S 114671

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH SCHULTZ,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA CASE NO. CR 49517
HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

JERALYN KELLER
State Bar No. 72565
790 East Colorado Boulevard, Ste 900
Pasadena, Ca. 91101-2113
Telephone: (626) 683-1233
Telecopy: (626) 683-8752
E-mail: jbkeller@pacbell.net
Attorney for appellant,
MICHAEL JOSEPH SCHULTZ

S 114671

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH SCHULTZ,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA CASE NO. CR 49517
HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

JERALYN KELLER
State Bar No. 72565
790 East Colorado Boulevard, Ste 900
Pasadena, Ca. 91101-2113
Telephone: (626) 683-1233
Telecopy: (626) 683-8752
E-mail: jbkeller@pacbell.net
Attorney for appellant,
MICHAEL JOSEPH SCHULTZ

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Rules

Constitutional Provisions

Other Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH SCHULTZ,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

INTRODUCTION

Michael Schultz grew up as the youngest child in a family in which the abuse of prescription and non-prescription drugs was an everyday occurrence. He began taking drugs in grade school. By the time he became an adult, he was addicted to methamphetamine.

In August 1993, Schultz — homeless and under the influence of methamphetamine — happened upon Cynthia Burger's open garage door as he wandered aimlessly about in the middle of the night. The prosecutor argued Schultz entered Burger's condominium through the garage, found

her in her bedroom, raped her, murdered her, and left the condominium undetected.

The jury convicted Michael Schultz of one count of first-degree murder, found the rape special circumstance and the burglary special circumstance true, and sentenced him to death.

In his opening brief and in this reply brief, Schultz explains the trial court erred in excusing one prospective juror who repeatedly declared his willingness to set aside his religious qualms about capital punishment and to abide by the juror's oath to follow the court's instructions and in excusing another prospective juror without ascertaining that prospective juror's ability to put aside her position on the death penalty to take on the duties of a capital juror. These errors require reversal of his death sentence.

Schultz's opening brief and this reply brief argue hearsay statements Burger made just a few hours before she died were admitted even though they did not qualify as exceptions to the hearsay rule. Schultz contends Burger's statements injected emotion into the guilt phase and distracted the trier of fact from the guilt issues.

Schultz's opening brief and this reply brief argue a pivotal match of a deoxyribonucleic acid (DNA) profile prepared in 1996 with a profile prepared in 2000 was entered into evidence without the required confrontation of the analyst who compiled the 1996 profile and without the requested pre-trial analysis required by *People v. Kelly* (1976) 17 Cal.3d 24. Schultz contends this erroneous admission deprived him of the opportunity to challenge the alleged match and also stripped away his ability to contest the reliability of Therresa Mooney's recollection of Schultz's alleged admissions.

Schultz's opening brief and this reply brief also argue he was denied a fair penalty trial and he was unfairly defamed and discredited because snatches of correspondence with an individual identified as a former leader of a skinhead gang were improperly admitted to rebut his expert's testimony he would be an obedient and companionable inmate if sentenced to life without parole and the Burger family was permitted to provide victim-impact testimony that far exceeded the permissible bounds of such testimony.

Schultz's opening brief and this reply brief argue the court erred in denying a mistrial when the prosecutor's admitted misconduct during the final moments of penalty-phase testimony exacerbated the prejudice engendered by the admission of evidence of Schultz's relationship with the former skinhead leader.

Schultz's opening brief and this reply brief argue evolving standards of decency compel the conclusion Penal Code section 190.2, subdivision (c) which allows the jury to rely on unadjudicated acts involving even limited force or violence violates the Eighth Amendment.

Finally, Schultz's opening brief and this reply brief present constitutional arguments this Court has considered in other cases.

Schultz does not reply to arguments by respondent adequately addressed in his opening brief. Schultz relies on *People v. Hill* (1992) 3 Cal.4th 959, 995 at fn. 3 to assert that neither the absence of a reply to any argument or allegation made by respondent nor the absence of a reassertion of any point made in the opening brief constitutes a concession, abandon-

ment, or waiver of the point by him, but reflects his view the issue has been adequately presented and the positions of the parties fully briefed.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief (AOB).

All statutory references are to the California Penal Code unless stated otherwise.

ARGUMENT IN REPLY

I. The trial court committed reversible error when it excused prospective juror Antonio A. who stated repeatedly he could — and would — abide by the juror's oath and follow the court's instructions and when it excused prospective juror Mary M. without fully ascertaining her willingness to follow the court's instructions.

A. Introduction and summary of contentions.

The right to a jury trial was so important to the founders it was included in both the original Constitution and the Bill of Rights.[1] Schultz contends he was denied this important right when the trial court improperly excluded prospective jurors, Antonio A. and Mary M., from service on his jury.

Antonio A.'s religious beliefs were at odds with capital punishment. The trial court concluded Antonio A.'s beliefs rendered him incapable of considering "imposition of the death penalty as a reasonable possibility or, quite frankly, as any possibility" and "if ... given the choice he would choose life without possibility of parole" and excused him. (11RT 1966)

---

[1] Article III, Section 2, Clause 3 of the Constitution of the United States; Sixth Amendment to the Constitution of the United States.

The trial court mis-recollected Antonio A.'s testimony. Antonio A. repeatedly stated he understood his obligation as a juror and could — and would — set aside the tenets of his church, follow the court's instructions, and sign a death verdict if he believed the facts warranted such a penalty.

The trial court's voir dire of Mary M. was extremely brief. Respondent acknowledges that brevity, but contends the court's voir dire was sufficient. Schultz disagrees. The trial court's fleeting voir dire established only that Mary M.'s position on capital punishment was evolving as jury selection continued, but it did not establish whether she could follow the court's instructions if called upon to sit as a juror.

B. Antonio A. unequivocally stated he would set aside his personal beliefs and preferences and be guided by the instructions he received from the court. The trial court improperly excluded him from service.

Supreme Court jurisprudence has long recognized an individual committed to obeying the juror's oath to follow the court's instructions is a qualified juror in a capital case. (*Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]; *Wainwright v. Witt* (1985) 469 U.S. 412, 424

[105 S.Ct. 844, 83 L.Ed.3d 622].) A juror may be labeled unqualified, and excused as such, only if unable or unwilling to make this commitment.

The expectation most individuals can — and will — put aside personal beliefs and opinions while serving as a juror is at the heart of the *Witt* Court's holding an individual's attitude about capital punishment is not cause for disqualification *unless* that attitude "*would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with the instructions and ... oath.*" (*Wainwright v. Witt, supra,* 469 U.S. at p. 424 citing *Adams v. Texas* (1980) 448 U.S. 38, 44 [100 S.CT. 2521, 65 L.Ed.2d 581]; *People v. Jones* (2013) 57 Cal.4th 899, 914; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

Although Antonio A.'s religious convictions inclined him to favor a life sentence, he unmistakably understood that, if he was chosen as a juror in Schultz's case, he would have to put his inclination aside. He underscored his ability to do so by explaining he had served as a juror before; he had taken the juror's oath before; and he understood a juror's obligation to follow instructions and to keep his own predisposition outside of the jury room.

Never once did Antonio A. say he would not follow the law. Never once did he say he would not consider a death verdict. Never once did he say he would not render a death verdict. All of his statements were to the contrary:

> I — I'm against the death penalty. And — but, *you know, inside this court, you know, I will follow the instruction, you know.*
> (11RT 1917-1918) (Italics added.)

> [A]s I said, *I could follow the instruction,* you know. I would — I will try, you know, to be fair, you know, and *follow the judge (sic) instructions.*
> (11RT 1919) (Italics added.)

> Q [By prosecutor]: And if the jury — if the jury decides that death is the appropriate penalty, there will be a form for you to sign. Could you sign that verdict form saying that this man should be put to death as his punishment?
> A [By Antonio A.]:*I could do that, you know.*
> Q: Well, it would have to be your individual decision though. It's—
> A: Deciding—
> Q: You can't just go along with everyone else.
> A: Yeah, but—
> Q: You have to decide for yourself
> A: *Yeah, I could sign.*
> (11RT 1919-1920) (Italics added.)

> I could [sign a verdict form imposing a death sentence].
> (11RT 1919)

I could sign [an individual verdict imposing a death sentence]. (11RT 1920)

Antonio A. was a man with serious religious convictions. But, in a country founded on religious freedom, religious convictions — even fervent religious convictions — do not disqualify an individual from service as a capital juror. The separation of secular authority and religious authority is deep-rooted in the American psyche, and *Wainwright*, *Witt*, and their progeny all acknowledge that even the most fervent have no difficulty rendering unto Caesar that which is Caesar's.

In an attempt to side-step Antonio A.'s announced willingness to act as an impartial juror and follow the court's instructions, respondent urges this Court to defer almost blindly to the trial court's ruling excusing Antonio A. Respondent's argument relies primarily on *Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014]. (RB 23-24)

Uttecht offers no guidance here, and respondent's reliance on it is inapt.

Prospective Juror Z in *Uttecht* was confused and ambivalent about whether he could impose a death sentence as was the prospective juror in

Darden v. Wainwright (1986) 477 U.S. 168 [106 S.Ct. 2464, 91 L.Ed.2d 144] on which *Uttecht* relied. (*Uttecht v. Brown, supra,* 551 U.S. at pp. 7-8.)

The *Uttecht* Court relied on the trial court's assessment of Juror Z's demeanor because — on appeal — the Court had no other way to resolve the confusion created by Juror Z's ambivalence and apparent confusion.

Schultz acknowledges demeanor may be a helpful barometer when a prospective juror's language is ambiguous or confused. But, Antonio A. was neither confused nor ambivalent. He explicitly stated he was chary about the death penalty, but he would set aside his personal beliefs and "inside this court, ..., [he would] follow the instructions." (11RT 1918) Demeanor cannot contradict Antonio A.'s unambiguous words, and the reliance on demeanor counseled in *Uttecht* is inappropriate here.

The near-blind reliance on the trial court's decision respondent urges is inappropriate for another reason.

Uttecht noted defense counsel had tenaciously contested all of the State's challenges unless the challenged juror "was explicit that he or she would not impose the death penalty or could not understand the burden

of proof;" the court had encouraged counsel to forgo argument if they agreed on a challenge to a particular prospective juror; and defense counsel did not object to the discharge of Juror Z. (*Uttecht v. Brown, supra,* 551 U.S. at p. 11) These pivotal facts led the *Uttecht* Court to infer defense counsel shared the court's belief the prosecution's challenge was valid.

The inference defense counsel agreed to the discharge of Antonio A. cannot be made in Schultz's case. Schultz's defense counsel voiced an objection, requested time to argue the matter further, and extensively argued Antonio A.'s dismissal. (11RT 1923, 1965-1966)

Jurors in a capital case face a very daunting and unenviable task. Few would relish sending another to their death. Antonio A. was mindful of the magnitude of his responsibility and repeatedly expressed a willingness to make the difficult decision in accordance with the court's instructions. He was a well-qualified and thoughtful juror.

The court erred in excluding Antonio A. from service.

C. Excluding prospective juror Mary M. was error.

Conventional legal wisdom holds "once the last person on the jury is seated, the trial is essentially won or lost." (Covington, Jury *Selection: Innovative Approaches to Both Civil and Criminal Litigation* (1934) 16 St. Mary's L.J. 575, 575-576.) Jury selection in capital cases is, therefore, literally a matter of life or death, and trial courts must conduct death-qualification voir dire with the special care and clarity required of a life-and-death event. (*People v. Heard* (2003) 31 Cal.4th 946, 967) Anything less denies the defendant on trial for his or her life the due process protections to which he or she is entitled.

The voir dire of Mary M. was not conducted with the required special care and clarity.

When she reported for jury service, prospective juror, Mary M., was a young woman who had no opinion on the death penalty, had no strong feelings on the subject of capital punishment, felt she could be open-minded about an appropriate punishment, and was willing to weigh and consider all the aggravating and mitigating factors before deciding what punishment should be imposed. (9JQ 2309, 2310-2311.)

Just days later, when Mary M. entered the jury box to replace the fourth juror excused by peremptory challenge, she announced she could not impose a death sentence under any circumstances. (11RT 1875-1876)

The trial court did not try to understand this abrupt about-face and did not try to determine whether Mary M. could set aside her new-found opposition to capital punishment and follow the court's instructions if selected as a juror. (11RT 1876)

Five or ten minutes of additional inquiry would have allowed the court to make a reasoned — rather than a precipitous — decision on Mary M.'s ability to perform as a juror.

D. This Court must reverse Schultz's sentence.

1. Introduction and summary of argument.

Under established Supreme-Court jurisprudence, the erroneous exclusion of a qualified prospective juror under *Witherspoon/Witt* automatically compels the reversal of the penalty-phase judgment with no inquiry whether the error actually prejudiced defendant. (*Gray v. Mississippi,* (1987) 481 U.S. 648, 668 [107 S.Ct. 2045, 95 L.Ed.2d 622]; *Davis v. Georgia* (1976) 429

U.S. 122, 123 [97 S.Ct. 399, 50 L.Ed.2d 339]; *People v. Riccardi* (2012) 54 Cal.4th 758, 778)

Although respondent does not argue otherwise, respondent urges this Court to reject the *Gray/Davis* automatic-reversal rule and apply a harmless error rule in its stead. Although respondent's theory is inartfully stated, it seems respondent is urging this Court to adopt the harmless error standard applied in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80]. (RB 28-29)

The decisions in *Gray* and *Ross* were dictated by the factual and procedural postures of those cases when they reached the Supreme Court. Respondent's argument overlooks the critical procedural differences between those cases. Failing to acknowledge these pivotal differences is fatal to respondent's argument.

2. The harmless error standard has no application when a qualified juror has been erroneously eliminated from the jury pool.

A defendant in a capital case is entitled to a decision made by an impartial jury. (*Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841]; *Irvin v. Dowd* (1961) 366 U.S. 717 [81 S.Ct. 1639, 6 L.Ed.2d 751].)

To ensure an impartial jury and to hamstring the State's ability to engineer a jury organized to return a verdict of death, *Witherspoon* and *Witt* limit the State's power to exclude jurors who harbor reservations about capital punishment:

> It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal "organized to convict." It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general

> objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.
> (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521-23 [88 S.Ct. 1770, 20 L.Ed.2d 776] quoting *Fay v. New York* (1947) 332 U.S. 261, 294 [67 S.Ct. 1613, 91 L.Ed. 2043].) (Internal footnotes omitted.) (Some internal citations omitted.)

What remedy is available to redress a trial court *Witherspoon/Witt* error? *Gray v. Mississippi, supra,* 481 U.S. 648 and *Ross v. Oklahoma, supra,* 487 U.S. 81 demonstrates that the remedy depends upon the nature of the error and the procedural posture of the case when it appears before the appellate court.

In *Gray* — as in Schultz's case — a qualified prospective juror was erroneously excluded for cause and, therefore, was no longer a part of the jury pool. Although the State argued it would have excused the prospective juror by peremptory had she remained in the jury pool, the Court concluded a reviewing court could not assume the improperly-excluded juror would eventually have been excluded.

Because a reviewing court could never know how the parties would have exercised their peremptory challenges had the erroneously-excluded

juror remained in the jury pool, the *Gray* Court concluded a reviewing court could only speculate how the jury would have been constituted had the error not occurred. *Gray* concluded that — when the make-up of the jury absent error cannot be known — automatic reversal of the death sentence is the only way to protect defendant's right to an impartial jury:

> [T]he relevant inquiry is "whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error." Due to the nature of trial counsel's on-the-spot decisionmaking during jury selection, the number of peremptory challenges remaining for counsel's use clearly affects his exercise of those challenges. Even if one is to believe the prosecutor's statement that if ... he had had a peremptory remaining, he would have used it to remove [the unqualified prospective juror], we cannot know whether in fact he would have had this peremptory challenge left to use.... *The nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless.* (*Gray v. Mississippi, supra,* 481 U.S. at pp. 664-665.)

The issue in *Ross v. Oklahoma, supra,* 487 U.S. 81 was the reverse of the issue presented in *Gray*. In *Ross,* the trial court erroneously failed to excuse a prospective juror who was plainly not qualified to serve under the *Witt/Witherspoon* standard. Defense counsel excused the erroneously-included unqualified prospective juror by peremptory challenge, and the

unqualified juror did not serve on the jury that sentenced defendant to death.

Ross declined "to extend the rule of *Gray* beyond its context: the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case" because the uncertainty about the make-up of the final jury that motivated the *Gray* Court to require automatic reversal did not exist in *Ross*. (*Ross v. Oklahoma, supra* 487 U.S. at p. 87, 88.) The *Ross* Court stated:

> One of the principal concerns animating the decision in *Gray* was the inability to know to a certainty whether the prosecution could and would have used a peremptory challenge to remove the erroneously excused juror. In the instant case, there is no need to speculate whether [the unqualified prospective juror] would have been removed absent the erroneous ruling by the trial court; [the unqualified prospective juror] was in fact removed and did not sit.
> (*Ross v. Oklahoma, supra* 487 U.S. at p. 88.) (Internal citations omitted.)

But, the *Ross* Court acknowledged automatic reversal would have been required if the erroneously-included unqualified juror remained on the jury:

> Had [the unqualified prospective juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's fail-

> ure to remove [the unqualified prospective juror] for cause, the sentence would have to be overturned. But [the unqualified prospective juror] did not sit. Petitioner exercised a peremptory challenge to remove him, and [the unqualified prospective juror] was thereby removed from the jury as effectively as if the trial court had excused him for cause. (*Ross v. Oklahoma, supra,* 487 U.S. at pp. 85-86.)

In sum,

- *Gray* held an erroneous *exclusion of a qualified prospective juror* compels automatic reversal of the penalty finding because a reviewing court cannot rest confident the exclusion did not infringe on the defendant's right to an impartial jury;
- *Ross* held an erroneous *inclusion of an unqualified juror* on the jury requires automatic reversal because an unqualified juror denies the defendant an impartial jury; and
- *Ross* held an erroneous *inclusion* of an unqualified prospective juror negated by removal of that prospective juror by peremptory challenge leaves a definable jury that may be judged by the harmless error standard.

Schultz contends two qualified prospective jurors were erroneously excluded from the jury pool in his case. Under *Gray* and *Ross,* reversal is

required. Respondent offers no reason why this well-established rubric should not apply to Schultz's case or why it should be revisited.

Every day, in courtrooms across the United States, the same dramatic scene takes place: a jury foreperson stands and reads the verdict in a criminal case — a verdict that determines the defendant's guilt, the nature and extent of his or her future liberty, and, sometimes, whether the defendant will live or die. In Schultz's case, the jury foreperson announced the verdict of a jury from which Antonio A. and Mary M. had been erroneously excluded. The erroneous exclusion of Antonio A. and Mary M. mandates reversal of Schultz's death penalty.

II. The trial court erred in admitting the taped message Burger left on the answering machine of her dance partner. The statements were irrelevant and prejudicial inadmissible hearsay.

A. Introduction and summary of contentions.

Just hours before she died, Burger called her dance-class partner and left a message on his voicemail device chatting happily about dance class the next evening and poking fun at her own clumsiness on the dance floor.

Before trial, the People successfully urged the court to find Burger's statements on the voicemail tape admissible under Evidence Code section 1250 as statements of Burger's then-existing plan or intent to stay home that night or, alternatively, admissible as non-hearsay circumstantial evidence of the same intent.[2] (7CT 1927-1929, 1930-1931) The prosecutor argued evidence Burger planned to stay home that evening was relevant for two reasons: (1) it was essential to the burglary special circumstance because it showed Schultz was an uninvited guest and (2) it corroborated Mooney's testimony Schultz entered Burger's residence intending to steal. (7CT 1928, 8RT 1321, 1322)

In his opening brief, Schultz contends the fact Burger intended to stay home the night she was killed was not in dispute, and hence, evidence — like the voicemail — that proved that fact was irrelevant and inadmissible under Evidence Code section 210. (AOB 91-95)

---

[2] The People filed a Trial Brief which contains almost all of the prosecution's pre-trial requests for rulings on matters related to trial evidence. (7CT 1892-1942) Schultz responded to these pre-trial requests for rulings on trial evidence in his Response to Trial Brief. (9CT 2207-2339)

Schultz also argues the fact Burger intended to stay home was (1) not relevant to the burglary special circumstance because proof the perpetrator was uninvited is not an element of burglary and, therefore, not an element of the burglary special circumstance, and (2) was not a fact from which one could reasonably infer that Schultz entered Burger's condominium intending to steal. (AOB 95-104)

He further argues the statements on the voicemail tape were not admissible under Evidence Code section 1250 or as non-hearsay and were more prejudicial than probative. (AOB 105-117)

Respondent's brief addresses some of Schultz's arguments, provides new or expanded theories in response to others, and does not address some at all. (RB 29-39)

Schultz addresses each in turn.

B. Evidence relating to undisputed facts is not relevant.

As Schultz argues in his opening brief and in section II-D-2 of this reply brief, one cannot infer Burger stayed home or planned to stay home the night of her death from the statements on the voicemail, and the trial

court erred in admitting the statements or as the voicemail under Evidence Code section 1250 as non-hearsay. (AOB 111-114)

But, even more basically, Schultz contends that — because the parties agreed there was no evidence Burger "went out that night and met [Schultz] and invited him in" (8RT 1322) and there was "no solid dispute as to whether or not [Burger] was home, intended to stay home, or left or went out and met Mr. Schultz at a bar and then returned" (8RT 1321) — evidence tending to prove those undisputed facts was not relevant under Evidence Code section 210. (AOB 91-95)

Section 210 limits admissible evidence to that which "prove[s] or disprove[s] any *disputed* fact.[3]" (Italics added.) (*People v. Price* (1991) 1 Cal.4th 324, 417 [evidence victim wanted to sell guns to relocate to avoid abusive boyfriend not admissible because sale of victim's gun not in dis-

---

[3] Evidence Code section 210 provides as follows:
"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

pute]; *Andres v. Young Men's Christian Association* (1998) 64 Cal.App.4th 85, 93 [evidence of absence of no-lifeguard sign irrelevant because undisputed health club did not have a sign]; *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110 and *People v. Reyes* (1976) 62 Cal.App.3d 53, 67-68 [evidence of probable cause for arrest inadmissible when validity of arrest not in dispute].)

Although the prosecution's argument for admission of the voicemail statements rested entirely on the claim the statements tended to prove Burger stayed home the night she died, respondent's brief neither concedes nor argues against Schulz's assertion there was no factual dispute about whether Burger stayed home the night she died and neither concedes nor argues against Schultz's claim evidence relating to undisputed facts is neither relevant nor admissible.

Respondent sidesteps this issue by ignoring it.

Relevancy is not an issue this Court should allow respondent to sidestep or ignore; it is the very core of admissibility.

Absent any argument refuting Schultz's contention the fact Burger intended to stay home was not a disputed issue, this Court should find the trial court erred in allowing admission of the statements on the voicemail.

A finding of irrelevance and inadmissibility under section 210 should end the discussion. But, out of an abundance of caution, Schultz addresses the remaining arguments.

C. The fact Burger did not consent to sexual relations with Schultz was not a disputed issue and evidence supporting that fact was irrelevant.

At trial, the prosecutor argued the statements on the voicemail proved Schultz was an uninvited intruder, an element of the burglary special circumstance. (8RT 1321-1322) In his opening brief, Schultz argued burglary does not require proof the intruder was uninvited. (AOB 95-101)

Respondent concedes burglary does not require a showing the invader was uninvited, and in scuttling the argument Burger's intent to stay home was relevant to the burglary special circumstance, respondent effectively concedes the inference the prosecutor drew from the voicemail was not relevant. (RB 32)

Respondent now argues Burger's intent to stay home is relevant to the rape special circumstance. (7CT 1892-1942, 8RT 1319-1322)

Because the prosecutor did not put this theory forward in the trial court, the issue was not addressed by either the parties or the court when the admission of the statements on the voicemail was argued and decided. (8RT 1319-1322)

However, the record demonstrates there was no dispute Schultz's sexual assault was uninvited. Defense counsel affirmatively stated Burger did not consent to sexual relations with Schultz.

In his opening statement, defense counsel plainly stated Schultz did not dispute the rape allegation:

> You'll hear evidence about a rape murder. I want to make it clear very clearly -- excuse me. *I'll make it very clear that we don't contest that.*
> (13RT2261) (Italics added.)

> And:

> Cindy Burger slept by herself upstairs. *Michael Schultz* saw her in bed, overpowered her, and *raped her.*
> (13RT 2263) (Italics added.)

And:

> At the end of this case when [the defense] get[s] another chance to speak to you, *we will again acknowledge the fact that Michael Schultz,* while under the influence of methamphetamine, *did rape and kill Cindy Burger.*
> (13RT 2274) (Italics added.)

When defense counsel gave his final summation, he kept his promise: the defense did not contest the allegation Schultz raped Burger:

> So we're *not contesting* the fact that Michael Schultz told his fiancée that while he was high on crank he randomly picked an open garage, went inside, *raped and killed Cindy Burger.*
> (16RT 2867) (Italics added.)

During evidence presentation, no witness testified Burger consented to sexual relations with Schultz.

In closing argument, the prosecutor devoted less than a second to the consent element of rape. His argument, *in its entirety,* on this issue was:

> The definition [of rape] continues. It defines what "against that person's will means." It means without the consent of the alleged victim.
> (16RT 2847)

Burger's lack of consent to sexual relations with Schultz — like Burger's intent to stay home the night she was killed — was not a disputed

issue. Since neither was a disputed issue, this Court must find the statements in the voicemail were not relevant to a disputed issue.

D. The taped message was not relevant to corroborate Mooney's testimony.

At the trial court, the prosecutor argued the voicemail proved Burger intended to stay home and the fact she stayed home "corroborated Ms. Mooney's testimony ... that defendant told her that he entered the residence with the intent to steal." (7CT 1928)

In his opening brief, Schultz argues the fact Burger stayed home does not corroborate Mooney's testimony because one cannot logically infer Schultz entered Burger's residence intending to steal from the fact she stayed home. (AOB 101-104)

Respondent does not directly address Schultz's opening-brief argument. Instead, respondent concludes —with no argument or explanation — the voicemail statements corroborate even more of Mooney's testimony. (RB 33) Respondent now contends the fact Burger stayed home corroborates Mooney's testimony Schultz "entered Burger's residence with the intent to steal something, he discovered Burger, and raped and murdered

her, and then attempted to cover the crime up." Respondent contends proof of these elements was necessary to satisfy the corpus delicti rule. (RB 33)

Respondent's argument is neither legally correct nor factually logical.

1. The corpus delicti of a Burger's murder does not require proof of (1) Schultz's intent on entering Burger's home, (2) the place where the crime took place, (3) the rape special circumstance, or (4) his attempt to cover up the crime.

The corpus delicti of a crime is the fact of the injury or harm and the fact a criminal agency caused the harm. (*People v. Zapien* (1993) 4 Cal.4th 929, 985-986; *People v. Jennings* (1991) 53 Cal.3d 334, 364.) In a murder case, the corpus delicti is proof of death by criminal means. (*People v. Cullen* (1951) 37 Cal.2d 614, 624; *People v. Watson* (1961) 198 Cal.App.2d 707, 710))

The identity of the perpetrator is not an element of the corpus delicti. (*People v. Ledesma* (2006) 39 Cal.4th 641, 721.) The perpetrator's state of mind is not an element. (*People v. McGlothen* (1987) 190 Cal.App.3d 1005,

1014.) The place where the crime took place is not an element. (*People v. Garcia* (1970) 4 Cal.App.3d 904, 911)

And, the felony-based special circumstances enumerated in section 190.2 — including the rape-based special circumstance — are not subject to the corpus delicti rule. (Pen. Code § 190.41; *Tapia v. Superior Court (People)* (1991) 53 Cal.3d 282, 298.)

Neither identification of Schultz as the perpetrator, nor proof of his intention on entering or remaining in Burger's condominium, nor proof the crime or the cover-up took place in Burger's condominium, nor any element of the rape or burglary special circumstances was part of the corpus delicti.

The statements on the voicemail played no role in establishing the corpus delicti, and respondent's reliance on this theory of admissibility is not well-founded.

2. One cannot logically infer Schultz "entered Burger's residence with the intent to steal something, he discovered Burger, and raped and murdered her, and then attempted to cover the crime up" from the undisputed fact Burger stayed home the night she died.

At trial, the prosecution argued the statements on the voicemail supported Mooney's testimony Schultz entered Burger's condominium harboring the intent to steal. (8RT 1321) Schultz's opening brief argued the statements do not support Mooney's testimony regarding Schultz's intent on entering Burger's home. (AOB 101-104) Respondent's brief does not address Schultz's argument. Instead, respondent now contends the fact Burger planned to stay home corroborates not only Mooney's testimony on Schultz's intent, but also her testimony Schultz "discovered Burger and raped and murdered her, and then attempted to cover the crime up" and her testimony Schultz "was not invited to Burger's residence for a legitimate purpose." (RB 33) Respondent fails to explain how any portion of Mooney's testimony is corroborated or supported by the statements on the voicemail. (RB 33)

Whether an inference can be drawn from a piece of evidence is a question of law for the court. (*Blank v. Coffin* (1942) 20 Cal.2d 457, 461; *Marshall v. Parkes* (1960) 181 Cal.App.2d 650, 660)

Evidence Code section 600, subdivision (b) adopts the dictionary definition of an inference: "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts."

An inference in a legal case cannot be based upon speculation or suspicion, but must "logically flow from the facts." (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1604; see, also, *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 800)

Respondent states — without explanation — that the fact Burger stayed home or planned to stay home supports the inference (1) Schultz raped Burger; (2) Schultz murdered Burger; (3) Schultz attempted to cover up his crimes; (5) Schulz entered Burger's residence with the intent to steal something; (6) Schultz was not invited to Burger's residence for a legitimate purpose. (RB 33)

Simple diagramming demonstrates that one cannot logically draw the conclusions respondent contends can be drawn from the fact Burger stayed home the evening she died or she had the state of mind to stay home that evening:

Fact:	Burger stayed home or planned to stay home on the night of August 5, 1993.
Inference:	Schultz raped Burger.
Fact:	Burger stayed home or planned to stay home on the night of August 5, 1993.
Inference:	Schultz murdered Burger
Fact:	Burger stayed home or planned to stay home on the night of August 5, 1993.
Inference:	Schultz attempted to cover up the crime.
Fact:	Burger stayed home or planned to stay home on the night of August 5, 1993.
Inference:	Schultz was not invited to Burger's residence for a legitimate purpose.
Fact:	Burger stayed home or planned to stay home on the night of August 5, 1993.
Inference:	Schultz entered Burger's house on August 5, 1993 harboring an intent to steal.

Likewise, one cannot infer Burger did not consent to sexual relations with Schultz from the fact she stayed home or planned to stay home the night she died.

Respondent fails to explain the inferences it urges. Schultz contends no logical explanation can be made because these inferences are far-fetched.

When there is no rational connection between the fact and the inference, the inference cannot be made as a matter of law. When the inference cannot be made from the evidence, the evidence is not relevant, and — as a matter of law — the trial court errs in admitting it.

E. The statements on the tape were not admissible under Evidence Code section 1250 as a statement of Burger's then-existing intent to stay home the night of August 4, 1993.

Schultz's opening brief argued the statements on the voicemail tape do not qualify for admission under Evidence Code section 1250 because the statements are not declarations of intent. (AOB 105-110)

Respondent replies by conceding that "[i]ndividually, the statements may not [be declarations of an intent to stay home]," but "in their entirety" they "raise an inference that" Burger was at home alone after 9:15 p.m., that she would stay home, and that she was not planning to have visitors because she could take Larry's return call that evening." (RB 34)

Respondent's argument misses the mark: (1) each statement in the voice mail must be considered separately and (2) Evidence Code section 1250 requires "a *statement* of the declarant's then existing state of mind" *not an inference* of that state of mind. (Evid. Code § 1250 [Italics added.].)

1. The individual statements on the voicemail are hearsay and each must qualify for admission. The voicemail cannot be considered a single statement.

The voicemail contains the following statements:

- Hi, Larry.
- This is Cindy.
- And it's about 9:15 on Wednesday night.
- Give me a call back if you can, uh, or at work tomorrow.
- I'd like to meet a little early before class and go over the step from last week.
- Um, I just hope I don't get too lost tomorrow.
- But, anyway, I had a real good, uh, trip.
- Look forward to seein' ya.

- And, give me a call when you get a chance.
- Bye-bye.

(7CT 1939, 13RT 2233)

Although respondent argues the entire voicemail must be considered a single statement, respondent provides no authority for the notion ten separate statements may be a single statement. (RB 33, 34)

All authority is to the contrary.

The Evidence Code defines a statement not as a series of expressions linked temporally together, but as "an oral or written verbal expression" — a single verbal expression. (Evid. Code § 225) The voicemail contains ten oral verbal expressions.

Although all of the statements on the voicemail were spoken by one person, the voicemail itself is a combination of statements. State and federal rules relating to the admissibility of combination statements or multiple hearsay are based upon the notion each layer or part of a multi-layered or combination statement must qualify as an exception to the hearsay rule before it can be admitted. Rule 805, 28 U.S.C.A. provides:

> Hearsay within hearsay is not excluded by the rule against hearsay if *each part of the combined statements* conforms with an exception to the rule.
> (Italics added.)

Evidence Code section 1201 states the same principle:

> A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence *if such hearsay evidence consists of one or more statements* each of which meets the requirements of an exception to the hearsay rule.
> (Italics added.)

The single-statement principle is so basic to the law of evidence that cases hold there is no difference between the federal rule and the California statute:

> Hearsay included within hearsay is not excludable by the hearsay rule under California law (Cal. Evid. Code § 1201) or federal law (Fed. R. Evid. § 805), so long as each link in the hearsay chain conforms to a separate hearsay exception.
> (*Padilla v. Terhune* (9th Cir. 2002) 309 F.3d 614, 621.)

Each of the statements on the voicemail tape was hearsay. Each should have been excluded under Evidence Code section 1200 unless the individual statement qualified for admission as an exception under Evidence Code section 1250 — the only section on which the prosecutor re-

lied. Respondent concedes the individual statements cannot qualify for admission under section 1250, and this Court should find the trial court erred in allowing them into evidence.

2. The statements on the tape were not admissible under Evidence Code section 1250 as a statement of Burger's then-existing intent to stay home the night of August 4, 1993.

Schultz argued the statements on the voicemail tape are not declarations of a present state of mind at length in his opening brief. (AOB 105-110)

Respondent concedes that "[i]ndividually, the statements may not permit such an inference," but concludes the "statements in their entirety" raise an inference Burger stayed home or intended to stay home the evening she was killed. (RB 34)

Even if it were permissible to case aside the rules of evidence and bundle all of the statements in the voicemail together, respondent fails to explain *how* the bundle of statements supports the inference Burger stayed home or planned to stay home the night she died.

Burger's statements on the voicemail were inadmissible hearsay. Admission of these inadmissible statements under Evidence Code section 1250 was error.

F. The court erred in ruling the entire taped message was more probative than prejudicial.

Evidence is unduly prejudicial under Evidence Code section 352 when the evidence will " 'arouse the emotions of the jurors.' " (*People v. Cudjo* (1994) 6 Cal.4th 585, 610 quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.)

The statements on the voicemail evoke an image of a young woman excited about her life, engaged in social activities with friends, and good humored about her own foibles.

But, the fact the words came before the jury through Burger herself immensely amplified their emotional power.

In human relationships, the tone of one's voice is almost more important than what one says. Depending on the speaker's tone, the same words can evoke very different emotions. Even a single word — like "yes" — can be spoken with enthusiasm, with resignation, or with cautious sus-

picion. Burger's tone of voice suggests an individual excited about her dance class and bubbly about her life. The fact the jury knew Burger's excitement about life and dance class would be abruptly derailed by her violent death a few hours later injected emotion into the guilt phase of the trial.

The trial court could easily have limited the prejudicial effect by adopting any of the alternatives suggested in Schultz's opening brief at pages 117-120.

The admission of the statements on the voicemail tape into evidence through Burger's own voice was more prejudicial than probative.

G. The prejudice engendered by introducing Burger's personal life into the guilt phase irreparably harmed Schultz's defense.

The presumption of innocence in favor of the accused is the foundation of our criminal justice process. The court's job is to ensure the criminal justice process guarantees that "guilt is established by probative evidence beyond a reasonable doubt." (*Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126].) Allowing irrelevant and emotionally charged

evidence to seep into the guilt phase distracts the jury from the proper focus of a guilt trial and encourages reliance on emotion and other arbitrary factors. Reliance on such extraneous factors opens the door for an unconstitutional verdict.

As this Court acknowledged in *People v. Salcido* (2008) 44 Cal.4th 93, 151, a purely emotional presentation regarding the victim — such as this voicemail tape — has no place in the guilt phase of a capital trial. *Salcido* is simply an echo of earlier decisions in other jurisdictions each of which acknowledges that the boundary drawn by the Supreme Court in *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] is crossed when irrelevant victim-impact testimony seeps into the guilt phase of a capital trial. (*Odle v. Calderon* (N.D. Ca. 1995) 884 F.Supp. 1404, 1429-1430; *Calhoun v. State* (Ala. 2005) 932 So.2d 923, 968-969.)

A measure of the prejudice of an error is the importance the prosecutor places on the evidence. The prosecutor played the voicemail tape during his opening statement. (13RT 2233) He played it again when the

first witness took the stand. (13RT 2281) And, he played it again in final argument. (22RT 3905)

When the prosecutor played the tape during Rodriguez's testimony, he added additional emotional sizzle by connecting the voice to a face; he introduced a photograph of Burger so photo-shopped and idealized her good friend, Rodriguez, had a difficult time even recognizing it as a photograph of Burger. (13RT 2279)

Allowing the jury to eavesdrop on Burger as — in her own voice — she made plans for a dance class the jury knew she would never attend shifted the focus from the elements of murder, rape, and burglary to the tragic end of Burger's plans. The statements on the voicemail had no evidentiary value whatsoever; their appeal was purely emotional. The court erred in failing to exclude the statements in the voicemail.

III. Schultz was denied his state and federal right of confrontation when Magee, an uninvolved surrogate, testified to the DNA profile independently developed by Yates.

A. Introduction and summary of contentions

Schultz's opening brief argued his Sixth-Amendment right to confront witnesses was violated when the court permitted Wendy Magee, a Cellmark employee, to testify to a deoxyribonucleic acid (DNA) profile developed by another Cellmark employee, Paula Yates, years before Magee joined Cellmark. (AOB 126-179)

Relying principally on *Williams v. Illinois* (2012) ___ U.S. ___ [132 S.Ct. 2221, 183 L.Ed.2d 89], *People v. Lopez* (2012) 55 Cal.4th 569, and *People v. Dungo* (2012) 55 Cal.4th 608, respondent argues Magee's recitation of Yates's tests and conclusions did not fall under the Confrontation-Clause umbrella.

Williams is a fractured opinion. Only one principle secures support from a majority of the Court. A five-justice bloc (the four dissenters and Justice Thomas) agreed when an expert witness repeats an out-of-court statement as the basis for a conclusion, the conclusion is necessarily de-

pendent on the statement's truth. This five-justice bloc agreed if the out-of-court statement the expert repeats is testimonial, the Sixth Amendment requires the appearance of the original declarant.

The rub in *Williams* was the justices did not agree on whether the out-of-court statement in that case was testimonial. The plurality and Justice Thomas found it was not testimonial; the dissenters found it was.

Schultz contends Magee's testimony demonstrates the 1996 Cellmark DNA profile developed by Yates fits as neatly within the definition of testimonial as one Matryoshka doll fits within another. Since Yates was not unavailable and had not been cross-examined earlier, *Williams* compels the finding introducing the 1996 DNA profile through Magee violated Schultz's Sixth-Amendment confrontation right.

B. Yates's DNA report and DNA profile were testimonial and the Sixth Amendment demanded Yates be made available for cross-examination.

In *Williams v. Illinois, supra,* 132 S.Ct. 2221, Sandra Lambatos, a state-laboratory forensic DNA expert, testified she had compared a DNA profile compiled by Cellmark, an outside laboratory, with a DNA profile pro-

duced by an analyst employed at the state laboratory. Lambatos concluded the two profiles matched. An analyst from the state laboratory appeared at trial; no one appeared from Cellmark.

Although Lambatos did not refer to or quote the Cellmark DNA profile, the *Williams* Court considered whether that document would have been admissible if she had.

Four opinions were written in *Williams* — each so different from its brothers it is impossible to declare one the common denominator. Four justices found the Cellmark DNA report was not sufficiently formal and lacked the requisite law-enforcement connection (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2243.); one justice found the reliability and need for DNA profiles moved such material outside the perimeter of the Sixth Amendment (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2251-2252); one justice found the DNA profile lacked the formality of an affidavit, a deposition, or a custodial interrogation rendering it non-testimonial (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2260); and four justices relied on the precedent set in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d

314] and *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610] to find the DNA profile had been prepared to establish some fact in a criminal proceeding and the fact the document was signed was sufficient formality in the circumstances (*Williams v. Illinois, supra,* 132 S.Ct. at pp. 2266-2267).

This Court considered these diverse viewpoints in *People v. Lopez, supra,* 55 Cal.4th 559 and *People v. Dungo, supra,* 55 Cal.4th 608 and concluded a testimonial statement exhibits some degree of formality and was made, or prepared, primarily for a criminal prosecution:

> Although the high court has not agreed on a definition of "testimonial," a review of [the most recent decisions] indicates that a statement is testimonial when two critical components are present.
> First, to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity.... [¶]
> Second, all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be.
> (*People v. Lopez, supra,* 55 Cal.4th at pp. 581-582.)

Cellmark's DNA profile, created by Yates but introduced through Magee's testimony, satisfies both prongs of this definition, and this Court must find it is a testimonial statement.

1. The 1996 Cellmark DNA profile was sufficiently formal to qualify as a testimonial statement.

What is "formal dress" for an out-of-court statement? Without question, an out-of-court statement signed and attested before a notary — the legal equivalent of a tuxedo — is formally dressed. Equally, a casual kibitz between friends —the legal equivalent of jeans and a sweatshirt — is not formally dressed.

The Supreme Court has yet to explain how much more than jeans is required to trigger Sixth Amendment protection or how much less than a tuxedo will do.

This Court recently tackled the testimonial dress code in *People v. Lopez, supra,* 55 Cal.4th 589 and *People v. Dungo, supra,* 55 Cal.4th 608. These cases indicate this Court considers a written statement formal if the statement recites a conclusion reached by human analysis and is signed by the individual who reached the conclusion.

In *Dungo*, this Court parsed the sections of an autopsy report into those portions that describe observations of objective physical facts and those portions that describe the pathologist's conclusions. This Court found the latter were formal; the former were not. (*People v. Dungo, supra,* 55 Cal.4th at pp. 619-620.)

Unlike an autopsy report, a DNA profile is not a mixture of objective physical facts and analytical conclusions. As the process described in the diagram in the appendix to Justice Breyer's concurring opinion in *Williams* and the diagram that appears at page 194 of Schultz's opening brief indicate, a DNA profile and the process of developing a profile are entirely evaluations and conclusions. The process requires human intervention, human interpretation, human analysis, and human decision-making at every step:

> The job of the DNA analyst ... involves taking the information processed by the computer and attributing it meaning. ... [T]his process relies largely on reasoning abilities, processes of elimination, subjective judgment calls, and inferences; it is not a mathematically certain, objective enterprise. If it was, we would not need DNA analysts at all because there would be no need for interpretation of DNA results. This is not to say that interpretation involves unbounded discretion — a DNA

> analyst works within a range of assumptions and knowledge that forms the basis of the inferences and conclusions drawn. But DNA interpretation is a discretionary act — more like stepping outside and predicting the afternoon weather than like reciting multiplication table.
> (Murphy, *Art in the Science of DNA: A layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing* (2008) 58 Emory L. J. 489, 501.)

The medical examiner signed the autopsy report in *Dungo*. (*People v. Dungo, supra,* 55 Cal.4th at p. 623.) Although the record does not indicate whether Yates's DNA profile was signed, one can reasonably conclude Yates's report was signed by Yates and another reviewer. *Williams* states Cellmark reports are "signed by two 'reviewers,' "and Magee testified her 2000 DNA profile was reviewed by another person in the laboratory. (15RT 2712) (*Williams v. Illinois, supra,* 132 S.Ct. at pp. 2260, 2267, 2276.)

The profile was a formal document as that term is understood in the Sixth Amendment arena.

2. The primary purpose of Cellmark's DNA profile was the creation of evidence for a criminal proceeding.

In *Lopez*, the printed legend "FOR LAB USE ONLY" appeared on the report, and this Court found that legend defined the report's purpose. (*People v. Lopez, supra*, 55 Cal.4th at p. 584.) In *Dungo*, Government Code section 27491 defined the purposes of an autopsy report. (*People v. Dungo, supra*, 55 Cal.4th at p. 620.) The *Williams* Court was forced to guess at Illinois's reason for soliciting the DNA profile from Cellmark. Lacking specific information, four justices concluded it had been requested to aid in the capture of a dangerous rapist and four concluded it had been requested for litigation.

The record in Schultz's case leaves no room to doubt the Ventura County Sheriff's Department Crime Laboratory requested the 1996 DNA profile for use as evidence in a criminal proceeding.

a. Magee described Cellmark's role as forensic — the development of evidence for use in court.

Magee consistently referred to Yates's report and her own report — not as a sample or as an exemplar or as a test specimen — but as evidence. (15RT 2690, 2706, 2709, 2712, 2715)

She described the care given to ensure the later admissibility of such evidence:

> When *evidence* is received at Cellmark, it either has to be hand carried or sent by a carrier with some sort of electronic tracking. And once that *evidence* is received at Cellmark, it is logged in, which means that it is given a Cellmark case number, and a chain of custody form is initiated which lists all of the *evidence* in the case. In addition, all of the *evidence* at Cellmark is stored in a secured *evidence* room.
> (15RT 2706) (Italics added.)

And:

> We make sure proper chain of custody is maintained by filling out the chain of custody form completely, which lists not only the *evidence* that was received, but also the condition it was received and its packaging whether it was sealed or not.
> We also again store it in a secured *evidence* room, and whenever we open *evidence* for testing, we reseal the *evidence* with *evidence* tape and will date and initial across the seal to indicate when in fact we have opened that *evidence*.
> (15RT 2706) (Italics added.)

Magee saw her role as forensic. She described herself as a person who "conduct[s] DNA testing on items of *evidence*" and "interpret[s] the result of that testing, generate[s] reports and *testif[ies] as required.*" (15RT 2690) (Italics added).

Magee's formal and continuing education focused on forensic science. She has a Master's degree in forensic science (15RT 2692) and is a member of both the American Academy of Forensic Science and the Canadian Society of Forensic Sciences (15RT 2693). She keeps current in her field by reading the Journal of Forensic Sciences and the International Journal of Legal Medicine. (15RT 2694)

Although Cellmark may engage in various activities, Magee described Cellmark as a "private forensic DNA testing laboratory." (15RT 2692)

b. Yates's DNA profile was prepared for law enforcement.

The record indicates the 1996 DNA profile was requested by the Ventura County Sheriff's Department Crime Laboratory and the laboratory was actively involved in directing Cellmark's efforts.

The assistant laboratory manager testified he sent a letter to Cellmark telling them "a little about the case just so they have a feeling for what [the laboratory was] looking for." (15RT 2686) What was the laboratory looking for? It was looking for a DNA profile so that profile "could be compared with a known suspect at any time." (15RT 2707)

The testimony suggests the DNA profile Yates developed was an integral part of the police investigation into Burger's murder. The police originally suspected the perpetrator was someone Burger knew. Burger's sister provided police with the names of Burger's male acquaintances, and the police investigated these individuals. (19RT 3326) Logic compels the conclusion the Ventura Sheriff's Office requested the DNA profile in 1996 because the department believed there was a real possibility DNA evidence would incriminate the perpetrator and eliminate others — such as Burger's male companions — as suspects.

The prosecution would not have sought leave to introduce Yates's 1996 DNA profile if it had not incriminated Schultz.

The 1996 DNA profile was testimonial under *Dungo* and *Lopez*. Under the holding of the five-justice bloc in *Williams*, it was admitted for its truth even though Yates was not unavailable and Schultz had never had the opportunity to cross-examine her. (AOB 154-156)

Schultz was denied his right to confront a pivotal witness.

C. Magee vouched for the accuracy and reliability of Yates's DNA profile.

Schultz is not unmindful four *Williams* justices found Lambatos merely accepted the premises of the prosecutor's question — including the premise the Cellmark DNA profile was accurate — as true in giving her answer and, therefore, the Cellmark DNA profile was not admitted for its truth through her testimony.

These four justices relied on the fact Lambatos testified *only* to the comparison and on the fact Lambatos *did not vouch* for either the accuracy of the DNA profile Cellmark developed or for the methods Cellmark utilized to obtain the profile and did not identify any Cellmark documents as the source of her opinions:

> The expert made no other statement that was offered for the purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how Cellmark handled or tested the sample. Nor did the expert vouch for the accuracy of the profile that Cellmark produced.
> (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2227.)

> Lambatos did not quote or read from the [Cellmark] report; nor did she identify it as the source of any of the opinions she expressed.
> (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2230.)

> Lambatos did not testify to the truth of any other matter concerning Cellmark. She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact. Nor did she testify to anything that was done at the Cellmark lab, and she did not vouch for the quality of Cellmark's work.
> (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2235.)

Unlike *Lambatos*, Magee appeared not only to render an opinion on the comparability of two DNA profiles, but also to vouch for the correctness of Yates's procedures and the accuracy of the profile she had produced.

Magee's role was established before she took the stand. Before trial, the prosecutor successfully sought leave to call a *single* Cellmark representative to be chosen from "a list of people that [Cellmark] send[s], de-

pending on schedules" "to testify to the procedures, results and maintenance of [the] records" relating to the DNA profiles developed by Yates in 1996 and by Magee in 2000. (8CT 2163-2167, 8RT 1286-1288, 1287, 1298, 1387)

Magee was that single representative. Her testimony strayed far from the path of an expert; and, in doing so, Magee became a conduit to bring hearsay to the jury's attention cloaked with a mantle of truth. While testifying, Magee:

- *Identified the sample that Yates tested* as a "vaginal wash pellet" obtained at Burger's autopsy "for the purposes of extracting DNA" to be compared to a "known suspect" (15RT 2707);
- *Described the tests Yates had performed* by detailing the process used to extract and separate the sample into sperm and non-sperm components, the process used to replicate those components, and the method utilized to develop a DNA profile for each (15RT 2708-2709);

- *Verified Yates's skill and technique* (15RT 2709); and
- *Vouched for the accuracy of Yates's results* stating Yates was "trained and qualified to extract DNA" and Yates's methods were "generally accepted in the scientific community" in 1996 and in 2000 (15RT 2709-2710).

The four-judge coalition attached significance to the limited nature of Lambatos's testimony because the coalition was eager to ensure its ruling did not disrupt the long-standing rule that "trial courts screen out experts who would act as mere conduits for hearsay." (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2241) Magee's far-reaching testimony allowed her to act as the conduit for hearsay these four justices wanted to avoid.

D. Introducing a DNA profile that Schultz could not contest through cross-examination struck a fatal blow to his defense.

The parties agree the analysis described in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] applies. (AOB 121-122; RB 50-51) Respondent, however, turns *Chapman* upside down and — arguing Schultz has not demonstrated "that the 'missing cross-examination of

Yates would have elicited any evidence favorable to appellant" — attempts to shift the burden of demonstrating harm to defendant (RB 51)

Under *Chapman,* the prosecution — not the defendant — must carry the burden of showing that a constitutional trial error is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The Supreme Court has cautioned state courts that the need to ensure "ensure that [the] burden allocation conforms to the commands of *Chapman*" is particularly important "[w]ith all that is at stake in capital cases." (*People v. Jackson* (2014) 58 Cal.4th 724, 775 citing *Gamache v. California* (2010) 562 U.S. ___, ___ [131 S.Ct. 591, 593, 178 L.Ed.2d 514].)

The prosecution cannot carry that burden.

As Schultz argues in his opening brief, his defense counsels had three arrows in their defense quiver: (1) Schultz was under the influence of methamphetamine the night Burger was killed and unable to premeditate his actions, (2) Therresa Mooney's claim Schultz had confessed to raping and smothering Burger was suspect and (3) Yates's DNA profile was wrong. (AOB 179)

Had defense counsel been able to cast doubt on Yates's DNA profile by cross-examining Yates, they could have argued Mooney's claim Schultz had confessed to raping and murdering Burger was suspect. Schultz points out the weaknesses in Mooney's testimony at pages 180 to 184 of his opening brief.

When defense counsel lost the ability to argue Yates's DNA profile was wrong, they also lost the ability to bring out these weaknesses in Mooney's testimony because if Yates's DNA profile demonstrating Schultz's sperm had been found in Burger at autopsy was true, it strained credibility to argue Mooney's claim Schultz had confessed to rape was not true.

Defense counsel could not risk losing all credibility with the jury by adopting such an obviously untenable position, and they were forced to concede all aspects of guilt save and except premeditation.[4]

---

[4] Schultz responds to Respondent's arguments relating to court's denial of a pre-trial *Kelly* hearing infra in section **** In his response, Schultz addresses the procedural errors that would have been exposed had the *Kelly* hearing been held or had Yates appeared as a witness.

The compelling nature of uncontested DNA evidence cannot be overstated.

Uncontested testimony from forensic DNA analysts can be overwhelming to jury members, who often have limited exposure to the concepts of biology, genetics, statistics, and the techniques used to generate DNA profiles. As stated in *Government of Virgin Islands v. Byers* (D.V.I. 1996) 941 F.Supp. 513, 527 [35 V.I. 240]:

> We are also cognizant of the likelihood that DNA evidence may confuse or overwhelm the jury. The differences between DNA profiling and traditional modes of forensic analysis substantially increase this likelihood. Fingerprint, foot print, handwriting, and bite mark evidence, for example, are easily comprehensible to the jury because they are taken from everyday life. The least experienced juror has observed a fingerprint, footprint, or bite mark, on many different occasions long before he or she enters the courtroom. And the fact that handwriting tends to vary from person to person is evident from grade school. DNA profiling evidence, on the other hand, is totally alien to most jurors. The specter of bands on an autorad is no more familiar to the average juror than the innermost workings of the stealth bomber.

The publicity attendant upon the release of wrongfully-convicted individuals through DNA has created the notion DNA is an infallible means of separating the guilty from the innocent. (15RT 2705-2706; News

and information, Press Releases, Innocence Project available online at http://www.innocenceproject.org/news/Press-Releases.php [accessed 7-8-2014].) This focus on DNA as a predictor of guilt invites jurors to ignore all other evidence and rely on an apparent DNA match as an infallible indicator of guilt.

When — as here — a defendant has no chance to cross-examine the analyst responsible for the DNA profile, he or she is denied all opportunity to dispel this mythic infallibility.

The aura of infallibility is further magnified by the use of statistical data based on Random Match Probability to show the meaning and power of the DNA match.

Statistics are persuasive as is evidenced by the frequent use of statistics in advertising: 8 out of 10 cats prefer Whiskas cat food; Ivory soap is $99^{44}/_{100}$% pure; 80% of dentists recommend Colgate toothpaste; 9 out of 10 doctors recommend Tylenol, and, at the same time, 4 out of 5 doctors recommend Advil. The persuasiveness of statistics was parodied by David

Letterman, who said: "3 out of 4 Americans make up 75% of the population."

Jurors who follow sports are accustomed to measuring the relative worth of individual players and teams by statistical evaluations and comparisons.

Statistical analyses are difficult concepts for jurors to grasp. A recent article relying on the research of Professor Jonathan Koehler, a professor of behavioral decision-making discussed the mathematical naiveté of most jurors:

> Research indicates that people generally aren't very good at interpreting probabilities, and they are easily swayed by the way statistics are presented, Koehler explains. For instance, a 2004 study published in *Psychological Science* found that mock jurors were more impressed by a match with the probability 0.1 in 100 than with one in 1,000, even though they are mathematically identical. Koehler argues that the fractional component in the first statistic (0.1 in 100) discouraged jurors from thinking about others who might match by coincidence. This made the DNA evidence seem relatively strong. In contrast, jurors who received the DNA match statistic as one

> in 1,000 were more likely to think about others in a large population who might match by coincidence, and this made the evidence seem weaker.
> (Meyers, *The problem with DNA* (June 2007) 38 Monitor on Psychology, American Psychological Association No. 6 at o. 52 available online at http://www.apa.org/monitor/jun07/problem.aspx [accessed 7-8-2014].)

Given the complexity of the field and the relative lack of mathematical sophistication among jurors, it is not surprising then jurors look to the random match statistic as the final arbiter on guilt. The inability of defense counsels to cross-examine Yates and call the 1996 DNA profile into question strangled Schultz's defense.

IV. Respondent agrees Yates's DNA profile and the process involved to secure a DNA profile are not admissible as business records. Because these materials were not admissible as business records and were testimonial, the trial court erred in admitting Yates's 1996 DNA profile and the process she relied upon.

The trial court ruled Yates's 1996 records of DNA extraction, replication, and profiling were admissible as business records under Evidence Code section 1271. (9CT 2481, 8RT 1287) Magee described Yates's extraction, replication, and profiling by referencing entries in Cellmark's records. But Cellmark's records were not introduced into evidence. (8RT 2707-2710)

Respondent appears to concede Cellmark's records were inadmissible under Evidence Code section 1271, but argues Magee's testimony about the contents of Cellmark's records — including the testimony regarding the entries in Cellmark's records relating to Yates's extraction, replication, and profiling — was admissible under *Williams v. Illinois, supra,* 132 S.Ct. 2221 and this Court's recent Sixth-Amendment jurisprudence. (RB 52) Respondent argues the error was, therefore, harmless under the rubric established in *People v. Jones* (2012) 54 Cal.4th 1, 50 and *People v. Smithey* (1999) 20 Cal.4th 936, 972)

In response, Schultz reasserts his argument Yate's DNA extraction, replication, profile, and the records thereof, admitted through Magee's testimony, were not admissible under *Williams* and this Court's recent Sixth-Amendment jurisprudence, and he incorporates the arguments he has made to support that position in his opening brief at pages 126 to 185 and at section III of this reply brief.

V. The trial court erred in denying Schultz a pre-trial hearing under the third prong of *Kelly* which assures the DNA extraction, replication, and profiling presented to the jury were conducted under the generally-accepted scientific methods. Magee did not know of Yates's performance or Cellmark's 1996 protocols and was not competent to provide such assurance.

A. Introduction and summary of argument.

The parties agree admissibility of scientific evidence is governed by the three-part test described in *People v. Kelly* (1976) 17 Cal.3d 24. (RB 54)

The third *Kelly* prong asks: Did this particular scientist — here Paula Yates — reliably perform the scientifically-accepted procedure? Before trial, Schultz unsuccessfully requested that the court determine whether the

prosecution's DNA profile evidence was admissible under the third *Kelly* prong[5] before allowing the jury to hear that evidence.

Respondent contends Magee's trial testimony was adequate to satisfy *Kelly's* third prong. (RB 52, 55-57)

Schultz contends Magee's trial testimony was not adequate because (1) Magee was not qualified to provide the trial court with the information necessary to answer the third-prong *Kelly* question because Magee was not a Cellmark employee in 1996 and played no role — supervisory or otherwise — in Yates's 1996 profile and (2) the trial court was under obligation to assure itself the proposed DNA-profile testimony passed muster under *Kelly before* the jury heard the evidence.

To allow Magee to testify — either in a pre-trial hearing or at trial — to procedures performed long before she became an employee of Cellmark endows Magee with the superhuman ability to look into the past.

---

[5] In the trial court, Schultz did not argue the first and second *Kelly* prongs had not been satisfied. He asked for a hearing only on the third prong. (9CT 2422-2423)

To bypass a pre-trial hearing and allow trial testimony to satisfy *Kelly* defeats the purpose behind *Kelly*: the admission of reliable generally-accepted scientific evidence and the exclusion of unreliable or eccentric scientific testimony.

Magee was not qualified to provide assurance Yates had performed the 1996 procedures correctly. Allowing her to testify regarding Yates's procedures at trial, rather than at a pre-trial hearing, brought unreliable and inadmissible evidence before the jury.

B. Magee did not know of Cellmark's practices in 1996 or the procedures Yates followed in developing a DNA profile in 1996. She was not qualified to provide competent evidence on *Kelly's* third prong.

The proponent of scientific evidence "*must* demonstrate that correct scientific procedures were used in the *particular* case" to scale *Kelly's* third hurdle to admission. (*People v. Kelly, supra,* 17 Cal.3d at p. 148 [Italics added.].)

Kelly's third prong can be satisfied *only* by testimony from a witness familiar with the method actually used in the DNA test presented to the

jury. *People v. Venegas* (1998) 18 Cal.4th 47 described such a witness in the following language:

> The issue of the inquiry is whether the procedures utilized in the case at hand complied with that technique. Proof of that compliance does not necessitate expert testimony anew from a member of the relevant scientific community directed at evaluating the technique's validity or acceptance in that community. It does, however, *require that the testifying expert* understand the technique and its underlying theory, and *be thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique.*
> (*Id.* at p. 81 citing *People v. Smith* (1989) 215 Cal.App.3d 19, 27, and *People v. Reilly* (1987) 196 Cal.App.3d 1127, 1153–1155.) (Italics added.)

Magee was *not* such a witness. She played no role of any kind in the 1996 DNA test — she did not assist Yates, she did not supervise Yates, and she did not review Yates's work or conclusions. She was not even a Cellmark employee in 1996 when the tests were performed. She was not *"thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique"* as required by this Court in *Venegas*.

Because Magee played no role in Yates's tests and was not employed at Cellmark in 1996, she could only presume Yates followed the protocol in place in 1996; she could assume Yates's results were reliable; and she could

only surmise that Yates developed an accurate male DNA profile. Her testimony was based entirely upon speculation.

Such speculation is exactly what *Kelly's* third prong guards against, and this Court must find Magee was not qualified to satisfy *Kelly's* third prong at trial or in a pre-trial hearing.

C. *Kelly's* third prong requires a foundation hearing before the testimony is admitted at trial to ensure that unreliable scientific evidence is not presented to the jury.

A *Kelly* hearing is a foundational hearing that must be held before the challenged evidence is admitted:

> Under the *Kelly* standard, evidence based upon application of a new scientific technique *may be admitted only after* the reliability of the method has been foundationally established, usually by the testimony of an expert witness who first has been properly qualified. The proponent of the evidence must also demonstrate that correct scientific procedures were used (*People v. McWhorter* (2009) 47 Cal.4th 318, 364.) (Italics added.)

In re Jordan R. (2012) 205 Cal.App.4th 111 is a recent illustration of the procedure demanded by *Kelly*. In *Jordan R.*, the court held a foundation hearing to determine the admissibility of a polygraph examination, and, having found a polygraph was not generally accepted as a reliable scien-

tific technique, the court did not permit evidence of the test or its results to come before the jury. (*Id* at pp. 120-121, 124-125)

Respondent urges this Court to regard Magee's trial testimony as equivalent to a pre-trial foundation hearing. To do so strips foundation of all meaning. A foundation hearing ensures inadmissible evidence is not put before the trier of fact. To allow the foundational hearing to take place in front of the trier of fact negates that goal.

Respondent further mistakes the purpose of a *Kelly* hearing when it argues "any deficiency in not having Yates testify went to the weight of the evidence." (RB 58)

Kelly does not serve as a balancing scale; *Kelly* serves as a gatekeeper. *Kumho Tire Co. Ltd., v. Carmichael* (1999) 526 U.S. 137 [119 S.Ct. 1167, 143 L.Ed.2d 238] described the gatekeeping obligation of *Kelly*'s opposite number, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 [113 S.Ct. 2786, 125 L.Ed.2d 469] — not as a balancing process — but as a pre-admission check on reliability and relevancy:

> The objective of [the gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.
> (*Id.* at p. 152.)

Magee was not qualified to satisfy *Kelly's* third prong. By failing to hold a third-prong *Kelly* hearing before DNA-profile testimony was put before the jury, the trial court allowed the prosecution to present unreliable and inadmissible scientific testimony to the jury and denied Schultz the opportunity to highlight the deficiencies in Yates's 1996 DNA procedures.

D. Schultz's defense was irreparably harmed by the admission of the DNA-profile evidence.

Schultz incorporates by reference the argument in section III of this reply describing the prejudice his defense suffered because the DNA evidence was admitted and he could not cross-examine the analyst who developed the 1996 profile, and he contends failing to hold a pre-trial hearing on admissibility wreaked additional havoc on his defense.

Kelly's third prong individualizes each case and protects a defendant from evidence that may have been obtained using faulty procedures.

DNA profiling is not immune from protocol errors:

> DNA tests are not now and have never been infallible. Errors in DNA testing occur regularly. DNA evidence has caused false incriminations and false convictions, and will continue to do so.
> (Thompson *The potential for error in Forensic DNA testing*, GeneWatch, Council for Responsible Genetics available online at http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=57 [accessed 3-29-2014].)

The National Academy of Science reported "although DNA analysis is considered the most reliable forensic tool available today, laboratories nonetheless can make errors...." (National Academy of Sciences, National Research Council, Committee on Identifying the Need of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward* (2009) at p. 47 available online at http://www.nap.edu/openbook.php?record_id=12589 [accessed 3-27-2014].)

In *McDaniel v. Brown* (2010) 558 U.S. 120, 136 [130 S.Ct. 665, 175 L.Ed.2d 582], a non-capital case, the Court acknowledged that "[g]iven the persuasiveness of [DNA profile evidence] in the eyes of the jury, it is important that it be presented in a fair and reliable manner."

Commenting on the need to be more attuned to the dangers of expert scientific testimony when the defendant faces a serious consequence, *United States v. Green* (D. Mass. 2005) 405 F.Supp.2d 104 stated:

> While I recognize that the [federal equivalent of *Kelly*] standard does not require the illusory perfection of a television show (CSI, this wasn't), when liberty hangs in the balance — and, in the case of the defendants facing the death penalty, life itself — the standards should be higher than were met in this case,
> (*United States v. Green* (D. Mass. 2005) 405 F.Supp.2d 104, 109) [Internal footnote deleted.].)

When — as here — the profile is evidence in a capital case, circumspection should be the order of the day because "the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death" and "[t]he finality of the death penalty requires 'a greater degree of reliability' when it is imposed." (*Murray v. Giarratano* (1989) 492 U.S 1, 8-9 [109 S.Ct. 2765, 106 L.Ed.2d 1] quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 2964, 57 L.Ed.2d 973] and citing *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *Eddings v. Oklahoma* (1982) 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1]. [Internal citations omitted.].)

DNA test results are only as reliable and accurate as the testing procedures used by the laboratory analyst who actually conducted the procedure.

In *People v. Castro* (N.Y. 1989) 144 Misc.2d 956, 977 [545 N.Y.S.2d 985], the court found the inclusionary DNA test results too unreliable to admit in a criminal proceeding because the laboratory (Lifecodes) failed to "conduct the necessary and scientifically acceptable tests" making the test results "inadmissible as a matter of law."

Plainly, if the DNA analyst has followed faulty procedures, the resulting profile — although cloaked with an aura of infallibility — is not only fallible, in all likelihood, it is false. Not only is a false profile inadmissible under Evidence Code section 210 because it is not relevant to any issue before the jury, it implicates the due process guarantee of a fair trial. (Fifth and Fourteenth Amendments to the Constitution of the United States; article I, section 7 of the California Constitution)

When Schultz was denied the opportunity to challenge the procedures Yates employed in 1996 in a pre-trial Kelly hearing, he lost the op-

portunity to demonstrate an error in the procedure and lost the opportunity to bar DNA evidence in its entirety from the jury.

VI. The court erred in admitting evidence relating to Schultz's correspondence with Merriman. The evidence was not proper rebuttal, irrelevant, prejudicial, and infringed on Schultz's constitutional right to freedom of association.

A. Introduction and summary of argument

In the penalty phase, Schultz presented evidence he had respected and obeyed prison officials and had been cordial to his fellow inmates during the years he had been incarcerated. (21RT 3689-3690, 3691, 3693-3694) His penology expert opined this history of compliance and socialization portended that Schultz would live out his life in prison in an obedient and cooperative manner if sentenced to a life term. (21RT3696-3697)

The prosecutor argued correspondence between Justin Merriman, who had once been a leader of a racist gang called the Skinhead Dogs, and Schultz rebutted the penologist's opinion because it proved Schultz "can

be expected to join the Aryan Brotherhood, [or] some other white gang, as soon as he gets to prison." (21RT 3696-3697, 3810)

The court did not allow the letters themselves into evidence, but allowed evidence of the fact the two men had corresponded and certain excerpts from the letters to come before the jury. (21RT 3811, 3812)

Respondent contends the evidence was proper rebuttal; the snippets of text admitted were not hearsay; the evidence did not violate the First-Amendment principles announced in *Dawson v. Delaware* (1992) 503 U.S. 159, 163 [112 S.Ct. 1093, 117 L.Ed.2d 309]; and admission was harmless error, if error at all. (RB 61-71)

Schultz will address each argument separately.

B. Respondent's argument the correspondence and association between Schultz and Merriman was proper rebuttal evidence rests on the improper and unconstitutional theory of guilt by association.

The court's ruling limited the prosecutor's evidence to: Schultz and Merriman had corresponded, the men addressed each other familiarly in their letters, Merriman espoused racist beliefs, and Merriman had once been a leader of a racist gang called the Skinhead Dogs. (21RT 3811-3812)

Respondent admits this evidence shows only an association between the two men. (RB 62)

The prosecutor argued this association meant Schultz and Merriman were two peas in a pod. If Merriman was a racist; Schultz was a racist. If Merriman had joined a racist-oriented gang; Schultz would join a racist-oriented gang. (21RT 3810, 3811)

This argument is patently fallacious. In a diverse society, individuals with different beliefs and traditions associate, but maintain their diversity. Catholics associate with Hindus and remain Catholic. Democrats associate with Republicans and remain loyal Democrats. And, a racially-tolerant inmate can associate with a racist inmate and maintain his tolerance.

Not only is this argument patently fallacious; it is abhorrent in law. Guilt based "upon the relationship between two [individuals] rather than upon the evidence [which] separately implicat[es]" those individuals is guilt by association. (*People v. Letner* (2010) 50 Cal.4th 99, 152 citing *People v. Chambers* (1964) 231 Cal.App.2d 23, 29.)

Neither a criminal conviction nor criminal punishment can be based upon such a theory:

> That one is married to, associated with, or in the company of a criminal does not support the inference that that person is a criminal or shares the criminal's guilty knowledge.
> (*United States v. Forrest* (5th Cir. 1980) 620 F.2d 446, 451)

The United States Supreme Court has repeatedly denounced guilt by association:

> The technique is one of guilt by association — one of the most odious institutions of history. The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies.
> (*Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 178-79 [71 S.Ct. 624, 652, 95 L.Ed. 817].) (Internal footnote deleted.)

> [G]uilt by association remains a thoroughly discredited doctrine,
> (*Uphaus v. Wyman* (1959) 360 U.S. 72, 79 [79 S.Ct. 1040, 1046, 3 L.Ed.2d 1090].)
>
> Misjoinder implicates the independent value of individual responsibility and our deep abhorrence of the notion of "guilt by association."
> (*United States v. Lane* (1986) 474 U.S. 438, 475 [106 S.Ct. 725, 745, 88 L.Ed.2d 814].)
> This Court has also held guilt by association has "no place" in criminal trials. (*Vogel v. Los Angeles County* (1967) 68 Cal.2d 18, 23 citing *Keyishian v. Board of Regents of University of State of New York* (1967) 385 U.S. 589, 607 [87 S.Ct. 675, 17 L.Ed.2d 629].)

Neither tort liability, nor denial of employment, a security clearance, a passport, or access to a student meeting room can be based upon guilt by association. (*National Association for Advancement of Colored People v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 932 [102 S.Ct. 3409, 73 L.Ed.2d 1215]; *Elfbrandt v. Russell* (1966) 384 U.S. 11, 19 [86 S.Ct. 1238, 16 L.Ed.2d 321]; *United States v. Robel* (1967) 389 U.S. 258, 265-266 [88 S.Ct. 419, 19 L.Ed.2d 508]; *Aptheker v. Secretary of State* (1964) 378 U.S. 500, 510-512 [84 S.Ct. 1659, 12

L.Ed.2d 992]; *Healey v. James* (1972) 408 U.S. 169, 186-187 [92 S.Ct. 2338, 33 L.Ed.2d 266])

Plainly, death cannot be based upon such a discredited and distasteful doctrine.

C. Introducing Schultz's association with Merriman infringed upon his right to freedom of association.

Even if this Court finds Schultz's association with Merriman proves Schultz shared Merriman's belief in the supremacy of the Caucasian race, *Dawson v. Delaware* (1992) 503 U.S. 159, 163 [112 S.Ct. 1093, 117 L.Ed.2d 309] curbs evidence of the exercise of the constitutionally-protected right to freedom of belief, freedom of expression, and freedom of association in a capital sentencing hearing.

Dawson held the constitutional *per se* barrier to admission can be lifted in a capital sentencing proceeding if that constitutionally-protected association or belief (1) is tied to the crime, proves an aggravating circumstance, or (2) indicates the defendant will be dangerous in the future.

In *Dawson*, the Court found there was no link:

> Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, ... had no relevance to the sentencing proceeding in this case. ... [T]he Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. ... [T]he murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing.
>
> Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance. In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society.
>
> (*Dawson v. Delaware, supra* 503 U.S. at p. 166.)

Schultz was not a member of the Skinhead Dogs. (21RT 3819) But, even if Schultz had been a member of the Skinhead Dogs, the links missing in Dawson's case are also missing in Schultz's case.

Dawson's membership in the Delaware branch of the Aryan Brotherhood was not admissible because the prosecution failed to lay a foundation the gang was "tied in any way to the murder of Dawson's victims." (*Dawson v. Delaware,* 503 U.S. at p. 166) There is no evidence the Skinhead Dogs or their racist philosophy played any role in Burger's murder. Burger

and Schultz are both Caucasians and no members of the gang participated in the crime.

Dawson's membership in the Aryan Brotherhood did not demonstrate Dawson might be dangerous in prison because the prosecution failed to lay a foundation the Delaware Brotherhood was "a white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates" or a gang that "had committed any unlawful or violent acts, or had even endorsed such acts." (*Dawson v. Delaware,* 503 U.S. at p. 166) There is no evidence the Skinhead Dogs is a prison gang; the only evidence was that the Skinhead Dogs was a street gang in Ventura County. (21RT 3815) Fitzgerald testified Merriman had been the leader of the gang "before" he entered prison. (21RT 3815) There was no evidence the gang had ever engaged in, advocated, or endorsed unlawful or violent acts to advance its white-supremacist philosophy or for any other reason. (21RT 3815)

The fact Schultz exercised his constitutional right to freedom of association to engage in friendly correspondence with Merriman, who had once

been the leader of a local skinhead gang, did not pertain to Burger's murder and was not a valid forecaster of Schultz's future behavior behind bars. It was not admissible.

D. The salutations and valedictions and the words "homie" and "brother" in Merriman's letters were inadmissible hearsay.

Respondent argues Schultz failed to raise a hearsay objection and has waived that issue on appeal. Respondent is in error, Schultz raised the appropriate objection.

Alternatively, for the first time, respondent argues the words "homie" and "brother" and the salutations and valedictions were not hearsay because: (1) the words themselves were relevant to an issue in the case merely because they were spoken irrespective of their truth or falsity (RB 63-64) and (2) under Evidence Code section 1250 they show Schultz's state of mind—"his intent to establish a relationship with a reputed White supremacist gang member while in prison." (RB 64)

Neither of these Johnny-come-lately arguments is correct.

1. Schultz objected to the admission of every part of Merriman's letters on the basis the entire contents of the letters was hearsay.

Respondent argues Schultz raised no hearsay objection to the words "homie" and "brother" and the salutations and valedictions in Merriman's letters in the trial court and argues Schultz's opening brief relies on the futility provision in *People v. McDermott* (2002) 28 Cal.4th 946, 1001-1002 and *People v. Hill* (1998) 17 Cal.4th 800, 820-822. (RB 63)

Respondent is mistaken. At the beginning of the argument regarding this issue, Schultz objected to any letters written by Merriman in their entirety on the grounds the letters in their entirety were hearsay. (21RT 3810-3811) Defense counsel never withdrew his hearsay objection. And, after the court made its ruling, defense counsel stated he maintained his objection, but believed the objection was adequately presented and he did not need to research it further:

> We object to it, but we don't need a night to look it over. If the ruling of the Court is that [the prosecutor] can ask Dennis Fitzgerald if Justin Merriman sent him two letters, Michael

> Schultz sent one, and the salutations, that's fine. I mean, we object to it, but we understand the Court's ruling. We're not asking for any more time.
> (21RT 3812-3813)

Schultz did not waive his hearsay objection to any part of Merriman's letters.

2. Neither the words homie and brother nor the salutations and benedictions of Merriman's letters were admissible as operative facts.

Respondent contends the excepted words from Merriman's letters are admissible as non-hearsay because the words themselves were "relevant to an issue in the case 'merely because the words were spoken ..., and irrespective of [their] truth or falsity.'" (RB 63) As evidenced by the cases respondent cites, respondent is arguing the words were operative facts. (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068-1069 citing 1 Jefferson, Cal. Evidence Benchbook (3d ed. 1997) Hearsay and Nonhearsay Evidence, § 1.45 at p. 31 and 1 Witkin, Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 588, p. 562.)

Respondent is mistaken in labeling the excerpts from Merriman's letters as operative facts; these words and phrases are not operative facts.

Operative facts are "those facts which prove a criminal or civil defendant's liability for a particular wrongful act" or "the facts of a case which prove the underlying act upon which a defendant ha[s] been found guilty." (*People v. Lawrence* (2000) 24 Cal.4th 219, 231.)

Words are operative facts in defamation actions because they are the defamation itself (*Russell v. Geis* (1967) 251 Cal.App.2d 560, 571; *Stoneking v. Briggs* (1967) 254 Cal.App.2d 563, 577); in conspiracy cases because they prove the criminal agreement (*People v. Collier* (1931) 111 Cal.App. 215, 240), in drug-sale cases because they prove the buy-sell agreement (*People v. Gonzales* (1968) 68 Cal.2d 467, 471), and in prostitution cases because they prove the agreement for the purchase and sale of sexual relations (*People v. Patton* (1976) 63 Cal.App.3d 211, 219).

Arguably, there are no operative facts in the penalty phase of a capital trial because there is no issue of guilt to be decided.

The closest things to guilt issues in the penalty phase are decisions relating to criminal activity introduced under section 190.3, subdivision (b). Respondent does not argue the words in dispute are related to the

criminal activity introduced by the prosecutor under section 190.3, subdivision (b).

The words were not non-hearsay operative facts. As Schultz argues at length in Section at pages 259-261, the words, homie and brother were admitted for their truth — to demonstrate that Schultz and Merriman were compatriots and members of the same peer group.

3. The disputed words in Merriman's letters were not admissible under Evidence Code section 1250.

a. The Court should not entertain this untimely and unsupported argument.

Respondent argues the words and salutations were admissible under Evidence Code section 1250 as evidence of "appellant's intent to establish a relationship with a reputed White supremacist gang member while in prison." (RB 64)

This argument was not presented in the trial court. (21RT 3808-3812)

The entire argument on appeal is a single conclusory sentence:

> Even if the words and salutations were arguably hearsay, this evidence was admissible under the state of mind exception to the hearsay rule, as it was relevant to show appellant's intent

> to establish a relationship with a reputed White supremacist gang member while in prison. (See Evid. Code, § 1250.) (RB 64)

California Rules of Court, rule 8.204 requires all briefs to "support each point by argument." Numerous cases have held a point asserted without argument or authority is forfeit and the reviewing court need not consider it. (*Taylor v. Nabors Drilling USA.* (2014) 222 Cal.App.4th 1228, 1248; *Taylor v. Roseville Toyota, Inc.* (2006) 138 Cal.App.4th 994, 1001 at fn. 2; *People v. Barrera* (1993) 14 Cal.App.4th 1555, 1567 at fn. 7)

This Court should not entertain respondent's untimely and unsupported argument.

b. Merriman's state of mind was not an issue in Schultz's case and respondent's reliance on Evidence Code section 1250 is misplaced.

Should this Court elect to entertain respondent's argument under Evidence Code section 1250, it must reject it.

Evidence Code section 1250 applies only if "the *declarant's* state of mind ... is itself an issue in the action." Merriman was the declarant of the words in the letters he wrote.

Respondent does not explain how Merriman's state of mind is an issue or how Merriman's state of mind is "relevant to show *appellant's* intent." (RB 64)

The disputed words in Merriman's letters are hearsay, and the trial court erred in admitting these words.

E. The admission of evidence linking Schultz to a racist was highly prejudicial and not at all probative and should have been barred under Evidence Code section 352.

Schultz has already argued the fact he knew and corresponded with Merriman and the excerpted words, salutations, and valedictories had no probative value, and he incorporates those arguments as though fully set forth.

Although respondent argues the evidence was not the type to arouse emotions in the jurors, common sense dictates the opposite. Race is an emotionally charged issue in the United States as evidenced by the outcry surrounding the recent Trayvon Martin incident. The existence and activities of gangs are also emotionally-charged issues as this Court has often

acknowledged. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Cox* (1991) 53 Cal.3d 618, 660; *People v. Anderson* (1978) 20 Cal.3d 647, 650-651)

Even the prosecutor recognized testimony linking Schultz to the Skinhead Dogs was harshly prejudicial. (21RT 3824)

When one places obvious prejudice on one side of a scale and no probative value on the other side, the scale tips completely in favor of exclusion.

F. Introducing this inflammatory and non-probative evidence linking Schultz to a reprehensible and violent racist philosophy irreparably prejudiced Schultz's penalty-phase presentation.

The prosecution effectively called Schultz a skinhead, a racist and so-to-be racist prison gang member. These linked Schultz to an odious stereotype — a Neo-Nazi thug obsessed with violent paramilitary activities bent on violently causing physical harm to persons of color, people of the Jewish faith, and all individuals in authority.

Had Schultz and Merriman exchanged ideas about racial supremacy in their letters or had Schultz asked Merriman about joining the Skinhead

Dogs or some other gang that shared the Dogs' philosophy, there might have been some basis for such a link. But, Schultz and Merriman did not write about those things. They ranted and railed against the system and bellyached about conditions in jail. (21RT 3809, 3810)

Further, the fact the letters themselves were not introduced into evidence invited the jury to conclude Schultz and Merriman had written about racism and violence when they had not.

Schultz was not a member of the Skinhead Dogs or any other gang. (21RT 3819) There was no evidence Schultz knew or endorsed Merriman's racist beliefs. There was no evidence the Skinhead Dogs engaged in any violent behavior or forced their unorthodox beliefs on others. Schultz and Merriman associated to vent their anger with the judicial system and to complain about the conditions of their incarceration. None of this evidence supported a finding Schultz was a nascent racist bent upon joining a violent racially-motivated prison gang or that his history of obedience and socialization was about to undergo an abrupt about-face.

The evidence was highly inflammatory and had no evidentiary value. The court erred in admitting it.

VII. The trial court erred in denying Schultz's motion for a mistrial. The prosecutor's misconduct was incurable and uncured resulting in a crushing blow to his penalty-phase case.

By his own admission, the prosecutor committed misconduct in the closing moments of the penalty trial by asking a question—"And does [Merriman] also offer to send [Schultz] a manual from San Quentin?"—that could only be answered by reference to an area the court had already ruled inadmissible. (21RT 3821, 3823-3824, 3826)

Because the prosecutor admitted misconduct, the only question is whether the misconduct irreparably and incurably damaged Schultz's chances for a fair trial. The answer to that question is: Yes.

The contents of the letters Merriman and Schultz exchanged were not admitted into evidence; the jury heard only that Schultz and Merriman

had corresponded and how they addressed each other in that correspondence.

The only clue the jury had what the two men had written about was the "manual" the prosecutor brought to their attention in the closing moments of the penalty trial. Although the letters actually were merely expressions of anger and frustration by two disgruntled prisoners who railed against the justice system and their conditions of confinement (21RT 3809-3810), the court shared defense counsel's concern the jury would speculate the manual provided instructions about "how to get in the [racist] gang" or "how to do a hit." (21RT 3824-3825)

Schultz's penalty phase case focused on providing the jury with reasons to sentence him to a life term rather than to death. A linchpin in that presentation was the testimony of Schultz's penology expert, who opined Schultz's history of good behavior was a valid harbinger of his future behavior in prison. Speculation the manual provided instructions about joining a prison gang or committing racially-motivated crimes in prison was particularly damaging to this defense. After the misconduct, the jury must

have believed a death sentence was the only way to prevent Schultz from committing crimes in prison.

The prosecutor's misconduct was not cured by the three anemic cautionary instructions the trial court provided to the jury. The first occurred when the misconduct occurred and made no particular point of the prosecutor's egregious conduct. (21RT 3818) The second was an afterthought when the court day concluded and followed a close-of-session instruction the court had given the jury many times before. (21RT 3823) It seems unlikely the jury paid much heed to this instruction. The last was a generic jury instruction which simply advised the jury not to consider various types of evidence, including "evidence that was stricken by the court." (22RT 3839)

The prosecutor's admitted misconduct significantly harmed Schultz's claim he would not present a danger to either his fellow inmates or to prison authorities and would abide by the rules of the institution if given a sentence of life without the possibility of parole. The trial court's efforts to mitigate the prosecutor's misconduct were unavailing. This

Court must reverse Schultz's death sentence and remand the matter for a new penalty-phase trial.

VIII. Victim impact evidence denied Schultz due process and the right to a reliable penalty determination under the Eighth and Fourteenth Amendments.

Victim impact testimony provides a way for the victims of crime to participate in the criminal justice process by giving them a voice and an opportunity to focus the court and the trier of fact on the human costs of the defendant's crime. While victims may speak, they may not speak so loudly their words lead the jury to make the life-or-death sentencing decision based upon caprice and arbitrary factors. A capricious and arbitrary death sentence is an unconstitutional death sentence. (*Furman v. Georgia* (1972) 408 U.S. 238, 276 [92 S.Ct. 2726, 33 L.Ed.2d 346].)

Schultz does not diminish the grief the Burger family suffered because of Cynthia Burger's murder, and he does not dispute that *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2497, 115 L.Ed.2d 720] and *People v.*

Edwards (1991) 54 Cal.3d 787, 835-836 endowed the family with the right to acquaint the jury with the hole that loss left in their lives.

But he contends *Payne* provided only one clear directive regarding victim impact testimony — "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Payne v. Tennessee, supra,* 501 U.S. at p. 830 at fn. 4.) The Burger family's testimony about the crime, the investigation, and the perpetrator crossed the bright line that separates valid victim impact testimony from that which *Payne* specifically described as violative of the Eighth Amendment.

Respondent focuses most acutely on the testimony of Virgie Burger and relies on *People v. Cowan* (2010) 50 Cal.4th 401 and *People v. Pollock* (2004) 32 Cal.4th 1153 to argue Mrs. Burger's testimony did not cross the line etched by *Payne.* (RB 78)

A. Virgie Burger vilified Schultz and the crime and invited the jury to compare the relative merit of Schultz's and Burger's lives.

Virgie Burger disparaged Schultz by labeling him a "monster." Not only did she give her own opinion of Schultz, she gave her own opinion of the crime stating it was a "weird horrible story" and a "horrendous story by a monster who had killed [Burger}" and "unbelievable" and a situation in which a "girl so beautiful both inside and out ... was murdered with great pain, fear, and then set fire and then put in a tub of acid." (18RT 3170)

Respondent argues Virgie's testimony was akin to that approved by this Court in *People v. Cowan, supra,* 50 Cal.4th 401. (RB 78) Respondent's reliance on *Cowan* is misplaced.

Unlike the testimony in *Cowan,* Virgie was not explaining how she felt when she imagined Burger's last moments; she was passing judgment on Schultz and finding in favor of the "girl so beautiful both inside and out" and against the "monster." She was giving her opinion about the crime and about Schultz.

B. Virgie Burger introduced Burger's religious training and religious convictions into the trial.

Virgie also testified Burger was a religious person who had attended a college that focused on religion and religious studies. (18RT 3169) Respondent argues Virgie's testimony was analogous to the testimony this Court found valid victim-impact testimony in *People v. Pollock* (2004) 32 Cal.4th 1153. (RB 78) Again, respondent's reliance is misplaced.

In *Pollock,* the trial court allowed one witness to testify she met the victim for the first time when the victim was teaching a Bible study class for children, and another witness to testify she learned of the victim's death from another member of the Bible study class. *Pollack* permitted the testimony on the grounds it was admitted "only to explain" how witnesses knew the victim or had learned of her death. (*People v. Pollock, supra,* 32 Cal.4th at p. 1182.) *Pollack* cautioned its decision was based on the fact that no witness "testified about [the victim's] specific religious beliefs, nor did [any witness] suggest religious doctrines should guide or affect the penalty determination process." (*People v. Pollock, supra,* 32 Cal.4th at p. 1182.)

In this case — unlike *Pollack* — Burger's religious beliefs and the depth of her religious commitment was brought before the jury.

C. The victim impact evidence was more prejudicial than probative and should have been excluded.

Victim-impact testimony is a story of grief and loss. Grief and loss are among the most deeply-felt human emotions. Common sense dictates that the court take particular care in balancing probative value against prejudicial effect when the evidence under consideration is, by its very nature, emotionally charged.

The Burger family's testimony was especially emotional.

Family members offered opinions about Schultz and the crime and invited the jury to base its life-or-death decision on those pejorative characterizations. The jury — not the family — decide how heinous the crime was; the jury — not the family — decide whether the defendant is deserving of mercy. The testimony was far more prejudicial than probative and the court erred in allowing the jury to consider it in deciding on the appropriate punishment for Schultz.

IX. Section 190.3, subdivision (b), which allows the jury to rely on unadjudicated acts involving even limited force or violence to impose the ultimate penal sanction, violates the Eighth and Fourteenth Amendments.

Schultz contends section 190.3, subdivision (b) is the only statute in the country that includes a statutory aggravator that allows a jury to impose the death penalty based upon unadjudicated everyday spats and quarrels. Including this provision in California's death penalty statute puts the California statute outside the mainstream and out of step with evolving standards of decency and violates the Eighth Amendment prohibition of cruel and unusual punishment.

Respondent unceremoniously dismisses Schultz's argument as one this Court "routinely rejected" in *People v. Bivert* (2011) 52 Cal.4th 96, *People v. Tafoya* (2007) 42 Cal.4th 147, *People v. Anderson* (2001) 25 Cal.4th 543, and *People v. Kirkpatrick* (1994) 7 Cal.4th 988.) (RB 79-80)

Respondent is mistaken. This Court neither considered nor rejected Schultz's argument in any of the cases on which respondent relies.

In *Bivert,* appellant argued *Roper v. Simmons* (2005) 543 U.S 551 [125 S.Ct. 1183, 161 L.Ed.2d 1], which barred the execution of an offender who

committed a capital crime while less than 18 years old, barred the admission of three murders appellant had committed while less than 18 years of age in the penalty phase. This Court rejected the argument on the ground *Roper* "spoke only to the question of punishment for juvenile offenses, while defendant's challenge 'is to the admissibility of evidence, not the imposition of punishment.' " (*People v. Bivert, supra*, 52 Cal.4th at p. 122 quoting *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.)

In *Tafoya*, appellant raised a bevy of arguments relating to admission of evidence of a rape charge filed 15 years earlier, but dismissed when the victim failed to appear. Tafoya's section-190.3-based argument was limited to his claim section 190.3 violated his right to due process, a fair and speedy jury trial, confrontation of witness, and a reliable penalty verdict because it permitted the admission of unadjudicated criminal activity on which the statute of limitations had expired or on which charges have been dismissed. This Court noted these arguments had been rejected on numerous occasions. (*People v. Tafoya, supra*, 42 Cal.4th at pp. 185-186.)

In *Anderson,* appellant raised numerous arguments relating to the admission of evidence of an uncharged murder of a gas station attendant that had occurred 12 years before. Although *Anderson* preceded *Tafoya,* the constitutional attack in *Anderson* was the same as that later raised in *Tafoya,* and this Court stated that contention had been rejected on numerous occasions. (*People v. Anderson, supra,* 25 Cal.4th at pp. 584-585.)

In *Kirkpatrick,* appellant argued section 190.3, subdivision (b) provided no meaningful basis for culling the few cases in which the death penalty should be imposed as required by *Gregg v. Georgia* (1976) 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 859]. This Court rejected the argument on the ground section 190.2 — not section 190.3 — provided the distinctions required by *Gregg.* (*People v. Kirkpatrick, supra,* 7 Cal.4th at p. 1015.)

Schultz's argument differs from these arguments.

Schultz argues a penalty-determination process that includes a statutory aggravator that allows a jury to impose the death penalty based upon unadjudicated everyday spats and quarrels is out of step with contem-

porary standards of decency and, therefore, violates the Eighth Amendment proscription of cruel and unusual punishment.

Miller v. Alabama (2012) ___ U.S. ___ [132 S.Ct. 2455, 2471, 183 L.Ed.2d 407] confirmed the Eighth Amendment applies — not just to an outright ban on various forms of punishment — but also to the sentencing process by which punishment is determined:

> For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime — as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process — considering an offender's youth and attendant characteristics — before imposing a particular penalty.
> (Internal footnote deleted.)

A sentencing process may render a punishment cruel and unusual.

Under well-established Eighth-Amendment jurisprudence, the concept of cruel and unusual punishment whether applied to a total ban or to a process is fluid and changes as civilized standards of punishment change. As stated in *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 [78 S.Ct. 590, 2 L.Ed.2d 630]:

> [T]he words of the Amendment are not precise, and ... their scope is not static. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Supreme Court jurisprudence demands that "evolving standards [of decency] should be informed by 'objective factors to the maximum possible extent.' " (*Atkins v. Virginia* (2002) 536 U.S. 304, 312 [122 S.Ct. 2242, 153 L.Ed.2d 335] quoting *Rummel v. Estelle* (1980) 445 U.S. 263, 274-275 [100 S.Ct. 1133, 63 L.Ed.2d 382].)

The Court has identified and relied upon several benchmarks to define evolving standards of decency including the number of states that permit or prohibit the death penalty for the particular circumstance or the particular class of defendant, the frequency of jury verdicts imposing the death penalty when the particular circumstances or the particular type of defendant are at issue, polling data, international law, and the official positions held by professional organizations.

Of these, the Court has long maintained that "legislative enactments and state practice with respect to executions" are the most important, most influential, and most reliable benchmarks in death cases. (*Kennedy v. Loui-*

siana (2008) 554 U.S. 407, 421 [128 S.Ct. 2641, 171 L.Ed.2d 525] quoting *Roper v. Simmons, supra,* 543 U.S. 551, 563.)

Thirty-two states[6] currently have a death penalty statute, but only four — California, Indiana, Nebraska, and Washington — have enacted a statute that includes any sort of unadjudicated conduct as a statutory aggravating factor.

Upon closer inspection, one finds only California's and Nebraska's statutes are currently being enforced. The Indiana Supreme Court held In-

---

[6] At the time Schultz filed his opening brief, thirty-three states had a death-penalty statute.
In May 2013, Maryland abolished the death penalty and replaced it with a life-without-parole sentence. (Simpson *Maryland becomes latest U.S. state to abolish death penalty,* Reuters U.S. edition (May 2, 2013) available online at http://www.reuters.com/article/2013/05/02/us-usa-maryland-deathpenalty-idUSBRE9410TQ20130502 [accessed 4-14-2014].)
The New Hampshire House voted to repeal the death penalty and on April 17, 2014, the repeal failed in the New Hampshire Senate by one vote. New Hampshire, however, has not executed anyone since 1939. (Tuchy, *New Hampshire Death Penalty Repeal Fails by 1 Vote,* ABC News (April 17, 2014) available online at http://abcnews.go.com/US/wireStory/hampshire-death-penalty-repeal-fails-vote-23363326 [accessed 4-17-2014].)
Governors in three of those states — Oregon, Colorado, and Washington — have placed moratoriums on the use of the death penalty.

diana statute 35-50-2-9(b)(8) unconstitutional in *State v. McCormick* (1976) 272 Ind. 272, 278 [397 N.E.2d 276], and Washington Governor Jay Inslee announced a moratorium on the death penalty in Washington on February 12, 2014 effectively mooting Section 10.95.020 of the Washington Revised Code. (Bacon, *Washington Governor suspends death penalty*, USA Today (February 12, 2014) available online at http://www.usatoday.com/story/news/nation/2014/02/11/washington-death-penalty-inslee/5394917/ [accessed 4-14-2014].)

Of the remaining two — the California and Nebraska statutes — the Nebraska statute is far less broad than section 190.3, subdivision (b) and limits admission of unadjudicated acts in ways the California statute does not.

Nebraska limits the admission of unadjudicated acts to a "substantial prior history" of completed — as opposed to attempted or inchoate — acts that are either seriously assaultive or which struck intense fear in the victim:

> The aggravating and mitigating circumstances referred to in sections 29-2519 to 29-2524 shall be as follows:
>
> (1) Aggravating Circumstances:
>
> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;
>
> (Neb. Rev. Stat. § 29-2523.)

The Nebraska Supreme Court has interpreted "substantial history" to mean an "actual, material, and important history of acts of terror of a criminal nature" and not an occasional act and not a non-terrifying act. (*State v. Ellis* (2011) 281 Neb. 571, 594 [799 N.W.2d 267, 290].)

A bill to repeal the death penalty was brought before the Nebraska Legislature in May 2013 and not brought to a vote because of a filibuster. The Legislature will reconsider the bill at its next session. (Duggan, *Filibuster sinks death penalty repeal in Nebraska Legislature,* World Herald Bureau available online at Omaha.com at http://www.omaha.com/apps/pbcs.dll/article?AID=/20130514/NEWS/130519861/1685 (accessed 4-14-2014].)

Forty-nine jurisdictions would not countenance a death sentence based upon an express aggravating factor that allowed the jury to con-

clude that a defendant had been involved in barroom shoving matches, domestic squabbles, shouting matches between neighbors, run-ins at social gatherings, or shows of bravado or machismo by competing suitors. Yet, the aggravating evidence on which Schultz's sentence is based rests almost exclusively upon such evidence.

In some arenas, marching to a different drummer is an act of courage; in the Eighth-Amendment arena marching to a different drummer is a sign the marching tune is unconstitutional. This Court should move California's death-penalty back in line with evolving standards of decency.

X. The admission of unadjudicated acts through anecdotal evidence is an unreliable method of deciding who should suffer the ultimate punishment.

Schultz believes the arguments presented in his opening brief at pages 394 to 396 adequately explain his position on this issue.

XI. California's death penalty statute, as interpreted by this Court and applied at Schultz's trial, violates the United States Constitution.

Schultz believes the arguments presented in his opening brief at pages 396 to 437 adequately explain his position on the collection of constitutional issues presented in this argument.

XII. The numerous errors that occurred during the guilt and penalty phases of Schultz's trial, when considered cumulatively, deprived him of a fair trial.

Respondent argues that Schultz has failed to demonstrate there were any errors and there is, therefore, no basis for invoking the cumulative error doctrine. Respondent further argues that if there was any error, there was no prejudice. (RB 90-91)

To the contrary, prejudicial errors were committed at Schultz's trial and these errors adversely affected the trial's outcome, as Schultz has explained in his opening brief and in this reply brief.

Schultz respectfully refers the reader to his discussion regarding the cumulative effect of the errors at pages438-440 of the opening brief.

Respectfully submitted,

Jeralyn Keller
Attorney for Appellant
MICHAEL JOSEPH SCHULTZ

California Rules of Court, rule 8.360

I, Jeralyn Keller, certify that I was appointed to act as appellate counsel for Michael Joseph Schultz for the direct appeal by the California Supreme Court and that I continue to act as Mr. Schultz's appellate counsel.

I prepared the Appellant's Reply Brief on my word processor utilizing Microsoft Word. The program indicates Appellant's Reply Brief, excluding this certificate, the Proof of Service, the Table of Contents, and the Table of Authorities contains 19,645 words.

JERALYN KELLER

PROOF OF SERVICE BY MAIL

I, JERALYN KELLER, declare:

I am over eighteen (18) years of age and not a party to the within action. My business address is 790 East Colorado Boulevard, Suite 900, Pasadena, California 91101-2113. On July 17, 2014, I served the within

APPELLANT'S REPLY BRIEF

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Pasadena, California addressed as follows:

MORDECAI GARELICK
CALIFORNIA APPELLATE PROJECT
101 SECOND ST, STE 600
SAN FRANCISCO, CA. 94105

MICHAEL JOSEPH SCHULTZ
K-31793
SAN QUENTIN PRISON
SAN QUENTIN, CA. 94974

HON. DONALD D. COLEMAN
DEPT 14
4353 VINEYARD AVE.
OXNARD, CA. 93036

STEVE LIPSON
PUBLIC DEFENDER'S OFFICE
800 S. VICTORIA AVE. # 207
VENTURA, CA. 93009

RYAN M. SMITH
OFFICE OF THE ATTORNEY GENERAL
300 S. SPRING ST., STE 1702
LOS ANGELES, CA.90013

I declare under penalty of perjury the document was printed on recycled paper and foregoing is true and correct and I signed the declaration on July 17, 2014 at Pasadena, California.

JERALYN KELLER