IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KEVIN BOYCE, Defendant and Appellant.	No. S092240 (Orange County Superior Court No. 97NF2316) [Capital Case]

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Orange
Honorable Frank F. Fasel, Judge

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENTS 3

1. APPELLANT IS BRAIN DAMAGED, SEVERELY MENTALLY ILL, AND MENTALLY RETARDED; PERMITTING THE STATE TO EXECUTE HIM, UNDER WHATEVER LEGAL GUISE, OFFENDS THE EVOLVING SENSE OF DECENCY IN THIS STATE AND NATION 3

   A. Respondent's Two-Page Response 4

   B. Reversal of the Death Sentence Is Required under Article I, Section 17 of the California Constitution 8

2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE PROSECUTION TO PLAY AUDIO RECORDINGS OF THE 911 CALLS MADE BY THE TWO SURVIVING VICTIMS OF THE CAPITAL CRIME 20

   A. Section 352 and the Relevance of the 911 Tapes 21

   B. The Ghastly 911 Tapes Shed Little if Any Light on the Witness's Credibility; They Were Played for a Different and Illegitimate Reason 26

   C. Reversal Is Required 33

3. APPELLANT'S CLAIMS REGARDING THE FLIGHT INSTRUCTION ARE FULLY COGNIZABLE ON APPEAL 37

4. THE RETALIATION CLAUSE OF THE PEACE-OFFICER SPECIAL CIRCUMSTANCE IS VAGUE AS APPLIED HERE 39

   A. The Importance of the Statute's Intent, to Protect Peace Officers, Does Not Immunize It from Vagueness Review 39

TABLE OF CONTENTS

Page

B. The Language of Special Circumstances Must Meet Heightened Requirements of Certainty 40

C. The Retaliation Clause of the Special Circumstance Is Unconstitutionally Vague As Applied Here 42

D. Even If this Court Were to Agree with Respondent's Interpretation of the Statute, that Interpretation Could Not Be Applied Retroactively to Appellant 45

E. Reversal of the Death Judgment Is Required 46

6. APPELLANT'S PENALTY PHASE MOTION FOR SELF-REPRESENTATION, AN ATTEMPT TO ASSERT AUTONOMOUS CONTROL OF HIS DEFENSE, WAS ERRONEOUSLY DENIED 47

A. Respondent's Thorny Path Through the Trial Court's Erroneous Exercise of Its Discretion 47

B. The Request Was Not Equivocal to the Trial Court or the Prosecution 49

C. The *Windham* Factors 52

D. Although Untimely Under this Court's Precedents, Appellant's Request Would Not Have Delayed the Penalty Phase 56

E. The Death Judgment Must Be Reversed 57

9. IN LIGHT OF THE OVERWHELMING MITIGATION, THE TRIAL COURT'S FAILURE TO GIVE THE JURY FULL INSTRUCTIONAL GUIDANCE AT THE PENALTY PHASE REQUIRES REVERSAL OF THE DEATH JUDGMENT 58

10. THE TRIAL COURT'S NONCAPITAL SENTENCING ERRORS REQUIRE REVERSAL AND A REMAND 69

A. The Invalid Upper Terms 69

B. The Invalid Consecutive Sentences 70

C. Correction of the Abstract of Judgment 74

CONCLUSION 76

TABLE OF AUTHORITIES

Page(s)

Fed. Cases

Abdul-Kabir v. Quarterman (2007) 550 U.S. 233 14

Armstrong v. Dugger (11th Cir. 1987) 833 F.2d 1430 8

Atkins v. Virginia (2002) 536 U.S. 304 ..... passim

Bobby v. Bies (2009) 556 U.S. 825 8

Bouie v. City of Columbia (1964) 378 U.S. 347 46

Brewer v. Aiken (7th Cir.1991) 935 F.2d 850 11

Brewer v. Quarterman (2007) 550 U.S. 286 15

Buhl v. Cooksey (3d Cir. 2000) 233 F.3d 783 52

Bullington v. Missouri (1981) 451 U.S. 430 33

Cannon v. Gibson (10th Cir. 2001) 259 F.3d 1253 16

Carroll v. Secretary, Dept. of Corrections (11th Cir. 2009) 574 F.3d 1354 6

Carter v. Kentucky (1981) 450 U.S. 288 61

Chapman v. California (1967) 386 U.S. 18 ..... 34, 59

Cunningham v. California (2007) 549 U.S. 270 69

Deck v. Missouri (2005) 544 U.S. 622 34

DeLassus v. United States (1835) 34 U.S. (9 Peters) 117 66

Eddings v. Oklahoma (1982) 455 U.S. 104 8

Enmund v. Florida (1982) 458 U.S. 782 11

Estelle v. McGuire (1991) 502 U.S. 62 34

Estelle v. Williams (1976) 425 U.S. 501 29

Faretta v. California (1975) 422 U.S. 806 ..... passim

Ferguson v. Culliver (11th Cir. 2008) 527 F.3d 1144 51

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Furman v. Georgia (1972) 408 U.S. 238 19

Gardner v. Florida (1977) 430 U.S. 349 ..... 34, 71

Ghent v. Woodford (9th Cir. 2002) 279 F.3d 1121 35

Glenn v. Tate (6th Cir. 1996) 71 F.3d 1204 11

TABLE OF AUTHORITIES

Page(s)

Gonzalez-Rivera v. I.N.S. (9th Cir. 1994.) 22 F.3d 1441 28

Graham v. Florida (2010) __ U.S. __, 130 S.Ct. 2011 4

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In re Winship (1970) 397 U.S. 358 37

Indiana v. Edwards (2008) 554 U.S. 164 ..... 6, 12

Jurek v. Texas (1976) 428 U.S. 262 41

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McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 34

Old Chief v. United States (1997) 519 U.S. 172 ..... 28, 29, 31

Oregon v. Ice (2009) 555 U.S. 160 70

Payne v. Tennessee (1991) 501 U.S. 808 ..... 32, 34

Porter v. McCollum (2009) 558 U.S. 30, 130 S.Ct. 447 14

Pulley v. Harris (1984) 465 U.S. 37 19

Riggins v. Nevada (1992) 504 U.S. 127 16

Rita v. United States (2007) 551 U.S. 338 71

Rompilla v. Beard (2005) 545 U.S. 374 14

Rose v. Clark (1986) 478 U.S. 570 33

Satterwhite v. Texas (1988) 486 U.S. 249 35

Screws v. United States (1945) 325 U.S. 91 65

Shepard v. United States (2005) 544 U.S. 13 70

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Simmons v. South Carolina (1994) 512 U.S. 154 32

Smith v. Mullin (10th Cir. 2004) 379 F.3d 919 ..... 11, 16

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TABLE OF AUTHORITIES

Page(s)

Thomas v. Allen (11th Cir. 2010) 607 F.3d 749 5
Tigner v. Texas (1940) 310 U.S. 141 6
Truesdale v. Moore (4th Cir. 1998) 142 F.3d 749 15
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Ulster County Court v. Allen (1979) 442 U.S. 140 37
United States v. Arlt (9th Cir. 1994) 41 F.3d 516 ..... 49, 51
United States v. Brooke (9th Cir. 1993) 4 F.3d 1480 ..... 23, 35
United States v. Cunningham (C.A.D.C. 1998) 145 F.3d 1385 35
United States v. Evans (C.A.D.C. 2000) 216 F.3d 80 24
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United States v. Frazier-El (4th Cir. 2000) 204 F.3d 553 52
United States v. Hitt (9th Cir. 1992) 981 F.2d 422 31
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United States v. Pepin (2d Cir. 2008) 514 F.3d 193 32
United States v. Scheffer (1998) 523 U.S. 303 67
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United States v. Smith (E.D.La. 2011) 790 F.Supp.2d 482 5
Wiggins v. Smith (2003) 539 U.S. 510 60
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Woodson v. North Carolina (1976) 428 U.S. 280 33
Zant v. Stephens (1983) 462 U.S. 862 8

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Bruns v. E-Commerce Exchange, Inc. (2011) 51 Cal.4th 717 40
Burke v. Almaden Vineyards, Inc. (1978) 86 Cal.App.3d 768 ..... 22, 26
Carlos v. Superior Court (1983) 35 Cal.3d 131 41
Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163 40
Evangelatos v. Superior Court (1988) 44 Cal.3d 1188 41

TABLE OF AUTHORITIES

Page(s)

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F.T. v. L.J. (2011) 194 Cal.App.4th 1 48

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In re Derrick B. (2006) 39 Cal.4th 535 44

In re Sheena K. (2007) 40 Cal.4th 875 72

In re Sturm (1974) 11 Cal.3d 258 71

Nally v. Grace Community Church (1988) 47 Cal.3d 278 22

People v. Anderson (1972) 6 Cal.3d 628 ..... 8, 9

People v. Aranda (2012) 55 Cal.4th 342 67

People v. Armendariz (1984) 37 Cal.3d 573 22

People v. Avery (2002) 27 Cal.4th 49 42

People v. Barnett (1998) 17 Cal.4th 1044 48

People v. Bean (1988) 46 Cal.3d 919 9

People v. Beeler (1995) 9 Cal.4th 953 10

People v. Benavides (2005) 35 Cal.4th 69 68

People v. Bivert (2011) 52 Cal.4th 96 34

People v. Black (2007) 41 Cal.4th 799 ..... 69, 70, 71

People v. Blair (2005) 36 Cal.4th 686 55

People v. Bloom (1989) 48 Cal.3d 1194 ..... 54, 55

People v. Bonin (1989) 47 Cal.3d 808 22

People v. Booker (2011) 51 Cal.4th 141 21

People v. Box (2000) 23 Cal.4th 1153 32

People v. Bradford (1997) 14 Cal.4th 1005 8

People v. Bradford (1997) 15 Cal.4th 1229 ..... 48, 55

People v. Bradford (2010) 187 Cal.App.4th 1345 53

People v. Brady (2010) 50 Cal.4th 547 21

People v. Brown (1986) 46 Cal.3d 432 59

People v. Burgener (2009) 46 Cal.4th 231 49

People v. Cardenas (2007) 155 Cal.App.4th 1468 70

People v. Carmony (2005) 127 Cal.App.4th 1066 9

TABLE OF AUTHORITIES

Page(s)

People v. Carter (1957) 48 Cal.2d 737 22
People v. Carter (2003) 30 Cal.4th 1166 ..... 60, 61, 67
People v. Carter (2005) 36 Cal.4th 1114 33
People v. Castenada (2000) 23 Cal.4th 743 41
People v. Chatman (2006) 38 Cal.4th 344 ..... 61, 66, 67
People v. Clark (1990) 50 Cal.3d 583 ..... 54, 55, 57
People v. Clark (1992) 3 Cal.4th 41 55
People v. Cleveland (2004) 32 Cal.4th 704 74
People v. Coleman (1985) 38 Cal.3d 69 22
People v. Cornett (2012) 53 Cal.4th 1261 42
People v. Cowan (2010) 50 Cal.4th 401 ..... 59, 60, 62, 67
People v. Cudjo (1993) 6 Cal.4th 585 34
People v. Cunningham (2001) 25 Cal.4th 926 35
People v. Daniels (1991) 52 Cal.3d 815 65
People v. Dejourney (2011) 192 Cal.App.4th 1091 34
People v. Dellinger (1989) 49 Cal.3d 1212 65
People v. Dement (2011) 53 Cal.4th 1 34
People v. Dent (2003) 30 Cal.4th 213 51
People v. Diaz (1992) 3 Cal.4th 495 55
People v. Dillon (1983) 34 Cal.3d 441 9
People v. Doolin (2009) 45 Cal.4th 390 ..... 48, 57
People v. Edwards (1991) 54 Cal.3d 787 55
People v. Ervine (2009) 47 Cal.4th 745 ..... 24, 58
People v. Estrada (1995) 11 Cal.4th 568 65
People v. Farley (2009) 46 Cal.4th 1053 46
People v. Farmer (1989) 47 Cal.3d 888 29
People v. Flood (1998) 18 Cal.4th 470 37
People v. French (2008) 43 Cal.4th 36 69
People v. Frierson (1979) 25 Cal.3d 142 9
People v. Fudge (1994) 7 Cal.4th 1075 8

TABLE OF AUTHORITIES

Page(s)

People v. Gallego (1990) 52 Cal.3d 115 53
People v. Gonzales (2011) 52 Cal.4th 254 ..... 58, 59, 62
People v. Gonzales Ruiz (1970) 11 Cal.App.3d 852 64
People v. Gonzalez (1990) 51 Cal.3d 1179 44
People v. Halvorsen (2007) 42 Cal.4th 379 ..... 47, 57
People v. Harris (1998) 60 Cal.App.4th 727 34
People v. Hawthorne (2009) 46 Ca1.4th 67 33
People v. Hillhouse (2002) 27 Cal.4th 469 37
People v. Holt (1997) 15 Cal.4th 619 66
People v. Hovarter (2008) 44 Cal.4th 983 65
People v. Howard (1992) 1 Cal.4th 1132 55
People v. Howard (2008) 42 Cal.4th 1000 61
People v. Jackson (1996) 13 Cal.4th 1164 10
People v. Jenkins (2000) 22 Cal.4th 900 ..... 42, 44, 55
People v. Jennings (1988) 46 Cal.3d 963 ..... 9, 19
People v. Jennings (2000) 81 Cal.App.4th 1301 34
People v. Joseph (1983) 34 Cal.3d 936 49
People v. Karis (1988) 46 Cal.3d 612 29
People v. Kelly (1992) 1 Cal.4th 495 41
People v. Koontz (2002) 27 Cal.4th 1041 55
People v. Lang (1989) 49 Cal.3d 991 55
People v. Lawrence (2009) 46 Cal.4th 186 ..... 48, 53, 54, 57
People v. Leal (2004) 33 Cal.4th 999 43
People v. Ledesma (2006) 39 Cal.4th 641 41
People v. Leonard (1983) 34 Cal.3d 183 22
People v. Leonard (2007) 40 Cal.4th 1370 4
People v. Lewis (2008) 43 Cal.4th 415 ..... 59, 61, 66, 67
People v. Livingston (2012) 53 Cal.4th 1145 59
People v. Loker (2008) 44 Cal.4th 691 ..... 60, 66, 67
People v. Lopez (2011) 198 Cal.App.4th 698 23

TABLE OF AUTHORITIES

Page(s)

People v. Loy (2011) 52 Cal.4th 46 ..... 21, 31
People v. Marshall (1990) 50 Cal.3d 907 ..... 9, 50, 52
People v. Massie (1998) 19 Cal.4th 550 55
People v. McKinnon (2011) 52 Cal.4th 610 26
People v. Michaels (2002) 28 Cal.4th 486 26
People v. Mincey (1992) 2 Cal.4th 408 10
People v. Moon (2005) 37 Cal.4th 1 ..... 60, 61, 63, 68
People v. Moore (2011) 51 Cal.4th 1104 61
People v. Moore (2011) 51 Cal.4th 386 22
People v. Morante (1999) 20 Cal.4th 403 46
People v. Murphy (1963) 59 Cal.2d 818 22
People v. Murtishaw (2011) 51 Cal.4th 574 ..... 22, 26
People v. Nelson (2011) 200 Cal.App.4th 1083 40
People v. Odle (1988) 45 Cal.3d 386 45
People v. Osband (1996) 13 Cal.4th 622 35
People v. Partida (2005) 37 Cal.4th 428 34
People v. Pinholster (1992) 1 Cal.4th 865 61
People v. Poggi (1988) 45 Cal.3d 306 10
People v. Polk (1996) 47 Cal.App.4th 944 30
People v. Ramos (1984) 37 Cal.3d 136 9
People v. Ramos (1997) 15 Cal.4th 1133 28
People v. Reeder (1976) 65 Cal.App.4th 235 64
People v. Riccardi (2012) 54 Cal.4th 758 ..... 21, 34
People v. Riggs (2008) 44 Cal.4th 248 ..... 48, 50
People v. Rivera (2011) 201 Cal.App.4th 353 23
People v. Rodriguez (1986) 42 Ca1.3d 730 40
People v. Rodriguez (1986) 42 Cal.3d 730 45
People v. Russel (1968) 69 Cal.2d 187 55
People v. Salcido (2008) 44 Cal.4th 93 32
People v. Sam (1969) 71 Cal.2d 194 23

TABLE OF AUTHORITIES

Page(s)

People v. Sandoval (2007) 41 Cal.4th 825 ..... 70, 74
People v. Schader (1969) 71 Cal.2d 761 ..... 25, 26, 28
People v. Scheid (1997) 16 Cal.4th 1 28
People v. Scott (2011) 52 Cal.4th 452 ..... 31, 71, 72
People v. Smithey (1999) 20 Cal.4th 936 ..... 9, 10, 38
People v. Souza (2012) 54 Cal.4th 90 ..... 58, 60
People v. St. Martin (1970) 1 Cal.3d 524 61
People v. Stanley (1967) 67 Cal.2d 812 26
People v. Stansbury (1993) 4 Cal.4th 1017 55
People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968 55
People v. Superior Court (Engert) (1982) 31 Cal.3d 797 41
People v. Tafoya (2007) 42 Cal.4th 147 11
People v. Taylor (2009) 47 Cal.4th 850 ..... 6, 47, 55
People v. Taylor (2010) 48 Cal.4th 574 37
People v. Thomas (2012) 53 Cal.4th 771 29
People v. Thompson (1980) 27 Cal.3d 303 22
People v. Thompson (2010) 49 Cal.4th 79 49
People v. Valdez (2012) 55 Cal.4th 82 22
People v. Wallace (2008) 44 Cal.4th 1032 ..... 10, 38
People v. Watson (1956) 46 Cal.2d 818 33
People v. Weidert (1985) 39 Cal.3d 836 ..... 40, 42, 46
People v. Welch (1993) 5 Cal.4th 228 71
People v. Wilkins (1990) 225 Cal.App.3d. 299 54
People v. Williams (1988) 44 Cal.3d 1127 10
People v. Williams (1998) 17 Cal.4th 148 72
People v. Wilson (2008) 43 Cal.4th 1 ..... 58, 59, 61
People v. Wilson (2008) 44 Cal.4th 758 60
People v. Wright (1985) 39 Cal.3d 576 22
People v. Wright (2005) 35 Cal.4th 964 34
People v. Young (2005) 34 Cal.4th 1149 10

TABLE OF AUTHORITIES

Page(s)

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Regents of University of California v. Superior Court (1999) 20 Cal.4th 509 40

Williams v. Garcetti (1993) 5 Cal.4th 561 41

Other State Cases

Commonwealth v. Baumhammers (Pa. 2008) 960 A.2d 59 ..... 7, 18

Corcoran v. State (Ind. 2002) 774 N.E.2d 495 17

Ex parte Borden (Ala. 2000) 769 So.2d 950 8

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Mays v. State (Tex. 2010) 318 S.W.3d 368 7

State v. Hancock (Ohio 2006) 840 N.E.2d 1032 6

State v. Ketterer (Ohio 2006) 855 N.E.2d 48 18

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State v. Scott (Ohio 2001) 748 N.E.2d 11 18

State v. Young (Tenn. 2006) 196 S.W.3d 85 29

Wells v. State (Miss. 1997) 698 So.2d 497 8

Statutes

Evid. Code, § 115 60

Evid. Code, § 190 60

Evid. Code, § 210 23

Evid. Code, § 312 65

Health & Saf. Code, § 1374.72 13

Ins. Code, § 10123.15 13

Pen. Code, § 190.2 ..... passim

Pen. Code, § 190.3 ..... 14, 33, 62

Pen. Code, § 654 74

Pen. Code, § 669 74

Pen. Code, § 1259 ..... 37, 38

Pen. Code, § 2962 13

TABLE OF AUTHORITIES

Page(s)

Welf. & Inst. Code, § 4242 13

Welf. & Inst. Code, § 5150 13

Welf. & Inst. Code, § 5600.3 13

Welf. & Inst. Code, § 5802 13

Constitutions

Cal. Const., art. I, § 17 ..... 8, 9, 11, 12

Cal. Const., art. I, § 24 9

Cal. Const., art. I, § 27 9

U.S. Const., 8th Amend. ..... passim

U.S. Const., 14th Amend. 32, 33, 34, 40

Jury Instructions

CALCRIM No. 2671 44

CALCRIM No. 760 59

CALCRIM No. 761 59

CALJIC No. 1.01 ..... 58, 59

CALJIC No. 1.03 58

CALJIC No. 1.05 58

CALJIC No. 2.03 65

CALJIC No. 2.11 64

CALJIC No. 2.20 25

CALJIC No. 2.21.2 65

CALJIC No. 2.52 37

CALJIC No. 2.80 63

CALJIC No. 2.81 63

CALJIC No. 8.84.1 59

CALJIC No. 17.30 59

CALJIC No. 17.50 59

Other Authorities

15 Code of Cal. Reg. 506 13

TABLE OF AUTHORITIES

Page(s)

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Page(s)

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KEVIN BOYCE, Defendant and Appellant.	No. S092240 (Orange County Superior Court No. 97NF2316) [Capital Case]

APPELLANT'S REPLY BRIEF

INTRODUCTION

Kevin Boyce is mentally retarded, with an IQ of 69. He is organically brain damaged, significantly so, and has been since early childhood. He is severely mentally ill and episodically psychotic. His thought processes are grossly distorted, paranoid, and delusional (e.g., the belief that he is the Egyptian God Osiris); his perceptual experiences are distorted, including auditory and visual hallucinations. He has learning disabilities and speech defects, secondary to his brain damage. He suffers significant impairments in nearly every aspect of his life.

At trial, this evidence was for the most part conceded by the state and is overwhelming. Respondent, in its brief, does not truly dispute this extraordinarily mitigating life history. An objective assessment of this evidence forces the conclusion that Kevin Boyce is one of the most mitigated persons ever to come before this Court in a capital case.

Why, then, was he sentenced to death? The crime here was certainly

horrific. And it has long been known that, "given a crime sufficiently atrocious and a popular resentment sufficiently inflamed, and the measurings of mental responsibility go to discard." (Parsons, *The Learned Judge and the Mental Defective Meet - What Then?* (1928) 12 Mental Hygiene 25, 30.)

In any event, when a mitigating case is as compelling as appellant's, the smallest of errors may have moved one or more of the jurors away from life toward death. Thus, this Court should scrutinize appellant's claims "with painstaking care." (*Kyles v. Whitley* (1995) 514 U.S. 419, 422.)

Assuming for the sake of argument that this Court rejects appellant's argument that he is and has been so mentally damaged that the appropriate remedy is to reduce the death sentence to life without the possibility of parole (see Arg. 1), then this Court must find that the trial court erred in denying appellant's penalty phase motion to control his defense by representing himself (see Arg. 6).

In this brief, appellant addresses certain contentions made by respondent, but does not reply to arguments which have been adequately addressed in the opening brief. The absence of a reply on any particular argument or allegation made by respondent and the failure to reassert any particular point made in appellant's opening brief do not constitute a concession, abandonment or waiver of the point by appellant, but indicates that the issue has been joined. The numbered arguments in this brief are consistent with those contained in Appellant's Opening Brief ("AOB") and Respondent's Brief ("RB").

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ARGUMENTS

1. APPELLANT IS BRAIN DAMAGED, SEVERELY MENTALLY ILL, AND MENTALLY RETARDED; PERMITTING THE STATE TO EXECUTE HIM, UNDER WHATEVER LEGAL GUISE, OFFENDS THE EVOLVING SENSE OF DECENCY IN THIS STATE AND NATION

Through no fault of his own, Mr. Boyce does not have an intact, normal, functioning brain. He is mentally retarded, with an IQ of 69. He is organically brain damaged, significantly so, and has been from early infancy. He scored in the bottom one or two percent on many of the tests administered to measure brain damage. He is also severely mentally ill and episodically psychotic. His thought processes are grossly distorted, paranoid, and delusional (e.g., the belief that he is the Egyptian God Osiris); he has distorted perceptual experiences including auditory and visual hallucinations. He has a mental disorder characterized by ideas of reference, odd beliefs, magical thinking, unusual perceptions, perceptual experiences, odd thinking and speech, suspiciousness or paranoid ideation, inappropriate or restricted affect, and odd behavior. He has learning disabilities and speech defects, secondary to his brain damage. He suffers significant impairments in nearly every aspect of his life.

Capital punishment must be limited to those offenders whose extreme culpability makes them "the most deserving of execution." (*Atkins v. Virginia* (2002) 536 U.S. 304, 319 ("*Atkins*"). Mr. Boyce is not within that category. Because of his damaged brain and severe mental illness, his culpability is categorically and overwhelmingly diminished. Allowing the government to terminate the life of such a profoundly damaged person would violate the evolved standards of decency in this state and this nation, standards that mark the progress of a maturing society. (AOB 62-81.)

Appellant should receive a hearing pursuant to *Atkins*, *supra*, 536 U.S.

304, in post-conviction proceedings. The pertinent facts, including an IQ of 69 and significant limitations in adaptive functioning from early childhood to adulthood, were developed at trial and mostly undisputed. (AOB 28-29, 51-55, 64, 66-67; cf. *People v. Leonard* (2007) 40 Cal.4th 1370, 1428 [factual prerequisites for a mental retardation claim not litigated at trial must be determined post-conviction].) Unfortunately, appellant is currently unrepresented for post-conviction proceedings.

A. Respondent's Two-Page Response

Respondent, in a two-page response, remains intent on exacting Mr. Boyce's life as payment for his crimes. (RB 51-52.) Aside from rightfully eschewing any claim of forfeiture, its truncated spelling is meritless.

Respondent avers that the high court in *Atkins* did not rely "on the opinion of mental health organizations, law reviews, and a Gallup poll survey of Americans." (RB 52.) But *Atkins* specifically states that the opinions of the pertinent professional organizations, religious communities, and polls are relevant evidence in determining whether a national consensus concerning a punishment has evolved. (*Atkins*, *supra*, 536 U.S. at p. 316, fn. 21.) These are set forth in appellant's opening brief. (AOB 73-74.)

Respondent also contends that the failure to show a lack of a national *legislative* consensus against the execution of mentally ill persons defeats the claim. (RB 52.) The high court has held otherwise: the absence of a legislative consensus does not foreclose appellant's claim: "'[t]here are measures of consensus other than legislation.'" (*Graham v. Florida* (2010) __ U.S. __, 130 S.Ct. 2011, 2023, quoting *Kennedy v. Louisiana* (2008) 554 U.S. 407, 432.) Appellant set forth those other measures in his opening brief. (AOB 73-74.)

Respondent also contends that certain mitigating evidence "does not factually support" the fact that appellant is brain damaged and severely

mentally ill: for example, he cared for his grandmother, took care of his daughter, and was polite. (RB 52, fn. 14.) The contention is contrary to the prosecutor's acceptance at trial that appellant is grossly impaired:

> But, you know, you are hearing this from Dr. Cross that he is -- you know, he is not the smartest -- he is not the smartest guy in the world. He is pretty down there. . . . Because, there is no point in challenging her results, especially in light of the fact that the defendant had similar results from the time he was very young, okay? I have seen those records. I don't challenge those.

(8 RT 2728; AOB 66-67.) He later stated:

> "We are not contesting the fact that Mr. Boyce has certain problems, and that are well documented relying -- regarding his mental abilities, and from whatever source. If it is organic brain disease or whatever, and we are not fighting that. Obviously, the court hasn't found us bringing in witnesses to do that.

(11 RT 3807-3808; see also 12 RT 3940 ["it never has been my position to deny" the brain damage].) The experienced counsel for the codefendant, in seeking a severance, remarked that appellant was "about as puddin-head puddin-head as one can get." (4 Pretrial RT 1107.)

Moreover, respondent's contention betrays a fundamental misapprehension of the capabilities of a person who suffers from these impairments and illnesses. People with retardation can drive cars and hold menial jobs (*Thomas v. Allen* (11th Cir. 2010) 607 F.3d 749, 759); they can also help pay household bills, help friends and neighbors, volunteer for military service, and be a reliable worker who provides for his family (*Wiley v. Epps* (5th Cir. 2010) 625 F.3d 199, 217); and they are generally able to fulfill all expected adult roles, and can "pass" in the community (*United States v. Smith* (E.D.La. 2011) 790 F.Supp.2d 482, 518-519). (See 7 RT 2517-2518 [testimony of Dr. Cross].)

Respondent further contends that the mitigating evidence shows that appellant "knew the difference between right and wrong, he was able to make

choices and knew the consequences of his actions." (RB 52, fn. 14.) But as with mental retardation (*Atkins*, *supra*, 536 U.S. at p. 318), a person can be brain damaged and severely mentally ill, and still know the difference between right and wrong. Thus, the claim does not rise or fall on that point, according to *Atkins*. Further, as the high court has pointed out, mental illness "can vary over time. It interferes with an individual's functioning at different times in different ways." (*Indiana v. Edwards* (2008) 554 U.S. 164, 175; see also *People v. Taylor* (2009) 47 Cal.4th 850, 877.)

Respondent attempts to dispatch appellant's equal protection and substantive due process claims with three cases. (RB 52.) Two are inapposite. In *Carroll v. Secretary, Dept. of Corrections* (11th Cir. 2009) 574 F.3d 1354, 1370, the court concluded that an extension of *Atkins* to the severely mentally ill would constitute a new rule of constitutional law in violation of the Anti-terrorism and Effective Death Penalty Act. Equal protection is not mentioned in *State v. Hancock* (Ohio 2006) 840 N.E.2d 1032, 1059-1060. The third case, *Tigner v. Texas* (1940) 310 U.S. 141, 147, is cited for the uncontested proposition that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Appellant has argued that there is no difference between the mentally retarded and the brain damaged and severely mentally ill for purposes of equal protection and capital eligibility. (AOB 78-81.) To the extent that brain damage and severe mental illness impose deficits in culpability and deterrability comparable to (or greater than) mental retardation, offenders suffering these illnesses should be treated similarly and be exempt from capital punishment. (AOB 80; see generally Comment, *Equal Protection From Execution: Expanding Atkins to Include Mentally Impaired Offenders* (2010) 60 Case W. Res. L.Rev. 925.) As a well-known scholar in the field explained:

> People with dementia or a traumatic head injury severe enough to result in significant limitations in both their intellectual

> functioning and adaptive behavior rarely commit capital offenses. If they do, however, the reasoning in *Atkins* should apply and an exemption is warranted, because the only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset.

(Slobogin, *Mental Disorder as an Exemption From the Death Penalty: The Aba-IRR Task Force Recommendations* (2005) 54 Cath. U. L.Rev. 1133, 1135-1136, internal quotation marks omitted.) Moreover, when laws impinge on fundamental rights protected by the constitution, appellate courts must apply strict scrutiny. The right to be free from cruel and/or unusual punishments is surely a fundamental right. (AOB 79; see *Foucha v. Louisiana* (1992) 504 U.S. 71, 80.)

Appellant acknowledged in his opening brief that various courts have declined to extend the holding in *Atkins* to persons with simple mental illness. (AOB 70, fn. 37.) Respondent adds a few additional cases (RB 51), but none is dispositive because appellant does not claim that *Atkins* should be extended to persons with simple mental illness. [1] His argument is that persons with *significant* brain damage, *severe* mental illness, and *significant* impairments in intellectual functioning should not be eligible for death.

Further, these cases provide little comfort when viewed against the history preceding the categorical bar on the execution of the mentally

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1. The additional cases cited by respondent do not involve a defendant who presented clear, convincing, and unrefuted evidence of brain damage, severe mental illness, and significant impairments in intellectual functioning. In *ShisInday v. Quartermain* (5th Cir. 2007) 511 F.3d 514, 521, the defendant simply had a long history of mental illness. In *Mays v. State* (Tex. 2010) 318 S.W.3d 368, 379-380, the court concluded, in part, that "appellant has failed to show that, if he did suffer from some mental impairment at the time of these murders, that impairment was so severe that he is necessarily and categorically less morally culpable than those who are not mentally ill." In *Commonwealth v. Baumhammers* (Pa. 2008) 960 A.2d 59, 96, the defendant argued that "*Atkins* should be extended to individuals such as himself, who had been described at trial by all psychiatric expert witnesses as suffering from mental illnesses."

retarded. Mentally retarded defendants were sentenced to death and undoubtedly executed in the years before *Atkins*. (See *Lambert v. State* (Okla.Crim.App. 1999) 984 P.2d 221, 238 [Eighth Amendment did not violate the execution of the mentally retarded; *Ex parte Borden* (Ala. 2000) 769 So.2d 950, 957-958; *Wells v. State* (Miss. 1997) 698 So.2d 497, 514-516; *Hall v. State* (Fla. 1993) 614 So.2d 473, 478.) Then, *Atkins* was issued, reaffirming that the Eighth Amendment is not static, but rather must be construed in accordance with contemporary and evolving standards of decency.

There are two interesting omissions from respondent's brief. First, it does not claim that the prosecutor lacked an incentive to attack the evidence of brain damage, severe mental illness, and significant impairments in intellectual functioning. (Cf. *Bobby v. Bies* (2009) 556 U.S. 825, 836.) Given that such evidence has long been recognized as mitigating (*Zant v. Stephens* (1983) 462 U.S. 862, 885 [mental illness]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115 [severe emotional disturbance]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1118 [retardation]; *Armstrong v. Dugger* (11th Cir. 1987) 833 F.2d 1430, 1433-1434 [organic brain damage]), the prosecutor had every incentive to attack the evidence. For the most part, he chose not to do so here. (Cf. *People v. Bradford* (1997) 14 Cal.4th 1005, 1059-1060 [evidence of brain damage and alcohol intoxication was contested by the prosecution's expert].)

Second, respondent fails to discuss this Court's role under the California Constitution's separate and independent prohibition against cruel or unusual punishments, an issue appellant discusses next. (AOB 69-70, & fn. 36.)

B. Reversal of the Death Sentence Is Required under Article I, Section 17 of the California Constitution

Article I, section 17 prohibits cruel or unusual punishment and is broader than the Eighth Amendment. (*People v. Anderson* (1972) 6 Cal.3d 628, 634 ["the delegates to the Constitutional Convention of 1849 . . . were aware

of the significance of the disjunctive form and that its use was purposeful"]; see also *People v. Smithey* (1999) 20 Cal.4th 936, 1019-1020, fn. 1 (conc. opn. of Mosk, J.); *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.) Yet, as with the Eighth Amendment, article I, section 17 prohibits the imposition of a punishment that is "not proportionate to individual culpability." (*People v. Jennings* (1988) 46 Cal.3d 963, 995; see also *People v. Marshall* (1990) 50 Cal.3d 907, 938.) And it, too, must be construed in accordance with contemporary and evolving standards, while also considering the penological purposes of the punishment (*Anderson*, *supra*, at pp. 647-648, 651-653). Just as the high court must bring its own independent judgment to bear in determining whether a punishment violates the Eighth Amendment, this Court determines whether a punishment is unconstitutional under article I, section 17 of our Constitution. (*Id.* at p. 640; see also *People v. Dillon* (1983) 34 Cal.3d 441, 478). [2]

On appeal, and upon a defendant's request, this Court performs what it refers to as "intracase proportionality review," under which it decides whether a penalty is disproportionate to the defendant's personal culpability by examining, inter alia, the circumstances of the offense and the consequences

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2. Article I, section 27 of the state Constitution provides that the death penalty is a permissible type of punishment. (See *People v. Frierson* (1979) 25 Cal.3d 142, 184-186.) But that provision does not bar consideration of a claim that a death sentence is disproportionate to a capital defendant's culpability: this Court retains broad powers of judicial review of death sentences "to safeguard against arbitrary or disproportionate treatment." (*Id.* at pp. 186-187; see also *People v. Ramos* (1984) 37 Cal.3d 136, 152-153; *People v. Bean* (1988) 46 Cal.3d 919, 958.)

Article I, section 24, a constitutional amendment requiring California state courts to afford no greater rights to criminal law defendants than those afforded by the federal Constitution, was found to be an invalid attempt to alter the substance and integrity of the state Constitution as a document of independent vitality, force, and effect. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352-353.)

of the defendant's actions, as well as the defendant's mental capabilities and other characteristics. (E.g., *People v. Wallace* (2008) 44 Cal.4th 1032, 1099; *People v. Jackson* (1996) 13 Cal.4th 1164, 1246; *People v. Williams* (1988) 44 Cal.3d 1127, 1157-1158.)

This proportionality review should serve to remove significantly brain damaged and severely mentally ill offenders from the ranks of the condemned. However, appellant is unaware of any case where this Court has found a death sentence under the 1978 death penalty scheme to be disproportionate to the defendant's culpability. (See Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla. L.Rev. 719, 751-752.) This is true of defendants who were brain damaged or mentally ill. For example, in *People v. Poggi* (1988) 45 Cal.3d 306, 348, the Court concluded that the presence of organic brain damage and a history of mental illness did not "sufficiently reduce [the defendant's] culpability to make the sentence disproportionate." In *People v. Mincey* (1992) 2 Cal.4th 408, 476-477, the Court concluded that "evidence of defendant's below-average intelligence [was] insufficient to make the sentence disproportionate to his individual culpability." In *People v. Beeler* (1995) 9 Cal.4th 953, although there was insufficient evidence that the defendant in fact suffered from organic brain damage, the Court observed that such evidence "would not *necessarily* render a death sentence cruel or unusual" under the state constitution. (*Id.* at p. 995, emphasis in original; see also *People v. Smithey* (1999) 20 Cal.4th 936, 1015-1016.) In *People v. Young* (2005) 34 Cal.4th 1149, 1229, despite evidence that the defendant's IQ was on the borderline of mental retardation, that he suffered from an organic brain disorder, and that his neuropsychological functioning was "highly impaired," this Court agreed with the trial court's conclusion that this evidence was insufficient to void the death judgment.

Nonetheless, under this Court's intracase proportionality review, the

death judgment must be reversed. Although the crime was horrific, a determination of the proportionality of a capital sentence cannot be based solely upon the circumstances of the offense or the magnitude of the resulting harm; it must also include an assessment of the factors calling for life. (*People v. Tafoya* (2007) 42 Cal.4th 147, 198; see also *Enmund v. Florida* (1982) 458 U.S. 782, 801 [punishment must be tailored to defendant's personal responsibility and moral guilt].) Thus, notwithstanding the circumstances of the offenses, appellant's mitigating evidence – significant brain damage, severe mental illness, grossly distorted thought processes, learning disabilities, and other mitigation -- is overwhelming, and significantly weakens the aggravating factors. (See *Hardwick v. Crosby* (11th Cir. 2003) 320 F.3d 1127, 1164; *Smith v. Mullin* (10th Cir. 2004) 379 F.3d 919, 942; *Brewer v. Aiken* (7th Cir.1991) 935 F.2d 850, 862 (conc. opn. of Easterbrook, J.) [citing empirical evidence of juror sympathy to claims of organic brain damage]; *Glenn v. Tate* (6th Cir. 1996) 71 F.3d 1204, 1211.) His severe impairments and damaged brain make the crimes more a heart-wrenching tragedy than an unmitigated outrage. Death is disproportionate to this most mitigated case.

In addition, appellant requests this Court to do what the high court does in construing the analogous provision of the federal Constitution: determine whether appellant's significant brain damage, severe mental illness, and significant impairments in intellectual functioning place him in a category of offenders for whom capital punishment cannot be imposed.

In other words, the question appellant raises is whether, wholly apart from the circumstances of the capital crime or other aggravating factors, appellant's culpability for the capital offense is sufficiently reduced to preclude the imposition of the death penalty under article I, section 17 of the California Constitution.

The pertinent facts for this claim are set forth above: appellant's IQ is

69; he is significantly brain damaged and has been since he was an infant; he is severely mentally ill and episodically psychotic; and his thought processes are grossly distorted, paranoid, and delusional. (AOB 63-66.) Sentencing such a person to death is cruel or unusual under article I, section 17 of the California Constitution for the following reasons.

First, the moral culpability of persons with significant brain damage and severe mental illness is greatly diminished by virtue of their impairments; they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. (See *Atkins*, *supra*, 536 U.S. at pp. 317-320.) Offenders like appellant who suffer from these conditions experience such distortions of reality that their ability to appreciate the wrongfulness of their conduct or to understand its consequences is significantly reduced. (See *Indiana v. Edwards*, *supra*, 554 U.S. at p. 176 [common symptoms of severe mental illness include "[d]isorganized thinking" and "deficits in sustaining attention and concentration"].) Similarly, their symptomatology creates such gross irrationality that it significantly impairs their judgment; thus, even if they understand the nature and consequences of their acts and appreciate their wrongfulness, they are nonetheless not fully able to control their conduct. Because of their disabilities in areas of reasoning, judgment, and control, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. (AOB 70-72.)

Second, any argument that a bar against the execution of the severely mentally ill and brain damaged is impracticable because psychiatry is an inexact science should be rejected. Courts are called on to define or apply the concept of a "severe" mental illness in a variety of contexts, both criminal and civil. (See *Indiana v. Edwards*, *supra*, 554 U.S. at pp. 176-178; *United States v. Long* (5th Cir. 2009) 562 F.3d 325, 334.) The term "severe mental disorder" is defined in this state's Mentally Disordered Offenders Act as:

> an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely.

(§ 2962.) A similar concept is set forth in the statutes regarding the Detention of Mentally Disordered Persons. (Welf. & Inst. Code, § 5150; see also Welf. & Inst. Code, §§ 4242, 5600.3, 5802 [defining serious mental disorders and severe mental illness]; Health & Saf. Code, § 1374.72 [defining "severe mental illnesses"]; Cal. Ins. Code, § 10123.15 [defining "severe mental disorders"]; 15 Code of Cal. Reg. 506 [defining "severe mental disorder"].) The State of Connecticut, prior to abolishing the death penalty, had a statute forbidding the execution of a defendant whose mental capacity was significantly impaired. (Conn. Gen. Stat. Ann, § 53a-46a, subd. (h)(3).) The American Psychiatric Association defines "severe mental illness" as including "disorders with psychotic features that are accompanied by some functional impairment and for which medication or hospitalization is often required." (AOB 75 & fn. 39.) Psychosis is defined as a "severe mental disorder characterized by gross impairments in reality testing, typically manifested by delusions, hallucinations, disorganized speech, or disorganized or catatonic behavior[.]" (Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness As The Next Frontier* (2009) Boston College L.Rev. 785, 836, fn. 354.) In *Foucha v. Louisiana*, *supra*, 504 U.S. 71, involving involuntary commitment, the dissent complained that psychiatry (and its opinions) is not an exact science. The majority responded:

> That may be true, but such opinion is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous and to base release decisions on qualified testimony that the person is no longer mentally ill or dangerous. It is also reliable enough for the State not to punish a person who by a preponderance of the evidence is found to have been insane at the time he committed a

> criminal act, to say nothing of not trying a person who is at the time found incompetent to understand the proceedings.

(*Id.* at p. 76, fn. 3.) In short, courts are capable of applying a definition of severe mental illness to the death penalty context, and determining the level of impairment required to confer ineligibility for that punishment. And in this case, appellant meets any definition of severely mentally ill and significantly brain damaged.

Third, the acceptable goals served by the death penalty -- retribution and deterrence -- are not served where the defendant's culpability is substantially diminished by brain damage and severe mental illness.

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable -- for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses -- that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

(*Atkins*, *supra*, 536 U.S. at p. 320; AOB 70-71.) The state's interest in exacting retribution by execution is constitutionally inadequate if a defendant's reasoning and moral capacities are sufficiently diminished, regardless of the aggravating factors and the circumstances of the crime.

Fourth, although the capital sentencers must consider mental illness and brain damage under section 190.3, factors (d), (h) & (k), that case-by-case consideration can be (and was here) inadequate. Evidence of brain damage and severe mental illness should be powerful mitigating evidence. (See *Porter v. McCollum* (2009) 558 U.S. 30, 130 S.Ct. 447, 454 [brain abnormality and cognitive defects]; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 257-258 [neurological damage]; *Rompilla v. Beard* (2005) 545 U.S. 374, 392 [organic brain

damage and extreme mental disturbance]; *Ferrell v. Hall* (11th Cir. 2011) 640 F.3d 1199, 1234-1235 [evidence of organic brain damage and mental illness is compelling mitigation].) But it is not always treated so. Courts and experts have recognized that such evidence is often a two-edged sword that enhances the likelihood that future dangerousness will be found by the jury. (See *Atkins*, *supra*, 536 U.S. at p. 321; *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-293; see generally Ramana, *Living and Dying with a Double-Edged Sword: Mental Health Evidence in the Tenth Circuit's Capital Cases* (2011) 88 Denv. L.Rev. 339.) [3]

Juries and judges often harbor hostile attitudes toward people with mental illness, and view severe mental illness as more aggravating than mitigating. (See, e.g., *Truesdale v. Moore* (4th Cir. 1998) 142 F.3d 749, 754-755; see also Tabak, *Executing People With Mental Disabilities: How We Can Mitigate An Aggravating Situation* (2006) 25 St. Louis U. Pub. L.Rev. 283, 288-289; Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Virg. L.Rev. 1109, 1165-1166 [severe mental illness, raises a number of collateral issues that may lead the jury to vote for a sentence of death rather than life]; Slobogin, *Mental Illness and the Death Penalty* (2000) 24 Mental & Physical Disability L.Rep. 667, 669-70.) Capital sentencing jurors, in the face of strong aggravating evidence, rather than properly weighing mental

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3. The National Mental Health Association has noted that capital trials often fail "to identify who among those convicted and sentenced to death actually has a mental health condition." (www.nmha.org/go/position-statements/54 (last visited Nov. 20, 2012). The American Psychiatric Association notes that "many observers of capital sentencing proceedings, including participating psychiatrists, believe that juries tend to give too little weight to mitigating evidence of severe mental disorder, leading to inappropriate execution of offenders whose responsibility was significantly diminished by mental retardation or mental illness." (*Mental Illness and the Death Penalty in North Carolina: A Diagnostic Approach* (2007), p. 25, footnotes omitted.)

illness as a mitigating factor, are just as likely to consider it an aggravating factor, as showing future dangerousness. (See Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force* (2005) 54 Cath. U. L.Rev. 1133, 1150-1151. One expert has stated:

> In many cases an offender's mental illness, although presumptively mitigating, might also be directly connected with an aggravating circumstance. For instance, an offender's risk for violence might be the result of mental illness.

(Melton et al., *Psychological Evaluations For The Courts: A Handbook For Mental Health Professionals and Lawyers* (3d ed. 2007) at p. 289.) Courts are not immune from this thinking. (*Cannon v. Gibson* (10th Cir. 2001) 259 F.3d 1253, 1277-1278 [evidence of brain damage "could have strengthened the prosecution's argument that Cannon represented a continuing threat to society"]; *Smith v. Mullin*, *supra*, 379 F.3d at p. 943 [noting district court dismissal of mental mitigation].) The inadequacies of a case-by-case adjudication of the severely mentally ill and brain damaged is exacerbated by the fact that (1) jurors observe the accused throughout the trial (*Riggins v. Nevada* (1992) 504 U.S. 127, 142 (conc. opn. of Kennedy, J.)), and (2) the demeanor of such persons may create an unwarranted impression of a lack of remorse for their crimes (see *Atkins*, *supra*, 536 U.S. at pp. 320-321). [4]

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4. Further, brain damage and severe mental illness, like significant cognitive limitations, sharply constrict a defendant's ability "to give meaningful assistance to their counsel." (*Atkins*, *supra*, 536 U.S. at p. 320.) Hallucinations and delusions diminish a defendant's ability to report in two distinct ways: they impair the ability to accurately observe, and, particularly where the delusions are paranoid (as appellant's were and are), they cause mistrust of persons attempting to help, and consequently impair willingness to cooperate with defense attorneys. Thus, a mentally impaired defendant might be unfairly convicted or sentenced to death if he alone has knowledge of certain facts but does not appreciate the value of such facts, or the propriety of communicating them to his counsel. (Bonnie, *The Competence of Criminal*

Footnote continued on next page . . .

Thus, substantial and unacceptable risks inhere when the state seeks the death penalty against a brain damaged, severely mentally ill person. As with the mentally retarded and juveniles, case-by-case sentencing determinations of a profoundly brain damaged capital defendant creates an unacceptably high risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605 (plur. opn.)).

That risk was heightened here by the prosecution's closing argument. As appellant pointed out in his opening brief, the prosecutor argued, in the face of Dr. Benson's contrary, reiterated, and unrefuted testimony, that appellant "fit" the diagnosis of antisocial personality disorder, "otherwise known as being a sociopath," and showed no remorse. (AOB 77; 12 RT 3933, 3935-3937.) Appellant reiterates: if prosecutors are susceptible to mistaking brain damage and severe mental illness for sociopathy, then capital sentencing jurors, particularly when urged to do so by the state's representative, are at substantial risk of making the same mistake. (AOB 77.) That risk cannot be tolerated under either the federal or the state Constitutions.

Before concluding, appellant sets forth certain quotes (internal quotation marks have been omitted) from several supreme court justices of our sister states, demonstrating in some small part the evolving standards of decency:

> The underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions for the seriously mentally ill, namely evolving standards of decency. (*Corcoran v. State* (Ind. 2002) 774 N.E.2d 495, 502 (disn. opn. of Rucker, J.).)

Defendants: Beyond Dusky and Drope (1993) 47 U. Miami L.Rev. 539, 552; Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation* (1992) 10 Behavioral Sci. & L. 291, 295.)

> This court has a chance to take a step toward being a more civilized and humane society. This court could declare that in the interests of protecting human dignity, Section 9, Article I of the Ohio Constitution prohibits the execution of a convict with a severe mental illness. I believe that the evolving standards of decency that mark the progress of Ohio call for such a judicial declaration. (*State v. Scott* (Ohio 2001) 748 N.E.2d 11, 20 (dis. opn. of Pfeifer, J.).)
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> [*Atkins* and *Roper*] imply that in some instances a defendant's diminished cognitive or reasoning capacities may bar the weighing of aggravating and mitigating factors because the defendant's diminished culpability, by itself, removes execution as a possible punishment. . . . Aggravating factors, while increasing our outrage as citizens in response to a crime, are irrelevant for capital sentencing purposes if the culpability of a defendant, at the time of his or her crimes, is sufficiently diminished. . . . [I]f the culpability of the average murderer is insufficient to invoke the death penalty as our most extreme sanction, then the lesser culpability of [the defendant], given her history of mental illness and its connection to her crimes, surely does not merit that form of retribution. (*State v. Nelson* (N.J. 2002) 803 A.2d 1, 49 (conc. opn. of Zazzali, J.).)
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> I too question whether [deterrence or retribution] applies to severely mentally ill offenders. . . .There seems to be little distinction between executing offenders with mental retardation and offenders with severe mental illness, as they share many of the same characteristics. (*State v. Ketterer* (Ohio 2006) 855 N.E.2d 48, 85-86 (conc. opn. of Lundberg Stratton, J.).)
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> Serious mental illnesses have similar effects [to the mentally retarded and juveniles]. . . . An individual with a serious mental illness may be just as seriously impaired in his ability to understand and process information as an individual with a diminished IQ or an individual who has not yet reached the age of legal majority. (*Com. v. Baumhammers* (Pa. 2008) 960 A.2d 59, 77 (conc. opn. of Todd, J.).)

The question here is not one of guilt, but whether this profoundly damaged person's life is to be exterminated. The words of Judge Chapel, dissenting in a pre-*Atkins* case, are apt:

> A majority of the Court today approves the execution of a mentally retarded man who has the mental age of an eight-year-old boy. The Court blithely rejects the claim that the execution of the mentally retarded violates our state and federal constitutions. In deciding to allow the killing of mentally retarded citizens, the majority swallows all sense of decency, disregards the will of the people of Oklahoma and ignores the principles and values of Article II, section 9 of the Oklahoma Constitution. Because our State constitution will not tolerate the execution of a mentally retarded man, I respectfully dissent to the imposition of the death penalty in this case.

(*Lambert v. State* (Okla.Crim.App. 1999) 984 P.2d 221, 240 (conc. & disn. opn of Chapel, P.J.), footnote omitted.)

Nor is it a question of escaping punishment: acceptance of this claim means that appellant would be sentenced to life without the possibility of parole.

There is no question that any capital sentencing scheme "may occasionally produce aberrational outcomes." (See *Pulley v. Harris* (1984) 465 U.S. 37, 54.) This Court has recognized that it is "obligated to set aside the penalty in any case in which it is aberrant[.]" (*People v. Jennings* (1988) 46 Cal.3d 963, 995.) The death sentence meted out to appellant-- significantly brain-damaged, severely mentally ill, and grossly impaired in intellectual functioning -- is incompatible with this state's evolved standards of decency, is excessive and disproportionate to appellant's diminished culpability, and makes no measurable contribution to any acceptable goals of capital punishment. It is a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." (*Furman v. Georgia* (1972) 408 U.S. 238, 312 (conc. opn. of White, J.).) It must be reversed.

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2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE PROSECUTION TO PLAY AUDIO RECORDINGS OF THE 911 CALLS MADE BY THE TWO SURVIVING VICTIMS OF THE CAPITAL CRIME

At the guilt phase, surviving victims Jennifer and Amy Parrish each testified at length that two African-American men with guns committed the salon offenses. (4 RT 1803-1839 [Jennifer]; RT 2149-2165 [Amy].) At the end of their respective testimony, the prosecutor asked whether Jennifer and Amy had called 911, and each replied in the affirmative. Over appellant's pretrial objection, the prosecutor played audio recordings of the 911 calls (the "911 Tapes"). The 911 Tapes "convey so much human suffering" and are "unpleasant to listen to." That is the prosecutor's description. (RB 56.) The seasoned defense attorney described them as "the most emotional thing I have ever heard in my life." (AOB 83.)

The prosecutor could have simply asked each witness what was said during the calls. What evidence did the 911 Tapes provide that was so important that the jury had to hear "so much human suffering?" In her call, Jennifer Parrish said: "My husband's been shot in the head." Amy Parrish said: "He's shot in the back of the head and there's stuff coming out of his nose," and "It's two black men. They each have a gun. . . . They took the guns with them." (RB 53-54.) Contrary to respondent's claim (RB 60), these statements are not very descriptive. They added virtually nothing to the lengthy testimony already given by those witnesses on those very points.

Trial courts must be alert to factors that may undermine the fairness of the fact-finding process and infringe the presumption of innocence, particularly in capital cases. Here, the 911 Tapes filled the courtroom with the surviving victims' real-time frantic and distraught pleas for help. These horrific tapes created a clear and impermissible danger of arousing and inflaming the jurors' hostility against the person charged with inflicting that

suffering, appellant, and luring the jurors away from their duty to impartially appraise the evidence at the guilt phase. At the penalty phase, given the overwhelming evidence of mitigation, the emotional impact of the tapes may have swayed one or more jurors to disfavor life. (AOB 82-96.)

Respondent, in its brief, does not allege forfeiture (the claims are fully preserved), but contends that the audiotapes were relevant, not unduly prejudicial under Evidence Code section 352, and harmless. (RB 53-66.) [5]

In this reply, appellant will focus on whether the trial court erred in admitting the 911 Tapes over appellant's section 352 objection. The remaining claims in Argument 2 are joined.

A. Section 352 and the Relevance of the 911 Tapes

Section 352 gives a trial court broad discretion to exclude evidence if its probative value is substantially outweighed by the probability that it will create a substantial danger of, inter alia, undue prejudice. (*People v. Riccardi* (2012) 54 Cal.4th 758, 808-809.) The statute applies when the prosecution attempts to introduce evidence such as prior bad acts, gruesome photos, or inflammatory evidence. (E.g., *People v. Loy* (2011) 52 Cal.4th 46, 61-62 [prior offenses]; *People v. Booker* (2011) 51 Cal.4th 141, 169-171 [gruesome photos]; *People v. Brady* (2010) 50 Cal.4th 547, 582-583 [victim impact evidence].) Indeed, it applies whenever the probative value of a party's proffered evidence is substantially outweighed by the danger of undue prejudice. Well before the

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5. All further statutory references made in this argument are to the Evidence Code. Section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

adoption of section 352, this Court recognized that "[i]f the principal effect of demonstrative evidence such as photographs is to arouse the passions of the jury and inflame them against the defendant because of the horror of the crime, the evidence must of course be excluded." (*People v. Carter* (1957) 48 Cal.2d 737, 751.)

Upon request, a trial court must "strike a careful balance" between the probative value of evidence and the danger of undue prejudice. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 595-596.) This balance is particularly delicate and critical where a criminal defendant's liberty and life are at stake. (*People v. Wright* (1985) 39 Cal.3d 576, 588; *People v. Murphy* (1963) 59 Cal.2d 818, 829.) In cases of doubt, the exercise of discretion under section 352 should favor the accused. (*People v. Thompson* (1980) 27 Cal.3d 303, 318.)

On appeal, a trial court's ruling under section 352 is reviewed for an abuse of discretion, and its decision will be reversed only if the probative value of the evidence is outweighed by the danger of undue prejudice. (*People v. Valdez* (2012) 55 Cal.4th 82, 133.) A trial court's discretion under section 352 is not unlimited: "The discretion granted the trial court by section 352 is not absolute and must be exercised reasonably in accord with the facts before the court." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 289, fn. 5, internal quotation marks omitted; see also *Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 774.) There are instances where that discretion has not been correctly exercised. [6] Moreover, where the trial court places its

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6. E.g., *Old Chief v. United States* (1997) 519 U.S. 172, 180-186; *People v. Moore* (2011) 51 Cal.4th 386, 405-406 [expert testimony]; *People v. Cudjo* (1993) 6 Cal.4th 585, 609-610 [exclusion of confession]; *People v. Bonin* (1989) 47 Cal.3d 808, 846-848 [experimental evidence]; *People v. Coleman* (1985) 38 Cal.3d 69, 85-86, 86-87, 92-93 [letters written by the defendant]; *People v. Armendariz* (1984) 37 Cal.3d 573, 589-590 [statements of fear]; *People v. Leonard* (1983) 34 Cal.3d 183, 187-189 [coarrestee's guilty plea]; *People v. Sam* (1969) 71 Cal.2d

Footnote continued on next page . . .

reasoning on the record, as the trial court did here (AOB 85), an appellate court may discern an error in the lower court's exercise of its discretion.

In addressing a trial court's balancing under section 352, a reviewing court must keep in mind the lower court's view of the *relevancy* of the evidence. This Court cannot review the trial court's section 352 balancing without knowing the theory of relevance, and thus the materiality and probative value of the evidence weighed by the court. (See §§ 210 [defining relevant evidence], & 352.) In a similar context, the Ninth Circuit stated: "the government must show how evidence is relevant; specifically, it must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from" the questioned evidence. (*United States v. Brooke* (9th Cir. 1993) 4 F.3d 1480, 1483, internal quotation marks omitted [admission of prior false statements].)

Here, at the hearings on the motion, the state offered a half-dozen theories of relevance. However, most of these bases for admissibility were either clearly not at issue or explicitly rejected by the trial court. For instance, the prosecutor argued that the tapes were relevant to show that Jennifer and Amy Parish were present at the scene and to show their suffering. But neither of those theories relates to a disputed fact (or, in the latter case, a permissible fact) that was of consequence to the guilt phase. Moreover, at the hearing on the motion, after the prosecutor submitted the matter, the court asked, "You are not going to respond specifically as to the probative value argument regarding some of the specifics like wound location?" The prosecutor responded, "No," explaining that this was a mistake in a prior, errant

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194, 206-207 [prior criminal acts]; *People v. Lopez* (2011) 198 Cal.App.4th 698, 713-716 [prior uncharged misconduct]; *People v. Rivera* (2011) 201 Cal.App.4th 353, 362-365 [demonstration of the murder by defendant in court, before the jury].)

transcript of a 911 call. The court then correctly concluded that "we don't have location of the wound issues." (1 RT 1025-1027; AOB 86-87.) The same is true of the so-called "identification" basis of relevancy. As respondent notes, defense counsel strenuously argued that identification was not in issue (RB 58), and in his opening statement, counsel conceded appellant's involvement. (AOB 87.) The trial court did not mention the identification basis in its ruling because it was not in issue. Further, to the extent that the 911 Tapes could be construed as mere "background," any probative value would be slight. (See *United States v. Sesay* (C.A.D.C. 2002) 313 F.3d 591, 598-600; *United States v. Evans* (C.A.D.C. 2000) 216 F.3d 80, 86-87; see generally Note, *Out-Of-Court Accusations Offered for "Background": A Measured Response from the Federal Courts* (2010) 58 U.Kan. L.Rev. 473.) [7]

Respondent's contention that the tapes were relevant to rebut appellant's "statements" that the gun discharged "accidentally" (RB 59) is particularly disingenuous. The record pages cited in its brief are to appellant's confession, not to any defense theory. At the hearing on the motion, defense counsel disclaimed reliance on an accidental shooting theory. (3 Pretrial RT 811.) At trial, the defense did not argue that the shooting was accidental. Nor did the trial court mention that theory in its ruling on the section 352 motion. The possibility of an accidental shooting was elicited from this mentally

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7. Respondent also claims that the 911 Tapes were relevant to refute the defense theory that a third person was involved and appellant was merely a lookout. (RB 59.) Its brief cites to defense counsel's opening statement, but not to any page where the prosecution offered this theory of relevancy to the trial court, or where the trial court weighed the probative value of this theory. "A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) To the extent that respondent has offered on appeal a new theory of admissibility not presented below, it has forfeited that claim. (See *People v. Ervine* (2009) 47 Cal.4th 745, 779-780.)

retarded, brain damaged defendant during his interrogation by law enforcement: they planted the suggestion, and as the mentally retarded are want to do, appellant went along with it. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 320-321.) The prosecutor all but conceded this fact at his guilt-phase closing argument:

> Because [Detective] Kennedy said, "Well, maybe it is an accident, you know, because there is a cold-blooded killer and people who do accidents." And Boyce is sort of like, "Well, yeah, okay. Yeah, that's what it was."

(8 RT 2731) The prosecution cannot "credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice." (*People v. Schader* (1969) 71 Cal.2d 761, 776.)

The prosecutor also argued that the tapes bolstered the witnesses' credibility. This was the relevancy basis accepted by the trial court:

> I do see some credibility/believability issues. I see some classic 2.20 Caljic [*sic*] [8] issues that go to these people's, what I am going to assume is going to be proffered testimony. And I think the people have a right to put that on, put that evidence on out front, so to speak, as opposed to reserving and waiting and seeing whether you can rehabilitate somebody. ¶ The court has done the weighing process, and the probative value outweighs any prejudicial effect and they both shall be admissible.

(1 RT 1028.) Respondent quotes the trial court's conclusion (RB 58), and addresses a portion of its section 352 argument to the credibility basis for admissibility (RB 59-60). The issue, then, is whether the relevance of the 911 Tapes to the credibility of the witnesses was substantially outweighed by a danger of undue prejudice from confronting the jurors with real-time ghastly screams of despair from the surviving victims.

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8. Pattern instruction CALJIC No. 2.20 sets forth various factors that the jurors should consider in determining the believability of a witness.

B. The Ghastly 911 Tapes Shed Little if Any Light on the Witness's Credibility; They Were Played for a Different and Illegitimate Reason

Under section 352, the probative value of the proffered evidence must be weighed against the danger of undue prejudice. (*People v. Murtishaw*, *supra*, 51 Cal.4th at pp. 595-596.) Evidence is probative if it is relevant, material (i.e., important to the case), and necessary. (*People v. Schader*, *supra*, 71 Cal.2d at pp. 774-775.) A court must consider whether the evidence (1) tends logically and by reasonable inference to prove the issue upon which it is offered, (2) is material or important to an issue in the proponent's case, and (3) is necessary to prove the proponent's case or merely cumulative to other available and sufficient proof. (*People v. Stanley* (1967) 67 Cal.2d 812, 818-819; *Burke v. Almaden Vineyards, Inc.*, *supra*, 86 Cal.App.3d at p. 774; 1 Jefferson, Cal. Evidence Benchbook (4th ed. 2012) § 22.6, pp. 404-405; cf. *People v. McKinnon* (2011) 52 Cal.4th 610, 669.)

Here, putting aside the horrific aspects of the recordings, the proffered statements were that two 911 calls were made; the victim had been shot in the head; and the persons responsible were "two black men," each with a gun. Given that each witness had just finished lengthy testimony establishing those very facts, even assuming that the audiotapes were relevant, they were clearly neither material nor necessary. The probative value of such cumulative evidence is low under section 352. (See *People v. Michaels* (2002) 28 Cal.4th 486, 532; *Burke v. Almaden Vineyards, Inc.*, *supra*, 86 Cal.App.3d at p. 774.)

Respondent refers to the credibility issue as follows:

> Here, the crux of the defense was to discredit Deputy Parish's and Ms. Parish's testimony placing Boyce inside the salon as the shooter. *As stated above*, the 911 recordings were relevant to support Deputy Parish's and Ms. Parish's credibility. ¶ Thus, the tapes addressed an issue in the case, i.e. whether the jury should credit the sisters' testimony regarding their recollection of what occurred at the salon.

(RB 60, emphasis added.) Appellant has emphasized a portion of that quote because nowhere in respondent's brief is there an explanation as to how the 911 Tapes were relevant to the witnesses' credibility. Nowhere does it articulate precisely the evidential hypothesis by which the 911 Tapes were relevant to the credibility of the witnesses.

The credibility of Jennifer and Amy Parrish's testimony regarding whether appellant was the shooter was in issue, not for any nefarious aspect of their character, but from the effect of the intense trauma of the unveiling crime upon their recollections. The heart of the defense was to show that the trauma of the incident gave rise to inconsistencies between their pretrial statements and their trial testimony regarding who was the shooter. (See AOB 10-11, 13-14.) Appellant made that clear at the hearing on the motion. (3 Pretrial RT 810-811.) And, in his guilt phase opening statement, before the prosecution began its case-in-chief, defense counsel confirmed:

> We are not suggesting [the witnesses' inconsistencies] be held against anyone. However, the fact remains that these witnesses have perceptions. They had perceptions, senses, ideas, regarding what occurred, and they gave at time accounts how this event unfolded. We have no choice but to selectively embrace, study and corroborate these details and analysis regarding the level of culpability assigned.
>
> From the outset when the suspects stormed the hair salon about 9:00 p.m. that night, commotion and fear existed. . . . The Parishes and Mr. York were clearly caught by surprise. They simply had no idea what hit them. They had little opportunity to see the suspects at all as they were taken by surprise and so quickly ordered to the floor.

(4 RT 1784.)

The probative value of the statements made on the 911 Tapes -- two African-American men with guns; the victim was shot in the head -- to the witnesses' credibility is close to nil. The fact that the perpetrators were two African-American men with guns is close to the barest description possible:

> In a country as racially diverse as the United States with millions of people representing each identifiable ethnic or racial group, the racial or ethnic background of an individual has virtually no probative value except to exclude that person from the "circle of suspicion."

(McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War On Terrorism"?* (2004) 16 Pace Int'l L.Rev. 19, 43; see also *Gonzalez-Rivera v. I.N.S.* (9th Cir. 1994.) 22 F.3d 1441, 1445-1446 [minimal probative value of race in suppression context].) Had the victims given a more particular description, or a description that was against the facts, then the 911 Tapes may have been admissible. But that did not occur here.

The trial court, in finding a credibility issue with sufficient weight to permit the introduction of inflammable evidence, seriously misjudged the probative value of the 911 Tapes to that issue. Appellant conceded in his opening statement (before the prosecution's case-in-chief) that he, an African-American man, was involved in the crimes. In assessing the materiality of the evidence (its importance to the case), the court must consider not only the elements of the offense, but also the defendant's admissions. (See *People v. Schader*, *supra*, 71 Cal.2d at p. 775 [referring to defendant's "testimonial" admissions].) Although a concession is immaterial to a determination of relevancy (*People v. Scheid* (1997) 16 Cal.4th 1, 16), it is important in determining the probative value of evidence under section 352 (see *Old Chief v. United States* (1997) 519 U.S. 172, 186; *People v. Ramos* (1997) 15 Cal.4th 1133, 1166-1167).

As a result of the error, defense counsel was placed in an untenable position when he began cross-examination of each witness. The entire courtroom was reeling from the two 911 Tapes, thereby greatly arousing the jurors' sympathy for the witnesses. This position was completely unnecessary because the probative value of that evidence was nearly nil.

Against this minimal probative value of the 911 Tapes must be weighed the danger of undue prejudice. The prejudice referred to in section

352 does not mean "damaging," but rather evidence that "uniquely tends to evoke an emotional bias" against a party while having little probative effect on the material issues. (*People v. Thomas* (2012) 53 Cal.4th 771, 807; *People v. Karis* (1988) 46 Cal.3d 612, 638.) It also means "the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." (*Old Chief v. United States*, *supra*, 519 U.S. at p. 180.) Prejudice becomes unfair when the primary purpose of the evidence at issue is to elicit emotions of bias, sympathy, hatred, contempt, retribution, or horror. (*State v. Young* (Tenn. 2006) 196 S.W.3d 85, 106, internal quotation marks omitted; see also Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases* (1989) 64 Wash. L.Rev. 289, 321-322.) [9] The problem with such horrific and emotional evidence is that by inflaming the anger and passions of the jurors, a danger is created "that the jurors' desire to see someone brought to justice for this crime might interfere with their duty to meticulously appraise the evidence." (*People v. Farmer* (1989) 47 Cal.3d 888, 907.) There is no reason for that danger to be countenanced in a capital case, particularly when the questioned evidenced has little probative value.

Respondent, with surgical precision, counters that the statements in the calls were "descriptive and not highly inflammatory[.]" (RB 60.) But the

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9. Professor McCormick similarly concludes that evidence which "tends to arouse the jury's hostility or sympathy for one side without regard to the probative value of the evidence is unduly prejudicial." (1 McCormick on Evidence (6th ed. 2006) § 185, p. 780.) He continues, "A juror influenced in this fashion may be satisfied with a somewhat less compelling demonstration of guilt than should be required." (*Ibid.*) Thus, the admission of unduly prejudicial evidence threatens the burden of proof, a crucial protection in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503 [presumption of innocence requires courts to be "alert to factors that may undermine the fairness of the fact-finding process"].)

content of the statements was not the problem under section 352. Rather, it was their context: real-time frantic screams and pleas for help as the victim died in their arms. The Tapes are emotionally devastating, and appealed to the jurors' sympathy for the surviving victims, aroused its sense of horror, provoked its instinct to punish, and posed a danger of bias against appellant.

Further, tape recordings have "a persuasive, sometimes a dramatic, impact on a jury." (*United States v. Knohl* (2d Cir. 1967) 379 F.2d 427, 440.) A tape recording of a 911 call from a homicide scene is powerful evidence and leaves a strong impression. (See *People v. Polk* (1996) 47 Cal.App.4th 944, 953, fn. 5; see also (See Note, *A Foundational Standard for the Admission of Sound Recordings into Evidence in Criminal Trials* (1978) 52 S.Cal. L.Rev. 1273, 1303 ["Evidence combining such high drama with the possibility of relatively easy alteration and manufacture should be treated with special caution"].) In *United States v. Layton* (9th Cir. 1985) 767 F.2d 549, involving the "Last Hour Tape" made during mass suicides in Jonestown, the court of appeals upheld the trial court's conclusion that the tape was more prejudicial than probative, in part because screams of dying children could be heard in the background. The court concluded:

> It would be virtually impossible for a jury to listen to this Tape and ignore the sounds of innocent infants crying (and presumably dying) in the background. The discussion of the impending mass suicide set against the background cacophony of innocent children who have apparently already been given poison would distract even the most conscientious juror from the real issues in this case.

(*Id.* at p. 556.) The 911 Tapes are in the same vein: they are unforgettable, horrific screams from surviving victims.

Nor can it be denied that alternative means for presenting this evidence were right at hand and easily administered: each witness could have testified that she made the call and what was said. Defense counsel mentioned this possibility at the hearing on the motion. (3 Pretrial RT 812.) This must be

taken into account when balancing under section 352: if other evidence, which does not carry the same dangers with it, could be used to establish the fact, then the marginal value of the preferred evidence is slight or non-existent. (See *Old Chief v. United States*, *supra*, 519 U.S. at p. 184; *People v. Loy* (2011) 52 Cal.4th 46, 61.)

The government has a general right to present its case as it deems fit. (*People v. Scott* (2011) 52 Cal.4th 452, 471.) However, that right is subject to the rules of evidence and fundamental fairness. This is the difference between fair blows and foul. In this case, having the witnesses testify to what was said on the 911 Tapes would not have unfairly deprived the state's case of its permissible persuasiveness. The testimony of the two woman leading up to the 911 calls was intense and terrifying: a robbery resulting in the death of one victim's fiancée.

The 911 Tapes were cumulative, immaterial, and unnecessary. Their probative value was next to nil. Any incremental probative value of the 911 Tapes to the credibility of the witnesses was substantially outweighed by undue prejudice, particularly where, as here, life and death were at stake. "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." (*United States v. Hitt* (9th Cir. 1992) 981 F.2d 422, 424.)

When shed of the inadequate legal bases for admissibility, the real reason why the prosecution went to great lengths to have the jury hear these tapes at the guilt phase boils down to this: to inject into the guilt phase the emotional impact and suffering of the surviving victims. (See 7 CT 2567.) That reason was impermissible. The trial court erred in admitting the audiotapes at the guilt phase.

With regard to the application of section 352 at the penalty phase of a

capital case, this Court has concluded that:

> the trial court's discretion to exclude evidence regarding the circumstances of the crime as unduly prejudicial is more circumscribed at the penalty phase than at the guilt phase of a capital murder trial, because the sentencer is expected to weigh the evidence subjectively.

(*People v. Salcido* (2008) 44 Cal.4th 93, 158, citing *People v. Box* (2000) 23 Cal.4th 1153, 1201.) That conclusion cannot apply, however, to unduly prejudicial evidence at the penalty phase. The Eight and Fourteenth Amendments to the federal Constitution forbid it. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825.) In *United States v. Pepin* (2d Cir. 2008) 514 F.3d 193, the court addressed the argument that more evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors:

> But it hardly follows from that general observation that relevant evidence is always permitted. Acceptance of that reasoning would eviscerate the trial court's ability to exclude unduly prejudicial material from the penalty hearing inasmuch as any decision to exclude necessarily means less evidence, not more.

(*Id.* at p. 204.) Further, under the Federal Death Penalty Act:

> judges continue their role as evidentiary gatekeepers and, pursuant to the balancing test set forth in [18 U.S.C.] § 3593(c), retain the discretion to exclude any type of unreliable or prejudicial evidence that might render a trial fundamentally unfair.

(*United States v. Fell* (2d Cir.2004) 360 F.3d 135, 145.) The Eighth Amendment requires "a reasoned moral judgment" about whether death or life is the appropriate sentence. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172.) Whether a sentencing jury's life and death decision is guided or unguided, unduly inflammatory and prejudicial evidence has no role in a reasoned moral judgment, and threatens the reliability of the sentencing decision. [10]

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10. The fundamental goals of statutes such as section 352 are to ensure accuracy and fairness. (See Gold, *Federal Rule of Evidence 403: Observations on the*

Footnote continued on next page . . .

Respondent correctly points out that in *People v. Hawthorne* (2009) 46 Ca1.4th 67, 101-102, this Court concluded that a 911 tape was admissible under Penal Code Section 190.3, factor (a), as a circumstance of the crime. (RB 61-62.) However, as appellant argued in his opening brief, the jury in *Hawthorne* was cautioned not to allow its emotional response to the 911 tape-recordings to "subvert their reasoned evaluation of the evidence." (*Id.* at p. 103.) That instruction was not given here. (See AOB 92.) Even if such an instruction had been given, appellant doubts its efficacy in this context. Real-time tape-recordings of 911 calls from the surviving victims at a homicide scene is a form of victim-impact evidence with great potential to unfairly impact the jurors' reasoned consideration of the mitigating evidence. Moreover, the 911 tapes in *Hawthorne* were played solely at the penalty phase. (*Id.* at p. 101.) Here, they were not only played at the guilt phase, they reverberated throughout the victim impact testimony of Amy and Jennifer Parrish at the penalty phase.

The 911 Tapes, real-time recording of their frantic and distraught pleas for help at the scene, even if part of the circumstances of the crime, were unduly inflammatory and should not have been introduced at the penalty phase.

C. Reversal Is Required

Under state law, reversal is required if there is a reasonable probability that the outcome would have been different in the absence of the 911 Tapes. (*People v. Carter* (2005) 36 Cal.4th 1114, 1170–1171; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The federal law claims are subject to the *Chapman* test: the

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Nature of Unfairly Prejudicial Evidence (1983) 58 Wash. L.Rev. 497, 499-500.) These are also the goals of the Eighth and Fourteenth Amendments. (See *Rose v. Clark* (1986) 478 U.S. 570, 579; *Bullington v. Missouri* (1981) 451 U.S. 430, 445-446; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plur. opn.)

prosecution must prove beyond a reasonable doubt that the erroneous admission of the 911 Tapes was harmless. (See *People v. Wright* (2005) 35 Cal.4th 964, 974-975, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) With regard to the due process claims, where an appellate court finds that improperly admitted evidenced has rendered the trial fundamentally unfair, no prejudice inquiry is required as prejudice is inherent in the finding of error.

This Court has stated that as a general matter, "the mere erroneous exercise of discretion under such 'normal' rules does not implicate the federal Constitution." (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; see also *People v. Dement* (2011) 53 Cal.4th 1, 52 [right to present a defense"]; *People v. Riccardi*, *supra*, 54 Cal.4th at pp. 809-810 [due process rights].) The issue here, however, is the right to a fundamentally fair and reliable trial under the Eighth and Fourteenth Amendments. (See *Deck v. Missouri* (2005) 544 U.S. 622, 628; *Gardner v. Florida* (1977) 430 U.S. 349, 358.) Insofar as the ultimate object of the section 352 weighing process is a fair trial (*People v. Harris* (1998) 60 Cal.App.4th 727, 736), the careful weighing of prejudice against probative value under section 352 "is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1104, quoting *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Under narrow circumstances, the erroneous admission of evidence may render a trial fundamentally unfair and violate the right to due process. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1383-1385.) Inflammatory evidence that diverts the jury's attention from its proper role or invites an irrational, purely subjective response violates the Fourteenth Amendment's due process clause when it is so unduly prejudicial that it renders the trial fundamentally unfair. (*People v. Bivert* (2011) 52 Cal.4th 96, 118; *Payne v. Tennessee*, *supra*, 501 U.S. 808, 825.)

The erroneous introduction of the 911 Tapes in this case, when assessed in light of the overwhelming evidence in mitigation, posed a risk that one or more jurors would be moved thereby to vote for death. Apart from the ghastly nature of the 911 Tapes, and their ability to lure the jurors from a reasoned moral response to the evidence, the timing of the introduction of the tapes is important in determining prejudice: as noted, the Tapes were played at the end of the direct-examination for each witness, immediately preceding cross-examination. Appellant's fate hung on the testimony of these two witnesses.

Respondent devotes two full pages to cataloguing the myriad circumstances of the offense, and contends that the evidence of guilt was overwhelming. (RB 63-66.) [11] This Court should look with skepticism upon the government's argument in light of the its tactical decision to introduce the 911 Tapes. (*United States v. Brooke*, *supra*, 4 F.3d at p. 1488; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131.) The government fought hard in two hearings to have this evidence introduced, evidence that conveys "so much human suffering"; it should not now be heard to claim that it was unimportant.

In any event, in appellant's view, the evidence in mitigation was overwhelming. He is mentally retarded, brain damaged, and severely mentally ill. (See Arg. 1, *ante*.) As stated in the Introduction, "Given a crime

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11. Respondent's "overwhelming evidence" argument is misplaced as regards the guilt phase. The harmless error inquiry requires the government to show that the error did not have an effect on the verdict, not merely that, absent the error, a reasonable jury would have reached a guilty verdict. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1126-1127; *United States v. Cunningham* (C.A.D.C. 1998) 145 F.3d 1385, 1394; *People v. Cunningham* (2001) 25 Cal.4th 926, 1018-1019; *People v. Osband* (1996) 13 Cal.4th 622, 743-747 (conc. & dis. opn. of Kennard, J.).)

sufficiently atrocious and a popular resentment sufficiently inflamed, and the measurings of mental responsibility go to discard." (Parsons, *The Learned Judge and the Mental Defective Meet - What Then?* (1928) 12 Mental Hygiene 25, 30.)

In passing, respondent states that any error is harmless because the prosecutor did not rely on the 911 Tapes at the penalty phase. (RB 66.) But the jurors considered the tapes, as they were instructed. And what respondent fails to notice is that the prosecutor did not refer to the tapes in his guilt phase closing argument either. Why? Because this evidence need be heard only once to have its intended, unconstitutional effect.

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3. APPELLANT'S CLAIMS REGARDING THE FLIGHT INSTRUCTION ARE FULLY COGNIZABLE ON APPEAL

Appellant argued that the trial court erred in giving the pattern instruction regarding flight as consciousness of guilt, CALJIC No. 2.52. (AOB 97-104.) The issue is joined (RB 66-72), but appellant must reply to one of respondent's contentions.

Appellant argued, inter alia, that the instruction created an impermissible inference that lessened the prosecution's burden of proof. (AOB 103; *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *In re Winship* (1970) 397 U.S. 358, 364.) Respondent contends that appellant has forfeited that particular claim:

> Boyce complains that instructing the jury with CALJIC No. 2.52 lessened the burden of proof. (AOB 104.) Boyce has forfeited his claim because he failed to preserve the issue by objecting on those grounds below. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

(RB 70.)

Respondent's reliance upon *Hillhouse* is misplaced because that case held that a claim under CALJIC No. 2.51 (regarding motive) was *cognizable notwithstanding a failure to object.* (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 503, citing § 1259 & *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.)

More recently, and directly on point, is *People v. Taylor* (2010) 48 Cal.4th 574, where the defendant argued that CALJIC No. 2.52 -- the instruction involved here -- allowed the jury to draw irrational permissive inferences. As in this case, the Attorney General in *Taylor* argued that the claim was forfeited. This Court rejected the argument:

> Contrary to respondent's suggestion, defendant did not forfeit his claim regarding CALJIC No. 2.52 by failing to object to the instruction in the trial court. (§ 1259 [appellate court may review an instruction, even when no objection was made below, if

defendant's substantial rights were affected].)

(*Id.* at p. 630, fn. 13, internal citations omitted.) Similarly, in *People v. Wallace* (2008) 44 Cal.4th 1032, also involving the flight instruction, the Attorney General again contended that the argument was forfeited for failure to object, and this Court again rejected the argument: "Section 1259, however, permits appellate review of claims of instructional error affecting a defendant's substantial rights. [Citations.] Therefore, we may assess this claim on its merits." (*Id.* at p. 1074, fn. 7.) Another case involving the flight instruction, *People v. Smithey* (1999) 20 Cal.4th 936, is in accord: "Despite the Attorney General's contention to the contrary, defendant did not waive this claim by failing to object to the instruction in the trial court." (*Id.* at p. 982, fn. 12.)

In short, a claim that the flight instruction lessened the burden of proof clearly affects an accused's substantial rights. Thus, the claim is cognizable on appeal despite a failure to object on those specific grounds. (§ 1259.) Respondent's forfeiture argument should be rejected.

Further, before trial, appellant filed a "Motion to Federalize All Objections Made by Counsel" (6 CT 1887), and respondent filed an opposition (6 CT 2020). At a hearing on the motion, the parties agreed that when an objection is made, that it "be deemed under federal and state" grounds. The trial court accepted that agreement. (2 Pretrial RT 558.)

The claims are fully cognizable on appeal.

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4. THE RETALIATION CLAUSE OF THE PEACE-OFFICER SPECIAL CIRCUMSTANCE IS VAGUE AS APPLIED HERE

The jury found true the special circumstance allegation that appellant killed an off-duty peace officer in retaliation for the performance of his duties. (§ 190.2, subd. (a)(7).) [12] The victim was a deputy sheriff, who had been assigned to a penal institution -- Wayside -- where appellant had been incarcerated several years before the victim was employed there. According to respondent, appellant "was upset by the way he was treated at Wayside" so he killed the victim "in retaliation for" the way appellant believed the victim, as a guard in the jail, treated people like appellant. (RB 76.)

In his opening brief, appellant demonstrated that the retaliation clause of subdivision (a)(7) is unconstitutionally vague, and that the evidence was legally insufficient to establish that the killing was in retaliation for the performance of the off-duty officer's official duties. (AOB 105-116.) Respondent contends that the retaliation clause of the special circumstance is not vague and sufficient evidence supported the allegation. (RB 72-79.) [13]

A. <u>The Importance of the Statute's Intent, to Protect Peace Officers, Does Not Immunize It from Vagueness Review</u>

In performing statutory interpretation, this Court's fundamental task "is to determine the Legislature's intent so as to effectuate the law's purpose."

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12. The retaliation clause of the statute provides:

> the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

13. Respondent's brief does not allege forfeiture of any argument raised in the opening brief; the vagueness claim was litigated at trial and is fully preserved for appeal. (See 6 CT 1654 [motion] & 7 CT 2169 [opposition].)

(*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724, internal quotation marks omitted.) Here, section 190.2, subdivision (a)(7), as respondent observes, is intended to effectuate society's strong interest in protecting peace officers. (RB 76-77, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 781; see also AOB 110.) However, the fact that a statute's purpose is laudable, important or crucial, does not insulate the statute – particularly one establishing eligibility for the death penalty – from vagueness review and the requirements of due process and the Eighth Amendment. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 176, fn. 9; *People v. Nelson* (2011) 200 Cal.App.4th 1083, 1096.) In *People v. Weidert* (1985) 39 Cal.3d 836, involving the killing-of-a-witness special circumstance, the Court stated:

> From a policy point of view, perhaps the killing of any witness—whether that witness' testimony was to be elicited in a proceeding denominated criminal, juvenile, traffic, "quasi-criminal," probate, civil, legislative, or administrative—should be a capital offense. However, our role is limited by the language of subdivision (a)(10) and any legislative history which elucidates its meaning.

(*Id.* at p. 843; see also *id.* at p. 855 ["There is no indication that the voters intended to make [the witness killing special circumstance] applicable to witnesses in juvenile proceedings"].)

In the final analysis, this issue presents the intersection of two crucial interests: protection of peace officers and eligibility for the death penalty. Statutory interpretation is reviewed de novo. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531.)

B. The Language of Special Circumstances Must Meet Heightened Requirements of Certainty

Under the Eighth and Fourteenth Amendments, special circumstances must be defined with sufficient precision to eliminate arbitrary or capricious decision-making by the sentencer. (See *Maynard v. Cartwright* (1988) 486 U.S.

356, 361-364.) They must have a "common-sense core of meaning . . . that criminal juries should be capable of understanding[.]" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973-974, quoting *Jurek v. Texas* (1976) 428 U.S. 262, 279 (conc. opn. of White, J.), ellipsis in original.)

To comply with due process, a special circumstance, as with any statute, may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning. (*People v. Castenada* (2000) 23 Cal.4th 743, 751; *Williams v. Garcetti* (1993) 5 Cal.4th 561, 567; *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 801, 803, citing *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) A special circumstance is unconstitutionally vague if the ordinary meaning of its language fails adequately to communicate the parameters of the statutory requirements. (*People v. Ledesma* (2006) 39 Cal.4th 641, 725.)

Many, if not most, statutes are ambiguous to some extent. (See *People v. Kelly* (1992) 1 Cal.4th 495, 533-534, citing *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201.) However, where a statute imposes criminal penalties, the standard of certainty is higher. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, fn. 8.) [14] Over a century ago, this Court stated that, in construing a penal statute, "the defendant is entitled to the benefit of every reasonable doubt, whether it

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14. In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 143, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1147, this Court stated:

> We cannot demand perfection in the drafting of statutes; some inconsistency and inequity is probably inevitable. But neither should we ignore such matters when called to our attention. If, as in this case, we can discover a reasonable interpretation of the statute which avoids logical anomalies and minimizes inequitable results, surely we would prefer that interpretation to one that does not.

arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute . . . ." (*Ex parte Rosenheim* (1890) 83 Cal. 388, 391.) "[T]he degree of strictness in construing penal statutes should vary in direct relation to the severity of the penalty." (*People v. Weidert*, *supra*, 39 Cal.3d at p. 848.) Further, when a statute defining a crime is susceptible of two reasonable interpretations, the rule of lenity, which has constitutional underpinnings, favors that interpretation more favorable to the defendant. (See *People v. Cornett* (2012) 53 Cal.4th 1261, 1271-1272; *People v. Avery* (2002) 27 Cal.4th 49, 57-58; *People v. Weidert* (1985) 39 Cal.3d 836, 847-850.) The rule of lenity may apply notwithstanding the protective purpose of a statute such as section 190.2, subdivision (a)(7). (See *People v. Cornett*, *supra*, at p. 1271, fn. 8.)

C. The Retaliation Clause of the Special Circumstance Is Unconstitutionally Vague As Applied Here

The issue here is whether the retaliation clause of the section 190.2, subdivision (a)(7) is unconstitutionally vague under these circumstances. First, it must be noted that the electorate who passed this statute did not limit it to the simple intentional killing of a peace officer; this is not a status special circumstance. There has to be more: a killing either in the performance of the officer's duties, which covers "present conduct" by the officer; or a killing in retaliation for the performance of duties, which covers killings for "prior actions" by the officer. (7 CT 2175 [prosecutor's opposition].)

There is no question that some killings fit within the retaliation clause. *People v. Jenkins* (2000) 22 Cal.4th 900, 1019-2020 is paradigmatic: the officer, though off-duty, was killed in retaliation for his investigation into a criminal case involving the defendant. Thus, there was a direct relationship between the defendant and the officer's performance of duties. This Court concluded that the special circumstance "requires a subjective purpose to retaliate for performance of official duties - and that performance must in fact have been lawful[.]" (*Id.* at p. 1021; AOB 111-112.) Other cases, including this case, are

not so clear: the performance of duties by the victim officer were unrelated to appellant. Indeed, the prosecution's pleadings evinced uncertainty as to whether the special circumstance applied here: its complaint contained the special circumstance allegation, but the original information did not. (1 CT 234; 3 CT 609-610.)

Respondent contends that "[t]here is no requirement of a direct relationship between the officer and the defendant." (RB 76.) It continues:

> There is nothing about the statute that suggests it should be limited to motivation based on a distinct act performed by a peace officer or one directed specifically at the defendant:

(RB 77.)

There are two answer to this contention. First, its adoption would mutate the special circumstance into a status offense. Second, the common meaning of the word "retaliate" equates to a motivation by the actor to "get back" at a person for actions taken by that person against the actor. That meaning is confirmed by dictionary definitions of the term. Courts often consult dictionaries to determine the usual meaning of words in statutes. (See *People v. Leal* (2004) 33 Cal.4th 999, 1009.) Thus, Webster's New World Dictionary (3d ed. 1988), defines retaliate as punishment in kind; return like for like. The American Heritage Dictionary (5th ed. 2011 is in accord: "To do something in response to an action done to oneself or an associate, especially to attack or injure someone as a response to a hurtful action." Black's Law Dictionary defines the term under "lex talionis" as "[t]he law of retaliation; which requires the infliction upon a wrongdoer of the same injury which he has caused to another." For that reason, the jury sent out a note asking if the officer had to be performing an official duty at the time of the offense: its commonsense understanding of the word "retaliate" was that the "pay back" should relate to the victim officer's duties.

Appellant argues that the retaliation clause must be construed to mean

that there were specific actions performed by the victim officer, known to the defendant, and motivating the killing. In other words, some direct relationship between the officer and his performance of duties, and the defendant. Otherwise, the statute is reduced to a status offense. The ordinary meaning of its language fails adequately to communicate the parameters of the statutory requirements, people of common intelligence would be relegated to differing guesses about its meaning, and there would be no common-sense core of meaning that criminal juries should be capable of understanding.

Appellant is unaware of any adjudicated meaning of the term "retaliation" in a like context; nor does respondent identify any. (See *In re Derrick B.* (2006) 39 Cal.4th 535, 539-540 [presumption that when statute uses term that has been judicially construed, term is used in the sense given by the courts].) The term is used in other special circumstances (e.g., § 190.2, subds. (a)(10) – (13)), as well as in certain civil contexts, including wrongful termination. For example, in *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, the court held that there had to be a causal link between the retaliatory animus and the adverse action in a retaliatory termination case. (*Id.* at pp. 1220-1221.) Put in terms relevant to the special circumstance, retaliation requires a direct relationship between the officer's performance of his duties and the defendant.

Nothing in the instructions given to the jury cured this fatal ambiguity. The trial court gave an instruction defining "official duties" as including the duties of a custodial officer. But it failed to limit the definition of retaliation as including a relationship between the officer's duties and the defendant. It also failed to require the jury to find that the officer's performance of duties was lawful, a necessary finding that must be made by the jury. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1020-1021; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1223; cf. CALCRIM No. 2671 [lawful performance of a custodial

officer].) [15] Appellant had a liberty interest in the accuracy of these findings, and in having them decided by the jury. (*People v. Odle* (1988) 45 Cal.3d 386, 412.) The prosecutor's guilt phase closing argument fed on these omissions:

> the bottom line is that although Shayne York was not on duty as a peace officer at the time that the murder took place, it was because Mr. Boyce was angry at the fact that he found out that Shayne York had -- was a guard at Wayside, a place where Mr. Boyce had been incarcerated. And I am going to talk about that a little bit later. [He never did so.] So it is in retaliation for that, and that's the lawful performance.

(8 RT 2684.) In other words, appellant shot the officer for being a police officer, not for his performance of duties, particularly duties unrelated to appellant. Or, as the prosecutor admitted in his opening statement, "it's in retaliation for him having been a peace officer." (4 RT 1781.)

In the absence of an appropriate definition, each juror would necessarily apply his or her own definition of retaliation. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 782.) The definition of the special circumstance given to appellant's jury was unconstitutionally vague, and the evidence was insufficient to establish beyond a reasonable doubt the elements of the special circumstance.

D. Even If this Court Were to Agree with Respondent's Interpretation of the Statute, that Interpretation Could Not Be Applied Retroactively to Appellant

If this Court were to hold that the retaliation clause of section 190.2, subdivision (a)(7) is constitutional as applied here, the effect would be to alter appellant's liability from first degree murder to murder with special

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15. Appellant cannot be accused of failing to tender different instructions. In his motion to dismiss the special circumstance, he objected that the then-current CALJIC instructions pertaining to the special were deficient. (6 CT 1670-1671.) By its ruling, the trial court rejected that argument. Instead, it gave the standard, but vague in these circumstances, instructions.

circumstances. Such an enlargement of the statute would change the legal consequences of appellant's acts completed before the effective date of the construction. Because an unforeseeable judicial enlargement of a criminal statute may not be applied retroactively without violating due process, such a holding should not apply to appellant's case. (*People v. Farley* (2009) 46 Cal.4th 1053, 1121-1122; *People v. Morante* (1999) 20 Cal.4th 403, 430-432; *People v. Weidert* (1985) 39 Cal.3d 836, 855; see also *Bouie v. City of Columbia* (1964) 378 U.S. 347, 351-353.)

E. Reversal of the Death Judgment Is Required

Whatever standard of prejudice is applied here (see AOB 115-117), two facts dictate reversal of the death judgment. First, the mitigating evidence was overwhelming. Second, the prosecutor, in his closing argument, made clear that his case for death was based on the circumstances of the crime and, in particular, the status of the victim as a peace officer, rather than any specific act committed in the performance of his duties. (AOB 115.) Accordingly, reversal of the death judgment is required.

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6. APPELLANT'S PENALTY PHASE MOTION FOR SELF-REPRESENTATION, AN ATTEMPT TO ASSERT AUTONOMOUS CONTROL OF HIS DEFENSE, WAS ERRONEOUSLY DENIED

In his opening brief, appellant argued that the trial court erred in denying appellant's motion for self-representation, made one week before the penalty phase was to begin. (AOB 131-142.)

It may appear incongruous that appellant is arguing that such a damaged individual should have been allowed to represent himself at the penalty phase. Yet, there was no question of appellant's competency to stand trial. And at the time of his request in 2000, in ruling on a motion for self-representation, "state law provided the trial court with no test of mental competence to apply other than the standard of competence to stand trial." (*People v. Taylor* (2009) 47 Cal.4th 850, 879.) In other words, the trial court erred to the extent that it considered as a basis for denying appellant's motion for self-representation any "supposed mental incapacity not amounting to incompetency to stand trial[.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 433.) Moreover, what appellant sought to do in asserting autonomous control of his penalty phase defense was not to ask for the death penalty, but to put on no evidence or argument. (AOB 131-133; see generally Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in their Own Defense* (1990) 81 J.Crim.L. & Criminology 419.)

Respondent concedes that the trial court erred by considering inappropriate factors in denying appellant's request, but claims that the request was untimely and equivocal. (RB 91-100.)

A. Respondent's Thorny Path Through the Trial Court's Erroneous Exercise of Its Discretion

According to this Court, when a motion for self-representation is not made before trial has begun it is untimely. (But see AOB 137-140.) The

motion may still be granted, but it is subject to the trial court's discretion. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365.)

In exercising that discretion, the court must ensure that the motion is knowing and intelligent, and that the accused understands the dangers of self-representation. (*Faretta v. California* (1975) 422 U.S. 806, 835.) The trial court must also consider certain factors, known as the *Windham* factors after *People v. Windham* (1977) 19 Cal.3d 121, and discussed *post.* (See *People v. Lawrence* (2009) 46 Cal.4th 186, 191-192; *People v. Barnett* (1998) 17 Cal.4th 1044, 1104-1106.)

Six pages into its argument, respondent concedes that the trial court erred by basing its denial of the motion on inappropriate factors. (RB 97; AOB 133.) A court may not "measure a defendant's competence to waive his right counsel by evaluating the defendant's 'technical legal knowledge." (*People v. Doolin* (2009) 45 Cal.4th 390, 454; see also *Faretta v. California*, *supra*, 422 U.S. at p. 836.) Or, as this Court has stated, "it is improper for a trial court to quiz a defendant on such topics and then draw on the defendant's lack of knowledge of the substantive law as a basis for denying the right to proceed without counsel." (*People v. Riggs* (2008) 44 Cal.4th 248, 277, fn. 10.) Here, the trial court's consideration of such improper factors in denying the request was a clear abuse of discretion:

> A discretionary order based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal even though there may be substantial evidence to support that order

(*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 26.)

Further, the trial court made no inquiry into whether appellant's request to waive counsel was voluntary, knowing and intelligent, as the Sixth Amendment requires. (AOB 134-135.) It simply denied the request because appellant was "not qualified to represent himself[.]" (8 RT 2960.) This, too,

was error, but it does not benefit the government:

> If a defendant seeks to represent himself and the court fails to explain the consequences of such a decision to him, the government is not entitled to an affirmance of the conviction it subsequently obtains. To the contrary, the defendant is entitled to a reversal and an opportunity to make an informed and knowing choice.

(*United States v. Arlt* (9th Cir. 1994) 41 F.3d 516, 521 [involving a pretrial motion].) Appellant is entitled to no less.

Nor did the trial court discharge "its duty to advise defendant of the dangers and disadvantages of self-representation." (*People v. Burgener* (2009) 46 Cal.4th 231, 241.) This, too, cannot be used to appellant's detriment. As the Court explained in *People v. Joseph* (1983) 34 Cal.3d 936, "[i]f a trial court could insulate an erroneous denial of *Faretta* status by a failure to give the proper warnings, the *Faretta* doctrine would be rendered a nullity." (*Id.* at p. 945.)

Thus, in denying appellant's motion, the trial court relied on inappropriate factors, failed to ascertain if the attempted waiver was knowing and intelligent, and failed to ensure that the request was made with awareness of the disadvantages of self-representation. The court abused its discretion.

B. The Request Was Not Equivocal to the Trial Court or the Prosecution

Respondent devotes one page to its claim that appellant's request was equivocal. No cases are cited. (RB 98.)

It is true, as respondent states, that the motion started out as a *Marsden* motion. But, "it is not at all uncommon for a *Faretta* motion to accompany an accused's request to dismiss court-appointed counsel." (*People v. Joseph*, *supra*, 34 Cal.3d at p. 944.) [16] In any event, the court's questioning of appellant and

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16. *People v. Thompson* (2010) 49 Cal.4th 79, is remarkably similar to this case. There, after the guilt phase had concluded, the defendant made an oral

Footnote continued on next page . . .

defense counsel revealed both that appellant desired self-representation and the reason for that request: appellant's desire to control his defense at the penalty phase. Here are the most pertinent statements by defendant at the hearing:

> I don't want to --them to put no defense for me on the penalty phase.
>
> I don't want them putting no defense for me on the penalty phase, so I would like to have them removed.
>
> No, I don't want no other attorney.
>
> I just want [defense counsel] moved off my case.

(8 RT 2953-2955.) These are statements, not questions, and they were confirmed by defense counsel. [17]

Thus, despite the initial confusion and contradictory statements by appellant, the trial court understood his request: "you are telling me you don't want another lawyer appointed and you want the court to relieve [defense counsel]." (8 RT 2959; see *People v. Riggs* (2008) 44 Cal.4th 248, 275, fn. 9 [initial confusion over representation was later clarified]; *People v. Marshall*

Faretta motion together with a motion to substitute counsel. After a lengthy hearing on both motions, the trial court stated that the defendant:

> clearly expressed his wishes to receive the death penalty, to call no witnesses, and to not confront or cross-examine any witnesses the prosecution called. The court granted defendant's request to represent himself, but placed his appointed attorneys on standby status.

(*Id.* at p. 132.) No issue was raised in *Thompson* because the trial court handled the situation correctly.

17. Respondent complains that "[a]t one point [appellant] said he did not even want to be present at the hearing. (RB 98, citing 8 RT 2959.) That statement did not make appellant's request equivocal; it was fully consistent with his intent to present no mitigation at the penalty phase.

(1997) 15 Cal.4th 1, 25 ["The court understood his words"].) Again, this was a statement, not a question. The court never made a finding that the request was equivocal because it clearly understood the request. (See *United States v. Arlt*, *supra*, 41 F.3d at pp. 519-520.)

Indeed, respondent understands the reason for appellant's request: "Boyce revealed the reason for his request was that he did not want a defense presented during the penalty phase." It then confirms that "[o]ut of an abundance of caution, the trial court treated the request as both a *Marsden* and *Faretta* motion. (RB 98.)

That should be the end of the claim that appellant's request was equivocal: if the court properly treated it as a *Faretta* motion – and it did – then the request was not equivocal. Appellant is not the most facile with words and ideas. But he communicated his thoughts calmly, his attorneys confirmed his intent, and the trial court understood the reason for the request. No talismanic formula is required to invoke the right to self-representation. (*Ferguson v. Culliver* (11th Cir. 2008) 527 F.3d 1144, 1147.)

Further, the inquiry into whether the request was equivocal was pretermitted by the trial court's abuse of discretion in denying the request on inappropriate bases. (See *ante*.) In *People v. Dent* (2003) 30 Cal.4th 213, this Court reversed the denial of a *Faretta* request where, as here, the trial court relied on an inappropriate factor in denying the motion. With regard to whether the request was equivocal, the Court stated:

> We need not decide this issue, however, because whether or not defendant's request was equivocal, the trial court's response was not only legally erroneous but also unequivocal, and foreclosed any realistic possibility defendant would perceive self-representation as an available option. Thus, even assuming defendant's request was equivocal, the trial court's response effectively prevented defendant from making his invocation unequivocal.

(*Id.* at p. 219.)

The requirement that a request for self-representation be unequivocal exists for a reason: to prevent defendants from making capricious or inadvertent waivers of counsel and to protect trial courts from manipulative vacillations by defendants regarding representation. (See *United States v. Frazier-El* (4th Cir. 2000) 204 F.3d 553, 558-559; *Buhl v. Cooksey* (3d Cir. 2000) 233 F.3d 783, 792.) As respondent notes, a motion for self-representation "made out of temporary whim, or out of annoyance or frustration" should not be granted. (RB 92, quoting *People v. Marshall* (1997) 15 Cal.4th 1, 21.)

Yet, respondent does not argue that *appellant's* motion was capricious or inadvertent, or made out of whim, annoyance, bad faith, passing emotion, or for manipulation. The reason for the motion, as respondent concedes (RB 99-100), was so that appellant could exercise his autonomy and control his defense. That reason is not whimsical. "[T]he state may not constitutionally prevent a defendant charged with commission of a criminal offense from controlling his own fate by forcing on him counsel who may present a case which is not consistent with the actual wishes of the defendant." (*People v. Windham* (1977) 19 Cal.3d 121, 130; see also *Faretta v. California*, *supra*, 422 U.S. at p. 817 ["forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so"].) Further, during the hearing, defense counsel stated that he was at "loggerheads" with his client regarding the presentation of the penalty phase. That suggests an extensive discussion by counsel with appellant, not a spur of the moment request. Tellingly, neither the trial court nor respondent aver that there was whim or manipulation in appellant's request. The court treated appellant's request as serious.

C. The *Windham* Factors

As noted above, a trial court presented with a mid-trial motion for self-representation shall inquire sua sponte into the specific factors underlying the

request thereby ensuring a meaningful record . . . ." (*People v. Windham* (1977) 19 Cal.3d 121, 128; see also *People v. Lawrence*, *supra*, 46 Cal.4th at pp. 191-196; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1353-1354.) The non-exhaustive *Windham* factors include:

> 1. defendant's prior history in the substitution of counsel;
>
> 2. the reasons set forth for the request;
>
> 3. the length and stage of the trial proceedings;
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> 4. disruption or delay which reasonably might be expected to ensue from the granting of such motion; and
>
> 5. the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney.

(*People v. Gallego* (1990) 52 Cal.3d 115, 163-164; see also *People v. Lawrence*, *supra*, 46 Cal.4th at pp. 191-192.)

Respondent claims that the trial court "implicitly or explicitly" considered several of the factors when denying appellant's request. (RB 98-99.) The record, however, does not reveal any reasoned application of the *Windham* factors. Instead, the court relied on improper factors, as respondent concedes.

Properly applied to this case, the *Windham* factors reveal:

> 1. appellant had no prior history of substituting counsel or seeking self representation;
>
> 2. the reason for the request was to protect his most fundamental right, to control his defense at the penalty phase;
>
> 3. although the request came after the guilt phase, differences with counsel over the penalty phase presentation may not appear until the end of the guilt phase;
>
> 4. no disruption or delay would have occurred because appellant intended to put on no witnesses at the penalty phase; and
>
> 5. the likelihood of appellant's effectiveness as his own attorney would weigh against granting the motion. However, that is true of any request for self-representation.

No *Windham* factor is necessarily determinative. (*People v. Lawrence*, *supra*, 46 Cal.4th at p. 196.) But the factors here weigh in favor of granting appellant's motion.

The most revealing factor is that appellant had a compelling reason for waiving counsel: the fundamental right to control his defense. This Court's capital cases have made clear that both the trial courts and counsel must respect a competent defendant's considered and voluntary decisions on matters of fundamental importance affecting trial of the action. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1222.) This includes a defendant's right to control his defense at the penalty phase: "The defendant has the right to present no defense and to take the stand and both confess guilt and request imposition of the death penalty." (*People v. Clark* (1990) 50 Cal.3d 583, 617-618, internal citations omitted.) Indeed, this Court has held that it is not irrational for a defendant to prefer death to life in prison. (*People v. Bloom*, *supra*, 48 Cal.3d at pp. 1222-1223.) [18]

Respondent has trouble accepting these plain, long-standing rules. It asserts that "there is nothing in the record to indicate Boyce had any further disagreement with counsel presenting mitigating evidence during the penalty phase or any other issues with his defense." (RB 99.) Whatever the meaning of that phrase, the hearing showed that appellant and counsel were at "loggerheads" over the presentation of the penalty phase. Respondent

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18. Respondent relies on dictum in a footnote in *People v. Wilkins* (1990) 225 Cal.App.3d. 299, 309, fn. 4, for the proposition that a disagreement over trial tactics is an insufficient reason to grant an untimely *Faretta* request." The disagreement in this case, however, was not over trial tactics, but over a fundamental right belonging to appellant. Both before and after *Wilkins*, this Court has recognized the importance of a capital defendant's "ability to control his destiny and make fundamental decisions affecting the trial." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1222.) Nowhere is that more important than at the penalty phase of a capital case.

concedes that *People v. Blair* (2005) 36 Cal.4th 686, 736-737, held that that a self-represented defendant has the right to refrain from presenting mitigating evidence during the penalty phase of a capital case. But it contends that "the reverse" is not true:

> A defendant who does not want to present mitigating evidence at the penalty phase, does not have the right to represent himself based solely on that fact.

(RB 100.) No authority is given for that proposition. Appellant is unaware of any such authority. Assuming that the requirements for self-representation are met, the authority relating to a defendant's autonomy and the right to control his or her own destiny and defense is to the contrary. (E.g., *People v. Taylor* (2009) 47 Cal.4th 850, 865-866; *People v. Blair*, *supra*, 36 Cal.4th at pp. 736-737; *People v. Koontz* (2002) 27 Cal.4th 1041, 1073-1074; *People v. Jenkins* (2000) 22 Cal.4th 900, 1044; *People v. Massie* (1998) 19 Cal.4th 550, 570; *People v. Bradford* (1997) 15 Cal.4th 1229, 1363-1373; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1062-1064; *People v. Clark* (1992) 3 Cal.4th 41, 109-110; *People v. Diaz* (1992) 3 Cal.4th 495, 566; *People v. Howard* (1992) 1 Cal.4th 1132; *People v. Edwards* (1991) 54 Cal.3d 787, 809-811; *People v. Clark* (1990) 50 Cal.3d 583, 617-618; *People v. Lang* (1989) 49 Cal.3d 991, 1029-1030; *People v. Bloom*, *supra*, 48 Cal.3d at p. 1222.)

An exercise of discretion must be "grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977, internal quotation marks omitted.) Here, the trial court considered erroneous factors, and failed to consider the appropriate factors. "[W]here fundamental rights are affected by the exercise of discretion by the trial court, we recognize that such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; see also *People v. Russel* (1968) 69 Cal.2d 187, 195 [exercises of

legal discretion must be guided by legal principles and policies appropriate to the particular matter at issue].) The court abused its discretion in denying appellant's motion.

D. Although Untimely Under this Court's Precedents, Appellant's Request Would Not Have Delayed the Penalty Phase

With respect to the *timeliness* of the motion, respondent has its dates off. It claims that appellant "waited until the day the penalty phase was scheduled to start to make his request. (RB 97, citing 8 RT 2952.) But the trial court set August 28, 2000, as the start of the penalty phase. Appellant's motion was made on August 22, 2000, when the guilt verdicts were returned. (10 CT 3357; 8 RT 2950.)

Second, by protesting that appellant's motion was "manifestly untimely" (RB 97), respondent seems to imply that this Court's timeliness requirement is a condition precedent to granting relief. It is not. This Court has held that a motion for self-representation made after trial has begun lies within the discretion of the trial court, which must consider the *Windham* factors. (AOB 140; see *ante*.) One of those factors -- the disruption or delay which might reasonably be expected to follow the granting of such a motion -- incorporates the effect of the timing of a request for self-representation. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.) [19] As noted, this factor weighed in favor of granting appellant's motion.

Third, the timeliness requirement for a self-representation motion does not exist in a cloud. It exists for a reason: to prevent the misuse of such a

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19. Respondent points out that the trial court initially noted that the motion "was not technically timely made." (RB 98, citing 8 RT 2961.) But it neglects the court's following sentence: "But just rather than a procedural denial, the court wanted to make inquiry of Mr. Boyce's ability to represent himself." The court's final ruling was on the merits.

motion to delay the trial or obstruct the orderly administration of justice. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 454; *People v. Halvorsen* (2007) 42 Cal.4th 379, 434.) Respondent does not argue that the motion would delay the trial. How could it? A week before the penalty phase was more than sufficient to effectuate appellant's intent: to present no witnesses, as he was entitled to do. (*People v. Clark* (1990) 50 Cal.3d 583, 617-618.) Appellant neither sought nor required a continuance. Accordingly, granting the motion would not have changed the court's calendar one whit, and respondent does not argue otherwise. Nor did the court express any concern that appellant was attempting to delay or disrupt the proceedings. (See *People v. Lawrence*, *supra*, 46 Cal.4th 186, 195.) Unlike the defendant in *People v. Doolin*, *supra*, 45 Cal.4th at pp. 454-455, appellant was ready to proceed.

In *Windham*, this Court cautioned that the timeliness requirement "must not be used as a means of limiting a defendant's constitutional right of self-representation." (*People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) That hortatory appeal applies here. As the Court stated in *People v. Halvorsen* (2007) 42 Cal.4th 379, 434: "The rationale behind the rule giving the trial court the discretion to deny an untimely *Faretta* motion-to avoid disruption of an ongoing trial-thus is not implicated in this case."

E. The Death Judgment Must Be Reversed

The penalty phase judgment must be reversed. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 434.)

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9. IN LIGHT OF THE OVERWHELMING MITIGATION, THE TRIAL COURT'S FAILURE TO GIVE THE JURY FULL INSTRUCTIONAL GUIDANCE AT THE PENALTY PHASE REQUIRES REVERSAL OF THE DEATH JUDGMENT

The penalty phase in this case was similar to a traditional trial. Over six days, numerous lay witnesses testified for both sides, were cross-examined, and impeached. Credibility was in issue. A number of experts testified, offering opinions on a variety of subjects, and were vigorously cross-examined. Accordingly, the trial court was required to instruct the penalty phase jurors with all of the applicable instructions, from CALJIC No. 1.01 through 8.88. (*People v. Souza* (2012) 54 Cal.4th 90, 134; *People v. Gonzales* (2011) 52 Cal.4th 254, 327-328 [respondent acknowledges error]; CALJIC No. 8.84.1.) It failed to do so. This was error and has been since 1988. (AOB 177-185.)

Respondent repeatedly concedes that the trial court erred (RB 119, 123, 124, 126), but contends that it was harmless. (RB 119-127.) The issues are mostly joined, but there remain a few threads.

First, respondent contends that appellant's failure to request CALJIC Nos. 1.01, 1.03, and 1.05 forfeited those claims. (RB 122, citing *People v. Ervine* (2009) 47 Cal.4th 745, 804, & *People v. Wilson* (2008) 43 Cal.4th 1, 30.) The contention is wrong, not because of respondent's reading of the cases, but because *Ervine* misread *Wilson*. *Ervine* states:

> We note as well that defendant forfeited any claim with respect to the failure to reinstruct in particular on the respective duties of the judge and jury [CALJIC No. 1.00] and the concluding instructions "by failing to request such instructions at trial." (*People v. Wilson* (2008) 43 Cal.4th 1, 30.)

(*Ervine*, *supra*, at 804.) *Wilson*, however, held no such thing:

> Finally, we reject defendant's claim that the trial court erred in failing to instruct sua sponte with CALJIC Nos. 17.30 through 17.50, which include cautionary instructions, instructions on the jurors' duties, and concluding instructions. While the Use Note

> to CALJIC No. 8.84.1 refers to CALJIC Nos. 1.01 through 8.88, it makes no reference to CALJIC Nos. 17.30 through 17.50. Defendant provides no authority supporting his claim that the trial court had a sua sponte duty in this regard; nor, we add, does he argue that the failure to give such instructions resulted in prejudice here. Thus, by failing to request such instructions at trial, defendant has waived this claim.

(*Wilson*, *supra*, at p. 30.) *Wilson* mentioned CALJIC No. 1.01 in discussing the instructions that *must* be given sua sponte, as compared to CALJIC Nos. 17.30 through 17.50 which do not.

This Court's cases and the Use Note to CALJIC No. 8.84.1 have long required trial courts to give CALJIC Nos. 1.01 through 8.88. (AOB 178-179; e.g. *People v. Gonzales* (2011) 52 Cal.4th 254, 327-328; *People v. Cowan* (2010) 50 Cal.4th 401, 494.) This Court should disapprove *Ervine*'s holding that a trial court has no sua sponte duty to instruct on CALJIC Nos. 1.01, 1.03, and 1.05 at the penalty phase. It conflicts with CALJIC No. 8.84.1, as well as the now-current CALCRIM Nos. 760 and 761, and can only cause mischief. (See, e.g., *People v. Livingston* (2012) 53 Cal.4th 1145, 1178 [citing *Ervine* & *Wilson*].)

Second, given the conceded error, respondent argues that appellant has not produced a "concrete example of how he has been prejudiced." (RB 124.) The requirement of a "concrete example" does not seem consistent with the "reasonable possibility" standard in *People v. Brown* (1986) 46 Cal.3d 432, 446-448. Nor is placing the burden of proof on appellant consistent with the standard in *Chapman v. California* (1967) 386 U.S. 18, 24, which explicitly places the burden of proof on the beneficiary of the error; here, respondent. This Court equates the *Brown* test with the *Chapman* test. (*People v. Wilson*, *supra*, 43 Cal.4th at p. 28.) Yet, the Court has come close to adopting respondent's view: "In the absence of some specific indication of prejudice arising from the record, *defendant* does no more than speculate that the absence of the instructions prejudiced him." (*People v. Lewis* (2008) 43 Cal.4th 415, 535,

quoting *People v. Carter* (2003) 30 Cal.4th 1166, 1221, internal quotation marks omitted, emphasis added; cf. Evid. Code, § 115 [defining "Burden of proof" as a party's obligation to establish *by evidence* a degree of belief concerning a fact in the mind of the trier of fact]; Evid. Code, § 190 [defining proof].)

If respondent were required to prove the error harmless, it too could only present speculation. It must concede that the penalty phase was lengthy, with many different witnesses and issues, and required a jury fully instructed to handle and evaluate the evidence, and decide the issues. But, nothing is known for sure about what this particular jury did in the jury room with these incomplete instructions. The impenetrability of jury deliberations is closely guarded. (See *People v. Wilson* (2008) 44 Cal.4th 758, 829 [emphasizing the sanctity and secrecy of jury deliberations].)

Appellant will offer examples from the record showing that there is a reasonable possibility that one juror would have voted differently had the error not occurred. If he can show that, relief should be granted. (See *Wiggins v. Smith* (2003) 539 U.S. 510, 537.) But first he notes that the error presents a larger issue. This Court has clearly and repeatedly exhorted "trial courts not to dispense with necessary penalty phase evidentiary instructions in the future. The cost in time of providing such instructions is minimal, and the potential for prejudice in their absence surely justifies doing so." (*People v. Carter* (2003) 30 Cal.4th 1166, 1222; see also *People v. Gonzales*, *supra*, 52 Cal.4th at p. 331; *People v. Moon* (2005) 37 Cal.4th 1, 37, fn. 7.) Yet, the Court continues to be faced with this error in capital cases, and required to closely scrutinize the record and the omitted instructions to determine whether there is a reasonable possibility of prejudice. The cases are too many to enumerate. [20]

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20. E.g., *People v. Souza* (2012) 54 Cal.4th 90, 134; *People v. Gonzales*, *supra*, 52 Cal.4th at pp. 327-328; *People v. Cowan* (2010) 50 Cal.4th 401, 494; *People v.*

Footnote continued on next page . . .

Why this error, and why in capital cases? Fully instructed juries is both the norm and a prerequisite in civil and criminal cases. "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302; see also *Mathews v. United States* (1988) 485 U.S. 58, 64 ["The issues of fact in a criminal trial are usually developed by the evidence adduced and the court's instructions to the jury"]; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) And yet, some trial courts, for some reason, are ill- performing this crucial duty in the most important judicial proceeding of all: the penalty phase of a capital case.

One possibility should be eliminated right away. This Court has often noted that the ultimate decision to be made at the penalty phase differs from that at the guilt phase: the penalty-phase determination is essentially moral and normative. (E.g., *People v. Moore* (2011) 51 Cal.4th 1104, 1145.) Nonetheless, before reaching that decision, jurors are usually, as they were here, presented with a large amount of adversarial proceeding evidence that must be evaluated and properly handled. Hence, the importance of being fully instructed.

The inquiry on appeal is highly fact-specific. The instructions given and the omitted instructions must be carefully analyzed in light of the evidence presented. In some cases, the paucity of the evidence eases the task. But in this case, there was a full-on penalty phase presented by the Orange County Public Defender. The result, as appellant has argued, is that the

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Loker (2008) 44 Cal.4th 691, 745; *People v. Lewis* (2008) 43 Cal.4th 415, 535; *People v. Wilson*, *supra*, 43 Cal.4th at p. 28 [assuming error]; *People v. Howard* (2008) 42 Cal.4th 1000, 1026; *People v. Chatman* (2006) 38 Cal.4th 344, 408; *People v. Moon* (2005) 37 Cal.4th 1, 37; *People v. Carter* (2003) 30 Cal.4th 1166, 1219; *People v. Pinholster* (1992) 1 Cal.4th 865, 965.)

mitigating evidence was overwhelming. In light of this, this Court should carefully review appellant's claim and err on the side of a reasonable possibility that one juror would have voted for life had the jury been properly instructed.

In this case, the omitted definition of beyond a reasonable doubt (as well as several other omitted instructions) related to the section 190.3, factor (b) Damani Gray incident. The beyond a reasonable doubt standard is applicable to factor (b) because "evidence of other crimes may be particularly important to a jury considering penalty[.] (*People v. Cowan* (2010) 50 Cal.4th 401, 489.) When in issue, a trial court is required to give "the definition of reasonable doubt that comprises the second paragraph of CALJIC No. 2.90." (*People v. Gonzales* (2011) 52 Cal.4th 254, 328.) Here, the incident occurred 12 years prior to trial when Gray was young. The prosecution called Gray and a police officer while the defense called two officers; all were subject to cross-examination. Versions differed. (See AOB 32-33 [statement of facts]; RB 28-29 [same].) The jurors required full instructional guidance in dealing with this issue. Yet, they did not receive all of the instructions necessary for handling the evidence, including the definition of a reasonable doubt. The words "beyond a reasonable doubt" are not self-defining for jurors. "[J]urors are often confused about the meaning of reasonable doubt" when that term is left undefined. (See Note, *Defining Reasonable Doubt*, 90 Colum. L.Rev. 1716, 1723 (1990) [citing studies]. Further, the guilt phase instructions were given two weeks before the penalty instructions. That raises a reasonable possibility that one juror, focused on the incident, would have misapplied the standard and voted for death. [21]

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21. A correct definition of beyond a reasonable doubt was also important to the defense because it argued lingering doubt in mitigation. (12 RT 3966-3967.) To assess that argument properly, the jury should have received the definition of beyond a reasonable doubt.

The Damani Gray allegation was not insignificant. The prosecutor used it for a reason, as he revealed in closing argument: "it shows a pattern of violence that begins back in 1987. It shows a pattern with encounters with the law." (12 RT 3900-3901.) The prosecutor effectively used a relatively minor criminal offense to make larger points in favor of death.

Next, experts were paramount in this case. The defense called six experts on a variety of subjects relating to appellant's social history and mitigation (Leo, Cross, Benson, Cervantes, Johnson, and Alonso). In his cross-examination of Dr. Benson, the prosecutor vigorously challenged certain key findings (the age that appellant began hearing voices and his identification as Osiris). (10 RT 3542-3544, 3551, 3553-3358, 3561; 11 RT 3799-3801, 3803-3807, 3817-3818.) At closing argument, the prosecutor repeatedly attacked those assumptions and the facts and opinions of certain of the experts. (12 RT 3920-3921, 3932-3935, 3937-3938, 3939-3940.) And, he sought to tag appellant as having anti-social personality disorder; in other words, a sociopath. (12 RT 3932-3934, 3936-3937.) Yet the expert in question testified unequivocally that appellant did not suffer that diagnosis. Moreover, a number of family members – including Trudith Bell, a teacher, and Brenda Boyce – gave lay opinions in mitigation regarding appellant. (9 RT 3210-3223, 3231-3232, 3239-3242 [Trudith Bell]; 9 RT 3290-3292, 3294-3295 [Brenda Boyce].)

Understanding and evaluating the weight to be accorded this evidence was not easy. (Cf. *People v. Moon* (2005) 37 Cal.4th 1, 38 [no prejudice where, inter alia, defendant called no expert witness to present his social history and no mental health professionals].) Out of the jury's hearing, counsel debated experts and their use of hypotheticals. (10 RT 3371-3375.) The jurors needed full guidance to resolve these disputes. They were instructed on CALJIC No. 2.80, the general expert instruction, but were not given CALJIC Nos. 2.81

regarding hypothetical questions or 2.82 on lay opinion. Cases have been reversed for the failure to give CALJIC No. 2.80. (*People v. Reeder* (1976) 65 Cal.App.4th 235, 241-243; *People v. Gonzales Ruiz* (1970) 11 Cal.App.3d 852, 859-865.) The instructions on hypotheticals and lay opinions that were erroneously omitted here are just as important. The fact that the jury returned death for a mentally retarded, brain damaged, and severely mentally ill defendant raises a reasonable possibility that one or more jurors did not properly assess the expert testimony.

In an interesting twist, one of the erroneously omitted instructions, CALJIC No. 2.11, states:

> Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence.

At the prosecutor's penalty closing, however, he argued:

> I thought it was very telling that we would hear from some of these witnesses, some of these relatives who would sort of spottingly see the defendant along the road, and yet the two people who live with him, we didn't hear from. We didn't hear from terry Boyce or Michelle Boyce. Why not? Why didn't we hear from the two people who grew up with him that saw him all the time?

(12 RT 3916.) CALJIC No. 2.11 would have useful, to say the least, in the jurors' assessment of that argument.

Another example of a reasonable possibility that a juror would have voted for life had the jury been fully instructed relates to the omitted CALJIC instructions concerning "Evidence and Guides for Its Consideration": direct and circumstantial evidence, the sufficiency of circumstantial evidence, and the sufficiency of circumstantial evidence to prove specific intent or mental state. (CALJIC Nos. 2.00, 2.01, 2.02, 2.03, 2.11, 2.13, 2.21.2, 2.22 and 2.27.) This Court long ago held that a trial court has a "duty to instruct on those general

principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885, internal citation omitted.) Evidence Code, section 312 allows no doubt as to the importance of these instructions:

> [W]here the trial is by jury:
>
> (a) All questions of fact are to be decided by the jury.
>
> (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

These evidence-guiding instructions would have applied to a number of issues, including the Damani Gray incident, the battle over the testimony of appellant's mother, Vertis, and the expert testimony. Several of these instructions contain the word "willful" (CALJIC Nos. 2.03, 2.21.2), which the high court long ago noted "is a word with many meanings[.]" (*Screws v. United States* (1945) 325 U.S. 91, 101.)

In short, respondent's "well-fitted men" (RB 125) were left to evaluate and consider the evidence at the penalty phase of a capital case under circumstances that would not occur in the smallest civil or criminal case.

In assessing this error, this Court has often relied on an ill-founded presumption. The jurors are specifically instructed (as was appellant's jury) to *disregard* the guilt phase instructions, meaning *pay no attention to those instructions.* (See *People v. Estrada* (1995) 11 Cal.4th 568, 578 [disregard defined as an intentional lack of attention]; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1219; RB 120.) That point was reinforced by the trial court's instructional finale: this "concludes the court's reading of the applicable instructions as to this phase of the trial." (12 RT 4050.) The jurors are presumed to have, and in any event would have, understood and faithfully followed the directions to disregard the guilt instructions. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) One or more jurors may have assumed that certain of the guilt phase instructions still applied; but that assumption would have violated the clear directive to

disregard those instructions and the court's statement that these are the only instructions that did apply. [22] Even if one or more jurors did violate that directive, they did not have those guilt phase instructions before them to consult, as they did two weeks earlier.

Yet, this Court has assumed in a number of cases that the jury did just that: where the jurors have not been adequately advised on the law regarding beyond a reasonable doubt, "the jury would likely have assumed the reasonable doubt the court referred to at the penalty phase had the same meaning as the term had during the guilt phase" (*People v. Loker* (2008) 44 Cal.4th 691, 745; see also *People v. Lewis* (2008) 43 Cal.4th 415, 536; *People v. Chatman* (2006) 38 Cal.4th 344, 408; *People v. Holt* (1997) 15 Cal.4th 619, 685.) Thus, this Court has found no prejudice from this error on the assumption that the jurors violated the instructions. [23]

The Court has also noted that nothing in the closing arguments of the parties suggested that the jurors were free to make a standardless assessment of the evidence. (E.g., *People v. Lewis*, *supra*, 43 Cal.4th at p. 535.) Here, the prosecutor stated as follows at the penalty phase closing argument:

> In the penalty phase, there is no burden of proof. Neither side has a burden as to which penalty is appropriate.

(12 RT 3899.) Although this was followed by the prosecutor noting that a factor (b) incident must be proven beyond a reasonable doubt (12 RT 3899), the confusion is palpable. Moreover, neither counsel discussed or explicated the omitted instructions at closing argument.

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22. Hypothetically, if a copy of the guilt instructions happened to be in the jury room by accident, conscientious jurors would not consult them in light of the trial court's directives to disregard them.

23. In 1835, Chief Justice Marshall wrote that "[h]e who alleges that an officer entrusted with an important duty has violated his instructions, must show it." (*DeLassus v. United States* (1835) 34 U.S. (9 Peters) 117, 134.)

The Court has concluded that there is "no reason to assume that the jurors would have felt free to evaluate the penalty phase evidence in a vacuum, rather than carefully and deliberately, as they apparently had evaluated the guilt phase evidence." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 535, quoting *People v. Carter*, *supra*, 30 Cal.4th at p. 1221, internal quotation marks omitted; RB 125.) But there is reason to believe that the jurors were left in a *partial* vacuum: a number of required instructions were not given. And whether the jurors evaluated the evidence carefully and deliberately is not the problem; the lack of guidance in that evaluation is.

The Court has also placed weight on the fact that the jurors in certain cases did not ask any questions or request clarification as to how to assess of the penalty phase evidence. (*People v. Aranda* (2012) 55 Cal.4th 342, 375; *People v. Lewis*, *supra*, 43 Cal.4th at 535; *People v. Chatman* (2006) 38 Cal.4th 344, 408; *People v. Loker* (2008) 44 Cal.4th 691, 745-746.) This is indeed puzzling. Cases with instructional error are legion. Yet there has never been a requirement that the jury notice the legal error and bring it to the court's attention. "We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence." (*Sparf v. United States* (1895) 156 U.S. 51, 102.)

In other cases, this Court has found the error harmless, in part because the aggravating evidence was voluminous, while the mitigating evidence was not particularly strong. (*People v. Cowan* (2010) 50 Cal.4th 401, 492.) In appellant's case, the mitigation was overwhelming.

With respect to respondent's quotation from *United States v. Scheffer* (1998) 523 U.S. 303, 313, regarding the proposition that credibility determinations are for the jury "who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of

men" (RB 125), appellant, apart from noting that the portion of *Scheffer* cited is a plurality opinion, has no quibble. But the fact that the jury has the responsibility to determine credibility and is fitted to do so does not negate the fact that a trial court has a sua sponte duty to instruct to instruct capital sentencing jurors on the general principles relating to the evaluation of evidence. (*People v. Moon*, *supra*, 37 Cal.4th at p. 35; *People v. Benavides* (2005) 35 Cal.4th 69, 111-112.) Taken to its extreme, respondent's position would do away entirely with the need to instruct such "fitted men." Few would embrace such a radical proposition, particularly at the penalty phase of a capital case when life is at stake.

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10. THE TRIAL COURT'S NONCAPITAL SENTENCING ERRORS REQUIRE REVERSAL AND A REMAND

A. The Invalid Upper Terms

In *Cunningham v. California* (2007) 549 U.S. 270, 274, the high court held that California's procedure for selecting an upper term violated a defendant's right to jury trial because it gave "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." The trial court here erred in this respect. (See *People v. French* (2008) 43 Cal.4th 36, 52; AOB 188-192.)

In its brief, respondent repeatedly asserts that the trial court imposed the upper term based on appellant's recidivism. (RB 127, 129.) This is puzzling given that the trial court made quite clear that it was imposing the upper term because of the vulnerability of the victim: "The court selects the aggravated term because of the vulnerability of the victims." (12 RT 4121.) The court gave the same reason for the upper term on the gun use enhancement. (12 RT 4121.)

What respondent apparently means to argue is that the court *could* have imposed the upper term based on appellant's recidivism. (RB 128.) It notes that the probation report mentioned several potential aggravating factors, and that the trial court mentioned appellant's two prior felony convictions in ruling on appellant's motion for modification. (RB 128-129.) Nonetheless, speculating upon what the court could have done is no substitute for what the court actually did. The court relied on the vulnerability of the victims factor. Undaunted, and contrary to the record, respondent's peroration again erroneously avers that "in imposing the upper terms, the trial court permissibly relied on [appellant's] criminal history." (RB 130.)

Respondent then contends that the error was harmless under *People v. Black* (2007) 41 Cal.4th 799, in which this Court concluded:

> as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial.

(*Id.* at p. 812, emphasis in original; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 839; RB 129-130.)

In his opening brief, appellant did not concede that this Court's decision in *People v. Black* sufficed to bring California's prior determinate sentencing scheme into compliance with *Cunningham*. (AOB 189.) Moreover, it is not clear that *Apprendi*'s recidivism exception still commands a majority of the high court. (See *Shepard v. United States* (2005) 544 U.S. 13, 27-28 (conc. opn. of Thomas, J.).) But in any case, respondent is baldly asking this Court to make its own choice of reasons to "save" the trial court's sentencing. That is not this Court's function. As the court of appeal stated in *People v. Cardenas* (2007) 155 Cal.App.4th 1468:

> It is not for the appellate court to conjure the reasons the trial court could have recited to support its sentencing decision from the many options listed in the statutes and court rules. We review the trial court's reasons-we don't make them up.

(*Id.* at p. 1483.)

Respondent does agree with appellant, however, that if this Court finds the *Cunningham* error prejudicial, "it should remand for resentencing[.]" (RB 132; AOB 193-195.)

B. The Invalid Consecutive Sentences

Respondent has misread appellant's claim regarding the trial court's imposition of consecutive sentences. Appellant does not claim that the trial court erred under *Oregon v. Ice* (2009) 555 U.S. 160. (RB 133.) Indeed, appellant noted that the 5-4 ruling in *Ice* held that Oregon's judge-imposed consecutive sentencing procedure did not violate the Sixth Amendment.

(AOB 192.) Still, there is no gainsaying the importance of the consecutive sentencing decision. As Justice Scalia pointed out, "[t]he decision to impose consecutive sentences alters the single consequence most important to convicted noncapital defendants: their date of release from prison." (*Id.* at p. 721 (dis. opn. of Scalia, J.).)

The trial court here did err, however, in failing to give any reason for the imposition of consecutive sentences. The statutes and sentencing rules require a trial court to state "reasons" for its discretionary choice to impose a consecutive sentence. (AOB 192-193; see *People v. Black*, *supra*, 41 Cal.4th at pp. 822-823 [court need cite reasons for its imposition of a consecutive sentence].) Requiring a statement of reasons "encourages the careful exercise of discretion and decreases the risk of error" and "supplies the reviewing court with information needed to assess the merits of any sentencing claim and the prejudicial effect of any error." (*People v. Scott* (1994) 9 Cal.4th 331, 349, 351.) Moreover, the sentencing hearing is a critical phase of the proceeding and the statement of reasons secures a defendant's right to due process. (See *Rita v. United States* (2007) 551 U.S. 338, 356-357 [importance of federal requirement for sentencing statement of reasons]; *Gardner v. Florida* (1977) 430 U.S. 349, 358; *In re Sturm* (1974) 11 Cal.3d 258, 267-272 [in parole context, due process required definitive statement of its reasons].)

Respondent contends that defense counsel's failure to object to the trial court's failure to state such reasons precludes raising the issue on appeal. (RB 134.) In *People v. Welch* (1993) 5 Cal.4th 228, this Court held that sentencing claims are not exempted from an objection requirement, and that defendants cannot challenge the terms of their probation for the first time on appeal. (*Id.* at pp. 236-237.) In *People v. Scott*, *supra*, 9 Cal.4th 331, the Court applied those principles "to defendants who challenge the statement of reasons given by the trial court in support of its discretionary sentencing

choices." (*Id.* at p. 348.) In other words, "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*Id.* at p. 353.)

According to WestLaw, more than 2,000 California cases have cited *Scott* on this point. Given the presumption that appellate counsel will raise only "genuinely colorable claims in good faith on appeal" (*In re Sheena K.* (2007) 40 Cal.4th 875, 886), that number suggests that there are thousands of cases where a trial court failed in some part of its sentencing duty, yet the claim was forfeited, ostensibly due to defense counsel's inattention. Justice Kennard pointed out one problem in her dissent: "In complex cases involving multiple counts with multiple sentence enhancements, therefore, it may be difficult for trial counsel to immediately identify any deficiencies in the trial court's oral statement of reasons." (*Scott, supra*, at p. 359 (conc. & disn. opn. of Kennard, J.).) *Scott* 's answer to this problem was post-conviction proceedings based on ineffective assistance of counsel:

> Under existing law, a defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent.

(*People v. Scott, supra*, 9 Cal.4th at p. 351.) *Scott* is not only draconian, but also inefficient in a time of limited judicial resources. Accordingly, appellant respectfully asks this Court to revisit that decision.

In any event, forfeiture does not prohibit an appellate court from reaching an unpreserved claim; it merely allows it not to do so. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7; *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.) And, the decision in *Scott* was premised, in part, on the assumption that the parties would know before the sentencing hearing what sentence is likely to be imposed and the reasons therefore. (*People v. Scott, supra*, 9 Cal.4th at pp. 350-351.) That is not the case here, as the probation

report does not mention consecutive or concurrent sentencing. (11 CT 3648-3658.) This Court also stated in *Scott* that "there must be a meaningful opportunity to object," and further declared:

> This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices.

(*Id.* at p. 356; see also *id.*, at pp. 350-351; see also *In re Sheena K.*, *supra*, 40 Cal.4th at p. 887 [appellate courts have invoked their discretion to review an apparent constitutional issue when the defendant did not have a meaningful opportunity to object at trial].) The constitutional issue at stake here is due process at criminal sentencing. The requirements for a meaningful opportunity to object do not appear to have occurred here. Had there been such an opportunity, then counsel, presumptively competent, would have objected.

Finally, respondent fails to identify the reason given by the trial court to justify imposition of a consecutive sentences: it simply points to the probation report as identifying "numerous aggravating circumstances." (RB 134-135; see rule 4.425.) Once again, it is asking this Court to save a sentencing decision that was made in error. No reasons were given by the trial court for this sentencing decision. The "vulnerability of the victim" sentencing factor could not be used to justify the consecutive sentences because the court relied on that factor in imposing the upper terms (AOB 192-193), and the prosecution's motion to strike the alleged prior convictions was granted (12 RT 4059-4060). The *Scott* rule is subject to a narrow exception: unauthorized sentences or sentences entered in excess of jurisdiction do not require an objection to preserve the claim for appeal. In the absence of a valid factor, the sentencing choice is unauthorized: "a trial court will abuse its discretion under the amended scheme if it relies upon

circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (See *People v. Sandoval* (2007) 41 Cal.4th 825, 847-848.) [24]

C. Correction of the Abstract of Judgment

In his opening brief, appellant argued that the abstract of judgment did not correctly reflect that the sentences on counts 2 through 11 were stayed "because of the fact that the court relied on the facts underlying these offenses to deny the motion to modify the death penalty." (12 RT 4123; AOB 193.)

Respondent correctly points out that the abstract of judgment shows that the sentences on those counts were stayed, pending the execution of the death sentence. (11 CT 3600; RB 127.) Although the sentences were not stayed under section 654, the trial court stated in its sentencing minute that the service of the additional years of imprisonment on Counts 2 through 11 were stayed. (11 CT 3656.)

Finally, in his concurring opinion in *People v. Cleveland* (2004) 32 Cal.4th 704, Justice Chin observed that when a defendant has been sentenced to death, "no need exists to impose any other sentence." (*Id.* at p. 770 (conc. opn. of Chin, J.).) A simple alternative exists, as Justice Chin proposed:

> The Legislature might provide that if the trial court imposes a

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24. Section 669 provides, in part:

> Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently.

In other words, when the trial court errs by failing to say anything about concurrent or consecutive sentences, the benefit inures automatically to the defendant. But when the court affirmatively errs in imposing consecutive sentences, here by failing to give the necessary reasons for that sentencing choice, a defendant with inattentive counsel must bear the consequence.

> sentence of death or LWOP on any count, it need not impose any other sentence, including enhancements. If the convictions are ever set aside or modified to reduce the sentence to something less than LWOP, the court can resentence the defendant on the remaining counts at that time.

(*Ibid.*) Appellant agrees with this observation.

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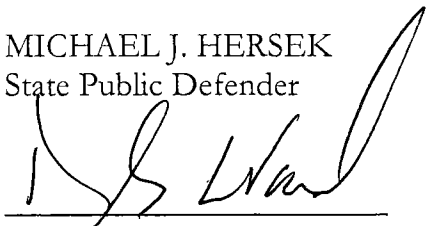
CONCLUSION

For all of the reasons stated above and in appellant's opening brief, the convictions and death sentence in this case must be reversed.

DATED: December 31, 2012.

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.630 (b)(2), I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the tables, contains approximately 23,000 words.

DATED: December 31, 2012.

DOUGLAS WARD
Senior Deputy State Public Defender

Attorney for Appellant
KEVIN BOYCE

DECLARATION OF SERVICE

Re: *People v. Boyce*, No. S092240

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. A true copy of the attached:

APPELLANT'S REPLY BRIEF

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

The Honorable Edmund G. Brown
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Each said envelope was then, on December 31, 2012, sealed and deposited in the United States Mail at Oakland, California, Alameda County, in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on December 31, 2012, at Oakland, California.

Neva Wandersee

AMENDED

DECLARATION OF SERVICE

Re: *People v. Boyce*, No. S092240

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. A true copy of the attached:

APPELLANT'S REPLY BRIEF

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

The Honorable Kamala D. Harris
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San Diego, California 92101

Each said envelope was then, on December 31, 2012, sealed and deposited in the United States Mail at Oakland, California, Alameda County, in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

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Neva Wandersee