IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	**Calif. Supreme Court No. S112442**
Plaintiff and Respondent,	**Shasta Co. Super. Ct. No. 98F26452**
	AUTOMATIC APPEAL
PAUL GORDON SMITH, JR.,	
Defendant and Appellant.	

APPELLANT'S OPENING BRIEF
VOLUME II (pages 198-357)

Automatic Appeal From the Judgment of the Superior Court of the State of California, County of Shasta The Honorable James Ruggiero, Judge Presiding

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A. The Trial Court Erroneously Admitted Evidence of Appellant's Bad Character.

1. Summary of proceedings.

Appellant requested and the trial court denied redaction of the following portions of appellant's statement to the police:

- "I can't kill someone like that" and "Seems like the only people that deserve to die are those who hurt other people." (5CT 3567; 7RT 1661.)

  The defense argued that the first statement suggested that appellant could kill under some other circumstances. The prosecutor argued that these statements were relevant to show that appellant did not know "right from wrong," and were thus a "roundabout admission of guilt." The defense pointed out that knowing right from wrong was not in issue, and prejudicial under Evidence Code section 352. The trial court denied appellant's request for redaction without stating any reasons. (7RT 1660-61.)

- "I wouldn't kill nobody over that. I have specific set down reasons why I would kill somebody, and I don't know why I killed her." (5CT 3576; 7RT 1665.)

The defense again argued this suggested appellant had reasons to kill and was prejudicial. The trial court found the statement probative in that appellant stated he did not know why he killed Sinner, and not unduly prejudicial under Evidence Code section 352. (7RT 1666.)[21]

- "I wouldn't ever abuse her, I wouldn't hit her.... So she obviously trusted me, now she said something that one night, you know that you have to live with your whole life, it's not killing somebody, I don't have a problem with that. That's not what bothers me. The killing of her bothers me, killing somebody else doesn't bother me. I don't glorify it, but I don't think it would bother me as much as this thing did." (7RT 1677; see 5CT 3727.)

The trial court ruled this statement probative as to appellant's mental state, i.e., that killing some human being would not bother appellant, although killing Sinner did because he liked her, and not prejudicial. (7RT 1678.)

- "First time in my life I haven't had a gun when I needed one, when it really counted." (5CT 3733; 7RT 1680.)

The defense argued that this statement was prejudicial bad character evidence (stating that he had had guns before) but the trial court admitted it as a "statement of intent." (7RT 1680.)

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[21] Yet the trial court did find a similar statement by appellant to be prejudicial and inadmissible. (See 7RT 1667 ["I don't have a problem killing somebody but at least [] I would like to have a reason for doing it. And, she's not the type of person to kill. She's innocent."].)

2. Applicable law.

Under Evidence Code section 1101, subdivision (b), prior bad acts of conduct are sometimes admissible, for example, to prove intent, motive or identity. However, because such evidence is so damaging it must be received with "extreme caution," and "all doubts regarding its connection to the crime must be resolved in the accused's favor." (People v. Alcala (1984) 36 Cal.3d 604, 631; see also People v. Daniels (1991) 52 Cal.3d 815, 856.) Such caution is required because evidence of prior bad acts tends to show the defendant's character for criminal acts, i.e., prohibited criminal disposition evidence. (See e.g., People v. Fitch (1997) 55 Cal.App.4th 172, 179.) People v. Albarran (2007) 149 Cal.App.4th 214, 223-24 points out that where the sole relevance of such evidence is to show a defendant's criminal disposition as a means of creating an inference of guilt, it should not be admitted. (Id. at 223.)

The trial court allowed not just evidence which tended to show criminal character, but direct evidence of criminal disposition ("killing doesn't bother me, I have reasons for killing") – and without any of the statutory safeguards built into prior bad acts evidence. The conversation about what appellant would have done if he could have done it, in a speculative situation, is not and cannot be relevant to anything other than his criminal disposition: what appellant might have done (but did not do) does

not tend to show that he committed any crime except in the prohibited sense that he has a criminal disposition. (See e.g., People v. Archer (2007) 82 Cal.App.4th 1380, 1392-93 [in a murder prosecution, evidence of material seized from the defendant's home demonstrating his interest in weapons and methods of using them was inadmissible criminal propensity evidence].)

The bad character evidence was irrelevant to any issue except criminal disposition, and also highly prejudicial, and thus inadmissible under Evidence Code section 352. Undue prejudice as that phrase is used in section 352 refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the jury to decide the case on an improper basis. (People v. Walker (2006) 139 Cal.App.4th 782, 806.) The types of statements improperly admitted here are exactly the type that would prompt an emotional reaction against appellant, i.e. that he had reasons to kill some people, and that he would have no problem killing someone, and that he had had guns various times before. None of these statements had any relevance to appellant's state of mind at the time of the charged offenses yet they were extremely prejudicial as evidence of appellant's criminal disposition, in particular, his supposed disposition to be armed, and to kill.

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B. The Trial Court Erroneously Admitted Improper Opinion Testimony in the Co-Defendants' Statements that Appellant Had Tortured Sinner.

The defense objected to numerous statements by the co-defendants to the effect that the victim was "tortured" and that appellant "was torturing her." (7RT 1661; 1698; 8RT 1725-40.)

The defense objected to such testimony as improper lay opinion on an ultimate question, as "torture" was the special circumstance alleged in the murder. (8RT 1726.). The trial court overruled the objections (excluding only "he likes to torture people"). (8RT 1737, 1740, 1749-50; 1763-64.)

An opinion is an *inference* from facts observed. The fundamental theory of the law of evidence expressed in the opinion rule is that witnesses must ordinarily testify to facts, leaving inferences or conclusions to the trier of fact. The rule applies not only to testimony on the stand but to hearsay statements of a person not on the stand. (See Witkin, California Evidence (4th Ed.) Vol. 1, pp. 528-29 and cases cited therein.)

Lay opinion testimony is permitted only if it is "rationally based on the perception of the witness," and "helpful to a clear understanding" of the witness' testimony. (Evid. Code, § 800.)

The challenged statements claiming that appellant "tortured" Sinner do not approach the types of lay opinions that are considered admissible, such as those going to identity, sanity, speed, appearance or demeanor,

intoxication, health or injury, age and parentage, all of which are obviously based on personal observation yet difficult to articulate without expressing an opinion.[22] (See Witkin, California Evidence (4th Edition, 2000) Vol. I, Opinion Evidence, pp. 538-539.)

People v. Miron (1989) 210 Cal.App.3d 580 is instructive. Miron upheld a trial court's exclusion of a hearsay statement by an eyewitness made just after a shooting, in which she stated that the victim "was trying to kill us." (Id. at 583.) The defendant sought to introduce the testimony as a spontaneous statement, but the appellate court found that the declaration was improper lay opinion evidence. Citing Evidence Code section 800, the court noted that the statement would have been inadmissible even had the eyewitness made it during her own testimony, because lay witness opinion testimony must be "rationally based on the witness's perception and helpful to a clear understanding of his or her testimony." (Id. at 583.)

In this case, the various declarants (Amy S., Eric and Lori) perceived the event of Sinner's death, but the challenged statements were opinions regarding appellant's **intent**, and thus, as in Miron, their statements were not helpful to a clear understanding of their testimony, and should have been excluded.

The statements were also inadmissible as lay opinion testimony as to

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[22] These were the types of cases relied on by the prosecutor at trial. (8RT 1730-32.)

a legal conclusion. Appellant was charged with the torture special circumstance allegation, and whether appellant intentionally inflicted torture was the critical question for the jury at the guilt and special circumstance phase of the trial. (See Morrow v. Los Angeles Unified School District (2007) 149 Cal.App.4th 1424, 1445 [various statements, including one purporting to relate another person's state of mind, were inadmissible lay opinion].)

People v. Aguilar (1997) 58 Cal.App.4th 1196, 1202 pointed out that the dictionary definition of torture does not indicate that the pain inflicted must be prolonged; yet the offense of murder by torture does include such an intent. Thus, to the extent the co-defendants were using the ordinary meaning of the word, their improper opinions at a very minimum misled the jury and resulted in prejudice to appellant.[23] Even assuming the trial court correctly instructed on the legal meaning of torture for purposes of the special circumstance allegation, it is unlikely the jury could have forgotten the dramatic testimony of eyewitnesses, who came to a conclusion based on their senses – but of what they observed happening to Sinner rather than appellant's intent. Also, as accomplices with agreements to testify in exchange for lesser sentences, the co-defendants were highly motivated to

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[23] See also People v. Barrera (1993) 14 Cal.App.4th 1555, 1563 noting that the trial had "appropriately enlarged" the dictionary definition of "torture" (the act or process of inflicting severe pain) by requiring a specific intent to cause pain and suffering in addition to death.

make appellant look worse so that they could seem proportionally less culpable.

C. The Improper Admission of This Testimony Prejudiced Appellant.

Where highly prejudicial evidence with no probative value is admitted, the defendant's federal due process rights are violated.[24] McKinney v. Rees, supra, 993 F.2d 1378 [admission of irrelevant and inflammatory evidence violated federal due process]; Estelle v. McGuire, supra, 502 U.S. 62 [state law errors that render a trial fundamentally unfair violate federal due process]; see also Holley v. Yarborough, supra, 568 F.3d 1091 [admission of irrelevant and inflammatory evidence violated the defendant's due process rights and rendered the trial fundamentally unfair].

The trial court has no discretion to admit irrelevant evidence. (People v. Crittenden, supra, 9 Cal.4th at 1321.) Thus, the admission of these highly prejudicial but irrelevant pieces of testimony violated appellant's federal constitutional due process rights under Hicks v. Oklahoma, supra, 447 U.S. at 346 [arbitrary violation of state law violates federal due process]).

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[24] The defense objected on federal constitutional grounds to testimony by the co-defendants that appellant "tortured" Sinner. (7RT 1733.)

ARGUMENT ON PROSECUTORIAL ERROR

V. THE PROSECUTORIAL ERROR IN SHOWING TO THE JURY ENLARGED PROJECTED PHOTOGRAPHS OF THE VICTIM'S BODY IN THE GRAVE VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. Summary of Proceedings Below.

The prosecution requested that various crime scene and autopsy photographs be displayed to the jury through projection, resulting in images some four-by-six-feet large. The defense objected to the enlarged projections of the photographs, pointing out the potential for prejudice. (23RT 6207-10.) The trial court ruled that the emotional impact from enlarged projections of certain photographs would be unduly prejudicial and suggested that those photographs be mounted on a posterboard in 8"x12" size. (23RT 6210-11.) After viewing the projections one-by-one, the trial court ruled that the photographs in Exhibits 1 through 9, 18, 20, 21 and 25 could not be projected, but Exhibits 10 through 16 could be. Neither Exhibit 17 nor Exhibit 26, both showing the body in the gave were shown to the court. (23RT 6213-18.)

The trial court emphasized that it was authorizing the projection only of the photographs it had seen and in the size it allowed. "And if there is a violation of that, then obviously that could be grounds for mistrial." (23RT 6210.) When the prosecutor later asked the court to reconsider the question

of the size of the photographs, the court said it could not rule on the matter without first seeing the proposed enlargements. (25RT 6965-67.)

On July 17, 2002 (the second day of trial), the trial court ordered the prosecutor to stop organizing his photographs (during examination of a witness by the defense) in a way that displayed them to the jury. (26RT 7226.)

On August 1, 2002, the projecting screen was used to display to the jury enlarged photographs of the campsite. Lt. David Compomizzo described and explained the photographs. (32RT 9072 et seq.) Photographs of the burial site were displayed in a similar manner, including (Exh. T-15, T-12, T-13, T-14, T-11, T-10, T-16 and T-17. (32RT 9094-97.)

The prosecutor then projected the enlargements of Exhibit 17 and 26; the first showing the body in the grave site, and the second showing the body in the grave with a black plastic bag wrapped around the head. (32RT 9098.) After showing these photographs, the prosecutor requested a recess, saying that several jurors were in a "highly emotional state." The request was denied. (32RT 9101.) The defense made cumulative and prejudicial objections to the photographs in Exhibits 10, 17, 26 and 27, pointing out that it was "obvious from the reaction of the jury" that the photographs were having a huge impact. The trial court overruled the objections. (32RT 9101, 9123-24.)

Defense counsel then pointed out that the court had earlier ruled certain of the photographs inadmissible on the large screen. The prosecutor's (incorrect) recollection was that the photographs he had displayed in projected enlargements had already been shown to the court.[25] (33RT 9125.)

The defense filed a motion for mistrial on the grounds that the prosecutor's violation of the court order resulted in an obvious emotional reaction by some of the jurors, and was prejudicial. (26CT 6112-15.) The trial court ruled that no prosecutorial misconduct occurred because there was no indication the prosecutor acted intentionally. The trial court also stated that it would have admitted one photograph and the other was cumulative so not prejudicial. (38RT 11730-35.)

B. It Is Prosecutorial Error to Refer to Evidence Already Ruled Inadmissible.

Prosecutors have a special obligation to promote justice: their duty "is not merely that of an advocate" and not "to obtain convictions, but to fully and fairly present . . . the evidence . . . ." (People v. Kasim (1997) 56

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25 Prior to projecting the photographs, the prosecutor stated his recollection that the "body in the grave" photograph was not objected to. The defense attorney said he didn't recall "off the top of his head" and thought that it wasn't. (32RT 9069; 40RT 11734.) However, the defense had objected to all enlarged projections and the trial court had ruled that only those enlargements it had seen were admissible, and the trial court had not seen the grave photographs. It was the prosecutor's obligation to abide by the trial court's ruling and defense counsel's momentary confusion or memory lapse does not excuse the prosecutor's error.

Cal.App.4th 1360, 1378; United States v. Kajayan (9th Cir. 1993) 8 F.3d 1315, 1323 [prosecutor's job is not just to win, but to win fairly, "staying well within the rules"].) When prosecutorial error[26] so infects the trial with unfairness as to render the conviction a denial of due process, it amounts to a federal constitutional violation. (Donnelly v. DeChristoforo (1974) 416 U.S. 637; Hill, supra, 17 Cal.4th at 818.)

Appellant contends that the prosecutor erred by projecting onto the screen the prejudicial photographs of the body in the grave after the trial court had specifically ruled that no such photographs could be used until it had first seen and approved them. (See Hill v. Turpin (11th Cir. 1998) 135 F.3d 1411, 1418 [finding prejudicial prosecutorial misconduct where the prosecutor disregarded the trial court's earlier order and referred to evidence already ruled inadmissible]; People v. Bell (1989) 49 Cal.3d 502, 532. [the prosecutor's deliberate asking of questions calling for inadmissible and prejudicial material is misconduct or error].)

Whether the prosecutor's actions were intentional or not is beside the

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26 As explained in People v. Hill (1998) 17 Cal.4th 800, 822-23 & fn. 1, the term prosecutorial *misconduct* "is somewhat of a misnomer;" since bad faith is not a prerequisite to a claim based on the prosecutor's actions; "prosecutorial error" is a more apt description

point. As explained in People v. Hill, supra, 17 Cal.4th at 822-23 & fn. 1, bad faith is not a prerequisite to appellate relief for prosecutorial "misconduct" because the injury to appellant occurs whether committed inadvertently or intentionally.

C. The Prosecutorial Error Prejudiced Appellant.

As set out above, where prosecutorial error is so egregious as to deny the defendant a fair trial, reversal is required and federal due process is violated. (Donnelly v. DeChristoforo, supra, 416 U.S. 637; Hill, supra, 17 Cal.4th at 818.)

Appellant submits that this error was egregious. The impact on the jury was so remarkable that the prosecutor himself requested a recess. The trial court's later conclusion that there was no prejudicial effect is thus refuted by the actual jury reaction – as well as the trial court's earlier observation of the "huge" emotional impact the enlarged projected photographs would have. (See 23RT 6210-11.)

Furthermore, even if this error is not deemed prejudicial standing alone, this Court must consider the cumulative prejudicial impact of the errors at trial. It is settled law that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (Hill, supra, 17 Cal.4th at 844; see also People v. Holt (1984) 37 Cal.3d 436 [considering the cumulative

prejudicial impact of various errors; Derden v. McNeel (5th Cir. 1991) 938 F.2d 605, 610 ["Several errors taken together [ ] violated petitioner's right to due process and cause the trial to be fundamentally unfair"]; Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15.)

United States v. Frederick (9th Cir. 1995) 78 F.3d 1370 reversed for cumulative error, announcing that "[w]here [] there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial."

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ARGUMENT RELATING TO UNNECESSARILY HARSH RESTRAINTS

VI. UNNECESSARILY HARSH AND VISIBLE RESTRAINTS USED ON APPELLANT DURING TRIAL VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND DUE PROCESS, AND HIS EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

A. Summary of Proceedings Below.

Because of allegations that appellant had kicked in his cell door and broken a window (see Statement of Facts, above, pp. 63-64), the prosecution brought a motion to transfer him to state prison pursuant to Penal Code section 4007.[27] On December 5, 2000, after testimony on the motion, the trial court concluded that appellant was a likely threat but stayed the transfer order pending further proceedings, noting that appellant had not been violent to the staff. (4CT 639; see 4RT 497-631.) On March 23, 2001, the stay was lifted after appellant had flooded his cell and kicked in his cell door; appellant was transferred to the state prison to be returned one month prior to trial. (5CT 734-38; RT 692-799.)

On May 8, 2002, at the beginning of trial, appellant objected to being restrained with a shock device, which left red marks and a tingling on appellant's arms. (8RT 1842-51.) After a hearing the next day, the trial court found there was a manifest need for restraints, and ordered that

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[27] Penal Code section 4007 provides that a jail inmate awaiting trial can be transferred to state prison under certain circumstances.

appellant be restrained with a leg brace on one leg and a concealed stun/shock device on the other. (9RT 2231- 32.)

After the jailhouse incident on June 22, 2002, appellant appeared in court in belly chains and leg shackles. (20RT 5434.) After a hearing as to the facts of that incident, the defense objected to these visible shackles and the use of the stun gun. (20RT 5436-90.) The trial court ruled that the restraints requested could be used but that the defense table would be covered with paper so the jurors could not see underneath. (20RT 5495-96.)

On the fourth day of taking evidence, September 11, 2002, appellant complained of scarring and pain from being chained from 8:00 a.m. to 5:00 p.m., even over lunch time. He requested that at least his legs be unshackled over lunch. (42RT 11184-85.) The medical report noted lacerations in the process of healing over the tendons in both ankles, with some callus formation. (28CT 6849; see 28CT 6848-52 [photographs of injuries and medical report].) The trial court denied appellant's request to be unshackled – at least as to the leg irons – during lunchtime. (40RT 11494-95.)

Appellant does not contend that there was no showing of manifest need in support of the trial court's order to shackle him during trial. However, he does contend that the use of a stun gun, and the use of visible

shackles for nine hours straight to the point of inflicting pain and scarring, did violate his federal constitutional rights to due process and a fair trial, as stated in Holbrook v. Flynn (1986) 475 U.S. 560, and to a reliable sentence under the Eighth Amendment as set forth in Johnson v. Mississippi, supra, 486 U.S. at 584.

B. Summary of Relevant Legal Principles.

Rhoden v. Rowland (9th Cir. 1993) 10 F.3d 1457, 1459-60 [hereafter Rhoden I] explained that shackling is not per se unconstitutionally prejudicial, but under Holbrook v. Flynn, supra, 475 U.S. 560, it does violate federal due process if restraints seen by the jury are "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." Holbrook v. Flynn held that a jury's observation of a defendant in custody may under certain circumstances "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy" which can unfairly prejudice a defendant's right to a fair trial notwithstanding the validity of his custody status. (Id. at 569.) Because visible shackling during trial is so likely to be prejudicial to the accused, it is only permitted when justified by an essential state interest specific to the trial. (Rhoden v. Rowland (9th Cir. 1999) 172 F.3d 633, 666 [Rhoden II]; see People v. Duran (1976) 16 Cal.3d 282.)

Federal due process requires that upon a showing of need, the trial

court must consider the least restrictive alternatives. (Rhoden I, supra, 10 F.3d at 1459; see Spain v. Rushen (9th Cir. 1989) 883 F.2d 712, 728-29 [granting relief where the trial court permitted painful shackling of defendant's hands for 17 months because the court should have considered the alternative of excluding the defendant from the courtroom for periods of time].)

C. The Use of a Stun Gun and Excessive Use of Leg Shackles Were Prejudicial Violations of Appellant's Federal Constitutional Rights to Due Process, A Fair Trial, and a Reliable Sentence.

Appellant contends that where the use of leg shackles causes pain and scarring, the restraint is excessive and in violation of due process. (Spain v. Rushen, supra, 883 F.2d at 721.) Rhoden II, citing Holbrook, supra, 475 U.S. at 568, pointed out the "strong likelihood of prejudice" from shackles that caused the defendant "physical and emotional pain during his trial." (172 F.3d at 637.)

Appellant also contends that the use of a stun gun was not warranted. (See People v. Mar (2002) 28 Cal.4th 1201, 1205, 1228 [unique risks and potentially significant psychological effects posed by stun devices should be taken into account in determining whether traditional restraints are less restrictive or intrusive].)

Finally, the chains were visible to the jury. (See 22RT 5949 [trial court admonishing jury not to consider that appellant was shackled].)

When erroneous shackling is visible to the jurors in the courtroom, reversal is required. (Rhoden II, supra, 172 F.3d at 635, 637; see also Tyars v. Finner (9th Cir. 1983) 709 F.2d 1274, 1284-85 [unjustified restraints during involuntary commitment proceedings that were visible to the jury were inherently prejudicial].)

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ARGUMENTS RELATED TO THE SPECIAL CIRCUMSTANCE FINDING

VII. THE TORTURE-MURDER SPECIAL CIRCUMSTANCE FINDING MUST BE VACATED BECAUSE THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT IN VIOLATION OF APPELLANT'S FEDERAL CONSTITUTIONAL GUARANTEE OF DUE PROCESS

A. A Special Circumstance Finding Unsupported by Substantial Evidence Violates Federal Due Process.

Unless every element of the crime or special circumstance is supported by sufficient evidence, the conviction or true finding cannot stand, for it violates state and federal constitutional guarantees of due process. (Jackson v. Virginia (1979) 443 U.S. 307.)

When the sufficiency of the evidence is challenged on appeal, the record is reviewed, in the light most favorable to the judgment, to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (People v. Rodriguez (1999) 20 Cal.4th 1, 11; People v. Mayfield (1997) 14 Cal.4th 668, 790-91 [same standard applies for sufficiency of evidence of special circumstance allegation].) This Court has emphasized that a reasonable inference may not be based on "speculat[ion]," "surmise, conjecture, or guesswork." (People v. Morris (1988) 46 Cal.3d 1, 21, disapproved on other grounds, In re Sassounian (1988) 46 Cal.3d 1, 17.)

B. The Torture-Murder Special Circumstance Is Not Supported by Sufficient Evidence That Appellant Intended to Increase the Victim's Suffering.

The torture-murder special circumstance requires proof that the defendant intentionally inflicted cruel pain and suffering for any sadistic purpose. (Pen. Code, § 190.2, subd. (a)(18); People v. Elliot (2005) 37 Cal.4th 453, 479.)

People v. Mungia (2008) 44 Cal.4th 1101 found the evidence insufficient to support the true finding on the torture special circumstance allegation. In that case, the defendant had tightly bound and then battered the victim, causing great pain and suffering, but there was no evidence that the defendant acted with an intent to torture, i.e., a sadistic purpose. Intent to torture is state of mind that must be proved by the defendant's statements, by another witness's description of the defendant's behavior, or by circumstances of the offense including nature and severity of wounds (although this last is not to be given undue weight). (Id. at 1136-37.) In Mungia, the defendant's statements suggested that he had killed the victim to prevent her from identifying him. Although the killing was "brutal and savage," nothing in the nature of the injuries suggested they were inflicted in an attempt to increase her suffering, or to inflict pain in addition to the pain of death, as is required for the torture special circumstance. (Id. at 1137-38.) Mungia observed that cases upholding the torture special circumstance finding involved evidence showing that the defendant had

deliberately inflicted nonfatal wounds, or had deliberately exposed the victim to prolonged suffering. (Ibid.)

Here the evidence shows that after Lori S. and Amy S. repeatedly beat Sinner in the head with the dent puller and the outsized chili can, appellant tied her up, tried to make her cut her own wrists, and cut them himself when she wasn't able to, meanwhile kicking her when she wasn't cutting enough, and pouring alcohol over the wounds. (See Statement of Facts, above, pp. 13, 22, 41.) Although the other witnesses used the word "torture" in describing appellant's actions, they were all three co-defendants with a strong motive to minimize their own culpability while maximizing that of appellant. (See Pen. Code,§ 1111; In re Miguel L. (1982) 32 Cal.3d 100, 108-09, overruled on other grounds in People v. Cuevas (1995) 12 Cal.4th 252, 274.) Appellant himself stated, in his statements to the police and at trial, that he killed without malice, as an act of mercy, since she was going to die anyway after the beating she took from Amy S. and Lori S.

People v. Whisenhunt (2008) 44 Cal.4th 174, 201 upheld a torture-murder special circumstance where the defendant poured hot oil over the victim's body. Appellant contends that this is qualitatively different than the evidence that appellant poured alcohol over the victim's wrists, since alcohol can function as a pain-reliever and hot oil obviously cannot. Although there was testimony that the pouring of alcohol over Sinner's superficial wrist wounds would have been painful, that is not evidence that appellant thereby

intended to increase Sinner's suffering. (See Wade v. Calderon (9th Cir. 1994) 29 F.3d 1312, 1321, fn. 3, overruled on other grounds in Rohan ex rel. Gates v. Woodford (9th Cir. 2003) 334 F.3d 803 [rejecting the view that the common meaning of torture includes an element of intent].)

Consequently, given the insufficiency of the evidence that appellant intended to increase (rather than decrease) Sinner's pain and suffering, this Court must vacate the torture-murder special circumstance finding. Because this was the only special circumstance the jury found true, the Court must also vacate appellant's sentence of death. (Pen. Code, § 190.3.)

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VIII. THE TORTURE SPECIAL CIRCUMSTANCE FINDING MUST BE VACATED BECAUSE THE TORTURE SPECIAL CIRCUMSTANCE IS INSUFFICIENTLY NARROW IN VIOLATION OF APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THE FOURTEENTH AMENDMENT GUARANTEE OF DUE PROCESS

Appellant contends that the torture special circumstance fails to perform the constitutionally required narrowing functions meant to avoid arbitrary imposition of the death sentence and to "ensure restraint and moderation in its application." (See Kennedy v. Louisiana (2008) ___ U.S. ___, 128 S.Ct. 2641, 2658.)

The jury found true only one of the two special circumstances alleged, the torture-murder special circumstance. Penal Code section 190.2, section (a)(18) provides that intentional that involving the "infliction of torture" is a special circumstance. The trial court instructed the jury pursuant to CALJIC No. 8.81.18 on the elements of the special circumstance as follows:

"To find that the [torture-murder] special circumstance is true, each of the following facts must be proved:

1. The murder was intentional; and

2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion **or for any sadistic purpose**; and

3. The defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.

Awareness of pain by the deceased is not a necessary element of torture." (25CT 5993; 37RT 10322.)

Appellant contends that the inclusion of the phrase "for any sadistic purpose" rendered the jury instruction unconstitutionally vague and overbroad, as it establishes a catch-all category into which almost all murders could fall. Because the phrase failed to limit the class of individuals upon whom the death penalty may be imposed, the instruction violated appellant's Eighth Amendment protection against cruel and unusual punishment, and his Fourteenth Amendment guarantee of due process. (Furman v. Georgia (1972) 408 U.S. 238 [to avoid cruel and unusual punishment under the Eighth Amendment 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]; Godfrey v. Georgia (1980) 446 U.S. 420, 428 [the Eighth Amendment requires "clear and objective standards that provide specific and detailed guidance" to the jury].)

Appellant recognizes that this Court rejected a similar argument in People v. Raley (1992) 2 Cal.4th 870. However, Raley involved a prosecution for sexual assault and murder, with kidnaping and torture special circumstance allegations. In rejecting the argument that the phrase "for any sadistic purpose" rendered the jury instructions unconstitutionally overbroad, this Court noted that there was no legal definition of the term, but cited various dictionary definitions of "sadistic" — all of which focused on the

relationship to sexual desire and pleasure, i.e., the love of cruelty as a manifestation of sexual desire; the infliction of pain as a means of obtaining sexual release, sexual pleasure from hurting one's partner, and sexual gratification gained by causing pain.[28] (Id. at 900-01 and fn. 4.) Raley involved sexual assault on the victim, and this Court found the phrase "sadistic purpose" constitutional in that context.

However, in this case, there was no evidence that appellant acted with any sexual intent; nor that he acted in revenge, for extortion or persuasion. In fact, the prosecution relied on evidence that appellant intended to kill Sinner because she "knew too much," i.e., she was a witness to other crimes. This case is thus more similar to People v. Mungia, supra, 44 Cal.4th at 1136-38 (in which this Court found the evidence insufficient to sustain the torture-murder special circumstance where the victim was killed because she could identify the defendant) than it is to Raley.

The United States Supreme Court recently observed that the failure to strictly enforce the narrowing rules set out in Furman and other cases "has raised doubts regarding the constitutionality of capital punishment itself." (Kennedy v. Louisiana, supra, 128 S.Ct. at 2658.)

Because a capital sentencing determining requires a heightened degree of reliability and certainty, Penry v. Lynaugh (1989) 492 U.S. 302, 331;

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[28] The term is derived from the Marquis de Sade, a French writer best known for his novels detailing bizarre sexual fantasies with an emphasis on violence and criminality. (http://en.wikipedia.org/wiki/Marquis_de_Sade.)

Johnson v. Mississippi, supra, 486 U.S. 578, the jury instruction given here was constitutionally inadequate. Federal constitutional principles guaranteeing due process and protecting against cruel and unusual punishment prohibit "standardless and unchannelled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury." (Godfrey, supra, 446 U.S. at 429.) The challenged jury instruction violated these constitutional principles under the Eighth and Fourteenth Amendments to the federal constitution and their state counterparts. Consequently, this Court must vacate the special circumstance finding of torture-murder, and appellant's death sentence.

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PENALTY PHASE ARGUMENTS
ARGUMENT RELATING TO ATKINS AND ROPER V. SIMMONS

IX. IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS EXCESSIVE IN VIOLATION OF THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THAT APPELLANT'S VICTIMIZATION BY HIS FATHER, INCLUDING REPETITIVE RAPES OVER A THREE YEAR PERIOD WHEN APPELLANT WAS TWO TO FIVE YEARS OLD, RESULTED IN A "FIXED" BRAIN CHEMISTRY RENDERING HIM COMPARATIVELY UNABLE TO CONTROL HIS BEHAVIOR AND RESPOND APPROPRIATELY TO HIS CIRCUMSTANCES AND OTHER PEOPLE

Appellant objected to the imposition of the death penalty in this case as violative of the Eighth Amendment. (5CT 926-28.) "[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." (Furman v. Georgia (1972) 408 U.S. 238, 331 [Marshall, J., conc.].) The thrust of the Eighth Amendment protection is against **excessive** punishment. (Id. at 332.)

Thus, Atkins v. Virginia (2002) 536 U.S. 304 held that death was an excessive sanction for a mentally retarded defendant. Atkins noted that society views mentally retarded offenders as "categorically less culpable than average criminal." (Id. at 316.) Likewise, Roper v. Simmons (2005) 543 U.S. 551 held that the Eighth Amendment prohibited execution of individuals who were under 18 years of age at time of their capital crimes.

In Roper, the High Court emphasized that capital punishment must

be limited to those offenders who commit "'a narrow category of the most serious crimes'" and whose extreme culpability makes them "'the most deserving of execution.'" (Roper, supra, 543 U.S. at 553, citing Atkins, supra, 536 U.S. at 319.) Roper observed that juveniles' susceptibility to immature and irresponsible behavior meant that their irresponsible conduct was not as morally reprehensible as that of an adult, and that the juveniles' own vulnerability and comparative lack of control over their immediate surroundings gave them a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. (Roper, supra, 543 U.S. at 553.) Roper declared that retribution "is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." (Id. at 571.)

Most recently, Kennedy v. Louisiana (2008) ___U.S. ___ [128 S.Ct. 2641] held that the Eighth Amendment forbids imposition of the death penalty for the rape of a child where the crime did not, and was not intended to, result in death.

Appellant contends that as in Atkins, Roper, and Kennedy, imposition of the death penalty in this case violates the Eighth Amendment protection against cruel and unusual punishment. A death sentence imposed on a

person 20 years old at the time of the offense, where that person was himself a victim of the most brutal of crimes at the most vulnerable ages of two or three to five years old, is excessive for the same reasons that a death sentence imposed on a juvenile or a mentally retarded person is excessive. (Roper v. Simmons, Atkins v. Virginia.)

Appellant was subjected to the repeated acts of anal rape as "punishment" over approximately three years, which destroyed his ability to cope and to respond appropriately for the rest of his life. (47RT 13288-89.) The abuse appellant suffered at the hands of his father actually changed the physiology and chemistry of the area of his brain that controls emotions and his ability to modulate those emotions; the inability of his medulla to stop production of neurotransmitters is responsible for his irrational and aggressive behavior. (45RT 12765-66, 12771-78; 47RT 13293.)

Appellant's home until he was five years old was described as "dark and dangerous," "very, very damaging and very horrendous," and even "evil." (42RT 11834.) Social workers and health professionals repeatedly described it as one of the worst environments they had ever seen in terms of the early onset, duration and severity of the abuse and neglect and abandonment. (42RT 11834, 11844-46, 11862, 11869-74, 11983-84.) Dr. Blankman described appellant's psychological damage as one of the worst

and possibly the worst he had seen in 20 years. (43RT 12286-87.) Not surprisingly, the hell appellant lived through in his home left him "broken" – and society's failure to provide him adequate treatment after he was removed from his home left him damaged beyond full repair.

Adults traumatized by rape or a series of rape may eventually "get over it," but a chronically traumatized child such as appellant did not and could not, because the chemical changes occurred during the critical time of development, so that his changed brain chemistry became "fixed." (47RT 13315-21.)

In short, at the time of his capital offense, and through no fault of his own, but rather because of the unspeakable brutality and depravity inflicted upon him as a child by his own father, appellant suffered "disabilities in areas of reasoning, judgment, and control of [his] impulses" just as do the mentally retarded, and thus did "not act with the level of moral culpability that characterizes the most serious adult criminal conduct." (Atkins, supra, 536 U.S. at 303.) At the time of his capital offense, and because of the repeated anal rapes during the most crucial period of childhood brain development, appellant has a "fixed" but abnormal brain chemistry, rendering him as vulnerable and as comparatively unable to control his surroundings as a juvenile under the age of 18 as described in Roper v.

Simmons, supra, 543 U.S. at 553.

Kennedy v. Louisiana, supra, 128 S.Ct. 2641 is pertinent here not just because it held that imposition of the death penalty was excessive for a crime not resulting in the victim's death, but because it acknowledged that the **single** incident of rape at issue in that case was an attack not just on the victim herself "but on her childhood;" and that "[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child." (Id. at 2658.)[1]

Indeed, the dissent in Kennedy considered child rapists as "depraved as murderers," and observed that "some victims are so grievously injured physically or psychologically that life *is* beyond repair." (Id. at 2676, Alito, J., diss.)[2] The dissent noted that "[t]he immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped." (Id. at 2677.) Long-term studies show that sexual abuse is "grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual

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1 The Kennedy opinion referred to C. Bagley & K. King, Child Sexual Abuse: The Search for Healing 2-24, 111-112 (1990); Finkelhor & Browne, Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization in Handbook on Sexual Abuse of Children 55-60 (L. Walker ed.1988).

2 The dissent referred to Meister, Murdering Innocence: The Constitutionality of Capital Child Rape Statutes, 45 Ariz. L.Rev. 197, 208-209 (2003).

development in ways which no just or humane society can tolerate." (Ibid.)[3]

Appellant contends that where a person cannot develop psychologically or emotionally as a result of being so victimized, no just or humane society can tolerate putting that person to death for a murder he committed. Certainly such a person is not the "most deserving of execution," and just as certainly, the profound adverse physiological and neurological effects which began with appellant being raped repeatedly for three years as a child and ended in the homicide at issue here, render appellant's "blameworthiness diminished," so that the death penalty in his case would be excessive punishment in violation of the Eighth Amendment.

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3 The dissent referred to C.Bagley & K.King, Child Sexual Abuse: The Search for Healing 2 (1990).

ARGUMENT RELATING TO WITT ERROR

X. APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JUROR SWIFT BASED ON HER VIEWS OF THE DEATH PENALTY, IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The trial court erred and violated appellant's federal constitutional rights to an impartial jury, to due process, equal protection,and to a reliable sentencing determination under the Fifth, Sixth, Eighth and Fourteenth Amendments by summarily dismissing a prospective juror based on her supposed anti-death-penalty views, based only on her answers to the juror questionnaire, which were contradictory, and without any voir dire examination of the prospective juror.

A. Summary of Proceedings Below.

On June 20, 2002, the trial court stated its intention to excuse prospective juror Ms. Swift on the ground that she was anti-death penalty "based on the responses she provided in her questionnaire." (19RT 5233.) Ms. Swift did not participate in voir dire and the trial court neither saw nor heard her respond to any questions. Defense counsel refused to stipulate. He argued that Ms. Swift had stated in response to question number 110, that "yes" she "would try" to set aside her opposition to the death penalty and follow the law; and that she had "left the door open" to being able to "do her

duty as a juror." (19RT 5232-33.)

In her questionnaire, Ms. Swift identified herself as a church-goer and said she "c[ould] not bring [her]self to decide whether or not a man should live or die." (57CT 15009.) She said she would "not like to sit as a juror" in this case because she "would hate to be wrong" and could not "judge this man." (57CT 15013.) She said that if the court's instructions differed from her own beliefs, she would "be uncomfortable about it." However, she said that she could base her decision solely on the evidence presented, as instructed by the court, and that she could set aside any preconceived opinions about the case. (57CT 15014.) She also stated that she had no preconceived biases, prejudices or ideas that would affect her judgment in the case. (57CT 15016.)

As to her general feelings about the death penalty, Ms. Swift said she did not "like" the idea of killing a man, and that God's word said "thou shalt not kill." (57 CT 15019.) Nonetheless, she thought the death penalty served the purpose of giving "wake up calls." (57CT 15019.) She did not think the death penalty should be imposed for any particular crime, said that she was strongly opposed to the death penalty, but said that she could be impartial. (57CT 15020.)

Specifically, she stated that in deciding between a penalty of death or LWOP, she could "limit her decision to [the specific] factors enumerated by

the Court and not consider any other factors." When asked if she could set aside her personal feelings and follow the law as instructed by the court, regardless of whether she agreed with the instructions, she answered, "yes" and added, "I will try." (57CT 15021.)

When asked if her feelings about the death penalty were such that in every case she would always vote against the death penalty, she answered yes, but also stated that if she first voted for one punishment and then became honestly convinced she was wrong, she could change her vote. (57CT 15021.) She gave further explanations to some of her answers, stating that the death penalty made her "uncomfortable," and that she would have a "very hard time" deciding whether the defendant was guilty or not guilty, and could be "the cause of a hung jury."

B. Summary of Applicable Legal Principles.

A criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment and the prosecution has a strong interest in having jurors who are able to apply capital punishment within the legal framework state law prescribes. To balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. (Witherspoon v. Illinois (1968) 391 U.S. 501, 521;

Wainwright v. Witt (1985) 469 U.S. 412, 416, 424.)

Under this standard, a death sentence cannot be carried out if the jury that imposed it "was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (Witherspoon, supra, 391 U.S. at 522; Uttecht v. Brown (2007) 551 U.S. 1, 9 [if a prospective juror is not substantially impaired by his or her views of capital punishment he or she cannot be excused for cause]; see People v. Schmeck (2005) 37 Cal.4th 240, 261 [describing the "substantially impaired" rule as settled].)

Where the prospective juror has made conflicting or ambiguous statements, the trial court's ruling will be upheld on appeal, if it is fairly supported by the record." (People v. Lewis (2008) 43 Cal.4th 41, 483.) Because the trial court generally makes its determination based in part on the prospective juror's demeanor, the reviewing court usually gives deference to the trial court ruling. (Witt, supra, 469 U.S. at 424-34.) However, deference to the lower court ruling is appropriate only where the trial judge "sees and hears the juror." (Id. at 426.)

Personal voir dire questioning of a prospective juror is crucial because "the trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the

jurors' views" would prevent or substantially impair the performance of her duties. (People v. Stewart (2004) 33 Cal.4th 425, 445.)

Only where the trial court has observed the prospective juror's demeanor is it "'entitled to resolve'" the ambiguity in the juror's answers. (Id. at 7, quoting Witt, supra, 469 U.S. at 434.) As explained most recently in Uttecht v. Brown, supra, 551 U.S. 1, 9,

> "deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."

C. Prospective Juror Swift Was Not Substantially Impaired and Was Therefore Wrongfully Excluded as a Juror.

1. People v. Stewart requires reversal of appellant's penalty phase judgment.

In People v. Stewart, supra, 33 Cal.4th at 445, this Court reversed a penalty phase judgment where the trial court excluded five prospective jurors based on their questionnaire responses alone. In Stewart, the five jurors had answered "yes" to a question whether he or she had a conscientious opinion or belief that would prevent or make it very difficult to ever impose the death penalty.[4] Four of the prospective jurors had offered further explanations,

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[4] Stewart criticized the "poor phrasing of the juror questionnaire" in that case which contributed to its conclusion of error under Witt. However, the Stewart Court emphasized that "even if the questionnaire had tracked the 'prevent or substantially impair' lanugage of Witt, [it] would still find that

such as "I do not believe in capital punishment," "I am opposed to the death penalty," "I don't believe in irreversible penalties," and "I supported legislation banning the death penalty." (Ibid.) None of these assertions was considered sufficient to justify excusal of these prospective jurors for cause. (Id. at 448.)

Appellant contends that the assertions against the death penalty in Stewart are functionally indistinguishable from those of Ms. Swift in this case. If anything, Ms. Swift's statements are less inflexible than the answers given by the prospective jurors in Stewart, since Ms. Swift stated that she could "limit her decision to [the specific] factors enumerated by the Court and not consider any other factors" and could follow the law as instructed by the court. (57CT 15021.)

As Stewart explained, under United States Supreme Court precedent, "a prospective juror's personal consientious objection to the death penalty is not a sufficient basis for excluding that person" as substantially impaired under Witt. (Id. at 446.) Of particular import to tMs. Swift's qualifications,

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the prosecutive jurors could not properly be excused for cause without any follow-up oral voir dire by the court." (Id. at 451-52.) The questionnaire in this case asked whether the juror's "feelings about the death penalty [were] such that in every case you would always vote AGAINST the death penalty." (57CT 15021.) However, the differing language in the questions provides no principled basis for distinguishing the Stewart holding, particularly given Ms. Swift's assertion in the questionnaire that she would follow the law.

Stewart pointed out that although a juror might find it very difficult to vote for the death penalty, her performance would not be substantially impaired under Witt "unless [] she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (Id. at 447.) Ms. Swift declared that she would be able to follow the law. (See 57CT 15021 ["Yes. I will try."].) Thus, her questionnaire showed not that she was impaired, but that she was **not** substantially impaired. Ms. Swift's answers showed that she could perform her duties as a juror: she said she could be impartial, she agreed that she could change her mind about the penalty if she came to believe her first vote was wrong, and she said that she could set aside her religious feelings and follow the court's instructions. Although Ms. Swift had difficulty with the death penalty, her questionnaire showed that she could "conscientiously consider" the death penalty where appropriate, because she answered that she could change her vote as to the sentencing alternatives.

Stewart noted that a prospective juror who declares herself against the death penalty in the questionnaire cannot be excused as impaired because "in response to brief follow-up questioning" the juror might demonstrate an ability to put aside personal reservations and follow the law. (Id. at 447.) Although Ms. Swift was not given follow-up questions in voir dire, she did

express her willingness and ability to follow the law despite her personal reservations. The trial court thus clearly erred in excusing her as "impaired" without clarifying questions in personal voir dire.

2. This Court cannot give deference to the trial court's ruling.

As set out above, Ms. Swift's responses to the questionnaire may have been ambiguous but they were not sufficient to establish that she would be substantially impaired as a juror, particularly without clarification or elaboration through the voir dire examination.[5] Because there was no voir dire of Ms. Swift, and the trial court peremptorily made its decision based solely on the questionnaire answers, this Court cannot and should not give any deference to the trial court's decision.

As Stewart observed, ambiguous answers such as given by Ms. Swift demonstrated "a need for clarification on oral voir dire." (Id. at 448.) Moreover, appellant does not argue that Ms. Swift would necessarily have withstood a properly adjudicated challenge for cause. But the problem is as

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[5] In Stewart, this Court noted that it "need not and d[id] not hold that a trial court never may properly grant a motion for excusal for cause over defense objection based solely upon a prospective juror's checked answers and written responses contained in a juror questionnaire." (Id. at 449.) The Court noted that it was "unaware of any authority upholding such a practice." (Id. at 449-50.) If a juror could be peremptorily excused based on the questionnaire, the juror's answers and responses would have to be much more specific, adamant, and unwavering than those given by Ms. Swift in this case.

in Stewart:

> "We simply do not know how [this potential juror] would have responded to appropriate clarifying questions posed [] by the trial court. Had the trial court conducted a follow-up examination of [the] prospective juror and thereafter determined (in light of the questionnaire responses, oral responses, and its own assessment of demeanor and credibility) that the prosective juror's views would substantially impair the performance of [] her duties as a juror in this case, the court's determination would have been entitled to deference." (Id. at 451-52.)

In this case, the trial court declined to listen to and observe Ms. Swift, and therefore deprived itself and this Court of the "demeanor" evidence considered so critical in assessing a prospective juror's qualifications. (Uttecht, supra, 551 U.S. at 9.)

It is significant that the trial court did subject at least one prospective juror to clarifying voir dire in the converse situation of a automatic death penalty juror, and then relied on her demeanor and credibility in oral voir dire to find that she was qualified. prospective juror Ms. Garman[6] stated in her questionnaire that she would "stick to her beliefs" even if they differed from instructions given by the court; and that she thought the death penalty was appropriate for any case involving the victim's death ["if you do a crimes, you have to fry for it"]). When questioned in oral voir dire, Ms. Garman

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6 In the Reporter's Transcript, this juror is referred to as Ms. Garman; in the questionnaire her last name appears to be Corman.

stated various times that she believed the death penalty should be imposed in all cases involving an allegation of torture, and denied being able to weigh aggravation and mitigation to determine the appropriate penalty. (25RT 6881, 6884-85.) After further questioning, Ms. Garman said she could listen to both sides although she did strongly believe in the death penalty; she reiterated that a torture-murder deserved the death penalty, and that she would find it hard to consider mitigation in such a case. (25RT 6887-89, 6891-92.) After a long explanation and final questioning by the trial court, Ms. Garman agreed that she could be open to either punishment, depending on the evidence. (25RT 6893-95.)

The defense challenged Ms. Garman for cause, emphasizing her clear indication in the questionnaire, when she was "not being pressured," that the defendant should "fry" for his crimes. (25RT 6896-97.) The trial judge acknowledged Ms. Garman's "conflicting answers," but relied on his "impression" from the oral voir dire that she would not automatically impose the death penalty. (25RT 6898-99.)

Ms. Garman gave unequivocal answers in her questionnaire, e.g., "if you do a crime, you have to fry for it," which she expanded upon in her voir dire, although the voir contained conflicting statements. Nonetheless, the trial court's conclusion that Ms. Garman was able to follow the law (despite her contrary claim in the questionnaire that she would stick to her own

beliefs) is entitled to deference, because the trial court was able to observe her demeanor and hear her responses, and thus assess her ability to perform as a jury.

Here, the trial court's insistence upon excluding Ms. Swift without conducting voir dire means that the trial court did not have the critical information necessary to properly assess her ability to serve as a juror, and no deference can or should be given to the trial court's ruling.

Even assuming arguendo that for some inexplicable reason Ms. Swift could have been excused on the basis of her questionnaire responses, the fact that the trial court excused an anti-death penalty prospective juror but allowed an automatic death penalty prospective juror to be rehabilitated in oral voir dire constitutes a violation of appellant's federal constitutional rights to equal protection and due process. In Wardius v. Oregon (1973) 412 U.S. 470, 473 fn. 6, the Supreme Court noted that state trial rules that provide for non-reciprocal benefits violate the due process clause. Although Wardius was concerned with reciprocal discovery rights, the same principle should apply to jury selection.. (See also Gray v. Klauser (9th Cir. 2002) 282 F.3d 633, remanded on other grounds in 537 U.S. 1041 [asymmetrical application of evidentiary rules violates federal due process]; Izazaga v. Superior Court (1991) 54 Cal.3d 356, 372-377.)

D. Erroneous Excusal of a Prospective Juror for Cause in Violation of Witherspoon Requires Reversal of the Death Sentence.

Dismissal of a juror in violation of Witherspoon is constitutional error

that requires vacation of a death sentence. No defendant can constitutionally be put to death at hands of a jury chosen by excluding prospective jurors s simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. (Witt, supra, 469 U.S. at 522-23; Stewart, supra, 33 Cal.4th at 455.) As stated in Gray v. Mississippi (1987) 481 U.S. 648, 668:

> "Because the Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury [], and because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." [] The right to an impartial adjudicator, be it judge or jury, is such a right." (Internal quotation marks omitted.)

(See also People v. Kelly (2007) 42 Cal.4th 763, 777 ["the erroneous exclusion of a prospective juror because of that person's views on the death penalty is reversible per se"].)

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ARGUMENTS RELATING TO JUDICIAL AND JUROR MISCONDCUT

XI. THE TRIAL JUDGE COMMITTED JUDICIAL MISCONDUCT AND THEN COMPOUNDED THE ERROR BY HOLDING A HEARING INTO HIS OWN CONDUCT, REFUSING TO INQUIRE OF THE JURORS, AND REFUSING THE DEFENSE REQUEST FOR A HEARING BEFORE AN IMPARTIAL JUDGE, THEREBY VIOLATING APPELLANT'S SIXTH AND FOURTEENTH RIGHTS TO A FAIR TRIAL AND DUE PROCESS AND EIGHTH AMENDMENT GUARANTEE OF A RELIABLE SENTENCING

A. Summary of Proceedings Below: The Trial Judge Holds Hearing Regarding Allegations of His Own Misconduct.

On October 10, 2002, during the presentation of mitigating evidence at penalty phase, defense counsel announced that various courtroom observers had told him that the trial judge had been making facial gestures indicating disbelief and disdain during the testimony of the defense expert witness Dr. Woods. The judge responded by saying that he had found some of Dr. Woods' testimony "interesting" and other parts "a stretch," but that in any case he wanted to admonish the jury. (47RT 13343-44.) Although the prosecutor said he had seen no facial expressions, the judge said that he himself "certainly wouldn't know" as he was not "looking in a mirror." (47RT 13346.) The judge then admonished the jury that he did not intend to suggest either belief or disbelief in any witness; and if he had done anything, including making facial expressions, that seemed to so indicate, the jury should disregard it. (47RT 13350.)

The judge expressed an openness to any additional remedy, suggesting they could "have another judge" hear the matter if the defense was concerned about his own ability to evaluate testimony. (47RT 13405.) The next day, the judge proposed inquiring of the jurors if they had noticed anything.[7] He also surmised that his gestures might have been him grimacing at the computer. (47RT 13462-63.)

At the next session, the defense moved for a mistrial based on judicial misconduct, and requested that another judge conduct individual inquiry of the jurors and the hearing on the motion. The judge refused (even though he had earlier suggested this procedure), stating that he was not obligated to recuse himself.[8] The trial judge initiated a hearing into his own conduct at which the following testimony was given. (48RT 13558-59.)

Attorney **Russell Swartz**[9] was in court on October 10 to observe Dr. Woods as a potential witness in another case. Although Swartz was

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7 The judge proposed questions to be asked of the jurors. (See 26CT 6283; 28CT 6868 [Court Exh. XXXVIII: proposed questions for jurors] .)

8 After the hearing, the judge also refused to inquire of the jurors, even though he had earlier proposed questions to pose to the jurors. (See previous footnote.)

9 As the witnesses came forward, the judge told them to testify freely and that their testimony would not be held against them. (See e.g., 48RT 13563, 13571, 13584, 13592.)

watching the witness and the jury, he saw the judge reacting to the testimony at various times: making movements such as rolling his eyes, putting his fist to his face and looking down, arching his eyebrows, and turning away just as the witness said something, suggesting to Swartz that the judge found some of the witness' testimony incredible. (48RT 13564-65.) After Swartz observed the judge for awhile, he concluded that the judge did not believe the witness, and that he was expressing this through his facial gestures and body movements. Swartz noticed that on several occasions the jurors looked at the judge, and he felt that they might be influenced, so he brought the matter to the attention of defense counsel. (48RT 13566.) Swartz was in the court for about an hour; when he first noticed the judge's reaction, he turned and asked appellant's investigator Art Wooden if he saw, and Wooden said the judge had been doing that for a long time.(48RT 13567-68.)

Retired police officer and defense investigator **Art Wooden** observed the trial and took notes as part of his job. He was supposed to find out how the jury was reacting to Dr. Woods, but then noticed the judge's reaction. He and Swartz discussed the judge's gestures and Wooden thereafter advised defense counsel. Wooden had taken notes describing the judge's gestures during Dr. Woods' testimony in both the morning and

afternoon sessions. Having observed the judge's gestures and body language, Wooden noted that the judge's "expressions on his face and his body language was bored," that he "doesn't seem to like the testimony," that the judge was "expressive in his facial [sic] in the negative way, frowns," "raising his eyebrows, sighs a lot, taking deep breaths, eyes rolling to the roof, frowns again, he's rocking his head back and forth." (48RT 13572-74.) In the afternoon session, after the judge had been advised of this issue, he seemed to be trying to avoid facial gestures; however, prior to that, the judge's gestures seemed to be in response to Woods' testimony. (48RT 13581.) "But most of the time . . . [the judge] would hear a comment or some feature that Dr. Woods was talking about, at that point he [] would turn away, roll his eyes, shake his head, [] it was like turning away from the witness . . . ." (48RT 13583.)

Police officer **Bunny Masterson** saw the judge rolling his eyes, and pursing his lips while Dr. Woods testified. She got the distinct feeling that the judge disbelieved some of the testimony and was annoyed by it something she had never observed before despite having been a juror in two long trials.[10] (48RT 13586-88.)

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[10] After the allegation of misconduct was first raised, the trial judge asserted that "Ms. Masterson has been staring me down all morning and I haven't been particularly impressed with her sitting back there, to tell the truth." (47RT 13344.) The judge's statement apparently was meant to distinguish

Appellant's attorney **Jeffrey Jens** testified that Dr. Woods was a critical defense witness. During Dr. Woods' testimony, Jens observed the judge rolling his eyes and looking away with what seemed to be disbelief. Jens observed this just before the recess in the proceedings when Swartz and Wooden reported the same thing to him. (48RT 13591-92.)

Sergeant **Ronald Clemens**, the investigating officer in this case, was sitting next to the prosecutor during Dr. Woods' testimony. Clemens testified that there were several distractions during the testimony, including electronic devices beeping when Barthel entered the courtroom and when Swartz was in the courtroom. Clemens said that the judge used cough drops and when he sucked on one his whole face moved. Clemens could not say that the judge was eating cough drops during Dr. Woods' testimony, but only that he might have been. (48RT 13594-99.)

The prosecutor in this case, **Brent Ledford**, was concentrating on the witness, but when he did look at the judge, he did not see any expression of disbelief. He thought the prominent crease in the judge's forehead

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Ms. Masterson from Mr. Swartz, Mr. Wooden, and Mr. Jens, as immediately after this criticism of Ms. Masterson, the judge stated that he certainly "respect[ed]" the other three men. (47RT 13344.). Ms. Masterson explained in her own testimony that the judge's accusation had not skewed her testimony, as she had observed the judge's facial gestures prior to be ing admonished by him, and that she had not been "staring" him down, although she did tend to make eye contact with people, as she had been taught in the police academy. (48RT 13588-89.)

accentuated any facial expressions; and said the judge had a tendency to frown and look down, which Ledford always thought was an effort to note exactly what was being said rather than an expression of disbelief. Also the judge did show displeasure when one of the electronic devices went off but this was probably before Dr. Woods testified. (48RT 13600-01.)

The judge's bailiff, deputy **Daniel Martin**, who testified at the suggestion of the judge, stated that he did not see anything that the jurors cued in on with the judge; it was just a normal day, with normal courtroom distractions. Martin was not present for all of Dr. Woods' testimony; he was present when Barthel's electronic device went off – this was before Dr. Woods testified. (48RT 13604-07.) Martin was replaced by deputy **Dan Neville** who noticed that the judge's attention was diverted when Swartz' palm pilot/phone made ticking or beeping noises. Martin had noticed that the judge tended to look towards the ceiling when thinking or taking notes. (48RT 13610-11.)

After this testimony, the judge stated on the record that he was not consciously aware of making facial expressions, but knew that he did make facial expressions, pursing his lips sometimes to mask a reaction, or leaning, rocking, and furrowing his brows, checking and adjusting the microphone, and periodically sighing without being aware of it. He said

that when Dr. Woods was testifying, he was thinking how it might affect appellant's sister Rebecca who was in the courtroom. (48RT 13612-13.) The judge also stated that he had "no reason to disregard what the witnesses said," but wanted to look at the courtroom videotape before making a ruling. (48RT 13614-15.)

The judge summarized the testimony, commenting that he had no reason to doubt it. (48RT 13640-44.) The judge stated his concern that the jury not take a cue from him, and said that he did not give signals to them when they occasionally looked at him with questioning eyes. He acknowledged that nonverbal communications could affect the jurors. (48RT 13644.)

The judge pointed out the absence of testimony that he had acted intentionally to influence the jury, and the testimony (by his own bailiff and the prosecutor) that he was acting as he normally did. (48RT 13650-51.) The judge distinguished his situation from the case law finding prejudicial judicial misconduct, which he described as involving "clear signals" sent from the judge, not involving "a judge's normal body language," and clear juror awareness of the judge's actions. Other cases deemed an admonition such as CALJIC No. 17.30 sufficient to cure the harm, and the judge reasoned that "[i]f an instruction cures the problem, an inquiry [into the

jury's awareness or reaction] is irrelevant or superfluous." (48RT 13653; see 48RT 13639 [defense request to inquire of the jurors].) The judge concluded that he had no duty to inquire of the jurors on the ground that "the threshold showing" required "something more that what would be my normal, but perhaps somewhat quirky physical characteristics[] to require an inquiry of the jury." (48RT 13652-54.) The judge denied the mistrial motion[11] "for the same reasons."[12] (48RT 13655.)

B. Summary of Applicable Legal Principles.

People v. Sturm (2006) 37 Cal.4th 1218 reversed the penalty phase of a trial in which the judge engaged in a pattern of disparaging defense counsel and defense witnesses, and through his comments conveyed to the jury his disdain for the defense expert witnesses. Sturm noted that "[j]urors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (Id. at 1233.) Thus, trial judges "'should be exceedingly discreet in what they say or do in the presence of a jury lest they seem to lean toward or lend their influence to

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11 This ruling was subject only to viewing the courtroom videotape. After the court viewed the videotape, it was agreed that the videotape, even enhanced, was of poor quality and no probative value. (48RT 13655, 13818; Exh. T-AF [videotape].)

12 The issue was raised and denied again in the motion for new trial. (See 27CT 6624, 6557; 51RT 14404-51.)

one side or another.'" (Id. at 1237.)

Although Sturm involved disparaging comments by the trial judge, other cases have acknowledged that a defendant can also show unacceptable judicial partiality by wordless conduct: a dismissive gesture, a look of disbelief, or a look of boredom. (People v. Harmon (1992) 7 Cal.App.4th 845, 852.)[13] For example, in People v. Franklin (1976) 56 Cal.App.3d 18, 24, the defendant argued that it was prejudicial judicial misconduct where the judge turned his back to the defense expert witness. Outside the presence of the jury, the judge explained that he did so to avoid unduly influencing the jury with unconscious facial expressions, and that it was a more relaxing posture. The Franklin court noted that trial judges are obligated to conduct trials in a fair and impartial manner, without casting aspersions or ridicule on a witness, but held that no reversible error was shown since the conduct was short-lived and the objection was made outside the jury's presence.

In People v. Walker (1957) 150 Cal.App.2d 594, the defense alleged that the judge's facial expressions visibly demonstrated to the jury his disbelief in some of the testimony of the defense witnesses. Walker noted that "jurors are quick to observe the attitude of the court toward litigants

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[13] In Harmon this issue was forfeited because of a failure to make a timely complaint.

and their counsel [] and to be influenced thereby," but concluded that the record in this case did not show that the judge had conveyed such an attitude to the jury. Walker held that a "mere statement" by defense counsel as to his opinion that the judge's facial expressions showed disbelief as to certain testimony was not a sufficient showing of judicial misconduct. (Id. at 604-05.)

In contrast to Walker, the record in the instant case contains sworn testimony to the judge's facial gestures, which various witnesses viewed as conveying the judge's negative attitude towards the defense expert. This is not a case of defense counsel stating his opinion; rather, the judge's gestures were first reported to defense counsel by other courtroom observers. Moreover, attorney Swartz testified that the jurors had more than once looked at the judge while he was gesturing.

Although the judge's own courtroom deputy and the prosecutor either tried to explain away the judge's gestures as normal behavior or stated they had not seen them, the judge himself acknowledged that he had no basis for disbelieving the witnesses who had seen his negative facial gestures. (48RT 13614.)

Appellant contends that the judge's gestures, observed by at least some of the jurors, amounted to judicial misconduct under the case law and

violated appellant's federal constitutional right to due process. (Bracy v. Gramley (1977) 520 U.S. 899, 904-05.) However, the trier of fact at the hearing held into the claim of judicial misconduct was the judge himself, which was itself a violation of due process, as set out immediately below.

C. The Trial Judge's Refusal to Permit an Impartial Hearing and to Inquire of the Jurors Violated Appellant's Due Process Rights.

1. There was no impartial hearing.

Appellant was entitled to a fair hearing on his claim of judicial misconduct, i.e., a hearing conducted by an impartial adjudicator. When the claim is that the trial judge himself has committed misconduct, another judge must consider the evidence.

In Haas v. County of San Bernadino (2002) 27 Cal.4th 1017, 1025, this Court held that "[w]hen due process requires a hearing, the adjudicator must be impartial." Code of Civil Procedure section 170.3, subdivision (5) provides that a judge "who refuses to recuse himself or herself shall not pass upon his or her own disqualification," but rather, "the question of disqualification shall be heard and determined by another judge . . . ."

"A fair trial by a fair tribunal is a basic requirement of due process."[14] (In re Murchison (1995) 349 U.S. 133, 136; Bracy v. Gramley,

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[14] Brown v. City of Los Angeles (2002) 102 Cal.App.4th 155, 178, fn. 13 distinguished the due process requirement of lack of bias from the due

supra, 520 U.S. at 904 [due process requires fair trial before judge without actual bias or interest in the outcome].) Fairness requires not only an absence of actual bias; our system endeavors to prevent even the probability of unfairness. (Murchison, supra, 349 U.S. at 136.)

> "To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." (Ibid.)

Murchison found a federal due process violation where same judge before whom witnesses had testified at a 'one-man' grand jury proceeding presided at the hearing wherein witnesses were adjudged in contempt for their conduct before the 'one-man grand jury.' That this violated due process was illustrated by the fact that "the judge called on his own personal knowledge and impression of what had occurred in the grand jury room, and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination." (Id at 138.)

This is similar to what happened here. Although the trial judge was not referring back to his recollection of secret grand jury proceedings as in

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process requirement of neutrality. The latter is concerned with the fairness of the procedure itself, but the due process requirement of lack of bias focuses on the actual adjudicator, and whether or not that person is capable of judging a particular controversy fairly on the basis of its own circumstances – the issue is the constitutionality of allowing a decision-maker to review and evaluate his own decisions or actions.

Murchison, he did rely on his own personal knowledge and impression of what he himself had done during Dr. Woods' testimony and what he habitually or routinely did, and used his personal beliefs to dismiss sworn testimony by disinterested observers.

In Wong Yang Sung v. McGrath (1950) 339 U.S. 33, 44, the United States Supreme Court declared:

> " 'A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible.' "

The same holds true under the circumstances here, where the trial judge had both the responsibility of appraising the allegation of misconduct made against him, and an obvious self-interest in seeking to explain away the allegations against him.

The trial judge distinguished the cases finding judicial misconduct as involving something more than "normal" body language (48RT 13653), yet in determining that his own gestures were "normal" rather than misconduct, he relied on his own assertions and descriptions of what was normal for him.[15] The judge also attempted to distinguish the cases finding judicial

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[15] The judge referred to testimony "regarding what I do on a normal basis in terms of my facial expressions." (48RT 13650.) The prosecutor did testify that the judge had a tendency to frown and look down, but the prosecutor stated he did **not** see any particular expressions on the judge's face during

misconduct as those involving "clear juror awareness" of the judge's gestures. Yet, attorney Swartz had testified that the jurors had looked at the judge while the latter was gesturing. Moreover, the judge refused to allow any inquiry into the jurors' awareness of his actions (even though he had earlier been "inclined" to inquire) on the grounds that an admonition was sufficient, and would render an inquiry "irrelevant or superfluous." (Compare 48RT 13617 and 13654.)

2. There was no inquiry into what jurors had observed.

Although the trial judge initially proposed an inquiry into what the jurors had observed of his gestures, he later ruled that no such inquiry was required. This ruling was based on the judge's own finding that the complained-of gestures were "normal" for him, and that an inquiry into the jurors' observations required a threshold showing of something more than "normal" body language. (48RT 13653.)

In the first place, this ruling is tainted insofar as it is based on the judge's own judgment of what was normal for himself, without benefit of

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Dr. Woods' testimony. The judge's bailiff – who testified at the suggestion of the judge himself – was not even present for all of Dr. Woods' testimony and did not see anything different when he was present, and another deputy testified that the judge tended to look towards the ceiling during testimony. The only detailed "testimony" about what the judge "normally" did in terms of his "facial expressions" was that by the judge himself. (See 48RT 13612-13.)

an impartial adjudicator. Secondly, to the extent there was "testimony" about what was a "normal" gesture for the judge, it came mostly from the judge himself, and the prosecutor (who claimed not to see any particular gestures) and the judge's bailiff (who was not even present during Dr. Woods' testimony). (See p. 248, above.) Unlike the jurors, the prosecutor and the judge's bailiff had long experience with the judge and the parameters of his courtroom behavior. The jurors could not have known that the judge's gestures during Dr. Woods' testimony were "normal." In any case, the suggestion that gestures were "normal" is suspect – otherwise courtroom observers would have noticed such behavior earlier in the trial and called it to the attention of counsel or the court.

Finally, there was testimony that the jurors **had observed** the judge on several occasions while he was grimacing. (48RT 13566.) Appellant contends that this unrefuted testimony, the credibility of which the judge did not question,[16] is akin to a question of juror misconduct which raises a presumption of prejudice and requires an evidentiary hearing. (See e.g., People v. Davis (2009) 46 Cal.4th 539, 625, People v. Hedgecock (1990) 51 Cal.3d 395, 415 [where defense presents evidence indicating a strong possibility of prejudicial jury misconduct, a hearing should be held where

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16 See 48RT 13614-15.

necessary to resolve material, disputed issues of fact].) The evidence presented here was unrefuted that the judge made grimaces which the jury had observed on several occasions, and which those observers who testified considered as expressions of disbelief in Dr. Woods' testimony. To the extent that testimony by the prosecutor and the bailiff (who was not present or did not observe the judge, and who did not testify as to what the jurors were looking at) is considered to the contrary, then there was a factual dispute that could only have been resolved by an evidentiary hearing.

3. Conclusion.

In short, the trial judge's insistence on judging his own alleged misconduct and his refusal to inquire of the jurors into what they had observed violated appellant's federal constitutional rights to due process.

D. The Trial Judge's Misconduct Requires Reversal of Appellant's Death Sentence.

This Court must review the judicial misconduct for prejudice under the Chapman v. California, supra, 386 U.S. at 24 standard used for federal constitutional error: reversal is required unless the prosecution can show beyond a reasonable doubt that the error was harmless. This cannot be done.

First, assuming arguendo the testimony at the hearing showed judicial misconduct, it cannot be deemed harmless because the witness for

whom the judge expressed his disbelief or disdain was the most important mitigation witness presented by the defense. Dr. Woods was the expert witness who was meant to explain to the jury the psychological significance of appellant's traumatic background and how it had impaired his judgment at the time of the capital crime, i.e., the critical witness in support of an argument for a life rather than a death sentence.

The trial judge was mistaken in considering the admonition given as sufficient to cure any harm (even without inquiry into how the misconduct might have affected the jurors). The case law is replete with opinions rejecting the notion that instructions or admonitions are sufficient to obliterate prejudice from error or misconduct. (See e.g., United States v. Kerr (9th Cir. 1992) 981 F.2d 1050; United States v. Simtob (9th Cir. 1990) 901 F.2d 799; Goldsmith v. Witkowski (4th Cir. 1992) 981 F.2d 697; People v. Laursen (1968) 264 Cal.App.2d 932, 939; People v. Perez (1962) 58 Cal.2d 229, 247; People v. Bracamonte (1981) 119 Cal.App.3d 644, 650, quoting Krulewitch v. United States (1949) 336 U.S. 440, 453 ["'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'"].).

This is especially true when the misconduct involves a judge, upon whose views and attitudes the jurors rely with confidence. (Sturm, supra,

37 Cal.4th at 1233.)

E. The Failure to Hold a Hearing by an Impartial Adjudicator is Structural Error Requiring Reversal of Appellant's Death Sentence.

Assuming arguendo this Court were to reject appellant's claim of prejudicial judicial misconduct, reversal is nonetheless required because of the judge's refusal to have an impartial officer consider the allegation of misconduct. The claim of misconduct was (1) serious enough; (2) alleged by two witnesses, one a former police officer and the other a lawyer unrelated to this case; and (3) considered sufficiently plausible, that the trial judge himself deemed a hearing necessary. Yet after calling for a hearing by an impartial judge (see 47RT 13405), the trial judge did a 180 degree turn around and held the hearing into his own misconduct himself, thus becoming both judge and accused. Such a procedure does not comport with minimum requirements of due process and requires reversal without resort to harmless error analysis.

The United States Supreme Court has divided constitutional errors into two classes. The first class refers to "trial errors," or errors that occur during presentation of the case to the jury, whose effect may be quantitatively assessed in the context of other evidence presented to determine prejudice or harmlessness. The second class refers to "structural

errors," which defy analysis by harmless-error standards because they affect the framework within which the trial proceeds. (United States v. Gonzalez-Lopez (2006) 548 U.S. 140, 148-50; see People v. Hernandez (2009) 178 Cal.App. 4th 15 [a gag order regarding a cooperating witness was structural error violating the defendant's right to consult with counsel].)

The denial of a trial by an impartial judge is structural error, i.e., a defect which affects the framework of the trial. (Arizona v. Fulminante (1991) 499 U.S. 279, 308, fn. 8, citing Tumey v. Ohio (1927) 273 U.S. 510.) Appellant contends that where an allegation of judicial misconduct arises during penalty phase of a capital trial, and appellant is denied an impartial judge to adjudicate the claim of judicial misconduct, the error is structural and requires reversal of the death sentence.
to harmless error analysis.

F. The Ruling Violated Appellant's Eighth Amendment Right to a Reliable Sentencing Determination.

In addition to the due process claims set out above, the trial court's conduct resulted in an unreliable sentencing determination in violation of appellant's Eighth Amendment rights. (Godfrey v. Georgia (1980) 446 U.S. 420 [Eighth Amendment requires higher degree of scrutiny in capital cases]; Woodson v. North Carolina (1976) 428 U.S. 280 [because death is

qualitatively different from imprisonment there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case]; Monge v. California (1998) 524 U.S. 721, 732 [because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings."].)

In sum, because the facts show that the trial judge did make negative facial gestures during testimony by a critical mitigation witness, and the jurors were never examined as to what effect seeing such gestures had on them, and the misconduct alleged was never adjudicated by an impartial tribunal, the resulting death sentence is not as reliable as required by the Eighth Amendment. This Court cannot conclude that the death sentence imposed on appellant was based in some part on the judge's negative reaction to mitigating evidence or not, and thus must vacate the sentence.

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XII. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JUROR, AND A RELIABLE SENTENCING DETERMINATION BY FAILING TO EXCUSE JUROR NUMBER 11 FOR MISCONDUCT DURING PENALTY PHASE DELIBERATIONS AND FOR DENYING THE NEW TRIAL MOTION BASED ON MULTIPLE INSTANCES OF SERIOUS JURY MISCONDUCT

A. Summary of Proceedings Below.

1. Two deliberating jurors speak to the jury coordinator.

On October 30, 2002, the third day of penalty phase deliberations, the jury coordinator reported that two women jurors (hereafter former JN 6 [65230] and JN 11 [18604])[17] had approached her in the lunch room and asked about their juror notebooks, "whether or not their personal opinions that they had made notations of in those notebooks [would] be brought out in the case." The coordinator said that as far as she knew the notebooks "were either destroyed or marked confidential" and the opinions wouldn't be brought out unless there was a question of juror misconduct. (50RT 14333.) Former JN 6 told the coordinator "that she had written in her notebook that the defendant was a prick, with an arrow pointing towards him," which the coordinator understood as meaning "she was showing it to somebody else on the jury panel." JN 11 did not tell the coordinator

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17 JN 11 replaced former JN 11 [17593] during penalty phase testimony. (44RT 12505.)

"exactly what she wrote." (50RT 14334.)

By the time this information was put on record, the jury had already reached a verdict. (50RT 14331.) Defense counsel objected on the grounds the jurors had committed misconduct. (50RT 14335.)

The court inquired of the two jurors. JN 11 acknowledged being involved in a conversation with the jury commissioner regarding what would happen to her notes, but denied having disclosed any of the contents of her notes. She denied have any discussion with JN 6 about the notebooks and claimed she had just walked up to the commissioner while in the company of JN 6, and then posed the question to the commissioner. (50RT 14342.) JN 11 said she did not disclose any information about the contents of her notebook. (50RT 14343.)

JN 6 admitted that she had repeated a specific comment in her notebook to the commissioner, but denied discussing that comment or any other part of her notes with any other juror outside the jury room. The trial court excused JN 6 [hereafter former JN 6], substituting in JN 65230 [hereafter new JN 6], and instructed the newly constituted jury to begin deliberations anew. (50RT 14343-49.)

Defense counsel objected to the continued presence on the jury of JN 11, pointing out that although she was present when former JN 6 disclosed

the nature of her notes (according to the commissioner), she failed to bring that to the court's attention, which was itself a violation of the court's order. (50RT 14351-.52.)

Jury Commissioner Jeanne Capell then gave sworn testimony, as follows. Capell confirmed as true what she had reported earlier. She testified that JN 11 approached first, and former JN 6 arrived a couple minutes later. However, JN 11 **was present** when former JN 6 reported her notebook statement about appellant. The commissioner testified that this statement [that she had written in her notebook that appellant was a prick] was "most definitely" made while JN 11 was standing right next to former JN 6 who "definitely heard everything that was said." (50RT 14354-56.) The commissioner's knees were almost touching the two jurors. (50RT 14357.) The commissioner said that when the two jurors approached her, each had posed the same question regarding the juror notebooks. (50RT 14362.)

JN 11 was recalled. She said she did not remember former JN 6 saying anything "**except she had a word in [her notebook] she didn't want anybody to read**," and JN 6 "barely heard that" as she was going to the elevator to save the elevator. (50RT 14366; emphasis supplied.)

The trial court acknowledged contradictory statements by JN 11 and

the coordinator, but factored into its consideration that the "trained" jury coordinator should not have been "participating in conversations with jurors" assigned to a trial or deliberating. The trial court found that JN 11 was being truthful. The court rejected the defense claim of juror misconduct, stating "I don't know Miss Capell had a clue whether JUROR No. 18604 [JN11] was listening or present or heard the conversation or not, so I'm going to deny the challenge." (50RT 14367.)

2. Sworn juror declarations setting forth facts constituting misconduct were deemed true for purposes of the motion for new trial.

On November 25, 2002, appellant filed a motion for new trial based on jury misconduct, alleging violations of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (27CT 6558-6586.) Sworn declarations from three jurors were attached as exhibits. At the hearing on the motion, the trial court accepted as true these declarations signed under penalty of perjury. (51RT 14424.)

The facts before this Court are thus as follows:

- Juror Number 4 [JN 4]

JN 4 [49545] stated under oath that after the first penalty phase verdict was set aside (after former JN 6 was removed and replaced) JN 11 was frustrated and "lost it" in the jury room: she was loud, upset, crying,

which put uncalled-for pressure on new JN 6. By the second day, JN 11 had calmed down but she remained talkative and tried to dominate discussions with her strong feelings. She talked about her own life.

JN 5 wanted to know what the prison expert would say about prison conditions that appellant would face, which was a "big factor," and the subject of a question to the court. JN 4 told the other jurors that appellant would not be locked in a cell but would be in the yard with other inmates. (27CT 6571-73.)

- Juror Number 3 [JN 3]

JN 3 [03405] stated under oath that new JN 6 [65230] was concerned about the deliberations. At the beginning of guilt phase deliberations, the jurors asked the bailiff how to elect the foreperson and he said if someone had experience they were usually selected. The jurors then discovered that former JN 6 (12929) had prior experience and elected her foreperson: "she knew about aggravating and mitigating evidence." When former JN 6 was excused from the jury, the others were shocked. JN 3 coaxed JN 11 [18604] into telling what she knew. JN 11 said she heard that former JN 6 asked someone in the cafeteria about the notebooks but claimed she hadn't heard "what was talked about." (27CT 6574-75.)

JN 11 was upset about having to start deliberations all over again and

cried the whole day; she was talking and annoyed, saying I can't believe we have to do this, I can't take this anymore. JN 11 accused JN 3 of the "mess" they were in (i.e., if JN 3 hadn't held out for a life sentence, the death penalty verdict would have been rendered before the problem in the lunch room).

The next day JN 11 reported to the other jurors that she had talked to former JN 6 (JN 12929) the night before. Former JN 6 said to tell the other jurors something like "remember the work we've already done." JN 3 suggested to JN 11 that she should tell the judge she had talked to the excused former JN 6. (27CT 6575-76.)

JN 11 said she knew what prison life was like and acted like she knew. She said if appellant were given an LWOP verdict "he would go into general population." JN 11 also reported to the other jurors in the first penalty deliberations (i.e., with former JN 6) that she had been abused as a child and never "killed anyone." In the second penalty deliberations JN 11 repeated that she was "severely abused sexually" as a child. (27CT 6576.)

- New Juror Number 6 [new JN 6]

New JN 6 [65230] stated under oath that during deliberations JN 11 explained to the other jurors that former JN 6 [12929] had been taken off the jury. JN 11 said that she and former JN 6 had talked to the jury

coordinator about the latter's notebook and whether it would be thrown away. JN 11 claimed she hadn't heard the conversation between former JN 6 and the jury coordinator. During these new deliberations, JN 11 was upset, crying and cussing, saying she would have a nervous breakdown if she "didn't get this trial over with," and that she wanted appellant "out of her life." (27CT 6578-80.) The other jurors "shoved all the evidence" at new JN 6 to let her catch up. The others were all talking as she tried to review the evidence, saying they had already been through it. (27CT 6580-81.)

The next day JN 11 said she had talked to former JN 6 the previous night and that former JN 6 had said "don't forget everything I've done." (217CT 6581.) JN 11 also said that if appellant didn't get the death penalty he would be in "general population." (27CT 6582.)

JN 11 said she was brutally raped and "seemed to be equating that somehow to this case." JN 3 [03405] told new JN 6 that JN 11 had talked about being molested during the first deliberations as well. (27CT 6583.)

3. Trial court ruling.

At the hearing on the new trial motion, defense counsel again argued that JN 11 [18604] had been guilty of misconduct in the first instance in talking to the jury commissioner, and then continued to commit misconduct

by violating the court's orders and introducing extrajudicial evidence into the deliberations. (51RT 14426-29.) Defense counsel also argued that the jury did not reinstitute deliberations as they had been instructed, but just told new penalty phase JN 6 to review the evidence alone and catch up to them. (51RT 14431.)

The trial court pointed to three areas that were arguably misconduct: the communication from former JN 6 repeated to the deliberating jurors by JN 11; the discussion about appellant's prison housing; and the injection into deliberations of personal information by the jurors. (50RT 14436-37). Nonetheless, the trial court saw nothing "prejudicial" in that the jury did its job and considered all the evidence. The trial court denied the motion for new trial. (51RT 14438.)

B. The Sixth and Fourteenth Amendment Rights to an Impartial Jury Requires that a Juror Who Cannot Be Impartial Must Be Excused.

The Sixth Amendment right to a trial by impartial jurors[18] encompasses additional guarantees implicit in the nature of trial by an impartial jury: that the jury's verdict be based upon the evidence adduced at trial, uninfluenced by extrajudicial evidence or communications or by improper association with the witnesses, parties, counsel or other person.

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18 U.S. Const., 6th & 14th Amends.; Cal.Const., art. I, § 16; Irvin v. Dowd (1961) 366 U.S. 717, 722; In re Hitchings (1993) 6 Cal.4th 97, 110.

(People v. Sanders (1988) 203 Cal.App.3d 1510, 1513; Turner v. Louisiana (1965) 379 U.S. 466, 472-73; Smith v. Phillips (1982) 455 U.S. 209, 217 ["Due process means a jury capable and willing to decide the case solely on the evidence before it"].)

A trial court's refusal to dismiss a juror on grounds of bias or inability to be impartial[19] is subject to review for abuse of discretion. (People v. Marshall (1996) 13 Cal.4th 843, 845.) However, the judge's determination of good cause must be supported by substantial evidence. (People v. Zamudio (2008) 43Cal.4th 327, 349.) A juror's inability to perform as a juror must further appear in the record as a demonstrable reality. (Ibid.)

C. The Trial Court Abused Its Discretion and Violated Appellant's Constitutional Rights to an Impartial Jury by Refusing in the First Instance to Excuse Juror Number 11 and by Denying the Motion for New Trial Despite the Multiple Instances of Misconduct Established in the Record.

The record in this case shows, as a demonstrable reality, that multiple jurors were unable to perform their duties as impartial jurors, and that the jury as a whole did not deliberate anew as required after the excusal of former JN 6. Therefore the trial court abused its discretion by refusing to

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[19] A juror may be substituted if "upon ... good cause shown to the court [the juror] is found to be unable to perform his duty" at any time during the trial. (Pen. Code, § 1089.)

excuse and replace JN 11 prior to reinstituting deliberations at penalty phase, and in denying the motion for mistrial.

1. JN 11 failed to disclose relevant facts in voir dire and then injected those facts into deliberations.

Because the trial court **accepted as true** the statements made in the sworn juror declarations submitted by appellant at the new trial motion, these declarations are the facts upon which this Court must apply the law: JN 11 told the other jurors during penalty phase deliberations that she had been severely sexually abused and brutally raped as a child, and equated her experience to that of appellant, stating that she had never "killed anyone." (27CT 6576, 6583.)

JN 11 **did not disclose** this information in voir dire, when expressly asked if she had been the victim of a crime. On the jury questionnaire, JN 11 answered "Yes" when asked if she or a close friend or relative had ever been a victim of a crime, but left blank the questions asking what crime, when, and what happened. (78CT 20470.) In voir dire, the following exchange with the trial court [Q] and JN 11 [A] took place:

"Q. All right. If I'm reading this correctly you responded to the question 'have you, a close friend or relative ever been the victim of a crime' with a yes?

A. Uh-huh.

Q. And then didn't put any additional information. I'm assuming because you didn't want to put it down in writing.

A. Uh-huh.

Q. Okay. I do need to ask you about that. Part of the reason for having it not in front of all other prospective jurors is so we can speak freely.

A. It was my sister.

Q. Okay.

A. She went to a party and somebody gave her bad drugs, and she's never been the same. And had she [sic] was institutionalized for awhile, and then she's just not there. Basically.

Q. Was anybody ever arrested for any offense?

A. Huh-uh.

Q. So just –

A. Yeah. She's just ... yeah.

Q. Is there anything about that you think might cause you to favor one side or the other here?

A. No." (16RT 4363.)

As this Court states in People v. Wilson (2008) 44 Cal.4th 758, 822, the pretrial voir dire process is important because it enables the trial court and the parties to determine whether a prospective juror is unbiased and both can and will follow the law. However, the voir dire process works only if jurors answer questions truthfully. (See also McDonough Power Equipment, Inc. v. Greenwood (1984) 464 U.S. 548, 554.) Thus, a juror who conceals relevant facts or gives false answers during the voir dire examination undermines the jury selection process and commits misconduct. (Wilson, supra, 44 Cal.4th at 822-23; accord Hitchings, supra, 6 Cal.4th at 112, 116; People v. Diaz (1984) 152 Cal.App.3d 926 [reversing conviction for assault with deadly weapon where juror failed to reveal he had been victim of that same crime].) Dyer v. Calderon (9th Cir. 1998) 151 F.3d 970 [en banc] granted relief on a habeas corpus petition where a capital juror failed to disclose that his brother was a murder victim despite on-point questions before and during voir dire.

On all fours with this case is Burton v. Johnson (10th Cir. 1991) 948 F.2d 1150, which reversed a murder conviction involving prominent abuse issues, where the juror failed to acknowledge her own sexual abuse during voir dire and then discussed her sexual abuse experiences with the other jurors during deliberations. Burton v. Johnson emphasized that

"dishonesty, of itself, is evidence of bias." (Id. at 1159; accord McDonough Power Equipment, Inc., supra, 464 U.S. at 556, (Blackmun, J., conc.] [honesty or dishonesty in juror's response is best initial indicator of whether juror was impartial] id. at 558 [Brennan, J., conc.] [dishonesty is factor to consider in determining bias].)

In Wilson, supra, 44 Cal.4th at 823, this Court noted that "mere inadvertent or unintentional failures to disclose are not accorded the same effect" as intentional concealment by a juror. The test for unintentional "concealment" is whether the juror is sufficiently biased to constitute good cause that he or she is unable to perform his or her duty.

However, this Court cannot deem JN 11's concealment to have been inadvertent. She certainly had not "forgotten" her abuse, and raised the subject matter repeatedly to argue against the mitigating evidence. She not only failed to mention the abuse in the questionnaire but avoided the matter again in a private voir dire by the court. In voir dire by the prosecutor, JN 11 was asked about her feelings regarding psychologists etc. and she said that she had "found through my [] own life experience, I have been to a couple of [] them myself [] when I was younger, and I didn't agree with them." (17RT 4384.) This exchange is susceptible of an inference that JN 11 had visited psychologists in the aftermath of her rape and severe abuse,

and that she had not just inadvertently forgotten that she was a victim of such a brutal crime.

Moreover, JN 11's other acts of misconduct, including speaking to former JN 6, reporting that conversation to the deliberating jurors, and failing to report the incident to the court, support an inference that her dishonest was intentional, and that she was biased against appellant.

In sum, the facts and the law are clear: JN 11 committed misconduct by failing to disclose her sexual abuse during voir dire; the fact that she used that undisclosed fact during deliberations as an argument against appellant shows actual bias.

2. JN 11's discussion with former JN 6 after the latter had been excused, and her repetition of former JN 6's statement to the sitting jury was serious misconduct.

It is a violation of a juror's oath to receive or communicate to fellow jurors information as to factual matters from sources outside the record. (Jeffries v. Wood (9th Cir. 1997 en banc) 114 F.3d 1484, 1491[20]; People v. Holloway (1990) 50 Cal.3d 1098, 1108; see also Smith v. Covell (1980) 11 Cal.App.3d 947, 952 [misconduct for a juror to discuss the matter outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law]).

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20 Jeffries v. Woods was overruled on other grounds in Lindh v. Murphy (1997) 421 U.S. 300.

> "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is [] deemed prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court [] with full knowledge of the parties." (Remmer v. United Staets (1954) 347 U.S. 227, 229.)

Penal Code section 1122, subdivision (a) forbids the jurors to discuss "any subject connected with the trial" with jurors or non-jurors at any time outside of deliberations. In conformance with this statute, the trial court repeatedly admonished the jurors before and during trial not to "converse amongst yourselves or with anyone else on any subject connected with this trial" except as deliberating jurors.

The trial court pointed out the importance of this order to the jurors, noting that as the trial progressed, they would become more familiar with each other, and admonished them that "not even amongst yourselves may you discuss anything even connected with this case" until the case was submitted, and the discussion took place with all 12 jurors "and no other persons are present in the jury deliberating room" (25RT 7023-24; see also 27RT 7584; 32RT 8918; 33RT 9282; 36RT 10037; 36RT 10108.) The trial court also instructed the jurors to report any violation of this admonition. (See e.g., 8RT 1863.)

JN 11 was in violation of this admonition when she spoke to former

JN 6 after the latter had been excused from the jury, and again when she reported back to the other jurors that she had talked to former JN 6, and said that JN 6 had asked her to relay to the jurors the message "not to forget" all the work they had already done on the case. This message was doubly or triply improper: first because the communication was made in violation of the court's order not to communicate with non-jurors; second, because after having the improper communication with former JN 6, JN 11 broadcast the contents of that communication to all the other jurors; and third, because the communication directly contradicted the court's instruction to begin deliberations anew and **not** to rely on the former deliberations which were conducted with former JN 6.

In re Hitchings, supra, 6 Cal.4th at 118 described a violation of this duty as "serious misconduct" raising a presumption of prejudice where the juror had a mid-trial discussion about the case with a co-worker during which she advocated castration as a punishment for the defendant.[21] On the other hand, People v. Wilson, supra, 44 Cal.4th 758 reversed a penalty phase verdict where the trial court had no grounds for excusing a juror who had made solitary and fleeting comments to a fellow juror during a break

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21 Hitchings rejected the argument that a single out-of-court conversation by a juror did not "not necessarily affect the juror's ability or impartiality." (6 Cal.4th at 85.)

early in the guilt phase of the trial. Wilson held that although such comments were a "technical" violation of section 1122 and the trial court's admonition, they were "trivial" and not made "in an obvious attempt to persuade anyone." (Id. at 839-40.)

It is obvious that this case is like Hitchings and distinguishable from Wilson. Here, the objectionable communications were made **during penalty phase deliberations**, they were repeated to the entire jury, and the comments carried a clear message intended to persuade the jury to convict. The record thus shows as a demonstrable reality that JN 11 committed misconduct and was biased.

3. JN 11 and her prior discussion with JN 6 and the jury coordinator was misconduct.

Appellant contends that JN 11 also violated the court's order when she talked to the jury coordinator in the company of former JN 6, and that the trial court's credibility determination cannot withstand scrutiny. The jury coordinator testified that JN 11 was present when former JN 6 said that her notebook contained a statement that appellant was a "prick" with an arrow pointing to him. The trial court noted that the statements by JN 11 and the jury coordinator were "conflicting," but then inexplicably decided to credit the unsworn and self-serving statements of JN 11 rather than the sworn testimony of the courthouse professional.

Moreover, the trial court disregarded the fact that JN 11's unsworn statements were internally inconsistent, in that when she was first questioned by the court, she denied having any discussion with JN 6 about the notebooks; however, when she was recalled for further questioning, JN 11, said that she did not remember JN 6 saying anything "except she had a word in [her notebook] she didn't want anybody to read," and that she [JN 11] had "barely heard that." In other words, JN 11 did hear – even if "barely" – former JN 6's comment. The fact that former JN 6 had made an arrow pointing to appellant supports an inference that she had shown or discussed the contents with someone else – if the comment was only for herself, there would be no need for a designating arrow.

Also, as pointed out by defense counsel, JN 11's statement that she did not hear former JN 6's statement to the coordinator – but then asked the coordinator the very same question about her notebook as former JN 6 had asked – makes it highly likely that the two jurors had previously discussed their notebooks.

Finally, since it was the jury coordinator, and not former JN 6 or JN 11 who reported this incident to the trial court, it is the coordinator's sworn testimony and not that of JN 11 that should be credited.

In sum, and despite the trial court's ruling, the record shows as a

demonstrable reality that JN 11 committed misconduct in discussing with former JN 6 and the coordinator the contents of former JN 6's notebook.

4. JN 11 and JN 4 committed misconduct by injecting into deliberations extrajudicial information about appellant's security level as a life prisoner.

The undisputed facts are that JN 11 told the other jurors that if they did not render a verdict of death that appellant would be in the "general population" in prison. She assured the other jurors that she knew what prison life was like. (27CT 6576, 6582.) JN 4 also told the deliberating jurors that appellant would be in the yard with other prisoners and not locked in his cell. (27CT 6571-72.)

It is misconduct for a juror to inject his or her specialized knowledge into jury deliberations. (In re Malone (1996) 12 Cal.4th 935, 963; see also People v. Marshall (1990) 50 Cal.3d 907, 949 [misconduct where capital juror told his fellow jurors that he had a "background in law enforcement" and the fact that the defendant appeared to have no prior record was meaningless because juvenile records are "automatically sealed"].) In re Stankewitz (1985) 40 Cal3d 391, 397, 399-400 involved a juror who told the others that he, as a former police officer, knew that a robbery took place upon forcible taking regardless of an intent to permanently deprive the victim of the property.

Although in Malone and Marshall, this Court found that the presumption of prejudice from juror misconduct had been rebutted because there was no substantial likelihood the misconduct had affected the other jurors adversely to the defendant, in Stankewitz the Court held that the presumption of prejudice was **not** rebutted, because the "special knowledge" improperly offered up by the offending juror went to a "key issue" in the case. (40 Cal.3d at 402.)

Stankewitz, and not Malone and Marshall, is controlling here. The significant issue at penalty phase – as determined by the prosecutor's argument, the jury's question to the Court, and the juror declarations deemed true by the trial court – was whether or not appellant would be a danger were he to be given a life-without-possibility-of-parole sentence.

5. The jurors committed misconduct by failing to report the improper communications of JN 11, and in failing to begin deliberations anew after former JN 6 was removed from the jury.

The facts are that JN 11 reported to all the sitting penalty phase jurors former JN 6's message to them not to "forget" all the "work" they had done (and presumably including their verdict of death). JN 3 suggested to JN 11 that she should report to the judge that she had communicated about the case with former JN 6. However, neither JN 11, nor JN 3, nor any other juror reported the matter to the trial court, despite

the court's explicit instruction that the jurors were to report any violation of the admonition against communications with non-jurors. (See 8RT 1863.) As set out above in section 2, pages 276-279, and incorporated by reference here, this is serious misconduct.

The undisputed facts also include that when new JN 6 joined the jury after former JN 6 had been excused, the other jurors "shoved the evidence" at her for her review while they talked of other matters because they had "already been through it." Appellant contends that this amounted to a refusal to follow the court's order to begin deliberations anew. Appellant was entitled to a verdict by 12 impartial jurors deliberating together, not 11 jurors who deliberated without the 12th, and then a hiatus while the 12th "caught up." (See People v. Engleman (2002) 28 Cal.4th 436, 445 [refusal to follow court order to deliberate is misconduct].)

D. The Multiple Instances of Juror Misconduct Raise a Presumption of Prejudice Which Cannot Be Rebutted and Which Requires Reversal of Appellant's Sentence of Death.

Once the defense shows an actual impropriety in the jury's conduct, prejudice is presumed.[22] (People v. Daniels (1991) 52 Cal.3d 815, 864.)

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[22] The presumption of prejudice is intended as an evidentiary aid to those who can show serious misconduct but are unable, because of the barrier erected by Evidence Code section 1150, to prove actual prejudice. (People v. Holloway, supra, 50 Cal.3d 1098, 1109.)

The presumption may be rebutted by affirmative evidence that prejudice does not exist, or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm from the misconduct. (People v. Williams (2006) 20 Cal.4th 287, 333.) Rebuttal of the presumption requires a showing that the defense allegations are false, or that there is no substantial likelihood that the misconduct influenced the vote of any juror. (People v. Marshall, supra, 50 Cal.3d at 950.)

As set out above, the undisputed evidence presented in the new trial motion established multiple instances of jury misconduct, raising a presumption of prejudice which was not rebutted: the presumption of prejudice cannot be rebutted by affirmative evidence that prejudice does not exist (since there was none), nor by a showing that the defense allegations are false, insofar as the allegations of misconduct arise from the jury declarations submitted at the new trial motion, because the trial court deemed those declarations to be true, and there was no evidence controverting them.

In short, the presumption of prejudice could be rebutted here only by a finding that there is no substantial likelihood or reasonable probability of actual harm from the misconduct, i.e., that the misconduct influenced any of the jurors. But no such finding can be made.

With respect to the misconduct claims involving JN 11's improper communications, appellant submits that, at a bare minimum, this Court must find that JN 11 herself was improperly influenced by those communications, in particular former JN 6's urging that the newly constituted jury "remember" the work during deliberations in which former JN 6 took part. The fact that JN 11 repeated that message to the other jurors (thus compounding her misconduct) is telling evidence that she had been influenced by these communications and that she intended to influence the other jurors as well.

With respect to the misconduct involving the statements by JN 11 and JN 4 claiming (extrajudicial) knowledge that appellant would not be locked in a cell, that he would be in the yard with other prisoners, and that he would be in general population, it is highly likely that these improper comments influenced at least one if not more jurors. Whether appellant would or would not be a conforming life prisoner was a critical point (a "big factor" as JN 4 put it] in deliberations, as shown by the question posed by the jurors to the court:

> "Question has arisen as to what can be considered an aggravating factor. . . . Are we required [] to only consider items A, B and C as aggravating factors? In particular, the possibility of or likelihood of future escapes and/or violent crimes is a factor weighing on several juror's [sic] minds. This is not a specified aggravating factor, but can we

consider it?" (Exh. T-XLIII, 28CT 6878.)

Significant to the question of prejudice is the fact that appellant had proffered the expert evidence of former associate warden Jim Parks that would have explained the high level of security for life prisoners; Parks would also have offered an opinion that appellant would adjust to prison with a life sentence. Because this evidence was excluded, this Court must consider the cumulative prejudicial impact[23] from its exclusion when assessing the likelihood that the jurors were swayed by the extrajudicial and "expert-like testimony" provided by the two jurors in deliberations which was to the contrary, i.e., that appellant would not be kept locked in a cell, that he would be in general population, etc., and which would have been refuted by the defense proffered testimony of an actual expert.

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[23] It is settled law that "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 (1998) 17 Cal.4th 800, 844; Taylor v. Kentucky (1978) 436 U.S. 478, 487, fn. 15 cumulative effect of errors can violate federal due process]).

E. The Multiple Incidents of Juror Misconduct During Penalty Phase Deliberations Violated Appellant's Eighth Amendment Right to a Reliable Sentencing Determination.

Assuming arguendo this Court finds that the presumption of prejudice arising from the multiple incidents of misconduct is rebutted, the misconduct was still of such nature and scope (involving many jurors) that it deprived appellant of his Eighth Amendment right to a reliable sentencing determination. (Godfrey v. Georgia, supra 446 U.S. 420 [Eighth Amendment requires higher degree of scrutiny in capital cases]; Monge v. California, supra, 524 U.S. at 732 [because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings."].)

If the known facts are given the required scrutiny , this Court can simply not conclude that the sentence rendered is sufficiently reliable given (1) the improper message from former JN 6 and JN 11 to "remember" the work they had already done; (2) the injection of extrajudicial claims that appellant would be in general population unless sentenced to death; (3) JN 11's concealment of information in voir dire and her later injection of that information into the deliberations as an argument for imposing the death sentence; and (4) the many failures to follow the judge's instructions.

EVIDENTIARY ERRORS

XIII. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO A RELIABLE SENTENCING DETERMINATION BY ERRONEOUSLY ADMITTING IN AGGRAVATION EVIDENCE WHICH DID NOT INVOLVE CRIMINAL ACTIVITY OR FORCE OR VIOLENCE, AND WHICH WAS UNRELIABLE

A. Introduction to Argument.

At the penalty phase, the prosecution can introduce, in aggravation, evidence of the defendant's prior criminal convictions and prior criminal activity. "However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (Pen. Code, § 190.3, subd. (b) [hereafter "factor (b)]".)

Over defense objection, the trial court allowed the prosecution to introduce evidence of the following incidents which did not result in criminal convictions and which did not involve the use or threat of violence as required under section 190.3:

(1) two alleged jail escape attempts by appellant;

(2) appellant's in-custody possession of (at different times) a flattened soda can and a rolled-up newspaper;

(3) a forcible extraction of appellant from his cell.

The erroneous admission of this evidence in aggravation violated appellant's statutory rights under Penal Code section 190.3, and his federal constitutional rights to due process and a reliable sentencing determination.

Each of these incidents is addressed separately below.

B. The Two Alleged Attempted Jail Escapes.

1. The alleged attempt of April 1999.

Appellant objected to evidence of an alleged attempted jail escape in April of 1999 on the ground that no criminal activity had occurred. (37RT 10534-35; 25CT 5903.) The trial court ruled the evidence admissible. (37RT 10536.)

The following evidence was admitted. Appellant's wife Jessica Smith received a letter from appellant in which he talked about an escape and asked her to take photographs of the outside of the jail. Prior to that, appellant had told her he wouldn't die in jail but would go down in a blaze of glory. (39RT 11102-03.) Jessica told appellant her friend Misty Slettum would help him and then informed law enforcement. An agent pretending to be Misty Slettum then recorded a telephone conversation in which appellant said Jessica had told him that Slettum was "gonna take those pictures for me," and asked if she "had a map of this part of town." He told

her to take the photographs when it was dark. Then followed a long discussion of whether appellant's wife was going to leave their son with "Misty" when she went into the military. Appellant emphasized that he did not want the photographs sent to him; he said he would explain in a letter what to do with them. (39RT 11104-11115; 44CT 11095-11109 [transcript of Exh. 108].)

Even assuming arguendo that appellant's request to take photographs of the jail amounted to a jail escape attempt, this incident was inadmissible under the plain language of section 190.3, subdivision (b), which forbids admission of evidence of criminal activity not involving force or violence. Appellant's acts did not express or imply violence in any way.[24]

In People v. Boyd (1985) 38 Cal.3d 762, 776-77, the prosecution presented evidence that a metal grating had been removed from an air vent in the local jail; and appellant and another inmate were seen without shirts, while two shirts were found with dirt that might have come from the grating. Boyd rejected the argument that the presumably violent removal of the grate was sufficient to justify admission of the evidence, stating clearly that there was "no evidence that defendant used or threatened force or

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24 Not even appellant's statement about a "blaze of glory" suggests violence committed *by* him, as opposed to *against* him.

violence to any person." This Court emphasized that the evidence of the attempted escape was barred by the specific exclusionary language in section 190.3, and also barred by the fact that because no violence or threat of violence was involved, the evidence was irrelevant to any of the specific aggravating and mitigating factors listed in section 190.3. (Ibid.; see also People v. Boyde (1988) 46 Cal.3d 212, 249 [evidence of the defendant's CYA commitment including his escape from juvenile hall was improperly admitted under section 190.3] and Boyde v. Brown (9th Cir. 2005) 404 F.3d 1139, 1159 [noting that on the direct appeal this Court had determined that the defendant's non-violent escape from CYA was not admissible under factor (b)].)

In sum, if the removal of a metal window grate and the wearing of dirty shirts which could have been soiled from the grate fail to show the threat of force or violence required under factor (b), a request to take photographs is similarly inadequate. The trial court erred by allowing the prosecution to present evidence of appellant's non-violent acts as aggravating evidence.

2. The alleged attempt of May 2002.

Defense counsel objected to the admission of the alleged escape attempt of May 18, 2002 as inadmissible under factor (b). (25CT 5903.)

The trial court ruled that evidence of the incident was admissible because putting money on the deposit of money in appellant's account on May 15 and the phone call made by appellant rendered the incident an attempted escape. (37RT 10546.)

Jailhouse informant Cozart testified that appellant and Ben Williams wanted Cozart to hold a hostage in his cell as a distraction so that appellant could knock out his window and bring up tools and rope from outside in order to effect an escape. Someone named Tim was supposed to put money in appellant's account as a sign that the plan was ready to be carried out. However, Tim never showed up on the scheduled dates and apart from talk, nothing happened. Meanwhile, Cozart informed the deputies, and Deputy Jackson determined that Tim Yakiatis had put money on appellant's account on May 15; on May 17, appellant also told someone named Carol to call Tim who was to await a call from appellant the next day. According to Deputy Jackson, Cozart believed the attempt would take place on May 24, and Jackson did not know if the money deposited to appellant's account on May 15 had anything to do with the escape. (See Statement of Facts, above, page 67.)

The evidence of this alleged escape attempt established neither a crime nor an act of force or violence against persons. As Cozart himself

said, apart from talk, nothing happened. The trial court relied on the deposit of money into appellant's account, but the deputy did not know if this deposit had anything to do with the escape, and the informant said the deposit was to signal a go, even though nothing happened after the deposit was made.

Appellant contends that any plan to escape never proceeded past the "mere preparation" stage. Mere preparation, which may consist of planning the offense or arranging the means for its commission is not sufficient to constitute an attempt. What is required is an act indicating a certain unambiguous intent to commit a certain crime. (CALJIC No. 6.00 [attempt defined].) Nor was there sufficient evidence that appellant planned force or violence against any person.

Under the case law cited immediately above, People v. Boyd, supra, 38 Cal.3d at 776-77, and People v. Boyde, supra, 46 Cal.3d at 249, the somewhat conflicting and uncertain evidence of a supposed escape plan should not have been admitted against appellant as aggravating evidence under section 190.3.

C. In-Custody Possession of a Rolled-Up Newspaper and a Flattened Soda Can.

Over defense objection, the trial court admitted testimony that while

in juvenile hall in 1995, appellant had slid a flattened soda can under the door of his cell to show to his counselor, who did not consider the can a weapon. (RT 10529-30; 39RT 11032-34, 11071-789.) Although the item was not preserved by law enforcement, Deputy James Masterson saw it. Although he could not remember its dimensions, he described it as a "knife." (39RT 11084-86, 11089)

Also admitted over defense objection was testimony that in February of 2001, a rolled-up newspaper was found in appellant's cell after he had been forcibly extracted from it. (38RT 10824, 10882-95.) The newspaper had not been preserved but a deputy testified it was tightly rolled, held together with elastic, and dense and hard. (38RT 10896-99.)

In-custody possession of a rolled-up newspaper and/or a flattened soda can is not criminal activity involving the use or threat of force or violence. As to the soda can, appellant gave it to his counselor to show it to her. There was no evidence as to the use or proposed use of the rolled-up newspaper.

Appellant acknowledges this Court's holdings that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b) insofar as it "is unlawful and involves an implied threat of violence even where there is no evidence defendant used

or displayed it in a provocative or threatening manner." (People v. Tuilaepa (1992) 4 Cal.4th 569, 589 [razor blades]; see also People v. Gutierrez (2002) 28 Cal.4th 1083, 1152 [razor blades].)

However, neither the soda can nor the rolled-up newspaper were even preserved by the authorities. Thus, the trial court was unable to determine whether the items were "potentially dangerous weapons" or not. Indeed, as to the newspaper, the trial court found that there was no foundation sufficient to permit the officer to testify that it was a weapon. (38RT 10894.) Consequently, the evidence of appellant's possession of a rolled up newspaper was inadmissible under factor (b).

In People v. Box (2000) 23 Cal.4th 1153, 1201, this Court declared that the trial court retains its "traditional discretion" to exclude " 'particular items of [section 190.3, factors (a) or (b)] evidence' " that are to be used in a " 'manner' that is misleading, cumulative, or unduly inflammatory." In addition, "factor (b) evidence, even if it depicts the moral blameworthiness of the defendant, may nonetheless be excludable under Evidence Code section 352 insofar as it unfairly persuades jurors to find the defendant guilty of the crime's commission." (Ibid.) The evidence that appellant possessed a flattened soda can and a rolled-up newspaper was misleading to the jury, because it was presented in a context that suggested appellant had

weapons or threatened violence, even though the witnesses differed on whether the no-longer-existing soda can could be described as a weapon, and the deputy who had seen the rolled up newspaper could not testify that it was a weapon.

D. The Forcible Extraction of Appellant From His Jail Cell in February of 2001.

Noting that there was no evidence of violent criminal activity on appellant's part, the defense objected under factor (b) to testimony relating to the February 2001 cell extraction, during which appellant was forcibly removed from his cell after refusing to open up his cell door, kicking his door, and yelling at the correctional officers. The trial court stated that the officer's claim that appellant had challenged him to a fight could be a violation of Penal Code section 69 [attempt by means of threat or violence to deter officer from performing his lawful duty] and proposed listening to the audiotape of the cell extraction. (37RT 10542.) However, the audiotape proved to be "mostly inaudible" and the trial court then proposed having the officer testify to the accuracy of the transcript. (38RT 10704.)

The trial court admitted the evidence on the basis of an officer's testimony that appellant (while locked in his cell) challenged the officer to a fight. (38RT 10817-18.) The deputy reported that the transcript of the cell

extraction audiotape was accurate, but also that appellant had stated that appellant would "knock [the deputy's] ass out" – even though that statement did not appear in the transcript. (38RT 10784-87: check for particular page.)

In the transcript prepared from the videotape of this incident, appellant said, "If you guys want to do it, lets get it on. Lets rock and roll." (43CT 11060; see also 43CT 11061 ["Let's get it on."].) Appellant also swears and complains that he is being treated badly, that the deputies don't follow the rules, and that they want to hurt him. (43CT 11061-63.)

When the deputy told appellant to "do some pushups," appellant said he wanted "to take out [his] aggression on [the deputy]." The deputy said "you are not going to get any aggression out because you will be on your face and down and handcuffed so fast . . . I guarantee." (43CT 11062.) Appellant said they wanted to take him to medical because he wasn't "coming out without a fight." (43CT 11063.) Appellant repeated that they wanted to hurt him saying: "Look around there are seven or eight of you. Come on. Come on. Turn the key." (43CT 11063.) The deputies entered, pinned appellant down, and told him not to move and to quit resisting. (43CT 11063.)

Testimony regarding the cell extraction was admitted, including

testimony that appellant said he would "knock [the deputy's] ass out." (38RT 10784-87.) (See Statement of Facts summary of cell extraction testimony.)

The cell extraction testimony, which in its essence involved violence against appellant based on his apparent attempted destruction of property, was inadmissible under factor (b). People v. Wright (1990) 52 Cal.3d 367, 425-26 (and cases cited therein) held that typically, verbal threats alone are not sufficient to permit admission under factor (b). People v. Tuilaepa (1992) 4 Cal.4th 569, 590 held that sexual taunts and death threats against correctional employees made by defendant while he was locked in a maximum security cell were improperly admitted. (See also In re Gay (1998) 19 Cal.4th 771, 786 & fn. 10 [evidence that "while in jail awaiting trial, [the defendant] had made threats against a jail guard and his family" was inadmissible as direct evidence in aggravation].)

First, angry retorts by a prisoner do not usually amount to threats to use force or violence as required under factor (b). Secondly, the audio portion of the recording of the cell extraction does not contain the "threats" by appellant testified to by the deputy. Third, the officers knew that appellant could neither hurt nor prevent them from doing their duty ["you will be on your face and down and handcuffed so fast... I guarantee"], and

appellant also knew he was helpless against them ["Look around. There are seven or eight of you."].

E. The Erroneous Admission of this Evidence in Aggravation Violated Appellant's Federal Constitutional Rights to a Reliable Sentencing Determination.

Even assuming for the purposes of argument that any of the evidence challenged in this section did constitute criminal activity within the meaning of factor (b), appellant submits that it was insufficiently reliable to be admitted at the penalty phase in aggravation. (Godfrey v. Georgia, supra, 446 U.S. 420 [Eighth Amendment requires higher degree of scrutiny in capital cases]; Woodson v. North Carolina, supra, 428 U.S. 280 [because death is qualitatively different from imprisonment there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case]; Monge v. California, supra, 524 U.S. at 732 [because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings."].)

With respect to the alleged escape attempts, the evidence did not clearly show either an actual attempt, as opposed to mere preparation, nor was there evidence of any violence or force by appellant. With respect to the supposed weapons, the items had not even been preserved and the

testimony as to whether the items were even weapons was conflicting and ambiguous or non-existent.

As to the forcible cell extraction incident, the testimony that appellant had made some kind of threat was contradicted by the audio tape recording of the incident.

In sum, the evidence given as to each of these incidents lacks the reliability required to permit such evidence to be the basis for a sentence of death.

F. This Court Must Reverse Appellant's Death Sentence.

Because the erroneous admission of aggravating evidence is an error of federal constitutional magnitude, review for prejudice is under the Chapman v. California, supra, 386 U.S. at 24 standard. (See People v. Ochoa (1998) 19 Cal.4th 353, 478-79.) Chapman requires reversal unless the prosecution can show beyond a reasonable doubt that the error was harmless. (Chapman, supra, 386 U.S. at 24.) No such showing can be made here.

The aggravating evidence discussed above was a significant part of the prosecution's case for a death verdict. Indeed, the focus of the prosecutor's argument for death was an emphasis on the number of violent incidents in which appellant had been involved, arguing that appellant was

consistently and continually violent and would "get worse." (50RT 14234-42; 14252, 14254-55.) The prosecutor's argument depended on the "evidence" challenged above. Consequently, the errors cannot be deemed harmless and appellant's death sentence must be reversed. (See e.g., People v. Minifie (1996) 13 Cal.4th 1055, 1071 [prosecutor's jury argument exploiting error "tips the scale in favor of finding prejudice"]; People v. Woodard (1979) 23 Cal.3d 329, 341 [argument focusing on erroneously admitted evidence shows prejudice].)

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XIV. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY ERRONEOUSLY EXCLUDING MULTI-GENERATIONAL MITIGATION EVIDENCE, INCLUDING A FAMILY HISTORY OF COVERING UP ABUSE

A. Summary of Relevant Facts.

The prosecutor objected on relevancy and cumulative grounds to any testimony about appellant's mother's upbringing. (41RT 11745-46.) The trial court questioned the relevancy of multi-generational dysfunction and initially sustained the prosecutor's objection. (41RT 11747-55.)

When appellant's mother, Doreen Smith, testified that she "couldn't deal with [her] sons" because she had never "dealt with herself as a child" – the prosecutor interrupted her answer with a relevancy objection and the trial court ordered the defense to ask the next question. (41RT 11785.) When Doreen testified that she couldn't keep her kids after moving to Eureka because she got into the methamphetamine drug world, the trial court sustained the prosecution's irrelevancy objection and ruled that anything that happened to appellant's mother after she was out of his life was irrelevant. (41RT 11788-89.)

When asked why she did not think she could "deal with" her children, the prosecutor again objected. (42RT 11800.) The trial court sustained objections to Doreen's own upbringing and a domestic violence

offense she had committed in Washington several years earlier, but then expressed concern that excluding testimony relating to multi-generational dysfunction could be an error. (42RT 11801, 11810-14.) The defense presented testimony and documents as to its importance. (42RT 11815-21; Ct. Exh. T-35.)

The trial court first ruled that only evidence of appellant's own mistreatment was relevant and that multi-generational dysfunction was irrelevant. (42RT 11824.) The next day, after the defense provided further documentation (Ct. Exh. T-36) and requested reconsideration of the issue, the trial court reversed its ruling, stating that it would permit such evidence. (42RT 11902.)

However, the trial court excluded as irrelevant all testimony about Doreen and her siblings (the Cromps) and their drug problems, problems with their own children, and being in and out of prison – even though some of these siblings had lived at the Smith home. (43RT 12086-89; 12202-03.) The defense proffered testimony from Sherry Bigger, a girlfriend of one of the Cromp brothers, but the trial court ruled that unless she had "observed the interaction between [the Cromps] and Doreen Smith," her testimony would be excluded as irrelevant. As a result of this ruling, the defense did not call Bigger as a witness. (43RT 12202-03.)

The trial court also excluded testimony from Sarah Belongie (appellant's father's sister) that her stepfather had sexually molested her, and physically abused her and her mother, and nothing was done about it. Belongie's mother was appellant's grandmother (Phyllis Jones), who had lived in appellant's home when he was sexually abused by his father; this grandmother was instrumental in covering up appellant's sexual abuse). The defense pointed out that this showed the pattern of covering up and accepting sexual abuse. (43RT 12363-72.)

B. Appellant Had a Constitutional Right to Present Multi-Generational Evidence of Dysfunction as Mitigating Evidence.

Appellant contends that the trial court's exclusion of multi-generational mitigating evidence of the Cromp family, including the presence of sexual and physical abuse, and the family pattern of covering up or ignoring such abuse, violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to due process and the right to present a defense, and to a reliable sentencing determination.

1. The right to present mitigating evidence of any aspect of character and background.

In 1976, the United States Supreme Court announced that states seeking to impose a death sentence consistent with the Eighth Amendment

had to allow for individualized consideration of the circumstances of the crime as well as the character and record of the offender. Gregg v. Georgia (1976) 428 U.S. 153, 189; Woodson v. North Carolina, supra, 428 U.S. at 304. Two years later, the Supreme Court held that the Eighth Amendment required "the sentencer, in all but the rarest kind of capital case, not be precluded from considering, **as a mitigating factor**, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio (1978) 438 U.S. 586, 604 (emphasis in original). In 1982, The Supreme Court expressly held that mitigating evidence is relevant even if it does not "provide a legal excuse from criminal responsibility," finding that a young defendant's "turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant." (Eddings v. Oklahoma (1982) 455 U.S. 104, 115.)

In sum, the United States Supreme Court has consistently and emphatically held that relevant mitigation in a capital case can encompass any evidence that the defendant "proffers as a basis for a sentence less than death," which would include evidence tending to humanize the defendant. (Abdul-Kabir v. Quarterman (2007) 500 U.S. 233, 247.) As stated most recently in Porter v. McCollum (2009) ___U.S. ___ [130 S.Ct. 447, 454]

citing Williams v. Taylor (2000) 529 U.S. 362, 398: " '[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable.' "

2. Multi-generational evidence is relevant and admissible in mitigation.

Mitigating evidence is a broad concept. A state "cannot preclude the sentencer from considering any relevant mitigating evidence that the defendant proffers in support of a sentence less than death," as "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." (Payne v. Tennessee (1991) 501 U.S. 808, 822 [internal quotation marks omitted]; see also People v. Williams (2006) 40 Cal.4th 287, 320 [the Eighth Amendment requires that the jury not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record offered as a basis for a sentence less than death].)[10]

If any aspect of the defendant's background can be mitigating, and the Eighth Amendment guarantees that the jury not be precluded from

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10 The trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability of undue prejudice. (People v. Cain (1995) 10 Cal.4th 1, 64.)

considering such evidence in mitigation, the question remaining is whether multi-generational evidence is admissible as family background mitigating evidence. Although the trial court was eventually convinced that multi-generational evidence was admissible, it nonetheless excluded such family evidence in the two situations cited above.

Wiggins v. Smith (2003) 539 U.S. 510, 522 stands for the proposition that "the standards for capital defense work articulated by the American Bar Association"[11] are the guides for determining the reasonableness of counsel's representation. (See also Hamblin v. Mitchell (6th Cir. 2003) 354 F.3d 482, 487, fn. 2, 488 [the 2003 ABA Guidelines are the clearest exposition of counsel's duties at penalty phase].) These standards specifically require trial counsel to prepare and present a multigenerational social history as part of the duty to investigate and present mitigating evidence, as multigenerational evidence is often required in order that the jury understand the defendant's mental state and functioning. (Commentary, ABA Guideline 10.11; see Hamblin v. Mitchell, supra, 354 F.3d at 487, fn. 2, and 488, 490.)

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[11] The reference is to the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases (1989). The ABA Guidelines adopted in 2003 explain in greater detail but otherwise do not depart from the 1989 Guidelines. (Hamblin, supra, 354 F.3d at 487.)

Hamblin v. Mitchell found defense counsel ineffective for failing to present mitigating evidence of the defendant's unstable and deprived childhood, extreme poverty and neglect, and family violence and instability. (Id. at 490.) State v. Larzelere (Fla. 2008) 979 So.2d 195 found reversible ineffective assistance of counsel where counsel failed to investigate and present mitigating evidence, including the multi-generational history of dysfunction and sexual abuse in the defendant's family. (See also State v. Bocharski (Ariz. 2008) 189 P. 3d 403, 497-98 [noting that the defendant had presented in mitigation evidence regarding his dysfunctional family, including multi-generational violence, criminality, and substance, sexual, emotional, and physical abuse].)

In sum, appellant had a constitutional right to present the multi-generational evidence excluded by the trial court, including the testimony regarding his mother's siblings, and the testimony of the multi-generational pattern of sexual and physical abuse followed by cover-up in his father's family. Appellant's right to present this evidence stems from the Eighth Amendment, as set out above, and also from his due process rights to present a defense and to a fair trial. (Rock v. Arkansas (1987) 483 U.S. 44, 53-56 [state restriction on defendant's right to testify was unconstitutional]; Crane v. Kentucky (1986) 476 U.S. 683, 690 [the federal

constitutional guarantees a criminal defendant a meaningful opportunity to present a complete defense]; Chambers v. Mississippi (1973) 410 U.S. 284 [exclusion of evidence vital to a defendant's defense constituted a denial of due process].) Appellant has had a federal due process right to rebut the prosecution's case. (Simmons v. South Carolina (1994) 512 U.S. 154, 174 [Ginsburg, J. and O'Connor, J., concurring] [defendant's right to rebut the prosecution's evidence is the "core requirement" and the "hallmark" of due process].)

C. The Exclusion of Relevant Mitigating Evidence Requires Reversal of Appellant's Death Sentence.

Appellant attempted to present a broad base of multi-generational evidence to counter the prosecution's evidence in aggravation, and to show that despite appellant's acts of violence, he was not personally so morally reprehensible as to deserve death, because his family history – including the multi-generational history – had basically created him as he was.

The jury did hear evidence of appellant's own abuse and neglect but the multi-generational evidence would have added a more profound dimension to that history, and "might well have influenced the jury's appraisal of his moral culpability." (Williams v. Taylor, supra, 529 U.S. at 398.) Thus, this Court should reverse appellant's death sentence.

XV. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, TO A FAIR TRIAL, AND THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND A RELIABLE SENTENCING DETERMINATION BY EXCLUDING EVIDENCE THAT APPELLANT WOULD ADJUST WELL IN STATE PRISON AND BY EXCLUDING PROPER REBUTTAL EVIDENCE AS TO THE SECURITY LEVELS IN STATE PRISON; ALTERNATIVELY, DEFENSE COUNSEL WAS INEFFECTIVE UNDER THE SIXTH AMENDMENT FOR MAKING PROMISES IN OPENING STATEMENT PRIOR TO LITIGATING THE ADMISSIBILITY OF THE PROMISED EVIDENCE REGARDING APPELLANT'S ADJUSTMENT AND PRISON SECURITY LEVELS

A. Summary of Proceedings Below and Introduction to Argument.

On September 24, 2002, in opening statement at penalty phase, defense counsel promised testimony by Jim Parks, former associate warden of San Quentin, and consultant to the Legislature on prison security, who would describe the level of security for prisoners with life and life-without-parole sentences:

> "He will testify that if [appellant] is given a sentence of life without possibility of parole, [Level 4] is the level that he will enter, and that he will remain . . . . [¶ and that such prisoners are] at all times, 24 hours a day [under the gun], there is always a posted guard with a gun being behind a security glass area that visually has contact with every cell and every inmate, has contact with every inmate when they go to lunch, dinner, at all times.

> He will testify that guards never ever enter areas where prisoners are unless there is at least two guards together. He will testify that if an inmate does not behave, that they go to areas in prisons called SHUs [] a prison within a prison . . . and they have actually no human contact.
>
> He will render the opinion that if sent to prison [appellant] will adjust to prison life." (41RT 11772-73.)

On October 1, 2002, the prosecution moved to exclude defense evidence of "prison conditions of confinement" as irrelevant at penalty phase. (26CT 6256.) The defense argued that even if the evidence were not relevant in mitigation, it **was** admissible to rebut the prosecution's evidence "of an escape, of violence in the jail [and] future dangerousness." (45RT 12655.) Defense counsel pointed out that the level of security for a life prisoner was probative to rebut the prosecution's evidence and argument that appellant's "knowledge of the jail, his knowledge of the system [] has enabled him to come up with these plans," and that he would "do the same wherever he is." (45RT 12656.) Defense counsel also argued that the comparison of the local jail with the state facility was admissible under Skipper v. South Carolina (1986) 476 U.S. 1.

The next day, the trial court excluded the proffered evidence as not relevant to appellant's character, culpability or the circumstances of the crime. (44RT 12752.)

Appellant maintains that the excluded evidence was relevant in mitigation under the Eighth Amendment as set forth in Skipper v. South Carolina, and that it was also relevant under the Fifth and Fourteenth Amendment rights to due process as rebuttal of the prosecution's evidence (and later argument) that appellant was and would be dangerous as a life prisoner, as set forth in Simmons v. South Carolina (1994) 512 U.S. 154, 174 [Ginsburg, J. and O'Connor, J., concurring].

In the alternative, defense counsel provided ineffective assistance of counsel under and Strickland v. Washington (1984) 466 U.S. 688 for failing to litigate the admissibility of evidence of appellant's adjustment and the security levels in state prison prior to promising to the jury that such evidence would be presented.

B. Testimony that Appellant Would Adjust Well as a Life Prisoner Was Relevant and Admissible Evidence in Mitigation.

Skipper v. South Carolina, supra, 476 U.S. 1 held that testimony regarding a capital defendant's ability to make a well-behaved adjustment to prison as a life prisoner is relevant and admissible evidence and cannot be excluded under the Eighth Amendment guarantee that a capital defendant is "'permitted to present any and all relevant mitigating evidence that is available.'" (Id. at 5-6, quoting Eddings (1982) 455 U.S. 104, 117.)

Following Skipper, People v. Fudge (1994) 7 Cal.4th 1075, 1117 held that expert testimony that "would have described [the capital defendant] as being a likely candidate to lead a productive and nonviolent life in prison" was "relevant and admissible mitigating evidence." Fudge noted that Skipper v. South Carolina, supra, 476 U.S. at 5 held that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Fudge concluded that "[e]xclusion of this mitigating evidence thus violates the constitutional requirement that a capital defendant must be allowed to present all relevant evidence to demonstrate he deserves a sentence of life rather than death." (7 Cal.4th at 1117.)

C. Evidence of the Security Levels in State Prison Was Admissible as Rebuttal to the Prosecution's Evidence in Aggravation.

The United States Supreme Court has emphasized that the defendant's right to rebut the prosecution's evidence is the "core requirement" and the "hallmark" of due process. (Simmons v. South Carolina, supra, 512 U.S. at 174 [Ginsburg, J. and O'Connor, J., concurring].) Appellant contends that he had a due process right to rebut the prosecution's evidence and argument that he would be dangerous in prison with evidence that his past behavior in jail would not be likely to

occur in prison because of the different security in prison (and because he would adjust to prison with a life sentence).

The case in aggravation focused on evidence of appellant's escape attempts, his possession of "shanks" in jail and the assault on Deputy Renault. (See Statement of Facts, above, pp. 53-75.) The prosecutor argued this evidence to the jury as support for a verdict of death, because "he attacks guards, he makes shanks, he wants to kill, he gets a rush over it.." (RT 14252), and (referring to the assault on Deputy Renault), "he's going to get worse," so that "the only appropriate verdict is death." (RT 14255.) Because appellant's previous bad behavior while incarcerated all took place in jail and not in prison, appellant had a due process right to rebut the prosecution's evidence with testimony from Parks that he would adjust, and would be unable to act out as he had in jail when he was in the high-level secure prison environment provided for life prisoners.

People v. Quartermain (1997) 16 Cal.4th 600, rejected an argument that evidence regarding prison conditions was admissible as rebuttal, questioning whether the excluded evidence "would have been even arguably proper as rebuttal." (Id. at 629.) In Quartermain, at guilt phase, evidence had been mentioned "in passing" as to the comfortable conditions in a federal prison where the defendant, his wife, and others had been

incarcerated and the defendant argued that he should have been able to "rebut" this evidence with expert testimony on prison conditions he would experience in California if sentenced to life rather than death. (Id. at 628-29.) This Court questioned whether the prison conditions testimony was even arguably rebuttal where the prosecution did not deliberately elicit or exploit the evidence of the other prison, and no reference was made to it at penalty phase, either during the presentation of evidence or penalty phase argument. The prosecutor's argument regarding the defendant's potential in prison was brief and focused on the defendant's character and record, arguing that his prior past record of good behavior might not hold if he were facing a sentence of life without parole: there was no prosecutorial argument that the prison system would be incapable of restraining or controlling any violence by defendant. (Id. at 629-30.)

The facts here are distinguishable. The evidence of appellant's prior acts in jail were introduced at penalty phase and the prosecutor did argue to the jury that appellant should be sentenced to death because he would continue to "attack guards" while in prison. Appellant had a right to rebut this presentation with evidence that the level of security he would experience as a life prisoner in a state prison would effectively prevent him from being able to continue or "escalate" such behavior.

D. Trial Counsel Was Ineffective for Promising Testimony in Opening Statement Before Having Litigated Its Admissibility.

Assuming arguendo that this Court deems the proffered defense evidence inadmissible, then defense counsel provided ineffective assistance of counsel by promising the presentation of the evidence in his opening statement prior to having litigated the admissibility of the evidence. The law on incompetence of counsel is well-settled. As set out in People v. Castillo (1997) 16 Cal.4th 1009, 1015, and Strickland v. Washington (1984) 466 U.S. 688, the defendant must show both that counsel's performance was deficient and that it was prejudicial, i.e., that it is reasonably probable that counsel's unprofessional errors affected the outcome. Moreover, a claim for ineffective assistance of counsel is cognizable on direct appeal "where there is simply no satisfactory explanation" for counsel's performance. (People v. Pope (1979) 23 Cal.3d 412, 426; see also People v. Mendoza-Tello (1997) 15 Cal.4th 264, 266 [ineffective assistance claim cognizable on direct appeal where there could be no satisfactory explanation for counsel's performance].)

Defense counsel's promise in opening statement that he would present specific testimony from Jim Parks regarding security for life prisoners and that appellant would adjust as a life prisoner was deficient

performance. A reasonable attorney in a capital case would have either deferred making such promises in opening statement until after the matter was litigated, or would have litigated the issue prior to making the opening statement promises. Counsel could have no valid or informed tactical reason[12] for promising the penalty phase jury evidence prior to being assured of its admission.

State v. Moorman (N.C. 1987) 358 S.E.2d 502 reversed a conviction where the defense attorney made evidentiary promises in opening argument which were not fulfilled at trial, noting that the conflict between the promises and the trial evidence "severely undercut the credibility of the actual evidence offered at trial . . . ." (Id at 511; see also Harris v. Reed (7th Cir. 1990) 894 F.2d 871 [prejudicial ineffective assistance where counsel made opening statement promises of testimony by two witnesses who were neither interviewed nor presented at trial]; Anderson v. Butler (1st Cir. 1988) 858 F.2d 16 [prejudicial ineffective assistance where counsel told jurors in opening statement that experts would testify the defendant acted in a robot-like state, and then decided not to call the experts]; United States ex rel. Hampton v. Leibach (7th Cir. 2003) 347 F.3d 219, 257 [failure to

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12 Unless counsel's tactical decision is an **informed** one, it does not excuse counsel's omission. (In re Marquez (1992) 1 Cal.4th 584, 602.)

present promised testimony is unreasonable where it cannot be chalked up to unforeseeable events].)

Jim Parks was to be an expert witness; defense counsel had thus obviously prepared for and planned his testimony sometime before the opening statement, i.e., he was not and could not have been a "last-minute witness" whose testimony was deemed necessary or valuable due to some unforeseen event or piece of testimony in the prosecution's case. Reasonable defense counsel would have brought a motion or request to present his testimony prior to making an emphatic promise to the jury that the testimony would be presented. This is particularly so in that this Court has not clearly set out the precise parameters or scope of admissibility of such evidence.

For example, as set out above, Fudge, supra, 7 Cal.4th at 1117 held that expert testimony that "would have described [the capital defendant] as being a likely candidate to lead a productive and nonviolent life in prison" was "relevant and admissible mitigating evidence." Whereas, Quartermain, supra, 16 Cal.4th at 633 held that expert testimony "regarding the prison conditions [defendant] would experience if he were sentenced to life without parole instead of receiving the death penalty" was evidence irrelevant "because it does not relate to the defendant's character,

culpability, or the circumstances of the offense." Because the proffered defense evidence included both types of evidence, reasonable counsel would have litigated the scope of admissible testimony by Parks prior to making his wholesale promise to the jury in opening statement.

E. The Exclusion of Relevant Defense Evidence Requires Reversal of Appellant's Death Sentence.

Whether the exclusion of defense evidence is viewed under the Chapman standard (requiring reversal unless the prosecution shows the error to be harmless beyond a reasonable doubt), see Fudge, supra, 7 Cal.4th at 1103, or the Strickland v. Washington standard for prejudice for the claim of ineffective assistance of counsel (reversal if in the absence of counsel's error a more favorable result would be reasonably probable), the result will be the same – reversal of appellant's sentence of death.

The factors showing prejudice are various. First, in closing argument the prosecutor relied on the fact that appellant was unable to present this evidence in closing argument, urging the jury to sentence appellant to death because he would continue his behavior and get worse in prison – an argument appellant could not counter because of the trial court's ruling. (See People v. Minifie (1996) 13 Cal.4th 1055, 1071 [prosecutor's jury argument exploiting error "tips the scale in favor of finding

prejudice"].)

In terms of the prejudice from counsel's omission, the case law recognizes that "little is more damaging than to fail to produce important evidence that had been promised in an opening." Anderson v. Butler, supra, 858 F.2d at 17. Reversal of appellant's sentence of death is thus required.

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CUMULATIVE PREJUDICE ARGUMENT

XVI. THE CUMULATIVE PREJUDICIAL IMPACT OF THE ERRORS AT THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION

The multiple errors in the guilty and penalty phases of appellant's trial resulted in convictions which are constitutionally unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution. (Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15.; Beck v. Alabama (1980) 447 U.S. 625 [Eighth Amendment also requires heightened reliability in guilt determination in capital cases].)

This Court must consider the cumulative prejudicial impact of these errors, which are of federal constitutional magnitude. (People v. Holt, supra, 37 Cal.3d at 458-59 [considering the cumulative prejudicial impact of various errors]; Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15 [cumulative effect of errors violated federal due process].) United States v. Frederick (9th Cir. 1995) 78 F.3d 1370 reversed for cumulative error, announcing that "[w]here [] there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than

analyzing the overall effect of all the errors in the context of the evidence introduced at trial."

Serious constitutional errors infected every stage of the proceedings, from the denial of a change of venue, to jury selection error through to judicial and jury misconduct. Moreover, the death sentence is simply unconstitutionally excessive and unreliable in a case such as this, where the behavior that ended with the homicide was the direct result of the unimaginable abuse and neglect inflicted on appellant at an early age.

Bocharski, supra, 189 P.2d at 425-26, reversed the death penalty in a felony murder case in which the defendant stabbed an elderly woman over 20 times, and where, as here, there was also aggravating evidence of a violent prison assault. The court reached that decision in light of the defendant's horrific background, noting:

> "Many criminal defendants present mitigation evidence of a less-than-ideal life, but [the defendant's] mitigation evidence is unique in its depth and breadth [demonstrating] severe neglect, as well as almost unimaginable mental, physical, sexual, and emotional abuse throughout his childhood."

The same is true here. As with a juvenile or a mentally retarded defendant, appellant's tragic background diminishes his blameworthiness and renders any death sentence cruel and unusual.

ARGUMENTS CHALLENGING CALIFORNIA DEATH PENALTY STATUTE

XVII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND AS APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (Kansas v. Marsh (2006) 548 U.S. 163, 179, fn. 6;[13] see also, Pulley v. Harris (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it

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13 In Marsh, the High Court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (Id. at 178.)

would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, the absence of a particular procedural safeguard while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional, in that such a safeguard might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death onto section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the

fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

XVIII . APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD

As explained in People v. Edelbacher (1989) 47 Cal.3d 983, 1023, in order 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. In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (People v Bacigalupo (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 26 special circumstances[14] purporting to narrow the category of first degree murders to those

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14 This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in People v. Superior Court (Engert) (1982) 31 Cal.3d 797. The

murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (People v. Dillon (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See People v. Hillhouse (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

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

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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number of special circumstances has continued to grow and is now 33.

XIX. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[15] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[16] or having had a "hatred of religion,"[17] or threatened witnesses after his arrest,[18] or disposed of the victim's body in a manner that precluded its recovery.[19] It also is the basis for admitting evidence

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15 People v. Dyer (1988) 45 Cal.3d 26, 78; People v. Adcox (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

16 People v. Walker (1988) 47 Cal.3d 605, 639, fn. 10.

17 People v. Nicolaus (1991) 54 Cal.3d 551, 581-582.

18 People v. Hardy (1992) 2 Cal.4th 86, 204.

19 People v. Bittaker (1989) 48 Cal.3d 1046, 1110, fn.35.

under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., People v. Robinson (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (Tuilaepa v. California (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (Tuilaepa, supra, 512 U.S. at 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (Ibid.) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright (1988) 486 U.S. 356, 363 [discussing the holding in Godfrey v. Georgia (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without

exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

XX. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire

process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

A. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In People v. Fairbank (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the United States Supreme Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466; Ring v. Arizona (2002) 536 U.S. 584; Blakely v. Washington (2004) 542 U.S. 296; and Cunningham v. California (2007) 549 U.S. 270.

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 478.)

In Ring, the High Court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id. at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (Walton v. Arizona (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id. at 598.) The court found that in light of Apprendi, Walton no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

The Blakely court considered the effect of Apprendi and Ring in a case in which the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (Blakely v. Washington, supra, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (Ibid..) Blakely ruled that this procedure was invalid because it did not comply with the right to a jury trial. (Id. at 313.)

In reaching this holding, Blakely stated that the governing rule since Apprendi is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum

sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (Id. at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In United States v. Booker (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. Booker reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (Id. at 244.)

In Cunningham, the High Court rejected this Court's interpretation of Apprendi, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (Cunningham v. California, supra., 549 U.S. at 288-89.) In so doing, it explicitly rejected the reasoning used by this Court to find that Apprendi and Ring have no application to the penalty phase of a capital trial.

1. In the wake of Apprendi, Ring, Blakely, and Cunningham, any jury finding necessary to the imposition of death must be found true beyond a reasonable doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance –

and even in that context the required finding need not be unanimous. (People v. Fairbank, supra; see also People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[20] As set forth in California's "principal sentencing instruction" (People v. Farnam (2002) 28 Cal.4th 107, 177), which was read to appellant's (50RT 14228), "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 presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[21]

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[20] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (People v. Brown (1988) 46 Cal.3d 432, 448.)

[21] 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,

These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[22]

This Court has repeatedly sought to reject the applicability of Apprendi and Ring by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (People v. Demetroulias (2006) 39 Cal.4th 1, 41; People v. Dickey (2005) 35 Cal.4th 884, 930; People v. Snow (2003) 30 Cal.4th 43, 126, fn. 32; People v. Prieto (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off Apprendi and Blakely in non-capital cases.

In People v. Black (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding Apprendi, Blakely, and Booker, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range."

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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. at 460.)

22 This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (People v. Allen (1986) 42 Cal.3d 1222, 1276-1277; People v. Brown (Brown I) (1985) 40 Cal.3d 512, 541.)

The United States. Supreme Court explicitly rejected this reasoning in Cunningham.[23] In Cunningham the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id. at 6-7.) That was the end of the matter: Black's interpretation of the DSL "violates Apprendi's bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (Cunningham, supra, 549 U.S. at 288-89.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (Id. at 293.)

> The Black court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have

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[23] Cunningham cited with approval Justice Kennard's language in concurrence and dissent in Black ("Nothing in the high court's majority opinions in Apprendi, Blakely, and Booker suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (Black, 35 Cal.4th at 1253; Cunningham, supra, at 8.)

> said, is the very inquiry Apprendi's "bright-line rule" was designed to exclude. See Blakely, 542 U.S., at 307-308, 124 S.Ct. 2531. But see Black, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (Id. at 272.)

In the wake of Cunningham, it is crystal-clear that in determining whether or not Ring and Apprendi apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

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

This holding is simply wrong. As section 190, subd. (a)[24] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but Cunningham recognized that the middle rung was the most severe penalty that

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[24] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (Cunningham, supra, 549 at 279.)

Arizona advanced precisely the same argument in Ring. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks Apprendi's instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." Ibid.; see 200 Ariz., at 279, 25 P.3d, at 1151.

(Ring, supra, 530 U.S. at 586.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (Ibid.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that

the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed. 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (Ring, 530 U.S. at 604.) Blakely made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (542 U.S. at 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to Apprendi and Cunningham, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

2. Whether aggravating factors outweigh mitigating factors is a factual question that must be resolved beyond a reasonable doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A finding that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the

protections of the Sixth Amendment. (See State v. Ring (Ariz. 2003) 65 P.3d 915, 943; State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); Woldt v. People, 64 P.3d 256 (Colo.2003); Johnson v. State, 59 P.3d 450 (Nev. 2002).)[25]

No greater interest is ever at stake than in the penalty phase of a capital case. (Monge v. California (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[26] As stated in Ring, supra, 536 U.S. at 589:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the

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25 See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 [features regarded in Ring as significant apply to both the finding of an aggravating circumstance and to whether the aggravating circumstances substantially outweigh the mitigating, since both findings are essential predicates for a sentence of death].

26 Monge foreshadowed Ring, stating that the Santosky v. Kramer (1982) 455 U.S. 745, 755 rationale for the beyond-a-reasonable-doubt burden of proof applied to capital sentencing: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [citations omitted].)" (Monge v. California, supra, 524 U.S. at 732 (emphasis added).)

applicability of Ring to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

B. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

1. Factual determinations.

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

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

be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition of life or death.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (Winship, supra, 397 U.S. at 363-364; see also Addington v. Texas (1979) 441 U.S. 418, 423; Santosky v. Kramer (1982) 455 U.S. 745, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See Winship, supra [adjudication of juvenile delinquency]; People v. Feagley (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; People v. Thomas (1977) 19 Cal.3d 630 [commitment as narcotic addict]; Conservatorship of Roulet (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard.

In Santosky, supra, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The

> stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

The penalty proceedings, like the child neglect proceedings dealt with in Santosky, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (Id. at 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (Winship, supra, 397 U.S. at 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (Woodson, supra, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In Monge, the United States. Supreme Court expressly applied the Santosky rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([Bullington v. Missouri,] 451 U.S. at 441

(quoting Addington v. Texas, 441 U.S. 418, 423-424 (1979).)" (Monge v. California, supra, 524 U.S. at. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

C. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (California v. Brown, supra, 479 U.S. at 543; Gregg v. Georgia, supra, 428 U.S. at 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (People v. Fairbank, supra), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See Townsend v. Sain (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (People v. Fauber (1992) 2 Cal.4th 792, 859; People v. Rogers (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to

allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (In re Sturm (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (Id. at 267.)[27] The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (Harmelin v. Michigan, supra, 501 U.S. at 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; Section D, post), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See Mills v. Maryland (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (, supra, 4 Cal.4th at 79), its basis can be, and should be, articulated. People v. Demetrulias, supra, 39 Cal.4th at 41-42)

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27 A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

and "moral" (People v. Hawthorne, supra, 4 Cal.4th at 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-Furman state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, ante.)

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

D. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative

proportionality review – a procedural safeguard this Court has eschewed. In Pulley v. Harris (1984) 465 U.S. 37, 51 (emphasis added), the High Court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The High Court in Harris, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, 465 U.S. at 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can not be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in Furman v. Georgia. (See Section A of this Argument, ante.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, ante), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, ante). Viewing the lack of comparative proportionality review in the context of

the entire California sentencing scheme (see Kansas v. Marsh), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See People v. Fierro (1992) 1 Cal.4th, 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., People v. Marshall (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

E. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., Johnson v. Mississippi (1988) 486 U.S. 578; State v. Bobo (Tenn. 1987) 727 S.W.2d 945. Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant (See Statement of Facts, above, pp. 53-75) and devoted a considerable portion of its closing argument to arguing these alleged offenses (see 50RT 14235-250).

The High Court's recent decisions in United States v. Booker, Blakely v. Washington, Ring v. Arizona, and Apprendi v. New Jersey, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

F. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

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

G. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Edelbacher (1989) 47 Cal.3d 983, 1034). The jury, however, was

left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (Woodson v. North Carolina (1976) 428 U.S. 280, 304; Zant v. Stephens (1983) 462 U.S. 862, 879.)

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

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

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (People v. Kraft (2000) 23 Cal.4th 978, 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see People v. Memro (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (People v. Arias (1996) 13 Cal.4th 92, 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(People v. Morrison (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the Morrison case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (Id. at 727-29.) This Court recognized that the trial court so erred, but found the error to be harmless. (Ibid.) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., People v. Montiel (1994) 5 Cal.4th 877, 944-945; People v. Carpenter (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (People v. Boyd (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See Hicks v. Oklahoma (1980) 447 U.S. 343; Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and Campbell v. Blodgett (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so

believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (Stringer v. Black (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (Eddings, supra, 455 U.S. at 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

XXI. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., Monge v.

California, supra, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protectionsfor persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (People v. Olivas (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (Westbrook v. Milahy (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (People v. Olivas, supra; Skinner v. Oklahoma (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In Prieto,[28] as in Snow,[29] this Court analogized the process of

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28 "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (Prieto,

determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, People v. Demetrulias, supra, 39 Cal.4th at 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[30]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what

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supra, 30 Cal.4th at 275; emphasis added.)

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

[30] In light of the Supreme Court's decision in Cunningham, supra, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, ante.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[31] (Bush v. Gore (2000) 531 U.S. 98.)

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 374; Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, supra.)

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

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (Soering v.

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31 Although Ring hinged on the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (Ring, supra, 536 U.S. at 609.)

United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., Stanford v. Kentucky (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; Thompson v. Oklahoma (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, The Death Penalty: List of Abolitionist and Retentionist Countries (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in Miller v. United States (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; Hilton v. Guyot, supra, 159 U.S. at p. 227; Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now

bans the execution of mentally retarded persons, the United States 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 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See Atkins v. Virginia, supra, 536 U.S. at 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (Hilton v. Guyot (1895) 159 U.S. 113, 227; see also Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. 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."[32] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. Ford v. Wainwright (1986) 477 U.S. 399; Atkins v. Virginia, supra.)

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

CONCLUSION

Wherefore, for the foregoing reasons, this Court should reverse appellant's convictions and remand for a fair trial on guilt, or in the alternative, this Court should vacate appellant's sentence of death and remand for a fair penalty phase hearing.

DATED: February 5, 2010

Respectfully submitted,

Kathy Moreno

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Attorney for Appellant

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

CERTIFICATION PURSUANT TO
CALIFORNIA RULES OF COURT, RULE 8.630(b)(1)(A)

I, Kathy Moreno, attorney for Paul Smith, Jr., certify that this Appellant's Opening Brief does not exceed 102,000 words pursuant to California Rules of Court, Rule 8.630(b)(1)(A). According to the WordPerfect word processing program on which it was produced, the number of words contained herein is 82,392.

Executed under penalty of perjury this 5th day of February, 2010, in Berkeley, California.

Kathy Moreno
KATHY MORENO

CERTIFICATE OF SERVICE

Re: People v. Paul Smith, Jr.

I, Kathy Moreno, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at P. O. Box 9006 Berkeley, California 94709-0006. I served the attached

APPELLANT'S OPENING BRIEF VOLUME II

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Berkeley, California, addressed as follows:

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I declare under penalty of perjury that service was effected on February ___, 2010 at Berkeley, CA and that this declaration was executed on February ___, 2010 at Berkeley, CA.

_____
KATHY MORENO