IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRISTOPHER JAMES SATTIEWHITE, Defendant and Appellant.	No. S039894 (Ventura County Superior Court No. CR 31367)

Appeal From the Judgment of the
Superior Court of the State of California
for the County of Ventura

The Honorable Lawrence Storch, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in Appellant's Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

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ARGUMENT

I. THE TRIAL COURT'S FAILURE TO APPOINT THE DIRECTOR OF THE REGIONAL CENTER FOR THE DEVELOPMENTALLY DISABLED TO EVALUATE APPELLANT'S COMPETENCY VIOLATED DUE PROCESS AND REQUIRES REVERSAL.

The trial court's failure to appoint the director of the local regional center for the developmentally disabled to evaluate appellant under Penal Code section 1369 meant that appellant was not evaluated by a qualified individual, violating appellant's state and federal rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty, as well as his right to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; AOB 29-45.)[1]

A. The Trial Court's Failure to Have Appellant's Competency Properly Evaluated Violated Due Process.

Respondent argues that "the trial court was not required to order Penal Code section 1368 proceedings, suspend criminal proceedings, or appoint any psychiatrist or director of the regional center for the

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[1] In this brief "AOB" refers to Appellant's Opening Brief, "RB" refers to Respondent's Brief, "CT" shall refer to the Clerk's Transcript, "RT" to the Reporter's transcript, "SCT" to the Supplemental Clerk's Transcript, "2SCT" to the Second Supplemental Clerk's Transcript, and "ECT" to the Clerk's Transcript containing the Exhibits and Juror Questionnaires.

developmentally disabled to examine appellant" because no evidence was presented prior to or during trial that appellant had a developmental disability. (RB 57-69.) Respondent also argues that no evidence from the penalty phase may be considered in evaluating the court's actions. (RB 60.) Both assertions are incorrect. The duty to properly evaluate appellant's competence lay with the trial court alone, and that duty was present throughout the entire trial. The trial court's failure to have appellant evaluated by a competent expert, even in the face of undisputed evidence of a developmental disability, violated due process.

1. It was the responsibility of the trial court to initiate proper 1368 proceedings.

The duty to properly evaluate appellant's competency belonged to the trial court alone:

> "Competence cannot be waived, and the court has the initial and primary duty to act when the facts demonstrate the defendant's possible incompetency; it is the failure of the trial court to raise the issue and suspend proceedings, not the failure of defense counsel to raise the issue, which constitutes the jurisdictional error. [Citations]" (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1416-1417.)

Here, of course, defense counsel did, in fact, raise the issue by filing a formal written motion raising a doubt as to his client's competency. (1 CT 25; 1 RT 214-215.) Respondent argues that the trial court had no duty to appoint the regional center for developmental disability because neither defense counsel nor the appointed expert, Dr. Davis, requested such an

appointment nor flagged the issue. (RB 62.) Both are irrelevant.

> "Whether the appointment of the regional center director was specifically requested at the second competency hearing or not is irrelevant; when a doubt exists, the trial court must 'take the initiative in obtaining evidence on that issue.' [Citation.] At no time did [the defendant] receive the proper competency hearing to which she was legally entitled. [Citation.]" (*Id.* at 1419.)

During trial, as evidence of appellant's impairment mounted, the trial court had a further duty to act. As the *Castro* court held, "the court has the initial and primary duty to act when the facts demonstrate the defendant's possible incompetency." (*Id.* at 1416-17.)

Respondent further argues that there was no substantial evidence before the trial court which would raise a suspicion that appellant was developmentally disabled within the meaning of Penal Code section 1370.1(a)(1)(H). (RB 60; 68.) However, that section provides that developmental disability includes mental retardation or " handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals," and respondent concedes that the evidence that appellant suffered from brain damage and mental disability was *uncontroverted.* (RB 64-68.) Appellant's special education teachers testified that in high school he functioned at a second or third grade level in math and reading. (21 RT 3904, 3909.) Respondent agrees that the prosecution psychiatrist did not dispute that appellant suffered from physical brain damage and dysfunction, and

operated at a second grade level. (RB 67; 23 RT 4472, 4484, 4486.)

In light of this overwhelming evidence, the trial court had a duty to suspend the proceedings - at any point in the trial - and order a proper competency evaluation and hearing. As the *Castro* court held:

> "[T]he presence of the requisite substantial objective evidence compels the trial court to sua sponte suspend proceedings and order a hearing, and the court's failure to do so in the face of such evidence is an act in excess of its jurisdiction and may be raised by the defendant on appeal from the judgment. [Citations.]" (*People v. Castro, supra,* 78 Cal.App.4th at p. 1416.)

The trial court's failure to do so meant that appellant was never evaluated by a qualified expert in violation of due process.

2. Appellant's competence was not assessed by an appropriate evaluator.

As this Court noted in *People v. Leonard* (2007) 40 Cal.4th 1370, "[a] valid assessment of a criminal defendant's ability to stand trial requires a comprehensive, individualized examination of the defendant's ability to function in a court proceeding. A reliable assessment is achieved through thorough examinations of each individual by experts experienced in developmental disabilities." (*People v. Leonard, supra,* 40 Cal.4th at pp. 1389-1390.) As noted above, it was undisputed that appellant suffered from significant brain damage at birth. (See 21 RT 3968, 3992, 22 RT 4168-69, 4282, 4300, 4316-4317, 23 RT 4470, 4472.) Lack of oxygen at birth had killed the upper neurons in the brain, resulting in significant damage, both

physically and mentally. (21 RT 3968-69, 3979.) At trial, appellant's neuro-developmental age was between 6 and 7 years old. (21 RT 3981.) Yet the psychologist's report, which was the only evidence considered by the court, states only that appellant "appears to function within a Low Average to Borderline level of intelligence. He states that he has learning disabilities but was unable to elaborate." (1A ECT 20.) In another place in her report, the psychologist notes that "[h]e [appellant] was in special education 'something to do with a learning disability.' He did not elaborate on this." (1A ECT 19.) The psychologist did not perform any IQ testing and there is no discussion of mental retardation or brain damage. She was provided with a cover sheet from an IQ exam. (1A ECT 18.) Appellant's IQ score of 73 was in the second or third percentile, meaning that 98 out of 100 people his age score higher. (22 RT 4282.) Yet here, as in *Castro*, the psychologist did not directly "attempt to determine [the defendant's] intelligence level or assess the extent of [his] developmental disability." [*Castro, supra*, 78 Cal.App.4th at p. 1418.]" (*People v. Leonard, supra,* 40 Cal.4th at pp. 1389-1390.) Instead, the psychologist asked appellant about the issue and stopped her analysis when appellant was unable to "elaborate."

It is clear that appellant was not properly evaluated by a qualified individual in violation of appellant's constitutional rights to due process, a fair jury trial and a reliable capital trial. (U.S. Const., 5th, 6th, 8th, & 14th

Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Reversal is required.

B. Unconditional Reversal is Required.

Respondent does not dispute that, given the length of time since appellant's trial, there can be no constitutionally adequate post-appeal evaluation of the appellant's competence at trial. (RB 57-69.) In *Drope v. Missouri* (1975) 420 U.S. 162, 183 [95 S.Ct. 896, 909], the United States Supreme Court held:

> "The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, see *Pate v. Robinson*, 383 U.S., at 386-387 [95 S.Ct. at pp. 842-843]; *Dusky v. United States* [(1960)], 362 U.S. [402,] 403 [80 S.Ct. 788, 789, 4 L.Ed.2d 824] we cannot conclude that such a procedure would be adequate here. Cf. *Conner v. Wingo* [(6th Cir. 1970)] 429 F.2d [630,] 639-640. The State is free to retry petitioner, assuming, of course, that at the time of such trial he is competent to be tried."

The *Drope* court reversed unconditionally because the evaluation would be made after a delay of six years. Here, appellant's reply brief is being filed in 2010, sixteen years after appellant was tried. "Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances," there simply is no procedure that would be adequate here. The case must be reversed unconditionally, with directions to the Ventura County Superior Court that, should appellant be re-tried, it has a *sua sponte* duty to declare a doubt as to his competence based upon a possible

developmental disability that may impair his ability to understand the nature of the proceedings or assist counsel in the conduct of the defense in a rational manner. (*Drope v. Missouri, supra,* 420 U.S. at 183; *People v. Castro*, *supra*, 78 Cal.App.4th at p. 1420.)

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II. THE TRIAL COURT COMMITTED PER SE REVERSIBLE ERROR IN DENYING APPELLANT'S *BATSON-WHEELER* MOTION.

The trial court erroneously found that there was no prima facie case of discrimination after the prosecutor used a peremptory challenge to strike the only African-American from the jury panel. The trial court's failure to find a prima facie case of discrimination violated appellant's state and federal constitutional rights. (AOB 46-57; *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.)

A. Because the Trial Court Erroneously Denied the *Batson/Wheeler* Motion Under the Wrong Legal Standard, Review is *De Novo*.

In ruling upon appellant's motion, the trial court explicitly stated that it was using the unconstitutional "strong likelihood" standard of *Wheeler* rather than the proper "reasonable inference" standard of *Batson*. (See *Johnson v. California* (2005) 545 U.S. 162 , 125 S.Ct. 2410, 2419; 6 RT 1146.) Respondent agrees that, because the court's ruling was made under the wrong standard, it is entitled to no deference and this Court's review is *de novo*. (RB 79-80, citing *People v. Cornwell* (2005) 37 Cal.4th 50, 66.) Because appellant raised an inference of discrimination, the trial court's failure to demand and evaluate the prosecution's reasons violated appellant's federal constitutional rights to a fair trial, due process, and equal protection of the law, and state and federal constitutional rights to a trial by a jury drawn from a representative cross-section of the community. (U.S.

Const., 6th & 14th Amends; Cal. Const., art. I, § 16.) These constitutional errors require that the case be remanded to the trial court for completion of the *Batson-Wheeler* inquiry.

B. The Trial Court Erroneously Denied the *Batson/Wheeler* Motion Based Upon a Mistake of Fact; Appellant Had Established a Prima Facie Case.

While agreeing that the trial court used the incorrect legal standard in its ruling, respondent argues that the record supports the trial court's finding that prospective juror Paul M. was equivocal in his attitude towards the death penalty. (RB 80-84.) However, the court's ruling was based upon a clear factual error - the court specifically cited one particular passage of Mack's voir dire as showing an "equivocal" attitude towards the death penalty (3 RT 479, lines 15-23):

> "Q: Well, excluding children for a moment, let's say that a killing that was the result or pursuant to a rape or kidnaping.
>
> Do you think you could remain open in a situation like that or do you think you might come back or would come back with a verdict of voting for the death penalty?
>
> A: No, I don't think I can just put that person to death penalty for that. I don't think I can do that."

From this passage the court concluded that "this particular juror was, from my evaluation of his testimony, in most instances favoring life without parole as contrasted with the death penalty." (6 RT 1239.) However, an

examination of the full colloquy demonstrates that the court's conclusion was patently incorrect; what the court left out was the colloquy that preceded and followed the cited section. As discussed in the AOB, Mr. Mack, a college graduate and school teacher, had stated on his questionnaire that the death penalty was used too seldom and ranked himself an eight on a scale of ten in favor of the death penalty. (AOB 47-51; 4 SCT 866.) He had no religious opposition to the death penalty or judging other people. (*Ibid.*) When asked to summarize his general feeling about the death penalty, he wrote: "If someone takes someone's life then they should die." (*Ibid.*) From the questionnaire alone, it appeared Mr. Mack would automatically impose the death penalty for any murder. When questioned by defense counsel about his questionnaire responses, Mr. Mack replied as follows:

> "Q: Well, I noticed on your questionnaire that you are of the opinion that the death penalty is exercised too seldom.
>
> Could you elaborate on that somewhat?
>
> A: Let me go back and look at exactly what I wrote up. Remember what pages this is on?
>
> Q: This would have been question 52 on page seven.
>
> A: Oh, okay. I be – this if someone can be proven that they have evidence to prove that the persons are guilty and some other people have died because of this, that I think the person should also receive – should – death

penalty also.

Q: Okay. Well, let me ask you this, then sir. If everyone that kills someone – and I am excluding those cases where there is a self-defense or defense of others. But in every killing where one kills another, you think they should automatically receive the death penalty?

A: Not each one, no.

Q: Okay. Do you have in mind what kind of case would merit, say, life without parole?
Let me – you do understand there are two options?

A: Yes, I do, uh-huh, yes.

Q: Do you have some set of circumstances in your mind where you think that would merit life without parole?

A: Not really. I really don't have any exactly. I just thought about what – if people lose their lives and young children or someone else, that – I think that really crossed my mind.

Q: Well, excluding children for a moment, let's say that a killing that was the result or pursuant to a rape or kidnaping.
Do you think you could remain open in a situation like that or do you think you might come back or would come back with a verdict of voting for the death penalty?

A: No, I don't think I can just put that person to death penalty for that. I don't think I can do that.

Q: Okay.

A: ***I'd have to listen with a wide open mind before I make a decision about that.***" (3 RT 478-479;

emphasis added.)

Thus, seen in its proper context, the passage cited by the trial court actually showed that Mr. Mack was actually a strong supporter of the death penalty but would listen with a "wide-open mind" before deciding between death and life without parole. Mr. Mack's responses were not "equivocal" except in the sense that he would freely consider both penalties and the trial court was simply wrong in both the factual basis and legal standard used in its ruling.

The trial court itself noted that its ruling was based solely upon Mack's alleged "equivocal" answers, which it

> "....[c]ontrasted with the situation where the juror says I am open minded on the subject, I can consider all of the evidence, I don't have any leanings one way or the other. I think there you have a neutral type person, generally speaking, and I think in that context that would present a closer question on whether or not you have made out of [sic] the prima facie case." (6 RT 1239.)

Here, in fact, that was exactly the situation: Mack explicitly stated that he would listen with a "wide open mind" before making a decision. Thus, the trial court's ruling was based upon clear factual error. By establishing that the *only* available African-American juror - a juror strongly in favor of the death penalty but still able to be fair and impartial - was excused by the prosecution, defense counsel made a prima facie case of discrimination. (See, e.g., *U.S. v. Horsley* (1989) 864 F.2d 1543 [prima facie case of purposeful discrimination may be established by peremptory

challenge of sole black on jury panel]; *U.S. v. Chinchilla* (1989) 874 F.2d 695, 698, fn. 5 ["...although the striking of one or two members of the same racial group may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury."].)

The trial court's ruling that no prima facie case had been made, based upon both factual and legal errors, violated appellant's rights to a trial by jury, equal protection, and due process. (*People v. Wheeler, supra,* 22 Cal.3d 258*; Batson v. Kentucky, supra,* 476 U.S. 79; Cal.Const., art. I, § 16 [right to jury drawn from representative cross-section of the community]; U.S. Const., 5th, 6th & 14th Amends. [due process and equal protection clause]; *Hicks v. Oklahoma, supra,* 447 U.S. 343, 346 [violation of rights under state law also a Due Process violation.)

C. Remand to the Trial Court Is the Appropriate Remedy.

Respondent does not dispute that the appropriate remedy for an erroneous finding that no prima facie case had been made is remand. (RB 69-84.)[2] This case must be remanded to the trial court for completion of the *Batson/Wheeler* inquiry. (*People v. Johnson* (2006) 38 Cal.4th 1096

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[2] As respondent notes, comparative juror analysis is inappropriate in this case as the trial court found that no prima facie case of discrimination was made out and failed to evaluate any reasons provided by the prosecution. (RB 84, fn. 84.) The proper remedy is remand for completion of the inquiry.

[determining whether the prosecution's peremptory challenges were based on impermissible group bias is a matter best left to the trial court after a remand of the case to that court.].)

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III. THE TRIAL COURT IMPROPERLY ADMITTED AUTOPSY AND CRIME SCENE PHOTOGRAPHS THAT SERVED NO PURPOSE OTHER THAN TO INFLAME THE JURY, REQUIRING REVERSAL OF BOTH THE GUILT AND PENALTY PHASES.

Appellant objected to the use of photographs of the victim, including closeups of the wounds and autopsy photographs, and moved the trial court to exclude all such evidence as highly inflammatory and prejudicial. The trial court overruled each objection. Appellant's opening brief demonstrated that the crime scene and autopsy photographs were irrelevant to any disputed issue of fact and were unduly inflammatory in both the guilt and penalty phases of the trial. The trial court erred in failing to exclude them under Evidence Code section 352 and in doing so, violated appellant's constitutional rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

A. The Issue is Preserved For Appeal.

Respondent argues that trial counsel waived any claim regarding admission of People's Exhibits 5, 6, 7, 23, 24, and 25 because he failed to object to admission of the photographs before the witness actually testified before the jury, citing *People v. Stansbury* (1993) 4 Cal.4th 1017, 1049. (RB 88.) However, trial counsel objected to the crime scene and autopsy photographs before trial started and continued to object when the various

photos were moved into evidence. (See 11 RT 2019, 2030-31, 12 RT 2172-2174, 2111-2114, 2155-2156.) The trial court overruled each objection. (*Ibid.*) In fact, the prosecutor eventually asked that one of the defense counsel be barred from making speaking objections because he was making speeches. (12 RT 2115.) In *Stansbury*, this Court noted that "*in limine* motions to exclude evidence normally must be renewed when the evidence is introduced at trial in order to preserve the issue for appeal. [Citation.] Nonetheless, as the motion was advanced on a specific legal theory, was directed to a 'particular, identifiable body of evidence,' and the motion was made 'at a time...when the trial judge [could] determine the evidentiary question in its appropriate context,' we decline to find the issue was waived for purposes of appeal. [Citations.]" (*Ibid.*) Here, appellant objected to the photos early and often and the trial court made its rulings on the merits. The issue was not waived.

Respondent further argues that appellant has waived all federal constitutional claims as to the photographs, citing *People v. Partida* (2005) 37 Cal.4th 428, 433-439. However, in *Partida* this Court refused to impose formalistic requirements limiting the scope of its review. Instead, it held that an issue is preserved for appeal if it "entails no unfairness to the parties," who had the full opportunity at trial to litigate whether the court should overrule or sustain the trial objection. (*Id.* at p. 436, quoting *People v. Yeoman* (2003) 31 Cal.4th 93,118.) Most importantly, it emphasized

that the legal consequences of an objection - the constitutional violation that resulted from the trial court's ruling - was a matter for the reviewing court to assess, and not the trial court. (*Id.* at p. 437.) Thus, it found that a defendant on appeal may argue federal constitutional consequences of an asserted error. (*Id.* at p.438.)

Here, appellant's objections gave the trial court full opportunity to determine whether the photographs deprived appellant of a fair and reliable trial. Moreover, the trial court's rulings implicated federal constitutional issues. Thus, the constitutional issues implicated in the trial court's rulings should be reviewed by this Court. (*Ibid.*)

B. The Photos Were Irrelevant to Any Disputed Issue.

No evidence is admissible unless it relates to a disputed fact that is of material consequence. (Evid. Code § 210.) Accordingly, a trial court has no discretion about whether to admit irrelevant evidence. (*People v. Turner* (1984) 37 Cal.3d 302, 321, overruled on another ground in *People v. Anderson* (1987) 43 Cal.3d1104, 1149 [error to admit crime scene photos that were unnecessary to prove any part of the prosecution's case].)

Here, the trial court found that the photographs had some evidentiary value and that their prejudicial effect did not outweigh their probative value. (See 11 RT 2114.) However, appellant did not dispute the nature of the wounds that the victim received, the manner of death, or any other fact that the photographs might depict. Respondent argues, as did the prosecution,

that the photographs were relevant to show that the victim's wounds were contact wounds, and that the victim had received a blow to the head rendering her unconscious, and that contact wounds and blow were evidence of premeditation and deliberation. (RB 89-90; 12 RT 2173.) However, the *fact* of the contact wounds and blow to the head were completely undisputed. (See 18 RT 3276; 12 RT 2170.) The *inference* of premeditation was a matter for argument based upon those undisputed facts. Accordingly, the autopsy and crime scene photographs were irrelevant and should have been excluded.

C. The Photographs Were More Prejudicial than Probative.

Respondent argues that the photographs were not excessively bloody or gruesome so they could not have impermissibly swayed the jury within the meaning of Evidence Code section 352. (RB 90-91.) However, in light of the fact that the photographs were cumulative and irrelevant, the prejudicial impact of, for example, People's 25, a picture of the victim with her scalp peeled away from her skull during the autopsy - ostensibly introduced into evidence to show the bruise that she had received from a blow - clearly outweighed its probative value. (12 RT 2173-74.)

Respondent, like the trial court, and indeed all of the professionals involved in this matter - is simply too accustomed to such photos to accurately gauge their effect upon jurors. As shown in appellant's opening brief, numerous studies have shown that such graphic photographs have a

dramatic effect on juries and influence the verdicts that juries return. (AOB 63-67; See Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].) The photos were both cumulative and prejudicial and their admission was erroneous.

D. Admission of the Photos Compels Reversal.

Respondent argues that any error in admitting the photos was harmless in light of the overwhelming guilt and penalty phase evidence. (RB 91-93.) However, this case was closer than respondent acknowledges. During penalty deliberations the jury sent a note to the trial court asking "[I]f we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) Thus, the impact of the photos was profound. First, a shocking, poster-size photo of the partially-clad body of a woman lying in a pool of her own blood was put up and left up for almost the entire trial only a few feet away from the jury box. (See 18 RT 3384, see also 3223, 3336, 3340, 3349.) That was followed by a barrage of close-up photographs of the wounds, photos of pools of blood and multiple angles of the victim at the crime scene, culminating in Exhibit 25, the picture of the victim with her scalp peeled away from her skull during the autopsy. (12 RT 2173.)

In the final argument of the penalty phase, the prosecutor

emphasized the importance of the huge blow-up picture of the victim lying in the ditch in a pool of blood, saying the photo was very important - but not, as the prosecution had previously argued to the court - to show the location or nature of the wounds. Instead, the prosecutor told the jury, "It [the photo] allows you to appreciate the horror, the terror she must have felt and it allows you to put in balance and perspective what the appropriate punishment is." (RT 4574.) In other words, the photo was important for its emotional impact. It is just this type of graphic evidence and improper argument that is incompatible with a rational or impartial penalty judgement. (See *Saffle v. Parks* (1990) 494 U.S 484, 493 [death penalty must be reasoned moral response rather than emotional one].) The death judgment must be reversed.

* * *

IV. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF KIDNAPPING AND THE TRUE FINDING ON THE KIDNAPPING SPECIAL CIRCUMSTANCE.

Appellant was convicted of capital murder on the uncorroborated testimony of Bobby Rollins, a man who could have been charged with the same crime, and who escaped prosecution and punishment by testifying against appellant. This was a violation of appellant's rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

A. The Prosecution's Only Evidence For A Kidnapping Was the Uncorroborated Testimony of Accomplice Bobby Rollins.

Respondent does not dispute that Rollins was an accomplice and agrees that Rollins' testimony must be corroborated. Respondent also concedes, as did the prosecutor, that there is no evidence about whether Gonzales had joined the men in the Cadillac consensually. (RB 93-98.) Instead, the prosecution theory was that Gonzales was kidnapped at the Mira Loma apartment complex and moved to Arnold Road against her will. (RB 96, fn. 43.) The sole "corroboration" for Rollins' story that the prosecutor could point to was that Lydia Sattiewhite had testified that Rollins had called her that night and said that he was calling from behind a "Sav•On" drugstore. (18 RT 3259.) This testimony corroborates nothing.

Corroborating evidence need not by itself establish every element of the crime, but it must, *without aid from the accomplice's testimony*, tend to connect the defendant with the crime. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 986, emphasis added.) Here, the only evidence that the car was ever at the Mira Loma apartments or that a kidnapping *even occurred* was Rollins' testimony and the "corroborating evidence" used by the prosecutor does not establish a crime, much less appellant's connection to it. (*Ibid.*)

Respondent does not attempt to argue that Lydia Sattiewhite's testimony was somehow corroborating. Instead, respondent points to two different items to corroborate Rollins' testimony:

> "Rollins's testimony is still sufficiently corroborated by the medical expert testimony which shows Genoveva was raped before appellant carried her into the ditch on Arnold Road to murder her. Moreover, appellant's statement to the police provides additional corroboration because he confirmed that Rollins was not with appellant and Jackson when they took Genoveva." (RB 98.)

Both points are irrelevant. Again, neither Woodling's testimony nor appellant's statement establishes that a kidnapping occurred, much less appellant's connection to it. (*People v. McDermott, supra,* 28 Cal.4th at p. 986.)

It has long been recognized that only movement accomplished by force can sustain a charge of kidnapping. (See *People v. Stanworth* (1974) 11 Cal.3d 588, 602; *People v. Harris* (1979) 93 Cal.App.3d 103, 114.)

Thus, when the victim consents to the asportation there is no violation of Penal Code section 207. (*People v. Harris, supra*, 93 Cal.App.3d at p. 114.) Kidnapping cannot be accomplished by means of fraud or inducement by fraud or deceit (*People v. Green* (1980) 27 Cal.3d 1,64; *People v. LaSalle* (1980) 103 Cal.App.3d 139, 162.)

Here, the only evidence of force was Rollins' uncorroborated testimony that, after he had seen a woman in the back of the car with Jackson, appellant told him that Jackson had just "gaffled" the lady. (13 RT 2399.) Rollins testified that he understood that to mean "snatched up." (13 RT 2401.) There simply is no other evidence in the present case to suggest that there was any kidnapping.

B. Reversal is Required.

The trial court instructed on first degree murder based on felony-murder as well as premeditation and deliberation. The trial court noted that the case had been submitted to the jury under both premeditation and felony-murder theories, and that it could not be told from the verdict which theory they had adopted. (24 RT 4735.) Thus, this Court cannot know whether the jury actually based its conviction of appellant on premeditation or on an invalid felony-murder theory, and "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect; and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the

conviction cannot stand." (*People v. Guiton* (1993) 4 Ca1.4th 1116, 1122; see also *Zant v. Stephens* (1983) 462 U.S. 862, 879 ["a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground"].) In this case at least one of the three theories of culpability were flawed and the jury was not required to agree on which type of first degree murder was committed. Appellant's conviction of first degree murder was fundamentally tainted and must be reversed. (*Zant v. Stephens, supra*, 462 U.S. at p. 879.)

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V. THE TRIAL COURT'S ERRONEOUS INSTRUCTION ON THE CONSENT DEFENSE TO KIDNAPPING WAS REVERSIBLE ERROR.

Appellant has shown that, despite the fact that there was no substantial evidence to show that Gonzales had been anything other than a willing passenger in the car with the three men, the instructions given in this case allowed the jury to find that the entire asportation was non-consensual because those instructions embodied an erroneous definition of consent. The erroneous definition of an element of the crime violated appellant's right to trial by jury, his due process right to have every element of the crime proved beyond a reasonable doubt, and his due process right to a fair trial and reliable penalty trial. (U.S. Const., Amends. 5th, 6th, 8th & 14th; Cal. Const., art. I, §§ 7, 15, 16, 17.)

Respondent states, as appellant acknowledged in his opening brief, that this Court has rejected similar arguments in other cases. (RB 100-105, citing *People v. Davis* (1995) 10 Cal.4th 463.) Appellant has acknowledged the *Davis* decision and asked the Court to reconsider its reasoning, both as a matter of law and in the context of this case. The arguments contained in appellant's opening brief set forth the reasons establishing why this Court should revisit the issues. The matter is fully joined and there is no need for further briefing at this time.

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VI. IF ANY COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE DEATH VERDICT MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE.

Appellant has shown that, if this Court reduces or vacates any of the counts or special circumstances, the penalty verdict should be reversed. This is so because the jury's consideration of the unauthorized factors in aggravation added improper weight to death's side of the scale and violated appellant's right to a fair trial and reliable penalty determination. (AOB 100-102; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. I, sect. 17; *Stringer v. Black* (1992) 503 U.S. 222, 232.)

Respondent argues that, as there was no reversible error as to any count or special circumstance, no reversal of the penalty verdict is warranted. Respondent also argues that the death verdict should stand if any special circumstance remains, as all evidence underlying the special circumstances was admissible at penalty phase under Penal Code section 190.3, subdivision (a), citing *Brown v. Sanders* (2006) 546 U.S. 212, 220-221. (RB 105.) Section 190.3 codifies the factors that a trier of fact may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's jury was guided by CALJIC No. 8.85 which instructs that the trier "shall" consider and be guided by the presence of enumerated factors, including, *inter alia*, "the circumstances of the crime of which the

defendant was convicted." (Pen. Code, § 190.3, factor (a); 3 CT 446-47; 24 RT 4670-72; CALJIC No. 8.85.)

The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, appellant must be granted a new penalty trial, to enable the fact-finder to consider the appropriateness of imposing death.

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VII. THE TRIAL COURT PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS IN INSTRUCTING THE JURY ON FIRST-DEGREE PREMEDITATED MURDER AND FIRST-DEGREE FELONY MURDER BECAUSE THE INDICTMENT CHARGED APPELLANT ONLY WITH SECOND-DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187.

Appellant has shown that his conviction of first degree murder must be reversed, because the indictment did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder. Instructing the jury that it could convict appellant of uncharged crimes violated appellant's rights to notice of the charges against him, due process of law, fair trial, and a reliable capital verdict. (AOB 103-111; U.S. Const., 5th, 6th, 8th & 14th Amends.; Calif. Const., art. I, §§ 7, 15, 16, & 17.) . Respondent relies on previous decisions of this Court rejecting similar claims. (RB 105-106.) Because this issue has been addressed fully in Appellant's Opening Brief, no further briefing is needed here.

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VIII. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, IN THAT DURESS COULD HAVE NEGATED MALICE AS WELL AS PREMEDITATION AND DELIBERATION.

In appellant's opening brief, he has shown that the failure to instruct on the lesser-included offense of voluntary manslaughter deprived him of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519; *Beck v. Alabama* (1980) 447 U.S. 625, 637. Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

Respondent argues that duress is not a defense to murder, citing *People v. Anderson* (2002) 28 Cal.4th 767. (RB 106-108.) However, *Anderson* is inconsistent with the well-established principle that, as a factual matter, duress can negate malice, as well as premeditation and deliberation. (*People v. Beardslee* (1991) 53 Cal.3d 68, 85; *People v. Caldwell* (1984) 36 Cal.3d 210, 218; *People v. Flannel* (1979) 25 Cal.3d 668, 680; *People v. Coad* (1986) 181 Cal.App.3d 1094, 1106.) Appellant therefore should have had the right to argue that right to argue that duress negated malice, thereby reducing the charge to voluntary manslaughter. (*People v. Breverman* (1998) 19 Cal.4th 142, 170, fn. 19.) Here, in giving the intoxication and duress instructions, the trial court found substantial

evidence that appellant was intoxicated and that Rollins threatened to "smoke" [kill] appellant. Even the prosecutor conceded there was an evidentiary basis for the duress instruction. (See 17 RT 3090.) A reasonable jury could infer that appellant killed the victim only out of fear that appellant would be killed as well. Lydia Sattiewhite, appellant's sister and Rollins' girlfriend, testified that Rollins told her that he had told appellant to "smoke" [kill] her because he was always standing around watching them and never took part in the "dirt." (16 RT 2955.) Rollins had told appellant that if he didn't smoke her, Rollins was going to smoke Gonzales and then appellant, too. (16 RT 2959.)

The *Breverman* court made clear that " 'no specific type of provocation [is] required ....'" [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any "'*[v]iolent, intense, high-wrought or enthusiastic emotion*'" [Citations] other than revenge [Citation.]" (*Id.* At 163, emphasis added.) Here, appellant was told that if he did not kill Gonzales, Rollins would kill her and then kill appellant. Being told to kill someone else or die yourself would certainly cause a "violent, intense, high-wrought or enthusiastic emotion."

Thus, as defense counsel argued to the court (17 RT 3068), "a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*Breverman* at pp. 163-164.)

Respondent quotes the *Anderson* decision as stating that "[t]he problem with making a killing under duress a form of manslaughter is that no statute so provides," and that there was "no basis on which to create a new, nonstatutory, form of voluntary manslaughter." (RB 108; *People v. Anderson, supra,* 28 Cal.4th at 782-783.) This Court, however, has also held that:

> "Since manslaughter is a "catch-all" concept, covering all homicides which are neither murder nor innocent, it logically includes some killings involving other types of mitigation, and such is the rule of the common law. For example, if one man kills another intentionally, under circumstances beyond the scope of innocent homicide, the facts may come so close to justification or excuse that the killing will be classed as voluntary manslaughter rather than murder. [Perkins on Criminal Law (2d ed. 1969) pp. 69-70.]"

(*People v. Flannel, supra*, 25 Cal.3d at pp. 679-680; see also *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197 ["[t]he focus of *Flannel* is that a person who honestly believes there is an imminent threat to his own life or the lives of others cannot harbor malice"].) The jury in this case should have been given the opportunity to decide whether Rollins' threats meant that appellant could not harbor malice. It is also clear that "duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony. [Citations.]" (*People v. Anderson, supra,* 28 Cal.4th 784.)

Respondent does not dispute that, if the instruction was required, the trial court's failure to do so was prejudicial because it was not harmless

beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is required.

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IX. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY WITH AN UNMODIFIED VERSION OF CALJIC 2.11.5, THE INSTRUCTION PERTAINING TO UNJOINED PERPETRATORS.

Appellant's opening brief has shown that Bobby Rollins was an accomplice who potentially faced a death sentence for the same crime, but was given immunity in exchange for his testimony. (14 RT 2490.) The trial court properly instructed the jury that accomplice testimony was to be distrusted and must be corroborated (See CALJIC 3.18, 3.11; 2 CT 275, 272), but then inexplicably instructed the jury not to consider why Rollins had not been charged in the case. (CALJIC 2.11.5; 2 CT 249; 19 RT 3396.) The instruction violated appellant's constitutional rights to due process, a fair trial and a reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

Respondent agrees that the trial court erred, but argues that the claim is waived by appellant's failure to object that the instruction should be limited to co-defendant Jackson, citing *People v. Sully* (1991) 53 Cal.3d 1195, 1218. (RB 109-110.) The law is clear, however, that instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998)18 Cal.4th 470 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error, nor must a defendant request modification or amplification

when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) Here, as respondent agrees, the law is well settled that CALJIC No. 2.11.5 should not be given with respect to an unjoined perpetrator who testifies at the defendant's trial. (RB 110, citing *People v. Brasure* (2008) 42 Cal.4th 1037, 1055.) The trial court therefore failed in its fundamental instructional duty.

Respondent also argues that the error was harmless. (RB 110.) The error was not harmless. "Out of necessity, the appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748.) Rollins was the heart of the prosecution's case. His testimony was the *only* direct evidence for the rape and kidnapping charges and special circumstances, and no percipient witness other than Rollins testified about the events of that night. Appellant's defense hinged on showing Rollins to be a liar who testified to save his own life and walk away from two sets of other charges with a slap on the wrist. The trial court's error prevented the jury from properly evaluating appellant's defense and Rollins' credibility. Reversal is required.

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X. CALJIC No. 2.51 IMPROPERLY ALLOWED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE.

Instruction of the jury with former CALJIC No. 2.51 allowed the jury to determine guilt based on the presence of an alleged motive and shifted the burden of proof to require appellant to establish his innocence. Indeed, the instruction contributed to the prosecutor's argument that "the key to solving every case is motive," and emphasizing that "the law does say that if there is motive it tends to establish guilt." (18 RT 3337.) Use of the instruction violated appellant's state and federal constitutional rights to due process and a reliable penalty verdict.[3] (AOB 125-131.) Respondent argues, as appellant acknowledged in his opening brief, that this Court has rejected similar arguments in other cases. (RB 111-112, citing *People v. Cleveland* (2004) 32 Cal.4th 704, 750.) Appellant has acknowledged these decisions and asked the Court to reconsider them, both as a matter of law or in the context of this case. Because this issue has been addressed fully in Appellant's Opening Brief, no further briefing is needed here.

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[3] Respondent contends that this claim is effectively waived because appellant failed to object or request a clarifying instruction. (RB 112.) Penal Code section 1259 does not require any objection - or "clarifying instruction" - for an instructional error that affects the substantial rights of a defendant. The instruction implicated constitutional rights and did not require an objection or request for clarification to preserve the issue for appeal.

XI. THE TRIAL COURT'S FAULTY EXPLANATION OF THE TRIAL PROCESS AND ERRONEOUS GUILT-PHASE INSTRUCTIONS DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT AND VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In the trial in this matter, the trial court repeatedly and erroneously described the first phase of the trial to the jury as determining guilt or innocence - and commented that one could call it an "innocence trial." (See, e.g. 7 RT 1311.) A number of the jury instructions given during the guilt phase then misled the jury regarding the reasonable doubt standard and impermissibly lightened the prosecution's burden of proof. Respondent relies on this Court's rulings that have affirmed the instructions at issue. (RB 112-120, citing *People v. Whisenhunt* (2008) 44 Cal.4th 174; *People v. Guerra* (2006) 37 Cal.4th 1067; *People v. Nakahara* (2003) 30 Cal.4th 705, 714.) Appellant acknowledges these rulings, but submits that this Court should reconsider its decisions in light of the faulty instructions' interplay with the trial court's erroneous description of the trial as an "innocence trial." Because this issue has been addressed fully in Appellant's Opening Brief (AOB 132-144), no further briefing is needed here.

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XII. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT AND PENALTY PHASES, AND THOSE CLAIMS WILL BE RAISED BY PETITION FOR WRIT OF HABEAS CORPUS.

As respondent correctly notes, appellant, in reliance upon this Court's precedents, will raise his ineffective assistance of counsel claims only in his petition for writ of habeas corpus. (RB 120; AOB 145; *In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; accord, *People* v. *Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

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XIII. THE TRIAL COURT'S FAILURE TO ADDRESS THE TIME CONFLICTS OF THREE SEPARATE JURORS TAINTED THE PENALTY VERDICT AND REQUIRES REVERSAL.

Jurors #3, #4, and #8 all felt pressured to end the penalty deliberations swiftly: juror #3 had a job promotion test on March 29th, juror #8 had a conference in Las Vegas from March 29th through March 31st, and juror #4 was using up her own vacation time for the trial, and the trial court's failure to recess deliberations, replace the jurors or even caution the jury not to hasten their deliberations - tainted the verdict in violation of due process guarantees and left the death sentence unreliable under Eighth Amendment standards. (AOB 146-150.)

Respondent argues that this claim is waived because trial counsel failed to ask that any juror be excused under section 1089. This is incorrect. A jury rushing to render a verdict due to outside time pressures is a fundamental violation of due process and renders the death verdict unreliable under Eighth Amendment standards. "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. [Citations.]" (*People v. Vera* (1997) 15 Cal.4th 269, 276 -277; accord, *People v. Saunders* (1993) 5 Cal.4th 580, 592, 589 fn. 5; *People v. Valladoli* (1996) 13 Cal.4th 590, 606.)

Respondent further argues that nothing in the record indicates the three jurors were unable to perform their duties as jurors. (RB 122-123.)

However, the sequence of events indicates quite clearly that the jurors' time pressures rushed them from a seeming deadlock to a death verdict. The jury had been deliberating for three days when the trial court gave its reply regarding the jurors' other commitments, and the jury next asked the court what would happen if they were unable to reach a unanimous decision. (3 CT 556.) It is clear that the jury was divided and far from reaching a verdict. After the court's reply, they recessed for the day and then returned a verdict after only three hours of deliberations on the 28th, just before jurors #3 and #8 needed to leave town. (3 CT 558.) The timing of the verdict speaks for itself, and its speed underscores the coerciveness of the situation. The deadline imposed by the jurors' travel and work plans and the trial court's responses created an inherent "pressure to bring the penalty deliberations to a speedy close." (*People v. Lucas* (1995) 12 Cal.4th 415, 489; see also *People v. Beeler* (1995) 9 Cal.4th 953, 1013 (conc. and dis. opn. of Kennard, J.) [great risk that jurors "unconsciously or otherwise" would hasten deliberations].) Yet the trial court failed to recess deliberations, replace the jurors, question any of the jurors about whether they would let those commitments play a conscious part in the penalty decision, or even caution them against hastening their deliberations.

There was substantial mitigating evidence before the jury. Appellant had been born with significant brain damage at birth. (See 21 RT 3968, 3992, 22 RT 4168-69, 4282, 4300, 4316-4317, 23 RT 4470, 4472.) His

neuro-developmental age was between 6 and 7 years old, but his ability to deal with moral judgments, consequences, or relationships with people was below that of an average 6 or 7-year-old. (21 RT 3981, 3991-3992.) He had undergone a lifetime of beatings by his father, who would also have appellant watch violent pornographic movies with him. (See 21 RT 3832-33, 3865.) After deliberating upon these facts for three days, the jury's note to the court specifically asked "if we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) Then, when the jurors' external commitments were almost upon them, a verdict was suddenly reached. Contrary to respondent's contention, the effect of those external commitments is clear.

A formerly deadlocked jury hurried into a death verdict to meet external obligations, and the trial court's error in rushing them along cannot be said to be harmless beyond a reasonable doubt. Accordingly, the penalty verdict must be reversed. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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XIV. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR MODIFICATION OF VERDICT BASED UPON APPELLANT'S PROBATION REPORT AND UPON ITS MISUNDERSTANDING OF THE FACTORS IN AGGRAVATION AND MITIGATION.

Appellant has shown that the trial court erred in denying appellant's motion for modification of the death verdict by reading and considering the probation report before ruling on the motion, as well as by using appellant's failure to testify as showing a lack of remorse - and using that lack of remorse an aggravating factor, and finally by using victim impact evidence from an unrelated crime as the most important aggravating factor. (AOB 151-161.) This Court must remand the case to the trial court for a new determination on the motion for modification of the penalty verdict.[4]

A. The Trial Court Improperly Considered the Facts and Recommendations from the Probation Report.

Respondent does not dispute that the trial court erred in reading the probation report prior to the hearing on the motion for modification (RB

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[4] Respondent argues that these claims are waived because trial counsel did not immediately object to the trial court's reference to the probation report or the stated bases for its decision. (RB 127.) Trial counsel had moved for a new trial and modification of the verdict, arguing that mitigation outweighed aggravation. The trial court did not reveal that it had read the probation report until after it had already ruled on both motions and immediately before it sentenced appellant to death. (24 RT 4734.) Counsel immediately appealed from the death sentence. Under these circumstances, any further objection at the hearing itself would have been futile. (See *Osborne v. Ohio* (1990) 495 U.S. 103, 124 [defendant not required to engage in futile efforts]; *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [failure to raise an issue at trial does not constitute waiver where action would have been futile].)

127-128), but argues that, because the trial court did not explicitly refer to any information from the report, "there was no reasonable possibility that the court's reading of the probation report affected its ruling." (RB 128.) This is backward. The report contained new and prejudicial information, erroneous conclusions of both fact and law, and a recommendation of death that were not before the jury. It detailed appellant's entire criminal record, erroneously stated that there were no mitigating factors, argued that, despite his limited intelligence, appellant knew right from wrong, and concluded that appellant was "a dangerous predator." It recommended that appellant be sentenced to death. None of this "evidence" was before the jury, but was read and considered by the trial court. Consideration of these allegations was highly improper and requires a remand for a proper hearing on the motion. (See *People v. Lewis* (1990) 50 Cal.3d 262, 287.)

B. The Trial Court Improperly Used Appellant's Failure to Testify as Evidence of Lack of Remorse, then Improperly Used The Alleged Lack of Remorse as an Aggravating Factor.

In ruling on the motion for modification, and during its discussion of the aggravating factors, the trial court noted the callous nature of the crime and that

> "[t]he Court has not heard, nor has the jury heard, any remorse on the part of the Defendant. Heard a lot of concern from the Defendant's family." (24 RT 4732.)

Respondent argues that the trial court was not commenting on

appellant's failure to testify, simply on the lack of any evidence of remorse, and that, while inappropriate as an aggravating factor, suggested the absence of a mitigating factor, and was therefore relevant to the court's determination. (RB 129-130.) However, the trial court's comments came during its listing of the aggravating factors, just before it noted the Oxnard beach rape, appellant's cocaine conviction, and the threat to Rollins - and well before it listed the mitigating factors, or lack thereof. (24 RT 4733.) In addition, the court's reference to "concern from the Defendant's family" referred solely to trial testimony and implicitly the alleged lack of concern from appellant must also have been a reference to the lack of such trial testimony.

If the court's reference was indeed to the state of the evidence, it was factually incorrect - prosecution witness Adrienne Wells testified that, during the course of the conversation in which he told her he had "killed a lady," appellant was crying and sorry that he had done it. (15 RT 2790, 2807.) The prosecution's star witness, Bobby Rollins, had told the police that appellant was upset and "never the same" afterward because he felt so badly. (17 RT 3105.)

Either way, it is unarguable that the trial court actually and erroneously used appellant's alleged lack of remorse as an aggravating factor. The case must be remanded to the trial court for a new hearing on the motion for modification.

C. The Trial Court Improperly Used Victim Impact Evidence From a Separate Crime as the Most Important Aggravating Factor.

When listing the aggravating factors it considered, the trial court found that the decisive aggravator was the victim impact evidence from a completely separate crime: the rape of Myra (Soto) Marquez at an Oxnard beach by Bobby Rollins and Fred Jackson with the help of appellant. The court stated:

> "I think that the jury, and I think this court might feel somewhat differently if, not withstanding the egregious nature of this murder, you did not have the Oxnard situation. And I recall when the jury was deliberating the – I think the last day of deliberations they wanted the testimony of one of those victims read back; that is, one of the Oxnard beach victim's read back." (24 RT 4733.)

The trial court was correct in its assessment - appellant was sentenced to death primarily based upon victim impact evidence from an entirely unrelated crime, together with the external commitments of two of the jurors. (See Argument XIII, *supra*.) As discussed at greater length in Argument XVII, *infra*, the jury was seemingly deadlocked after three days of deliberations and submitted a note to the trial court asking, "if we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) The next day of deliberations was Monday, March 28th. On Monday, the jury's final note asked to have the testimony of Jamie and Myra Marquez read to them. (3 CT 559.) The jury then delivered a verdict of death before noon. (24 RT 4708.) The trial court then also used that

victim impact evidence as the decisive aggravating factor in its decision. Like its use of appellant's alleged lack of remorse and consideration of the probation report, the court's use of victim impact evidence from a completely unrelated crime as the single most important aggravator violated appellant's right to not to be sentenced to death except on the basis of statutory aggravating factors, a right protected as a matter of federal due process under the Fifth and Fourteenth Amendments. It also violated the Eighth and Fourteenth Amendment requirements that capital sentencing be subjected to heightened standards of fairness and reliability. (AOB 158-159.) Remand is required.

D. Remand to the Trial Court Is Required Because the Cumulative Impact of the Errors Creates a Reasonable Possibility That They Affected the Modification Decision.

Respondent does not dispute that the cumulative effect of the trial court's errors would require remand for a proper hearing, arguing only that there was no error or prejudice at all. (RB 131.) However, even the most deferential review must concede that the trial court erred in ruling on this motion. It explicitly used appellant's failure to testify to infer (incorrectly) that appellant had no remorse, and then, to compound that error, used that lack of remorse as an aggravating factor. It then improperly used victim impact evidence from a completely separate crime as the most important aggravating factor. Finally, the trial court's consideration of the probation report and acceptance of its recommendations added further improper

aggravation to an already improperly skewed determination of aggravating factors.

The trial court's review of the verdict under Penal Code section 190.4, subdivision (e), is one of the key "checks on arbitrariness" in the California death penalty scheme. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-52; see also *People v. Frierson* (1979) 25 Cal.3d 142, 179 [section 190.4 provides safeguard for assuring careful appellate review].) The Eighth Amendment standards for reliability and this Court's recognition of the need for special care in reviewing a death verdict should compel it to remand the case to the trial court for a new hearing on the motion for modification.

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XV. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S NEW TRIAL MOTION BASED UPON THE NEWLY DISCOVERED EVIDENCE THAT THE VICTIM'S FAMILY DID NOT WANT APPELLANT TO RECEIVE THE DEATH PENALTY.

After trial, the probation report in this case revealed that the victim's family - her mother and eldest son - did not want appellant to receive a death sentence, a fact that the prosecution had known but not revealed to the defense. (24 RT 4714-4717.) The trial court then denied appellant's motion for new trial based upon this new information on the grounds that such evidence was inadmissible. (24 RT 4722.) The erroneous denial of the motion prevented a jury from considering all available mitigating evidence when it decided appellant deserved to die, and precluded appellant from introducing rebuttal evidence to counter the State's evidence and argument for the death penalty in violation of his rights to due process, a fair jury trial, equal protection, and a reliable jury determination on penalty. (AOB 162-174; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Appellant's death sentence must be reversed and the case remanded for a new penalty phase.

A. The Fact That The Victim's Family Wished To Show Appellant Mercy Was Admissible Mitigating Evidence.

Respondent argues, as appellant acknowledged in the opening brief, that this Court has rejected similar claims in the past based on a finding that the U.S. Supreme Court "has never suggested that the defendant must be

permitted to do what the prosecution may not do." (RB 132-133; *People v. Smith* (2003) 30 Cal.4th 581, 622.) However, in California defendants in capital cases are allowed to introduce an extremely broad array of mitigation evidence: eight separate categories of mitigation evidence, including "[a]ny . . . circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (§ 190.3, subd. (k).) There is no equivalent provision for aggravating circumstances. In fact, there are precisely three narrowly-drawn categories of aggravating evidence. Thus, the fact that the prosecution is barred from introducing such evidence is irrelevant in determining whether the defendant may do so.

"[T]he Supreme Court's decisions in *Lockett* [and] *Eddings* . . . 'make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any "sympathy factor" raised by the evidence before it.'" (*People v. Easley* (1983), 34 Cal.3d 858, 876, quoting *People v. Robertson* (1982) 33 Cal.3d 21, 58.) Sympathy in this context is synonymous with mercy and pity. (*People v. Ochoa* (1998) 19 Cal.4th 353, 459; *People v. Caro* (1988) 46 Cal.3d 1035, 1067.) Here, the members of the victim's family, those most hurt by the crime, had found appellant worthy of mercy and forgiveness. Maria Cabrera had asked God to forgive appellant and did not wish to see him die. Nor did the victim's son Salvador. Their sympathy and mercy were certainly "a basis for a sentence less than death" and appellant was entitled to have the jury consider that

factor in making their decision.

B. Once the Prosecutors Asked For A Death Sentence on Behalf of the Victim's Family, Due Process Required That The Contrary Views of the Victim's Family Be Admissible as Rebuttal Evidence.

Respondent argues that there is no connection between the viewpoint of the victim's family and their testimony about how her loss had affected their lives, and thus that the family's views about the suitability of the death penalty were not proper rebuttal evidence. (RB 133-134; *People v. Lancaster* (2007) 41 Cal.4th 50, 97.) However, a central theme in the State's penalty phase case was, as trial counsel noted (24 RT 4718-4719), that justice for the victim's family demanded a death sentence. The prosecutors emphasized and re-emphasized in their closing arguments that justice for the family meant a death sentence:

> "The defendant and his family begged you for mercy. For the People of the State of California and for the family of Genoveva Gonzales, I ask you for justice." (23 RT 4548.)

Of course, the only two choices given the jury at penalty phase were death and life without parole. Thus, the prosecutor explicitly told the jury that "mercy" meant life without parole, "justice" meant a death sentence, and that he was asking them, *on behalf of the Gonzales family*, for a death sentence. In fact, appellant's execution would further wound Mrs. Cabrera, who did not want "to see another death and have another mother crying because of what happened to her daughter." (Probation report, p. 13.) This

Court allows the State to argue non-statutory aggravation when it rebuts mitigating evidence offered by the defendant. (*People v. Davis*, *supra*, 10 Cal.4th at p. 537, citing *People v. Cox* (1991) 53 Cal.3d 618, 685 [dealing with lack of remorse].) Appellant certainly must be afforded similar consideration, as the family's views were highly relevant to rebut the State's arguments regarding what justice for the Gonzales family might require.

C. Denial of the New Trial Motion Requires Reversal.

Respondent argues that any error was harmless under *Chapman* because of the other penalty phase evidence, stating "it is plain that the irrelevant death penalty views of the victim's mother and son would not have altered the penalty verdict." (RB 134-135.)

This argument ignores the fact that this was a close case. The jury took four days to decide punishment, asking for read-backs of testimony and making a number of other inquiries. There was substantial mitigating evidence before the jury. Respondent concedes that the evidence that appellant suffered from brain damage and mental disability was *uncontroverted.* (RB 64-68.) Appellant's special education teachers testified that in high school he functioned at a second or third grade level in math and reading. (21 RT 3904, 3909.) The prosecution psychiatrist did not dispute that appellant suffered from physical brain damage and dysfunction, and operated at a second grade level. (RB 67; 23 RT 4472,

4484, 4486.) He had undergone a lifetime of beatings by his father, who would also have appellant watch violent pornographic movies with him. (See 21 RT 3832-33, 3865.) Appellant's ability to deal with moral judgments, consequences, or relationships with people was below that of an average 6 or 7-year-old. (21 RT 3991-3992.)

The jury was, in fact, at an impasse on the third day of deliberations, when they sent out a note asking "if we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) This error precluded the jury from hearing evidence that might have served as the basis for a sentence less than death, and certainly would have rebutted one of the State's most powerful and emotional arguments for a death sentence, thereby creating a risk that the death penalty was imposed on appellant in spite of factors which may have called for a less severe penalty. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605.) As counsel noted, it would have taken one question on cross-examination: "'[a]re you satisfied with life without the possibility of parole?' And she would have said, 'Yes.' I think that is tremendous evidence." (RT 4719.)

Under U.S. Supreme Court precedent, that risk "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*)

> "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an

> evidentiary ruling. . . . Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.'"

(*McKoy v. North Carolina* (1990) 494 U.S. 433, 442, citing *Mills v. Maryland* (1988) 486 U.S. 367, 375 [internal citations omitted].) The same is true here. The death judgment must be reversed and the case remanded for a new penalty phase.

***

XVI. THE PROSECUTION'S FAILURE TO DISCLOSE THE VICTIM'S FAMILY'S VIEWS TO THE DEFENSE VIOLATED *BRADY V. MARYLAND.*

As shown above in Argument XV, *supra,* the prosecution stipulated that they had known of the mother and son's opposition to appellant receiving a death sentence, and had failed to disclose it to the defense. (24 RT 4717-4720.) As further shown above, the evidence was admissible as mitigation evidence because it might serve "as a basis for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5), and as rebuttal evidence whose admission was required by Due Process to rebut the prosecution's repeated calls for a death sentence on behalf of a family that did not want it. (*Ibid.*, *People v. Frye* (1998)18 Cal.4th 894, 1017; 23 RT 4596; 4604.) The evidence was material, in that there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 682.) There is more than a reasonable probability that the proper disclosure and admission of this evidence would have produced a different result. Reversal for a new penalty phase is required. (AOB 162-177; *Brady v. Maryland* (1963) 373 U.S. 83; *Strickler v. Greene* (1999) 527 U.S. 263, 282.)

Respondent argues, as in Argument XV, that the victim's family's views were not admissible as mitigating evidence or as rebuttal evidence, and were therefore not material. (RB 135-137.) Appellant has addressed

those arguments in Argument XV, *supra*, and the opening brief (AOB 175-177.) Since respondent offers no further analysis, additional briefing at this time is not necessary.

***

XVII. THE INTRODUCTION OF INFLAMMATORY VICTIM IMPACT EVIDENCE FROM AN UNRELATED CRIME VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Over repeated objections, the prosecution introduced detailed and emotional testimony regarding the unrelated Oxnard beach rape and its impact on the two victims. (See RT 3624-3683.) The admission of prejudicial victim impact evidence not directly related to the capital offense violated appellant's constitutional rights, including the right to confrontation, to due process, to a fundamentally fair penalty proceeding, and to a reliable sentencing determination, under the Fifth, Sixth, Eighth, Fourteenth Amendments of the United States Constitution, and the parallel provisions of the California Constitution. (AOB 178-189; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

A. Victim Impact Testimony Concerning any Crime Other Than the Capital Offense is Inadmissible.

Respondent states, as appellant has acknowledged, that this Court has rejected similar arguments in other cases. (RB 137-138; *People v. Demetruilias* (2006) 39 Cal.4th 1, 39, *People v. Holloway* (2004) 33 Cal.4th 96.) Appellant submits that these decisions should be reconsidered in light of the constitutional standards identified in his opening brief. Since respondent offers no further analysis, additional briefing at this time is not necessary.

B. Admission of Victim Impact Evidence Concerning the Oxnard Beach Rape Was Prejudicial Error.

Respondent argues that admitting victim impact evidence from the Oxnard beach rape was harmless error in light of the other aggravating evidence admitted at penalty phase. (RB 138.) However, the crime underlying the capital charge was not overwhelmingly aggravated, and the jury took four days to decide punishment, asking for read-backs of testimony and making a number of other inquiries. The jury was, in fact, at an impasse on the third day of deliberations, when they sent out a note asking, " [I]f we are unable to reach a unanimous decision either way, what will happen?" (3 CT 556.) Then, on the fourth day of deliberations, the jury's final note asked to have the testimony of the beach rape victims read to them. (3 CT 559.) The jury then delivered a verdict of death before noon. (24 RT 4708.) The trial court itself, in denying appellant's modification motion, stated that both the court and the jury placed great weight upon the testimony of the victims of the Oxnard beach rape, and noted that the jury had asked that their testimony be re-read during deliberations. (24 RT 4733.)

There is more than a "reasonable possibility" that the error affected the verdict - there is a reasonable certainty. This Court cannot know - and certainly cannot know beyond a reasonable doubt - that the penalty verdict would have been the same absent an error of this magnitude. (*Chapman v.*

California, supra, 386 U.S. at p. 24; *People v. Brown* (1988) 46 Cal.3d 432, 447; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.) The death judgment must be reversed.

***

XVIII. THE TRIAL COURT ERRED IN REFUSING A REQUESTED JURY INSTRUCTION DEFINING THE SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE.

After the prosecution told the jury that appellant would present a danger as long as he was imprisoned, arguing that executing people like appellant meant that "no one else will have to fall victim to them again," (23 RT 4598), appellant requested a penalty phase instruction that read as follows:

> "Life without the possibility of parole means exactly what it says – the defendant will be imprisoned for the rest of his life. For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors." (3 CT 506.)

The trial court refused the instruction. (23 RT 4406.) Because the term "life without possibility of parole" is commonly misunderstood or disbelieved by jurors, the failure to define it for the jury violated due process by failing to inform the jury accurately of the meaning of the sentencing options. The failure also resulted in an unfair, capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (AOB 190-196; U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

Respondent argues that this Court has rejected similar arguments in other cases, finding that CALJIC Nos. 8.84 and 8.88 adequately inform the

jury of a defendant's ineligibility for parole. (RB 143; *People v. Prieto* (2003) 30 Cal.4th 226.) Respondent further argues that the prosecution's invocation of future dangerousness was cured by the trial court's instruction to disregard that argument, and that "[i]t is inconceivable that the jury would not have understood the concept conveyed by the requested jury instruction in light of the instructions actually given, and the extensive argument to the jury by appellant's trial attorney regarding the meaning of life without parole. (RB 144.)

The reality is that no instruction could remove the prosecutor's threat from the jurors' minds and, as shown at greater length in appellant's opening brief, jurors simply do not believe that "life without possibility of parole" means what it says. (AOB 191-192; [the results of a telephone poll commissioned by the Sacramento Bee showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life."] Sacramento Bee (March 29, 1988) at pp. 1, 13; see also Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons v. South Carolina* (1994) 512 U.S. 154 168, fn. 9.) Appellant asks that this Court reconsider whether a definition of "life without possibility of parole" is required under *Simmons* in light of the extensive empirical evidence showing that jurors simply do not understand the term standing alone. Had the jury been instructed

concerning appellant's parole ineligibility, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 123 S.Ct. 2527, 2543; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Accordingly, the judgment of death must be reversed.

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XIX. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO CONSIDER ONLY THOSE AGGRAVATING FACTORS THAT ALL JURORS HAD FOUND PROVEN BEYOND A REASONABLE DOUBT REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE.

Appellant requested a jury instruction telling the jury that they must find aggravating factors proven beyond a reasonable doubt before they could use that factor in reaching their sentencing decision. The trial court's denial of that request violated appellant's right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Reversal of the death sentence is required.

Respondent states that this Court has previously rejected the argument that a jury must find aggravating factors proven beyond a reasonable doubt before they could use that factor in reaching their sentencing decision. (RB 145-146, citing *People v. Romero* (2008) 44 Cal.4th 386, 428-429.) Appellant submits that *Romero* and the decisions cited therein should be reconsidered in light of the constitutional standards identified in his opening brief. (AOB 207-214.) Since respondent offers no further analysis, additional briefing at this time is not necessary.

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XX. THE TRIAL COURT'S REFUSAL OF PENALTY PHASE INSTRUCTIONS REGARDING VICTIM IMPACT EVIDENCE AND EVIDENCE REGARDING APPELLANT'S BACKGROUND WAS REVERSIBLE ERROR.

Appellant submitted a proposed jury instruction that read as follows:

> "Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.
>
> You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case.
>
> You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence." (3 CT 505.)

The trial court refused to give the requested instruction. (23 RT 4406.) Appellant submitted a second proposed jury instruction which read as follows:

> "Evidence has been presented of defendant's lifestyle or background. You cannot consider this evidence as an aggravating factor, but may consider it only as a mitigating factor." (3 CT 496.)

The trial court also refused to give this instruction. (23 RT 4399-4400.) The special instructions were properly designed to inform the jury as to its duty to weigh and consider penalty phase evidence, and correctly stated the law. Accordingly, the trial court erred in refusing to instruct the jury as appellant requested and reversal of the death sentence is required. (AOB 207-214.)

Respondent argues that this Court has rejected similar claims in other cases based on a finding that the standard jury instructions are adequate. (RB 147-149; *People v. Carey* (2007) 41 Cal.4th 109, 134; *People v. Perry*

(2006) 38 Cal.4th 302, 319.)

However, appellant was entitled upon request to specially-drafted instructions which either related the particular facts of his case to any legal issue, or which pinpoint the crux of his defense. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; *People v. Sears* (1970) 2 Cal.3d 180, 190; see *Penry v. Lynaugh* (1989) 492 U.S. 302, overruled on another ground by *Atkins v. Virginia* (2002) 536 U.S. 304.) The requested instructions were correct statements of law that related to one of the central tasks faced by appellant's penalty phase jury: the weighing of aggravating evidence (including victim impact evidence) and mitigating evidence (including appellant's background.) Moreover, the instructions were offered to pinpoint appellant's theory of the case, rather than specific evidence, and were thus proper. (*See People v. Kraft* (2000) 23 Cal.4th 978, 1068.) Thus, appellant had a *right* to such instructions, whether or not the court also instructed the jury with the vague and general language of factor (K) or CALJIC No. 8.84.1.

The trial court's refusal to give the instructions at issue deprived appellant of the right recognized in *Sears* and *Rincon-Pineda*, *supra*, and of his rights to a trial by jury and fair and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and by the applicable sections of the California Constitution. (AOB 207-214; U.S. Const., 5th, 6th, 8th, and 14th Amends.;

Cal. Const., art. I, §§ 7, 15-17.) Reversal is required.

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XXI. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR FELONY-MURDER BEFORE FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE.

Appellant has argued that the trial court erroneously instructed appellant's jurors on felony murder, even though he was charged only with first degree malice murder. Even assuming that the jury could be instructed on both crimes, the trial court erred in not requiring the jurors to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder. The errors denied appellant his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to a unanimous jury verdict and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., Amends. 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Respondent states, as appellant has acknowledged, that this Court has rejected similar arguments in other cases. (RB 149-150; *People v. Loker* (2008) 44 Cal.4th 691, 707-708.) Appellant submits that these decisions should be reconsidered in light of the constitutional standards identified in his opening brief. Since respondent offers no further analysis, additional briefing at this time is not necessary.

***

XXII. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD NOT RETURN A VERDICT OF SECOND DEGREE MURDER UNLESS IT UNANIMOUSLY ACQUITTED APPELLANT OF FIRST DEGREE MURDER.

Appellant has argued that the acquittal-first instruction, CALJIC 8.75, precludes full jury consideration of lesser-included offenses, and thereby implicates the due process and jury trial guarantees of the Sixth and Fourteenth Amendments and the Eighth Amendment's requirement for heightened reliability in capital cases. (AOB 224-225.) Respondent simply argues that this Court has rejected this claim in other cases. (RB 150-152.) Appellant submits that these decisions should be reconsidered in light of the constitutional standards identified in his opening brief. Since respondent offers no further analysis, additional briefing at this time is not necessary.

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XXIII. THE PROSECUTOR'S PENALTY PHASE ARGUMENT IMPROPERLY PRESENTED AN EMOTIONAL PLEA TO THE JURORS TO PROTECT PRISON GUARDS, SATISFY SOCIETY'S DEMANDS AND PROVIDE VENGEANCE FOR THE VICTIM'S FAMILY.

The prosecutors' penalty phase arguments went beyond the limits of acceptable advocacy by using emotion in order to inflame the jury and by arguing that the death sentence was required to protect prison guards, satisfy society's demands for safety and closure, and to make the victim's family whole. The arguments violated appellant's federal and state constitutional rights to due process, a fair trial, equal protection, and a reliable jury determination on penalty. (AOB 226-235; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15-17.)[5]

A. The Prosecutor Improperly Argued that the Death Sentence was Needed to Protect Prison Guards and Satisfy Society's Need for Closure and Safety.

The prosecutors told the jury that appellant would present a danger as long as he was imprisoned, arguing that executing people like appellant meant that "no one else will have to fall victim to them again." (23 RT 4598.) The prosecutor went on to explicitly tell the jury that "[n]o one in the Department of Corrections would be safe with that man as a prisoner,"

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[5] Respondent again argues that some of appellant's claims are waived for failure to object at trial, but then correctly notes that, at the time of appellant's trial, no objection was required to preserve such issues for appeal. (RB 154, fn. 67; *People v. Leonard* (2007) 40 Cal.4th 1370, 1417; *People v. Moon* (2005) 37 Cal.4th 1, 17.)

raising, without any evidentiary support, the specter of an attack on a prison guard. (23 RT 4607.) Respondent argues that the error was harmless because an objection was then sustained and the jury was instructed to disregard the prosecutor's argument. (*Ibid;* RB 154-155.) This argument, of course, ignores the impossibility of un-ringing that particular bell. Respondent then notes that the prosecutor went on to make a similar argument about appellant's future dangerousness based upon his threats to Rollins and Jackson, citing cases that allow such arguments. (See RB 153-154; 23 RT 4608; *People v. Huggins* (2006) 38 Cal.4th 175, 253.) Those cases should be reconsidered, as future dangerousness is not a proper aggravating factor under California law, and allowing the prosecutor to use it as one would violate due process. (See Pen. Code § 190.3; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776; *Hicks v. Oklahoma*, *supra,* 447 U.S. at p. 346 [due process liberty interest in the requirements of state law].)

The prosecutor told the jurors that they bore responsibility for making society feel secure by punishing appellant with death. (23 RT 4596-4597.) Respondent argues that the argument was not misconduct because it was appropriate commentary on the impact of the murder and did not diminish the jurors' sense of personal responsibility for the verdict. (RB 154-155.) However, it is obvious that if society's demand for "closure" and security warranted the death penalty in and of themselves, no amount of mitigation could ever overcome it. (See *Eddings v. Oklahoma* (1982) 455

U.S. 104, 105 [8th and 14th Amendments require consideration of mitigating evidence].) That kind of emotional appeal would indeed diminish the jurors' sense of personal responsibility to render an individualized verdict. (See *Caldwell v. Mississippi*, *supra,* 472 U.S. at pp. 328-329; *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn. 15 [*Caldwell* extends to any argument that diminishes a juror's sense of personal responsibility.) Accordingly, this Court should find that the prosecutors violated due process by infecting the trial with fundamental unfairness and compromised the Eighth Amendment's requirements for a reliable penalty verdict.

B. The Prosecutors Improperly Contrasted Life in Prison with the Victim's Family Visiting the Grave Site.

The prosecutors described Gonzales's family visiting the grave site with flowers every Sunday after church, in order to contrast their loss with appellant serving a life sentence without parole and invited the jury to weigh the comparative pain of the victim's family against appellant's life in prison. (23 RT 4597.) Respondent argues that this argument, while done in an "emotional manner," was simply invoking the significant effect that the murder had on Gonzales' family. (RB 158.) What this argument ignores, however, is that such arguments set up a standard that no defendant in a capital case could ever overcome - emphasizing the permanency of the

victim's death, as contrasted to life in prison, is prejudicial because all homicides by definition involve this situation:

> "[T]he State's contention – it is unfair for [the defendant] to live since [the victim] is dead – creates a super-aggravator applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence." (*Le v. State* (Okla.Crim App. 1997) 947 P.2d 535, 554-555; see also *Eddings v. Oklahoma*, *supra,* 455 U.S. at p. 105 [8th and 14th Amendments require individualized consideration of mitigating evidence].)

Such an argument was designed solely to inflame the emotions of the jurors, and was particularly egregious in light of the fact that the victim's family did not want appellant to receive the death penalty. The prosecutor misleadingly told the jury that "to fix the penalty in this case at life in prison would be to minimize the suffering and death of Genoveva Gonzales and continued suffering of her family." (23 RT 4596.)[6]

The prosecutors offered the jury an easy way to make a hard choice. If death were required to protect society or prison guards in this case – if it were necessary to avenge the victim's loss – then the jury need not determine an individualized sentence. The prosecutor's arguments violated appellant's constitutional rights to due process and a reliable penalty

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[6] As shown in arguments XV and XVI, *supra*, the prosecution knew that the victim's family did not want appellant to receive the death penalty, even as it asked the jury for vengeance for that family. (AOB 162-177.)

verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.) Reversal is required.

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XXIV. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT AND AS APPLIED IN THIS CASE FALLS SHORT OF INTERNATIONAL NORMS.

Appellant has argued that the death penalty violates international standards, both as a matter of substantive law and as it relates to our own requirements under the Eighth Amendment. (AOB 236-240; see *Atkins v. Virginia, supra,* 536 U.S. 304 [122 S.Ct. 2242, 2249, fn. 21] [the fact that the "world community" disapproves of executing the mentally retarded supports the conclusion that it violates the Eighth Amendment].) Respondent argues that this Court has rejected this claim in other cases. (RB 160.) Appellant submits that these decisions should be reconsidered in light of the prevailing international standards identified in his opening brief. Since respondent offers no further analysis, additional briefing at this time is not necessary.

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

Appellant submits that various features of California's death penalty law violate federal constitutional standards. Respondent relies on previous decisions of this Court rejecting similar claims. (RB 160-169.) Appellant submits that this Court should reconsider its decisions for the reasons stated in Appellant's Opening Brief. (AOB 241-266.)

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XXVI. CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED.

Appellant's Opening Brief demonstrated how the errors in this case combined to create both the guilt and penalty verdicts in this case. (AOB 267-270.) Respondent states that there were no errors to accumulate, but does not dispute that if there are errors, they should accumulate to establish prejudice. (RB 169.)

There were multiple errors in appellant's trial. Those errors fed off each other and ultimately led to the guilt and penalty verdicts. First, the entire trial process was fundamentally tainted by the trial court's failure to have appellant's competency properly evaluated in violation of due process. He was then convicted based primarily upon the testimony of an accomplice whose unbelievable testimony was bolstered by an erroneous jury instruction that barred the jury from considering the accomplice's motive for testifying. The trial court then failed to instruct on the voluntary manslaughter charge that would have resulted from appellant's duress defense, skewing the verdict toward first degree murder. The trial court also gave numerous instructions that diminished the reasonable doubt standard and lowered the prosecution's burden of proving the kidnapping charge and special circumstance.

In the penalty phase, the instructions allowed the jury to dismiss

appellant's mitigation evidence of mental impairment because it did not rise to the level of extreme disturbance required under Penal Code section 190.3, factor (d), so that the jury could not have given full consideration to this evidence. The trial court then refused requested defense instructions that would have correctly guided the jury in its task. That jury was also under external time pressures and went from deadlock to death verdict after re-hearing improper victim-impact evidence from an unrelated crime that inflamed the jury against appellant.

Even if some of the errors were harmless individually, the cumulative effect of these errors, taken together or in any combination, affected the trial as a whole. Thus, other courts have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Irving v. State* (Miss. 1978) 361 So.2d 1360, 1363.) And because the death penalty was imposed, the cumulative effect of these errors must be examined with special caution. (See *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].) Accordingly, the Court must reverse the judgment in this case.

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CONCLUSION

For all the reasons stated above, as well as those stated in Appellant's Opening Brief, reversal of the convictions, the special circumstance findings, and the death judgment is required.

DATED: June 3, 2010

Respectfully submitted,

PETER HENSLEY

Attorney for Appellant
CHRISTOPHER JAMES
SATTIEWHITE

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Peter Hensley, represent appellant in this automatic appeal. I conducted a word count of this brief using my word processor. I certify that this brief uses a 13-point Times New Roman font and is 15,533 words in length.

Dated: June 3, 2010

_____

PETER HENSLEY
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Re: *People v. Sattiewhite* — No. S039894 (Ventura Sup. Ct. No. CR 31367)

I, Peter Hensley, declare that I am over 18 years of age, and not a party to the within cause; my business address is 315 Meigs Road, Suite A-382, Santa Barbara, CA 93109. A true copy of the attached:

APPELLANT'S REPLY BRIEF

was served each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Christopher James Sattiewhite
P.O. Box H-60700
San Quentin State Prison
San Quentin, CA 94974

Superior Court of California
County of Ventura
800 South Victoria Avenue
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101 Second Street, Suite 600
San Francisco, CA 94105

Willard Wiksell, Esq.
Philip Gunnels, Esq.
674 County Square Drive, Ste 301
Ventura, CA 93003

Each envelope was then, on June ___, 2010, sealed and deposited in the United States Mail at Santa Barbara, California, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June ___, 2010 at Santa Barbara, California.

_____
PETER HENSLEY