarily because Pearl's next husband, Art Jennings, Sr., treated them so badly. By all accounts, Art, Sr., behaved atrociously as a parent. He sexually molested the Foster girls and constantly beat the Foster boys. Art, Sr., was an incorrigible thief. He taught the boys to steal and whipped them if they did not succeed at it. Legend had it that the first of the two children Art and Pearl had between them, a little girl, was smothered to death by Art. When the Foster children were taken away from Art and Pearl, because of the mistreatment, Pearl did not care at all. (R.T. 3280-3287, 3307, 3314.)

Appellant was much younger than the Foster children. He was raised in isolation as an only child. Both Art and Pearl beat and whipped appellant frequently. Appellant reported to Dr. Stahly that Art had not sexually molested him, but that when

appellant was about 12, Art did have appellant orally copulate Art's girlfriend, so that Art could take pictures of it. Pearl started having appellant orally copulate her when appellant was nine years old. She had appellant do this a couple of times per week for a year or more. (R.T. 3288-3294, 3316-3320.)

As a child appellant had suffered from a very bad stuttering problem. Art and Pearl dealt with it by yelling at appellant and hitting him to make him stop. Only after relatives told them appellant needed speech therapy did the parents get him the therapy. (R.T. 3324)

The punishment of forcing a child to hold a 2-by-4 over his head, which appellant had visited on Art, Jr., was a favorite of Art Sr.'s. Appellant described to Dr. Stahly the anger and pain it had caused him, but said he never thought about these things when he himself did the same thing to Art, Jr. (R.T. 3326.)

Dr. Stahly noted particularly how enmeshed appellant was with Art, Sr. Even when appellant was arrested for murder, he had wondered aloud how his father was going to get home. This was typical of the relationships that form between battered children and their parents. (R.T. 3342.)

James Park, a retired top level employee of the California Department of Corrections, testified about the living situation appellant would encounter under a life without parole sentence. In Park's opinion, appellant was not likely to be a danger to anyone inside prison. (R.T. 3358-3370.)

Dr. Joseph Lantz, the psychologist who had testified for the defense at the guilt phase, reviewed Dr. Stahly's testimony and agreed with her conclusions. Appellant's personality development had been seriously disrupted by the environment in which he was raised. In Dr. Lantz's opinion, it would have taken some very active intervention for a person as seriously damaged as appellant was to turn his life around. (R.T. 3379-3384.) In Dr. Lantz's most recent interview with appellant, appellant was only beginning to show some sadness and insight about his situation. (R.T. 3396.) Dr. Lantz noted Dr. Stahly's testimony about how typical it was that appellant worried about his father's transportation on the day of appellant's arrest. Lantz himself noted that appellant named his two children Arthur and Pearl, after his two abusing parents. This also was typical of battering families. (R.T. 3398.)

Dr. Lantz concluded that appellant was not capable of deciding to take Art, Jr.'s, life. (R.T. 3403.)

G. Prosecution Penalty Phase Evidence

Fransji Evans, one of appellant's half-sisters from the Foster family, testified. Her father, Ray Foster, had repeatedly sexually abused and beaten her. She ran away and was put in a home for girls in 1954, six years before appellant was born. Pearl did not sexually or physically abuse the children. She was

cold and distant, not a loving mother, but a decent mother. Pearl knew about Ray Foster's abuse of their children, and did nothing to stop it. (R.T. 3414-3419.)

Fransji visited her mother and Art Jennings, Sr., in 1960. On that occasion Art, Sr., beat her up and forcibly raped her. (R.T. 3419.) She next saw Pearl and Art, Sr., in 1971. During the course of a one- to one-and-one-half month visit, Fransji observed that Pearl adored appellant, and was very good to him. So was Art, Sr. Starting in 1973 Fransji began seeing the family regularly. What she saw was normal father-son and mother-son relationships. (R.T. 3420-3427.)

Fransji was aware that her testimony in this trial was inconsistent with her siblings' testimony at the death penalty trial of Richard Foster. (R.T. 3430.) Fransji had not learned about Art, Sr.'s, horrific violence towards her brothers until the time of the Foster trial. (R.T. 3435.)

Wilma Sharp, the half-sister from the Foster family who had raised Art, Jr., until he was five years old, testified that she, too, had been sexually molested by Art, Sr., when she was a child. Art abused all the Foster children. He hung the boys by clotheslines, and beat them with barbed wire. But Pearl did not beat the children. Wilma had not wanted to give Art, Jr., back to appellant and Michelle, but she sought legal advice about it and was told she could not keep the boy. (R.T. 3437-3442.)

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ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE APPELLANT WAS GUILTY OF FIRST DEGREE MURDER

Appellant contends that there was insufficient evidence to prove he was guilty of first degree murder.[6]

"In reviewing a challenge to the sufficiency of the evidence under the due process clause of the Fourteenth Amendment to the United States Constitution and/or the due process clause of article I, section 15 of the California Constitution, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (People v. Johnson (1980) 26 Cal.3d 557, 578; People v. Berryman [1993] 6 Cal.4th 1048, 1083; see also Jackson v. Virginia (1979) 443 U.S. 307, 317-320 [61

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[6] In subsequent arguments in this brief (argument "VI" and argument "XI") appellant argues that reversal is required because of the admission in his trial of extra-judicial statements made by Michelle Jennings which were in some way inculpatory as to appellant.

For purposes of the instant argument, it is assumed that Michelle's extra-judicial statements may be assessed as part of the evidence against appellant.

L.Ed.2d 560, 99 S.Ct. 2781].)" (People v. Cole (2004) 33 Cal.4th 1138, 1212.)[7]

If this case were described in a short paragraph, there would be only three possible theories of first degree murder. Penal Code section 189 provides: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, *poison*, lying in wait, *torture*, or by any other kind of *willful*, *deliberate*, *and premeditated* killing, is murder of the first degree. * * *" (Emph. added to highlight the three possibilities.)

However, the actual evidence and the jury's findings in the case narrow the field to only one reasonably arguable possibility: torture murder.[8]

Appellant could not have been convicted on a deliberation-premeditation theory (see C.T. 523-524 [CALJIC No. 8.20]), because the act that caused Arthur's death was Michelle's

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[7] The U.S. Supreme Court's case of Jackson v. Virginia holds that this version of the substantial evidence rule is compelled under the due process clause of the U.S. Constitution. Accordingly, appellant's contentions in this brief that a finding or verdict lacked the support of substantial evidence include a contention that this failure of evidence reflects a violation of appellant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

[8] Note that appellant could not have been, and was not, proven guilty of first degree murder under an *aiding-abetting* theory. For reasons that are discussed in more detail in argument "III," *infra*, there was no proof that Michelle intended to kill Arthur, and no proof that appellant aided her in an act of giving Arthur pills in order to kill or to harm him.

administration of the sleeping pills, and there was obviously no evidence that in doing so Michelle acted with deliberate, premeditated intent to kill Arthur. There was nothing in the evidence to suggest that Michelle administered the pills to harm Arthur, rather than to palliate him. And the fact that she administered only two of the 32 Unisom pills supports the intent-to-palliate theory and defeats the intent-to-harm theory.

Similarly, there was no evidence that appellant, himself, killed Arthur by means of some deliberate and premeditated act.

Appellant could not have been convicted on a poison theory. The court instructed the jury on first degree murder by poison (C.T. 525 [CALJIC No. 8.23]), but the jury rejected the poison theory - they found "not true" the special circumstance allegation that the defendants "murdered Arthur Jennings by the administration of poison" (C.T. 472, 474; R.T. 3218). And, again, it was Michelle, not appellant, who administered the fatal "poison," and there was no evidence that she did so with any intent to kill Arthur.

The only remaining theory of first degree murder available to the jury was torture. (See C.T. 526 [CALJIC No. 8.24].)[9]

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[9] For purposes of this argument, it will be assumed that appellant's acts with respect to Arthur, over time, met the statutory definition of "torture," and that this definition is constitutional, i.e., that the constitution would permit conviction of first degree murder, and a true finding on a "torture" special circumstance, and a resulting death judgment, in a case where exactly the same sequence of events occurred as here - save for Michelle Jennings' administration of the sleeping pills - and the child died as the result of the father's acts (compare argument "II," *infra*).

The cases on torture murder discuss the defendant as the "killer" or "perpetrator." (See, e.g., People v. Davenport (1985) 41 Cal.3d 247, 267-268, and cases cited.) And this usage points the way to the flaw in the prosecution's case for torture murder here: on the instant facts, to describe appellant as the "killer" begs the question. The question is, assuming that appellant "tortured" Arthur, was there substantial evidence to prove appellant was the "killer" of Arthur; was there evidence to prove that appellant, by torturing Arthur, caused the child's death? (See, e.g., People v. Proctor (1992) 4 Cal.4th 499, 530 ["[T]here must be a causal relationship between the torturous act and death . . ."].)[10] The clear answer is, no.

"In homicide cases, a 'cause of the death of [the decedent] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death of [the decedent] and without which the death would not occur.' (See CALJIC No. 3.40.)" ' (People v. Cervantes (2001) 26 Cal.4th 860, 866.)[11] "The criminal law . . . is clear that for liability to be found, the cause of the harm

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[10] The closely related question of whether the jury was properly instructed on how to resolve this issue is discussed in arguments "VIII" and "IX," *infra*.

[11] This court's citation of CALJIC No. 3.40 in this passage in Cervantes is significant. In the instant case the trial court erred by omitting the jury instruction CALJIC No. 3.40, which instructs that the evidence must prove an unlawful act that *caused* the harm, and goes on to define for the jury what "cause" means in the criminal law. This point is argued separately, *infra*, argument "IX.")

not only must be direct, but also not so remote as to fail to constitute the natural and probable consequence of the defendant's act.' [Citations.] [W]hen purpose or knowledge of a result is an element of an offense, the actor is not liable for an unintended or uncontemplated result unless, as relevant here, 'the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a . . . bearing on the actor's liability or on the gravity of his offense. " (*Id.*, pp. 869-870.)

" 'In general, an "independent" intervening cause will absolve a defendant of criminal liability. (1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) §§ 131, p. 149.) However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." [Citation.] On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. "A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [ ] The precise

consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act." [Citations.]' " ' " (*Id.*, 26 Cal.4th at p. 871.)

For the reasons detailed in the paragraphs below, the evidence in this case did not reasonably and credibly support the set of inferences necessary to find appellant guilty of torture murder under these principles.

In this argument it is assumed that appellant committed "torture" against Arthur.[12] Almost all of the testimony of the autopsy pathologist, Dr. Frank Sheridan, was devoted to the subject of what can be labeled "torture." But Dr. Sheridan attributed the death all but exclusively to the pills the Jenningses gave to Arthur to make him feel better.

Dr. Sheridan detailed at length the child abuse type injuries and the emaciation. (R.T. 2573-2602.) He went on to identify the presence of the three drugs — doxylamine (Unisom), hydrocodone (Vicodin), and daizepam (Valium). There was "a lot" of Unisom — a "[p]otentially fatal" amount. There was "a small amount" of Vicodin, which "wouldn't [have been] very

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[12] As noted in the Statement of Facts, *supra*, there was evidence that Arthur had suffered lacerations from having been hit in the head, had suffered at least one significant burn injury, had apparently been shaken violently, had suffered other, lesser injuries, and suffered malnourishment. For present purposes it is assumed that appellant was responsible for these injuries, and his acts constituted "torture" as that term is used in the Penal Code.

significant." Likewise, the amount of Valium was "small . . . [r]ather minor," and was "[n]ot toxic on [its] own." (R.T. 2602-2603.) The cause of death was *combined drug toxicity*; the Unisom was "by far the most important" in this, because "the level of that on its own is potentially fatal whereas the level of the other two on their own wouldn't even have been toxic, let alone fatal." (R.T. 2603-2604.)

Later on, Dr. Sheridan clarified that the "drug level of [Unisom was] sufficient to cause death" (R.T. 2614), and that the Unisoms "killed the child" [quoting counsel], i.e., "they appear to be the immediate cause of death" [quoting Dr. Sheridan]. (R.T. 2618.) The other two drugs contributed "to a small extent." (R.T. 2636.)

The Unisom box seized from the Jennings trailer originally contained 32 tablets, and 30 of them remained in the box. The amount of Unisom in Arthur's body was consistent with his having taken two Unisoms. (R.T. 2641-2642.) The dosage prescribed on the box was one tablet; the directions also specified that the product was for adults only, and should not be administered to children under 12 years of age. Dr, Sheridan testified that for an adult, 10 of the tablets would be "pretty dangerous." (R.T. 2649-2651.)

Dr. Sheridan "also listed on the death certificate under the heading Contributing . . . Causes . . . acute and chronic physical abuse and neglect." (R.T. 2604.) He also "mentioned

the pneumonia," which Dr. Sheridan identified as a result of "all the other features." (R.T. 2604-2605.) Dr. Sheridan could not say "to what extent [the pneumonia] speeded the process [of fatality] up. * * * [The pneumonia] wasn't even obvious on autopsy, it was only under the microscope. * * * So it's hard to say how much it contributed. But I'm trying to think it's not a very big factor. [*Sic.*]" (R.T. 2641.)

Leaving the drugs out of the equation, Dr. Sheridan testified, "[*u]nless this child had been turned around*, in other words, treated and all the rest of it, and fed, of course, very importantly, this child would *probably* have died anyway *within a fairly short period of this time*." (R.T. 2614-2615, emph. added.) In other words, "*without getting appropriate care and without the whole situation being reversed* . . . then the child would have died." (R.T. 2617, emph. added.)

The parties stipulated that Dr. Randall Baselt, an expert toxicologist, reviewed documents about the death of Arthur Jennings, including Dr. Sheridan's autopsy report, and Dr. Baselt concluded that the drug concentrations were sufficient to account for the death of the child, with Unisom playing the most important role. In fact, in Dr. Baselt's opinion, the Unisom could have caused death in the absence of the other two agents. The Vicodin would be a significant contributor to the combination, with Valium playing a relatively minor role. It was entirely possible that the two Unisom tablets administered on the

morning of February 4, 1996, resulted in the concentration found at autopsy. (R.T. 2564-2566.)

This body of evidence simply does not satisfy the substantial evidence rule. It does not furnish substantial evidence to prove that "torture" caused Arthur's death. The only facts this evidence was sufficient to prove about what caused Arthur to die were that the sleeping pills administered by Michelle certainly were the immediate cause of death, and that the sleeping pills likely would have killed Arthur no matter what other circumstances existed. And conversely, had the sleeping pills not been administered, Arthur *might have* eventually died, *if* nothing was done to remedy the situation.

To put the point in the terms this court has applied, the evidence failed to prove that by "torturing" Arthur appellant set in motion a chain of events that actually produced Arthur's death as a direct, natural, and probable consequence of the "torture," or that Arthur's death would not have occurred without the "torture."[13] The evidence failed to prove the cause of death was

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[13] Likewise, assuming that appellant gave Arthur the Vicodin and Valium, the death by Unisom overdose was not a direct, natural, and probable consequence of the administration of the other drugs.

This point is secondary, because there was no evidence whatsoever that in giving Arthur small amounts of Vicodin and Valium, the Jenningses intended to kill him, or even to cause him harm. Obviously, these drugs were administered with palliative intent, also. Therefore the "cause" analysis need not be undertaken with respect to the Vicodin and Valium, because they are not a viable route to a deliberation/premeditation theory of first degree murder, or to a torture murder theory of first degree murder.

not "so remote as to fail to constitute the natural and probable consequence of" the "torture." That his wife would overdose Arthur on over-the-counter sleeping pills, in an effort to palliate him, in an act that was probably fatal by itself, but may have been exacerbated in some small way by other acts that had been meant to palliate the boy, was not shown to be "a normal and reasonably foreseeable result of" the "torture." The evidence was insufficient to prove that appellant "should have foreseen the possibility of" this fatal palliative overdose.

In short, it may be assumed the evidence in this case sufficiently proved that appellant committed "torture." The evidence surely did prove that appellant committed some criminal acts against Arthur. Nevertheless, the evidence distinctly failed to prove *torture murder*, under Penal Code section 189.

As a result, the conviction of first degree murder must be reversed.

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II. ANY INTERPRETATION OF THE EVIDENCE IN THIS CASE AS BEING SUFFICIENT TO SUPPORT CONVICTION OF FIRST DEGREE MURDER UNDER THE PENAL CODE SECTION 189 PROVISO FOR "TORTURE" MURDER WOULD BE UNCONSTITUTIONAL

In argument "I," *supra*, appellant contended that the evidence in this case was insufficient to support a finding that he was guilty of first degree murder under Penal Code section 189, particularly the section 189 proviso for "torture" murder. That argument includes a contention that the conviction on the evidence presented here constitutes a violation of the constitutional right to due process of law, to wit, a violation of the constitutionally mandated substantial evidence rule. (Footnote 7, and accomp. text.)

The purpose of the instant argument is to note the other constitutional infirmities in the murder conviction.

The United States Supreme Court has frequently stated, in various ways, that the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution require that state death penalty schemes must employ laws and procedures which meaningfully narrow the class of persons eligible for the death penalty, and which are especially tailored to achieve reliability in determining both guilt and sentence. (See, e.g., Zant v. Stephens (1983) 462 U.S. 862 [103 S.Ct. 2733, 77 L.Ed.2d 235]; Beck v. Alabama (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392]; Godfrey v. Georgia (1980) 446 U.S. 420, [100 S.Ct. 1759, 64 L.Ed.2d 398]; Lockett v. Ohio (1978) 438 U.S. 586 [98 S.Ct. 2954,

57 L.Ed.2d 973]; Gardner v. Florida (1977) 430 U.S. 349 [97 S.Ct. 1197, 51 L.Ed.2d 393] (opinion of Stevens, J).)

Appellant specifically contends that the first degree murder verdict in this case, on the evidence presented, violates this well established "narrowing" principle. Any construction of California law that makes appellant death eligible based on the evidence in this case necessarily causes the California law to fail the "narrowing" test. The homicide in this case was not intentional, and appellant did not cause, and did not aid or abet in causing, the death.

Separately, the United States Supreme Court has established that the Fifth and Fourteenth Amendments to the U.S. Constitution vest persons with a due process liberty interest that guarantees them protection against being punished, or being punished to a certain degree, pursuant to vague, arbitrary, or illegitimate standards. (See, e.g., Kolender v. Lawson (1983) 461 U.S. 352, 357 [75 L.Ed.2d 903, 908-909, 103 S.Ct. 1855]; Hicks v. Oklahoma (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227].)

Any construction of the evidence in this case that renders appellant guilty of murder by means of torture or by means of deliberation and premeditation will necessarily violate this well-settled principle of constitutional law. When a parent who has inflicted painful injuries on his child, and has contemplated killing the child, is found guilty of murdering the child by torture or by deliberate intent, after his spouse had inadvertently killed the child through her independent effort to

palliate the child, in circumstances where the defendant's own efforts to palliate the child may have contributed to the child's death, the law underlying the conviction is too vague and arbitrary to withstand scrutiny under these constitutional authorities.

For each of these reasons, the conviction of first degree torture murder is unconstitutional, and the judgment must accordingly be reversed.

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III. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE SPECIAL CIRCUMSTANCE ELEMENT THAT THE FATAL ACT INVOLVED "INTENT TO KILL"

In arguments "I" and "II" appellant has demonstrated that the first degree murder conviction fails the test of substantial evidence. In the instant argument and the following argument appellant will demonstrate that the special circumstance finding also fails the test of substantial evidence.

In the guilt phase of this case the jury made fundamental findings that the evidence did not prove Arthur Jennings was killed by intentional poisoning (Pen. Code, § 190.2, subd. (a)(19)), yet did prove that the killing "involved the infliction of torture" (*id.*, subd. (a)(18)). (C.T. 472, 474, 475; R.T. 3218.) Together this pair of findings dictates the conclusion that the special circumstance finding against appellant must be reversed, for lack of substantial evidence.

The long-settled rule of review for sufficiency of the evidence was noted in argument "I," *supra*. "On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (Jackson v. Virginia[,] [*supra*,] 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 99 S.Ct. 2781];

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People v. Johnson[,] [*supra*] 26 Cal.3d 557, 578.)" (People v. Snow (2003) 30 Cal.4th 43, 66.)[14]

Furthermore, "[t]he rules governing sufficiency of the evidence are as applicable to challenges aimed at special circumstance findings as they are to claims of alleged deficiencies in proof of any other element of the prosecution's case." (People v. Morris (1988) 46 Cal.3d 1, 19.)

As has been demonstrated in the previous arguments in this brief, the evidence in the case proved, beyond dispute and without contradiction, that the significant cause of Arthur's death was the pills he had been administered — specifically, the two over-the-counter Unisom pills. Other things played a role in the child's dying exactly when and exactly as he did; but he would not have died, had the Unisom pills not been administered, and the Unisom pills, alone, were toxic enough to kill him. (R.T. 2602-2604, 2609-2610, 2618, 2636, 2641 [testimony of Dr. Sherman]; R.T. 2565-2566 [stipulated account of Dr. Baselt]; C.T. 900 [autopsy protocol of Dr. Sherman].)

It was also established beyond contradiction that the Unisom pills were administered by Michelle Jennings. Both defendants said so in their statements, there was no evidence to suggest these statements were false, and the prosecution never disputed in any way the fact that Michelle was the one who purchased and administered the sleeping pills.

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[14] To repeat a point made in argument "I," Jackson v. Virginia holds that this legal standard is required by the due process clause of the United States Constitution.

This entire record reveals two glaring failures of proof on the special circumstance allegation, under the substantial evidence rule.

First, Penal Code section 190.2, subdivision (a)(18) — the "torture" special circumstance that was the only one the jury found true — requires that "[t]he murder was *intentional* and involved the infliction of torture." There was no substantial evidence whatsoever in this case to prove Michelle Jennings *intended* to kill Arthur when she gave him two of the 32 sleeping pills; it is simply not a "reasonable" or "credible" interpretation of the whole record to infer that she did. It was obvious that Michelle's motive in administering the pills was palliative, if tragically misguided.

Furthermore, as noted above, the jury clearly communicated that it was *not* persuaded that Michelle intended to kill Arthur by administering the pills. If the jury had been persuaded of that, it is essentially impossible that they would not have found the poison special circumstance true - as to Michelle, at least.[15]

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[15] This conclusion is further fortified by the facts that the deliberating jury asked the judge specifically whether the poison special circumstance required intent to kill by means of the poison, the judge responded (correctly) in the affirmative, and the jury very shortly thereafter returned its verdicts with the "not true" findings as to both defendants on the poisoning special circumstance. (C.T. 470; R.T. 3206, et. seq.) It is unmistakable that the jury rejected the poison special circumstance because they were unpersuaded that Michelle intended to kill Arthur with the Unisom pills, and they were unpersuaded that either parent intended to kill Arthur with the minor amounts of Vicodin and Valium.

And, of course, there was no evidence that appellant killed Arthur intentionally, even if he had, from time to time, harbored some intent to kill Arthur.

The second fatal failure of proof has to do with the fact that in order to find appellant guilty of the special circumstance, the jury had to find he aided Michelle in administering the pills, and did so with the personal intent to kill Arthur. Penal Code section 190.2, subdivision (c) requires such a finding in the case of any defendant who is, as appellant was, "not the actual killer."

Here again, there was no substantial evidence to support such a finding. In order for a defendant to be found vicariously liable for a crime, it must be shown that he "act[ed] with knowledge of the criminal purpose of the perpetrator and with an intent either of committing, or of encouraging or facilitating commission of, the offense. (People v. Beeman (1984) 35 Cal.3d 547, 560.)" (People v. Sanchez (1995) 12 Cal.4th 1, 33.) These principles apply generally to special circumstance findings (see, e.g., People v. Carrera (1989) 49 Cal.3d 291, 310-311), with the exception that Penal Code section 190.2 adds the further

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requirement that both the principal and the aider-abettor must act with *intent to kill*.[16]

Thus, here it was necessary for the evidence to prove that appellant aided Michelle in her act of giving the sleeping pills to Arthur, and in doing so, shared Michelle's *intent to kill* Arthur with the pills. But, as noted above, the evidence demonstrated conclusively that in administering the pills Michelle *did not* intend to kill Arthur, and the jury so found. And just as clearly, the evidence demonstrated that appellant had no intent that Arthur should die from the effects of sleeping pills — even if it is assumed for purposes of argument that appellant intended to kill Arthur by some other means at some point in the near future.

In sum, the evidence completely failed to prove that either of the defendants intended to kill Arthur by administering the sleeping pills that did kill him. As a result, the special circumstance finding must be reversed, and this in turn dictates reversal of the death judgment.

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[16] In situations where section 190.2 does not apply, a person can be held vicariously liable for a crime he did not necessarily intend to aid, so long as that crime is a natural and probable consequence of the one he did intend to aid. (See, e.g., People v. Beeman, *supra*, 35 Cal.3d at p. 560.)

It should be noted that the different rule for aider/abettors in the California death penalty scheme - the requirement for aiding/abetting liability that the aider/abettor act with *specific intent to kill* - would have to be observed even in the absence of any statutory directive, under the "narrowing principle" mandated by U.S. Supreme Court decisions approving the death penalty against challenges under the Fifth, Eighth, and Fourteenth Amendments. (See, e.g., Zant v. Stephens, *supra*, 462 U.S. 862, and other cases noted at p. 42, *ante*.)

IV. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE SPECIAL CIRCUMSTANCE ALLEGATION THAT THE MURDER "INVOLVED THE INFLICTION OF TORTURE"

Appellant contends that not only was the evidence insufficient to prove the special circumstance allegation that an *intentional* murder occurred (argument "III," *supra*), but it also was insufficient to prove the special circumstance allegation that "[t]he murder . . . involved the infliction of torture" (Pen. Code, § 190.2, subd. (a)(18); see C.T. 475).[17]

From all the evidence about cause of death, and especially the evidence presented by Dr. Sheridan (discussed in the Statement of Facts, *supra*, and argument "I," *supra*, and argument "III," *supra*) to the effect that Arthur might have died as a result of the acts of "torture," in the absence of the pill overdose, *if* Arthur had not been fed, and *if* nothing else had been done to improve Arthur's condition, and if the "torture" continued, the only rational conclusion is that Arthur's death *was not* shown to have been caused by the (intentional) acts of "torture." Instead, the death was caused by the pill overdose. There was simply no evidence in this case sufficient to raise a credible and reasonable inference (Jackson v. Virginia, *supra*;

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[17] The finding form reads: "We, the jury in the above-entitled action, find that said defendant, MARTIN CARL JENNINGS, intentionally murdered Arthur Jennings and involved the infliction of torture." (C.T. 475.) The grammatical error would seem to be immaterial to the issues on appeal.

Note that appellant also contends in argument "V," *infra*, that insofar as the special circumstance finding could withstand scrutiny under this sufficiency-of-evidence argument, the special circumstance itself is flatly unconstitutional.

People v. Johnson, *supra*) that appellant's intentional acts of "torture" caused Arthur's death.

Conversely, all the evidence about the cause of Arthur's death strongly and directly implied that Arthur would have died if he had only been given the pill overdose, and had not suffered any "torture."

Thus, there was a failure of proof on the element of the special circumstance that the murder "involved torture." The acts that were presented as constituting "torture" did occur, but they were not in any legally significant way "involved" in Arthur's overdose death.

Another perspective on this issue is furnished by the fundamental requirement that "[i]n every crime . . . there must exist a union, or joint operation, of act and intent . . .." (Pen. Code, § 20.)[18] There was evidence that in the last days of Arthur's life appellant voiced a desire to end Arthur's life, and that appellant made some effort to find a place to dump a body. This evidence could be construed as supportive of a finding of *intent to kill* on appellant's part. However, the *act* that killed Arthur was Michelle's administration of the sleeping pills, possibly aided by the earlier administration of small amounts of Vicodin and Valium. The *acts* of giving Arthur medications, and the malevolent *intent* indicated by appellant were not unified, and did not jointly operate.

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[18] Appellant specifically contends that this unity of act and intent is required by the due process clause of the United States Constitution.

In sum, the evidence in this case certainly was sufficient to prove each of the defendants guilty of a crime or crimes. But the evidence was utterly insufficient to prove either one of them liable for a murder *involving torture*.

As a result, the special circumstance finding must be reversed.

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V. THE SPECIAL CIRCUMSTANCE FINDING AND DEATH VERDICT MUST BE REVERSED AS VIOLATIVE OF APPELLANT'S CONSTITUTIONAL RIGHTS, BECAUSE THE EVIDENCE DID NOT PROVE, AND THE JURY DID NOT FIND, THAT THE "TORTURE" WHICH CONSTITUTED THE SPECIAL CIRCUMSTANCE WAS THE CAUSE OF THE DEATH WHICH WAS THE BASIS OF THE MURDER CONVICTION

Subdivision (a)(18) of Penal Code section 190.2 decrees a special circumstance for any murder which is "intentional and involved the infliction of torture." Appellant contends that in order for this provision to be constitutionally applied, it is necessary that the evidence prove the torture to be the *sole* cause, or the *primary* cause, of the victim's death. The jury in this case was not instructed to limit its decision-making in this manner, and, for the reasons noted in the previous arguments in this brief, it is manifest that the evidence in this case could not be construed as supporting a "torture special circumstance" if it was so limited. Therefore the special circumstance finding and the death verdict must be reversed.

The same essential claim that is articulated in the preceding paragraph was raised by the appellant in People v. Bemore (2000) 22 Cal.4th 809, and was rejected by this court.[19] Appellant contends the facts of this case are meaningfully distinguishable from those of Bemore, and he should prevail even

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[19] The court had previously rejected similar claims in other cases which were cited in the Bemore opinion. (E.g., People v. Barnett (1998) 17 Cal.4th 1044; People v. Crittenden (1994) 9 Cal.4th 83.) The rule discussed in the text above would seem to be now firmly established in this court's case law.

if this court adheres to its decision in Bemore. (See discussion, *infra*.)

Additionally, however, appellant invites the court to reconsider and repudiate its Bemore holding.

People v. Bemore involved a store robbery in which the lone clerk was stabbed many times, and killed. The court recited the claims and its decision as follows:

> Defendant . . . challenges the torture-murder special-circumstance finding on the ground the prosecution failed to establish a "causal relationship" between the intentional infliction of extreme pain and the murder. He insists that, to the extent the torturous acts merely facilitated the robbery and did not lead directly to [the victim's] death, the murder could not properly have been found to "involve" torture within the meaning of section 190.2(a)(18).
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> Defendant's interpretation of the torture-murder special-circumstance statute is mistaken. As we recently explained, section 190.2(a)(18) applies "where '[t]he murder was intentional *and involved the infliction of torture*.' (Italics added.) Unlike section 189, which defines the crime of first degree torture murder as murder 'perpetrated by means of . . . torture,' thereby positing the requirement of a causal relationship between the torturous act and death [citations], section 190.2, subdivision (a)(18), does not by its terms require such a causal relationship. [Citations.] Because other types of murder, such as premeditated murder, also are defined as murder of the first degree, we believe the Legislature, by employing the broader language of section 190.2, subdivision

(a)(18), intended to encompass (within the torture-murder special circumstance) acts of torture occurring within a larger time frame, including those that would not have caused death. [Citation.] We conclude the prosecution was not required to prove that the acts of torture inflicted upon [the victim] were the cause of his death." (People v. Crittenden, *supra*, 9 Cal.4th 83, 141-142, fn. omitted.)

Defendant next argues that the torture-murder relationship contemplated by section 190.2(a)(18) does not adequately define or limit the class of persons eligible for the death penalty, and that the statute is unconstitutional as a result. (See Zant v. Stephens[,] [*supra*,] 462 U.S. 862, 878 [103 S.Ct. 2733, 2743, 77 L.Ed.2d 235]; Godfrey v. Georgia[,] [*supra*,] 446 U.S. 420, 433 [100 S.Ct. 1759, 1767, 64 L.Ed.2d 398].) He seems to imply that, unless construed to require a causal relationship of the sort required for first degree torture murder under section 189, the phrase, "involved the infliction of torture," in section 190.2(a)(18) is either too broad or too vague to meaningfully distinguish between those first degree murderers who deserve death and those who do not.[20]

We have rejected similar claims before. Section 190.2(a)(18) requires "some proximity in time [and] space between the murder and torture." (People v. Barnett [*supra*,] 17 Cal.4th 1044, 1161 [construing and approving CALJIC No. 8.81.18 insofar as it summarizes the torture-murder special circumstance statute].) The statute obviously does not apply where "no connection"

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[20] Appellant specifically advances the same constitutional claims here. See *infra*.

between the two events appears. (Barnett, at p. 1161.)[21] Also, the torture-murder special circumstance renders death eligible only those first degree murderers who "intentionally performed acts which were calculated to cause extreme physical pain to the victim and which were inflicted prior to death." (People v. Davenport [*supra*,] 41 Cal.3d 247, 271.) As so construed, section 190.2(a)(18) satisfies the Eighth and Fourteenth Amendments to the federal Constitution by providing a sufficiently narrow and rational basis on which to base eligibility for the death penalty. (People v. Barnett, *supra*, 17 Cal.4th at p. 1162; see People v. Davenport, *supra*, 41 Cal.3d at p. 270.)

Finally, whatever the "outer limits" of the statute in this regard (People v. Barnett, *supra*, 17 Cal.4th 1044, 1162), the instant record discloses a close connection between the torture and the murder.

(22 Cal.4th at pp. 842-843.)

The instant case is about as good an illustration as can be

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[21] The criteria set forth in the preceding two sentences of the Bemore opinion possibly were met in this case. There was some temporal and spatial proximity between the "torture" and the death. On the other hand, the facts of this case satisfy, or come very close to satisfying, the "no connection" standard, as to which this court stated it is "obvious" the special circumstance does not apply.

The glaring tension between these two ideas spotlights the flaw in the court's Bemore analysis. Where "A" tortures "V" in a way that could not possibly cause V to die, then shortly later and in the same location A's accomplice, "B," shoots V in the head, killing him, under Bemore an argument can be made that A is liable for special circumstance torture murder, without any further proof. In order for this special circumstance to hope to pass muster constitutionally, there must be *some* cause linkage between the torture and the killing, and in fact, it must be substantial.

As appellant has noted at some length already in this brief, it is that cause link which is missing in the facts of this case.

imagined of the error of Bemore and its predecessor cases. Here, viewing the evidence in the light most favorable to the prosecution, the evidence proved that appellant "tortured" Arthur without any apparent intention that it result in his death, or result in his death presently; and after that continued for some days or weeks, Michelle Jennings overdosed Arthur on sleeping pills, killing him. Arguably, some non-torturous acts of administrating medicine by appellant also contributed a bit to Arthur's death. Under Bemore, as long as some theory of first degree murder could be imagined — for example, the theory that Michelle overdosed Arthur deliberately and with premeditation — the murder could be converted into a special circumstance murder because of the "torture," even though the torture did not cause Arthur's death, and Arthur would not have died as a consequence of the torture.

For the reasons that follow, this problem obviously renders the California "torture" special circumstance unconstitutional — on its face, as applied generally, and as applied here.

As appellant has already noted in this brief, the bedrock constitutional foundation of the death penalty in the United States is the "narrowing" principle. The United States Supreme Court has repeatedly, in various ways, stated that the United States Constitution requires that state death penalty schemes must employ laws and procedures which meaningfully narrow the class of persons eligible for the death penalty, and which are especially tailored to achieve reliability in determining both

guilt and sentence. (See again, Zant v. Stephens, *supra*, 462 U.S. 862; Beck v. Alabama, *supra*, 447 U.S. 625; Godfrey v. Georgia, *supra*, 446 U.S. 420; Lockett v. Ohio, *supra*, 438 U.S. 586; Gardner v. Florida, *supra*, 430 U.S. 349 (opinion of Stevens, J).) This court has expressly acknowledged and accepted this principle in its own capital case jurisprudence - indeed, it purported to do so in Bemore. (22 Cal.4th at p. 843; see also, e.g., People v. Benavides (2005) 35 Cal.4th 69, 104.)

Similarly, it was noted above that the U.S. Constitution vests persons with a due process liberty interest which guarantees them protection against being punished, or being punished to a certain degree, pursuant to vague, arbitrary, or illegitimate standards. (See, e.g., Kolender v. Lawson, *supra*, 461 U.S. 352, 357; Hicks v. Oklahoma, *supra*, 447 U.S. 343, 346.)

This court has routinely rejected challenges to the California death penalty scheme, and to many of the results it has produced, in ways that cannot be squared with these constitutional imperatives. And the line of cases culminating in Bemore is a prime example of that problem: Despite the absolute requirement that the death penalty scheme must *narrow* the class of persons eligible for death to a select few, in the part of Bemore quoted above this court frankly acknowledged that its interpretation of the torture special circumstance makes the category even *broader* than the corresponding category of non-death-eligible torture murder proscribed in Penal Code section 189. (*Id.*)

As a result, appellant contends, first, that under the U.S. Supreme Court authorities cited above in this argument, on its face subdivision (a)(18) of Penal Code section 189 is unconstitutional, in that it fails to impose a requirement of strict causal connection between the "torture" and the killing; and second, that this court's interpretation of the subdivision is unconstitutional, insofar as it fails to impose a strict causal connection requirement.

Third, and most importantly, it would be particularly inappropriate, unjust, and unconstitutional, to affirm the judgment in this case under the reasoning of cases such as Bemore and Crittenden. Here there was no meaningful causal relationship between the "torture" and the death at all. This case involved an accidental killing by one defendant, under circumstances where the action of the killer-by-accident was not 100 percent unrelated to previous acts of non-fatal "torture" by a different defendant. The United States Constitution will not permit imposition of the death penalty against the non-killer defendant on the facts presented here.

Accordingly, the judgment must be reversed.

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VI. FOR NUMEROUS REASONS RELATING TO THE PROSECUTION'S THEORY THAT ARTHUR JENNINGS WAS TORTURED BY WAY OF DELIBERATE STARVATION, THE JUDGMENT MUST BE REVERSED

A. Introduction

The preceding arguments in this brief assume, for purposes of discussion, that the evidence adequately proved appellant committed acts of "torture." The instant argument demonstrates that the finding of "torture," itself, was fatally flawed.

A major foundation stone of the torture special circumstance finding, and of the murder conviction itself, was the notion of "starvation." The prosecution's theory was that deliberate, purposeful withholding of food from Arthur Jennings, in an extreme way over time, was a crucial, culpable fact.[22] Yet the prosecutor, although he argued this theme repeatedly to the jury in his closing arguments, put on *no actual evidence* of starvation in this sense.

For a number of reasons which will be discussed in this argument, the "starvation" foundation stone of the prosecution's case is fatally flawed: There was insufficient evidence to support this theory, and what evidence there was on the subject should have been excluded from appellant's trial.

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[22] For analytical purposes, in this argument the words "starve" and "starvation" will be used to mean purposeful, deliberate action by one or both of the defendants to deprive Arthur of food on an extended basis (except where the word appears in a quotation from the reporter's transcript). This is to be contrasted with the non-culpable meaning of the words - such as where a hiker becomes stranded in the wilderness, runs out of food, and ends up dying of starvation.

The deliberate-starvation-as-torture stone must be removed. And without it, the structure of the prosecution's case collapses. The guilty verdict and the special circumstance finding must therefore be vacated.[23]

B. The Trial Record on Deliberate Starvation

1. The opening statements

In his short opening statement, the prosecutor made no reference to the deliberate-starvation theory. He referred to the fact that Arthur wasted physically during his time with the defendants, and referred vaguely to two incidents which would later be testified to, incidents in which Arthur ate or drank very hungrily. (R.T. 2297-2302.)

The first real reference before the jury to the deliberate-starvation theory came in the opening statement of Michelle Jennings' counsel.[24] Describing the discipline style the Jenningses employed, defense counsel Nacsin stated: ". . . [S]top

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[23] In part this argument discusses the admissibility against appellant of out-of-court statements made by Michelle Jennings. The admissibility of Michelle's out-of-court statements is discussed in more detail, and independently, in argument "XI," *infra*.

[24] One of the reasons why the judgment against appellant must be reversed because of the "deliberate starvation" theory is that it was so much a function of the case against Michelle Jennings that appellant was seriously prejudiced by the trial court's decision to try both defendants before a single jury. This problem is discussed in part E. of this argument, *infra*.

giving him food, mom; don't feed him tonight, he wet the bed. When he quits wetting the bed, you can feed him." (R.T. 2309.)

2. The prosecution's case-in-chief

In the prosecution's case-in-chief there was no evidence about deliberate-starvation. It was not disputed that Arthur lost a significant amount of weight, and that he was pathologically underweight when he died. And there was, as already noted, testimony about Arthur being observed eating and drinking very hungrily.

Significantly, there was no hint of a discussion of this subject in the lengthy interrogation of appellant and Michelle which was the central evidence against them.

3. Appellant's defense case

The subject of starvation was not really brought up with Joseph Lantz, the psychologist who testified for appellant's defense. Dr. Lantz did on one occasion volunteer his view that Arthur's malnourishment was a function of Arthur's reaction to other factors: "[A] child that age can't [respond compliantly to slapping, shouting, yelling, force], in particular this child, under the circumstances that he had. So he continued to cry and tantrum. And he *wouldn't* eat, and he was soiling himself, and he

was wetting the bed. And he was inconsolable." (R.T. 2817, emph. added.)

In the prosecutor's cross-examination of Dr. Lantz the following colloquy occurred:

> Q: Who told you that young Arthur wasn't eating?
>
> A: I recall both — Martin Jennings having said that at one point, there's also the indication of the weight loss in the autopsy reports, that he was emaciated. There was one witness who talked about him taking a carton of milk as if he was a starving child at that point. So that in my opinion, certainly it would be consistent with a child who was traumatized that he would not be eating. [*Sic.*]
>
> Q: Or not being fed?
>
> A: Certainly if he's not being fed, he would not be eating, yes.
>
> (R.T. 2826.)

4. Michelle Jennings' defense case

The only actual evidence about the theory of deliberate starvation came in Michelle Jennings' defense case. The psychologist who testified for Michelle, Nancy Kaser-Boyd, testified:

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> [Michelle] told me that Martin told her that hitting Arthur wasn't working and they needed to try something else, and that if they didn't feed him, maybe he would do the things that they were asking him to do. * * * [S]he told me that [in response to Martin's suggestion] sometimes she went along with that, but there were other times when she agreed to sneak him food.
>
> (R.T. 2882.)

In the prosecutor's cross-examination of Dr. Kaser-Boyd the following colloquy occurred:

> Q: You say [in your written report], "The last month or so, Arthur couldn't hold food down. Even medication he would throw up." And then in parenthes[e]s I imagine is your question "What medication?" "Once I tried to give him Dimetab (sic)." [*Sic.*]
>
> A: Yeah.
>
> (R.T. 2911.)
>
> * * *
>
> Q: [Michelle] also told you that — we'll go on to page 11 [of your report] — "Saturday he seemed fine. He was on his bed watching TV and playing and he ate." [¶] Is that what she told you?
>
> A: Yes.
>
> (R.T. 2912.)

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5. The prosecutor's argument to the jury

In his closing argument the prosecutor noted that the evidence showed Arthur was eating hungrily on Christmas Day of 1995, and the autopsy pathologist found no medical reason why Arthur would not be able to eat and absorb food. At about the same time Pauline Morris saw Arthur gulping milk. The prosecutor summarized: "Twenty-Fifth he's eating. [¶] Is this starvation (pointing)? Starting to look like it." (R.T. 3054.)

The prosecutor went on: "[A]round the 26th [of January, 1996] . . . [i]s he gaining weight? No. Is food still being withheld? Yeah. Starvation. Is that painful? They did it in concentration camps." (R.T. 3056.)

"We move into February now. * * * Has the food been started up? No." (R.T. 3057.)

When Michelle gave Arthur two sleeping pills, not one, "[r]emember the condition of this child at this time. He's emaciated, he's starving to death, he's got injuries from head to toe." (R.T. 3059.)

"What's still working on this child? Malnutrition, starvation. His body is so emaciated, it's so emaciated, it's eaten all the fat it can. There is no fat, it's now eating the muscles. It's eating his muscles to keep him going." (R.T. 3060.)

"If you find a first degree murder, . . . then you look to the two special circumstances, and that's that the murder was intentional and done with either poison or involved torture. And

I say involved torture. It doesn't imply torturous acts killed the child but they are a cause. A cause. [¶] What does Dr. Sheridan tell us? All of these factors worked together . . . — the physical abuse, the starvation and the poison." (R.T. 3063.)

"I'm going to give him double the adult pills even though he's so little, so skinny, so emaciated, hasn't been fed for God knows how long. How about giving food to the child? If you're not going to the doctor, give him food. Nah, because he's not going to be around that long. They're looking for mine shafts." (R.T. 3064.)

"So are they weighing and considering their options? You bet they are. * * * They make a conscious decision to get rid of little Arthur. The means they're not sure of . . .. * * * What's the way? I don't know. We'll figure it out. Starvation ain't working fast enough. Darn." (R.T. 3066.)

6. Appellant's counsel's argument to the jury

In his closing argument, counsel for appellant stated, at one point: "[T]he child is misbehaving. What do you do? Well — based upon [Martin's] personality disorders and his upbringing, what do you do? * * * You spank. If that doesn't work, you beat. If he's peeing, pooping, whatever, you withhold food." (R.T. 3083-3084.)

"Of course the child was terribly malnourished, and they were withholding food as a form of punishment." (R.T. 3097.)

7. Prosecutor's reply argument to the jury

In his final argument, the prosecutor said: "This child is starving to death. Why is he starving to death? Because they are intentionally keeping food from him. * * * Do they ever even three years later tell their doctors, 'Well, when we are making him better, we are force-feeding him.'? No. No. They tell their doctors, 'Well, he wasn't able to keep food down.' [¶] And there's food in that house. * * * There's food. The only reason this child was not eating was because he was not being allowed to." (R.T. 3121-3122.)

"No intent to kill. Brings a thought to my mind. Bear with me. I am going to give you an example. You go to the pet store. You see a cute little bunny there. You buy the cute little bunny. You get the cage, you get the food, and all that. You take it home. The bunny is a really cute guy. You are having a great time with it. [¶] But after a while there comes a point in time where it's a pain to clean up. You've got to feed it and on and on. And so you figure I'll just get rid of it. Well, I don't got the guts to [w]ring it's neck. What do I do? I leave it out and ignore it. I ignore it. I don't feed it. I don't water it. It dies. [¶] Did I have the intent to kill it? Damn right I did." (R.T. 3125.)

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8. The jury's question to the judge, and the judge's answer

During deliberations the jury submitted a written question to the court. It read: "Can starvation be construed as extreme physical pain under legal definition of torture?" Outside the presence of the jury the judge read the question, then stated: "And the record should reflect that we, the court and counsel, has discussed informally in chambers off the record out of the presence of Mr. and Mrs. Jennings the appropriate response, and I believe that the following response has been agreed to by all counsel and the court, and I would like to read it into the record. (Reading:) [¶] 'Only if the required mental state for the lesser offense of torture or the Special Circumstance - Murder Involving Torture is proved, see California Jury Instructions 9.90 and 8.81.18, then it is up to the jury and each of you to decide whether or not starvation may constitute extreme physical pain under the law.' " (R.T. 3212; see also C.T. 606.)

This answer was sent in to the jury at 1:43 p.m. on April 19, 1999. The jury returned with its verdicts and findings one hour and nine minutes later. (R.T. 3213; C.T. 471.)

C. There Was Insufficient Evidence to Sustain a Finding That The Defendants Deliberately Starved The Victim

The most striking fact about the deliberate-starvation theory in this case is that, notwithstanding the prosecutor's

gradually increasing reliance on the theory as he argued the case, he put on *no affirmative evidence whatsoever* to prove the theory. He concocted the theory out of thin air. There was in this case no substantial evidence to prove the torture-by-starvation theory.

The substantial evidence rule was set forth in detail in argument "I," *supra*. On appeal, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible and of solid value -- from which a reasonable trier of fact could find a given vital fact, or find the defendant guilty, beyond a reasonable doubt. (Jackson v. Virginia, *supra*, 443 U.S. 307, 317-320; People v. Johnson, *supra*, 26 Cal.3d 557, 578.)[25]

The simplest and most intellectually honest approach to this subject is to note that even the snippet of evidence in the co-defendant's case-in-chief was surely insufficient to prove the Jenningses deliberately starved Arthur. The prosecutor's theme, and the only theme that would have supported a finding of the torture special circumstance — "infliction of extreme cruel physical pain and suffering" (CALJIC No. 8.81.18) — on the basis of deliberate starvation, would have required evidence not of some expression of the idea of withholding food as a means of

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[25] Here again, appellant will note that the Jackson case holds that this requirement of substantial evidence is required under the due process guarantee of the Fifth and Fourteenth Amendments to the U.S. Constitution.

discipline, but "reasonable, credible, . . . solid" evidence of actual deliberate withholding of food, on a systematic basis over a sustained period of time.[26]

In this connection, a well-established corollary of the substantial evidence rule holds that a fact finding cannot be based on speculation or conjecture. "[A]lthough reasonable inferences must be drawn in support of the judgment, th[e] court may not 'go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of [guilt] which is merely the product of conjecture and surmise may not be affirmed.' " (People v. Memro (1985) 38 Cal.3d 658, 695; accord: People v. Marshall (1997) 15 Cal.4th 1, 35.) "A reasonable inference . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . .. A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " (People v. Morris, *supra*, 46 Cal.3d 1, 21; accord: People v. Marshall, *supra*, 15 Cal. 4th 1, 35; see also, People v. Raley (1992) 2 Cal.4th 870, 889-891; People v. Velasquez (1980) 26 Cal.3d 425, 435; People v. Kilborn (1970) 7 Cal.App.3d 998, 1003.)

The idea that the defendants actually systematically starved Arthur was speculative and conjectural, in this sense, on the

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[26] By way of contrast, had there been evidence that the Jenningses on a few occasions punished Arthur by sending him to bed without dinner, this would certainly not have constituted substantial evidence of torture by deliberate starvation.

actual evidence in this case. What Michelle told Dr. Boyd was that at some point appellant suggested withholding food as a disciplinary measure, and she went along with this *sometimes* but furnished Arthur with food other times. Michelle also told Dr. Boyd that Arthur was *not holding food down* toward the end of his life, and that on the Saturday before he died, Arthur was on the bed "*and he ate*" (R.T. 2912). These assertions support only the inference that the Jenningses were *not* deliberately starving Arthur. The actual evidence of what Michelle told her psychologist does not reasonably, credibly, and solidly support the inference that the Jenningses deliberately starved Arthur to the point of torture.

This conclusion is fortified when the obvious truth is noted that the prosecution in its case put on *no evidence whatsoever* to prove that Arthur was deliberately starved. Any affirmance of the special circumstance which would be based solely on evidence presented in a *co-defendant's case-in-chief*, and not in the prosecution's case, would violate appellant's constitutional rights to due process of law, to jury trial, and to protection against cruel and unusual punishments. (U.S. Const., Fifth, Sixth, Eighth, and Fourteenth Amends.)

The finding against appellant of torture by deliberate starvation also could not be sustained by simply inferring the fact from Arthur's emaciation, because such a finding likewise would be too speculative under the substantial evidence rule (see again People v. Morris, *supra,* and other cases cited at p. 70).

In this connection, it is noteworthy that one witness, Dr. Lantz, drew the inference that Arthur was probably *refusing* to eat as an expression of clash of wills with his parents. (R.T. 2817.) This inference was likely influenced by the testimony of Wilma Sharp, who had raised Arthur to the age of five, to the effect that Arthur was "real strong willed" and could be difficult if he did not get his way. (R.T. 2322.)

There was also evidence suggesting that Arthur had epilepsy, or some other seizure disorder, which might have contributed to his failure to thrive. Yet another possible inference is that Arthur suffered from some other condition that was never diagnosed.

A further possible inference from the circumstantial evidence, alone, is that *Michelle* Jennings was withholding food as a disciplinary measure, and appellant simply did not care enough to notice the child was wasting, or did not care that he was wasting. There certainly was direct evidence to prove that Michelle, herself, was willing to treat Arthur cruelly. (E.g., R.T. 2677 [Michelle said she "socked the damn little brat"]; R.T. 2387 {Michelle said she had bruised Arthur's face so badly that she had to put on makeup]; R.T. 2389 [Michelle hit Arthur in the face and chest, causing bruises].) Also supporting this inference is the reality that without any specific evidence on the subject, the reasonable inference as to which parent was in charge of feeding the child is that the mother was in charge.

In sum, it could be *speculated* that appellant was involved in a deliberate effort to starve Arthur; but virtually anything can be speculated, and that is why the substantial evidence rule forbids the basing of findings on speculation. By contrast, there was no *substantial evidence* of appellant having been involved in a deliberate effort to starve Arthur.

The findings in question here were implicit; the jury's formal findings were simply that appellant was guilty of first degree murder, and the torture special circumstance allegation was true. (C.T. 473, 475.)[27] This raises the abstract question of whether the verdict and the special circumstance finding were based on the insufficiently-supported deliberate starvation

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[27] Many times this court has been faced with the argument that the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution require - at least in a death penalty case - that where the jury has been presented with a choice about the factual theory underlying its finding that the homicide was a first degree murder, or its finding of a special circumstance, it must expressly articulate a unanimous finding as to what its factual theory is. Here, for example, the jury would have been required to express whether it found first degree murder based on torture, and whether it based its finding of torture on the deliberate starvation theory.

However, this court has consistently rejected such arguments. (E.g., People v. Osband (1996) 13 Cal.4th 622, 682-683; People v. McPeters (1992) 2 Cal.4th 1148, 1185.) Acknowledging that this is the court's settled position, appellant will here only state for purposes of preservation of the issue that he does assert the constitutional right, under the Fifth, Sixth, Eighth, and Fourteenth Amendments, to such express, unanimous findings, and therefore claims the failure of the trial court in this case to require such findings dictates reversal of the judgment.

theory, or on some other theory.[28] This question in turn implicates this court's opinion in People v. Guiton (1993) 4 Cal.4th 1116. The Guiton rule dictates reversal here.

In Guiton the court examined at length the thorny question of appellate review of a general verdict or finding that might be based on a valid theory, yet might also be based on an invalid theory. The court noted that there are two categories of uncertainty in this general situation — uncertainty as to what legal theory the jury relied on, or uncertainty as to what factual theory the jury relied on. The court concluded: "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, . . . the] rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (4 Cal.4th at p. 1129.)

In short, where the uncertainty is factual, the presumption is to affirm the judgment, and where the uncertainty is legal, the presumption is to reverse the judgment.

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[28] Appellant noted in argument "I," *supra*, that there was obviously no substantial evidence to support one of the other possible theories - i.e., murder by poison or "generic" deliberation/premeditation murder. The instant discussion, particularly as it concerns the jury's rapid verdict after asking whether "starvation" could be considered "torture," makes it all the more obvious that the jury did base its verdict on a torture murder theory, not a deliberation/premeditation theory or an intentional poisoning theory.

The instant case features the Guiton problem of "factual" inadequacy. That is, the "torture" finding might have been based on the idea about the facts that the defendants deliberately starved Arthur - a theory as to which there was "inadequate" (insufficient) evidence - or might have been based on some other theory as to which, it can be assumed here, the evidence was sufficient. Thus, the finding should be affirmed - "*absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.*" (4 Cal.4th at p. 1129.)

This qualifier is decisive in this case. In Guiton the court elaborated on this qualifier: "[T]he record may sometimes affirmatively indicate that the general rule should not be followed. [¶] Taking the ["factual inadequacy"] situation first, although affirmance is the norm, reversal might be necessary if the record affirmatively demonstrates there was prejudice, that is, if it shows that the jury did in fact rely on the unsupported ground. * * * We may, for example, hypothesize a case in which the *district attorney stressed only the invalid ground in the jury argument*, and *the jury asked the court questions during deliberations directed solely to the invalid ground*. In that case, we might well find prejudice. The prejudice would not be assumed, but affirmatively demonstrated." (4 Cal.4th at p. 1129, emph. added.)

This exception obviously applies here. With increasing force and focus as he went along, the prosecutor argued the deliberate-starvation-as-torture theory to the jury. And, even

more significantly, the jury sent out a question about exactly this theory ("Can starvation be construed as extreme physical pain under legal definition of torture?"), and when the answer came back in the affirmative, the jury returned with its verdicts and findings *less than an hour and a quarter later*. A more "affirmative demonstration" of reliance on the factually invalid theory could hardly be imagined.[29] For this reason alone, the judgment in this case must be reversed.

D. Under Crawford v. Washington, the Finding Cannot Be Rescued on the Basis of Evidence Presented in the Co-defendant's Case

A further, independent reason why the judgment cannot be affirmed on the basis that there was sufficient evidence of deliberate starvation to support the findings of first degree murder and the torture-murder special circumstance is that what evidence there was on this point consisted of out-of-court, testimonial statements of the co-defendant, Michelle Jennings.

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[29] See also, on the point that a jury's quick return with a verdict after getting invalid or questionable information from the judge supports a finding of prejudicial, reversible error, People v. Pearch (1991) 229 Cal.App.3d 1282, 1295.

1. The law as articulated in Crawford

In Crawford v. Washington (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court rendered a new interpretation of the Sixth Amendment confrontation clause. The issue in Crawford was whether a defendant was properly convicted on evidence consisting of an out-of-court statement the victim made to police. After conducting an exhaustive review of the history behind and the cases under the confrontation clause, the court stated:

> "[Members of the court and other commentators have offered] two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law . . . . Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine. * * * In [White v. Illinois (1992) 502 U.S. 346 [112 S.Ct. 736, 116 L.Ed.2d 848] we considered the first proposal and rejected it. (502 U.S., at 352-353, 116 L.Ed.2d 848, 112 S.Ct. 736.) Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because [the statement at issue here] is testimonial under any definition. This case does, however, squarely implicate the second proposal."
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> (541 U.S. at pp. 60-61.)

The court proceeded to hold:

> "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law

> . . .. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."
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> (541 U.S. at p. 68, fn. omitted.)

Because the statement admitted against Crawford was testimonial, and the Sixth Amendment right to confrontation was not observed, the judgment was reversed.

2. Under Crawford, Michelle Jennings' statements that tended to support the deliberate-starvation theory were strictly inadmissible

The constitutional holding of Crawford is decisive as to the statement(s) of Michelle Jennings to Dr. Kaser-Boyd which were the *only* affirmative evidence in this case that a deliberate effort was made to "starve" Arthur Jennings.

The Crawford court freely acknowledged that it was not deciding the limits of the term "testimonial."[30] "[A] casual

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[30] Any significant developments in the interpretation by the courts of what statements are and what statements are not "testimonial" will be discussed in the reply brief, in supplemental briefing, or at oral argument. The discussion above is based on the case law as of mid-2005.

remark to an acquaintance" (541 U.S. at p. 51) is probably not testimonial, and " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' " (*id.*, at p. 52) apparently are testimonial.

Appellant contends Michelle Jennings' statement to Dr. Kaser-Boyd, which was conveyed to the jury by Dr. Kaser-Boyd, surely was testimonial under Crawford. This was no "casual remark"; it was one of the key details of the story related by one co-defendant, to a defense expert whose job it was to help make the declarant's case *as a witness at trial*, which cast blame on the other co-defendant. Appellant is confident that the case law following Crawford will hold that any such statement — a co-defendant casting blame for a crime, or for key actions involved in the crime, on his or her co-defendant, in a statement to an expert hired to assist the declarant and testify in her defense at her trial — is a "testimonial" statement for Sixth Amendment confrontation purposes.

And therefore, the statements were strictly inadmissible under Crawford.

3. The Crawford case applies retroactively to protect appellant's rights here

Because Crawford implicates the fundamental fairness and accuracy of criminal proceedings, and reworks the understanding

of bedrock criminal procedure, it applies retroactively. (Bocktin v. Bayer (9th Cir. 2005) [2005 US App LX 9973, no. 02-15866]; accord: Schriro v. Summerlin (2004) 542 U.S. 348 [124 S.Ct. 2519, 159 L.Ed.2d 442] [stating the standard for retroactivity of constitutional reinterpretation of criminal procedural rules].)

4. The Crawford issue cannot be deemed waived, and must be addressed on its merits

Although appellant's trial counsel did not object to the admission of Michelle's statement about starvation, the court should not deem the issue waived, but instead should proceed to decide the issue, i.e., to reverse the judgment because of the unconstitutional admission of Michelle's statements as evidence against appellant. This court has long held that failure to object does not forfeit review of denials of fundamental constitutional rights. (E.g., People v. Vera (1997) 15 Cal.4th 269, 276-277; People v. Saunders (1993) 5 Cal.4th 580, 589-592; People v. Holmes (1960) 54 Cal.2d 442, 443-444.) Additionally, the Crawford opinion itself makes clear that under the law in effect at the time of the trial of this case, admission of Michelle's statements would not have been considered a Sixth Amendment violation. Therefore an objection at that time would have been futile, and the issue is not waived. (E.g., People v. Birks (1998) 19 Cal.4th 108, 116 [issue which lower court could

not have decided favorably to the party that would have raised it is considered properly before higher court in the first instance].) Furthermore, this court has noted that the forfeiture rule is not automatic, and will be excused by reviewing courts when an important legal issue is presented. (E.g., In re S. B. (2004) 32 Cal.4th 1287, 1293.)

5. The Crawford error was prejudicial and reversible

It would seem to be beyond debate that *if* it was error under Crawford to admit Michelle's statements about withholding of food, the error certainly was prejudicial and reversible.

Crawford unmistakably states a constitutional rule, a rule dictated by the Sixth Amendment to the United States Constitution. It is long established that error under the U.S. Constitution is reviewed under the strict harmless-beyond-a-reasonable-doubt test, which requires the reviewing court to ask whether it is persuaded beyond a reasonable doubt that the error was harmless. (See Chapman v. California (1967) 386 U.S. 18, 24

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[17 L.Ed.2d 705, 87 S.Ct. 824]; Sullivan v. Louisiana (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182].)[31]

Obviously, the admission of Michelle's statements to Dr. Kaser-Boyd was not harmless under the Chapman test; this court certainly could not declare that the first degree torture-murder verdict against appellant, and the special circumstance finding of murder involving torture, were *surely* unattributable to Michelle's statements. Those statements were the only evidentiary basis in the case for the "starvation" theory that was the underpinning of the "torture" findings.

It was noted above that there was not substantial evidence to support the view that Arthur's weight loss, alone, was sufficient to support the torture-murder verdict and the torture special circumstance. But assuming this fatal problem was overlooked, the court would then be compelled to find prejudicial the constitutional error in admitting Michelle's statements that there was mention between the defendants of the idea of deliberately withholding food. On the whole of the evidence in this case, the thought of concluding that the torture findings

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[31] This test originated with the Chapman case, and is generally referred to as the Chapman test. More recently, the United States Supreme Court explained the Chapman test as follows: "Harmless-error review looks . . . to the basis on which 'the jury actually rested its verdict.' [Citation.] The inquiry, in other words, 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, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182] (first emph. in orig.).)

were *surely unattributable* to Michelle's statements is nonsensical.

E. Apart From the Crawford Error, the Judgment Must be Reversed Because Key Testimony Came Into Evidence in the Co-Defendant's Defense Case in a Joint Trial, After the Defense Had Moved For Severance of the Trials

Even if Michelle's statement to Dr. Kaser-Boyd were deemed non-testimonial under Crawford v. Washington, the judgment would have to be reversed as a matter of fundamental due process, i.e., a violation of appellant's Fifth and Fourteenth Amendment rights, because this evidence of "torture" by deliberate starvation was a product of the trial judge's denial of the defense motions to sever the trials of the two defendants, or to otherwise insulate the one defendant from the effects of the statements of the other. (See (C.T. 259-295, 376-377, 1187-1197 [moving papers seeking severance or other insulation]; 1 R.T. 103-152, passim [hearing and decision denying relief].)

" 'The court should separate the trial of codefendants "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." [Citations.}' " (People v. Cummings (1993) 4 Cal.4th 1233, 1286.) "The use of dual juries is a permissible means to avoid the necessity for complete severance." (*Id.*, at p. 1287.)

Appellant contends the trial court surely should have granted the severance motion in this case. This case featured incriminating statements by Michelle Jennings, conflicting defenses - each party's defense insinuating that the other party was the truly guilty one - and confusion about evidence of multiple events, some involving appellant, some involving Michelle, and some involving both defendants. The judgment in this case must be reversed under the doctrine articulated in Cummings.

However, the court need not dwell on this question. The cases discussing the issue of denial of a motion to sever the trials of jointly charged defendants typically note the corollary that, notwithstanding the merits of the trial judge's decision to allow a joint trial when the decision was made, sometimes the judgment must be reversed only because a defendant ended up suffering important prejudice as a result of the joint trial. "After trial, . . . the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law. (People v. Turner (1984) 37 Cal.3d 302, 313.)" (People v. Cleveland (2004) 32 Cal.4th 704, 726.)[32]

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[32] Appellant notes that this is a due process rule - that is to say, a rule dictated by the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, any failure by this court to apply this rule here would work a violation of appellant's constitutional rights under these provisions.

Unmistakably, such a gross unfairness occurred in this case. As has been noted above, here the jury apparently found that appellant committed torture by systematically starving Arthur over time, in both its first degree murder finding and its special circumstance finding. Yet the *only* significant evidence in the case that furnished support for this theory was the statement by Michelle to her psychologist which was introduced in *Michelle's defense case*.

A clearer violation of due process could hardly be hypothesized. The evidence supporting the crucial jury findings was not only a statement of the co-defendant, it was evidence presented only in the co-defendant's case — a part of the joint trial that had literally nothing to do with appellant's trial. This evidence would not have appeared in a severed trial of appellant alone, and would not have been heard by appellant's jury in a joint trial before separate juries.

Thus, under the long-standing retrospective review principle discussed most recently in Cleveland, the judgment against appellant must be reversed because of the grossly unfair impact of evidence put on by his co-defendant in her defense case.[33]

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[33] A further, separate reason why the judgment should be reversed under this due process principle has to do with Dr. Kaser-Boyd's testimony that Mary Dobson, a neighbor of the Jenningses, had asserted that appellant controlled Michelle. (R.T. 2922.)

Trial counsel objected to the admission of this evidence, and the objection was overruled. (R.T. 2921.) Obviously, this decision was erroneous, under appellant's Sixth Amendment confrontation rights and under the evidentiary hearsay rules

[FOOTNOTE 33 CONTINUES ON p. 86]

F. The Admission of Michelle Jennings' Statements About Withholding of Food Was Also Prejudicial Error Under the Evidence Code Provisions Governing Hearsay Evidence

Even if Michelle's statements to Dr. Boyd were deemed non-testimonial under Crawford v. Washington, and apart from the due process violation discussed in part E., just above, the judgment should be reversed because admission of the statements about deliberate starvation was erroneous under the hearsay provisions of the Evidence Code.[34]

Michelle Jennings' statement to Dr. Kaser-Boyd was, of course, hearsay — a statement made other than by a witness while testifying, which was offered to prove the truth of the matter stated — and generally, hearsay is inadmissible. (Evid. Code, §

[FOOTNOTE 33 CONTINUED, FROM p. 85]

(Evid. Code, §§ 1200, et. seq). It was an out-of-court statement by Dobson that was offered to prove the truth of the matter asserted, and was not within any exception to the hearsay rule.

This error was also prejudicial, because the second- or third-hand assertion attributed to Mary Dobson tended to run counter to other evidence that suggested it was Michelle who dominated appellant, not the other way around.

[34] Trial counsel did not object to the admission of the hearsay, and therefore respondent might argue that this non-constitutional aspect of the issue was waived.

The better approach in this regard is to consider the issue on its merits, anyway, because although a technical waiver may be presented, it could be claimed the waiver was an act of ineffective counsel, and the merits would have to be considered under that rubric, anyway. (See, e.g., People v. Scott (2000) 83 Cal.App.4th 784, 792; People v. Kelley (1997) 52 Cal.App.4th 568, 583; People v. DeJesus (1995) 38 Cal.App.4th 1, 27.) And, indeed, should the court reach this non-constitutional issue, and proceed to deem it waived, not to be decided on its merits, appellant will present the issue under the ineffective-counsel rubric in his companion petition for writ of habeas corpus.

1200.) Admission of hearsay against a criminal defendant violates his confrontation rights, unless the hearsay is admissible under a firmly rooted exception to the hearsay rule. (See, e.g., People v. Brown (2003) 31 Cal.4th 518, 538.) And there is no hearsay exception that would justify admission of Michelle's statement in this case. (See Evid. Code, §§ 1202-1341, passim.)

And of course, for the reasons already articulated in foregoing parts of this argument, under any standard of review (Chapman v. California, *supra*; compare People v. Watson (1956) 46 Cal.2d 818, 836 [standard of review for non-constitutional errors inquires into whether it is reasonably probable the verdict was affected by the error]), this error was prejudicial and reversible.

G. Conclusion

For a host of reasons, the judgment in this case must be reversed because of flaws relating to the theory that Arthur Jennings was deliberately, systematically starved, and this starvation constituted torture. There was insufficient evidence to prove this crucial fact, and what evidence there was to prove it was inadmissible in appellant's trial for numerous reasons.

Accordingly, the judgment must be reversed.

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VII. THE COURT'S FAILURE TO INSTRUCT THE JURY THAT ANY "AIDING AND ABETTING" BY APPELLANT WHICH OCCURRED AFTER THE CO-DEFENDANT ADMINISTERED THE FATAL DOSE OF SLEEPING PILLS WOULD SUPPORT LIABILITY AS AN ACCESSORY, BUT NOT LIABILITY AS A PRINCIPAL IN THE HOMICIDE, WAS REVERSIBLE ERROR

In argument "III," *supra*, appellant noted the well known rule of vicarious liability as *principals* for aider-abettors — persons who, with knowledge of the unlawful purpose of the perpetrator, and with the intent of committing, encouraging, or facilitating the crime, aid, promote, encourage, or instigate the crime. (See CALJIC No. 3.01, which was given in this case (C.T. 512, R.T. 3147-3148).) Appellant contends that the court committed reversible error when it failed to instruct further that a person who engages in behavior that meets this definition of aiding and abetting, but does so "*after* a felony has been committed" (quoting Pen. Code, § 32) is *not* a principal, but is instead an accessory, and as a consequence of this "aiding and abetting" conduct, *is not* liable for conviction of the crime committed by the co-defendant. (See Pen. Code, §§ 31, 32.)[35]

This court has long held that a trial court is required to instruct sua sponte — i.e., even in the absence of a request — on general principles of law relevant to issues raised by the evidence. (See, e.g., People v. Cavitt (2004) 33 Cal.4th 187, 204; People v. Roberge (2003) 29 Cal.4th 979, 988; People v.

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[35] CALJIC No. 6.40 is the recommended instruction for cases in which the defendant is charged as an accessory; presumably, a modified version of CALJIC No. 6.40 would have sufficed in this case.

Barton (1995) 12 Cal.4th 186, 194-198; People v. Wickersham (1982) 32 Cal.3d 307, 323; People v. Sedeno (1974) 10 Cal.3d 703, 716.) The distinction between "aiding and abetting" *before or during* the commission of the crime, on the one hand, and "aiding and abetting" *after* the commission of the crime, on the other hand, was definitely a general principal of law raised by the evidence here.

The evidence revealed that both parents engaged in acts of child abuse committed against Arthur. It will be assumed for present purposes that there was evidence that both parents were complicit in the withholding of food or malnourishment. There was some evidence that appellant may have suggested that Michelle give Arthur sleeping medication to comfort him. But the evidence also unmistakably established that Michelle went to the store and bought the box of Unisom tablets; that the directions on the box indicated that the normal adult dosage was one tablet, and that the tablets should not be given to children under 12 at all; and that Michelle proceeded to give Arthur two Unisom tablets. The two Unisom tablets were the significant cause of death.

Appellant played no part in these events that directly led to Arthur's death. However, appellant obviously *did* "aid and abet" in the efforts to conceal the crime and the body after Arthur died. Therefore the court was obliged to instruct the jury on the specific law that applies to "aider-abettors" whose participation occurs *after* the crime has been committed.

Note that appellant does not contend that the trial court should have given a "lesser related offense" instruction on the crime of accessory. (Cf. People v. Birks, *supra*, 19 Cal.4th 108 [overruling People v. Geiger (1984) 35 Cal.3d 510, which had held that defendants are entitled on request to instruction on "lesser offenses" which are not necessarily included in the charged offense, but are only related to it].) Rather, appellant contends that the law separates "aiding and abetting" type behavior into two temporal categories - before and during commission of the crime, on the one hand, and after the crime has been committed, on the other hand - and where there is some evidence to suggest a defendant's "aiding and abetting" conduct might have fallen into *either* category (or both of them), that law is a general principle of law relevant to the issues, triggering a sua sponte duty to instruct the jury on the point.

If the court were to construe the record such that the judge should have given the instruction discussed here on request, but was not under a sua sponte obligation to give it, the issue should be decided on the merits, anyway, despite a potential claim of waiver, if only because of the potential alternative claim of ineffectiveness of counsel. (See, e.g., People v. Scott (2000) 83 Cal.App.4th 784, 792; People v. Kelley (1997) 52 Cal.App.4th 568, 583; People v. DeJesus (1995) 38 Cal.App.4th 1, 27.) In addition to that, as was noted previously in this brief, this court has established the precedent of excusing an arguable forfeiture where an important legal issue is presented. (In re S. B., *supra*, 32 Cal.4th 1287, 1293.)

The error in failing to instruct the jury on accessory liability was prejudicial, under either the Watson standard or the Chapman standard.

It has been noted already in this brief that appellant's conduct, though reprehensible, and arguably "torturous," was not a significant cause of Arthur's death; it was Michelle's act of overdosing the child that caused it. Appellant was *involved* in the events that led up to Arthur's death, and remained *involved* afterward. Under the instructions they were given, the jurors easily could have mistaken general *involvement* with aiding and abetting liability, i.e., the idea that appellant took some action, with the thought in mind that Michelle had committed a crime by administering the sleeping pills, and did so with intent either to encourage or facilitate her commission of that crime. (People v. Beeman, *supra*, 35 Cal.3d 547, 560.)

A pinpoint instruction on the distinction between liability as an aider-abettor and liability as an accessory likely would have cured this problem, and helped the jurors to focus on the timing of appellant's actions, and on how appellant's actions affected events. So instructed, the jury would have known not to find appellant liable for homicide based only on his knowing and

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intentional participation in the effort to conceal the homicide.[36]

Accordingly, the judgment must be reversed.

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[36] Appellant specifically contends that omission of instruction on accessory liability violated in constitutional right to due process of law (U.S. Const., Fifth and Fourteenth Amends.), for essentially the same reason noted in footnote 18, *supra*: the United States Constitution requires as a prerequisite for criminal liability a unity between the criminal act and the criminal state of mind, and the instructions given here permitted the jury to find appellant guilty of the homicide that Michelle Jennings committed at one point in time, based on a state of mind appellant developed at a significantly later point in time.

VIII. THE JURY WAS ERRONEOUSLY INSTRUCTED ON THE ISSUE OF CAUSE OF DEATH, UNDER CALJIC No. 3.41

A key issue in the guilt trial of this case was causation: What caused Arthur Jennings' death, and in what way? The trial judge failed to instruct the jury properly on this key issue, with the result that regardless of the sufficiency or insufficiency of the evidence in this respect (see argument "I," *supra*), the judgment must be reversed.

It was noted in argument "I" that this court has articulated the law relating to causation at length. "In homicide cases, a 'cause of the death . . . is an act or omission that sets in motion a chain of events that produces *as a direct, natural and probable consequence* of the act or omission the death . . . and *without which the death would not occur.*' " (People v. Cervantes, *supra*, 26 Cal.4th 860, 866, emph. added.) "The . . . cause of the harm not only must be direct, but also *not so remote as to fail to constitute the natural and probable consequence* of the defendant's act.' . . . [T]he actor is not liable for an unintended or uncontemplated result unless . . . 'the actual result involves the *same kind of injury or harm as that designed or contemplated and is not too remote or accidental* in its occurrence . . . ." (*Id.*, pp. 869-870, emph. added.) "A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a *normal and reasonably foreseeable* result of defendant's original act the intervening act is dependent and

not a superseding cause, and will not relieve defendant of liability. * * * The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility . . .." (*Id.*, 26 Cal.4th at p. 871, internal quotation marks omitted, emph. added.)

This is the *law* of causation that applies here. The *instruction* the court gave on the subject was CALJIC No. 3.41.[37] As given here it reads:

> There may be more than one cause of the death. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is the cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the death and acted with another cause to produce the death.
>
> If you find that the defendant's conduct was a cause of the death to another person, then it is no defense that the conduct of some other person contributed to the death.
>
> (See C.T. 550; R.T. 3172.)

This statement of the law was radically different from the rule most recently described in Cervantes. In essence, the court instructed the jury that if the "torture" committed by appellant was "operative at the moment of" Arthur's death, appellant was

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[37] Both defense counsel objected to the giving of CALJIC No. 3.41, and the objections were overruled. (R.T. 2989-2990.)

guilty of first degree murder. Quite obviously, this instruction expanded the realm of culpable causation far beyond the limits set forth by this court in Cervantes and other cases.

This court has indicated that CALJIC No. 3.41 is a proper instruction, *when given in conjunction with CALJIC No. 3.40*. (See discussion in People v. Bland (2002) 28 Cal.4th 313, 337-338; People v. Sanchez (2001) 26 Cal.4th 834, 845-849, passim.) But CALJIC No. 3.40 was *not* given here.[38] The cases plainly imply that CALJIC No. 3.41, by itself, is insufficient in circumstances like those presented here.

In the only case where it was contended on appeal that CALJIC No. 3.41 was erroneous, the Court of Appeal held that there was no error, specifically because *CALJIC No. 3.40 was given*. (People v. Autry (1995) 37 Cal.App.4th 351, 363.) It is unmistakable that the Autry court would have found it error, under the circumstances presented here, to give only CALJIC No. 3.41.

In sum, the law requires that for a person's act — here, the "torture" by appellant — to be held a criminal cause, it must produce the harm — here, death — directly, naturally, as a probable consequence; conversely, the "torture" will not be a

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[38] CALJIC No. 3.40, which was not given here, contains language that resembles, and arguably communicates, the Cervantes standard - language to the effect that an act is a cause of the crime if it sets in motion a chain of events that produces that result as a direct, natural, and probable consequence.
CALJIC No. 3.40 is discussed at length in argument "IX", *infra*, where appellant contends the omission of No. 3.40 was reversible error.

criminal cause if the death does not reflect the same kind of injury as the "torture" contemplated or was designed to produce. The death must not be remotely related to the act(s) of "torture," or accidental; it must be a normal and foreseeable result of the "torture."

By stark contrast, the jury here was instructed only that the "torture" could support a first degree murder conviction in this case if it was "operative at the moment of the death," no matter what other causes were operative. This instruction greatly missed the mark, and was, accordingly, erroneous.

It is obvious that this error was prejudicial, under either the Chapman test or the Watson test.[39] Under the legal doctrine relating to causation, the evidence in this case most assuredly failed to support a finding that the "torture" by appellant was an actionable cause of death; by contrast, under the instruction given to the jury, the "torture" was more or less conclusively proven to have been an actionable cause of death. It is fair to say that the jury could not have found appellant guilty without the error, and hardly could have failed to find him guilty with the error.

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[39] Appellant specifically contends that the Chapman test applies, because the state of the jury instructions on the fundamental issue of causation worked to expand the possibility of a first degree murder verdict, and a special circumstance finding, far beyond what the law actually allows. The instructions thus violated appellant's right to due process of law (U.S. Const., Fifth and Fourteenth Amends.), and violated the crucial "narrowing" principle which is an absolute requirement of the Eighth Amendment in death penalty cases.

Specifically, Arthur's death as a result of an accidental overdose of sleeping pills was not in any way a direct or natural or probable or foreseeable consequence of the "torture." And the point of "torturing" Arthur surely was not to bring about his death by drug overdose. His death was a tragic product of great negligence — an accident. Yet the testimony revealed that the "torture" was still "operative" at the time of Arthur's death, in the sense that there were relatively fresh injuries and Arthur was obviously not thriving well at the time the drugs were administered.

This leads to another perspective on the error in giving CALJIC No. 3.41 as the sole jury instruction on causation — namely, its fatal vagueness. The judge failed to explain to the jury what he meant by the key word "operative," and failed to explain to the jury what he meant by the key phrase "substantial factor."

People v. Bland, *supra*, 28 Cal.4th 313, is one of the many cases in which this court has discussed a trial court's duty to define terms used in its jury instructions. There the court held that there exists a sua sponte duty to define the term "proximate cause" when that term is used in the jury instructions. "A court has no sua sponte duty to define terms that are commonly understood by those familiar with the English language, but it does have a duty to define terms that have a technical meaning peculiar to the law. [Citations.] '[T]erms are held to require clarification by the trial court when their statutory definition

differs from the meaning that might be ascribed to the same terms in common parlance.' [Citations.] * * * [It is] clear that proximate causation *does* have a meaning peculiar to the law, and that a jury would have difficulty understanding its meaning without guidance." (28 Cal.4th at pp. 334-335, emph. in orig.)

The same is true of the terms "substantial factor" and "operative" in CALJIC No. 3.41. The court is invited to assume a case in which on Day 1 the defendant angrily struck the victim in the leg with a baseball bat, breaking the leg; after which a third party, on Day 2, chased the victim from his car to the doorway of his apartment building, tackled him, and stabbed or shot him to death. Certainly in this case the broken leg was still "operative" on Day 2, and any reasonable juror could have concluded the broken leg was a "substantial factor" in the death, since the victim likely would have made it through the doorway to the safety of the building, if only his leg had not been disabled by the defendant's act. In this hypothetical, under the jury instructions here the defendant in the hypothetical would be liable for conviction of murder.[40]

The error in this latter sense was prejudicial for reasons parallel to those stated earlier in this argument: Had the jury been properly instructed on the limitations of the concepts of "operative" and "substantial factor," it would have been

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[40] In this sense, also, the state of the jury instructions on causation worked to violate appellant's constitutional rights under the due process clause and the "narrowing" principle. (See fn. 39.)

compelled to find appellant not guilty, because the "torture" he committed was related to Arthur's death only very remotely, at most. Without being informed of these limitations, the jury was likely to - and, obviously, did - decide that the remote connection was enough to meet the "operative" and "substantial factor" tests.

For all these reasons, the trial court erred when it instructed the jury under CALJIC No. 3.41, as it did, without further instruction on the law of causation, and the error was prejudicial. The judgment must be reversed.

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IX. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GIVE THE JURY INSTRUCTION CALJIC NO. 3.40, OR A LIKE INSTRUCTION

In argument "VIII" it was noted that CALJIC No. 3.41, which was given here, improperly instructed the jury on the issue of causation. The judge committed a parallel error by failing to give CALJIC No. 3.40, the sua sponte instruction on causation which would have given the jury more accurate information about the decision they had to make.[41]

CALJIC No. 3.40 reads:

> [To constitute the crime of _____ There must be in addition to the __(result of the crime)__ an unlawful [act][or][omission] which was a cause of that __(result of the crime)__.]
>
> The criminal law has its own particular way of defining cause. A cause of the __(result of the crime)__ is an [act][or][omission] that sets in motion a chain of

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[41] What flows from appellant's several previous arguments on the issue of causation is that the judge should have instructed the jury with the precise legal principles articulated most recently in People v. Cervantes, *supra*, 26 Cal.4th 860 - describing precisely what linkage between the defendant's act(s) and the death is required in order for the defendant to be found guilty of the homicide.

It could well be argued that CALJIC No. 3.40 does not adequately convey these principles, and therefore error would have occurred even if the trial court had given No. 3.40. However, that issue need not be reached. For present purposes, it may be assumed that CALJIC No. 3.40 would have adequately conveyed to the jury the principles they needed to understand in order properly to decide the causation issues in this case with regard to appellant.

For purposes of preservation of issues, appellant will note that his argument technically is that the trial court erred by failing to give a modified version of CALJIC No. 3.40 that faithfully conveyed the principles set forth in Cervantes.

> events that produces as a direct, natural and probable consequence of the [act][or][omission] the __(result of the crime)__ and without which the __(result of the crime)__ would not occur.

This court has long held that a trial court is required to instruct sua sponte — i.e., even in the absence of a request — on general principles of law relevant to issues raised by the evidence. (See, e.g., People v. Cavitt, *supra*, 33 Cal.4th 187, 204; People v. Roberge, *supra*, 29 Cal.4th 979, 988; People v. Barton, *supra*, 12 Cal.4th 186, 194-198; People v. Wickersham, *supra*, 32 Cal.3d 307, 323; People v. Sedeno, *supra*, 10 Cal.3d 703, 716.)

The use note provided by the CALJIC editors with instruction number 3.40 indicates it is a sua sponte instruction, and this is the plain import of the cases cited previously in this brief on the issue of causation. (E.g., People v. Bland, *supra*, 28 Cal.4th 313; People v. Sanchez, *supra*, 26 Cal.4th 834; People v. Autry, *supra*, 37 Cal.App.4th 351.) The issue of whether the "torture" committed by appellant set in motion a chain of events that produced as a *direct, natural and probable consequence* the sleeping-pill-overdose death of Arthur was unquestionably a general principle of law that was vital to the decision of this case. Yet this principle was nowhere conveyed in the instructions that were actually given to the jury at the guilt phase.

This error was prejudicial for essentially the same reasons noted in argument "VIII," *supra*: While the evidence in the case

entirely failed to support a finding that the "torture" by appellant was an actionable cause of death, the instructions given to the jury, which omitted any correct description of the law of causation, suggested the "torture" was more or less conclusively proven to have been an actionable cause of death. The jury could not have found appellant guilty without the error, and could hardly have failed to find him guilty with the error.[42]

Therefore the judgment must be reversed.

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[42] For exactly the same reasons stated in footnote 39, as to argument "VIII" - i.e., because the state of the jury instructions on the issue of causation worked to expand the possibility of a first degree murder verdict, and a special circumstance finding, far beyond what the law actually allows - appellant contends the error discussed in argument "IX" violated his constitutional right to due process of law, and violated the Eighth Amendment "narrowing" principle, and therefore the error must be analyzed for prejudice under the Chapman standard.

X. OMISSION OF THE JURY INSTRUCTION THAT A SEEMINGLY CRIMINAL ACT COMMITTED BY ACCIDENT OR MISFORTUNE IS NOT A CRIME (CALJIC No. 4.45), AND THE JURY INSTRUCTION DEFINING CRIMINAL NEGLIGENCE, OR LIKE INSTRUCTIONAL LANGUAGE, WAS REVERSIBLE ERROR

The act that directly caused Arthur Jennings to die was the administration by Michelle of the two over-the-counter sleeping pills. The evidence clearly indicated that this was a tragic accident, and indeed, the jury rejected the theory that Arthur was poisoned, i.e., the theory that Michelle gave him the pills in order to kill him or to cause him harm. (C.T. 474, 477.) Yet the trial court failed to instruct the jury on the defense of accident. Appellant contends this was reversible error.

An act is not criminal if it was "committed . . . through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." (Pen. Code, § 26, subd. Five.) Likewise, "[h]omicide is excusable . . . [w]hen committed by accident and misfortune . . .." (Pen. Code, § 195, subd. 1.)

The CALJIC form instruction on accident is instruction number 4.45, which was not given here. It reads, consistently with these statutory prescriptions:

> When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no][neither][criminal intent [n]or purpose,]

[nor] [criminal negligence,] [he][she] does not thereby commit a crime.[43]

The CALJIC editors declare that CALJIC No. 3.36, defining criminal negligence, must be given along with No. 4.45, ["i]f [No. 4.45] is given in its entirety . . .." (California Jury Instructions - Criminal (Jan., 2005 Ed.), p. 166.) Number 3.36 was not given here, either. It reads:

> [Criminal negligence"] ["Gross negligence"] means conduct which is more than ordinary negligence. Ordinary negligence is the failure to exercise reasonable care.
>
> [Criminal negligence"] ["Gross negligence"] refers to [a] negligent act[s] which [is][are] aggravated, reckless, or flagrant and which [is][are] such a departure from the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for [human life][danger to human life] or to constitute indifference to the

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[43] Note that the CALJIC editors furnish an "accident" instruction that is specific to homicide — instruction No. 5.50. That instruction was not given here, either. Appellant's argument focuses on the omission of No. 4.45, because the CALJIC editors recommend that No. 4.45, not No. 5.00, should be given "in a case requiring proof of criminal negligence for conviction" (California Jury Instructions - Criminal (Jan., 2005 Ed.), p. 184.) This would seem — arguably, at least — to apply to Michelle Jennings' act of giving the overdose to Arthur.

While it could be debated exactly what combination of instructional language should have been given here, the fact remains that the court did not instruct at all on the defense of accident or on criminal negligence. Therefore it is unnecessary on this appeal to decide exactly what the best instructional language *would have* been.

consequences of those act[s]. The facts must be such that the consequences of the negligent act[s] could reasonably have been foreseen and it must appear that the [death][danger to human life] was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act.

It appears that no one requested instruction on the defense of accident or on criminal negligence. (R.T. 2980-3040, passim.) However, as has been noted previously in this brief, "[t]he trial court has a duty to instruct, sua sponte, 'on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case.' (People v. Montoya (1994) 7 Cal.4th 1027, 1047.) This includes the duty to give instructions concerning defenses on which the defendant relies or which are not inconsistent with the defendant's theory of the case. (People v. Breverman [1998] 19 Cal.4th 142, at p. 157. * * * The claim that a homicide was 'committed by accident and misfortune' ([Pen. Code,] § 195), is such a defense because it 'amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime.' (People v. Lara (1996) 44 Cal.App.4th 102, 110; see also People v. Gonzales [1999] 74 Cal.App.4th 382,] 390.)" (People v. Bohana (2000) 84 Cal.App.4th 360, 370.)[44]

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[44] The CALJIC editors note that when no. 4.45 is given, no. 3.36 is also a sua sponte instruction. (Cal. Jury Instrucs. - Criminal, *supra*, pp. 126, 166.)

That the overdosing with sleeping pills in this case was accidental not only was "a defense on which the defendants relied," it was a fact the prosecution did not even try to contest. And apart from what theories the parties advanced, on the evidence here the idea that the sleeping pill overdose was deliberate is outlandish. Given Arthur's emaciated state and the manifest evidence of many abuse-type injuries, added to the evidence that Arthur was given non-lethal amounts of several prescription drugs, the thought that one or both parents would decide to kill him by slightly overdosing him with over-the-counter sleeping aids is absurd.

Certainly, then, the trial court had a sua sponte duty to instruct on accident and misfortune, and therefore also on criminal negligence, and failed to discharge these duties.

Under all the circumstances here, these errors in failing to instruct on the defense of accident and the law of criminal negligence was prejudicial and reversible.

It appears that this court recognizes erroneous omission of instruction on a defense to be error under the United States Constitution. (See, e.g., discussion in People v. Mayfield (1997) 14 Cal.4th 668, 774; see also, e.g., People v. Breverman, *supra*, 19 Cal.4th 142, 165 et. seq. [indicating that the lesser Watson standard of review would apply *in non-capital cases*, thus suggesting the Chapman standard would apply in capital cases, under U.S. Supreme Court authorities].) In any event, appellant specifically asserts this to be the case — that failure to

instruct on a defense violates a capital case defendant's rights to due process of law (U.S. Const., Fifth Amend.), to jury trial (*id.*, Sixth Amend.), and to be protected against cruel and unusual punishment (*id.*, Eighth Amend.).

Accordingly, to determine whether the error is prejudicial the court must inquire into whether the error was harmless beyond a reasonable doubt, i.e., whether the verdict was surely unattributable to the error. (Chapman v. California, *supra*, 386 U.S. 18, 24; Sullivan v. Louisiana, *supra*, 508 U.S. 275, 278.)

The omission of instruction on the defense of accident and on the law concerning the partial defense of criminal negligence in this case cannot survive this strict scrutiny. The prosecution theory that seemingly was persuasive for the jury, which rejected the theory that Arthur was deliberately "poisoned," but apparently accepted the theory that Arthur was "tortured" by starvation, was that Michelle administered the sleeping pills, which was the immediate cause of death, and the Jenningses engaged in abuse, including starvation, which was arguably a remote cause of death, and therefore the parents were guilty of murder — indeed, first degree murder. Yet the jury was not instructed that if they concluded the overdose was strictly accidental, no culpable homicide was committed, at all, and they were not instructed that if they concluded the overdose was a product of gross or criminal negligence, there was a culpable homicide, but it was involuntary manslaughter (see CALJIC No. 8.45, given in this case).

It is logically possible that the jury might have arrived at their first-degree-murder conclusion if they had been properly instructed, but it is more likely - and certainly is reasonably *possible* - that their verdict and findings were "attributable to" the court's failure to instruct on the full defense of accident or the partial defense of negligent homicide. In other words, it is reasonably possible the jury would not have convicted the defendants of first degree murder, and would not have found the special circumstance allegations true, if these key instructions had been given. Therefore the court cannot say the verdicts and findings were *surely* unattributable to the instructional omissions.

Therefore, the errors were prejudicial, and the judgment must be reversed.

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XI. BECAUSE THE TRIAL COURT ADMITTED INTO EVIDENCE IN APPELLANT'S TRIAL A NUMBER OF EXTRA-JUDICIAL STATEMENTS BY MICHELLE JENNINGS WHICH INCULPATED APPELLANT, STATEMENTS AS TO WHICH APPELLANT HAD NO OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE MICHELLE, THE JUDGMENT MUST BE REVERSED

A. Introduction / Summary

Appellant contends that the judgment must be reversed because of the admission into evidence of extra-judicial statements by Michelle Jennings (other than statements about "starvation" which were discussed in argument "VI," *supra*), which were exculpatory as to her and inculpatory as to appellant. The admission of these statements was surely erroneous, and under all the circumstances here, the error was prejudicial.

B. The Developing Law Relating to Admission of Out-of-Court Statements Against a Criminal Defendant

The right of confrontation of witnesses, guaranteed by the Sixth Amendment to the United States Constitution, is "essential and fundamental" to a fair trial. (Pointer v. Texas (1965) 380 U.S. 400, 405 [85 S.Ct. 1065; 13 L.Ed.2d 923].) Accordingly, the United States Supreme Court has consistently held that a nontestifying codefendant's extrajudicial custodial confession that inculpates a co-defendant is inadmissible in the latter defendant's trial because it would violate that defendant's Sixth Amendment confrontation guarantee to admit it. (E.g., Bruton v.

United States (1968) 391 U.S. 123 [20 L.Ed.2d 476, 88 S.Ct. 1620]; Roberts v. Russell (1968) 392 U.S. 293 [20 L.Ed.2d 1100, 88 S.Ct. 1921]; Cruz v. New York (1987) 481 U.S. 186, [95 L.Ed.2d 162, 107 S.Ct. 1714]; Gray v. Maryland (1998) 523 U.S. 185 [140 L.Ed.2d 294, 118 S.Ct. 1151]; Lee v. Illinois (1986) 476 U.S. 530 [90 L.Ed.2d 514, 106 S.Ct. 2056]; see also, Lilly v. Virginia (1999) 527 U.S. 116, 133-134 [144 L.Ed.2d 117, 119 S.Ct. 1887]; *id.* at p. 143 (conc. opn.).

Most recently, in Crawford v. Washington, *supra*, 541 U.S. 36, the court held more broadly that the prosecution may not use *any* "testimonial" out-of-court statement against a defendant, unless he is guaranteed the right to confront the declarant in court.

In Crawford the court did not offer a fully dispositive definition of "testimonial," but it did state conclusively that "some statements qualify [as 'testimonial'] under any definition - for example, *ex parte* testimony at a preliminary hearing. [¶] Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." (541 U.S. at p. 52.)

Thus, it is beyond debate that statements made by Michelle Jennings in the police interrogations were "testimonial."

In cases like this one, which feature the problem of co-defendants' out-of-court statements that tend to inculpate a fellow defendant, and therefore are inadmissible, various remedies have been employed to protect the non-declarant

defendants' rights in this regard. Sometimes the trials are severed, sometimes the statements are excluded at a joint trial, sometimes separate juries are seated for the trials of each defendant. The only important thing to note about this subject in this brief is that while the defense raised the issue and sought remedies, none of these remedies was employed in appellant's trial. The trial court excluded a few statements, but it denied all relief as to the statements it did admit. (C.T. 259-295 [moving papers]; 1 R.T. 103-152, passim [hearing and decision]; see also R.T. 2877 ["Aranda-Bruton" objection to testimony of psychologist Dr. Kaser-Boyd].)

C. The Statements of Michelle Which Were Admitted Into Evidence, And How They Fit Into The Whole of The Evidence

The trial court admitted out-of-court testimonial statements that Michelle had made in each of two settings — the joint interrogation of appellant and herself, and Michelle's interview(s) with the psychologist Nancy Kaser-Boyd.

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1. Videotape interrogation statements[45]

The entire videotape of the primary interrogation session was played to the jury. The essential statements by Michelle in this session which were either directly or indirectly inculpatory as to appellant were as follows (see C.T. 692-804, passim [transcript]):

I didn't do it, I didn't kill Arthur. (*Stated several times.*)

I never hurt that kid. Spanking, yes.

[*Concerning the subject of the defendants having discussed killing Arthur*] And I said send him to Wilma, or to Dad's.

Did I want to kill him? No. (*This pattern repeated twice.*)

Did I hit Arthur in the head with the shovel, Martin?

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[45] The interrogation session was very lengthy, and it involved statements by four different people - two police officers and the two Jenningses. Because of these factors, and of the nature of recorded interrogations generally, three conventions will be employed here in relating Michelle's statements:

First, while much of the text of this part of the brief will reflect exact quotations, the goal is to relate the gist of what Michelle said. For this reason, quotation marks are not used.

Second, as it typically happens in interrogations — particularly interrogations with more than two people talking — oftentimes here the key communications involved a series of fragmentary statements. Accordingly, as necessary some of the import of the statements will appear inside brackets; the brackets indicate that the material within is either information supplied by other parties in the interrogation, or a summary that cannot fairly be placed in the mouth of Michelle, or a clarified version.

Third, a few parenthesized statements in italics are added. These are clarifications or background information that is not part of the interrogation, per se.

[*Insinuating, no.*]

Who did all this? It wasn't me, was it?

Why didn't you [*Martin*] tell me [*that Arthur was injured by falling on the fireplace shovel*]?

I didn't know the [*trip driving around looking at mine shafts had to do with*] looking for a place to dump the body.

Did I kill Arthur, Martin? [*Insinuating, no.*]

Martin was talking about shooting Arthur in the head. I said let's send him to Wilma's, or to your Dad's.

Martin threatened me. He said, 'if you tell I'll hurt you or Pearl.'

Martin told me to give [*Arthur*] Vicodin.

I gave him one Valium, that's all. Martin gave the rest. I said I gave them all, but I didn't.

Martin had me go to the store, get Sominex, and give it to Arthur, to put him to sleep.

Remember the time you [*Martin*] dragged him, threw him on the porch, and he got a big bruise on his head? What happened? I wasn't there.

I spanked Arthur, put him in the corner, and when he had fits, I smacked him in the face. But in that last couple days Martin got carried away. He hit Arthur in the face with his fist. [*Martin vocally denies at this point.*] I seen you punch him, Saturday and Sunday. Remember when you go like this [*gesturing*] and knock

him down, and you'd kick him and slug him, and put his feet out from under him? And have him hold the two-by-four, and when he dropped it, you dropped him?

It's not from me, is it?

I told them [*the police*] about you [*Martin*] holding his hand over the stove.

Do you think the things I did caused his death, Martin? I can't hit hard and do damage to other people can I?

[*Officer says Michelle told police that on Friday and Saturday Arthur was having a fit and you, Martin, started*] bouncing him off the wall. [*Michelle*] went in there and stopped Martin three or four times.

What about the duck tape? Arthur's yelling. And you got tired of it and you said, 'Fuck this! I'm going to end it!' And you went over and put duck tape over his mouth and hands. And his hands turned purple. I told you, 'You're gonna kill him!' I went over and took it off myself. Remember, I had to cut it off?

Why are you lying and trying to bring me down?

Martin threatened to beat me, several times.

It was not me who hit Arthur with the shovel.

How come you [*Martin*] didn't tell me about the shovel thing?

I didn't hit him with the shovel, did I?

[*Don't*] drag me down in this mess.

I'm not responsible for what happened to Arthur.

I didn't do it, right?

I first heard of Arthur's head hitting the shovel when [*Detective Glozer*] told me.

And I didn't cause the death [*although*] I'm getting blamed.

On Christmas Evening Arthur was being a pain, peeing, lying, [*etc.*], and you [*Martin*] got tired of it, and said, 'Fuck this. I'm going to take care of this.' Then you brang him in and turned on the burner and put his hand over it. I told you to stop. Remember?

Martin said not to put Arthur on the insurance because he would not be there long enough.

Do you want me to lose Pearl? Then why bring me down? I didn't do nothing.

I told Martin not to kill him. I said 'send him to Wilma's or give him to Art [*Jennings, Sr.*].'

How come you're putting this off on me? You going to take blame? (*This statement occurred when the two defendants were left alone together.*)

My answer [*to 'who killed Arthur'*] is no. (*Stated several times.*)

When you were flipping him on the bed, he was coming off that high [*gesturing*] off the bed, his neck was flopping back just like a dead duck.

You did hit him in the chest a couple of times, a week, maybe two weeks ago.

He died when I come home, so I don't know what the hell happened. They said he had a bloody head, so you must have done something. And I don't know about it.

I had to give Arthur CPR, [*but after that*] he was breathing fine. Then I left to go with Art [*Sr.*]. Then I came home [*and got the*] bad news. But he was not bleeding nowhere.

There were not a lot of beatings. Honest, no. He started acting up after Christmas. Then Martin decided to burn his hand and was knocking him down and kicking him down.

You're [*referring to Martin*] the only one that knows [*whether there was a shovel blow*]. I wasn't there.

Maybe there's something you [*Martin*] don't want to make clear.

You killed Arthur, didn't you?

2. Statements to Dr. Kaser-Boyd

The statements by Michelle to Dr. Kaser-Boyd, her psychologist, which were put in evidence and were inculpatory as to appellant were (see R.T. 2873-2874, 2880, 2882, 2887):

Martin abused Michelle, though it eased the last two years.

Martin told Michelle that Arthur's fits were not epileptic, they were on purpose.

Martin finally said hitting Arthur was not working, and proposed depriving Arthur of food.

Nearer in time to Arthur's death, Martin talked of shooting Arthur in the head, and Michelle said he was not going to.

D. Discussion: Admission of the Statements Was Erroneous Under Crawford v. Washington, And Also Under the Case Law That Predated The Crawford Case

1. The trial court erred

The trial court's admission into a joint trial before a single jury of the statements recited in part "C." was surely erroneous under all the authorities leading up to and including Crawford v. Washington.

Putting aside for the moment the subject of the Crawford case, appellant's point would seem to be undebatable under the still-viable "Aranda-Bruton" rule.[46] This court recently noted: " 'The Aranda / Bruton rule addresses the situation in which "an out-of-court confession of one defendant . . . incriminates not only that defendant but another defendant jointly charged." [Citation.] " 'The United States Supreme Court has held that, because jurors cannot be expected to ignore one defendant's confession that is 'powerfully incriminating' as to a second defendant when determining the latter's guilt, admission of such

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[46] People v. Aranda (1965) 63 Cal.2d 518; Bruton v. United States, *supra*, (1968) 391 U.S. 123.

a confession at a joint trial generally violates the confrontation rights of the nondeclarant." ' " (People v. Combs (2004) 34 Cal.4th 821, 841, emph. omitted; see discussion in People v. Song (2004) 124 Cal.App.4th 973, 980-984.)

Michelle's statements were excludable just as certainly under Crawford v. Washington. This analysis was already set forth in argument "VI," *supra*, with the exception that as to the statements in the police interrogation at issue here, Michelle's statements were "testimonial" by definition. As noted in argument "VI," Crawford applies retroactively, and the issue should not be deemed waived or forfeited. And the Crawford rule is a "bright-line" rule, applicable to all testimonial, out-of-court statements that inculpate the co-defendant: admission of such statements is flatly prohibited.[47]

In a cursory discussion in People v. Combs, *supra*, 34 Cal.4th 821, this court held that out-of-court statements made in a joint interview of the defendant and the person (Purcell) who was involved in the murder the defendant committed, were admissible, despite the Crawford rule, because Crawford was not implicated: the statements by Purcell "were not admitted for

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[47] The succeeding discussion in the text above concerns a possible argument for avoiding the effect of Crawford with regard to the statements Michelle made in the police interrogation - to wit, that appellant "adopted" Michelle's statements as his own.

At this writing there would not seem to be any basis for contending that Crawford is not absolutely controlling with regard to the admission of the statements Michelle made to her psychologist in preparation for trial, statements which appellant could not have "adopted." (See again full discussion in argument "VI.") Should respondent advance any such claim in his brief, appellant will reply to that argument in the reply brief.

purposes of establishing the truth of the matter asserted, but were admitted to supply meaning to defendant's conduct or silence in the face of Purcell's accusatory statements. [Citations.] '[B]y reason of the adoptive admissions rule, once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own admissions* . . .. [Citation.] Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant.' [Citation.]" (*Id.*, at p. 842, emph. in orig.)[48]

Appellant expressly contends that in this respect this court's Combs opinion flatly contradicts Crawford v. Washington and must be reconsidered or overruled. In Combs this court used the state law of hearsay as a mechanism for avoiding the rule of Crawford. But in Crawford the United States Supreme Court forbade exactly this kind of maneuver: "Where nontestimonial

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[48] The court went on: " 'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' (Evid. Code, § 1221.) The statute contemplates either explicit acceptance of another's statement or acquiescence in its truth by silence or equivocal or evasive conduct. 'There are only two requirements for the introduction of adoptive admissions: "(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his *adoption* of, or his *belief in*, the truth of such hearsay statement." [Citation.]' . . . Admissibility of an adoptive admission is appropriate when ' "a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution . . .." ' " (34 Cal.4th at pp. 842-843, emph. in orig.)

hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . .. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (541 U.S. at p. 69.) The import of this is unmistakable. Where what is at issue is the admission against a defendant of testimonial out-of-court statements by another person, state hearsay law simply cannot be raised as a bar to the defendant's assertion of his Sixth Amendment right to confrontation and cross-examination.

This controlling statement in Crawford makes it unnecessary to dwell on the secondary fact that Michelle Jennings' testimonial statements were not admissible as "adoptive admissions," even under the Evidence Code, either. The adoptive admissions rule, described in the quotation above from People v. Combs, applies where the non-declarant has manifested his adoption of, and his belief in, the *truth* of the statements. These features are notably absent in the joint interrogation session at issue here.

During the videotaped interview the police left the Jenningses alone together for several minutes, and during that period Michelle implored appellant to take responsibility for the crime, for her sake and the baby's, and appellant agreed to do it. (C.T. 750-758.) After further interrogation the officers again left the Jenningses alone together, and at that point

Michelle thanked appellant, and appellant said he was just trying to help her. Michelle then asked appellant why he had not told her the story of Arthur catching appellant and Cora Grein kissing, and appellant hitting Arthur with the fireplace shovel, and appellant told her he had just made it up. He had confessed because he loved Michelle and Pearl. (C.T. 801-804.)

Quite obviously, appellant did not evidence an adoption of Michelle's statements as the *truth*, or evidence any belief that her statements were *true*. Rather, appellant expressed his willingness to "confess," to take responsibility for Arthur's death, *regardless of* the truth.

This does not mean Michelle's statements were *inadmissible*; it means they were admissible *so long as appellant's Sixth Amendment right to confrontation and cross-examination was honored*. (Crawford v. Washington, *supra*.) The trial court erred by allowing the statements into evidence in a way that prevented appellant from confronting and testing the statements by having Michelle Jennings on the witness stand.

2. The error was prejudicial and reversible

The remaining question about the admission at trial of the testimonial statements by Michelle noted in part "C." above is whether the error was prejudicial — i.e., whether this court can say the verdict and findings against appellant were *surely* unattributable to the admission of Michelle's many statements.

(Chapman v. California, *supra*, 386 U.S. 18, 24; Sullivan v. Louisiana, *supra*, 508 U.S. 275, 278.)[49]

The key to analysis of this question is that not only was it surely an act of *Michelle* Jennings that caused Arthur's death (almost surely accidentally), but there is good reason to believe that *Michelle* Jennings committed many of the acts of abuse over the weeks and months of Arthur's residence in the household. That is to say, conversely, the court is asked not to make the question of prejudice circular, by simply assuming that appellant personally engaged in so many acts of significant violence against Arthur that it could not reasonably be supposed that appellant was not wholly culpable, no matter what Michelle said in the interrogation or in the sessions with her psychologist.

It is important to note that the only significant evidence of any abusive acts at all by appellant comes from the interrogation. Other than Cora Grein, who is discussed below, there were three witnesses who testified about their observations of the Jennings household while Arthur was living there — Louis Blackwood, Phillip Orand, and Kevin Orand. None of them ever observed appellant abusing Arthur, or acknowledging having abused Arthur. To the contrary, Kevin Orand recalled *Michelle* having said she "socked the damn little brat between the eyes, knocked

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[49] It was already noted in argument "VI," *supra*, that Crawford error is reviewed under the strict, beyond-a-reasonable-doubt Chapman standard. If this error is viewed as Aranda-Bruton error, the rule is the same: Aranda-Bruton error is constitutional error, and thus takes the constitutional standard of review. (See People v. Song, *supra*, 124 Cal.App.4th 973, 981, and cases cited.)

him out" (R.T. 2677) because Arthur had kicked her. Phillip Orand saw Arthur, and observed aloud that there was something wrong with him; appellant responded by saying that *Michelle* had knocked him out. (R.T. 2664.) Louis Blackwood did not observe any acts of abuse by anyone, but on one occasion *Michelle* Jennings had "got[ten] up in my face" (R.T. 2523), angrily, in a way that seemed out of proportion to the situation. Blackwood also testified that appellant "referred to her as the boss" (*ibid.*), and in Blackwood's opinion, "[s]he was the boss. * * * *Michelle* was the man of the house, so to speak." (*Ibid.*, emph. added.)

Additionally, it should be recalled that Michelle told her psychologist, Dr. Kaser-Boyd, that she (Michelle) had bruised Arthur's face so badly that she had to put on makeup. (R.T. 2387, 2389.)

Although it is an entirely subjective matter, appellant asks the court to observe the interrogation videotape with the testimony of Louis Blackwood in mind, with the question in mind of whether one of the Jenningses appeared to be the dominant partner, and if so, which one it was. A strong argument can be made that the videotape reveals that *Michelle* was the dominant partner in the relationship.

A related point on the subject of the prejudice of admitting Michelle's self-exculpatory statements into evidence is the idea that as the interrogation went on, appellant was gradually manipulated into "taking the fall" for abuse that *Michelle* had

committed. Appellant was willing to assign responsibility to himself generally, but was halting and uncertain when called upon to describe the details of his abusive acts. In many ways the videotape creates the impression that appellant had to be "helped" to know what details to describe, before he agreed that these were the details of the acts he was supposed to admit.

The actions of the two Jenningses when they were alone in the interrogation room strongly support this view. On both of these occasions, Michelle became openly thankful for appellant's willingness to "confess," and get her off the hook. Appellant's demeanor also changed, from that of a halting, uncertain man who could not remember much, to that of a relatively assertive "co-conspirator" in the enterprise of shifting all the blame from Michelle's shoulders onto his own.

It is not inconsistent with this view that in his halting series of admissions to facts the other people in the room supplied, appellant attempted to minimize the level of his culpability. Given the basic facts known to all — that a five-year-old child had been over time bloodied and bruised, beaten and burned, while in his parents' custody, and finally had died — it is not unreasonable to imagine one parent taking responsibility in the interest of protecting the other parent, rather than in the interest of getting the real truth out, and yet at the same time hoping to minimize his own culpability in the false account he gives.

Appellant submits that this is not only *a* reasonable interpretation of all the evidence before this court, but it is in the end the most reasonable interpretation.

Two other points should be made in this discussion of prejudice. First, much of the time in the interrogation was devoted to the subject of the relatively fresh wound to the back of Arthur's head. It is unmistakable that the detectives assumed this blow caused Arthur's death, and felt, therefore, that their first and foremost goal had to be to secure an admission on this point.[50] Sensing this, appellant first denied responsibility for the injury, then tried to fix the blame for it on Cora Grein, then stated that he, himself, had caused it by striking Arthur with the fireplace shovel. Significantly, as soon as the Jenningses were alone, appellant's demeanor of heavy guilt evaporated. Michelle thanked appellant, and he whispered to her that he had "just tried to help you" (C.T. 801); Michelle asked why he had not told her the story about Cora, and appellant whispered, "I made it up" (C.T. 802).

In short, not only was the admission about the shovel blow not probative as to the actual cause of death; it also was not a particularly reliable indicator of a culpable act by appellant, at all.

Cora Mae Grein did give testimony at the trial that was consistent with appellant's admission in the interrogation about

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[50] As it turned out, the autopsy pathologist regarded this injury as "not life threatening" (R.T. 2653) and not any part of the cause of death.

the shovel blow. (R.T. 2682-2687.) However, it is significant that the detectives obviously had not heard this story from Grein before the interrogation of the defendants occurred. Thus, appellant had told the story, and the detectives knew the story, before the detectives first interviewed Grein. It is entirely possible that Grein got the story she told as a trial witness from the police detectives, not from her own memory. In this connection, it is notable that in all the other time she was around the Jennings family, when Arthur was there, Grein had seen appellant hit Arthur only once. (See R.T. 2683.)

Also, Grein had an obvious bias against the Jenningses, who had triggered the removal of her children from her custody, and who had, in the interrogation, featured her first as the likely killer, and then as a witness to a homicide. Grein's relating of the shovel-blow story is not nearly as significant a piece of evidence as it would appear to be at first blush.

Apart from all of the foregoing discussion, the erroneous admission of Michelle's out-of-court, testimonial statements should be deemed prejudicial and reversible just based on the content of the statements, themselves. Given this content, and viewing it in light of the rest of the evidence, this court cannot form the necessary degree of certainty that the jurors — or some of them — must not have deemed Michelle's words and conduct during the interrogation persuasive on the issue of whether appellant was the main actor in the abuse and neglect of Arthur.

The statements to Dr. Kaser-Boyd were, with one exception, repetitions of things Michelle said in the interrogation, and thus were prejudicial for the same reasons discussed above.

The exception is the statement about depriving Arthur of food as a disciplinary measure. This subject was discussed in great detail in argument "VI," *supra*. For present purposes it suffices to say again that this was the only actual evidence in the case on the point of deliberate starvation as discipline, and given the jury's overall findings, its admission was absolutely prejudicial.

Finally, on the subject of prejudice, it should be noted that there is a natural tendency in a multiple-defendant situation like the one this case features, for people (i.e., jurors) to seek to identify a "true bad guy."[51] The likelihood that jurors would have deemed appellant the "true bad guy" in this case was certainly higher with an evidentiary mix featuring Michelle's manifold professions of total innocence than would have been the case without her statements. This also is a factor which, by itself, precludes a finding that the error in the

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[51] See, e.g., People v. Massie (1967) 66 Cal.2d 899, 917 (fn. 19 and accomp. text and case citations). Massie is the root case on the rules for severance of defendants (see discussion citing People v. Cummings, *supra*, 4 Cal.4th 1233, 1286, in argument "VI," *supra*).

One of the bases for severing defendants is prejudicial association with a co-defendant. Most typically this has to do with the interest of a "less bad" defendant (see, e.g., People v. Chambers (1964) 231 Cal.App.2d 23, 28-29), but there are concerns on the opposite side, as well, that support severance. In a joint trial, an error that tends unfairly to paint one defendant as the real "bad guy," should be seen as especially prejudicial.

admission of Michelle's statements was harmless beyond a reasonable doubt.

E. Conclusion

The trial court certainly committed constitutional error in admitting into evidence at appellant's trial the statements Michelle Jennings made in a police interrogation and in her interviews with her defense psychologist. And any careful and fair review of the whole of this case will lead to the conclusion that this error was prejudicial, i.e., that the court cannot conclude the first degree murder verdict and the special circumstance finding were *surely* unattributable to the error.

Therefore, the judgment must be reversed.

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XII. THE COURSE OF EVENTS IN THIS CASE COMPELS APPLICATION OF THE RULES OF REVERSAL FOR SUBSTANTIAL ERRORS, CUMULATIVE ERRORS, AND LENGTHY JURY DELIBERATIONS

Apart from the specific errors argued above in this brief, there are several general reasons, rooted firmly in the traditions of appellate review, why the judgment in this case must be reversed.

First, it cannot be disputed that at best for the prosecution, in this case the guilt phase evidence was close on the key issues of whether appellant caused Arthur Jennings' death at all, and whether the homicide was a first degree murder or a special circumstance murder. The closeness of the guilt phase evidence, added to the fact that the case involved only a single homicide, makes it unmistakable that the penalty decision in the case was also close. In such circumstances the courts of this state have consistently held that because the case was closely balanced, *any* substantial error tending to discredit the defense or corroborate the prosecution must be deemed prejudicial. (See People v. Bain (1971) 5 Cal.3d 839, 852; People v. Duran (1976) 16 Cal.3d 282, 295-296; People v. Zemavasky (1942) 20 Cal.2d 56, 62; see also, People v. Babbitt (1988) 45 Cal.3d 660, 689; In re Martin (1987) 44 Cal.3d 1, 51.)

Second, the verdict was potentially influenced by the cumulative effect of numerous errors, as discussed in arguments "VI" through "XI," *supra*. The courts have consistently applied a similar rule, to the effect that where the errors in the case

have been numerous, they should be considered as a cumulative whole, and not just separately and discretely, in deciding the question of whether a result more favorable to the appellant would have been reached had there been no error. (See, e.g., People v. Hill (1998) 17 Cal.4th 800, 844-845, and cases cited; see also, People v. Holt (1984) 37 Cal.3d 436, 459; People v. Cardenas (1982) 31 Cal.3d 897, 907.) "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (People v. Hill, *supra*, 17 Cal.4th at p. 844.)

Additionally, the jury deliberated in the guilt phase for approximately seven full days (see C.T. 452-472, passim; R.T. 3199-3214), and in the course of their deliberations they had the testimony of six different witnesses read back to them, and they also reviewed the videotape of the interrogation session (C.T. 455, 457, 459, 460, 465, 468). The jury also deliberated for almost three full days in the penalty phase (C.T. 634, 680, 682, 683), and in those deliberations they requested readbacks of two witnesses' testimony (C.T. 679, 681).

Two other long established rules of review hold that where the deliberations were lengthy, the reviewing court should be strongly inclined to deem any error prejudicial and reversible (In re Martin, *supra*, 44 Cal.3d 1, 51 [citing cases where the deliberations ranged from six to 22 hours in length]), and that where the jurors have requested readbacks of key testimony, this also should incline the reviewing court to find any significant

error reversible (People v. Pearch (1991) 229 Cal.App.3d 1282, 1295, and cases cited).

All of these principles apply completely in this case. They make the case for reversal of the judgment compelling.

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XIII. THE DEATH PENALTY IS AN UNCONSTITUTIONAL PUNISHMENT IN ALL CASES, AND THEREFORE THE PUNISHMENT IN THIS CASE MUST BE REDUCED TO LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE

Appellant contends the death penalty is an unconstitutional form of punishment in all cases, and accordingly, it cannot be enforced. The punishment violates the guarantees of due process of law, contained in the Fifth and Fourteenth Amendments to the United States Constitution, and the prohibition of cruel and unusual punishments, contained in the Eighth Amendment to the United States Constitution.[52]

Because this court has to date routinely rejected this argument, appellant will not set it forth at great length. Essentially, appellant's argument is that the issue can be understood, and can be resolved, by reference to the writings of

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[52] But for section 27 of article I of the California Constitution, which provides that "[t]he death penalty provided for under [California law] shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment[] . . . nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution," appellant would contend that the death penalty constitutes cruel or unusual punishment, and a deprivation of life without due process of law, under the California Constitution. (Cal. Const., art. I, §§ 15, 17.)

Accordingly, appellant makes no detailed argument that the death penalty is unconstitutional under the California Constitution. However, for purposes of preserving the issue, appellant contends that, for the same reasons advanced with regard to the U.S. Constitution, the death penalty violates the cruel or unusual punishments clause, and the due process clause, of the California Constitution.

various justices of the United States Supreme Court — primarily the writings of Justice William Brennan.[53]

The constitutionality of the death penalty was the subject of numerous U.S. Supreme Court decisions in the last third of the 20th Century. In McGautha v. California (1971) 402 U.S. 183 [28 L.Ed.2d 711, 91 S.Ct. 1454], by a vote of 6 to 3 the Court held, insofar as is relevant here, that the guarantee of due process was not violated by a procedure according to which the jury in a capital case was not given any criteria to apply in deciding whether the penalty should be death or life imprisonment. The three dissenting Justices concluded that the guarantee of due process requires, at a minimum, the enactment of *some* statutory criteria to guide the jury's decision.

The very next year, in Furman v. Georgia (1972) 408 U.S. 238 [33 L.Ed.2d 346, 92 S.Ct. 2726], by a vote of 5 to 4 the Court effectively held the death penalty unconstitutional. The Justices filed nine separate opinions. Four of the opinions are especially important in terms of appellant's contention here.

It is also crucial to note that in Furman, the Court adopted a convention which it follows to this day, i.e., categorizing its holdings about the constitutionality of the death penalty under

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[53] Appellant's argument largely reflects the thoughts of U.S. Supreme Court justices expressed in the following passages: Furman v. Georgia (1972) 408 U.S. 238, 263-306 [33 L.Ed.2d 346, 92 S.Ct. 2726] [Brennan, J., conc.]; Callins v. Collins (1994) 510 U.S. 1141 [127 L.Ed.2d 435, 437-439, 114 S.Ct. 1127, 1128-1130] [Blackmun, J., diss. from den. of cert.]; Walton v. Arizona (1990) 497 U.S. 639 [111 L.Ed.2d 511, 110 S.Ct. 3047] 657-669 [Scalia, J., conc.]

the rubric of the Eighth Amendment, which prohibits, inter alia, the infliction of "cruel and unusual punishments."

What is noteworthy about this convention is that at least some of the reasoning behind the arguments for the unconstitutionality of the death penalty has to do more with concepts of due process — fundamental fairness — than with concepts of what is "cruel" or "unusual." The convention of labeling the whole discussion as an Eighth Amendment discussion has given various Justices, down through the years, the opportunity to contend that a full refutation of the argument for unconstitutionality can be found in the simple facts that (1) the Constitution itself acknowledges the existence of the death penalty, and (2) the death penalty was commonly employed in the late 18th Century, when the Eighth Amendment was adopted. It is demonstrably true, this argument contends, that the death penalty was not "cruel and unusual" in the eyes of the Framers of the Constitution. (See, e.g., Callins v. Collins (1994) 510 U.S. 1141 [127 L.Ed.2d 435, 114 S.Ct. 1127] [Scalia, J., concurring in denial of cert.]; McGautha v. California, *supra*, 402 U.S. at p. 226 [Black, J., concurring].)

But even as a matter of the history of the Court's jurisprudence, the issue is not so simple as this. For present purposes, it can be said that three strains of thought have emerged among the Justices. All three of them are discernable in the various opinions filed in Furman.

One view holds that the death penalty is more or less constitutional per se, either expressly or impliedly because it was widely employed both before and after the adoption of the Constitution, and was never (before the 1970s) seriously questioned by the Court. Under this view, whether or not to have a death penalty, and what the contours of it might be, are matters to be left generally to the Executive and Legislative branches of government. (See, e.g., 408 U.S. at p. 410 [Blackmun, J., dissenting]; *id.*, at pp. 417-434 [Powell, J., dissenting]; *id.*, at pp. 465-470 [Rehnquist, J., dissenting].)

Another view, the one advocated by appellant here (*infra*), holds that the death penalty is unconstitutional, per se.

The middle view has shifted over time, but it has also prevailed, in the sense that it has dictated the outcomes of the cases and issues the Court has decided.

In Furman the middle-ground Justices found the death penalty unconstitutional, but only as it was then applied. There were two articulators of the middle ground, Justices Stewart and White.

Justice Stewart expressed two basic ideas. First, he contended that a mandatory death penalty, for given crimes, would be less subject to constitutional challenge than was an optional death penalty, because the latter is by definition a cruel punishment, in that it goes beyond — in kind, not in degree — the punishment which the Legislature has declared is ***necessary*** in such a case. Second, the death penalty as it existed in 1972 was

an unusual punishment, because it was imposed so infrequently. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." Accordingly, Justice Stewart concluded "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." (408 U.S. at pp. 308-310.)

Justice White expressed very similar views. He concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes," and that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." (*Id.*, at p. 413.)

It was this middle view which changed, in 1976, when the Court reversed direction and upheld the constitutionality of the death penalty. Crucial to any present challenge to the constitutionality of the death penalty is the demonstrable fact that while it was ***said*** that new statutes enacted in the wake of Furman satisfied the concerns which Justices Stewart and White had voiced, in reality the new statutes did not satisfy these concerns at all. No statute could. And these concerns are as valid today as they were in 1972.

In 1976 the Court decided a set of five cases involving the constitutionality of the "new" death penalty laws in five states. (Gregg v. Georgia (1976) 428 U.S. 153 [49 L.Ed.2d 859, 96 S.Ct. 2909]; Proffitt v. Florida (1976) 428 U.S. 242 [49 L.Ed.2d 913, 96 S.Ct. 2960]; Jurek v. Texas (1976) 428 U.S. 262 [49 L.Ed.2d

929, 96 S.Ct. 2950]; Woodson v. North Carolina (1976) 428 U.S. 280 [49 L.Ed.2d 944, 96 S.Ct. 2978]; Roberts v. Louisiana (1976) 428 U.S. 325 [49 L.Ed.2d 974, 96 S.Ct. 3001].) A plurality of three "swing" justices expressing a middle view — Justices Stewart, Powell, and Stevens — were decisive in all five cases. The Georgia, Florida, and Texas statutes were upheld, while the North Carolina and Louisiana statutes were found unconstitutional.[54]

The plurality of Justices approached the issue as more or less strictly an Eighth Amendment ("cruel and unusual") question. In that analysis they started from the principle, which has repeatedly been endorsed by majorities in the Court's decisions, that " '(t)he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' [Citations.] Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. . . . [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." (Gregg v. Georgia, *supra*, 428 U.S. at p. 173.)

However, the plurality also perceived a tension between what they viewed as Eighth Amendment requirements that punishments "must accord with 'the dignity of man,' " must not be

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[54] The other six Justices voted according to their Furman views in all five cases, four on the side of constitutionality and two on the side of unconstitutionality.

" 'excessive,' " and must be proportional to the crime (*ibid.*), on the one hand, and the "limited role to be played by the courts" (*id.*, p. 174), on the other hand, in setting or assessing policy.

The plurality acknowledged that they were influenced by the public and Legislative response to Furman. Death penalty statutes had been re-enacted in 35 states. This, for the plurality, was virtually decisive on the "evolving standards of decency" issue. The plurality also concluded that individual juries are proper expressions of such contemporary "evolving standards." (*Id.* at pp. 175-182.) Given these several principles, the plurality concluded the death penalty must not be held unconstitutional, per se. (*Id.*, at p. 186.)

Taking up the constitutionality of the Georgia law in the Gregg case, the plurality set the stage for all the Court's ensuing jurisprudence when it stated: "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. * * * [Therefore,] Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Id.*, at pp. 188-189.)

The plurality found the Georgia bifurcated trial system,

which is broadly like the California system, adequately addressed these needs. "Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman. No longer should there be 'no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not.' " (428 U.S. at p. 198.)

The ensuing, and final, part of the plurality's opinion in Gregg foreshadowed future U.S. Supreme Court decisions, by carefully analyzing, and rejecting, a series of contentions about the efficacy of the specific elements of the Georgia procedure in achieving the goal of guided discretion.

In Jurek, the plurality found a somewhat different form of "guided discretion" statutory formulation was likewise constitutional. And in Proffitt, the plurality validated yet another statutory form, one in which it was the judge, not the jury, who makes the penalty decision.[55]

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[55] More recently the Court decided that the penalty determination must be made by the jury, not by the judge. (Ring v. Arizona (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556].)

By contrast, the plurality rejected the North Carolina and Louisiana statutes — in both cases because they provided for an automatic or mandatory death penalty in certain circumstances.[56]

The ensuing history of death penalty litigation in the Court has followed a predictable course. In more recent years Justice Scalia has summarized the developments in disparaging, but fairly accurate, terms. In a concurring opinion in Walton v. Arizona (1990) 497 U.S. 639, 657 [111 L.Ed.2d 511, 110 S.Ct. 3047], Justice Scalia criticized the court for becoming a "rulemaking body for the states' administration of capital sentencing," imposing an intricate, "labyrinthine" set of procedural rules. Furthermore, Justice Scalia wrote, the court has developed a doctrine of constraints on sentencers' discretion to impose the death penalty, while at the same time developing a "counterdoctrine" (*id.*, 497 U.S. at p. 661) which forbids constraints on sentencers' discretion to decline to impose the death penalty, thus "completely explod[ing] whatever coherence the notion of 'guided discretion' once had" (*ibid.*).

Justice Scalia noted that in reality the Furman decision essentially forbade the exercise of discretion in capital

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[56] Notably, Justice Stewart was the only individual who served as a "swing" vote in both Furman and the 1976 set of cases, and the views he expressed in these two instances cannot be reconciled. Under his Furman reasoning, a mandatory death penalty would have been constitutional, or much more likely so than a discretionary death penalty; four years later, he had completely reversed his view on the mandatory/discretionary variable. Appellant contends that, as it often happens in human experience, Justice Stewart's first "take" was much more nearly correct.

sentencing, whereas later decisions purporting to be consistent with Furman in fact were entirely contrary to it. The present system institutionalizes the randomness and freakishness which the court had ruled unconstitutional in Furman, and makes reasonable predictability in the process utterly impossible. In a jurisprudence containing the contradictory commands that discretion to impose the death penalty must be limited but discretion not to impose the death penalty must be virtually unconstrained, Justice Scalia notes, a multitude of procedures can be said to support a claim in one direction or the other, and therefore counsel are obliged to make those claims. This, in turn has caused the rise of a permanent floodtide of capital penalty litigation in the state and federal courts. (*Id.*, 497 U.S. at pp. 661-669.)

In Walton, Justice Scalia went on to present his own analysis of the constitutionality of the death penalty. Most notably, Justice Scalia's approach is grounded solely in the Eighth Amendment, and, in conformity with his general approach to constitutional litigation, holds strictly to the text. Justice Scalia accepts the Furman principle that if a death penalty law allows for discretionary application, some standards are required; but also believes that a mandatory death penalty law "cannot possibly violate the Eighth Amendment." (497 U.S. at p. 471.) Justice Scalia believes "that once a State has adopted a methodology to narrow the eligibility for the death penalty, *thereby ensuring that its imposition is not 'freakish,'*

(citation), the distinctive procedural requirements of the Eighth Amendment have been exhausted" (Tuilaepa v. California (1994) 512 U.S. 967, 980 [114 S.Ct. 2630, 2639, 129 L.Ed.2d 750, emph. added), and the death penalty is constitutional.

There are at least two significant flaws in Justice Scalia's approach — namely, its over-narrow interpretation of what is "cruel," and its failure to apprehend the over-arching due process problem, which sometimes is categorized under the Eighth Amendment term "unusual," of arbitrary and capricious application. The emphasized language above suggests that Justice Scalia believes the adoption of a "methodology to narrow the eligibility for the death penalty" absolutely ensures that the penalty will not be applied in an arbitrary or capricious way. This borders on the absurd. "Simply to assume that the procedural protections mandated by [the] Court's prior decisions eliminate the irrationality underlying application of the death penalty is to ignore the holding of Furman . . .." (Pulley v. Harris (1984) 465 U.S. 37, 67 [79 L.Ed. 2d 29, 104 S.Ct. 871] (Brennan, J., dissenting).

A further, compelling illustration is furnished by the history of Justice Blackmun and the death penalty. Justice Blackmun dissented in Furman, dissented in Woodson and Roberts, and, while concurring, did not join in the plurality's reasoning in Gregg, Jurek, and Proffitt. Thus, Justice Blackmun was originally a firm believer in the constitutionality of the death penalty.

During the following years, Justice Blackmun sought to apply the developing body of rules as best he could — sometimes voting with majorities, sometimes dissenting. But in 1994, after 22 years of wrestling with the death penalty, Justice Blackmun gave up the effort. His words furnish compelling reason why the death penalty must be declared unconstitutional:

> "Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct.2726 (1972), and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. * * * Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, see Furman v. Georgia, *supra*, can never be achieved without compromising an equally essential component of fundamental fairness — individualized sentencing. See Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978).
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> "* * *
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> "On their face, these goals of individual fairness, reasonable consistency, and absence of error appear to be attainable: Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow. Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the Furman promise of consistency and rationality, but from the requirement of individualized sentencing as well. Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, see McCleskey v.

> Kemp, 481 U.S. 279, 313, n. 37, 95 L.Ed. 2d 262, 107 S.Ct. 1756 (1987), the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.
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> "From this day forward, I no longer shall tinker with the machinery of death. * * * I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."
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> Callins v. Collins, *supra*, 510 U.S. 1141, 1143-1145 [127 L.Ed.2d 435, 437-439, 114 S.Ct. 1127, 1128-1130] (dissenting from denial of cert.)(fns. omitted)

Justice Blackmun went on to explain his view of the development of the death penalty jurisprudence, and his inclination for a long time to agree with the doctrine. However, he had made a fundamental change of mind. The effort to maintain a death penalty system had reduced, but not eliminated, the number of people subject to arbitrary sentencing. This was so, Justice Blackmun concluded, because in the end "the decision whether a human being should live or die is so inherently subjective — rife with all of life's understandings, experiences, prejudices, and passions — that it inevitably defies the rationality and consistency required by the Constitution." (*Id.*, 510 U.S. at pp. 1152-1153, fn. omitted.)

Justice Blackmun went on to lament the Court's developing inclination simply not to hear death penalty cases, and specifically, the developing procedural law making it

increasingly difficult for condemned inmates to win federal review of their judgments. He concluded that he was not optimistic that the court will ever develop a fair and consistent death penalty scheme, but was optimistic that the court will eventually abandon the enterprise altogether. (*Id.*, at p. 1159.)

Justice Blackmun's final words in discussing his "conversion" after 22 years of wrestling with the death penalty echo the analysis offered by Justice William Brennan in his opinion in Furman v. Georgia, in 1972. In it, Justice Brennan clearly explained why the death penalty is unconstitutional, in all cases (see Furman v. Georgia, *supra*, 408 U.S. 263-306, passim).

Justice Brennan began with the proposition that history teaches that it is clear the framers of the Constitution intended, in enacting the Eighth Amendment, to curb legislative power, but not as clear what the framers thought to be actually "cruel and unusual" punishments at the time. But they did not intend to prohibit only those punishments. Indeed, this was firmly established by the time of Furman, in 1972, in the Supreme Court's jurisprudence. Were it otherwise, Justice Brennan noted, the Eighth Amendment would be uniquely pointless, for it would serve only to legitimize advances that had been already made and institutionalized by the executive and legislative branches of the government. To the contrary, the Eighth Amendment was a part of the Bill of Rights, and the very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of

political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Accordingly, the courts bear an unavoidable responsibility to uphold these principles.

It is clear that the cruel and unusual punishments clause was intended to draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Historical and textual analysis indicate that there are certain basic tenets to be applied in making this determination.

The basic concept underlying the clause is the basic dignity of mankind. The state must act towards people in a civilized way, even when it is acting rightly to punish them. A punishment cannot be so severe as to be degrading to the dignity of human beings.

Four inquiries aid in determining the ultimate question of whether a punishment is or is not consistent with basic human dignity. First is the question of whether the punishment is so severe as to be degrading to the dignity of human beings. Second, a severe punishment may not be imposed arbitrarily, that is, imposed upon some but not upon others who are similarly situated. Third, a punishment is illegitimate if it is one that has been rejected by society. Fourth, a punishment violates the cruel and unusual punishments clause if it is excessive, i.e., unnecessary.

The death penalty fails these tests. It is uniquely degrading to human dignity, since it treats human beings as

things to be discarded or destroyed. On this ground alone, Justice Brennan would have held the death penalty unconstitutional.

But furthermore, the infliction of the death penalty had become extremely arbitrary. Many thousands of persons were theoretically eligible for capital punishment, and only a tiny handful were being executed.[57] When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted too arbitrarily to pass muster under the Eighth Amendment.

Justice Brennan noted that, in 1972, a large fraction of the American public disapproved of the death penalty, and therefore

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[57] Experience since 1972 reveals that this feature of capital punishment is ineradicable. As Justice Blackmun noted in Callins, and as is obvious to any unbiased observer, today the death penalty is actually visited upon only a very small percentage of the people who commit crimes which, according to the laws which the people and their governments have enacted, qualify the perpetrators for capital punishment.

the third inquiry also led to the conclusion that the death penalty is unconstitutional.[58]

Finally, he reasoned, it is obvious that the death penalty is excessive, in that it is unnecessary. The interest of protecting society from further harm at the hands of the perpetrator is equally well served by long term or permanent imprisonment. Statistics prove that the death penalty is not effective as a deterrent.[59] Furthermore, even in the abstract the idea of the death penalty as a deterrent is irrational, since by definition it could only work in the case of a rational criminal who would choose to commit a capital crime if the punishment were imprisonment for life, but would chose not to commit it if the punishment were death. And not only that; since

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[58] The primary development in the aftermath of Furman, and the one that directly underlay the change in the Court's general conclusion about the constitutionality of the death penalty, was the strong political reaction to Furman, a reaction which proved that a large segment, at least, of American society desired to continue to embrace the death penalty. Accordingly, Justice Brennan's comments on the apparent rejection of the penalty by American society cannot be wholly included as part of appellant's argument.

However, appellant would include the following caveat. Experience since 1972 proves that a large majority of Americans approve of the *idea* of capital punishment. There is no sound reason to believe that very many people actually approve of the arbitrary and capricious way in which the death penalty is *actually* administered today, or to believe that very many people would be approving of the death penalty if they were exposed to the spectacle of dozens of executions per month or hundreds of executions per year.

Appellant submits that Justice Brennan's whole argument on the unconstitutionality of the death penalty is not particularly diminished by developments which occurred after he wrote it.

[59] Justice Brennan referred at this point to the exhaustive statistical presentation in the companion concurring opinion of Justice Thurgood Marshall in Furman, at 408 U.S. pp. 345-354.

the actual imposition of the penalty occurs in such a fortuitous number of cases, and so far in the remote future, these factors, too, would have to be a part of this rational criminal's calculation. No sensible case could be made for any true deterrent effect of the death penalty.

Finally, the argument that only the death penalty adequately expresses the community's outrage over the affront of the crime also fails. There is simply no evidence to suggest that the death penalty serves to express this outrage in a way that is more effective or meaningful than the alternate punishment of lifetime imprisonment. Additionally, on this subject, the inquiry must weigh the probability that the actual infliction of the death penalty actually works a retreat from the goal of expressing the community's morality, for the death penalty is a barbarous and inhuman act itself.

The only other argument for the death penalty, Justice Brennan noted, is retribution — the argument that it is right to execute the criminal because he deserves it. This argument is flatly contradicted by the actual fact that, over time, American society consistently punishes almost all the people who commit "death deserving" crimes with one form or another of imprisonment, not with death. This shows that there is no real constituency for killing criminals simply to get even with them.

Justice Brennan concluded:

> "In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability

> that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not."
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> (408 U.S. at p. 306.)

It bears emphasis that the central basis of Justice Brennan's view in 1972, the central basis of the "middle ground" Justices' view in 1972, and the central basis of the lesson Justice Blackmun learned from 22 years of experience "tinkering with the machinery of death," was the same: No matter how the death penalty laws are structured, and no matter how the death penalty laws are administered, in the end this form of punishment is visited on only a tiny fraction of the persons theoretically eligible for it. Yet the Court fully accepts that "the penalty of death is qualitatively different from a sentence of imprisonment, however long. 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 [plur. opn.].)

These factors, existing in tandem and ineradicable, dictate that the death penalty be held unconstitutional.

For all the reasons so comprehensively identified by Justice Brennan in 1972, and the parallel reasons — learned from experience by a one-time judicial supporter of capital punishment — which were voiced by Justice Blackmun in 1994, the death penalty must be held unconstitutional and unenforceable.

XIV. IMPANELMENT OF A JURY WHICH WAS FORMED ON THE PRINCIPLE THAT THE ONLY PERSONS WHO WERE INELIGIBLE TO SERVE ON THE BASIS OF THEIR VIEWS ABOUT CAPITAL PUNISHMENT WERE PERSONS WHO WOULD "AUTOMATICALLY" VOTE AGAINST IMPLEMENTATION OF THE DEATH PENALTY, UNDER PEOPLE v. HOVEY AND WITHERSPOON v. ILLINOIS, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS

A. Introduction

It is a standard procedure in California death penalty cases for the defense to request the seating of two juries, one impaneled to decide the guilt issues and one impaneled to decide the penalty, if a penalty proceeding became necessary. Appellant contends his constitutional rights under both the United States Constitution and the California Constitution for the guilt issues were violated when he was tried by a jury which was formed on the principle that persons who would automatically vote against the death penalty could be excluded.[60]

B. Discussion

In Hovey v. Superior Court (1980) 28 Cal.3d 1, this court considered the findings of numerous studies that a capital jury selection process that excludes individuals who indicate they would never vote to impose a death sentence produces juries more

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[60] In this case there was no defense motion seeking this remedy. The implications of this omission are discussed in this argument, *infra*, in part C.

prone to convict at the guilt phase than would a jury on which such individuals had been permitted to serve. The appellant in Hovey contended trial before such a jury is unconstitutional, in that the jury would lack the neutrality or impartiality the U.S. and California constitutions guarantee. (U.S. Const., Sixth Amend.; see Witherspoon v. Illinois (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]; Cal. Const., art. I, § 16; see also 28 Cal.3d at pp. 26-63, passim.)[61]

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[61] "A neutral jury is one drawn from a pool which reasonably mirrors the diversity of experiences and relevant viewpoints of those persons in the community who can fairly and impartially try the case." (*Id.*, 28 Cal.3d at pp. 19-20, fn. omitted; see Witherspoon v. Illinois, *supra*, 391 U.S. at pp. 519-520, and fn. 8.) In Lockhart v. McCree (1986) 467 U.S. 162, 182-183 [106 S.Ct. 1758, 1764, 90 L.Ed.2d 137], the U.S. Supreme Court, over a strong dissent, held that this concept of neutrality does not apply to a constitutional analysis of a capital jury's determination of guilt. (For the reasons stated in the dissenting opinion in Lockhart (*id.*, 467 U.S. at pp. 195-198), appellant argues that this conclusion was incorrect, and should be re-examined and overruled.)

More importantly, for present purposes, the analysis employed in Hovey, which has not been repudiated by this court, was not grounded solely on the Sixth Amendment right to an impartial jury; it was based in part on the state due process clause and the state constitutional right to a jury trial. (See U.S. Const., Sixth and Fourteenth Amends.; Cal. Const., art. I, §§ 7, 15, 16; see Hovey, *supra*, 28 Cal.3d at pp. 7 (fn. 3), 10 (fn. 17).) Appellant expressly bases the Hovey issues discussed in this brief not only on the U.S. Constitution, but also independently on the state constitution. (Cal. Const., art. I, § 24; see, e.g., People v. Pettingill (1978) 21 Cal.3d 231, 247-248; accord: Raven v. Deukmejian (1990) 52 Cal.3d 336, 353-354.)

1. The court should hold exclusion of only prospective jurors who could not vote for the death penalty violated the right to a fair and impartial jury

The court in Hovey accepted that "the use of a 'death-qualified' jury pool to select a guilt phase jury would be unconstitutional if juries so selected would tend to return more verdicts favorable to the prosecution than would juries selected from a 'neutral' jury pool." (*Id.*, at p. 22, fn. 54.) However, the court was not able to conclude on the basis of the data presented in Hovey that defendants in single-jury, bifurcated capital trials in California are deprived of their constitutional rights to an impartial jury at the guilt phase. (*Id.*, at pp. 63-69.) This result was a product of the studies' failure to account for the fact that in California the death-qualification process involves the exclusion of not only those prospective jurors ineligible to serve by reason of their opposition to capital punishment, but also those who, following a conviction of capital murder, would automatically vote *for* the death penalty. (*Ibid.*)[62] The court clearly implied that if it could be shown

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[62] The exclusion of "automatic death penalty" prospective jurors was a California corollary to the decision in Witherspoon v. Illinois, *supra*, 391 U.S. 510, which held that under the U.S. Constitution, only persons with opinions *against* capital punishment could permissibly be excluded for cause from a capital case jury, and then, they could be excluded only if they made it "unmistakably clear" that if and when the time came to sentence the defendant they would automatically vote against the death penalty. (See Hovey, *supra*, 28 Cal.3d at p. 11.)

This U.S. standard was subsequently clarified in Wainwright v. Witt (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], such

[FOOTNOTE 62 CONTINUES ON p. 154]

that these "automatic death penalty" jurors comprise so small a portion of the total universe of prospective jurors as to render insignificant the effect of the studies' failure to take account of them, then a conclusion that California death penalty juries are conviction-prone in the guilt phase, and hence that they are unconstitutionally formed, would follow. But the court found that such a showing of immateriality had not been made in Hovey. (28 Cal.3d at p. 64, noting, inter alia, the court's disagreement with the U.S. Supreme Court's dictum that it is "undeniable . . . that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment," in Adams v. Texas (1980) 448 U.S. 38, 49 [65 L.Ed.2d 581, 100 S.Ct. 2521].)

This gap in the data has since been closed. It is now established that the California process of death-qualification of

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[FOOTNOTE 62 CONTINUED FROM p. 153]

that the question now is whether a prospective juror's views on capital punishment would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (469 U.S. at p. 424; see also People v. Ghent (1987) 43 Cal.3d 739, 787.) This development does not alter the analysis of the studies discussed in the instant argument. (See Lockhart v. McCree, *supra*, 467 U.S. 162, 167, fn. 1.)

To put more generally a point touched upon in footnote 61, *supra*, it must be noted, for purposes of issue-preservation, that by the instant argument appellant intends to challenge the holding of these three U.S. Supreme Court cases, to wit, the rule that it is permissible under the U.S. Constitution to exclude from capital case juries, on the basis of personal views, people who state they would automatically vote against imposition of the death penalty, and only those people. This aspect of the argument is not articulated in any detail in this brief, because under the Supremacy Clause (U.S. Const., Art. VI, § 2), the California Supreme Court is powerless to affect those holdings.

juries violates the capital defendant's right to a neutral guilt phase jury within the meaning of Hovey.[63]

Two post-Hovey articles by Professor Joseph B. Kadane (Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1983) 78 J. American Statistical Assn. 544 (hereinafter, "JASA article"); Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Human Behavior 115 (hereinafter, "LHB article")), present statistical confirmation that individuals falling in the automatic death penalty group (referred to by Kadane as the "ALWAYS" group) are present in the population in less than one-tenth of the proportion as those excludable from capital juries by reason of their categorical opposition to the death penalty (referred to by Kadane as the "NEVER" group).)

Utilizing the results of objective polling of representative population samples, Professor Kadane determined that, after eliminating those individuals who indicated that they could not be fair and impartial even at the guilt phase of a capital trial — and who would therefore be ineligible for jury service regardless of their views on capital punishment — those who

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[63] Essentially the same claim appellant presents here was presented in People v. Jackson (1996) 13 Cal.4th 1164. In Jackson, the court summarily rejected the claim insofar as it implicated the U.S. constitutional issues involved in Lockhart and Witherspoon, but did not address the claim insofar as it implicated the state law issues noted in Hovey. (13 Cal.4th at pp. 1198-1199.) It appears the same claim was also raised by the appellant in People v. Gurule (2002) 28 Cal.4th 557, 597, with the same result; indeed, by the time of Gurule this court addressed the issues in very summary fashion, declaring them "now settled" (*ibid.*).

indicated that regardless of the evidence at the penalty phase they would always vote for the death penalty comprised one percent (1%) of the population, while those who indicated they would never vote for the death penalty comprised 11.3 to 11.6 percent. (JASA article, pp. 549-550; LHB article, p. 116.)

Thus, among those prospective jurors barred from service on capital juries in California by reason of their views on capital punishment — the ALWAYS and NEVER groups — the NEVER group predominates to such an extent that taking the ALWAYS group into account, as the court in Hovey insisted should be done, would have a negligible impact, if that much, on the findings of the studies considered in Hovey, and which the court found otherwise sound. (LHB article, p. 116.)

To illustrate the point, Professor Kadane recomputed the findings of the two principal studies considered in Hovey, taking into account the exclusion of the ALWAYS group.[64] For the purposes of his calculations, Kadane adopted the conservative assumption that those in the ALWAYS group would be the most biased against the defense, such that their exclusion would yield

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[64] The two studies were the "Ellsworth Conviction-Proneness Study" (see 28 Cal.3d at pp. 38-40 and fn. 76), and the "Ellsworth Attitude Survey" (*id.*, at pp. 50-54 and fn. 97), which were later published as, respectively, Cowan, et. al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation* (1984) 8 Law & Human Behavior 53, and Ellsworth, et. al., *Due Process vs. Crime Control: The Impact of Death Qualification on Jury Attitudes* (1984) 8 Law & Human Behavior 31.

the most beneficial result possible for the defense.[65] Even indulging this assumption, Professor Kadane found that, viewed as a single group, the prospective jurors excluded from service by virtue of their membership in the ALWAYS group or the NEVER group were one-and-one-half times less likely to be biased against the defense than those permitted to remain. (JASA article, p. 551; LHB article, p. 119.)

It is apparent from these findings that California's death qualification process does indeed produce juries more conviction-prone than their non-death-qualified counterparts. It follows from the reasoning of Hovey that the trial court in this case should have allowed the guilt phase to be decided by a jury from which persons in the NEVER group — "guilt phase includables" who could be excluded from the penalty phase under Witherspoon — were not excluded.

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[65] As Kadane explained: "The harsher [the] views [of the ALWAYS jurors] are to the defense, the more difficult the defense's task of showing that exclusion of the whole group [ALWAYS and NEVER] is disadvantageous to them. Accordingly, I take the most conservative stance on this issue. Those in [the ALWAYS group] are assumed, on each item [of opinion in the study], to take the position . . . most opposed to the defense's interests. Inevitably, this assumption is, to some extent, false . . . . To the extent that bias against the defense is shown using this assumption, the real extent of bias against the defense is greater by some amount." (JASA article, p. 550; see also LHB article, pp. 116-118.)

2. The court should hold exclusion of only prospective jurors who could not vote for the death penalty violated the right to a jury reflecting a fair cross-section of the community

On the separate subject of the constitutional requirement that a jury must reflect a representative cross-section of the relevant community, a plurality of this court in People v. Fields (1983) 35 Cal.3d 329, found that otherwise qualified potential jurors whose views on capital punishment prevented them from serving on a capital jury were not a cognizable group for the purpose of such a challenge at the guilt phase. (35 Cal.3d at pp. 342-353; also *id.*, at p. 374 (conc. opn.).) This view was later echoed by the U.S. Supreme Court in its parallel holding under the United States Constitution. (Lockhart v. McCree, *supra*, 476 U.S. 162, 173-177.) For the reasons stated in the dissenting opinions in both cases, however, appellant respectfully contends that these holdings are incorrect, and should be re-examined and overruled. (See 35 Cal.3d at pp. 375-387 (Bird, C.J., and Reynoso, J., dissenting); 476 U.S. at pp. 184-206 (Marshall, J., dissenting).)

The practice of trying capital defendants by juries more disposed to convict than those impaneled to try non-capital cases violates the guarantee of equal protection, as well. (U.S. Const., Fourteenth Amend.; Cal. Const., art. I., § 7.) Given the fundamental nature of the interests at stake — the defendant's life and liberty (see People v. Olivas (1976) 17 Cal.3d 236, 251) — the state could only justify the subjection of a capital

defendant to this kind of disadvantage by showing that the practice is *necessary* to further a *compelling* state interest. (Plyler v. Doe (1982) 457 U.S. 202, 216-217 [72 L.Ed.2d 786, 102 S.Ct. 2382].)[66]

The cases identify two principal state interests in support of guilt-phase death-qualification — (1) the avoidance of the burden of presenting all or most of the guilt-phase evidence a second time at the penalty phase (or, alternatively, of impaneling a separate, possibly unneeded, penalty-phase jury at the outset of the guilt-phase trial) (see People v. Fields, *supra*, 35 Cal.3d at p. 351; Lockhart v. McCree, *supra*, 476 U.S. at p. 181); and (2) the benefit of having a single jury determine the " 'necessarily interwoven' " issues of guilt and penalty

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[66] This is generally labeled the "strict scrutiny" test. It is sometimes said that an initial inquiry is necessary, to determine whether the groups in question are "similarly situated" with respect to the purpose of the challenged rule or practice (see, e.g., In re Eric J. (1979) 25 Cal.3d 522, 531). This inquiry in reality "is the same as asking whether the distinction between them can be justified under the appropriate test of equal protection. Obvious dissimilarities between groups will not justify a classification which fails strict scrutiny (if that test is applicable) or lacks a rational relationship to the legislative purpose. [Citations.]" (Fullerton Joint Union High School District v. State Board of Education (1982) 32 Cal.3d 779, 798, fn. 19 (disapproved on other grounds in Board of Supervisors of Sacramento Co. v. Sacramento Local Agency Formation Comm. (1992) 3 Cal.4th 903).)

(Lockhart, *supra*, 476 U.S. at pp. 180-181; Fields, *supra*, 35 Cal.3d at p. 352).[67]

By this court's own admission, however, neither of these interests is of more than "moderate weight and significance" (Fields, *supra*, 35 Cal.3d at p. 352); they are not compelling state interests. The idea of saving money and trouble by avoiding the seating of a second jury is grounded on considerations of administrative convenience and expense (*ibid.*). This is far from a compelling interest under the strict scrutiny test. (See, e.g., Memorial Hospital v. Maricopa County (1974) 415 U.S. 250, 263 [39 L.Ed.2d 306, 94 S.Ct. 1076].)

The second idea - having a single jury determine the "interwoven" guilt and penalty issues - is no more compelling an interest. The sentencing determination is not even performed by the jury in the vast majority of California criminal trials, and thus, necessarily, the state has shown very little general interest in having a jury decide the "interwoven" issues of guilt and penalty.

Additionally, a single-jury mechanism is not ***necessary*** to achieving this end. As noted above, one suitable alternative

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[67] Both Lockhart and Fields allude to the advantage to the ***defendant*** of a single jury in those cases where he or she "might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." (Lockhart, *supra*, 476 U.S. at p. 181.)

This is not a ***state*** interest. It is an interest personal to the defendant which he has decided to forgo. Putting aside that analytical flaw, the same analysis appellant advances in the ensuing parts of the text above applies to the idea of justifying the single-jury system on the basis of the defendant's hope of benefitting from jurors' "residual doubts."

would be to impanel a second jury which would hear the guilt-phase evidence, but would not begin to operate as a jury until and unless the penalty phase came about. (See Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology* (1960) 66 Ind. L.J. 137, 147, fn. 81.).[68]

Moreover, the reluctance of the United States Supreme Court to declare federal constitutional mandates for particular schemes to protect defendants' rights in capital cases should not deter this court from its duty to declare minimum constitutional standards for the protection of the rights of defendants in *California* capital cases. (Cal. Const., art. I, §§ 1, 7, 15, 16, 17; see Traylor v. State (Fla. 1992) 596 So.2d 957, 961-963.)

Finally, the conviction-proneness of death-qualified juries, in comparison to non-capital criminal juries, necessarily means that guilt-phase death-qualification violates the principle that a heightened interest must be recognized, in capital cases, in a reliable determination of guilt or innocence, under the constitutional guarantee of due process and the constitutional prohibition of cruel and unusual punishment. (U.S. Const.,

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[68] The state's assertion of an interest in having the guilt and penalty issues submitted to the same jury is also potentially tainted by the findings discussed in part B.1. of this argument, and in Hovey, Lockhart, and other cases. That is, the single jury which the state considers it necessary to have hearing both parts of a capital case is also a jury which has been selected in a unique way which insures that it will be relatively more prone to convict the defendant than a jury selected in the normal manner would be. Appellant submits that it surely offends the constitution to allow the state to assert a "compelling interest" in a jury selection procedure which has the side effect of producing a jury which is unusually prone to decide the case in the state's favor.

Fifth, Eighth, Fourteenth Amends.; Cal. Const., art. I, §§ 1, 7, 15, 17; see Beck v. Alabama, *supra*, 447 U.S. 625, 638 [same reasoning invalidating procedural rules tending to diminish reliability of sentencing decision applies to rules tending to diminish reliability of guilt decision]; Ake v. Oklahoma (1985) 470 U.S. 68, 87 [84 L.Ed.2d 53, 105 S.Ct. 1087] (conc. opn. of Burger, C.J.) [finality of sentence in capital cases warrants protections possibly not required in non-capital context].)

In sum, the procedure approved in People v. Hovey, by which persons who would automatically vote in a penalty phase either for or against the death penalty are excluded from the unitary jury which decides not only the penalty, but also the issues of guilt, clearly violates the right to a jury comprised of a fair cross-section of the community.

C. The Issue Should be Addressed on its Merits, Not Considered Waived or Forfeited

Although defense counsel below did not seek relief along the lines outlined in this argument, appellant's argument should be addressed on its merits and not considered waived or forfeited, pursuant to the doctrine of constitutionally ineffective assistance of counsel.

To state this familiar rule briefly, in order to establish that his counsel performed below the threshold of quality required by the Sixth Amendment guarantee of representation by

counsel, an appellant " 'must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. (Strickland v. Washington (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693, 104 S.Ct. 2052]; In re Wilson (1992) 3 Cal.4th 945, 950.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Strickland, *supra*, 466 U.S. at p. 694.)' (In re Neely (1993) 6 Cal.4th 901, 908-909.)" (In re Jones (1996) 13 Cal.4th 552, 561.)

Additionally, it is long established that counsel render ineffective assistance if they take actions or make omissions in ignorance of easily discoverable case law. (People v. Green (1980) 27 Cal.3d 1, 44; People v. Ibarra (1963) 60 Cal.2d 460, 466; People v. Rosales (1984) 153 Cal.App.3d 353, 361.)

Minimally rational behavior is not enough. Counsel's choices must be "within the range of reasonable competence." (People v. Pope (1979) 23 Cal.3d 412, 425.) A defendant is constitutionally entitled "not to some bare assistance but rather to *effective* assistance." (People v. Ledesma (1987) 43 Cal.3d 171, 215, emph. in orig.)

A case of constitutionally inadequate counsel is made out where it is shown that " 'by reason of counsel's failure to

perform the obligations imposed upon him, defendant is deprived of an *adjudication* of a crucial or potentially meritorious defense.' " (People v. Shaw (1984) 35 Cal.3d 535, 541, emph. in orig.) In this connection, " '[a] crucial defense is not necessarily one which, if presented, "would result inexorably in a defendant's acquittal." ' " (*Id.*)

It is often said that when the record on appeal does not reveal a rational or competent explanation for the decisions of counsel of which the appellant complains, but also does not reveal a manifest failure to perform within the range of reasonable competence, the correct avenue for the appellant to pursue relief is a writ of habeas corpus. (See People v. Pope, *supra*, 23 Cal.3d at pp. 425-427; accord: People v. Mendoza Tello (1997) 15 Cal.4th 264, 266; People v. Scott (1997) 15 Cal.4th 1188, 1212; People v. Fosselman (1983) 33 Cal.3d 572, 581-582.)

But the habeas corpus alternative is necessary only "[w]here the record does not illuminate the basis for the challenged acts or omissions . . .." (People v. Pope, *supra*, 23 Cal.3d at p. 426; accord: People v. Mendoza Tello, *supra*.) In this connection, it is established that, as to any point that can be adjudicated outside the presence of the jury, "there could be no satisfactory tactical reason for not making a potentially meritorious objection." (People v. Nation (1980) 26 Cal.3d 169, 179.)

Turning to the issue before the court here, appellant's claim to relief based on the seating of the same jury for both

phases of the trial should not be considered waived. Requests for this relief are nearly universal in California death penalty cases. (See, e.g., People v. Lenart (2002) 32 Cal.4th 1107, 1120-1121; People v. Gurule (2002) 28 Cal.4th 557, 596-597; People v. Jackson (1996) 13 Cal.4th 1164, 1198-1199; People v. Johnson (1992) 3 Cal.4th 1183, 1212-1213.)[69] Thus, under the ineffective-counsel case law, trial counsel here must be charged with an awareness of this procedure, and his failure to seek it cannot be considered a valid tactical choice.

D. Conclusion

For all the foregoing reasons, the court should conclude that conducting this trial before a single jury that was "death-qualified" under the Hovey and Witherspoon/Witt procedures violated appellant's constitutional rights to due process and to a jury trial.

Moreover, this error was reversible per se, because the trial before the jury that was ultimately selected was one of those " 'structural' errors[] which 'defy analysis by harmless-error standards' and require reversal without regard to the strength of the evidence or other circumstances." (People v. Flood (1998) 18 Cal.4th 470, 493, quoting Arizona v. Fulminante

[69] Note that in the Gurule case this court addressed the issue on its merits, even though trial counsel had not preserved the issue by a timely motion or objection. (28 Cal.4th at p. 597.)

(1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302].) "With regard to such structural errors, Fulminante explained:

' "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." ' " (People v. Flood, *supra*, 18 Cal.4th at p. 493.)

Accordingly, because this case was tried to a single jury from which persons opposed to capital punishment were excluded, the judgment must be reversed.

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XV. FOR NUMEROUS REASONS, THE CALIFORNIA DEATH PENALTY SCHEME IS GENERALLY UNCONSTITUTIONAL

A. Introduction

Appellant contends in this argument that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this court, appellant presents these arguments here under a single heading, with the intent of alerting the court to the nature of each claim and its federal constitutional grounds, and providing a basis for the court's reconsideration. Appellant contends that, individually and collectively, these various constitutional defects require the sentence in this case to be set aside.

The Eighth and Fourteenth Amendments require that in order to avoid arbitrary and capricious application of the death penalty, a death penalty statute's provisions must genuinely narrow the class of persons eligible for the death penalty, and must reasonably justify the imposition of this vastly more severe sentence than the ones ordinarily imposed upon persons found guilty of murder. (See again, Zant v. Stephens, *supra*, 462 U.S. 862, and other cases cited at p. 42, *supra*.)

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, not narrowed it.

As applied, the California death penalty statute can encompass virtually every first degree murder, and can allow any

conceivable circumstance of the 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 all first degree murderers to the few deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute. Yet that section has been specifically constructed to make almost every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase of trial 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 system that functions "wantonly and . . . freakishly" (Furman v. Georgia, *supra*, 408 U.S. 238, 310), randomly choosing from among the thousands of murderers in California only a few who are to suffer the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that

randomness in selecting whom the state will kill dominates the entire process of applying the penalty of death.

B. Appellant's Death Penalty is Invalid Because Penal Code Section 190.2 is Unconstitutionally Broad

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, *supra*, 408 U.S. 238, 413 [conc. opn. of White, J.]; accord, Godfrey v. Georgia, *supra*, 446 U.S. 420, 427.) 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 purportedly accomplished in its entirety by the "special circumstances" set forth 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 use in their capital sentencing statutes." (People v Bacigalupo (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow the category of those eligible for the death penalty, but to make *all* murderers eligible. This statute was enacted into law by initiative by the voters on November 7, 1978. 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*." (1978 Voter's Pamphlet, p. 34 [emph. added].)

By the time of the offense charged in this case the statute contained over two dozen special circumstances, and by now the number has grown to 33. Taken together, these special circumstances are so inclusive as to encompass nearly every first degree murder - as its drafters expressly intended.

The intent behind this all-embracing list of special circumstances is directly contrary to the constitutionally necessary function prescribed by the United States Supreme Court: to narrowly circumscribe the class of persons eligible for the death penalty. In California, almost all felony-murders are now potential special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (People v. Dillon (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance. (People v. Hillhouse (2002) 27 Cal.4th 469, 500-501, 512-515; People v. Morales (1989) 48 Cal.3d 527, 557-558, 575.)

A comparison of section 190.2 with the Penal Code section 189 definition of first degree murder reveals that section 190.2 sweeps so broadly that it is difficult even to hypothesize a form of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has determined that there are only 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?* 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)

This analysis makes it entirely clear that the theoretically possible noncapital first degree murders represent only a small

subset of the universe of all first degree murders. Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for 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. It is therefore unconstitutional.

This court has routinely rejected challenges to the statute's lack of any meaningful narrowing, with very little discussion. In People v. Stanley (1995) 10 Cal.4th 764, 842, the court stated that the United States Supreme Court rejected a similar claim in Pulley v. Harris, *supra*, 465 U.S. 37, 53. But this is not so. The U.S. Supreme Court has never addressed this claim. In Pulley, the issue 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, exercising their legislative prerogative, 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 inclusive that it guarantees 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.[70]

C. Appellant's Death Penalty is Invalid Because Penal Code Section 190.3, as Applied, Allows Arbitrary and Capricious Imposition of Death In Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Penal Code section 190.3 sets forth the criteria for juries to use in deciding at the penalty phase whether the sentence is to be death or life imprisonment. Appellant contends that subdivision (a) of section 190.3 violates the Fifth, Sixth,

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[70] In a habeas corpus petition to be filed after the completion of appellate briefing in this case, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Appellant will also present empirical evidence demonstrating that, as applied, California's capital sentencing scheme creates 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 the U.S. Supreme Court condemned for exactly that reason, in Furman v. Georgia, *supra*, 408 U.S. 238.

As for appellant's allusion to international law, see also section F. of this argument, *post*.

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 have been characterized as "aggravating," and warranting the death penalty - even features squarely at odds with other features deemed "aggravating" and supportive of death sentences in other cases.

The most significant problem with section 190.3 is its factor (a), which directs the jury to consider in aggravation the "circumstances of the crime." This court has held that this broad term meets constitutional scrutiny, and has never adopted a limiting construction other than that a "circumstances of the crime" aggravator must be some fact beyond the elements of the crime themselves. (People v. Dyer (1988) 45 Cal.3d 26, 78; People v. Adcox (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88, third para.)

This has allowed very expansive interpretations of factor (a). The court has approved reliance on the "circumstance of the crime" aggravating factor because, for example, three weeks after the crime defendant sought to conceal evidence (People v. Walker (1988) 47 Cal.3d 605, 639, fn.10); or the defendant had a "hatred of religion" (People v. Nicolaus (1991) 54 Cal.3d 551, 581-582); or he threatened witnesses after his arrest (People v. Hardy (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853;, or he disposed of the victim's body in a manner that precluded its recovery (People v. Bittaker (1989) 48 Cal.3d 1046, 1110, fn. 35).

Although factor (a) has survived a facial Eighth Amendment challenge in the United States Supreme Court (Tuilaepa v. California, *supra*, 512 U.S. 967, 987-988), appellant contends it has by now 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.

For example, 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:[71]

> * because the defendant struck many blows and inflicted multiple wounds (e.g., People v. Morales, Cal. Supreme Ct. No. [hereinafter "No."] S004552, R.T. 3094-95; People v. Zapien, No. S004762, R.T. 36-38; People v. Lucas, No. S004788, R.T. 2997-2998; People v. Carrera, No. S004569, R.T. 160-61;
>
> * because the defendant killed with a single execution-style wound (People v. Freeman, No. S004787, R.T. 3674, 3709; People v. Frierson, No. S004761, R.T. 3026-3027;

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[71] A number of the citations in this part of the brief refer to the transcripts of cases the court has considered over the years. As to these transcripts, appellant hereby requests that the court take judicial notice of the material, and hereby places respondent on notice of the request. (Evid. Code, §§ 452, subd. (d), 453.)

* because the defendant killed the victim for some purportedly aggravating motive, such as money, revenge, witness-elimination, avoiding arrest, sexual gratification (People v. Howard, No. S004452, R.T. 6772 (money); People v. Allison, No. S004649, R.T. 968-969 (same); People v. Belmontes, No. S004467, R.T. 2466 (elimination of a witness); People v. Coddington, No.S008840, R.T. 6759-6760 (sexual gratification); People v. Ghent, No. S004309, R.T. 2553-2455 (same); People v. Brown, No. S004451, R.T. 3543-3544 (avoid arrest); People v. McLain, No. S004370, R.T. 31 (revenge));

* because the defendant killed the victim without any apparent motive at all (People v. Edwards, No. S004755, R.T. 10,544; People v. Osband, No. S005233, R.T. 3650; People v. Hawkins, No. S014199, R.T. 6801);

* because the defendant killed the victim in cold blood (People v. Visciotti, No. S004597, R.T. 3296-3297);

* because the defendant killed the victim during a savage frenzy (People v. Jennings, No. S004754, R.T. 6755);

* because the defendant engaged in a cover-up to conceal his crime (People v. Stewart, No. S020803, R.T.; People v. Benson, No.S004763, R.T. 1141; People v. Miranda, No. S004464, R.T. 4192);

* because the defendant did not engage in a cover-up and so must have been proud of the killing (People v. Adcox, No. S004558, R.T. 4607; People v. Williams, No. S004365, R.T. 3030-3031; People v. Morales, No. S004552, R.T. 3093);

* because the defendant made the victim endure the terror of anticipating a violent death (People v. Webb, No. S006938,

R.T. 5302; People v. Davis, No. S014636, RT 11,125; People v. Hamilton, No. S004363, R.T. 4623);

* because the defendant killed instantly without any warning (People v. Freeman, No. S004787, R.T. 3674; People v. Livaditis, No. S004767, R.T. 2959);

* because the victim had children (People v. Zapien, No. S004762, R.T. 37);

* because the victim had not yet had a chance to have children (People v. Carpenter, No. S004654, R.T. 16,752);

* because the victim struggled prior to death (People v. Dunkle, No. S014200, R.T. 3812; People v. Webb, No. S006938, R.T. 5302; People v. Lucas, No. S004788, R.T. 2998);

* because the victim did not struggle (People v. Fauber, No. S005868, R.T. 5546-5547; People v. Carrera, No. S004569, R.T. 1600);

* because the defendant had a prior relationship with the victim (People v. Padilla, No. S014496, R.T. 4604; People v. Waidla, No. S020161, R.T. 3066-67; People v. Kaurish (1990) 52 Cal.3d 648, 717);

* because the victim was a complete stranger to the defendant (People v. Anderson, No. S004385, R.T. 3168-3169; People v. McPeters, No. S004712, R.T. 4264).

These examples show that absent any court-imposed limitation on the "circumstances of the crime" aggravating factor, prosecutors have urged juries to find this aggravating factor

based on any "circumstances" at all, including squarely conflicting ones.

Similarly, past cases show that the "circumstances of the crime" aggravator is used arbitrarily and capriciously to embrace facts that cover the entire spectrum of facts inevitably present in every homicide:

* Prosecutors have argued the age of the victim as an aggravating factor when the victim was a child, an adolescent, a young adult, in the prime of life, or elderly. (See, e.g., People v. Deere, No. S004722, R.T. 155-56 (victims were ages 2 and 6); People v. Bonin, No. S004565, R.T. 10,075 (victims were ages 14, 15, and 17); People v. Kipp, No.S009169, R.T. 5164 (victim was age 18); People v. Carpenter, No. S004654, R.T. 16,752 (victim was 20); People v. Phillips, (1985) 41 Cal.3d 29, 63, (victim was 26 -- "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, R.T. 3345 (victim was 61, "finally in a position to enjoy the fruits of his life's efforts"); People v. Melton, No. S004518, R.T. 4376 (victim was 77); People v. Bean, No. S004387, R.T. 4715-4716 (victim was "elderly").)

* Prosecutors have argued the method of killing as an aggravating factor where the victim was strangled, bludgeoned, shot, stabbed, consumed by fire. (See, e.g., People v. Clair, No. S004789, R.T. 2474-2475 (strangulation); People v. Kipp, No. S004784, R.T. 2246 (same); People v. Fauber, No. S005868, R.T. 5546 (use of an ax); People v. Benson, No. S004763, R.T. 1149 (use of a hammer); People v. Cain, No. S006544, R.T. 6786-6787 (use of a club); People v. Jackson, No. S010723, R.T. 8075-8076 (use of a gun); People v. Reilly, No. S004607, R.T. 14,040 (stabbing); People v. Scott, No. S010334, R.T. 847 (fire).)

* Prosecutors have argued the motive of killing as an aggravating factor where the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all. (See, e.g., People v. Howard, No. S004452, R.T. 6772 (money); People v. Allison, No. S004649, R.T. 969-970 (same); People v. Belmontes, No. S004467, R.T. 2466 (eliminate a witness); People v. Coddington, No.S008840, R.T. 6759-6761 (sexual gratification); People v. Ghent, No. S004309, R.T. 2553-2555 (same); People v. Brown, No. S004451, R.T. 3544 (avoid arrest); People v. McLain, No. S004370, R.T. 31 (revenge); People v. Edwards, No. S004755, R.T. 10,544 (no motive at all).)

* Prosecutors have argued the time of the killing as an aggravating factor where the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day. (See, e.g., People v. Fauber, No. S005868, R.T. 5777 (early morning); People v. Bean, No. S004387, R.T. 4715 (middle of the night); People v. Avena, No. S004422, R.T. 2603-04 (late at night); People v. Lucero, No. S012568, R.T. 4125-26 (middle of the day).)

* Prosecutors have argued the location of the killing as an aggravating factor where the victim was killed in her own home, in a public bar, in a city park, or in a remote location. (See, e.g., People v. Anderson, No. S004385, R.T. 3167-68 (victim's home); People v. Cain, No. S006544, R.T. 6787 (same); People v. Freeman, No. S004787, R.T. 3674, 3710-3711 (public bar); People v. Ashmus, No. S004723, R.T. 7340-3741 (city park); People v. Carpenter, No. S004654, R.T. 16,749-50 (forested area); People v. Comtois, No. S017116, R.T. 2970 (remote, isolated location).)

These examples make it clear that in actual practice the "circumstances of the crime" aggravator is being relied upon in every case, by every prosecutor, no matter what the facts, without any limitation whatever. Entirely opposite facts, and facts that are inevitable variations of every homicide, have been turned into aggravating factors which then are used to justify the death penalty.[72]

In sum, the section 190.3 "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 (1988) 486 U.S. 356, 363 [108 S.Ct. 1853, 100 L.Ed.2d 372]).

It is the "circumstances of the crime" which authorize the prosecution to charge a special circumstance, and for the jury to find a special circumstance allegation true, in the first place. Since the whole point of the penalty phase is to assure a rational separation of the few cases which call for the death

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[72] The constitutional infirmity of the "circumstances of the crime" aggravator is exacerbated by the facts that under California's capital sentencing scheme the sentencing jury is not required to unanimously agree upon the existence of any particular aggravating factor, or to find that any aggravating factor (other than prior criminality) has been proven beyond a reasonable doubt, or to make any record of the aggravating factor(s) relied upon in determining that the aggravating factors outweigh the mitigating factors.

These other concerns are discussed in subsequent parts of the text of this argument, *post*.

penalty from the many cases which do not (see, e.g., (Maynard v. Cartwright, *supra*, 486 U.S. 356, 363 [discussing the holding in Godfrey v. Georgia, *supra*, 446 U.S. 420]), by allowing the jury to base its decision in this regard on the "circumstances of the crime" as that phrase has been interpreted in California, and on the special circumstance finding, itself, the statute really grants the jury authority to base its decision on any reason, or no reason at all. This standardless procedure is unconstitutional.

It must be noted that the constitutional infirmity was especially prejudicial to appellant, Martin Jennings, because here the prosecutor did not put on any significant evidence in the penalty phase, and in his short argument to the jury he essentially asked them to return a death verdict solely because of the generic "circumstances of the crime" and the special circumstance. (See R.T. 3475-3481, esp. pp. 3478-3481.) The jury in this case was left with no basis for a death verdict other than the fact that appellant had been found guilty of the crime with which he was charged.

For these reasons, the California death penalty scheme is unconstitutional generally, under U.S. Supreme Court authorities construing the Eighth Amendment, and it worked in an unconstitutional manner in this particular case.

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D. Appellant's Death Penalty is Invalid Because The Death Penalty Statute Contains No Safeguards To Prevent Arbitrary and Capricious Sentencing, And Deprives Defendants of the Right to a Jury Trial on Each Factual Determination on Which the Death Sentence is Based - in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments To the United States Constitution

1. Introduction

Parts B. and C., above, demonstrate that California's death penalty statute fails to narrow the pool of murderers eligible for the death penalty either by way of defining "special circumstances" or by way of providing meaningfully narrowing sentencing guidelines for juries.

In this part of the argument, appellant focuses on the fact that the California scheme provides none of the other safeguards that are commonly employed by other states' death penalty schemes to guard against the arbitrary imposition of death sentences. California death penalty juries do not have to make written findings, do not have to unanimously find the aggravating circumstances on which they base their sentencing choice, and do not have to be persuaded beyond a reasonable doubt that aggravating circumstances are proved, or 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 - neither of which is a factor in the instant case - California death penalty juries are not instructed in the penalty phase on any burden of proof at all.

Not only is inter-case proportionality review not required (see argument "XVII," *infra*), it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make - whether or not to order the defendant put to death.

2. Appellant's death verdict was not premised on findings by a unanimous jury, beyond a reasonable doubt, that one or more aggravating factors existed and that these factors outweighed mitigating factors; his constitutional rights were thus violated

The jury in this case was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. All this was consistent with this court's previous interpretations of California's death penalty statute. For example, in People v. Fairbank (1997) 16 Cal.4th 1223, 1255, this court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . .."

But these interpretations have been effectually nullified by the U.S. Supreme Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] [hereinafter Apprendi]; Ring v. Arizona (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428] [hereinafter Ring]; and Blakely v. Washington (2004) 542 U.S. 296 [124 S.Ct. 2531; 159 L.Ed.2d 403] [hereinafter Blakely].

In Apprendi, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.) In Ring, the high court extended the reasoning of Apprendi, holding that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in Apprendi, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt.

In Blakely the court reasserted that the Sixth Amendment entitles a defendant to a jury determination beyond a reasonable

doubt of all facts legally essential to the sentence.

After the U.S. Supreme Court's decisions in these cases, it is plain that California's death penalty scheme as interpreted by this court violates the federal Constitution.

a. In the wake of these U.S. Supreme Court cases, any aggravating factor necessary to the imposition of death must be found true beyond a reasonable doubt

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. (See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-103(d) (West 1992); Del. Code Ann., tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann., § 1710-30(c) (Harrison 1990); Idaho Code, § 19-2515(g) (1993); I11. 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); State v. Stewart (Neb. 1977) 250 N.W.2d 849, 863; State v. Simants (Neb. 1977) 250 N.W.2d 881, 888-90; 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).

The state of Washington has a related requirement that before making a death judgment the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann., § 10.95.060(4) (West 1990).) 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).)

Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to address the subject in their statutes.

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

California statute 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) outweigh any and all mitigating factors.

This court has acknowledged that fact-finding is part of a sentencing jury's responsibility: 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 (1988) 46 Cal.3d 432, 448.)

According to California's "principal sentencing instruction" (People v. Farnam (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.) Thus, before the process of weighing aggravating factors against mitigating factors can begin, the jury must find that one or more aggravating factors exist. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.

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 the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt.' " (*Id.*, 59 P.3d at p. 460)

In People v. Anderson (2001) 25 Cal.4th 543, 589, this court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), Apprendi does not apply. After Ring, this Court repeated the same analysis in People v. Snow, *supra*, 30 Cal.4th 43, and People v. Prieto (2003) 30 Cal.4th 226: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], Ring imposes no new constitutional requirements on California's penalty phase proceedings." (People v. Prieto, *supra*, 30 Cal.4th at p. 263.)[73]

The Prieto holding is based on a truncated view of California law. Penal Code section 190, subdivision (a), provides as follows: "Every person guilty of murder in the first

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[73] At this writing the court has not decided the effect of Blakely on California death penalty trials and verdicts.

degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." In Ring, the state of Arizona advanced the same argument this court has employed, but to no avail: "In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by Apprendi, Arizona first restated the Apprendi majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies 'death or life imprisonment' as the only sentencing options, see Ariz. Rev. Stat. Ann., § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict . . .. This argument overlooks Apprendi's instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.*; see 200 Ariz. at 279, 25 P.3d at 1151." (Ring, 536 U.S. at pp. 603-604.)

In this regard California's statute parallels Arizona's. Just as in Arizona, when a defendant is convicted of first degree murder in California with a finding of one or more special circumstances, the statute "authorizes a maximum penalty of death only in a formal sense." (Ring, *supra*, 536 U.S. at p. 602.) Penal Code section 190, subdivision (a), provides that the punishment for first degree murder is 25 years to life, life

without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5." Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist, and that it or they substantially outweigh(s) the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).[74]

There is no meaningful difference, under Ring, between the Arizona and California schemes. Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and finds no mitigating circumstances substantial enough to call for leniency. Arizona Revised Statutes, section 13-703(E), provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

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[74] It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this court has recognized that a particular special circumstance can even be argued to the jury as a mitigating circumstance. (See People v. Hernandez (2003) 30 Cal.4th 835.)

California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances: "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." (Pen. Code, § 190.3.)

The Ring case stated: "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." (536 U.S. at p. 602.) Under the California scheme, as under the Arizona scheme, "no matter how the state labels it," the jury is called upon to make a fact-finding or findings as a predicate of any death judgment.

This court also has recognized that fact-finding is one of the functions of the capital case 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. The Court held that Ring does not apply only because the facts that are found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is

appropriate." (Snow, *supra*, 30 Cal.4th at 126, fn. 32; citing Anderson, *supra*, 25 Cal.4th at 589-590, fn. 14.) However, under the U.S. Supreme Court cases, this is a distinction without a difference. The fact remains that under both the Arizona and California schemes, the jury must make a finding of an aggravating circumstance before it can impose a death judgment. Thus, the presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California, and under the U.S. Supreme Court cases, this dictates the same Sixth Amendment protection for defendants as to the aggravating factor(s) as are required for the other elements of the crime. (See Ring, *supra*, 536 U.S. at p. 602.)

Finally, this court has relied on the undeniable fact that "death is different," as a basis for withholding, rather than extending, procedural protections. (Prieto, *supra*, 30 Cal.4th at p. 263.) In Ring, Arizona also sought to justify the lack of a unanimous, beyond-a-reasonable-doubt jury finding of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the grave and irrevocable nature of the death penalty to the purpose of limiting defendants' procedural rights was rebuffed. "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.' 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, *supra*, 536 U.S. at p. 606, citing with approval Justice O'Connor's Apprendi dissent, 530 U.S. at p. 539.)

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 [141 L.Ed.2d 615, 118 S.Ct. 2246].) In Monge, the U.S. Supreme Court foreshadowed Ring, expressly finding the Santosky v. Kramer ((1982) 455 U.S. 745, 755 [71 L.Ed.2d 599, 102 S.Ct. 1388]) rationale for the beyond-a-reasonable-doubt burden of proof requirement is applicable to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([Bullington v. Missouri,] [1981] 451 U.S. [430] at p. 441 [101 S.Ct. 1852, 68 L.Ed.2d 270])(quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, *supra*, 524 U.S. at p. 732.)

As the high court stated in Ring, *supra*, 536 U.S. at pp. 589, 609: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of

any fact on which the legislature conditions an increase in their maximum punishment . . .. The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

The final step of California's capital sentencing procedure is indeed, as this court has said, a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in viewing these facts as bases for eliminating procedural protections that would render the decision a rational and reliable one and allowing the facts 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 Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The jury must decide unanimously on the findings underlying the death judgment

This court "has held that unanimity with respect to aggravating factors is not required by statute or as a

constitutional procedural safeguard." (People v. Taylor (1990) 52 Cal.3d 719, 749; accord, People v. Bolin (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons for it - including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., Griffin v. United States (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; Murray's Lessee v. Hoboken Land and Improvement Co. (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historically settled usages].)

As noted in the preceding section of this argument, the U.S. Supreme Court has made clear that critical factual determinations in capital cases must be made by a jury, and cannot be attended with fewer procedural protections than decisions of much less consequence. (Ring v. Arizona, *supra*.) These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (Brown v. Louisiana (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (Monge v. California, *supra*, 524 U.S. at p. 732), this principle must be applied to a jury's decision to impose the death penalty.

In Monge the high court developed this point at some length, explaining: "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 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 fact finding')." (Monge v. California, *supra*, 524 U.S. at pp. 731-732; accord, Johnson v. Mississippi (1988) 486 U.S. 578, 584). Thus, the Sixth, Eighth, and Fourteenth Amendments cannot be satisfied by anything less than unanimity in the crucial findings of a capital jury.

It is worth noting that in California, an enhancing allegation in a non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital 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 836, 111 S.Ct. 2680]), and certainly no less (Ring, 536 U.S. at p. 602).

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated. The first sentence of article 1, section 16, of the California Constitution provides: "Trial 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 People v. Wheeler (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

Separately, when the state applies this fundamental requirement to findings carrying a maximum punishment of one year in the county jail, yet not to findings underlying a death judgment, by its inequity it violates the equal protection clauses of the federal and state constitutions, and by its irrationality it violates both the due process and cruel and unusual punishment clauses of the constitutions, as well as violating the Sixth Amendment's guarantee of a trial by jury.

This court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that misconduct." (People v. Raley, *supra*, 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial on guilt or innocence." (Monge v. California, *supra*, 524 U.S. at p. 726; Strickland v. Washington, 466 U.S. at pp. 686-687; Bullington v. Missouri (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

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 grave risk that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do, and also that 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 enough smoke there must be enough 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*; People v. Hayes (1990) 52 Cal.3d 577, 643.) However, the U.S. Supreme Court's decisions in Apprendi, Ring, and Blakely make clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which a capital case defendant is entitled to unanimous jury findings beyond a reasonable doubt.

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3. Some burden of proof is required in order to establish a tie-breaking rule and to ensure even-handedness

This court has held that a burden of persuasion is inappropriate, given the normative nature of the determinations to be made in the penalty phase. (People v. Hayes, *supra*, 52 Cal.3d at p. 643.) However, even a normative determination can result in jurors sometimes finding 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 (1981) 455 U.S. 104, 112 [71 L.Ed.2d 1, 102 S.Ct. 869].) It is unacceptable - "wanton[]" and "freakish[]" (Furman v. Georgia, *supra*) - the "height of arbitrariness" (Mills v. Maryland (1988) 486 U.S. 367, 374 [108 S.Ct. 1860; 100 L.Ed.2d 384]) - 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.

Therefore, the adoption of some burden of proof is constitutionally required.

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4. Even if it had been constitutional for the penalty case to proceed without any burden of proof, it was error to fail to instruct the jury to that effect

If in the alternative it were permissible not to have any burden of proof at all, the trial court nevertheless erred prejudicially by failing to articulate this 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*.) The reason is obvious: 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 in any given case.

The same is true if there is no burden of proof but the jury is not told this. Jurors who believe the burden should be on the defendant to prove mitigation in the penalty phase would permitted to apply that rule. And such jurors do exist. (See, e.g., People v. Dunkle, No. S014200, R.T. 1005, cited in Appellant's Opening Brief in that case at page 696.)

In other words, without an instruction that neither party bears a burden of proof, there exists a constitutionally unacceptable possibility that some jurors in this case voted for the death penalty because of a presumption as to the allocation of a burden of proof which actually does not exist. That renders the failure to give any instruction at all on the subject a violation of the 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.

Such error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (Sullivan v. Louisiana, *supra*.)

Moreover, there is one demonstrable ground of possible prejudice arising out of this problem in the instant case. Here, in the guilt phase the parties followed the universal sequence of presentation of their cases - prosecution, followed by defense - and the jury was of course instructed on the traditional burden of proof. But in the penalty phase, the defense put on its case first, and the defense presented its argument first, then followed the prosecution's argument with a final closing argument. This reversal of the standard sequencing of the case very likely suggested, to some jurors at least, that the burden of proof was likewise reversed, and the defense bore the burden of proof in the guilt phase, since the jurors knew the normal rule to be that the party that goes first bears the burden of proof.

5. California violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, by failing to require that the jury base any death sentence decision on written findings

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his

federal due process and Eighth Amendment rights to meaningful appellate review. (California v. Brown (1987) 479 U.S. 538, 543 [107 S.Ct. 837; 93 L.Ed.2d 934].); Gregg v. Georgia, *supra*, 428 U.S. at p. 195.) Given that California capital case juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances, as discussed at length above, there can be no meaningful appellate review of the choice of the death penalty without at least written findings. (See, e.g., discussion in Townsend v. Sain (1963) 372 U.S. 293, 313-316 [83 S.Ct. 745, 9 L.Ed.2d 770].)

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.) Ironically, such findings are otherwise considered by this court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (In re Sturm (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)

A determination of parole suitability shares many characteristics with the decision whether or not to impose the death penalty (apart from the obvious and compelling difference in its consequences for the individual). In both cases, the subject has already been convicted of a crime, and the decision-maker must consider such factors as future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Calif. Code of Regs., tit. 15, §§ 2280, et. seq.; see also People v. Martin (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Separately, in non-capital cases California law requires the sentencer to state on the record the reasons for the sentence choice. (Pen. Code, § 1170, subd. (c); People v. Martin, *supra*.) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants, not less. (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.

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 the United States. 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. (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).

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 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 determining or reviewing whether the jury has made the 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 the federal guarantee of due process and the Eighth

Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

6. The use of restrictive adjectives in the list of potential mitigating factors impermissibly act as barriers to consideration of mitigation

The inclusion in the statutory list of potential mitigating factors of such adjectives as "extreme" (see Pen. Code, § 190.3, factors (d) and (g)) and "substantial" (see *id.*, factor (g)) act as barriers to the proper 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.)

7. The failure to instruct that certain factors set forth in Penal Code section 190.3 are relevant solely as potential mitigators denied appellant a fair, reliable, and evenhanded determination in the penalty determination

In accordance with customary California practice, nothing in the penalty phase instructions in this case 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 introduced

by a prefatory "whether or not" - factors (d), (e), (f), (g), (h), and (j) of Penal Code section 190.3 - were relevant solely as possible mitigators. (People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Edelbacher (1989) 47 Cal.3d 983, 1034; People v. Lucero (1988) 44 Cal.3d 1006, 1031, fn.15; People v. Melton (1988) 44 Cal.3d 713, 769-770; People v. Davenport, *supra*, 41 Cal.3d 247, 288-289). The trial court's failure to advise the jury of this limitation in his instructions left the jury free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and thus invited them to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors. For example, the jury might have found it aggravating that the child victim obviously was not a participant and did not consent to the act (subd. (e)), or that appellant did not consider his acts justified (subd. (f)), or that appellant did not appear to suffer from a mental disease and was not intoxicated (subd. (h)).

As a consequence, appellant was deprived of the reliable, individualized capital sentencing determination guaranteed 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 likely the jury aggravated the sentence based on what were, as a matter of state law, non-aggravating factors and did so believing that the state - as represented by the trial court - had identified these as potential aggravating factors supporting

a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]" (Stringer v. Black (1992) 503 U.S. 222, 235 [112 S.Ct. 1130, 117 L.Ed.2d 367]).

Capital sentencing procedures must protect against such " '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, JJ.)) and help ensure that the death penalty is evenhandedly applied. (Eddings v. Oklahoma, *supra*, 455 U.S. at 112.)

E. 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 preceding sections of this argument, 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 in death penalty cases 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 by itself 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, *supra*, 17 Cal.3d 236, 251.) "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, 356 U.S. 86, 102 (1958)." (Commonwealth v. O'Neal (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

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.) 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 [62 S.Ct. 1110; 86 L.Ed. 1655].)

California cannot meet this burden here. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the

challenged classification must be more strict, and any purported justification by the state of the discrepant treatment must 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 People v. Prieto, *supra*, 30 Cal.4th 226, this court stated, "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." (30 Cal.4th at p. 275.) In People v. Snow, *supra*, 30 Cal.4th 43, the court stated, "the final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Id.*, at p. 126, fn. 32.)

Yet California affords persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for, say, receiving stolen property. An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See Pen. Code, §§ 1158, 1158a.) When the question of which sentence is appropriate is considered in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.406 requires that

the reasons for selecting the upper or lower term must be stated orally on the record, including the primary factor or factors supporting the choice. Rule 4.420 provides that circumstances in aggravation and mitigation must 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 discussions *ante*.) 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 unlike the cases of all persons in California who are sentenced for non-capital crimes, no reasons for a death sentence need be provided.

These discrepancies on basic procedural protections are skewed against persons subject to the death penalty; they are, accordingly, in violation of the guarantee of 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 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.) 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. However, because the court was

seeking to justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the court's reasoning was necessarily flawed.

In Allen the court offered three justifications for its holding.

First, the court 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." (42 Cal.3d at p. 1286.)

But 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, *supra*, 481 U.S. 279, 305.) Principles of uniformity and proportionality must operate in the area of death sentencing to prohibit death penalties that flout a societal consensus as to particular offenses (Coker v. Georgia (1977) 433 U.S. 584 [97 S.Ct. 2861; 53 L.Ed.2d 982]) or offenders (Enmund v. Florida (1982) 458 U.S. 782 [102 S.Ct. 3368; 73 L.Ed.2d 1140]; Ford v. Wainwright (1986) 477 U.S. 399 [106 S.Ct. 2595; 91 L.Ed.2d 335]; Atkins v. Virginia (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335]). 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 constitutionally 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 Pen. Code, § 190.4; People v. Rodriguez (1986) 42 Cal.3d 730, 792-794.) In this respect the absence of a disparate sentence review cannot be justified on the ground that 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 Determinate Sentence Law (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, as the U.S Supreme Court has noted repeatedly, the difference between life and death is far greater than the difference between any various terms of years in prison. (Ford v. Wainwright, *supra*, 477 U.S. at p. 411; Woodson v. North Carolina, *supra*, 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.]; see also Reid v. Covert (1957) 354 U.S. 1, 77 [77 S.Ct. 1222; 1 L.Ed.2d 1148] [conc. opn. of Harlan, J.]; Kinsella v. United States (1960) 361 U.S. 234, 255-256 [80 S.Ct. 297; 4 L.Ed.2d 268] [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.J.]; Gardner v. Florida, *supra*, 430 U.S. 340, 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 [106 S.Ct. 1683; 90 L.Ed.2d 27, 36] [plur. opn.], quoting California v. Ramos (1983) 463 U.S. 992, 998-999 [103 S.Ct. 3446; 77 L.Ed.2d 1171]; Harmelin v. Michigan, *supra*, 501 U.S. at p. 994; Monge v. California, *supra*, 524 U.S. at p. 732.)

In Monge the high 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 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 fact finding')." (Monge v. California, *supra*, 524 U.S. at pp. 731-732.)

The 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, in Allen 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. (42 Cal.3d at p. 1287.) This distinction does not withstand analysis. 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 Pen. Code, § 190.3, subds. (a) through (j), with Cal. 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 for non-capital cases.

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 [121 S. Ct. 525; 148 L. Ed. 2d 388].) 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.)

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. But "community standards" 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 any longer permit the imposition of death in a particular case. (See, e.g., Atkins v. Virginia, *supra*.)

Nor can "community standards" 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 justify 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*.)

Although Ring hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . .. The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death." (Ring, *supra*, 536 U.S. at pp. 589, 609.)

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*.)

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 must be applied by this Court when a fundamental interest is affected.

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency

"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[75] 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*

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[75] After the publication of this article, in 1995, South Africa joined with the other civilized nations of the world and abandoned the death penalty.

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 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].)

Complete abolition of the death penalty, or strict limitation of its use to only "exceptional crimes such as treason" is particularly uniform in the nations of Western Europe. (See, e.g., Stanford v. Kentucky (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; Thompson v. Oklahoma (1988) 487 U.S. 815, 830 [108 S.Ct. 2687; 101 L.Ed.2d 702] [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).)

Likewise, "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all have abolished the death penalty. (*Id.*)

Although the United States is of course not bound by the laws of any other sovereignty in its administration of its criminal justice systems, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.' " (1 Kent's Commentaries 1, quoted in Miller

v. United States (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; Hilton v. Guyot (1895) 159 U.S. 113, 227; Sabariego v. Maverick (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; 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 the Eighth Amendment is not a static proscription. "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. at p. 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. at p. 100; Atkins v. Virginia, *supra*, 536 U.S. at pp. 316-317.) 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*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O.T. 2001, No. 00-8727, p. 4.)

Likewise, in determining that the Eighth Amendment bans the execution of persons who were under the age of 18 when they committed the crime, the court noted the importance of the fact that no other country on Earth continued to give official sanction to the juvenile death penalty. (Roper v. Simmons (2005) ___ U.S. ___ [125 S.Ct. 1183, 1198-1199; 161 L.Ed.2d 1].)

Thus, assuming arguendo that 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 rarely used punishment for very rare crimes - is. Nations in the Western world no longer accept it. And the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind the civilized world. (See Atkins v. Virginia, *supra*, 536 U.S. at p. 316.)

Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of U.S. law. (Hilton v. Guyot, *supra*, 159 U.S. 113, 227; see also Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

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

homicides.[76] (See article VI, section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes.")

Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad - mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev. 1, 30 (1995).)

In sum, the very broad death scheme in California and the use of execution as a regular punishment violate both International Law and the Eighth and Fourteenth Amendments. For these reasons, appellant's death sentence should be set aside.

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[76] The instant case involves only a single homicide, and the basis for the first-degree finding and the special circumstance finding was essentially a version of the felony murder doctrine.

G. Conclusion

The foregoing series of arguments are only some of the generic or systemic reasons why the death sentence in this case cannot stand. For these many, many reasons, the death judgment in this case must be reversed.

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XVI. THE VESTING OF UNBRIDLED DISCRETION IN PROSECUTORS TO SEEK OR NOT TO SEEK THE DEATH PENALTY, IN CASES WHERE A SPECIAL CIRCUMSTANCE CAN BE CHARGED, RENDERS THE CALIFORNIA DEATH PENALTY SCHEME UNCONSTITUTIONAL

Rarely do the courts, in discussing the death penalty, address the effect on the analysis of the settled principle that prosecutors have virtually unchecked discretion to seek or not to seek the death penalty.[77] This only magnifies, or multiplies, the arbitrariness and capriciousness — the "freakishness" — of the process by which the very few are selected from among the many, for death. As a consequence of this unbridled discretion, the California death penalty scheme must be held unconstitutional under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Under California law, the individual prosecutor has complete discretion to determine whether the death penalty will be a potential punishment in a given murder case. This court has held

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[77] See, e.g., McCleskey v. Kemp, *supra*, 481 U.S. 279, 296-297 [95 L.Ed.2d 262, 107 S.Ct. 1756]: "[T]he policy considerations behind a prosecutor's traditionally 'wide discretion' suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.' [Citation.] Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty." (Fns. omitted.)

"[T]he capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.' [Citation.] As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, 'the power to be lenient [also] is the power to discriminate' . . .." (*Id.*, 481 U.S. at pp. 311-312, fns. omitted).)

this system constitutional. (People v. Crittenden, *supra*, 9 Cal.4th 83, 152; accord: People v. Carpenter (1999) 21 Cal.4th 1016, 1064.) Appellant contends this issue should be revisited, and the court should reverse its position.

As Justice Broussard noted in his dissent in People v. Adcox, *supra*, 47 Cal.3d 207, 275-276, empowering prosecutors in this manner creates a substantial risk of arbitrariness in the selection of cases for death penalty treatment — arbitrariness both with regard to location within the state, and over time in a given location. There can be no doubt that under the present statutory scheme, some offenders are chosen as candidates for the death penalty by local prosecutors who would not have been singled out for death by prosecutors in another county or at another time in the same county. Yet "[c]apital punishment [must] be imposed . . . with reasonable consistency, or not at all." (Eddings v. Oklahoma, *supra*, 455 U.S. 104, 112.)

Additionally, the absence of standards to guide prosecutors' discretion permits reliance on constitutionally irrelevant and impermissible considerations, including the races and economic status of perpetrators and victims, the prosecutor's political ambitions, and the press attention focused on the case. To seek the death penalty on the basis of "factors that are constitutionally impermissible . . ., such as . . . race," violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (Zant v. Stephens, *supra*, 462 U.S. 862, 885.)

Just like the "arbitrary and wanton" jury discretion condemned in Woodson v. North Carolina, *supra*, 428 U.S. 280, 303,

the arbitrary and wanton prosecutorial discretion allowed by the California death penalty scheme in the charging, prosecution, and submission of a case to a jury as a death penalty case is contrary to the principled decision making mandate of the Fifth, Eighth, and Fourteenth Amendments. (Furman v. Georgia, *supra*, 408 U.S. 238.)

On this point, also, it fell to Justice Brennan to make the case in the U.S. Supreme Court:

> "[The present case] highlights the utter failure of the elaborate sentencing schemes approved by the Court in Gregg and its companion cases to meaningfully limit the arbitrary infliction of death by the States. When Gregg was decided several Members of the Court expressed the belief that channeling juror discretion would minimize the risk that the death penalty 'would be imposed on a capriciously selected group of offenders,' thereby making it unnecessary to channel discretion at earlier stages in the criminal justice system. See Gregg, *supra*, [428 U.S.] at 199, 49 L.Ed.2d 859, 96 S.Ct. 2909 (opinion of Stewart, Powell, and Stevens, JJ.). But discrimination and arbitrariness at an earlier point in the selection process nullify the value of later controls on the jury. The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor's office. His decision whether or not to seek capital punishment is no less important than the jury's. Just like the jury, then, where death is the consequence, the prosecutor's 'discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' 428 U.S., at 189, 49 L.Ed.2d 859, 96 S.Ct. 2909.
>
> "Instead, the decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to

> negotiate at all are made at the unbridled discretion of individual prosecutors. The prosecutor's choices are subject to no standards, no supervision, no controls whatever. There are, of course, benefits associated with granting prosecutors so much discretion, but there are also costs. Some of these costs are simply accepted as part of our criminal justice system. But if the price of prosecutorial independence is the freedom to impose death in an arbitrary, freakish, or discriminatory manner, it is a price the Eighth Amendment will not tolerate."
>
> (DeGarmo v. Texas (1985) 474 U.S. 973, 975, [88 L.Ed.2d 322, 106 S.Ct. 337].)

The instant case is one which especially calls for imposition of a check on prosecutors' discretion to seek the death penalty. The evidence in this case revealed that appellant did not commit homicide, and did not aid and abet in a homicidal act. What can be said against appellant on the facts is that he treated his young son cruelly, and there is a basis for arguing that the boy would not have died when he did if appellant had behaved less cruelly. On this record, no sensible argument can be made that appellant's behavior warranted execution, under any of the leading United States Supreme Court cases approving the death penalty as a remedy, generically.

For the reasons noted in appellant's presentation above, and the reasons articulated by Justice Brennan in DeGarmo, this court should hold that the death judgment in this case was the end result of an exercise of prosecutorial discretion which the constitution will not countenance, and that accordingly, the judgment must be reversed.

XVII. IMPOSITION OF THE DEATH PENALTY IN THIS CASE WOULD VIOLATE THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW AND THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND/OR UNUSUAL PUNISHMENTS, IN THAT THE REMEDY WOULD BE CONSTITUTIONALLY DISPROPORTIONATE; AND THEREFORE, THE JUDGMENT MUST BE REVERSED OR MODIFIED

A. The judgment should be reversed pursuant to an intercase proportionality review

In Pulley v. Harris, *supra*, 465 U.S. 37 [79 L.Ed. 2d 29, 104 S.Ct. 871], the United States Supreme Court held there is no constitutional requirement that the state courts conduct proportionality review in the administration of the death penalty. This court has consistently held, in accord, that such intercase proportionality review — comparing the sentence in the given case with the results of other cases — is not constitutionally required, and therefore need not be conducted. (E.g., People v. Lenart, *supra*, 32 Cal.4th 1107, 1130; People v. Barnett (1998) 17 Cal.4th 1044, 1182; People v. Ray (1996) 13 Cal.4th 313, 359-360; People v. Marshall (1996) 13 Cal.4th 799, 865-866; People v. Melton, *supra*, 44 Cal.3d 713, 771; accord: People v. Carpenter, *supra*, 21 Cal.4th 1016, 1064.)

Nevertheless, appellant contends this line of cases has been wrongly decided, and both Supreme Courts should hold that

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intercase proportionality review is constitutionally required.[78] Comparative review is necessary to prevent wanton and capricious imposition of the death penalty and thus to ensure that the state statutory scheme is in compliance with the requirements of the Fifth, Eighth, and Fourteenth Amendments to the United States

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[78] It furnishes strong support for appellant's claim here that 29 of the 34 states that have reinstated capital punishment require "inter-case" sentence review. By statute Georgia requires that the Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. §§ 27-2537(c).) In approving this provision, the United States Supreme Court noted that it guards ". . . further against a situation comparable to that presented in Furman [v. Georgia, *supra*, 408 U.S. 238 [33 L.Ed 346, 92 S.Ct. 2726] . . .." (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." (Proffitt v. Florida, *supra*, 428 U.S. 242, 259 [49 L.Ed.2d 913, 96 S.Ct. 2960].)

Twenty states have statutes similar to Georgia's, and seven states have judicially instituted similar review. (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. Cod. 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).)

(See also 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, *supra*, 572 P.2d 1338, 1345; State v. Simants, *supra*, 250 N.W.2d 881, 890; State v. Richmond (Ariz. 1976) 560 P.2d 41, 51; Collins v. State (Ark. 1977) 548 S.W.2d 106, 121.)

Constitution. (See generally Proffitt v. Florida, *supra*, 428 U.S. 242, 260.)

Comparative appellate review is the most rational means, if not the only effective means, by which to demonstrate that the death penalty scheme as a whole is producing arbitrary results. This is no doubt why 90 percent of the states sanctioning the death penalty require intercase review (see fn. 78 *supra*).

In addition, it is notable that comparative appellate review is required in *non*-capital cases in California. (Pen. Code, § 1170, subd. (f).) Under the Fifth, Eighth, and Fourteenth Amendments, death penalty case defendants are entitled, if anything, to *more* rigorous protections against arbitrariness than are afforded to non-capital defendants. (Harmelin v. Michigan, *supra*, 501 U.S. 957, 994; Myers v. Ylst, *supra*, 897 F.2d 417, 421.) Therefore intercase proportionality review is required here.

In People v. Allen, *supra*, 42 Cal.3d 1222, 1286-1288, this court held that no equal protection problem arises from the fact that Penal Code section 1170, subdivision (d), dictates intercase review of non-capital sentences, while there is no provision for intercase review of death sentences. However, as already noted in part E. of argument "XV," *supra* - where Allen was discussed generally as a case in which this court undertook a constitutional equal protection analysis - the three reasons the court gave for its holding in Allen do not withstand scrutiny.

First, the court held that if a disparity were found to exist, it would be unseemly for a judge to guess what the jury

would do if confronted with the disparity. (42 Cal.3d at pp. 1286-1287.) Appellant submits that in the face of such a disparity — i.e., objective evidence of a substantial possibility that the defendant was sentenced to death for arbitrary or impermissible reasons — concerns about the role and feelings of the jurors pale to insignificance.

Second, the court suggested in Allen that because death and life without possibility of parole are the only possible sentences for a special circumstance murder, a death sentence should be viewed as within the "normal" range, no matter what kind of disparate treatment was shown. (42 Cal.3d at p. 1287.) This ignores the well established principle that the death penalty, "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.)

Finally, the court in Allen held that the normative part of the jury's decision to impose a death sentence makes it more difficult to assess the reasons for a disparity than it would be to make the parallel assessment under the determinate sentencing law. (42 Cal.3d at p. 1287.) Appellant suggests the likely reason for any such difficulty is the fact that the capital case sentencer, unlike the non-capital case sentencer, is not required to state reasons for its sentence choice. The fact that the court has been able to conduct harmless error review for penalty phase error in so many cases since Allen was decided, moreover, indicates that the court is much better able to identify and

assess juries' reasons for imposing a death sentence than the Allen decision suggests the court thought then. (See, e.g., People v. Turner (1994) 8 Cal.4th 137, 193-194; People v. Wash, *supra*, 6 Cal.4th 215, 261; People v. Hardy, *supra*, 2 Cal.4th 86, 200, 204, 205, 212; People v. Sanders (1990) 51 Cal.3d 471, 521.)

For all the foregoing reasons, appellant submits that intercase proportionality review is both constitutionally required and feasible.

Furthermore, in this connection, this court has frequently noted a caveat to its otherwise flat rejection of the requirement of intercase proportionality review: " '*Unless the state's capital punishment system is shown by the defendant to operate in an arbitrary and capricious manner*, the fact that such defendant has been sentenced to death and others who may be similarly situated have not does not establish disproportionality violative of constitutional principles. [Citation.]' " (People v. Ramos (1997) 15 Cal.4th 1133, 1182, emph. added.)

This court's experience since the late 1970s, involving hundreds of homicide cases which resulted in death judgments and thousands of homicide cases which resulted in non-death judgments, proves beyond dispute that this state's capita1 punishment system has been "shown . . . to operate in an arbitrary and capricious manner." That is to say, whi1e some of the death judgments have issued in cases of especially outrageous and despicable crimes, and while no doubt many of the non-death judgments have issued in cases with significant mitigating

factors, nevertheless in recent history this court has seen a large number of cases as to which no sensible or rational explanation could be devised to explain why case "A" or case "B" resulted in the death penalty, while cases "C" through "Z" did not.

"When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." (Furman v. Georgia, *supra*, 408 U.S. 238, 293 (Brennan, J., concurring).) When it happens that "of all the people convicted of . . . murders . . ., many just as reprehensible as" the one before the court, nothing more is necessary to prove the appellant is "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed" (*id.*, at pp. 309-310 (Stewart, J., concurring)).

In other words, appellant contends this court has a constitutional duty to conduct intercase proportionality review, simply because its own experience, and the statistical information it is uniquely positioned to compile and review, concerning both the automatic appeals and the homicide cases which have come before it by way of petition for review, since 1977, raise an obvious and strong presumption that the death penalty is being administered in an unconstitutional way in California, a way that results in death judgments in an arbitrarily selected handful of cases.

At a minimum, "proportionality review of a death sentence is constitutionally []necessary" if only because "a comparative review of death sentences imposed on similarly situated defendants *might* eliminate some, if only a small part, of the irrationality that currently surrounds the imposition of the death penalty." (Pulley v. Harris, *supra*, 465 U.S. 37, 60-61 (Brennan, J., dissenting), emph. added.)

Turning to the merits of the issue in this case, if this court were to compare this case against the hundreds of others in California which have resulted in death judgments, and the thousands of other homicide cases in California which have not resulted in death judgments, the court would have to conclude that imposition of the death penalty upon appellant in this case would be disproportionate to such a degree that reversal, or modification to a sentence of life imprisonment without possibility of parole, would be constitutionally required.

Specifically, this case involved a single homicide; the actual homicidal act was committed by a co-defendant, not the appellant; appellant did not aid and abet in that act; and the homicide was accidental. There simply is no "intercase" justification for the death penalty in this case.

The result in the case of a co-defendant charged with the same crime could be considered an "intercase" matter or an "intracase" matter. This court apparently takes the view that comparison of an appellant's case to that of a co-defendant is an "intercase" matter, subject to the court's rule discussed here,

i.e., absolute refusal to consider the matter. (See discussion in People v. Maury (2000) 30 Cal.4th 342, 441-442, and cases cited.)

Appellant would be remiss, however, in failing to note the comparison of his death sentence with the sentence Michelle Jennings received, i.e., 25 years to life imprisonment — which was in fact the maximum sentence she could receive under the Penal Code.[79] The facts of this case are that appellant showed evidence that he wished for Arthur to die, and repeatedly visited physical abuse on the child, but never took any step that actually killed the child. Appellant was involved in administering his own prescribed medications to Arthur, for palliative purposes, but those amounts were not nearly enough to kill him. Michelle Jennings, on her own, administered a dose of sleeping pills which did kill Arthur.

Thus, in this case the actual killer received a sentence of 25 years to life; her accomplice, who bears that label only because he engaged in acts that were not entirely unrelated to the death, causally, received the death penalty. This gross

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[79] In the record correction proceedings in this case the undersigned counsel requested to have included in the record on appeal in the instant case some post-verdict transcripts from the case against Michelle Jennings. The Superior Court declined this request. (See C.T. 1144; R.T. 3590-3592.)

Consequently, appellant hereby requests that the court take judicial notice of those transcripts, i.e., pages C.T. 647-649, and pages R.T. 3580, et. seq. - particularly p. 3734 - of the record on appeal in People v. Michelle Jennings, case number E030778 of the Court of Appeal, Fourth Appellate District, Division Two. (Note that the Michelle Jennings case resulted in a published opinion (see 112 Cal.App.4th 459) but the opinion does not recite the nature of the sentence.)

disparity of results makes the death sentence in this case utterly unconstitutional, under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The judgment should be reversed pursuant to an intracase proportionality review

This court has consistently held that appellants in death penalty cases are entitled to intracase proportionality review — review of whether the death judgment in the individual case is disproportionate to the crime and the offender. (People v. Maury, *supra*, 30 Cal.4th at p. 441; People v. Ramos, *supra*, 15 Cal.4th 1133, 1182; People v. Mincey (1992) 2 Cal.4th 408, 476.)

As the court stated in People v. Mincey, *supra*, "[T]he imposition of a death sentence is subject to 'intracase' review to determine whether the penalty is disproportionate to a defendant's personal culpability. (People v. Baciqalupo, *supra*, 1 Cal.4th [103] at p. 15; People v. Andrews [1989] 49 Cal.3d 200, 234.) A sentence that is grossly disproportionate to the offense for which it is imposed may violate the prohibition against cruel or unusual punishment contained in article I, section 17 of the California Constitution. (People v. Kaurish [1990] 52 Cal.3d [648] at p. 716; People v. Dillon, *supra*, 34 Cal.3d 441, 478.)"

Such review should result in reversal or modification of the death judgment here. As noted several times already in this brief, this was essentially a voluntary manslaughter case, not an

intentional killing, even by the prosecutor's own theory. Appellant acted with criminal intent, and perhaps at times harbored homicidal intent, but the evidence reveals that he never *acted on* that homicidal intent. For these simple reasons, pursuant to intracase review, the court should find the death penalty is grossly disproportionate to the offense, and order the sentence reduced to life imprisonment without possibility of parole.

Additionally, appellant notes that the California constitutional doctrine discussed in part B. of this argument traces back to In re Lynch (1972) 8 Cal.3d 410, and in adopting this form of proportionality review as a constitutional requirement, the court in Lynch pointed to a parallel doctrine under the United States Constitution, articulated in that court's then most-recent death penalty case, Furman v. Georgia, *supra*. Accordingly, appellant's argument in part B. is based not only on the California Constitution, but on the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, as the doctrine of the proportionality requirement in death penalty jurisprudence has developed in the majority, concurring, and dissenting opinions in the long line of cases starting with Furman.

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XVIII. THE JUDGMENT SHOULD BE MODIFIED FROM TO DEATH TO LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE, UNDER THIS COURT'S POWER AND DUTY REFLECTED IN PENAL CODE SECTIONS 1181, SUBDIVISION 7, AND 1260

Appellant contends that this court is empowered to reduce a death judgment to a judgment of life imprisonment without possibility of parole, and should do so in this case, in the event the judgment is not reversed for other reasons.

A majority of justices of the court have held the court has no such power. (See, e.g., People v. Lenart, *supra*, 32 Cal.4th 1107, 1137; People v. Hines (1997) 15 Cal.4th 997, 1079-1080.) Appellant contends that, for the reasons articulated by Justice Mosk (below), the court has the power to do so.

In a concurring opinion in Hines, Justice Mosk elaborated on a theme he had sounded in earlier cases:

> "I write separately to state, and to explain, my adherence to the view that we have 'authority under Penal Code sections 1181, subdivision 7, and 1260,' to 'reduce [a] sentence from death to life imprisonment without possibility of parole . . ..' [Citations.]
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> "Penal Code section 1181 (section 1181) deals with appellate courts, including this one, indirectly. It provides that, '[w]hen a verdict has been rendered or a finding made against the defendant, the [trial] court may, upon his application, grant a new trial in [certain] cases only . . ..' It specifies a number of circumstances. It lists one such in its subdivision 7: 'When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such

verdict or finding by imposing the lesser punishment without granting or ordering a new trial, *and this power shall extend to any court to which the case may be appealed . . ..*' (Italics added.)

"Penal Code section 1260 (section 1260) deals with appellate courts directly. It provides that the appellate court 'may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.'

"It is evident that section 1181, subdivision 7, and section 1260 are complementary. Section 1260 defines what an appellate court has authority to do. Under this provision, an appellate court may, among other things, 'reduce . . . the punishment imposed' for an offense. For its part, section 1181, subdivision 7, defines, in part, when an appellate court has authority to do what it may. Under this provision, an appellate court may reduce the punishment imposed '[w]hen [a] verdict or finding' choosing between available statutory punishments is "contrary to law or evidence' — specifically, it may 'modify such verdict or finding by imposing the lesser punishment.'

"It is also evident that section 1181, subdivision 7, and section 1260 are of general applicability. Certainly, they are not limited in their operation so far as they touch the death penalty law, which appears at Penal Code sections 190 et. seq. (section 190 et. seq.). To quote section 1181, subdivision 7, the death penalty law is paradigmatic of provisions 'wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed.' Moreover, the death penalty law refers to section 1181, subdivision 7, and does so expressly. In section

190.4, subdivision (e), it provides in pertinent part that, '[i]n every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11 [*sic*: read Section 1181]' on the ground that it is 'contrary to law or the evidence presented.'

"Although we do indeed have authority under section 1181, subdivision 7, and section 1260 to reduce a sentence from death to life imprisonment without possibility of parole, our power is limited. * * * [W]e can do so only after viewing the evidence, which comes to us on a cold record, in the light most favorable to the punishment imposed. [Citation.]

"Furthermore, . . . our exercise of such power will likely be rare. In passing on an automatic application for modification of a verdict or finding of death pursuant to section 190.4, subdivision (e), the trial judge will presumably grant relief if indeed he should (cf. Evid. Code, § 664 [establishing a presumption that "official duty has been regularly performed"]) — that is, if the trier of fact's at least implicit conclusion that aggravation outweighs mitigation is, in fact, contrary to law or evidence. Hence, in considering a request to reduce a sentence of death, we shall have occasion to grant relief only in the assumedly uncommon situation in which the trial judge has erroneously refused to do so.

". . . [W]e do not have authority under section 1181, subdivision 7, and section 1260 to reduce a sentence from death to life imprisonment without possibility of parole 'simply because we disagree with' the trier of fact's choice . . .. Pursuant to section 190.4, subdivision (e), we can do so only after we view the evidence in the light most favorable to the punishment imposed, and only if we then determine that the trier of fact's at least implicit conclusion that aggravation outweighs mitigation is contrary to law or evidence.

"But to the extent that the majority imply that we do not have authority under section 1181, subdivision 7, and section 1260 to reduce a sentence from death to life imprisonment without possibility of parole under any circumstances, they are wrong. * * * [T]he majority argue precedent. The decisions they cite find their source in People v. Odle (1951) 37 Cal.2d 52. Odle held that we did not have authority to reduce a sentence of death. (*Id.* at pp. 55-59.) It may have been correct when it was decided. At that time, subdivision 7 in its present form had not yet been added to section 1181. (See Stats. 1933, ch. 520, § 1, p. 1341.) In other words, at that time, we did not yet possess the 'power' to reduce the 'punishment . . . imposed' for an offense '[w]hen [a] verdict or finding' choosing between available statutory punishments was 'contrary to law or evidence.' Soon thereafter, however, we were given that very 'power' through the addition to section 1181 of subdivision 7 in its present form. (Stats. 1951, ch. 1674, § 117, p. 3851.)"

(15 Cal.4th at pp. 1081-1084 (fns. omitted).)

The reasons for the court to exercise the power discussed by Justice Mosk in the quotation above should be self-evident, in light of the foregoing arguments in this brief.

Additionally, it is manifest that reversal of the judgment because of legal error would occasion lengthy and costly trial proceedings concerning an event which will, by that time, be about 15 years in the past. Under these circumstances, the interests of justice would best be served by simply reducing the penalty to life imprisonment without parole. (Compare People v. Lucero, *supra*, 44 Cal.3d 1006, 1034 (Mosk, J., conc. and diss.).)

In sum, in the interests of justice the court should exercise its inherent and statutory power to modify the penalty

in this case to life imprisonment without parole, and affirm the judgment as so modified.

Appellant further contends that the two statutory provisions discussed in this argument clearly establish a procedural entitlement that is protected by the due process clause of the United States Constitution. (Hicks v. Oklahoma, *supra*, 447 U.S. 343.) "Where a statute indicates with 'language of an unmistakable mandatory character' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." (Ford v. Wainwright, *supra*, 477 U.S. 399, 428 [91 L.Ed.2d 335, 358, 106 S.Ct. 2595] (O'Connor, J., conc.).) The refusal of this court to acknowledge or employ its power under sections 1181(7) and 1260 constitutes an arbitrary deprivation of that constitutionally protected expectation, in violation of the due process clause of the Fourteenth Amendment.

Separately, capital case defendants also possess, under the Eighth Amendment and the due process clause, the right to meaningful appellate review. The United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (Parker v. Dugger (1991) 498 U.S. 308, 321 [112 L.Ed.2d 812, 111 S.Ct. 731].)

This court's refusal to date to employ Penal Code sections 1181(7) and 1260 deprives capital case defendants of meaningful review in the sense described by the United States Supreme Court.

For all of the above reasons, along with the reasons for mitigation of punishment which have been discussed frequently in this brief - primarily the facts that appellant was not the person who killed Arthur, that appellant did not act with homicidal intent, and that the killing was accidental, not intentional - insofar as the court may conclude the judgment should not be reversed for other reasons argued in this brief, the court should modify the penalty in this case to life imprisonment without parole, and affirm the judgment as so modified.

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XIX. THE DELAY BETWEEN THE TIME OF THE JUDGMENT AND THE TIME OF ANY EXECUTION WHICH MIGHT OCCUR IN THIS CASE RENDERS THE DEATH PENALTY CRUEL AND/OR UNUSUAL, UNDER THE STATE AND FEDERAL CONSTITUTIONS, AND AS A RESULT THE SENTENCE MUST BE MODIFIED TO INCARCERATION FOR LIFE

Appellant contends that, for two related or similar reasons, the delay between the time of the judgment and the time when any execution might occur in this case, a period that likely will be 15 years or more, renders execution of the death penalty cruel and/or unusual punishment under both the United States Constitution and the California Constitution.

A. The Delay Itself Renders the Execution Cruel And/or Unusual Punishment

One reason advanced by appellant in this regard is essentially the same reason various appellants have advanced in previous California death penalty cases, a reason this court has consistently rejected. Since it appears that this court's position on the issue is settled, only the essence of the argument is presented here, largely for purposes of preserving the issue for review by the federal courts.

The argument has been advanced that the lengthy period of incarceration during the time between judgment and execution, with its attendant uncertainty and anguish, is itself cruel and unusual, to such an extent that the constitution prohibits the execution from going forward. (See discussions in People v.

Ochoa (1998) 19 Cal.4th 353, 476-478; People v. Frye (1998) 18 Cal.4th 894, 1030-1032 (majority opn.); *id.*, at p. 1032 (Mosk, J., conc.); People v. Hill (1992) 3 Cal.4th 959, 1014-1016; People v. Chessman (1959) 52 Cal.2d 467, 499.)[80]

Some brief comment on the reasoning that has been employed

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[80] At least one scholar has advanced a thorough and detailed analysis of this issue, reaching the conclusion that the kind of delay from the time of judgment to the time of execution which is routine in California renders the death penalty scheme unconstitutional under the Eighth Amendment and the line of U.S. Supreme Court cases beginning with Gregg v. Georgia. (Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?* (1998) 29 Seton Hall L. R. 147.) Professor Aarons concluded:

"Under Gregg's objective criteria for measuring the evolving standards of decency, inordinate delay between the imposition of a sentence and the actual execution of a capital defendant violates the Eighth Amendment. Historically, death row inmates have not regularly spent as long under a sentence of death as they may now. The most relevant Court case presumed that the mental strain experienced while awaiting execution, without a realistic notion of when, if ever, that execution would occur, is a form of punishment. Legislatures have not explicitly considered the issue of inordinate delay; consequently, there is no statutory authority that specifically authorizes executions after a capital defendant has spent an inordinate time on death row. Presently, sentencers are not allowed to consider the likelihood that the prisoner will be on death row for an inordinate period in deciding whether to impose a death sentence. Thus, the imposition of a death sentence should not be considered a definitive statement on the issue. Finally, the only penological objective that can justify an execution after an inordinate delay is unmitigated retribution. The [United States Supreme] Court, however, has disapproved of naked retribution as the sole rationale for a death sentence. Due to the paucity of definite answers to some of the factors that the Court considers, legal developments in other nations and in international law ought to be considered on this issue. These developments reflect the values of other nation states on the death penalty and have traditionally informed the development of this nation's Eighth Amendment jurisprudence. International opinion is generally against the imposition of capital punishment, but is willing to tolerate such sentences so long as they occur before an inordinate delay between the imposition of the death sentence and the execution." (*Id.*, at p. 211.)

in rejecting this claim is in order. In Frye, this court quoted the U.S. Ninth Circuit Court of Appeals as follows: ' " 'It would indeed be a *mockery of justice* if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place.' " ' (18 Cal.4th at p. 1031, quoting McKenzie v. Day (9th Cir. 1995) 57 F.3d 1461, 1466 (emph. added).)

Similarly, in Hill the court stated: "*The argument is, of course, specious*. Because an appeal is constitutionally mandated, defendant's argument is in reality a frontal attack on the validity of the death penalty in all cases. The existence of an automatic appeal under state law is not a constitutional defect; it is a constitutional safeguard." (3 Cal.4th at p. 1014, emph. added.)

The tone of the court's comments suggests that the court does not really understand the argument. (See, in this connection, inter alia, the comments of Justice Stevens of the U.S. Supreme Court, quoted in part C of this argument, *infra*; see also Aarons, *op. cit. supra* (fn. 80), 29 Seton Hall L.R. 147, passim.)

In a sense it is true, as the court noted in Hill, that the argument for invoking the cruel/unusual punishment bulwark against the delay inherent in the capital appeals process is essentially "that the very existence of a capital appeal renders the death penalty unconstitutional" (3 Cal.4th at p. 1014). But

this is not "specious" or "a mockery of justice"; in fact, appellant contends, the problem posed here is of somewhat the opposite nature — i.e., this perspective on the general issue of capital punishment proves that *the death penalty* is a "mockery of justice," and the arguments for employing it are, constitutionally at least, "specious."

At its heart, the problem is that the due process which the constitution guarantees and demands, in order for capital punishment to pass constitutional scrutiny under the due process clause, works directly to make the whole of the process, including the years of anguish and the end point of execution, cruel and unusual, such that capital punishment fails scrutiny under the cruel/unusual punishment clause. (And if the situation were reversed, the reverse would be true: Swift execution might arguably survive cruel/unusual punishment scrutiny, but could never hope to survive due process scrutiny.) Capital punishment is simply, inherently incompatible with American standards of justice.[81]

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[81] Justice Brennan captured an aspect of this problem in his discussion in Furman v. Georgia, *supra*, 408 U.S. 238:

> "[D]eath remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. [Citation.] As the California Supreme Court pointed out, 'the process of carrying out a verdict of death is often so degrading and brutalizing to the

[FOOTNOTE 81 CONTINUES, p. 249]

[FOOTNOTE 81 CONTINUED FROM p. 248]

human spirit as to constitute psychological torture.' People v. Anderson, 6 Cal.3d 628, 649, 493 P.2d 880, 894 (1972). Indeed, as Mr. Justice Frankfurter noted,

> 'the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.' [Citation.]
>
> * * *
>
> "The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. Expatriation, for example, is a punishment that 'destroys for the individual the political existence that was centuries in the development,' that 'strips the citizen of his status in the national and international political community,' and that puts '[h]is very existence' in jeopardy. Expatriation thus inherently entails 'the total destruction of the individual's status in organized society.' [Citation.] 'In short, the expatriate has lost the right to have rights.' [Citation.] Yet, demonstrably, expatriation is not 'a fate worse than death.' [Citation.] Although death, like expatriation, destroys the individual's 'political existence' and his 'status in organized society,' it does more, for, unlike expatriation, death also destroys '[h]is very existence.' There is, too, at least the possibility that the expatriate will in the future regain 'the right to have rights.' Death forecloses even that possibility.
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> "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured

[FOOTNOTE 81 CONTINUES, p. 250]

If the argument that the inherent delay and torture involved in the capital appeals process is cruel and unusual is only another way of putting the point that capital punishment is, itself, cruel and unusual, this argument is nevertheless not "specious" or a "mockery."

B. Because of the Delay, the Execution Operates Against a Person Who Is So Far Different from The Person Against Whom the Judgment Was Entered That this Punishment Is Rendered Cruel And/or Unusual

Appellant's second contention is that it is unconstitutionally cruel and unusual to put to death the person whom the defendant has come to be, many years after the crime he committed.

In People v. Lenart, *supra*, 32 Cal.4th 1107, the court rejected this argument, stating that "[c]laims of personal growth or transformation are appropriately made to the Governor, who exercises his discretion to grant or deny clemency." (*Id.*, at p. 1131.) But there are two flaws in this approach.

[FOOTNOTE 81 CONTINUED FROM p. 249]

in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, (citation), yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.' "
(408 U.S. at pp. 288-290, fns. omitted.)

For one thing, California governors have reduced the clemency process to a kind of crude appellate process, in which the "clemency" decision turns on the fact that the defendant did commit the crime, and on an assessment of his original culpability; considerations of personal growth or transformation are considered insignificant at best. (See, e.g., D. Kravets, "*California to Execute Inmate in 1981 Slayings*" (national A.P. wire story of Jan. 18, 2005), posted on Abolishment Movement web site; D. Kravets, "*Convicted Killer Executed in California*" (national A.P. wire story of Jan. 20, 2005), posted on Abolishment Movement web site; Berman, *Sentencing Law and Policy* web site, entry of Jan. 18, 2005.)

Second, the fact that considerations specific to the inmate, apart from the crime, are theoretical bases for clemency appeals does not mean these considerations are beyond the power of the courts. Appellant's argument is that it is cruel and unusual, under the Eighth Amendment, to put a person through the capital case process, and execute him many years after the crime, without regard to events and changes that occur during those many years. This poses a question for the court to decide, not the Governor.

A factor that should not be forgotten is that appellant will have aged, from his 30s to his 50s or 60s, by the time of any execution that would occur. By that time, even apart from the fact that he would remain incarcerated, he would be a much less likely candidate for violent parental behavior than he had been at the time of his son's death.

In sum, the person who would be led to the execution chamber would not be the same person against whom the judgment was pronounced, in any but the dry, technical sense of lifetime identity. This is not enough to justify capital punishment; in other words, to execute a person whose identification with the person who committed the crime has been greatly attenuated by time and circumstance is cruel and unusual, under both the California Constitution and the United States Constitution.

C. The Issue of the Constitutional Effect Of the Delay Between Judgment and Execution Is a Serious Issue Which Needs to Be Confronted and Decided by the Courts

It bears emphasis that the arguments advanced by appellant here are not considered "specious" by all those who do not share with Justices Brennan, Marshall, and Blackmun the view that capital punishment is generically unconstitutional. Witness the words of Justice Stevens, joined by Justice Breyer, in a comment on the denial of certiorari in Lackey v. Texas (1995) 514 U.S. 1045, 1045-1047 [131 L.Ed.2d 304, 115 S.Ct. 1421]:

> Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. * * *
>
> "Though novel, petitioner's claim is not without foundation. In Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), this Court held that

the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, see *id.*, at 177, 49 L.Ed.2d 859, 96 S.Ct. 2909 (opinion of Stewart, Powell, and Stevens, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id.*, at 183, 49 L.Ed.2d 859, 96 S.Ct. 2909.

"It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that 'when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.' In re Medley, 134 U.S. 160, 172, 33 L.Ed. 835, 10 S.Ct. 384 (1890). If the Court accurately described the effect of uncertainty in Medley, which involved a period of four weeks, see *ibid.*, that description should apply with even greater force in the case of delays that last

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for many years.[82] Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 952, 68L.Ed.2d 334, 101 S.Ct. 2031 (1981) (Stevens, J., respecting denial of certiorari) ('the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself'). As Justice White noted, when the death penalty 'ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible

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[82] At this point Justice Stevens inserted the following footnote:

"See also People v. Anderson, 6 Cal.3d 628, 649, 493 P.2d 880, 894 (1972) ('The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture') (footnote omitted); Furman v. Georgia, 408 U.S. 238, 288-289, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (Brennan, J., concurring) ('[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death'); Solesbee v. Balkcom, 339 U.S. 9, 14, 94 L.Ed. 604, 70 S.Ct. 457 (1950) (Frankfurter, J., dissenting) ('In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon'); Suffolk County District Attorney v. Watson, 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (1980) (Braucher, J. concurring) (death penalty is unconstitutional under state constitution in part because '[i]t will be carried out only after agonizing months and years of uncertainty'); *id.*, at 675-686, 411 N.E.2d, at 1289-1295 (Liacos, J., concurring)."

returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman v. Georgia, 408 U.S. 238, 312, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (opinion concurring in judgment); see also Gregg v. Georgia, 428 U.S., at 183, 49 L.Ed.2d 859, 96 S.Ct. 2909 ('[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.')

"Petitioner's argument draws further strength from conclusions by English jurists that 'execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689.' Riley v. Attorney General of Jamaica, [1983] 1 A.C. 719, 734, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarman, dissenting, joined by Lord Brightman). As we have previously recognized, that section is undoubtedly the precursor of our own Eighth Amendment. See, e.g., Gregg v. Georgia, 428 U.S., at 169-170, 49 L.Ed.2d 859, 96 S.Ct. 2909; Harmelin v. Michigan, 501 U.S. 957, 966, 115 L.Ed.2d 836, 111 S.Ct. 2680 (1991) (Scalia, J., concurring in judgment).

"Finally, as petitioner notes, the highest courts in other countries have found arguments such as petitioner's to be persuasive. See Pratt v. Attorney General of Jamaica, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C. 1993) (en banc); *id.*, at 32-33, 4 All E.R., at 785-786 (collecting cases).

"Closely related to the basic question presented by the petition is a question concerning the portion of the 17-year delay that should be considered in the analysis. There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case. It may be appropriate to distinguish, for example, among delays

> resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occurring in the latter two categories, see *id.*, at 33, 4 All E.R., at 786, it is at least arguable that some portion of the time that has elapsed since this petitioner was first sentenced to death in 1978 should be excluded from the calculus.
>
> "As I have pointed out on past occasions, the Court's denial of certiorari does not constitute a ruling on the merits. [Citations.] Often, a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.' [Citation.] Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study."[83]

To repeat, at an absolute minimum this court must acknowledge that the arguments appellant advances here are far from "specious" or a "mockery of justice." They are sound legal arguments which raise troubling issues. Appellant submits that the time has come for the California Supreme Court to "serve as a laboratory" for the analysis and decision of the cruel/unusual punishment issues involved in the systematically long delay between judgment and execution in California death penalty cases.

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[83] As should be clearly implied by appellant's adoption of this quotation, appellant means specifically to contend that to execute him so long after the crime and the judgment as any execution might happen in this case would violate the United States Constitution, in the ways discussed as possibilities by Justice Stevens.

CONCLUSION

For each and all of the reasons discussed in this brief, the judgment in this case, including especially the judgment of death, must be reversed.

RULE 36 CERTIFICATION

The undersigned counsel hereby certifies under penalty of perjury that the word count of this brief is: 62,732 words.

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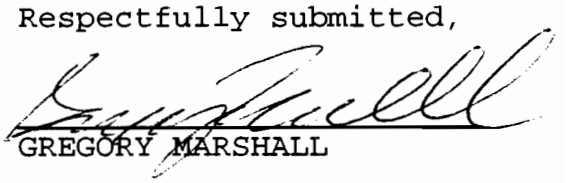
Respectfully submitted,



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Attorney for Appellant

DATE: November 3, 2005

PROOF OF SERVICE BY MAIL

CASE: People v. Jennings, no. S081148

DATE: November 3, 2005

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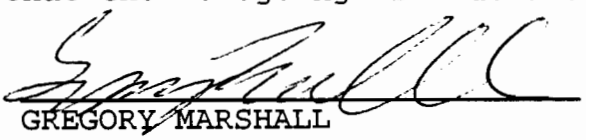
I declare under penalty of perjury that the foregoing is true and correct.



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