IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. REFUGIO RUBEN CARDENAS, Defendant and Appellant.	Case No. S151493 Tulare County Superior Court No. VCF117251 DEATH PENALTY CASE

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Tulare

The Honorable Patrick J. O'Hara

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APPELLANT'S REPLY BRIEF

XI.
APPELLANT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED WHEN OVER HIS OBJECTION TRIAL COUNSEL CONCEDED THAT APPELLANT WAS GUILTY OF SHOOTING THE VICTIMS

A. Introduction

Appellant twice unequivocally objected during the trial to his counsel's strategy of conceding that appellant had committed the alleged homicide, but lacked the requisite mental state to be found guilty of first-degree murder. He first objected during a *Marsden*[1] hearing during the prosecution's guilt phase case (22RT 2302-2303) and reaffirmed his objections after the jury found him guilty and the alleged special circumstances to be true. (24RT 2946-2948; 5CT-

[1] *People v. Marsden* (1970) 2 Cal.3d 118.

Exhibits 1481.)[2] As will be demonstrated below, defense counsel's concession that appellant shot the victim in this case over appellant's objection violated appellant's Sixth Amendment rights and constituted structural error requiring reversal of appellant's conviction and death sentence.

B. Legal Principles

The United States Supreme Court recently held in *McCoy v. Louisiana* (2018) __ U.S. __, __; 138 S.Ct. 1500, 1505, that a criminal defendant has the right under the Sixth Amendment "to insist that [defense] counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." Thus, "[w]hen a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." (*Id.* at p. 1509.)

The Court explained that "[w]ith individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." (*McCoy*, *supra*, 138 S.Ct. at p. 1505.) "Just as a defendant may steadfastly refuse to plead guilty in the face of

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[2] Appellant's Motion to Unseal Reporter's Transcripts of *Marsden* Hearings on Appeal, filed November 20, 2019, is currently pending before this Court.

overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial." (*Id*. at p. 1508.)

Accordingly, defense counsel's refusal to abide by his or her client's wish to assert his innocence and instead concede his guilt is "incompatible with the Sixth Amendment" and constitutes structural error requiring reversal and a new trial. (*McCoy*, *supra*, at p. 1512.)

C. Appellant Unequivocally Asserted That the Objective of His Defense Was to Maintain His Innocence

1. The First *Marsden* Hearing

In the middle of the prosecution's presentation of evidence in the guilt phase, the court held a *Marsden* hearing to address appellant's opposition to defense counsel's concession of his guilt to the jury, during which the following discussion took place:

> **The Defendant:** Yeah. Because like my understanding of what's going on and everything, it seems like we're going into this trial with a self-defense kind of plea and stuff, and that was something I never agreed to or anything like that.
>
> **The Court:** I'm sorry, sir?
>
> **The Defendant:** I mean, that's my understanding of the defense part on this case, is it's going in self-defense, as far as -- you know what I mean, my motive and what the reasons are that this crime took place. But the thing is, you know what I mean, I'm trying to prove my innocence. . . . That's why I wanted to bring it to the Court's attention so it can be at least noted on the record on my behalf, for the most part.

> **The Court:** Let me understand, then. You were indicating that as you see the defense, they are talking about self-defense. You want the defense to be, in fact, you didn't do it at all?
>
> **The Defendant:** Yes.

(22RT 2302-2303.)

Defense counsel offered a litany of reasons for disregarding appellant's wish to maintain his innocence. She discussed issues regarding various potential defense witnesses whom she was either unable to find, or who were subject to impeachment, or were unwilling to testify. (22RT 2303-2305.) The Court stated that "as far as your lawyer, I think she's doing a very good job. . . . There's no reason . . . for me to relieve her at this time . . . ." (22RT 2309)

2. The Second *Marsden* Hearing

During the guilt phase closing arguments, defense counsel conceded that appellant shot the victim, and focused her argument on appellant's lack of premeditation and deliberation. (22RT 2412-2436.) She stated that "[t]he evidence is he intended to shoot through a dark window that he couldn't seen [sic] the other side of right after a shot was fired at another guy." (22RT 2422.) She elaborated that "all . . . [of the] evidence that points toward rash impulse, unpremeditated killing of another. The result was shots fired at the car, no intent to kill. That's what the physical evidence shows." (22RT 2421.)

Following the jury's guilt verdict, appellant wrote a letter to the Court complaining that his attorney had conceded his guilt of a

lesser crime without his approval. (5CT-Exhibits 1481) The letter stated in relevant part as follows:

> Would my rights to a fair trial be violated if my attorney threw out (*sic*) the trial from the beginning of open (*sic*) arguments to closing arguments telling the jury that I was guilty of a lesser crime without first securing my approval of this tactic?
>
> If so, how serious can this affect my rights (*sic*) to a fair trial?
>
> Then what would be the Court's dutie (*sic*) and responsibility to correct or determine if such an act violated my rights to a fair and just trial?

(*Ibid*.) In response, the Court conducted a second *Marsden* hearing to address appellant's concerns. (24RT 2943-2948.) The court read the relevant portions of the letter into the record, after which the following discussion took place:

> **[To Defense Counsel] The Court:** So as far as your conduct of this trial is there anything you'd like to add?
>
> **[Defense Counsel]:** No. My trial tactics are my trial tactics.
>
> . . .
>
> **The Court [to the defendant]:** All right. Basically I think what you are doing here is questioning your attorney's trial tactics; is that right.
>
> **The Defendant:** Yes.
>
> **The Court:** . . . I think your concern is your attorney [–] basically your feeling is on the closing argument she was saying convict my client of a lesser charge without getting your approval.
>
> **The Defendant:** Yes.
>
> . . .
>
> **The Defendant:** What I'm saying you know what I mean if she's over here telling them I'm guilty . . . basically telling them I'm guilty of this crime I'm

> charged with I'm telling her I'm innocent does that in [any which] way shape or form violate my rights to a [–]
>
> . . .
>
> **The Defendant:** What my concern is if she's informing the jury that I'm guilty of a charge which I'm trying to prove my innocence to and she [is] continuing to tell them I'm guilty and the prosecution [is] telling them I'm guilty of course they are going to find me guilty of a crime. My thing is by her saying I'm guilty without her telling them I'm guilty or anything [- -] me trying to prove my innocence, does that violate my constitutional right to a [fair trial].
>
> **The Court:** . . . I think she's doing what a lawyer should do and she doesn't necessarily have to conduct a defense exactly as you would like to.

(24RT 2944-2947.)

D. Defense Counsel's Concession That Appellant Shot the Victims, Over Appellant's Unequivocal Objection, Violated Appellant's Sixth Amendment Right to Maintain his Innocence and Requires Reversal of his Conviction and Death Sentence

Contrary to what the trial court told appellant, defense counsel was not entitled to argue appellant's guilt of a lesser charge without his approval, and her refusal to abide by appellant's wish to assert his innocence and instead concede his guilt violated appellant's Sixth Amendment rights. (*McCoy v. Louisiana*, *supra*, 138 S.Ct. at pp. 1505, 1512.)

What defense counsel did in the instant case is materially indistinguishable from what defense counsel did in *McCoy*. In that case, despite voluminous evidence linking McCoy to the alleged crimes, the latter steadfastly maintained his innocence, and attempted to fire his counsel prior to and during the trial for

refusing to assert his innocence to the jury. (*McCoy, supra,* 138 S.Ct. at p. 1506.) Rather than abide by his client's wish to maintain his innocence, McCoy's attorney conceded that McCoy had committed the homicides, but argued that his "mental state prevented him from forming the specific intent necessary for a first-degree murder conviction." (*Id.* at p. 1503.) Defense counsel believed that admitting to the killings in the guilt phase of the trial would preserve credibility during the penalty phase. (*Id.* at p. 1510.) Despite McCoy's numerous protestations regarding his counsel's admission of his guilt, and counsel's request to withdraw rather than present an innocence defense, the court declined to relieve defense counsel. In both his opening statement and closing argument in the guilt phase, McCoy's attorney told the jury "there was 'no way reasonable possible' that they could hear the prosecution's evidence and reach 'any other conclusion other than Robert McCoy was the cause of these individuals' death.'" (*Id.* at p. 1507.) In his closing argument, defense counsel conceded that his client "committed these crimes" but argued that he had "serious mental and emotional issues." (*Ibid.*)

In the instant case, appellant stated clearly and unequivocally during both *Marsden* hearings that his express desire was to maintain his innocence of the shooting, and that he did not want his attorney to concede his guilt. (22RT 2302-2303; 24RT 2946-2948) Nevertheless, defense counsel conceded in her closing argument to the jury that appellant shot Gerardo Cortez, but that it was a "rash impulse, unpremeditated killing of another." (22RT 2421.) As in *McCoy*, defense counsel pursued a strategy over the express

objection of her client that conceded that the latter committed the criminal act leading to the charges, but lacked the mental state required for a conviction of the offense as charged.

This case is also factually similar to *People v. Flores* (2019) 34 Cal.App.5th 270 and *People v. Eddy* (2019) 33 Cal.App.5th 472, each of which reversed a conviction because the defense attorney had conceded the defendant's guilt in closing argument in contravention of the defendant's desire to maintain his innocence. In *Flores*, the defendant was tried in separate trials for attempted murder of a police officer by driving a car into the officer, and for two weapons charges, possession by of a firearm by a felon and manufacturing an assault weapon. (*People v. Flores*, *supra*, 34 Cal.App.5th at p.275.) Much like the instant case in which appellant maintained he was not the shooter, the defendant maintained that he was innocent of the charges because he was not the driver of the car that hit the police officer, and because the gun at issue in the second trial was not his. (*Ibid*.) Over his client's objection the defense attorney argued that the defendant was guilty of hitting the officer with the car, but there was no premeditation. (*Id*. at p. 280.) At the trial for the weapons charges the attorney again conceded over his client's objection that the gun belonged to the defendant, but asserted the defendant did not know it was an assault weapon. (*Id*. at pp. 280-281.) The Court of Appeal held that reversal of the two convictions was compelled by *McCoy*. (*Id*. at p.280.)

In *People v. Eddy*, *supra*, the defendant was charged with first degree murder for a stabbing, but maintained that he was factually innocent because someone else had stabbed the victim. (33

Cal.App.5th at p. 478.) Against the defendant's wishes, his attorney argued that he was guilty of voluntary manslaughter, explaining to the trial court that he had concluded that this was the best strategy given the totality of the evidence. (*Id.* at pp. 478-479.) The Court of Appeal reversed the conviction because the "defendant has established a violation of his right to decide the objective of his defense under *McCoy*, and because this violation constitutes structural error . . . ." (*Id.* at p. 483.)

In *Eddy*, the Attorney General argued that the defendant was not entitled to reversal because he had not apprised the trial court of his objection to defense counsel's strategy until after his conviction, and therefore had not adequately preserved his claim for appellate review. The Court of Appeal rejected this argument, stating that "we do not think preservation of the Sixth Amendment right recognized in *McCoy* necessarily turns on whether a defendant objects in court before his or her conviction. Rather, the record must show (1) that defendant's plain objective is to maintain his innocence and pursue an acquittal, and (2) that trial counsel disregards that objective and overrides his client by conceding guilt. (*People v. Eddy*, *supra*, 33 Cal.App.5th at pp. 481-482.)

In the instant case, the record clearly establishes that appellant's plain objective was to maintain his innocence and pursue an acquittal, and that trial counsel overrode her client by conceding guilt. Appellant told the trial court that he wanted his defense to be "[I] didn't do it at all." (22RT 2303.) At the first hearing he very clearly stated that "I'm trying to prove my innocence" (22RT 2302), and told the court at the subsequent hearing, "What my concern is if

she's informing the jury that I'm guilty of a charge *which I'm trying to prove my innocence to*[,] and she [is] continuing to tell them I'm guilty[,] and the prosecution is telling them I'm guilty[,] of course they are going to find me guilty of a crime." (24RT 2947, emphasis added.) The Court itself summarized appellant's position with respect to defense counsel's closing argument as, "she was saying convict my client of a lesser charge without getting your approval." (24RT 2946.)

Not only did defense counsel not get appellant's approval to argue for a lesser charge, she did so over his express objection. Appellant explained it succinctly when he described his objection as, "basically telling them I'm guilty of this crime I'm charged with[.] I'm telling her . . . I'm innocent[.] [D]oes that in [any which] way[,] shape or form violate my rights[?]" (24RT 2946.) The answer to his question, and the question before this Court is, put simply, "yes."

The trial court told appellant that defense counsel's approach was aimed at saving him from "this second phase," and that her tactics "were the appropriate tactics to take based upon the evidence." (24RT 2946.) However, whether pursuing a factual innocence claim was in appellant's best interest or was a wise legal strategy was irrelevant. (*McCoy*, *supra*, 138 S.Ct. at p. 1511.) As the Supreme Court explained, a criminal defendant has a "protected autonomy right" to decide the objective of his or her defense, and that right is violated when the trial court allows defense counsel to

"usurp control of an issue within [the defendant's] sole prerogative."[3] (*Ibid.*) That is precisely what occurred in the instant case.

E. Violation of Appellant's Constitutionally Protected Autonomy Right to Decide the Objective of his Defense Constituted *Per Se* Reversible Error

In *McCoy, supra,* 138 S.Ct. 1500 , the Supreme Court stated that "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review.'" (*Id.* at p. 1511.) The clear violation of appellant's constitutionally protected autonomy right in this case constituted structural error, necessitating reversal of appellant's conviction and death sentence.

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[3] The Supreme Court equated a defendant's right to decide that the objective of his or her defense to the rights to decide whether to plead guilty, to waive the right to a jury trial, to testify in his or her own behalf, to forgo an appeal and to reject assistance of counsel. (*Ibid.*)

XII.
THE GANG-MURDER SPECIAL CIRCUMSTANCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT IS UNRELIABLE, ARBITRARY AND CAPRICIOUS, DISCRIMINATORY, VAGUE AND UNFAIRLY BENEFICIAL TO THE PROSECUTION

The gang-murder special circumstance is set forth in Penal Code section 190.2, subdivision (a)(22). Several aspects of this special circumstance make it qualitatively different than all of the others included in section 190.2. In particular, the vague and overbroad terms of this provision allow its arbitrary and capricious application, with discriminatory effects, and afford the prosecution an unfair advantage at trial, undermining the reliability of the guilt and penalty phases of the capital trial.

These constitutional flaws may be grouped into several categories.

First, the gang-murder special circumstance requires litigation of matters collateral to the charged homicide and even collateral to the defendant. These include the adjudication of whether there exists a "criminal street gang," as defined by subdivision (f) of section 186.22, and whether the defendant was an active participant in it. The establishment of a criminal street gang, in particular, often turns on the status of, and crimes committed by, individuals other than the defendant, regardless of whether defendant knew these persons, was aware of their status, or was involved in their conduct.

Second, the method by which the state is permitted to prove the elements of the special circumstance is highly problematic. When the gang-murder special circumstance has been alleged, the state may use a member of its own team – a police officer testifying as a gang expert – to establish *every fact* that makes an intentional murder capital under section 190.2, subdivision (a)(22). This results in a grossly uneven playing field for the parties – a disparity that is exacerbated because the defense rarely, if ever, has the same access to the expansive "basis evidence" these officer experts routinely rely upon in rendering their opinions.

Third, the terms incorporated by the gang-murder special circumstance are nebulous and artificial. A "criminal street gang" is a legal creation which does not correspond to the reality of informal street gangs. And whether a defendant qualifies as an active participant or has acted to further the gang may depend upon which jurisdiction in the state he is tried.

Fourth, California is an outlier among states using gang conduct as a reason to impose death. In fact, California may stand alone in allowing substantial quantities of gang evidence to be introduced in the guilt phase of trial.

Finally, empirical evidence shows that the gang special circumstance targets defendants of color. This disparity may be produced, at least in part, by inaccurate stereotypes of gang members as Latino and Black. In fact, when law enforcement officials are the arbiters of whether a criminal street gang exists, whether a particular individual is an active participant in that gang

or whether a crime was committed to further or benefit the group, Whites are often overlooked although empirical evidence suggests that they participate in gangs and commit crimes in roughly equivalent numbers.

These flaws—separately and together-- violate the Eighth and Fourteenth Amendments of the federal Constitution and Article I, sections 7, 15 and 17 of the California Constitution. This Court should declare section 190.2, subdivision (a)(22) invalid.[4]

A. California's Special Circumstances Must Satisfy the Eighth Amendment and Due Process

There is a "fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman* itself." (*Zant v. Stephens* (1983) 462 U.S. 862, 876 (*Zant*), citing *Furman v. Georgia* (1972) 408 U.S. 238.) As set forth below, because a special circumstance is both an eligibility factor and a selection factor, it must fulfill several requirements. It must genuinely narrow the class of persons eligible for death and guard against the arbitrary and capricious imposition of a death sentence. A special circumstance also needs to promote an individualized penalty determination. It may not be vague and should promote the heightened reliability required by the Eighth Amendment and fairness demanded by due process.

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[4] The constitutionality of a statute may be raised for the first time on appeal. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; see also, *In re Charles G.* (2017) 14 Cal.App.5th 945, 949, fn. 2.)

The United States Supreme Court has recognized two distinct phases of the capital sentencing process. In the *eligibility* phase, "the jury narrows the class of defendants eligible for the death penalty . . . ." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275.) In the *selection* phase, "the jury determines whether to impose a death sentence on an eligible defendant." (*Ibid.*) In California, a special circumstance acts as both an eligibility and selection factor. First, the presence of a special circumstance identifies who is eligible for the ultimate punishment. (See *Brown v. Sanders* (2006) 546 U.S. 212, 214, citing § 190.2.) Second, a special circumstance is also a selection factor at the penalty phase because under factor (a) of section 190.3, the jury is instructed to consider the existence of any special circumstance found to be true in deciding whether to impose the death penalty or life without the possibility of parole.

As to eligibility, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant*, *supra*, 462 U.S. at p. 877; see also *Arave v. Creech* (1993) 507 US. 463, 474; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) Eligibility factors must channel and limit "the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary and capricious in its imposition." (*Buchanan v. Angelone*, *supra*, 522 U.S. at pp. 275-276; see also *Maynard v. Cartwright* (1988) 486 U.S. 356, 362 ["Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing

the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action"]; *Godfrey*, *supra*, 446 U.S. at p. 428.)

In contrast, at the selection stage the focus is on an "an individualized determination on the basis of the character of the individual and the circumstances of the crime." (*Zant*, *supra*, 462 U.S. at p 879.)

In *both* the eligibility and selection phases, the "State must ensure that the process is neutral and principled so as to guard against bias or caprice . . . ." (*Tuilaepa v. California* (1994) 512 U.S. 967, 973.). Thus, neither eligibility nor selection factors may be "'too vague.'" (*Ibid*.)) The high court has explained:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. . . . [T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty . . . .

(*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Significantly, this differs from vagueness analysis under the due process clause, which rests on lack of notice, whereas Eighth Amendment analysis focuses on the failure adequately to guide jurors' discretion, as required by *Furman v. Georgia*, 408 U.S. 238. (*Maynard v. Cartwright*, *supra*, 486 U.S. at pp. 361-362.)

The high court has also made clear that "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case. (*Johnson v. Mississippi* (1998) 486 U.S. 578, 584 [citations omitted.])

This Court has recognized that the requirement of heightened reliability applies to the special circumstance provisions that in California distinguish those persons who are eligible for the ultimate sanction from those who are not. (*People v. Horton* (1995) 11 Cal.4th 1068, 1135 [prior murder special circumstance]; *People v. Trujeque* (2015) 61 Cal.4th 227, 249-252.) It also applies more broadly to the guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

In addition to the Eighth Amendment, the due process clause requires the State to "administer its capital-sentencing procedures with an even hand . . . ." (*Gardner v. Florida* (1977) 430 U.S. 349, 361; see also *Simmons v. South Carolina* (1994) 512 U.S. 154, 156.)

B. Section 190.2 Subdivision (a)(22) Violates the Eighth and Fourteenth Amendments Because It Requires the Litigation of Collateral Matters

Section 190.2, subdivision (a)(22) is qualitatively different than the other special circumstances. It alone requires the litigation of numerous issues collateral to the charged offense, and even to the defendant himself. This feature of the gang-murder special circumstance creates a constitutionally

intolerable risk of unreliability and deprives a capital defendant of an individualized penalty determination based on his character and conduct.

There are twenty-two special circumstances. (See § 190.2, subd. (a)(1)-(22).) Many of them relate to the method or means by which a defendant kills. (§ 190.2(a)(4) and (6) [by destructive device]; (a)(15) [lying in wait]; (a)(18) [torture]; (a)(19) [poison]; and (a)(21) [shooting from a vehicle].) Others relate to the motive or purpose for the killing. (§ 190.2(a)(1) [financial gain]; (a)(5) [to escape or prevent arrest]; and (a)(17) [during commission of a felony].) Still others relate to the status of the victim. (§ 190.2(a)(7) [peace officer]; (a)(8) [federal law enforcement officer]; (a)(9) [firefighter]; (a)(10) [witness]; (a)(11) [prosecutor]; (a)(12) [judge]; (a)(13) [elected official]; (a)(16) [because of race, color, religion or country of origin] and (a)(20) [juror].) Finally, two special circumstances relate to the number of victims killed. (§ 190.2(a)(2) [prior murder conviction]; and (a)(3) [multiple murder].)

At first glance, the gang-murder special circumstance set forth in section 190.2, subdivision (a)(22) does not appear to be dramatically different from the others. It applies to a defendant who:

> intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of section 186.22, and the murder was carried out to further the activities of the criminal street gang.

Although section 190.2, subdivision (a)(22) has yet to be construed by this Court in a capital case,[5] it ostensibly incorporates three elements: 1) that the defendant committed an intentional murder; 2) that he did so while an active participant in a criminal street gang; and 3) that he committed the murder to further the activities of the gang.

Underlying the second and third elements of the gang-murder special circumstance is another element – the existence of a "criminal street gang" – which in turn consists of three components. There must be a formal or informal organization, association or group with three or more participants who identify with a common name, sign or symbol. One of the group's primary activities must be the commission of one or more specified criminal offenses. And, the group's members must engage in a pattern of criminal gang activity. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.)

Superficially, section 190.2, subdivision (a)(22) seems most like the special circumstances that relate to a defendant's motive or purpose for killing, such as killing during the commission of a felony. It differs fundamentally, however, by requiring proof of facts collateral to the charged offense, and, in many instances, unrelated to the defendant himself. These collateral facts are

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[5] This Court has decided three capital cases in which juries found the gang special circumstance true: *People v. Sandoval* (2015) 62 Cal.4th 394, *People v. Johnson* (2016) 62 Cal.4th 600 and *People v. Miracle* (2018) 6 Cal.5th 318. None of the defendants in these cases challenged the validity of section 190.2, subdivision (a)(22).

admitted because they either relate to the existence of a criminal street gang or to a defendant's active participation in it.

In regard to the criminal street gang element, the prosecution must prove the existence of a group, but it need not demonstrate that the defendant is part of it. (See *People v. Valdez* (2012) 55 Cal.4th 82, 132 [gang membership is not an element of the gang enhancement]; CALCRIM No. 736 [People do not have to prove defendant was an actual gang member to establish gang special circumstance].) In fact, no case has held that the prosecution need show that the defendant even knew the group's members. The prosecution must also prove that the group has a common name, sign or symbol, but not that defendant knew of them or ever used them. (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1101 [element was satisfied by gang officer's testimony that the gang used a particular name and symbol].)

Regarding the group's primary activities, there is no requirement that the defendant has ever engaged in them or even knows what they are. (See *People v. Margarejo* (2008) 162 Cal.App.4th 102, 108 [gang officer's testimony that gang's primary activities included murder was sufficient evidence of that element].) And, evidence proving the requisite pattern of criminal gang activity may be established by crimes committed by persons other than the defendant whom he may not ever have met. (see e.g., *People v. Tran* (2011) 51 Cal.4th 1040, 1045-1407 [nothing indicated that defendant Tran knew gang member Mata who committed one of the predicate offenses].) In the instant case, there was no evidence that appellant

had ever met Hector Mendoza, the individual whose drive-by shooting was offered as a predicate offense.

Accordingly, the existence of a criminal street gang may turn on evidence that has little or no connection to the defendant. If so, the defendant is put in the position of disputing the conduct or status of people other than himself in order to contest the existence of a criminal street gang. Indeed, how could a defendant dispute the existence of a criminal street gang? Would he have to challenge the status of its purported members, even if he does not know them? How would he counter the gang officer's claim that the group identified with a color or symbol if he is not a member? How would the defendant refute the commission of predicate offenses used by the state to establish the requisite pattern of criminal gang activity if he was not involved in them? Moreover, whether or not the defendant has personal knowledge of these collateral facts, to dispute them would require a defendant to wage a trial-within-a-trial – this kind of collateral litigation simply does not occur when other special circumstances are at issue.

Further, litigation of whether the defendant was an active participant in a gang – aside from the question of whether the group qualifies as a criminal street gang – almost inevitably will involve facts irrelevant to the charged offense. "Active participation" is defined as involvement in a gang that is more than nominal or passive. (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) The prosecution typically uses a police officer testifying as a gang expert to establish this element. (See, e.g., *People v.*

Hill (2011) 191 Cal.App.4th 1104, 1113.) The officer may rely on all kinds of information to opine that the defendant was an active participant in a gang, including the defendant's association with purported gang members, his history of being seen in particular geographic areas or wearing particular clothing, and his prior criminal activity. (See, e.g., *People v. Castenada*, *supra*, 23 Cal.4th at p. 752-753 [proof of defendant's active participation included evidence of his seven prior contacts with law enforcement in the presence of known gang members].) None of these factors need be related to the charged offense. Thus, to dispute this opinion testimony, a defendant might be forced to litigate a wide variety of otherwise irrelevant, but likely very prejudicial, allegations.

As previously noted, the Eighth Amendment demands heightened reliability in capital cases that encompass the guilt phase of the trial. (*Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) Forcing a defendant to litigate so many facts tangential to the charged offense, and even to himself, unconstitutionally diminishes the reliability of both phases of a capital trial in which a gang-murder special circumstance has been alleged.

A statute which interjects irrelevant considerations into the factfinding process of a capital case introduces an intolerable level of uncertainty and unreliability because it diverts "the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the

defendant is guilty of a capital crime." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 642.)

The introduction of prejudicial, collateral facts also contravenes the Eighth Amendment's requirement of an individualized penalty determination based on the character of the defendant and the circumstances of his crime. (See *Zant*, *supra*, 462 U.S. at p. 879; see also *United States v. Rivera* (E.D.Va. 2005) 405 F.Supp.2d 662, 670-671 (*Rivera*).) In *Rivera*, the district court granted defendant's motion to strike a non-statutory aggravating factor related to his alleged membership in the MS-13 criminal street gang because it would not assist the jury in making the required individualized determination of whether defendant Rivera should be sentenced to death. The court elaborated: "The purpose of the selection phase of sentencing is to focus on *this* individual's characteristics, not on the possible guilt of those with whom he associated." (*Rivera*, *supra,* 405 F.Supp.2d at p. 670.)

The *Rivera* court was also concerned about the reliability of such aggravating evidence because it would include general statements about MS-13 as a group, including allegations that the gang engaged in uncharged murders and assaults. Such allegations would be virtually impervious to cross-examination as well as irrelevant to the defendant's individual actions or intentions. (*Rivera, supra,* 405 F.Supp.2d at p. 671.) In sum, the court stated: "The jury in this case is charged with rendering a verdict as to the conduct of Denis Rivera on a particular date, not the conduct of all members of MS-13 for an unlimited period of time." (*Ibid.*)

In the penalty phase of a California capital trial, the jury must take into account the "circumstances of the crime of which the defendant was convicted . . . and the *existence of any special circumstances* found to be true . . . ." (§ 190.3, subd. (a), italics added; see also, *People v. Anderson* (2018) 5 Cal.5th 372, 392-393 [under factor (a), jury entitled to consider at the penalty phase all guilt phase evidence offered to establish circumstances of the offense].) Thus, the jury is directed to consider all of the evidence supporting a gang-murder special circumstance, whether or not it related to the *defendant's* character and conduct. Under factor (a), the jury would be free to consider the violent conduct of others and defendant's association with them. It could consider the defendant's own past non-violent interaction with the gang as evidence of his bad character. It could ultimately determine that a defendant is deserving of death because of his connection to a particularly violent gang – even if he had never met the members who committed the violence or participated in it. Such a conclusion, however, would deprive a defendant of the individualized sentencing consideration to which he is constitutionally entitled.[6]

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[6] Although appellant's jury was instructed during the guilt phase that it could not consider evidence concerning the criminal activities of others offered to prove the predicate offenses as evidence of appellant's bad character or criminal disposition, or as proof of his mental state with respect to the capital crime (20RT 1759-1760), at the penalty phase, the jury was instructed to disregard all of the instructions it was given in the guilt phase and follow only the instructions given in the penalty phase. (25RT 3196-3197; 6CT 1508.) The trial court did not give the same limiting instruction in the penalty phase. The jury would thus have

(footnote continued)

C. When the Gang-Murder Special Circumstance Is Alleged, a Capital Trial Is Unconstitutionally Tilted in the Prosecution's Favor

The due process clause demands that the state administer its capital-sentencing procedures even-handedly. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 361.) Moreover, if a state chooses to authorize capital punishment, under the Eighth Amendment, "it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia*, *supra*, 446 U.S. 420, 428.) Yet proof of section 190.2, subdivision (a)(22) is driven by police opinion testimony which is based on information available largely only to law enforcement. This unfairly and prejudicially hampers the defense and creates the risk of arbitrary and unreliable findings.

1. A Gang Officer's Opinion Testimony Is All-Encompassing and Very Powerful

A police officer testifying as a gang expert is permitted to opine on every element necessary to prove that an otherwise noncapital murder falls within the ambit of the gang-murder special circumstance.

An officer can speak to each of the elements of a "criminal street gang." He can testify to the existence of a group of three or more persons who identify with a common name, symbol or sign. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620 (*Gardeley*).) He can

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understood that it could consider all of the gang evidence, irrespective of whether it pertained specifically to appellant, in reaching its penalty determination.

opine that one of the group's primary activities is an offense specified in subdivision (e) of section 186.22. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) He can state his belief that the group has engaged in a pattern of criminal gang activity. (*People v. Albillar* (2010) 51 Cal.4th 47, 53.) Indeed, the officer may opine that a group *is* a "criminal street gang." (*People v. Hill*, *supra*, 191 Cal.app.4th at p. 1112.)

A law enforcement expert is not limited to opinions regarding the existence of a criminal street gang, however. He may also opine on other elements relevant to the gang-murder special circumstance, including whether the defendant was an active participant and/or member of the gang at the time of the homicide. (See *People v. Castenada*, *supra*, 23 Cal.4th at pp. 745-746 [gang officer testified that defendant was a member].) And, at least by way of hypothetical question that closely matches the facts of the case, the officer may testify that the defendant killed to further the activities of the gang. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1041 [hypothetical regarding § 186.22, subd. (b)].)

Gang scholars have remarked on the outsized impact law enforcement officers have when they are permitted to opine specifically about the elements at issue in a gang prosecution. Sociologist Victor Rios observes that the ability to rely so heavily on police officers as experts is unique to the gang context. (Rios & Navarro, *Insider Gang Knowledge: The Case for Non-Police Gang Experts in the Courtroom* (2010) 8 Crit. Crim. 21, 24 (*Insider Gang Knowledge*).) Law enforcement gang experts are "powerful agents" who "can state opinions based on circumstantial evidence

that would not be allowed in most other criminal cases." (*Id.* at p. 25.) Rios concludes that permitting law enforcement personnel to be "the ultimate source of knowledge for judges and juries" is unacceptable. (*Id.* at p. 35.)

Other commentators have pointed out that even general testimony about the culture and habits of street gangs has "incredible evidentiary power." (Note, McGinnis & Eisenhart, *Interrogation Is Not Ethnography: The Irrational Admission of Gang Cops as Experts in the Field of Sociology* (2010) 7 Hastings Race & Poverty L.J. 111, 126.) They explain:

> . . . the gang expert can provide juries with a motive for the crime underlying the gang charge, divine the meaning of obscure graffiti to show identity and an admission of the crime, explain why the prosecution does not have any credible witnesses to support their theory of the case, and explain why a witness would say the defendant was not where the police say he was. The gang expert's opinion enables a prosecutor to cast a wide net to establish criminal liability for seemingly innocent behaviors that are not obviously related to the alleged crime. Police officer gang experts can do all this because they purport to understand "gang culture."

(*Ibid.*)

The power of such testimony is exacerbated by the minimal constraints placed on gang officers as expert witnesses, who testify "at the limits of reality if they so choose . . . ." (Klein, *Gang Cop: The Words and Ways of Officer Paco Domingo* (2004) p. 173 (*Gang Cop*).) When unchecked, gang officer testimony "can be used to unfairly disadvantage the defendant and even to threaten the constitutional right to a fair trial. [Fn.] This is harmful to both a defendant and to the criminal justice system." (Nevin,

Conviction, Confrontation, and Crawford: Gang Expert Testimony as Testimonial Hearsay (2011) 34 Seattle U.L. Rev. 857, 873-874 (*Conviction, Confrontation, and Crawford*).)

2. Gang Officers Are Members of the Prosecution Team Rather Than Neutral Experts

Given the immense influence police officer experts wield in a case with a gang-murder special circumstance, the need for impartiality in such witnesses is manifest. The role of a gang officer is not a neutral one, however. Police officers are part of the prosecution team. (See *In re Brown* (1988) 17 Cal.4th 873, 879 ["prosecution team" includes both prosecutorial and investigative personnel].) Indeed, as eminent gang scholar Malcolm Klein observes, the role of a law enforcement officer as gang expert is clear: "to testify with a view toward conviction and maximum sentence." (*Gang Cop*, *supra*, p. 168.)

Further, these officers receive training and work in an environment that ingrains them with a narrow perspective that views street gangs and gang members as an enemy to be eradicated. Their education is not designed to produce impartial experts with a multifaceted understanding of street gangs. The Honorable Jack Nevin, a trial judge in the state of Washington, explains the dilemma:

> While a particular police organization might require some training of its gang experts, rarely is that an objective training or certification process. Instead, it is police officers regulating the skills and training of other police officers. Certainly, this is not an inappropriate approach for most police training. But the area of gang

> expertise has such an extraordinary impact on case disposition that it cries out for an objective and neutral certification standard.

(*Conviction, Confrontation, and Crawford*, *supra*, at p. 875, fn. 120.)

In California, the training necessary to become a gang officer "expert" is primarily accomplished in courses offered by POST, the Commission on Peace Officer Standards and Training. These courses are open only to law enforcement personnel and are taught by other officers. (Ridley, *Down By Law: Police Officers as Gang Sociology Experts* (2016) 52 Crim. L. Bull., art 7, p. 11.) The online descriptions of these classes suggest that the instruction is focused on the skills necessary to facilitate the prosecution and incarceration of persons believed to be gang members, rather than on any empirical exploration of the phenomenon of street gangs.[7] This is not the kind of training a neutral expert receives.

Once trained, California gang officers often work in special units tasked with the suppression of street gangs. But the culture

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[7] State of California Commission on Peace Officer Standards and Training, *California POST Course Catalog*, Gangs, Gang Investigations <https://catalog.post.ca.gov/Default.aspx> (as of Dec. 30, 2019). Gang officers may also receive additional training at conferences put on by groups such as the California Gang Investigators' Association (CGIA). Because membership in these organizations and the training they offer are available only to law enforcement personnel, the content of the training cannot be objectively assessed. But the fact that the CGIA's logo is a graphic of the Grim Reaper in a graveyard with "RIP" and "Gangs" suggests a less than neutral approach.

that develops in these insular, isolated settings does not foster objectivity. In fact, it may create a unique set of problems. Professor Klein explains why this insularity is dangerous: "[s]pecial challenges, special tactics, and special intelligence combine with remote supervision to produce cohesive bands of specialists inclined to write their own rules and bend others in the pursuit of righteous goals." (*Gang Cop*, *supra*, at p. 176.)

The ease with which specialized gang units can derail is illustrated by both the Rampart scandal almost two decades ago, and the recent informant scandal in Orange County. In 1999, Los Angeles Police Department (LAPD) officer Rafael Perez was arrested for stealing cocaine from an LAPD evidence room. Perez was in the Rampart Division of LAPD's anti-gang unit, called CRASH (Community Resources Against Street Hoodlums). His arrest led to the revelation of misconduct and corruption at epic levels. (*Gang Cop*, *supra*, at pp. 182-191.) In 2000, a review panel described the scandal in these terms:

> Rampart CRASH officers developed an independent subculture that embodied a "war on gangs" mentality where the ends justified the means, and they resisted supervision and control and ignored LAPD's procedures and policies . . . . [CRASH] routinely made up its own rules and, for all intents and purposes, was left with little or no oversight. [Fn.] As a result, Los Angeles is now faced with a police corruption scandal of historic proportions that involves allegations of not just widespread perjury, false arrest reports, and evidence planting, but also incidents of attempted murder and the beating of suspects. . . . The consequences of the Rampart scandal cannot be overstated.

(*Report of the Rampart Independent Review Panel* (2000) Exec. Summ., p. 2.)[8]

The scandal was shocking but not unpredictable. Professor Klein explains: "This Rampart story is bad; it's horrible. Yet to people knowledgeable about special units in policing, it was not all that surprising." (Gang Cop, *supra*, at p. 187.) Moreover, the misconduct and corruption were not limited to the Rampart Division of CRASH. Perez asserted that "90 percent of the officers that work CRASH, and not just Rampart CRASH, falsify a lot of information. They put cases on people.'" (*Id*. at p. 186.)

Significantly, it was eventually recognized that the other institutional players had failed to provide the kind of checks that might have prevented such widespread misconduct. The scandal did not result from the actions of a few rogue gang officers but rather from a "total systems failure" that included every institution in the criminal justice system. (Blue Ribbon Rampart Review Panel, *Rampart Reconsidered: The Search for Real Reform Seven Years Later* (2006) Exec. Summ., p. 7 (Blue Ribbon Panel).) Emphasizing that as of 2006 there had yet to be a full accounting of the scandal and that little had changed, the Blue Ribbon Panel recommended a county-wide "comprehensive integrity audit." (*Id*. at p. 16) It determined that Los Angeles

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[8] More than 70 police officers were implicated in misconduct; 40 were fired, relieved of duty or disciplined and another ten resigned. Nearly 150 criminal convictions were reversed as a result of falsified evidence and police perjury and many more cases were dismissed. (*Gang Cop*, *supra*, at pp. 184-185.)

County's criminal justice system did not have checks robust enough to prevent misconduct and perjury. (Blue Ribbon Panel, Full Report, p. 78.) It stated:

> The Rampart CRASH scandal revealed the criminal justice system's failure to prevent the conviction of innocent people. Every institution failed to take a proactive stance in preventing and prosecuting police misconduct and perjury that leads to such wrongful convictions. [¶] Years after the scandal, virtually nothing has changed. The Office of the District Attorney and the Office of the United States Attorney continue to view police misconduct cases as isolated, historical cases that can be addressed with traditional investigative and prosecutorial measures.

(Blue Ribbon Panel, Full Report, p. 78.)

The Orange County informant crisis stands as proof that what happened in CRASH was not an aberration. Discovery litigation in a death penalty trial revealed substantial misconduct in the prosecution of several gang and homicide cases, primarily involving the planting of jailhouse informants by law enforcement in hopes of soliciting incriminating statements from other inmates facing charges. Murder charges in three cases were dropped, all involving an informant who was both a gang member and serial killer. The "snitch" was "handled" by a veteran Santa Ana Police Department (SAPD) gang detective who promised him that the rewards he would reap would not be disclosed. (See Saavedra, *Here is why an admitted killer walked free*, Orange County Register (Oct. 22, 2014); Moxley, *Tony Rackauckas' Truth or Consequences: DA Continues Dropping Cases to Avoid Disclosures*, OC Weekly (Oct. 1, 2014); Dalton, *More Murder Charges Dropped in Wake of DA Informants Case*,

Voice of OC (Sept. 29, 2014).) Murder charges in a fourth case were never brought, due to the inconsistent characterization of the suspect's gang membership made by the former long-term head of SAPD's Gang Task Force. (Moxley, *OC prosecutors mischaracterized Henry Cabrera's gang ties for more than a decade – and now it's coming back to bite them*, OC Weekly (Aug. 21, 2014).)[9]

In sum, such heavy reliance on expert witnesses who are inculcated with a one-sided perspective of street gangs and operate as an integral part of the prosecution team is inimical to a fair and reliable death penalty trial.

3. The Defense Is at a Huge Disadvantage

In comparison to the multitude of advantages the prosecution wields in cases with gang allegations, the defense is at a distinct disadvantage.

Stereotypes about gangs are so powerful and enduring that the defense starts at a severe disadvantage. (Hagedorn and

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[9] A gang unit in the Los Angeles County Sheriff's Department was also identified as problematic. The L.A. Times reported: "Seven deputies were fired in 2013 after an investigation into the Jump Out Boys, a group of gang enforcement officers who are accused of glorifying shootings by deputies. Their signature tattoo was a skeleton holding a revolver. Whenever a deputy in the group was involved in a shooting, he would earn extra ink of smoke coming out of the gun." (Lau and Rubin, *After decades of problems, new allegations surface of a secret clique within L.A. County Sheriff's Department*, L.A. Times (July 10, 2018) <https://latimesblogs.latimes.com/lanow/2013/02/sheriff-fires-gang-unit-clique.html> (as of Dec. 30, 2019).

MacLean, *Breaking the Frame: Responding to Gang Stereotyping in Capital Cases* (2012) 42 U. Memphis L. Rev. 1027 (*Breaking the Frame*).) These stereotypes have been disseminated and repeated by mass media. (*Id.* at p. 1052.) Police expert testimony activates and reifies them, "seiz[ing] on society's predisposition to simplify complex matters and reinforce beliefs consistent with popular stereotypes." (*Id.* at p. 1040.) Confronting these fixed views is daunting, as Hagedorn and MacLean explain:

> With cases involving gang members . . . jurors may seem immune to a compelling counter-narrative. Their personal framework for evaluating a defendant's culpability can be almost impermeable. Any counter-narrative about the defendant that challenges [jurors'] preconceived ideas about gangs may simply be disregarded or misinterpreted . . . .

(*Breaking the Frame*, *supra*, at p. 1028.)

Moreover, the defense faces an uphill battle trying to counter the prosecutor's police officer expert with one of its own. Given the number of gangs in California compared to the limited number of potential non-officer experts, it may be difficult if not impossible to find an expert, such as an academic, who has intimate knowledge of the particular gang to which the defendant allegedly belongs. (*Gang Cop*, *supra*, at p. 165.) Yet sometimes a trial court may only want to hear information about the gang at issue rather than about gangs more generally. (*Ibid.*)

Neither will an expert retained by the defense have access to the wealth of basis evidence readily available to the prosecution officer expert. The latter has a vast collection of crime and intelligence reports, databases, and other information exclusively available to him. This point is readily established in appellant's case

by the fact that the trial court denied appellant's motion to compel discovery of statistics maintained by the Visalia Police Department regarding the number and types of crimes committed by NSV gang members and associates. (11RT 153.) The court accepted the prosecutor's representation that no such statistics existed,[10] but also ruled that "the reports would be overly cumbersome and burdensome and . . . they will not, in my estimation, lead to admissible evidence." (*Ibid.*) Furthermore, the trial court quashed appellant's subpoena deuces tecum seeking data regarding NSV crimes from the CalGang database.[11] (12RT 169.) Without these kinds of resources, a defense expert will have a formidable task in convincing the jury that he or she knows as much as the prosecution's expert. Not surprisingly, Klein concludes "it is the unusual case that can call on an equally expert defense witness." (*Gang Cop*, *supra*, at p. 173.)

The defense is also significantly hampered in cross examining the state's officer expert. The experience of an officer expert comes

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[10] It appears that the prosecutor's representation that such statistical information did not exist was inaccurate. The prosecution's gang expert, Luma Fahoum, acknowledged that such statistics were indeed maintained by the Visalia Police Department. (20RT 1805.)

[11] CalGang is a statewide database "that houses data on members of criminal street gangs, descriptions, tattoos, criminal associates, locations, vehicles, field interviews, criminal histories and activities." (State of California, Department of Justice, Office of the Attorney General, *What is CalGang* (2019) <https://oag.ca.gov/calgang> (as of Dec. 30, 2019).)

from talking to alleged gang members, yet the defense has no way of knowing who these informants were, what they said or the contexts under which they were contacted.[12] Thus, the defense is hard pressed to effectively test the reliability of this information or to determine whether it in fact supports the officer's opinion.

The fact that law enforcement officers as gang experts primarily rely on hearsay for their opinions creates another problem for the defense. For decades, a gang expert was free not only to rely on hearsay but also to relate it to the jury, pursuant to the rationale that it was not being offered for the truth but only to support the expert opinion. (*Gardeley*, *supra*, 14 Cal.4th at p. 619.) In 2016, this Court retreated from this part of *Gardeley*, holding that the basis evidence upon which a gang expert relies *is* offered for its truth. Therefore, an expert may not relate it to the jury; rather, it must be independently established by non-hearsay evidence or (if not testimonial) admitted pursuant to a hearsay exception. (*People v. Sanchez* (2016) 63 Cal.4th 655 (*Sanchez*).)

Under *Sanchez*, however, an expert may still *rely* on hearsay evidence in forming opinions. (*Sanchez, supra,* 63 Cal.4th at p. 687.) The question thus becomes how defense counsel can meaningfully test the proffered opinions without herself eliciting the inadmissible hearsay. This Court has yet to address this conundrum. But prior to *Sanchez*, legal commentators recognized the difficult position a criminal defendant faces when testimonial hearsay is used by a

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[12] Officer Fahoum testified she learned "what's really happening on the streets" from talking to gang members. (20RT 1740.)

gang expert against him. For example, Professor Seaman observed that if the defendant chooses to cross-examine the expert concerning the testimonial hearsay, he will lose the opportunity to object to its disclosure based on confrontation grounds. (Seaman, *Triangular Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony* (2008) 96 Geo. L.J. 827, 829.) Calling the situation a "catch-22," Seaman contends that it puts the "defendant in the untenable position of having to make a choice between two strategies, either of which threatens to deny his constitutional rights." (*Id.* at p. 836.)

All told, the defense is hamstrung – in comparison to the state – in a gang prosecution. Professor Klein, who has studied street gangs for decades, interviewed hundreds of gang-involved youth and over 250 gang officers, and testified in court as an expert, concludes:

> It has been my distinct impression that gang cases in court are out of balance. The bulk of the armament, both evidence and jury assumptions, favor the prosecution. Further, on average, the prosecution has greater resources to call on, including gang experts, officer credibility, case investigators, and special technologies.

(*Gang Cop*, *supra*, at p. 159.)

4. The Expansive Use of Police Officers as Gang Experts Has Been Criticized

Judges and scholars have questioned the fairness of the pervasive use of police officers as gang experts.

In 2008, the Second Circuit Court of Appeals chronicled "The Emergence of the Officer Expert." (*United States v. Mejia* (2nd Cir. 2008) 545 F.3d 179, 188 (*Mejia*).) The *Mejia* court explained that the

law enforcement officer as an expert witness began emerging in the 1980's, initially to explain jargon in organized crime cases. The use of such witnesses then spread to a broader range of issues, including the structure and operations of street gangs. (*Id*. at pp. 188-190.) The court lamented, however, that the role of law enforcement experts had blurred:

> An increasingly thinning line separates the legitimate use of an officer expert to translate esoteric terminology or to explicate an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinion for factual evidence.

(*Mejia*, *supra*, 545 F.3d at p. 190.)

The likelihood of illegitimate use of officer experts grows when their testimony moves from general to specific. When an "officer's purported expertise narrows" from street gangs generally to a particular gang:

> . . . the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them. The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt.
>
> In such instances, it is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict—even more so when that expert happens to be one of the Government's own investigators.

(*Mejia*, *supra*, 545 F.3d at pp. 190-191.)

Judge Nevin has also expressed concern about the dual role a gang officer often plays as both fact witness and expert witness.[13] Demonstrating how expert testimony from law enforcement usurps the jury's role, Judge Nevin states:

> Typically, allowing the gang expert to testify as a fact witness has the effect of corroborating other factual testimony in the case and providing an "expert" summary of what the jury has heard from other fact witnesses. The gang expert's dual role was never contemplated by the rules of evidence, let alone the Anglo-American common law. . . . When the officer expert comes to court and simply disgorges his factual knowledge to the jury, the expert is no longer aiding the jury in its fact finding; he is instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense.

(*Conviction, Confrontation, and Crawford*, *supra*, at p. 875.)

The testimony of law enforcement personnel as gang experts is often justified by likening what they do to social science. In *Mejia*, *supra*, 545 F.3d 179, the court compared them to "a sociologist describing the inner workings of a closed community" or an anthropologist "equipped by education and fieldwork to testify to the cultural mores of a particular social group . . . ." (*Id.* at p. 190.)[14] But Judge Nevin emphasizes that gang officer as expert

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[13] The prosecution's gang expert in the instant case, Officer Luma Fahoum, testified both as an expert witness and a fact witness. Appellant argued in his opening brief that the trial court failed to instruct the jury how to evaluate Fahoum's dual role testimony. (AOB 215-219.)

[14] Indeed, in *Gardeley, supra,* this Court characterized the culture and habits of criminal street gangs as "'an area of gang

(footnote continued)

creates the opportunity for straying beyond the presentation of sociological or anthropological knowledge and substituting facts learned from investigation into the defendant's case. "If the officer expert goes beyond the limits of his expertise, he loses his status as 'anthropologist/sociologist' and becomes, simply, a fact witness who includes all evidence he considered, regardless of its admissibility . . . . The expert no longer helps the jury understand. Rather, the expert tells the jury what to decide." (*Conviction, Confrontation, and Crawford*, *supra*, at p. 874.)

While Judge Nevin's concern is well taken, it is critical to step back and ask whether gang officers may fairly be compared to social scientists. Social sciences, including sociology, "claim special knowledge of human behavior beyond what standard legal analysis can provide." (Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy* (1989) 38 Emory L.J.1005, 1007 (*Assessing the Value of Social Science*).) Hagedorn and MacLean point out that police officers are rarely knowledgeable of social science studies of gangs and are even dismissive of them. (*Breaking the Frame*, *supra*, at p. 1041.) Klein emphasizes the differences in knowledge sources between gang officers and academics who study gangs. The officers' contact with gang-involved youth come largely or exclusively through the criminal justice system in street stops, arrests and interrogation. In contrast, criminologists see and learn about gang

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sociology and psychology' . . . ." (14 Cal.4th 605, 617 quoting *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.)

members in varied circumstances, only some of which involve the specter of crime. Their base of knowledge derives from "nonconfrontational street observations, private times and home times, and interview and questionnaire responses as well as police and court files. The criminologist sees a far broader spectrum of gang members, gang behaviors, and gang contexts." (*Gang Cop*, *supra*, at p. 49.)

Moreover, when a purported expert's knowledge is based solely on observation, rather than controlled investigation, his opinions "provide little more than common sense can provide." (*Assessing the Value of Social Science*, *supra*, at p. 1078.) Professor Faigman explains that sociologists and other social scientists can offer an "objective" understanding of human behavior only through the application of the scientific method. (*Id*. at pp. 1007-1008.) Indeed, he posits, the "legal relevance of social science findings should depend on their scientific strength; that is, on the ability of social scientists to answer validly the questions posed to them." (*Id*. at pp. 1009-1010, fns. omitted.)

In contrast to findings derived from the application of the scientific method is nonscientific social inquiry – or what Professor Faigman calls "suppositional science." (*Assessing the Value of Social Science*, *supra*, at p. 1013.) Suppositional science offers social science findings that either have not been tested by the scientific method (and perhaps are untestable) or inadequately tested. (*Id*. at pp. 1013, 1052.) Experts using suppositional science rely on their observations to derive general laws or theories claimed to be applicable to a population at large. Such conclusions, however,

"invariably suffer from either the bias of the researcher or the unrepresentativeness of the sample, or both." (*Id.* at p. 1055.) If an expert's observations are not subjected to a rigorous testing process, his or her bias – whether intentional or unintentional – "may manifest itself through selective attention to the expected behavior, thus operating as a self-fulfilling confirmation" of the expert's opinions or beliefs. (*Id.* at p. 1055, fn. omitted.) That is why conclusions based on suppositional science must be tested:

> A subjective view of reality, or hypothesis, attains objectivity through systematic test or, stated another way, attempts to falsify it. Falsifiability or testability represents the line of demarcation between science and pseudo-science, and the strength of particular scientific statements depends on the extent to which they have been tested appropriately.

(*Assessing the Value of Social Science*, *supra*, at p. 1015.) Thus, without testing, it is impossible to know if conclusions drawn from suppositional science are any more valid than informed speculation. (*Id.* at p. 1065.) Such conclusions "should not be presented to jurors through expert testimony . . . because such experts can provide little or no assistance to fact-finders who have their own (and possibly equally valid) suppositions concerning the fact questions they must resolve." (*Id.* at p. 1013.)

Gang officer expert testimony presents a classic case of suppositional science. These officers base their conclusions about whether particular defendants should be categorized as gang members on their unrepresentative field observations, devoid of any empirical testing to determine whether the criteria they employ are accurate. They offer theories about how gang members act and think, without ever subjecting these theories to controlled

investigation which might falsify them. In truth, "[p]olice work with gangs is driven primarily by selective personal experience, stereotypes, and ideology, and seldom by objectively gathered knowledge about their nature." (*Gang Cop*, *supra*, at p. 194.)

Perhaps this lack of objective, systematic inquiry is what leads many law enforcement officers to adopt understandings about gangs that are not supported by empirical evidence. For example, contrary to stereotype, most street gangs are only moderately cohesive. (*Gang Cop*, *supra*, at pp. 44, 54.) Most are small and relatively disorganized. (Abt, *Bleeding Out: The Devastating Consequences of Urban Violence—and a Bold New Plan for Peace in the Streets* (2019) p. 33 (*Bleeding Out*).) When the STEP Act was adopted, this point was well understood. A report by the Los Angeles County District Attorney's Office declared:

> Individual gangs are . . . marginal in their organization. Their cohesion, such as it is, is a product of shared values, family, friendship and neighborhood ties rather than any overarching structure. Most gangs are loosely knit coalitions of small, autonomous cliques that frequently compete – and sometimes fight – with one another. . . .

(Reiner, *Gangs, Crime and Violence in Los Angeles: Findings and Proposals from the District Attorney's Office* (1992) p. 37.) Gang leadership tends to be weak, situational and non-hierarchical. (*Ibid*; see also *Gang Cop*, *supra*, at p. 54.) The reputed code of loyalty is more rhetoric than fact. (*Gang Cop*, *supra*, at p. 54.) Membership tends to be fluid over context and time. (*Id*. at p. 70.) The "blood in, blood out" stereotype that members never leave a gang is also inaccurate; most youth are involved in gangs for only about a year.

(*Id*. pp. 55-56.) "Payback" or retaliation is greatly overblown; while minor confrontations sometimes escalate to serious violence, most do not. (*Id*. at pp. 77, 130, 132.) Gang norms are not well fixed. They are adhered to in some circumstances and ignored in others. (*Id*. at p. 132.)

The gang officer expert in appellant's case is a paradigmatic example of suppositional science in the courtroom. The gang officer expert in appellant's case is a paradigmatic example of suppositional science in the courtroom. Officer Fahoum acknowledged that all of her formal training on gangs had been provided by other law enforcement personnel. (20RT 1738, 1803.) She had no background in behavioral science and had never read a book or article published by a behavioral scientist who had expertise in gang culture. (20RT 1803.) Neither had she ever read any books or any studies that contradicted her own opinions about gangs. (20RT 1804.)

Yet Officer Fahoum went well beyond offering how she had seen some gang members act in the past. She also opined about how gang members *will* act, using her prior observations to predict behavior. For example, Fahoum opined that "fear and intimidation is the main goal for gang members," and "everything is territory" for them. (20RT 1788.) Without empirical inquiry, such a broad statement cannot be supported by one officer's experiences. Fahoum further applied her experience to opine that appellant – or a hypothetical version of him – had shot the victims to defend NSV territory, "answering to the insult of Southerners coming into their territory," as well as to raise his status in the gang. (*Ibid*.) However, Fahoum's experiences with gangs did not equip her to determine

that defense of gang territory and enhancement of personal status were the motivating factors for any particular crime.

5. Conclusion

The high court has reversed criminal convictions in cases where the trial court has applied unjustified and uneven evidentiary standards in a way that favors the prosecution over defendants. (See, e.g., *Green v. Georgia* (1979) 442 U.S. 95, 97 [exclusion of hearsay testimony considered sufficiently reliable to use against the co-defendant in a separate trial denied defendant of a fair penalty phase]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [trial judge who gratuitously singled out defendant's only witness for lengthy admonition on the dangers of perjury, but not prosecution's witnesses, effectively discouraged the witness from testifying and deprived defendant of due process]; *Cool v. United States* (1972) 409 U.S. 100, 103, fn. 4 [jury instruction which in effect told the jury it could convict defendant based solely on accomplice testimony without telling jury that it could acquit on the same basis required reversal]; *Wardius v. Oregon* (1973) 412 U.S. 470, 472 [due process clause forbids enforcement of notice-of-alibi rule unless reciprocal discovery rights are given to criminal defendants].)

In the gang prosecution context, far more than an evidentiary standard is off kilter; the defense is at a fundamental and pervasive disadvantage that erodes the presumption of innocence from the start of the proceedings. Without access to the content of the training classes, the scores of undocumented conversations gang officers have with gang members and others in the community, etc., the defense is seriously disadvantaged and to some extent

shadow boxing. Yet, the likelihood that some or much of the information upon which a gang officer renders his opinion is unreliable is great.

Even if this imbalance of power does not offend due process in a noncapital case, death is different. As previously emphasized, the "State must administer its capital-sentencing procedures with an even hand . . . ." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 361.) There is no similar imbalance between the prosecutor and the defense when it comes to any other special circumstance. But when a gang special circumstance is charged, a capital trial does not operate with an even hand; instead, the defendant must fight for his life with one hand tied behind his back.

D. Litigation of the Gang-Murder Special Circumstance Imbues a Capital Prosecution with Unreliability and Arbitrariness

As discussed earlier, neither eligibility factors nor selection factors may be "'too vague.'" (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 973, quoting *Walton v. Arizona* (1990) 497 U.S. 639, 654.) Both must be part of a process that "is neutral and principled so as to guard against bias or caprice in the sentencing decision." (*Tuilaepa*, *supra*, 512 U.S. at p. 973.) The basic principle is that a factor is not unconstitutionally vague if it has "some 'common-sense core meaning . . . that criminal juries should be capable of understanding.' [Citation omitted.]" (*Tuilaepa*, *supra*, 512 U.S. at p. 973.) A special circumstance also "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more

severe sentence on the defendant compared to others found guilty of murder." (*Zant*, *supra*, 462 US. 862, 877.)

The individual elements of section 190.2, subdivision (a)(22) – including the existence of a criminal street gang, active participation in it, and murder in furtherance of the gang's activities – have been applied in an exceptionally broad manner. When these malleable elements are combined, they inject the litigation of the gang-murder special circumstance with arbitrariness and capriciousness. Thus, they fail to genuinely narrow the class of persons eligible for death, that is, to reasonably justify imposition of the ultimate penalty on some but not others.

1. A Criminal Street Gang Is an Artificial Construct That Does Not Match Reality

Section 186.22, subdivision (f), which defines criminal street gang, is the "linchpin" of the STEP Act. (*In re Nathaniel C.*, *supra,* 228 Cal.App.3d at p. 1000.) In the noncapital context, this Court has determined that the term is not unconstitutionally vague under the due process clause. (*Gardeley*, *supra*, 14 Cal.4th at pp. 622-623.) But the Eighth Amendment requires a different analysis. (*Maynard v. Cartwright*, *supra*, 486 U.S. 356, 361-362.) As appellant will show, each of the elements of a criminal street gang—– – the existence of a group with a common color, sign, or symbol, a designated primary activity and a pattern of criminal gang activity – is so amorphous and easily established that a capital jury is not left with a common-sense meaning it is capable of understanding. As a result, this part of the special

circumstance "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia* [(1972) 408 U.S. 238]." (*Ibid*.)

a. Formal or Informal Group, Sign or Symbol

In 1939, the United States Supreme Court recognized that there existed no legal, lay, or academic agreement as to what constitutes a "gang." It said: "The meanings of that word indicated in dictionaries and in historical and sociological writings are numerous and varied. Nor is the meaning derivable from the common law, for neither in that field nor anywhere in the language of law is there definition of the word." (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453-455, fns. omitted.)

The work of gang scholars confirms that there is *still* no universal consensus on how to define a street gang. (Klein and Maxson, *A Brief Review of the Definitional Problem*, in *The Modern Gang Reader* (Maxson, et al., edits., 2014) p. 3 (*A Brief Review*).) Klein and Maxson explain that because street gangs are informal groups, their essence is not easily described:

> [G]angs don't normally come to us with constitutions, bylaws, charters, organizational charts, or written credos to which members subscribe. Thus, definitional approaches must to some extent be ad hoc and reflective of the definer's experience.

(*A Brief Review*, *supra*, at p. 6.)

Yet the STEP Act purports to definitively state what a gang is. STEP's definition, which contrasts sharply with an academic operationalization of gangs, was:

> . . . carefully crafted in the late 1980s to serve a specific purpose, the establishment of a *legal* category of gangs in order to enhance the ability of law enforcement to suppress gangs and incarcerate gang members. This definition has become widely accepted by public officials and the media as "real," with some unfortunate consequences. Since copied in many states, that law enforcement definition was originally embodied in [the STEP Act].
>
> . . . The legal haziness of "youth gang" or "street gang" is replaced by the critical term *criminal street gang*, and this in turn is defined by reference to the most serious offenses and those that are stereotypical of gang activity. Thus the gang has become reified by police and prosecutors' aims and concerns, with little reference to depictions accumulated over decades by gang research.

(*A Brief Review*, *supra*, at p. 6.)

In fact, the stereotypes embodied in section 186.22, subdivision (f)'s definition of a criminal street gang have been disproved by research data. (Klein, *Gang Cop*, *supra*, at pp. 41-52.) For example, there is no gang composed of only three persons. (*Id*. at p. 48.) Moreover, gangs are no longer understood as informal, street-corner groups but rather as organized, violent criminal conspiracies. With STEP "any sense of the variations in gang structures and activities is lost . . . Reality is replaced by the goals of law enforcement: to label youth as gang members and to incarcerate them for as long as possible. . . ." (*A Brief Review*, *supra*, at p. 6.)

Given the lack of consensus on what constitutes a gang, it is not surprising that the legal definition varies by jurisdiction. The National Gang Center's survey of anti-gang laws in the United States catalogs these differences. (*Brief Review of Federal and State Definitions of the Terms "Gang," "Gang Crime," and "Gang Member*," National Gang Center (as of Dec. 2015)).[15] For example, in Arizona a gang may consist of one member, but in Washington, D.C. it must have at least six members. (*Id*. at pp. 6-11.) In Illinois, a gang is defined as a "[c]ombination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining," while in Arkansas it is defined as a "group" and in Nevada as "[A]ny combination of persons." (*Id*. at pp. 6, 7, 9.) And of the approximately 45 jurisdictions that statutorily define a gang, only 27 of them require proof of a common name, identifying sign, or symbol. (*Id*. at p. 2.)

b. Primary Activities

The "primary activities" element in section 186.22, subdivision (f) might assist section 190.2, subdivision (a)(22) in satisfying the Eighth Amendment if it served to rationally and reliably limit application of the gang-murder special circumstance to a defendant who murders while participating in a violent criminal group. However, in its current iteration, this element is so broad and easily established that it contributes to, rather than prevents, the unreliable and arbitrary determination

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[15] <https://www.nationalgangcenter.gov/content/documents/definitions.pdf>

of whether the group defendant is allegedly involved with is a criminal street gang. Reliability and rationality are further undermined by academic research indicating that violent crimes are *not the primary activities* of street gangs and by the routine admission of vague but highly prejudicial testimony from law enforcement experts.

The primary activities element is now so inclusive it applies to non-violent and non-serious crimes. Under the STEP Act as originally enacted, proving the existence of a criminal street gang required the prosecution to establish that one of the group's primary activities was among seven enumerated crimes. (Baker, *Stuck in the Thicket: Struggling With Interpretation and Application of California's Anti-Gang STEP Act* (2006) 11 Berkeley J. Crim. L. 101, 114 (*Stuck in the Thicket*).) Section 186.22, subdivision (e) has been expanded, however, and currently includes 33 offenses. Now a group may be designated as a criminal street gang if its primary activity is one of all but five of these specified crimes. (§ 186.22, subd. (f).) And, although the STEP Act was enacted to combat crimes committed by violent street gangs,[16] the 28 qualifying offenses are comprised of more nonviolent offenses than violent ones, and include such mundane offenses as auto theft and felony vandalism. (*Stuck in the Thicket*, *supra*, at pp. 114-115.) In fact, a group which engages in graffiti may constitute a criminal street gang under section 186.22,

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[16] Findings accompanying adoption of the STEP Act indicate it was motivated by a "state of crisis" caused by "violent street gangs." (§ 186.21)

subdivision (f). (See *People v. Superior Court (Johnson)* (2004) 120 Cal.Ap.4th 950, [no due process violation to prosecute defendants pursuant to § 186.22, subds. (a), (b) and (d), where the primary activity of the criminal street gang was felony vandalism].)

Not only is the list of qualifying primary activities exceedingly broad, but there are few limitations on how this element may be proven at trial, which decreases the likelihood that this critical element will be reliably adjudicated. Some years ago, in *People v. Sengpadychith*, *supra*, 26 Cal.4th 316, this Court appeared to set some boundaries on this element. It stated: "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. . . . That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . ." (*Id*. at p. 323.) The Court went on to explain that sufficient evidence of such activities "might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*Id*. at p. 324.)

However, the Court in *Sengpadychith* also cited with approval *Gardeley*, *supra*, 14 Cal.4th 605, in which the primary activities element had been proven solely by the opinion of a police officer testifying as a gang expert. (*Sengpadychith, supra,* 26 Cal.4th at p. 322.) Now, the primary activities element is routinely established by nothing more than an officer's say-so. (See, e.g., *People v. Margarejo*, *supra*, 162 Cal.App.4th at p. 107

[evidence sufficient where officer testified that gang's primary activities "'range from simple vandalism and battery, and can extend all the way to murder. They also include consolidated weapons, carjackings, robberies and a lot of narcotic related offenses'"]; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330 [officer's opinion testimony sufficient]; *People v. Duran* (2002) 97 Cal.App.4th 1148, 1465 [evidence sufficient where, when asked about gang's primary activities, officer replied "'There's several. The main one is putting fear into the community [¶] Now, when I say that, what I mean is often these gang members are committing robberies, assault with deadly weapons, narcotics sales, and they're doing it as a group. [¶] And in doing so, they start claiming certain territories within the city . . . . [¶] And they're controlling either the narcotic sales in that area, they're committing the robberies in this area, all for the purpose of fear and intimidation of the community'" (italics omitted)].)

Sengpadychith also held that an officer's opinion regarding a gang's primary activities may take into account the charged crimes. (*Sengpadychith, supra,* 26 Cal.4th at p. 320.) Indeed, it may be based *only* upon the pending charges. (*People v. Galvan* (1998) 68 Cal.App.4th 1135, 1137-1142 [sufficient evidence where officer opined that charged offenses of attempted murder, assault and robbery alone constituted evidence of the gang's primary activities].)

People v. Martinez, *supra*, 158 Cal.App.4th 1324, illustrates how little is needed to establish this essential element. In *Martinez*, an officer opined that the primary activities of the

defendant's gang included robbery, assault, theft and vandalism. Defendant Martinez objected that there was no evidence to show how the officer knew of this information, how he had obtained it, or whether it was reliable. Arguing that the testimony lacked foundation, Martinez asserted it was insufficient to establish the group's primary activities. The reviewing court disagreed, relying on the officer's experience. It stated that he "had both training and experience as a gang expert. . . . His eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffices to establish the foundation for his testimony." (*People v. Martinez*, *supra,* 158 Cal.App.4th at p. 1330.)

Martinez demonstrates, then, that the language in *Sengpadychitch* purporting to give some substance to the primary activities element in section 186.22, subdivision (f) means little. No empirical showing is required; no statistically verifiable evidence must be presented. And because this element may be proven by nothing more than the ipse dixit of a police officer, there is no effective way to disprove it.

Even apart from the fact that the primary activities element can be proven with simply a conclusory opinion, it is important in the capital context to recognize that the notion street gangs are *primarily* engaged in crime is empirically untrue. Research demonstrates that most street gang activity is non-criminal. (*Gang Cop*, *supra*, at p. 43.) Klein tells us what gang members spend most of their time doing:

> Many of them go to school or work, although not as steadily as most of us. And far more than most of us,

> gang members simply do nothing. They hang around, walk around, sit around, loaf, tell exaggerated stories of gang exploits, and otherwise waste the day, often in each other's company. It is, in truth, a fairly boring life . . .

(*Gang Cop*, *supra*, at p. 43.)

When gangs do commit crimes, they are overwhelmingly minor ones. Klein concludes that at least 80 percent of gang crime involves graffiti and other vandalism, petty theft, minor fighting, loitering, burglary, joyriding and auto theft, drug and alcohol use, and small-scale drug sales. (*Gang Cop*, *supra*, at pp. 42, 124, 126.) Serious and violent crimes such as homicide, shootings, aggravated assaults, and robbery "constitute a small portion of all gang crime." (*Id*. at p. 43.)

Klein scoffs when police officers claim that one of a gang's primary activities is to commit drive-by shootings and intimidation, calling that "nonsense." He explains that "No gang has drive-bys and intimidation as a primary activity. . . . Many, perhaps most, street gangs engage in them rarely or even not at all." (*Id*. at p. 170; see also *Bleeding Out*, *supra*, at pp. 33-34 [only a small percentage of gang members commit serious crimes like murder or kidnapping].)

Ironically, the same officer opinion testimony which proves so little may nonetheless be exceedingly prejudicial. When a juror hears that a gang's primary activities are murder, drive-by shootings and other major, violent crimes, she may well assume that the defendant, as a participant in the gang, has engaged in one or more of these unspecified yet apparently ubiquitous offenses.

In sum, while this Court has rejected due process challenges to the primary activities element in noncapital cases, the element has been interpreted in such an expansive and unexacting manner that it leads to the arbitrary and unreliable determination of a criminal street gang's existence in violation of the Eighth Amendment.

c. Pattern of Criminal Gang Activity

The final element in establishing a criminal street gang – a pattern of criminal gang activity – adds almost nothing of substance to the gang special circumstance. As previously discussed, to prove this element, the prosecution must establish the commission of at least two enumerated, or predicate, offenses. (See Arg. I.C.1., *ante*; § 186.22, subd. (e).) There are close to no limits on how the predicate offenses can be proven. Perhaps most significantly, they need not be gang related. (*Gardeley*, *supra*, 14 Cal.4th at pp. 620-625.) One crime will suffice if it was committed by more than one person. (*People v. Loeun* (1997) 17 Cal.4th 1, 10.) The prosecution can rely exclusively on the current charges (*id*. at p. 11) or on crimes previously committed by the defendant (*People v. Tran, supra,* 51 Cal.4th at pp. 1040, 1044, 1046). The state need not minimize the prejudice to defendant by using only offenses committed by other gang members. (*Id*. at pp. 1048-1049.)

A jury is not required to unanimously agree which of the predicate offenses establish the necessary "pattern of criminal activity." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527.) While the last of the predicate offenses must have occurred

within three years of another predicate offense, there is no requirement that any of them occur within three years of the charged crime. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 388.)

In sum, the proof required to establish the pattern element is so insubstantial it fails to aid the gang-murder special circumstance in rationally narrowing, or reliably identifying, those eligible for death.

2. Active Participation in a Criminal Street Gang Is Vague, Unreliable and Arbitrary

The gang special circumstance requires that the defendant must have committed the charged murder while he was an active participant in a criminal street gang. (§ 190.2, subd. (a)(22).) In the noncapital context, this Court has found that the term "active participant" is not unconstitutionally vague. (*People v. Castenada*, *supra*, 23 Cal.4th 743 [construing § 186.22, subd. (a)].) But Castenada did not address whether the term is sufficiently reliable and nonarbitrary for Eighth Amendment purposes. It is not.

To construe active participation, this Court in *Castenada* looked to the dictionary. It declared that active means not passive and to participate is to take part in something. (*People v. Castenada*, *supra*, 23 Cal.4th at p. 747.) The Court thus concluded that active participation denotes participation that is more than nominal or passive. (*Ibid.*) But using synonyms to describe "active" and "participation" does not meaningfully flesh out what is required to satisfy this element.

Moreover, the Court suggested that when a defendant has aided and abetted a felony offense committed by gang members – as

required by 186.22, subdivision (a) – he has "by definition" actively participated in the gang. (*People v. Castaneda, supra,* 23 Cal.4th at p. 752.) If that is the case, however, then the active participation element is superfluous. By analogy, committing a murder to further the activities of a gang – as required by section 190.2, subdivision (a)(22) – necessarily establishes active participation and it too is superfluous. Thus, irrespective of whether this definition provides adequate notice of what conduct is prohibited for due process purposes in noncapital cases, it does not satisfy the Eighth Amendment's vagueness concerns in a capital case because it leaves juries and appellate courts with open-ended discretion to decide whether the element has been proven and whether the defendant deserves life or death as a consequence. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at pp. 361-362.)

It is worth noting that in noncapital gang cases, the active participation element of section 186.22, subdivision (a) is often met by police officer expert testimony that the defendant is a gang member. Although active participation and membership in a criminal street gang are not synonymous (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130), proof of membership is often relied upon to establish active participation (see, e.g., *People v. Sanchez, supra,* 63 Cal.4th at p. 673 [detective opined that Sanchez was a Delhi gang member to prove, inter alia, gang participation pursuant to § 186.22, subd. (a)]). Certainly in this case the prosecution relied heavily upon appellant's purported gang membership to prove the special circumstance. (See Arg. I.D.1.a., *ante*.)

But as appellant has already explained, there is no universally accepted criteria for determining gang membership. (See Arg. III.D.1.a.) As one commentator has observed:

> The lack of a consistent and workable definition of "gang member" not only fails to provide adequate notice to potential offenders and uniform guidance to juries, but it also encourages arbitrary enforcement of gang laws by police agencies throughout California, many of whom disagree as to what constitutes "gang membership" for purposes of monitoring gang activity as the street level.

(*Stuck in the Thicket*, *supra*, at p. 110.) Thus, to the extent membership is used as a proxy for active participation, it adds an additional layer of unreliability and arbitrariness.

3. Murder Carried Out to Further the Activities of a Criminal Street Gang Is Unreliable and Arbitrary

This Court has not elaborated on what it means to murder "to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).) However, if it is defined similarly to the gang-related prong of the section 186.22, subd. (b) gang enhancement, it is insufficient under the Eighth and Fourteenth Amendments.

As noted, a police officer testifying as a gang expert is essentially permitted to tell the jury that this element is satisfied. Through a hypothetical that mirrors the facts of the case being litigated, the officer may expressly state that the hypothetical defendant acted to further the activities of a gang. (See *People v. Vang*, *supra*, 52 Cal.4th at p. 1041 [hypothetical regarding gang

enhancement].)[17] In no other context would an agent of the state be allowed to opine so directly on an element of a special circumstance. For example, to appellant's knowledge, an officer expert could not testify – hypothetically or otherwise – that a killing was carried out for the purpose of retaliation against a government official or judicial officers (see § 190.2, subds. (a)(12)-(13)) or while the defendant was engaged in the commission of a specified felony (§ 190.2, subd. (a)(17)). These, of course, are fact questions for the jury to determine.

Moreover, as previously indicated, gang scholars emphasize that there is no universal understanding of what makes an offense gang related. Law enforcement agencies use varying methods for categorizing crimes as such. (See Arg. III.D.2., *ante*, citing Egley & J. Howell, Highlights of the 2011 National Youth Gang Survey (OJJDP, Sept. 2013) p. 3; McDaniel, et al., *Gang Homicides in Five U.S. Cities* in *The Modern Gang Reader*, pp. 391-392; *Insider Gang Knowledge*, *supra*, at p. 34.)

In fact, Professor Klein doubts the value of expert opinion as to whether a defendant has acted to further or support a gang. He argues they are nebulous concepts often asserted but infrequently established:

> "Support" and "furtherance" in my court experience are assertions made by the prosecution *and never proven*. The court accepts these assertions. Defense seldom

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[17] As mentioned, in this case Detective Sanchez opined that *appellant* – rather than a hypothetical gang member – acted with the required intent. The trial court had to remind him that the question put to him was a hypothetical. (44RT 2117-2118.)

> challenges them. How, after all, can you prove that a gang member's action is purposefully designed to further gang goals? There's no gang treasure to enrich via drug sales, no totem with notches for each successful drive-by, assault, or murder. There's no score sheet on which to record a unit increase in gang status attributable to a payback. *Indeed, to assert furtherance of gang goals is a statement of faith and nothing more.* Having the phrase entombed in the legislation and the penal code does not make it anything more.

(*Gang Cop*, *supra*, at pp. 171-172, italics supplied; see also Yoshino, *California's Criminal Gang Enhancements: Lessons From Interviews With Practitioners* (2008) 18 Rev. of L. & Soc. Justice 117, 131-133 [discussing trend to file gang enhancements for any crime involving a suspected gang member]; *Stuck in the Thicket*, *supra*, at pp. 126-128 [discussing variation in defining crime as gang related].)

E. California Is an Outlier in Predicating a Death Sentence on Gang Conduct

When the ultimate sanction is irrationally imposed, it is presumed excessive. (*McCleksey v. Kemp* (1987) 481 U.S. 279, 301, citing *Furman v. Georgia*, *supra*, 408 U.S. 238.) In determining whether the death penalty is proportionate for a particular crime, the United States Supreme Court has looked to contemporary values that "reflect the public attitude toward a given sanction." (*Id.* at p. 300, internal quotation marks and citation omitted.) "A societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense." (*McCleskey*, *supra*, 481 U.S. at pp. 305-306.)

Thus, it is informative that California is an outlier among death penalty states in predicating capital punishment on gang-

related conduct. Only four other states have death penalty statutes that include gang-related aggravating circumstances. (Lewis, *Death for Association: Assessing the Constitutionality of Gang-Related Aggravating Factors in State Death Penalty Statutes* (2014) 16 T.M. Cooley J. Prac. & Clinical L. 145, 156-157 [citing Arizona, Florida, Indiana and Missouri] (*Death for Association*).)

The list of aggravating circumstances in the Arizona statute includes: "The defendant committed the offense with the intent to promote, further or assist the objectives of a criminal street gang or criminal syndicate or to join a criminal street gang or criminal syndicate." (A.R.S. § 13-751(F)(9).) In Florida, the fact that "[t]he capital felony was committed by a criminal gang member . . ." is one of 16 aggravating factors. (Fla. Stat. Ann. § 921.141(6)(n).) In Indiana, "murder by intentionally killing the victim while committing or attempting to commit" criminal organization activity is an aggravator. (I.C. 35-50-2-9(1)(I).) And in Missouri, it is aggravating if "[t]he murder was committed during the commission of an offense which is part of a pattern of criminal street gang activity . . . ." (V.A.M.S. 565.032 2(17).)

Appellant has found no appellate cases involving the gang-related aggravating circumstances from these four states.[18] This suggests that these aggravators are used rarely, if at all. In contrast,

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[18] There has been suggestion that Florida's aggravating factor would not pass constitutional muster, since it appears to be based entirely on a defendant's status as a gang member. (*Death for Association*, *supra*, at pp. 148-149.)

California's use of the gang-murder special circumstance has been robust. As demonstrated in the Appendix, almost 45 persons have been sentenced to death based, at least in part, on section 190.2, subdivision (a)(22).

Moreover, it appears that in Arizona, Florida, Indiana and Missouri, evidence offered to prove gang-related aggravating circumstances would be introduced during the penalty or sentencing phase of the case, rather than in the guilt phase, as occurs in California. As appellant has shown, the introduction of such prejudicial evidence at the first phase of a capital trial creates the risk of arbitrary and unreliable guilt determinations. California's unique use of gang evidence further supports appellant's claim that section 190.2, subdivision (a)(22) is unconstitutional for the reasons he has advanced.

F. The Special Circumstance Is Disproportionately Imposed on People of Color

"It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." (*Pena-Rodriguez v. Colorado* (2017) 137 S.Ct. 855, 867.) The failure of courts to address the "familiar and recurring evil" of racial bias risks "systemic injury to the administration of justice." (*Id.* at p. 868.) The gang-murder special circumstance creates racial bias that injures the administration of California's death penalty scheme by targeting defendants of color.

A unique approach was recently employed to assess racial disparities in the application of California's special circumstances. (Grosso, et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement* (2019

forthcoming) UCLA L. Rev., p. 16 (*Death by Stereotype*).)[19] As part of an inquiry into whether California's death penalty statute adequately narrows capital eligibility as required by *Furman*, Professor Grosso and her colleagues evaluated the extent to which any particular special circumstance targets defendants based on race or ethnicity. (*Id.* at p. 3.) They found that most of the special circumstances listed in section 190.2, subdivision (a) appear to apply evenly across racial groups. (*Id.* at p. 37.) Some, however – especially the gang-murder special circumstance – narrow death eligibility in a way that targets defendants of color. (*Ibid.*)

The researchers considered over 27,000 convictions of first-degree murder, second-degree murder and voluntary manslaughter that resulted from homicides committed in California between 1978 and June 2002. From this "universe" they developed a stratified sample of 1900 cases. (*Death by Stereotype*, *supra*, at pp. 27-28.) These cases were then coded, based primarily on information from probation reports, for liability of first-degree murder and the factual presence of special circumstances. (*Id.* at pp. 30-33.)

Logistic regression analyses which controlled for culpability and other relevant factors revealed that several special circumstances apply disparately based on the defendant's race. (*Death by Stereotype*, *supra*, at p. 50.) The largest disparity found was for the gang-murder special circumstance, which disproportionately impacted both Latino and African-American

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[19] Available at SSRN <https://ssrn.com/abstract=3354842> (as of Jan. 5, 2020).

defendants. (*Id*. at pp. 43-46.) For Latino defendants the odds that the gang special circumstance would be found or present were 7.8 times higher than the odds faced by similarly situated defendants of other races. For Black defendants the odds were 4.8 times higher. (*Id*. at p. 46.)

The disparity found by these scholars is supported by the racial makeup of those people sentenced to death under the gang special circumstance. There are currently 44 such defendants. They are overwhelmingly Latino (25) and African-American (15); only a few are White (3) and one is Asian. (See Appendix.)[20]

In short, although the gang special circumstance is facially neutral, it operates in a manner that is anything but fair. In fact, it appears "to codify rather than ameliorate the harmful racial stereotypes that are endemic to our criminal justice system." (*Death by Stereotype*, *supra*, at p. 3, fn. omitted.)

The study reported in *Death by Stereotype* was not designed to examine whether Latinos actually committed gang homicides almost eight times as often as other defendants. As indicated, the data for coding applicable special circumstances came from convictions and probation reports. Thus, it was dependent on how the killing was prosecuted and/or characterized by law enforcement. However, law enforcement designation of gang membership is "tremendously over inclusive of young men of color" while

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[20] Appellant is submitting a request for judicial notice pursuant to California Evidence Code section 452 in conjunction with this brief to support the data included in the Appendix.

simultaneously under inclusive of White males. (K. Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation of Pre-Trial Detention* (2011) 23 St. Thomas L. Rev. 620, 622; see also Greene and Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies* (Justice Policy Institute 2007) pp. 33-34 ["law enforcement significantly overestimates the participation of black and Latino youth in gangs and underestimates that of white teens"] (*Gang Wars*); *Gang Cop*, *supra*, at p. 55 [law enforcement tends to discount White gangs such as the skinheads].)[21]

The Justice Policy Institute found that police were approximately 15 times more likely to identify Latinos and Blacks as gang members than Whites. (*Gang Wars*, *supra*, at pp. 36-37.) Survey data contradicts this, however, and shows that gang-involved youth are representative of the demographics of their communities. (Esbensen et al., *Street Gangs, Migration and*

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[21] Groups of racist Whites known as "skinheads" have traditionally been viewed as "hate groups" rather than criminal street gangs. (Simi, *Hate Groups or Street Gangs? The Emergence of Racist Skinheads* in *The Modern Gang Reader*, *supra*, at p 154.) Yet "skinhead groups meet the criteria commonly used to define gangs and thus fall within the same conceptual rubric." (*Id*. at p. 155.) They routinely engage in drug manufacture and distribution, identity theft, home invasions, and other crimes. (*Id*. at pp. 161-162.) California has more white supremacy groups than any other state; the highest concentration of them are in Los Angeles County. (*Tracked and Trapped: Youth of Color, Gang Databases and Gang Injunctions* (Youth Justice Coalition Dec. 2012) p. 9.) But Whites have barely registered in California's gang database for that county. (*Ibid*.)

Ethnicity (2008) p. 118.) Conducting a 15-city study, Esbensen and colleagues found that the rates of White, Black and Latino youth participating in gangs were similar, at 7.3%, 8.3% and 9.0% respectively. (*Id*. at p. 123; see also, J. Howell, Gang Prevention: An Overview of Research and Programs (OJJDP Dec. 2010) p. 3.) Perhaps not surprisingly, they observed that "gang members were white in primarily white communities and gang members were African-American in predominantly African-American communities." (*Migration and Ethnicity*, *supra*, at p. 119.)

Esbensen's findings were also consistent with other survey data. (*Migration and Ethnicity*, *supra*, at p. 123.) Further, such data reveals that youth who admitted gang involvement also self-reported statistically similar rates of committing property crimes, offenses against the person, and drug sales. (*Gang Wars*, *supra*, at p. 38.)

Police fail to recognize Whites as gang involved, however, because they have been trained to believe that gang members are young men of color. Esbensen explains: "You find what you're looking for. The training manuals for police departments, law enforcement experts that lecture to community groups and go to the police officer trainings—they all perpetuate the myth that gang members are racial and ethnic minorities. Cops are trained to look and that's what they find." (*Gang Wars*, *supra*, at p. 43, quoting Esbensen.)

Because police expect that gang members are youth of color, they concentrate their gang enforcement efforts in communities of color. However, because youth seldom have agency over where they

live, they have no way of escaping the over-policing of their neighborhoods and may be unfairly characterized as gang involved based on their style of dress, friends and family and presence in particular areas. (See *Gang Wars*, *supra*, at p. 43.) Alternately, young males in these communities who are gang members may have joined for benign reasons. Gangs have both negative and positive properties. "On the positive side, they provide their members with an identity and status often lacking in youth drawn" to them. (*Gang Cop*, *supra*, at p 43.) Kids join for "something to belong to, for excitement, for protection." (*Id*. at p. 88.) In fact, joining a neighborhood clique is a "normal deviance" for many youth. (*Breaking the Frame*, *supra*, at p. 1059.)

If minorities are especially scrutinized and labeled as gang members, then the disparate application of the gang-murder special circumstance to them is clearly unjust. However, even if it is assumed for the sake of argument that gang members *are* mostly brown and black, and that law enforcement *accurately* identifies who participates in gangs, designating a kind of offense primarily committed by people of color for harsher treatment is morally and constitutionally repugnant. This principle was recognized when the enormous sentence disparities between crimes involving crack cocaine versus powder cocaine were ameliorated. There was no constitutionally defensible reason for proscribing stiffer punishment for possessing or selling crack cocaine, which was used more often by Blacks, than for possessing or selling powder cocaine, which was used more often by Whites. Analogously, singling out gang-related murders for capital punishment – knowing that Latino and African-

American defendants will be disparately impacted – should not be tolerated.

G. Appellant's Convictions and Death Sentence Must Be Reversed

If this Court finds the gang-murder special circumstance to be unconstitutional, it must reverse his conviction and death sentence.

XIII.
APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT AND CALIFORNIA'S DUE PROCESS CLAUSE AND PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE MURDER FOR WHICH HE WAS SENTENCED TO DEATH WAS COMMITTED WHEN HE WAS NINETEEN YEARS OLD

Appellant Refugio Ruben Cardenas was born on July 18, 1984. (1CT 35.) The murder of Gerardo Cortez, for which appellant was sentenced to death, occurred on October 9, 2003, less than two months after appellant turned 19.[22] (1CT103.) Appellant shows below that he is categorically excluded from the death penalty under the Eighth Amendment's prohibition against cruel and unusual punishment and under California's independent prohibition against cruel or unusual punishment (Cal. Const., art. I, § 17) because it was committed when appellant was between the ages of 18 and 21 at the time of the crime. Appellant is also excluded from the death penalty under the due process clause of the federal Constitution and under California Constitution article I, section 7, because the penalty cannot be reliably imposed upon individuals between ages 18 and 21.[23]

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[22] The jury also convicted appellant of the attempted murder of Jorge Montez and Quirino Rosales. (6CT 1485-1486.)

[23] Appellant recognizes that this argument was rejected in *People v. Gamache* (2010) 48 Cal.4th 347, 404-405. However, since this Court's decision in *Gamache*, a national consensus had evolved excluding 18 to 20 years from execution. There is also a significant new body of science regarding this period of late adolescence which was not available to the Court in 2010, and which shows that

(footnote continued)

A. The Death Penalty is Unconstitutional for 18 to 20 Year Olds for the Reasons Articulated in *Roper v. Simmons*

The Eighth Amendment ban on cruel and unusual punishment "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense. [Citation.]'" (*Roper v. Simmons* (2005) 543 U.S. 551 (*Roper)*, quoting *Weems v. United States* (1910) 217 U.S. 349, 367 .) "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." (*Ibid*.; see *Timbs v. Indiana* (2019) __ U.S. __, __; 139 S.Ct. 682, 687 [Cruel and Unusual Punishment Clause of the Eighth Amendment applies to the states].)

In *Roper*, the United States Supreme Court banned the execution of individuals under 18 years old at the time of their crimes. The Court based its ruling on the Eighth Amendment's prohibition of cruel and unusual punishment (*Roper*, *supra*, 543 U.S. at pp. 560-561) and conducted a two-step analysis to reach its decision (*Id*. at p. 564). The Court first emphasized that a national consensus had formed in opposition to the execution of juveniles. A majority of states prohibited the practice, and those states that permitted the practice administered it infrequently. (*Id*. at pp. 564-565.) The Court then conducted an independent proportionality analysis and found the execution of juveniles an excessive punishment given the two justifications for capital punishment,

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imposition of the death penalty on this group is disproportionate and unreliable.

retribution and deterrence. (*Id.* at p. 569.) The Court noted that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Id*. at p. 568, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319 (*Atkins*).) If a capital sentence does not serve those penological objectives with respect to a class of offenders, the sentence is disproportionate.

Citing the advances in the scientific understanding of juvenile behavior, the Court overruled its earlier decision in *Stanford v. Kentucky* (1989) 492 U.S. 361, 379, which upheld the death penalty for juveniles convicted of homicides committed when they were 16 or 17 years old and held that the execution of juvenile offenders violates the Eighth Amendment because the severity of the punishment is categorically disproportionate to the offender's diminished personal responsibility for the crime. (*Roper*, *supra*, 543 U.S. at pp. 571-573.) Relying on that science, it determined that 16 and 17-year-olds have specific characteristics that typify youth, including (1) a lack of maturity and an underdeveloped sense of responsibility, (2) increased susceptibility to negative influences and outside pressures and (3) unformed or underdeveloped character, so that they could not be classified among the worst of offenders. (*Roper*, *supra*, 543 U.S. at pp. 569-570.) These characteristics diminished the culpability of juveniles and, thus, the two main social purposes served by the death penalty, retribution and deterrence, applied with lesser force. (*Id*. at p. 571 [imposition of the death penalty on juveniles does not contribute to either goal because

the culpability or blameworthiness of a juvenile is "diminished, to a substantial degree, by reason of youth and immaturity"].) The Court noted that the risk of executing a juvenile offender despite diminished culpability could not be eliminated by an individualized sentencing regime. (*Id*. at pp. 572-573.) The Court therefore categorically exempted juveniles from the death penalty. (*Id.* at pp. 578-579.)

After *Roper*, the Court began to apply the "children are constitutionally different from adults" rationale to noncapital sentencing. First, in *Graham v. Florida*, the Court barred sentences of life without parole for nonhomicide offenders who were under 18 at the time of their crimes. (*Graham v. Florida* (2010) 560 U.S. 48, 62 (*Graham*).) Two years later, the Court held in *Miller v. Alabama* (2012) 567 U.S. 460, 482 (*Miller*) that the Eighth Amendment prohibits the mandatory imposition of life without the possibility of parole for juvenile offenders.

Consistent with the holdings in *Graham* and *Miller,* in the 14 years since *Roper*, the national consensus has once again evolved. The line between childhood and adulthood must now be moved to age 21, excluding from the death penalty juveniles, such as appellant, who was 19 at the time of the crime. Execution trends and legislative developments show that there is a national consensus that adolescents like appellant be categorically exempted from the death penalty. Moreover, emerging psychological and neurological science conclusively demonstrates that young men and women up to the age of 21, and beyond, exhibit the same three characteristics displayed by those under 18 that diminish their

responsibility, demonstrating that the punishment is disproportionate for that category.

B. Looking at Legislation, Sentencing Practices and Other Objective Criteria, There is a Clear National Consensus That 18 to 20-Year-Olds Should Be Categorically Excluded from the Death Penalty

"[T]he standard of extreme cruelty . . . itself remains the same, but its applicability must change as the basic mores of society change." (*Atkins*, *supra*, 536 U.S. at p. 311, fn.7, citing *Trop v. Dulles* (1958) 356 U.S. 86, 101 (plurality opinion.) "[E]volving standards of decency," in turn, are measured by reference to whether a "national consensus" supports a categorical prohibition on a given punishment. (See *Atkins*, *supra*, 536 U.S. at pp. 312-314.) To ascertain whether or not such a consensus exists, the Court considers "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." (*Roper*, *supra*, 543 U.S. at p. 563.)

Recent trends demonstrate that there is a national consensus that individuals between the ages of 18 and 21 be categorically excluded from the death penalty. First, since the Court decided *Roper*, the use of the death penalty to execute individuals between the ages of 18 and 21 has become exceptionally rare. Second, legislative changes, from laws regulating the possession of guns, alcohol and marijuana for the young between ages 18 and 21, to laws relating to foster case, and to those extending the age of those over whom juvenile courts have jurisdiction, evince a national consensus that individuals under the age of 21 should be considered less culpable.

1. The National Trend is Towards Not Executing Young Offenders Under the Age of 21

In banning the juvenile death penalty in *Roper*, the Court relied upon data showing that the majority of states rejected the juvenile death penalty and that, even where permitted, it was infrequently imposed on 16 and 17-year-olds. (*Roper*, *supra*, 543 U.S. at pp. 571-573.) A similar pattern is now emerging regarding application of the death penalty to individuals between the ages of 18 and 21.

a. Some States Have Either Abolished the Death Penalty Altogether or an Execution Has Not Taken Place in 10 Years or more

Since *Roper*, nine states have abolished the death penalty, making a total of 21 states and the District of Columbia without a death penalty statute. [24] Additionally the governors of four states,

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[24] The states that abandoned the death penalty prior to *Roper* are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The states that have abolished the death penalty since *Roper* are Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), New York (2007) Delaware (2016) and Washington (2018). *Rauf v. State* (Del. 2016) 145 A.3d 430, 433-434 [abolishing death penalty in Delaware]; *State v. Gregory* (Wash. 2018) 427 P.3d 621 [holding Washington's death penalty unconstitutional under Washington law]; DPIC, *States with and without the death penalty,*<https://deathpenaltyinfo.org/states-and-without-death-penalty>.) Earlier this year the New Hampshire legislature gave its approval in a veto-proof supermajority to a bill repealing the death penalty statute. DPIC, *New Hampshire Senate Passes Death-Penalty Repeal With Veto-Proof Majority*, <https://deathpenaltyinfo.org/node/7367> [as of Nov. 15, 2019].)

(footnote continued)

including most recently California, have imposed moratoria on executions.[25] In 25 states, then "people under twenty-one are categorically protected from execution." (See Blume, et al., *Death by Numbers: Why Evolving Standards Compel Extending* Roper's *Categorical Ban Against Executing Juveniles from 18 to 21,* p. 3, [counting 24 states before New Hampshire's pending repeal] Forthcoming 2019, Tex, L. Rev., available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=3341438>, p. 17 [as of Nov. 15, 2019].)

That number, even before taking into account sentencing practices, is greater than in *Graham* and *Miller*, "where the Court nevertheless found national consensuses." (Blume et al., *supra*,

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Appellant counts New Hampshire as among the state's repealing the death penalty.

[25] The four states where there are governor initiated moratoria on the death penalty are: Pennsylvania (2015), Oregon (2015, extending a previous moratorium), Colorado (2013) and California (2019). (Death Penalty Information Center (DPIC), *Statements from Governors of California, Pennsylvania, Washington, Colorado and Oregon Halting Executions,* <https://deathpenaltyinfo.org/node/5792> [as of Nov. 15, 2019]; *Commonwealth of Kentucky v. Bredhold*, (Ky.Cir. Ct., Aug. 1, 2017, No. 14-CR-161) p. 4, fns. 7-8 at <https://deathpenaltyinfo.org /legacy/files/pdf/TravisBredholdKentuckyOrderExtendingRopervSimmons.pdf> [as of Nov. 15, 2019] (*Bredhold*); *United States v. Fell* (D. Vt. 2016) 224 Supp. 3d 327, 349 ["Governors in four more states with death penalty statutes on the books have imposed moratoria on capital punishment."]. As Justice Liu recently observed in *People v. Potts* (2019) __ Cal.5th __, __; 2019 WL 1389241 at * 32 (conc. opn. of Liu, J.) ["A death sentence in California has only a remote possibility of ever being carried out."])

Forthcoming Tex. L. Rev., p. 18; *Cruz v. United States* (D. Conn. Mar. 29, 2018) 2018 WL 1541898, at *18 ["In *Graham*, 39 jurisdictions permitted life imprisonment without parole for juvenile non-homicide offenders, see *Graham*, *supra*, 560 U.S. at p. 62, while, in *Miller*, 29 jurisdictions permitted mandatory life imprisonment without parole for juvenile homicide offenders, see *Miller*, *supra*, 567 U.S. at 482. . ."].) Comparing this data to that in *Graham* and *Miller* supports appellant's argument that the death penalty for those who were still adolescents at the time of their crimes is a cruel and unusual punishment. (See Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty* (2016) 40 N.Y.U. Rev. L. & Soc. Change 139, 170, available at <https://socialchangenyu.com/review/a-decent-proposal-exempting-eighteen-to-twenty-year-olds-from-the-death-penalty> [as of Nov. 15, 2019] [The situation for eighteen- to twenty-year-olds is remarkably analogous to the situation described in *Graham*."].)

Additionally, in eight of the states that still retain the death penalty as a sentencing option, no execution has taken place in at least ten years. (Editorial Board, *Capital Punishment Deserves a Quick Death*, N.Y. Times (Dec. 31, 2017),<https://www.nytimes.com/2017/12/31/opinion/capital-punishment-death-penalty.html> [noting eight states without an execution in 10 years as of 2017] [as of Nov. 15, 2019].)[26] In total, 31 states (plus the District of

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[26] There have been no executions for a decade in eight states that maintain the death penalty on the books. These are: California (2006); Kansas (no executions since the death penalty was reinstated in 1994); Pennsylvania (1999) Colorado (2009); Montana

(footnote continued)

Columbia, the military and the federal government) have either formally abolished the death penalty or have not conducted an execution in more than a decade.[27] Accordingly, since *Roper*, the majority of states have not executed anyone under 21.

b. For States with the Death Penalty There is a Marked Decline in the Execution of Those Under 21 Years Old at the Time of the Crime

Many states have legislation still permitting the execution of young people between 18 and 21 years old. However, "'[t]here are measures of consensus other than legislation.'" (*Graham*, *supra*, 560 U.S. at p. 62, quoting *Kennedy v. Louisiana* (2008) 554 U.S. 407, 433.) "Actual sentencing practices are an important part of the Court's inquiry into consensus." (*Ibid.*, citing *Enmund v. Florida* (1982) 458 U.S. 782, 794-796; see *Atkins*, *supra*, 536 U.S. at p. 316 [actually executing the intellectually disabled in states permitting

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(2006); Nevada (2006); North Carolina (2006); and Wyoming (1992). There has not been a military execution since before 1976 and there has not been a federal government execution since 2003. (DPIC, *Jurisdictions with No Recent Executions* <https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions [collecting statistics] [as of Jan. 6, 2020].)

[27] On July 25, 2019, the United States Department of Justice announced that the federal government intended to resume executions. <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> [as of Nov. 15, 2019].)

the practice was "uncommon"]; *Roper*, *supra*, 543 U.S. at p. 567 [citing the infrequency of the use of the death penalty for juveniles "even where it remains on the books"]; *Kennedy v. Louisiana*, *supra*, 554 U.S. at p. 433 ["Statistics about the number of executions may inform the consideration of whether capital punishment for the crime of child rape is regarded as unacceptable in our society"]; see *Penry v. Lynaugh* (1989) 492 U.S. 302, 334 [noting importance of actual sentencing practices to demonstrate contemporary values and national consensus].) Moreover, the consistency of the trend toward abolition of a practice is evidence of a national consensus against it. (*Atkins*, *supra*, 536 U.S. at pp. 564-567; see *Hall v. Florida* (2014) 572 U.S. 701, 717 (*Hall*) ("Consistency of the direction of change is also relevant.")[28]

As to those actual sentencing practices, with respect to the states that have retained the death penalty and actively use it, only half of them have used the death penalty for defendants under 21 years of age in the recent past. California was not one of them. Even among those states that have sentenced such young offenders to die, there has been a decline in executions of such individuals.

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[28] See also *Coker v. Georgia* (1977) 584 U.S. 584, 593-597 (plurality opinion) (considering the sentencing behavior of juries as well as legislative decision-making); *Enmund v. Florida*, *supra*, 458 U.S. at p. 788 (looking to "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made".)

i. Executions of Youthful Offenders Since Roper

Since *Roper*, "35 states have not executed a youthful offender." (Blume et al., *supra*, Forthcoming Tex. Law Rev., p. 23.) 30 states do not use the death penalty. Of the 30 states that do use the death penalty, five (Montana, Wyoming, Utah, Idaho, and Kentucky) have not executed anyone who was under 21 years old at the time of their offenses between 2000 and 2014. (The Clark County Prosecuting Attorney, *U.S. Executions since 1976* <http://www.clarkprosecutor.org/html/death/usexecute.htm> [as of Nov. 15, 2019].) This is in spite of the fact that three of these states—Kansas, Idaho, and Kentucky—have "youthful offenders on their death row." (Blume et al., *supra*, Forthcoming Tex. Law Rev., p. 23.)

Between 2005 and 2017, only "15 states who executed at all executed a person who was under 21 at the time of the offense." (Blume et al., Forthcoming Tex. L. Rev., *supra,* p. 23; see also Eschels, *Data & The Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels's A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From The Death Penalty* (June 15, 2016) 40 N.Y.U. Rev. L. & Soc. Change 147, 152, App. 1 [collecting statistics], <https://socialchangenyu.com/harbinger/data-the-death-penalty-exploring-the-question-ofdata-the-death-penalty-exploring-the-question-of-national-consensus-against-executing-emerging-adults-in-conversation-with-andrew-michaels> [as of Nov. 15,

2019][29].) On the federal level, there have been three executions since the federal death penalty was reinstituted in 1988. None of the men executed were between 18 and 21 at the time of their crimes.[30]

Additionally, since *Roper*, the number of states executing youthful offenders has gone down. Only nine of the 15 executed anyone between the ages of 18 and 21 at the time of the offense between the years of 2011 and 2015. (Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change, p. 153; *Bredhold*, *supra*, at p. 5 [examining nationwide statistics and concluding that "the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods"].) Of those executed for crimes committed between the ages of 18 and 21, more than three quarters were executed in only four states—Texas, Oklahoma, Virginia and Ohio. (*Ibid*.) In 2015, only Texas executed a

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[29] The states are Alabama, Arkansas, Delaware, Florida, Georgia, Indiana, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas and Virginia. (Michaels, *supra,* 40 N.Y.U. Rev. L. & Soc. Change, App. 1.)

[30] Louis Jones was executed in 2003 for crimes he committed when he was 44 years of age. Timothy McVeigh was executed in 2001 for crimes he committed when he was 26 years of age, and Juan Garza was executed the same year for crimes he committed when he was 34 years of age. (See U.S. Executions since 1976, The Clark County Prosecuting Attorney <http:// www.clarkprosecutor.org/html/death/usexecute.htm> [as of Nov. 15, 2019], [showing age at time of crime and date of executions for McVeigh, Garza and Jones].) The Federal government has not executed anyone less than 21 years of age since 1952,when it executed a 20 year old black man named William Tyler, Jr. (*Ibid*).

young offender. (Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change, p. 153.)

California abandoned executing youthful offenders decades ago. Since 1978**,** the year the death penalty was reinstituted in California (see *People v. Edwards* (1991) 54 Cal.3d 787, 851), California has not executed anyone whose offense was committed between the ages of 18 and 21.[31] The last person executed in

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[31] Thirteen men have been executed in California since 1978, when the death penalty was reinstituted in the State: Robert Alton Harris, David Edwin Mason, Williams George Bonin, Keith Daniel Williams, Thomas M. Thompson, Jaturun Siripongs, Manuel Babbitt, Darrell Keith Rich, Robert Lee Massie, Stephen Wayne Anderson, Donald Beardslee, Stanley Williams, and Clarence Ray Allen. (See California Department of Corrections and Rehabilitation [CDCR], *Inmates Executed, 1978 to Present* at <https://cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/> [as of Nov. 15, 2019].) Of these men, the youngest was Darrell Keith Rich, 23 at the time of his capital crimes. The oldest was Clarence Ray Allen, 50 at the time of his capital crime. (The Clark County Prosecuting Attorney, *U.S. Executions Since 1976* at <http://www.clarkprosecutor.org/html/death/usexecute.htm> [as of Nov. 15, 2019] [showing birthdates and offense dates for Harris, Mason, Rich, Massie, Anderson, Beardslee and Williams]; *People v. Mason*, No. S004604, Appellant's Opening Brief, p. 137 [Mason birthdate Dec. 2, 1956]; *Williams v. Calderon,* No. CVF-89-160-REC, Amended Petition for Writ of Habeas Corpus, Exhibit 4, p. 13 [Williams birthdate June 6, 1947]; *In re Thomas M. Thompson*, Petition for Executive Clemency, p. 16 [Thompson birth date Mar. 20, 1955]; *In re Jaturun Siripongs,* Clemency Petition of Jaturun Siripongs, p. 25 [Siripongs birthdate October 15, 1955]; *In re Manuel Babbitt*, Petition for Clemency, Exhibit 4, p. 12 [Babbitt birth date May 3, 1949]; *Allen v. Hickman*, No. C 05-5051 JSW, Defendant's Opposition to Temporary Restraining Order and Stay of Execution, Exhibit 3, p. 3 [Allen birthdate Jan. 16, 1930]; CDCR, *Inmates*

(footnote continued)

California who committed the capital crime when 18 years old was in 1958. The last execution in California for someone who committed his capital crime when he was 19 years old was in 1961. The last execution in California for someone who committed his crime when he was 20 was in 1960.[32]

The execution rate for youthful offenders contrasts with the murder rate for that same group. In 2010, 18-year-olds and 19-year-olds led as perpetrators of murders and non-negligent homicides. "If there were no national consensus against executing emerging

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Executed, 1978 to Present, Inmate Summary [showing offense dates].)

[32] William Rupp was executed in 1958. (Rupp Granted Stay Minutes before Death, Desert Sun (Feb. 1, 1957) <https://cdnc.ucr.edu/?a=d&d=DS19570201.2.11&e=-------en--20--1--txt-txIN-------1> (as of Nov. 15, 2019) [Showing Rupp's age]; Rupp Loses 6-Year Legal Battle, Executed Today, Desert Sun (Nov. 7, 1958), <https://cdnc.ucr.edu/?a=d&d=DS19581107.2.11&e=-------en--20--1--txt-txIN--------1> [as of Nov. 15, 2019] [showing Rupp's execution].) Alexander Robillard was executed in 1959. (Hillsborough Cop-Killer Is Captured, Santa Cruz Sentinel (Aug. 9, 1959) <https://cdnc.ucr.edu/?a=d&d=SCS19590809.1.1&srpos=3&e=-------en--20--1--txt-txIN-Alexander+Robillard+19-------1> [as of Nov. 15, 2019] [showing age]; Robillard Dies in Gas Chamber, Madera Tribune (Apr. 26, 1961) <https://cdnc.ucr.edu/?a=d&d=MT19610426.2.11&srpos=1&e=-------en--20--1--txt-txIN-Alexander+Robillard-------1> [as of Nov. 15, 2019] [showing execution]. Jimmie Lee Jones was executed in 1958. (*Sentence Rapists to Gas Chamber,* Humboldt Standard (Nov. 20, 1958) <https://newspaperarchive.com/eureka-humboldt-standard-nov-20-1958-p-1/> [showing age at arrest] [as of Nov. 15, 2019]; *Negro Rapists are Executed as Quakers March in Protest,* Reno Evening Gazette (Jan. 8, 1960), <https://newspaperarchive.com/reno-evening-gazette-jan-08-1960-p-1> [showing execution] [as of Nov. 15, 2019].)

adults, one would expect that the practice of executing members of this high-violence group would be common. It is not." (Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change 147, p 152, fn. 35, citing Snyder, *Bureau of Justice Statistics, U.S. Dep't of Justice, Arrest in the United States, 1990-2010*, at pp. 17-18 <https://www.bjs.gov/content/pub/pdf/aus9010.pdf> [as of Nov. 15, 2019].)

ii. Death Sentencing Rates for Youthful Offenders

Since *Roper*, nationwide only "140 of the 1133 death sentences were imposed on youthful offenders and the number of youthful offenders sentenced to death each year has been declining." (Blume et al., *supra*, 2019 Forthcoming Tex. Law Rev., p. 20.) After *Roper*, the peak for youthful offenders in one year was in 2007, when 22 such offenders received the death sentence. "Since 2013, at most eight youthful offenders have been sentenced to die in one year." (*Ibid.*) Moreover, the proportion of youthful offenders sentenced to death is less than the proportion of adult offenders sentenced to death in relation to those in each group arrested for homicide, "which indicates that even when youthful offenders are arrested for homicide offenses, they are increasingly unlikely to receive a death sentence when compared to older homicide offenders." (*Id.* at pp. 20-21.) Most jurisdictions do not sentence young people to death at all. "Twenty-nine states and the military have not sentenced a youthful

offender to death since *Roper*, compared to 20 states who have not sentenced an adult offender." (*Id.* at p. 22.)[33]

Given the changes delineated above, and given the consistency of the change in direction away from the execution of 18 to 20-year-olds, it is clear that a national consensus has arisen in opposition to the death penalty as applied to offenders aged 18 to 20. This Court should therefore conclude, as was done in *Graham* with respect to juvenile life without parole sentences, that: "The many States that allow [a death sentence for twenty year olds] but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare. And it is fair to say that a national consensus has developed against it." (*Graham*, *supra*,. 560 U.S. at p. 67 [internal quotation marks omitted]; see Michaels, *supra*, 40 N.Y.U. Review of Law and Social Change, at p. 142 ("Because of the capital punishment practices of a minority of states, over the past fifteen years individuals who committed crimes while eighteen- to twenty-years old lost their lives in a manner that most of the country appears to oppose.")

2. There are Other Indicators of a National Consensus Against Executing Youthful Offenders

There are other indicators of an emerging national consensus against the execution of youthful offenders. Statutory provisions

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[33] California has sentenced 34 youthful offenders to death since *Roper*. In California these sentences are concentrated in Los Angeles and Riverside. (Blume et al., *supra*, Forthcoming Tex. Law Rev., p. 22.)

concerning matters other than the death penalty reflect a legislative recognition that young people between the ages of 18 and 21 are less mature or responsible than fully developed adults. (See *Thompson v. Oklahoma* (1988) 487 U.S. 815, 823-825 [detailing civil laws differentiating between adults and children in context of capital case]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 [capital case recognizing that "history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults"].) Reference to international law is instructive as to what is cruel and unusual in this context. (*Roper*, *supra*, 543 U.S. at p. 575; *Atkins*, *supra*, 536 U.S. at p. 315, fn. 21; *Trop v. Dulles*, *supra*, 356 U.S. at pp. 102-103.)

a. State and Federal Statutes

There are a significant number of laws that use age 21 as the marker between children and adults for the regulation of activities that require maturity, impulse control or the weighing of risk.

i. Gun Control

For example, the Federal Gun Control Act of 1968 (GCA) prohibits individuals 20 years old and younger from purchasing handguns. (18 U.S.C. § 922(b)(1), (c)(1).) Congress' primary reason for drawing the line at age 21 was the immaturity of individuals under 21 years old. (See *National Rifle Assn. of America., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (5th Cir. 2012) 700 F.3d 185, 203, quoting Pub.L. No. 90-351, 18 U.S.C. § 901(a)(6), 82 Stat. 197, 226 (1968) [characterizing the under 21 as "emotionally immature"]; *Id.* at p. 206 ["Congress found that persons under 21 tend to be relatively irresponsible and can be prone to violent crime . . ."]; see Michaels, *supra,* 40 N.Y.U. Rev. L. & Soc.

Change at p. 156 [The GCA reflects "modern cultural perceptions of prolonged adolescence"].) Indeed, most states, including California, set 21 as the age for purchasing handguns. (Giffords Law Center to Prevent Gun Violence, *State minimum age to purchase or possess guns* <http://lawcenter.giffords.org/category/state-law/state-minimum-age-purchase-possess-guns/> [collecting state statutes regulating gun purchase and age] [as of Nov. 15, 2019]; Astor, *Florida Gun Bill: What's in It, and What Isn't*, N.Y. Times (Mar. 8, 2018), <https://www.nytimes.com/2018/03/08/us/florida-gun-bill.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> ["The bill would change the minimum age for all gun purchases to 21 from 18"]; see Luna, *No gun purchases before the age of 21 under California bill*, Sac. Bee (Feb. 28, 2018) [Bill introduced in California Senate to raise the minimum age to purchase rifles and shotguns to 21]; Sen. Bill 1100 (Partantino, (Reg. Sess. 2017-2018) <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1100> [as of Nov. 15, 2019].)

ii. Drinking Laws

Just as most federal and state laws restrict handgun purchases for 18 to 20-year-olds, the National Minimum Drinking Age Act of 1984 [NMDA] promotes a uniform national drinking age of 21. (23 U.S.C. § 158.) The NMDA encouraged states to increase the legal drinking age from age 18 to age 21 by conditioning the award of federal highway funds upon them doing so. (See *South Dakota v. Dole* (1987) 483 U.S. 203, 205.) Every state currently treats 18 to 20-year-olds as juveniles with respect to the purchase of alcohol, effectively raising the minimum drinking age to 21. (Alcohol

Policy Information System, *Highlight on Underage Drinking* <https://alcoholpolicy.niaaa.nih.gov/underage-drinking> [collecting state statutes] [as of Nov. 15, 2019].) The underlying concern of the legislators was that highway "fatalities were due to the less than fully mature behavior of eighteen- to twenty-year-olds." (Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change at p. 153, citing Roman, *How should young adults be punished for their crimes?*, Huffington Post (Jan. 13, 2014) <http://www.huffingtonpost.com/john-roman-phd/young-adults-crime_b_4576282.html> [as of Nov. 15, 2019].)

A majority of states have enacted laws that impose civil liability on vendors and adults 21 years old and older for serving alcohol to individuals under the age of 21. (Mothers Against Drunk Driving, *Dram Shop and Social Host Liability* <https://www.madd.org/wp-content/uploads/2017/08/Dram_Shop_Overview.pdf> [as of Nov. 15, 2019] [collecting states].) A number of state courts have held that the limitation of the sale of alcohol to young people under 21 is a recognition of the limited responsibility of that class. (See, e.g., *Steele v. Kerrigan* (N.J. 1997) 689 A.2d 685, 698, quoting *Rappaport v. Nichols* (N.J. 1959) 156 A.2d 1, 8 ["The Legislature has in explicit terms prohibited sales to minors as a class because it recognizes their very special susceptibilities and the intensification of the otherwise inherent dangers when persons lacking in maturity and responsibility partake of alcoholic beverages"]; *Biscan v. Brown* (Tenn. Ct. App., Dec. 15, 2003, No. M2001-02766-COA-R3-CV) 2003 WL 22955933 at *17 [nonpub. opn.] ["'These broad prohibitions . . . are directed to minors as a class in recognition of their

susceptibilities and the intensification of dangers inherent in the consumption of alcoholic beverages, when consumed by a person lacking in maturity and responsibility'"], quoting *Brookins v. Round Table, Inc.* (Tenn. 1981) 624 S.W.2d 547, 550; *Hansen v. Friend* (Wash. 1992) 824 P.2d 483, 486 [the state liquor act "protects a minor's health and safety interest from the minor's own inability to drink responsibly"].)

iii. Tobacco and Marijuana Laws

Other potentially risky activities are limited to people 21 years old and older. Five states (including California), and a number of localities have recently proscribed the sale of tobacco products to individuals below the age of 21. (Campaign for Tobacco Free Kids, *States and Localities That Have Raised the Minimum Legal Sale Age for Tobacco Products to 21* <https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/sales_21/states_localities_MLSA_21.pdf> [as of Nov. 15, 2019] [listing state statutes and local regulations]; Bergal, *Oregon Raises Cigarette-Buying Age to 21*, Wash. Post. (Aug. 18, 2017); Cal. Bus. & Prof. Code, § 22963, subd. (a).) All of the states that have legalized recreational marijuana, including most recently California, have proscribed its use by people under 21.[34] States drew the line at 21 for recreational marijuana use based on considerations of the same factors relied upon in *Roper*, i.e., the inability to control

[34] See Colo. Rev. Stat. § 44-12-402 (2018); Alaska Stat. § 17.38.070 (2014); Or. Rev. Stat. § 475B.270 (2015); Wash. Rev. Code § 69.50.560 (2015); D.C. Code Ann. § 48-904.01 (2015); Nev. Rev. Stat. § 453D.110 (2017); Cal. Health & Saf. Code, § 11362 (2017).

impulses, peer pressure and the tendency to risky behavior. (See, e.g., H.R. 128-88 1st Sess. (Me. 2017) p. 1 <https://legislature.maine.gov/legis/bills/bills_128th/chapters/PUBLIC1.asp> ["ensuring that possession and use of recreational marijuana is limited to persons who are 21 years of age and older is necessary to protect those who have not yet reached adulthood from the potential negative effects of irresponsible use of a controlled substance"] [as of Nov. 15, 2019].)

iv. Other Civil Statutes

Under the Free Application for Federal Student Aid (FAFSA), the Federal Government considers individuals under age 23 legal dependents of their parents. (See FAFSA, *For purposes of applying for federal student aid, what's the difference between a dependent student and an independent student?* <https://studentaid.ed.gov/sa/fafsa/filling-out/dependency> [as of Nov. 15, 2019].) Similarly, the Internal Revenue Service allows students under the age of 24 to be dependents for tax purposes. (See IRS, Publication 501 (2018), *Exemptions, Standard Deduction, and Filing Information*, <https://www.irs.gov/publications/p501#en_US_2017_publink1000220868> [as of Nov. 15, 2019].) The Affordable Care Act allows individuals under the age of 26 to remain on their parents' health insurance. (42 U.S.C. § 300gg-14 (2017).)

Many states prohibit young people under 21 years old from gambling in casinos.[35] Some states restrict the types of driver's

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[35] See Colo. Rev. Stat. § 44-30-809 (2018); Del. Code tit. 29, § 4810 (1974); Ind. Code § 4-33-9-12 (1993); Iowa Code § 99B.43 (2015); La. Rev. Stat. § 14:90.5 (2004); Miss. Code § 75-76-155

(footnote continued)

licenses people under 21 years old can have, including limiting the transport of hazardous materials to men and women over 21 years old.[36] There are also restrictions relating to the types of employment (including service as a public official) and licenses young adults may hold.[37]

(1990); Mo. Rev. Stat. § 313.817 (1991); Nev. Rev. Stat. § 463.350 (1955), N.J. Stat. § 5:12-119 (1977); S.D. Codified Laws § 42-7B-35 (1989).

[36] See Ark. Code Ann. § 27-51-1604; Colo. Rev. Stat. § 42-4-116; Ind. Code § 9-24-11-3.5; La. Stat. Ann. § 401.1; Md. Code Ann., Transp. § 16-817; see also 49 C.F.R. §§ 390.3, 391.11 [requiring commercial drivers to be at least 21 years of age to transport passengers or hazardous materials intrastate, and to drive commercial vehicles interstate]; Cal. Veh. Code, § 15250 [requiring federal hazardous endorsement to transport hazardous materials].)

[37] Many state provisions require that state legislators be over the age of 21. (Ala. Const., art. IV, § 47; Alaska Const., art. II, § 2; Ariz. Const., art. IV, § 2; Ark. Const., art. V, § 4; Colo. Const., art. V, § 4; Del. Const., art. II, § 3; Fla. Const., art. III, § 15; Ga. Const., art. III, § 2, ¶ III; Ill. Const., art. IV, § 2(c); Ind. Const., art. IV, § 7; Iowa Const., art. III, § 4; Ky. Const. § 32; Me. Const., art. IV, § 4; Md. Const., art. III, § 9; Mich. Const., art. 4, § 7; Miss. Const., art. 4, § 41; Mo. Const., art. III, § 4; Neb. Const., art. III, § 8; Nev. Rev. Stat. § 218A.200; N.J. Const., art. IV, § 1; N.M. Const., art. IV, § 3; N.C. Const., art. II, § 6; Okla. Const., art. V, § 17; Or. Const., art. IV, § 8; Pa. Const., art. II, § 5; S.C. Const., art. III, § 7; S.D. Const., art. III, § 3; Tenn. Const., art. II, § 9; Tex. Const., Art. III, § 7; Utah Const., art. VI, § 5; Va. Const., art. IV, § 4; Wyo. Const., art. III, § 2.) There are also state-law age restrictions on licenses. (See, e.g., Ark. Code Ann. § 16-22-201 [license to practice law restricted to those over 21]; Ark. Code Ann. § 17-24-302 [licensing for collections agencies restricted to those over 21]; Cal. Health & Saf. Code, § 1562.01 [staff at a short-term residential treatment center must be at least 21]; Cal. Bus. & Prof. Code, § 4996.2 [licensed social worker must be 21];

(footnote continued)

As one commentator pointed out, "[t]he ability to purchase guns and alcohol are societal privileges bestowed on adults twenty-one years of age and older." (Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change at p. 154.) So too is casino gambling, transporting hazardous materials, holding public office, and marijuana and tobacco possession. The United States Supreme Court has recognized a relationship between societal privileges and eligibility for capital punishment. In *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 835, the Court prohibited the execution of juveniles whose offenses occurred before their sixteenth birthday. According to the plurality, "[t]he reasons that juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible." (*Ibid.*; see also Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change at p. 154.)

Cal. Veh. Code, § 11104 [driving instructor must be at least 21]; Colo. Rev. Stat. § 12-52-108 [license to transmit money issued to those 21 and older]; Idaho Code Ann. § 54-3602 [members of grape growers and wine producers commission must be at least 21]; La. Stat. Ann. § 3520 [those 21 and older may be appointed to police department]; Me. Stat. tit. 25, § 2804-G [law enforcement officers must be at least 21 years]; Mo. Rev. Stat. § 77.044 [city administrators must be at least 21]; N.H. Rev. Stat. Ann. § 206:27-b [members of deputy conservation officer force must be at least 21]; N.Y. Educ. Law § 8804 [certification as a certified behavior analyst assistant issued to those 21 and older]; Okla. Stat. § 2106 [license to sell or issue checks for a fee issued to those 21 and older]; 52 Pa. Stat. and Cons. Stat. Ann. § 70-812 [engineer in charge of mining hoist engine must be 21 or older]; Tenn. Code Ann. § 62-26-226 [license to train others as private investigators to be issued to those 21 or older]; Utah Code Ann. § 20A-5-602 [poll workers must be at least 21].)

v. Foster Care and Young Offender Laws

Laws relating to foster care and the control of young criminal offenders also constitute formal recognition of the immature status of 18 to 20-year-olds. A number of states, including California, have passed laws extending foster care services from the age of 18 to the age of 21. (Kasarabada, *Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts to Improve Consequences of Aging Out* (2013) 17 CUNY L.Rev. 145, 151, fn. 29 [listing state jurisdictions establishing 21 years old as the age at which youth will age out of foster care]; Cal. Welf. & Inst. Code, § 303, subd. (a); see also Fostering Connections to Success and Increasing Adoptions Act of 2008, PL 110-351, October 7, 2008, 122 Stat. 3949, § 201 [continuing federal support for children in foster care after 18 based on evidence that youth who remain in foster care until age 21 have better outcomes].) Under the Individuals with Disabilities Education Act (IDEA), youth and late adolescents with disabilities who have not earned their traditional diplomas are eligible for services through age 21. (20 U.S.C. § 1412(a)(1)(A) (2017).) Going even further, 31 states require access to free secondary education for students up to at least the age of 21. (National Center for Educational Statistics, *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2015* <https://nces.ed.gov/programs/statereform /tab5_1.asp > [as of Nov. 15, 2019].) These laws are recognition that individuals between 18 and 21 years old are not prepared for independent living when their character is not fully formed and they still have a propensity for risky behavior, and who are therefore still

vulnerable. (See *Roper*, *supra*, 543 U.S. at p. 570 [identifying as a salient characteristic of youth an individual's "vulnerability and comparative lack of control over their immediate surroundings"].)

In keeping with this trend, states have created courts targeted specially at young adults ages 18 to 21;[38] adopted "youthful offender" laws awarding special protections to individuals 18 to 21;[39] and extended the obligation to pay child support to at least 21.[40]

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[38] Hayek, *Environmental Scan of Developmentally Appropriate Criminal Justice Responses to Justice-Involved Young Adults* (2016) National Institute of Justice <https://www.ncjrs.gov/pdffiles1/nij/249902.pdf > [listing courts targeted for the 18 to 21] [as of Nov. 15, 2019].

[39] Most notably, in 2013, the California Legislature added Penal Code section 3051, which required a youth offender parole hearing for individuals sentenced to life without the possibility of parole for crimes they committed when 18 or younger. In 2015, the Legislature increased the age for youthful offender parole hearings from 18 to 23. (Pen. Code, § 3051, subd. (a)(1).) The Legislature explicitly connected the raising of the age of eligibility for a youthful offender parole hearing to the trend in the state to recognize the need to protect individuals until the age of 21:

> The State of California recognizes this [that young people are still growing past age 18] as well. State law provides youth with foster care services until age 21. It extends Division of Juvenile Justice jurisdiction until age 23. It also provides special opportunities for youth in our state prison system through age 25.

(Cal. Sen. Bill No. 261 (2015-2016 Reg. Sess.) p. 3 <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB261> [as of Nov. 15, 2019].)

[40] See Ind. Code § 31-16-6-6; Mass. Gen. Laws Ann. ch. 209, § 37; Mo. Rev. Stat. § 452.340(5); N.Y. Fam. Ct. Act § 413(1)(a); N.C.

(footnote continued)

States often give young people additional protections and supervision in the area of inheritance and bequests and there are limitations on their access to credit cards.[41] Finally, most states have enacted statutes continuing jurisdiction over juvenile offenders to include individuals between ages 18 and 21.[42] There has thus

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Gen. Stat. § 50-13.4; 43 Okla. Stat. Ann. § 112(E); Or. Rev. Stat. § 107.108(1)(B).

[41] All 50 states have implemented the Uniform Gift to Minors Act, which creates a custodian for minor inheritances up to the age of 21. (Uniform Law Commission, *Transfer to Minors Summary* <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4dd556bb-78d7-89a6-b25d-e3ea3d46eaff&forceDialog=0> [as of Nov. 15, 2019].) Other states extend additional credit protections to individuals under 21 years old. (See, e.g., 815 Ill. Comp. Stat. 140/7.2 [prohibiting issuance of credit cards to persons younger than 21 without financial guarantee of ability to pay]; La. Stat. Ann. § 3577.3 [prohibiting credit card companies from providing inducements to college students without provision of credit card debt education brochure]; Okla. Stat. Ann. tit. 14A § 3-309.1 [prohibiting issuance of credit card to those under 21 without cosigner or submission of evidence of independent means of payment].)

[42] Most states have extended the jurisdiction of juvenile courts to age 21 or older. (See, e.g., Ala. Code § 44-1-2; Cal. Welf. & Inst. Code, § 208.5; Cal. Welf. & Inst. Code, § 607; Cal. Welf. & Inst. Code, § 1731.5; Cal. Welf. & Inst. Code, § 1769; Conn. Gen. Stat. § 18-73; Del. Code Ann. tit. 10, § 928; Fla. Stat. § 985.0301; Idaho Code Ann. § 20-507; Ill. Comp. Stat. Ann. 405/3; Ind. Code § 31-30-2-1; Kan. Stat. Ann. § 38-2304; Ky. Rev. Stat. Ann. § 625.025; La. Child Code Ann. Art. 898; Md. Code Ann., Cts. & Jud. Proc., § 3-8A-07; Mass. Gen. Laws Ann. ch. 120, § 16; Mich. Ct. Rules, Rule 6.937; Minn. Stat. Ann. § 260B.193; Mo. Rev. Stat. § 211.041; N.J. Stat. Ann. § 9:17B-2; N.M. Stat. Ann. § 32A-2-19; N.Y. Exec. Law § 508; Ohio Rev. Code Ann. § 2151.23; Or. Rev. Stat. § 419C.005; 14 R.I. Gen.

(footnote continued)

been a consistent trend toward extending the services of "traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18. These various laws and policies, designed to both restrict and protect individuals in this late adolescent age group, reflect our society's evolving view of the maturity and culpability of 18 to 21 year olds, and beyond." (ABA Resolution 111 and Report to the House of Delegates <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf> (2018), p. 10.)

In his opinion in *Roper*, Justice Kennedy noted that nearly all states draw the line between childhood and adulthood at the age of 18 for many purposes, including marrying without consent, voting and serving on juries. (*Roper*, *supra*, 543 U.S. at p. 569.) The Court concluded that 18 is "the age at which the line for death eligibility ought to rest." (*Ibid.*) However, the rationales sustaining those laws are based on different youthful characteristics than those underpinning *Roper*. For example, voting and jury duty are not activities highly susceptible to impulsive or risky behavior.[43] They

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Laws § 14-1-6; S.C. Code Ann. § 63-19-1440; S.D. Codified Laws § 26-llA-20; Va. Code Ann. § 16.1-242; Wash. Rev. Code § 13.40.300.)

[43] Unlike voting and jury service, marriage is a constitutionally-protected right, not a privilege. (*Obergefell v. Hodges* (2015) __U.S.__, 135 S.Ct. 2584, 2589; *Loving v. Virginia* (1967) 388 U.S. 1, 12.) As such, the rationale for selecting the age of marriage without parental consent must balance the individual's right to marry against the state's interest in curbing the social harms of child marriage. (See Girls Not Brides, *Setting the Age of Marriage Can Have a Huge Impact on Child Marriage*

(footnote continued)

allow a person time to "gather evidence, consult with others and take time before making a decision." (Steinberg, *A 16-Year-Old is as Good as an 18-Year-Old — or a 40-Year-Old — at Voting*, L.A. Times (Nov. 3, 2014).) "By contrast, the purchase or use of tobacco or alcohol, living without parental guidance or committing a capital crime are all emotionally arousing activities, where maturity, vulnerability and susceptibility to influence and underdeveloped character come into play." (*Phillips v. Ohio*, No. 16-9725, Brief of Juvenile Law Center, Atlantic Center for Capital Representation and Vincent Schiraldi as Amici Curiae in Support of Petitioner, 2017 WL 3141427 at *15; see Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"* (2009) 64 Am. Psychologist 583, 592-593.) As the examination of state legislation shows, the national consensus clearly recognizes that when it comes to activities characterized by "emotionally arousing conditions," the age of adulthood should be set at 21 years old. (Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy* (2016) 85 Fordham L.Rev. 641, 652.)

b. ABA Resolution 111

On February 5, 2018, the ABA House of Delegates called on all death penalty jurisdictions to ban capital punishment for any offender who committed their crime at the age of 21 or younger.

<https://www.girlsnotbrides.org/three-laws-that-countries-can-adopt-to-address-child-marriage> [as of Nov. 15, 2019].)

((ABA resolution 111 and Report to the House of Delegates (2018) <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf> [as of Nov. 15, 2019].) In doing so, the ABA considered both increases in scientific understanding of adolescent brain development and legislative developments in the legal treatment of individuals in late adolescence. (*Id.* at pp. 6-10.) For example, it recognized 'a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18. (*Id.* at p. 10.) As one court has concluded, "[w]hile there is no doubt that some important societal lines remain at age 18, the changes discussed [in the ABA Report] reflect an emerging trend toward recognizing that18-year-olds should be treated different from fully mature adults." (*Cruz v. United States*, *supra*, 2018 WL 1541898 at * 22).

C. The Death Penalty as Punishment for Crimes Committed by 18 to 20-Year-Olds Is Disproportionate

As noted, this Court must consider "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. (*Trop v. Dulles*, *supra*, 356 U.S. at pp. 100-101; *Roper*, *supra*, 543 U.S. at p. 561.) Consistent with this jurisprudence, the United States Supreme Court has periodically revised its determination of which offenders qualify for a categorical exemption to the death penalty. (Compare *Penry v. Lynaugh*, *supra*, 492 U.S. at p. 340 [concluding that the Eighth Amendment did not mandate a categorical exemption from the death penalty for intellectually

disabled offenders] with *Atkins*, *supra*, 536 U.S. at p. 317 [barring execution of intellectually disabled offenders and rejecting *Penry* due to evolving standards of decency].)

As part of its analysis of which offenders the Eighth Amendment categorically excludes from various types of punishment, the United States Supreme Court has repeatedly looked to science to inform its analysis of evolving standards of decency. (See, e.g., *Miller*, *supra*, 567 U.S. at p. 471 ["Our decisions rested not only on common sense . . . but on science and social science as well"], quoting *Roper*, *supra*, 543 U.S. at p. 569]; *Hall*, *supra*, 572 U.S. at p. 723 [updating the definition of Intellectual Disability in light of the medical community's evolving standards]; *Moore v. Texas* (2017) 137 S.Ct. 1039, 1044 [chastising the state court for "diminish[ing] the force of the medical community consensus"]; *id.* at p. 1053 [state court failed to inform "itself of the 'medical community's diagnostic framework'"], quoting *Hall*, *supra*, 572 U.S. at p. 721.)

In *Graham*, *supra*, 560 U.S. at p. 48, which held that the Eighth Amendment prohibits a sentence of life without possibility of parole for a non-homicide crime committed when the offender was under the age of 18 (*Id.* at p. 81), the Court made its reliance on the psychological and neurobiological explanation of human development explicit. In his majority opinion, Justice Kennedy, citing to amicus briefs from the American Psychological Association and American Medical Association, wrote that: "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of

the brain involved in behavior control continue to mature through late adolescence." (*Id*. at p. 68, citing Brief for the American Psychological Association et al. as Amici Curiae, 2009 WL 2236778 at *22-27 and Brief for the American Medical Association et al. as Amici Curiae, 2009 WL 2247127 at *16-24.)

Recent scientific and medical developments have made clear that the characteristics of youth that typify diminished culpability, as articulated by the *Roper* Court, are still present in individuals through the age of 20, much the same as they are in individuals under age 18. These developments have influenced both legislators and courts, who have increasingly acknowledged in our nation's laws and judicial decisions that these relevant characteristics of youth extend to 21. International developments also support a conclusion that the execution of youthful offenders is unconstitutional.

1. Research in Developmental Psychology and Neuroscience Documents Greater Immaturity, Vulnerability and Changeability in Individuals Between the Ages of 18 and 21

In *Roper*, the Court concluded that "marked and well understood" developmental differences between juveniles and adults both diminish juveniles' blameworthiness for their criminal acts and enhance their prospects of change and reform. (*Roper*, *supra*, 543 U.S. at p. 572). *Roper* cited lack of maturity and an underdeveloped sense of responsibility, increased susceptibility to negative influences and outside pressures and unformed or underdeveloped character as typifying young people under 18. The Court recognized these differences as central to the calculus of culpability and disproportionality of punishment imposed on juvenile offenders.

Recent research has shown that these characteristics hold equally for late adolescents and young adults between the ages of 18 and 21. (Schiraldi & Western, *Why 21 Year-Old Offenders Should Be Tried in Family Court*, Wash. Post (Oct. 2, 2015) ["Young adults are more similar to adolescents than fully mature adults in important ways. They are more susceptible to peer pressure, less future oriented and more volatile in emotionally charged settings"]; see *Cruz v. United States*, *supra*, 2018 WL 1541898, at *25 ["[W]hen the Roper Court drew the line at age 18 in 2005, the Court did not have before it the record of scientific evidence about late adolescence that is now before this court."]; *Bredhold*, *supra*, at p. 6 ["If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates [the] ruling [that the state's death penalty statute is unconstitutional as applied to those under the age of 21]."])

a. Youths Between the Ages of 18 and 20 are Immature and More Likely than Adults to Engage in Risky Behavior

As recognized in *Roper*, adolescents have less capacity for mature judgment than adults and, as a result, are more likely to engage in risky behaviors. "[A]s any parent knows and as . . . scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" (*Roper*, *supra*, 543 U.S. at p. 569, quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367.)

Scientific evidence shows that individuals between the ages of 18 and 21 display these same characteristics. For instance, late

adolescents underestimate both the seriousness and the number of risks involved in a given situation. (Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking* (2008) 28(1) Developmental Review 78, 79; Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants* (2003) 27(4) Law & Hum. Behav. 333, 357.) Late adolescents are more likely than adults to attend to the potential rewards of a risky decision than to the potential costs. (Cauffman et al., *Age Differences in Affective Decision Making as Indexed By Performance on The Iowa Gambling Task* (2010) 46 Developmental Psychology 193, 194.) Moreover, young persons have significantly diminished abilities to act temperately, i.e., to evaluate a situation before acting. (Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency* (2008) 32 Law & Hum. Behav. 78, 85.)

Young people are more likely to engage in sensation seeking, the pursuit of arousing, rewarding, exciting or novel experiences. This is especially true for individuals between the ages of 18 and 21, more than for younger juveniles. (Steinberg et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation* (2017) Dev. Sci. DOI: 10.1111/desc.12532 <https://drive.google.com/file/d/0B4e3FILdCIeRMWNaRi1ZdzVPQk0/view> [as of Nov. 15, 2019], p. 2; Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking* (2017) 23 Psychology, Public Policy, & Law 410, 414 ["Sensation-seeking — the tendency to pursue novel, exciting, and rewarding experiences — increases substantially around the time of puberty and remains high well into

the early 20s, when it begins to decline"].) The kinds of risk seeking behaviors young adults engage in include crime. (Modecki, *supra*, 32 Law & Hum. Behav. at p. 79 ["In general, the age curve shows crime rates escalating rapidly between ages 14 and 15, topping out between ages 16 and 20, and promptly deescalating"]; Steinberg, *supra*, 23 Psychology, Public Policy, & Law at p. 413.)

Individuals in their late teens and early twenties are less capable decision-makers than older individuals, are more impulsive and are less likely to consider the future consequences of their actions and decisions. (Steinberg et al., *Age Difference in Future Orientation and Delay Discounting* (2009) 80 Child Development 28, 39; Steinberg et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report Evidence for a Dual Systems Model* (2008) 44 Developmental Psychology 1764, 1774-1776; Steinberg, *supra*, 23 Psychology, Public Policy, & Law at p. 414.) In fact, recent studies show that the peak age of risky decision-making is not for children under the age of 18, but for young adults between the ages of 19 and 21. (Braams et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior* (2015) 35 J. of Neuroscience 7226, 7235 [Figure 7]; Shulman & Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment* (2014) 50 Developmental Psychology 167, 172-173.)

Critical cognitive abilities mature much later than previously thought. Such cognitive abilities include the ability to exercise self-control, to consider the risks and rewards of alternative courses of

action and to resist coercive pressure from others. Attentiveness to rewards is high until the early twenties, but the system responsible for self-control, regulating impulses and thinking ahead, as well as evaluating the rewards and costs of an act is underdeveloped. (Casey et al., *The Adolescent Brain* (2008) 1124 Annals of the New York Academy of Sciences 111, 121; Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking* (2008) 28(1) Developmental Review 78, 83; Cohen et al., *When Does a Juvenile Become and Adult? Implications for Law and Policy* (2016) 88 Temple Law Rev. 769, 783 (summarizing research on brain maturation and noting that studies "have shown continued regional development of the prefrontal cortex, implicated in judgment and self-control beyond the teen years and into the twenties.")

Neurobiological research has shown that the main cause for psychological immaturity during late adolescence and the early twenties is the difference in development rates between the neurological system responsible for increased sensation and reward seeking and the system responsible for self-control, regulating impulses and evaluating risks and rewards. According to recent findings, the portions of the human brain responsible for self-control do not reach full maturity until at least the mid-20s. (Steinberg, *supra*, 28(1) Developmental Review at p. 83; see *Miller*, *supra*, 567 U.S. at p. 472, fn. 5 ["'It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance'"], quoting Brief for American Psychological Association et al. as Amici Curiae, p. 4; Surgeon

General Vivek Murthy, *E-Cigarette Use Among Youth and Young Adults: A Report of the Surgeon General — Executive Summary*, Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (2016) Fact Sheet 508 <https://e-cigarettes.surgeongeneral.gov/documents/2016_SGR_Fact_Sheet_508.pdf> ["The brain is the last organ in the human body to develop fully. Brain development continues until the early to mid-20s"] [as of Nov. 15, 2019].) [44]

As such, during late adolescence and young adulthood, there is a "maturational imbalance" "that is characterized by relative immaturity in brain systems involving self-regulation during a time of relatively heightened neural responsiveness to appetitive, emotional, and social stimuli." (Steinberg, *supra*, 23 Psychology, Public Policy, & Law at p. 414, citing Casey et al., *The Adolescent*

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[44] Neurobiologists do not completely understand the specific changes that are implicated in the transition from adolescence and young adulthood to maturity. However, the changes involve the development of "association cortices and the frontolimbic systems involved in executive, attention, reward, and social processes." Taber-Thomas and Perez-Edgar, *Emerging Adult Brain Development* in The Oxford Handbook of Emerging Adulthood. (Jeffrey Jensen Arnett, edits. 2015), pp. 126-127.) Scientists also know that they involve increased myelination (a process of forming a sheath around the neuron enabling it to signal more efficiently) and continued adding and pruning of neurons. (See Michaels, *supra*, 40 N.Y.U. Rev. L. & Soc. Change at pp. 165-167 [collecting neurological studies].) This region of the brain is not fully mature until early adulthood, i.e., the early 20's or later. (Buchen, *Science in Court: Arrested Development* (2012) 484 Nature 304, 306; Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy* (20/09) 45(3) J. of Adolescent Health 216, 217.)

Brain (2008) 28 Developmental Review 62; see also Shulman, et. al., *The Dual Systems Model: Review, Reappraisal, and Reaffirmation* (2016) 17 Developmental Cognitive Neuroscience 103, 117 ["[S]tudies show that, as predicted, psychological and neural manifestations of reward sensitivity increase between childhood and adolescence, peak sometime during the late teen years, and decline thereafter, whereas psychological and neural reflections of better cognitive control increase gradually and linearly throughout adolescence and into the early 20s."].) As the imbalance diminishes, there are improvements in impulse control and thinking and planning ahead. (Blakemore & Robbins, *Decision-Making In The Adolescent Brain* (2012) 15 Nature Neuroscience 1184, 1184; Albert & Steinberg, *Judgment and Decision Making in Adolescence* (2011) 21 J. of Research on Adolescence 211, 217, 219.)

Because of the interaction between immature systems of self-regulation and heightened responsiveness to external stimuli, the differences between individuals in their late teens and early twenties and individuals who have fully matured are magnified when the decisions are made in situations that are emotionally arousing. These especially include situations, common in crimes that cause negative emotions, such as fear, threat, anger or anxiety. (Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts* (2016) 27(4) Psychological Science 549, 559.)

b. Young People Ages 18 to 20 Are More Vulnerable to Negative Influences and Peer Pressure

As *Roper* also recognized, "juveniles are more vulnerable . . . to negative influences and outside pressures, including peer pressure." (*Roper*, *supra*, 543 U.S. at p. 569.) Just as with 16 and 17-year-olds, studies have provided support for the contention that older adolescents are more vulnerable to coercive pressure than adults are. (Steinberg & Monahan, *Age Differences in Resistance to Peer Influence* (2007) 43 Developmental Psychology 1531, 1541; Albert, *supra*, 21 J. of Research on Adolescence at p. 218.) Moreover, the presence of peers makes such individuals more sensitive to rewards and makes them extremely attentive to immediate rewards. (Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry* (2011) 14 Developmental Science F1, F7; O'Brien et al., *Adolescents Prefer More Immediate Rewards When in the Presence of Their Peers* (2011) 21 J. of Research on Adolescence 747, 747, 751.) Finally, the presence of peers increases risky decision making among adolescents, but not among older individuals. (Smith et al., *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known* (2014) 50 Developmental Psychology 1564, 1564; Steinberg, *supra*, 28(1) Developmental Review at p. 91 [noting that "the presence of friends doubled risk-taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults"].)

c. Young People Ages 18 to 20 Are More Capable of Change and Rehabilitation

Finally, as the *Roper* Court recognized, "the character of a juvenile is not as well formed as that of an adult." (*Roper*, *supra*, 543 U.S. at p. 570.) Accordingly, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character.'" (*Graham*, *supra*, 560 U.S. at p. 76, quoting *Roper*, *supra*, 543 U.S. at p. 572.) The Court reaffirmed in *Graham* that "'from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'" (*Graham*, *supra*, 560 U.S. at p. 68, quoting *Roper*, *supra*, 543 U.S. at p. 570.)

Like the 16 and 17-year-olds who were the subject of *Roper*, young persons under the age of 21 also have a great capacity for behavioral change. (Kays et al., *The Dynamic Brain: Neuroplasticity and Mental Health* (2012) 24 J. of Clinical Neuropsychology & Clinical Neuroscience 118, 118 <https://doi.org/10.1176/appi.neuropsych.12050109> [as of Nov. 15, 2019].) Because the brain is still developing, personality trains are transient in late adolescents – just as they are with juveniles. "[Y]oung adulthood is a developmental period when cognitive capacity is still vulnerable to the emotional influences that affect adolescent behavior, in part due to continued development of prefrontal circuitry involved in self-control." (Cohen et al., *supra*, 88 Temple Law Rev. at p. 771.)

Given the on-going development of adolescents and young adults, it is nearly impossible to predict future criminality from criminal behavior of young offenders, even among those accused of committing violent crimes. Indeed, approximately 90 percent of serious juvenile offenders age out of crime and do not continue crime into adulthood. (Monahan et al., *Psychosocial (Im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior* (2013) 25 Development & Psychopathology 1093, 1093-1105.) In fact, "even within a sample of juvenile offenders that is limited to those convicted of the most serious crimes, the percentage who continue to offend consistently at a high level is very small." (Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders* (2010) 22 Development & Psychopathology 453, 468.) New studies showing the changing brain structure and function over the course of a young person's life "reinforce arguments . . . that most adolescent crime is a product of the developmental influences described earlier and that most teenagers will 'mature out' of their criminal tendencies." (Bonnie & Scott, *The Teenage Brain: Adolescent Brain Research and the Law* (2013) 22(2) Current Directions in Psychological Science 158, 160.)

2. Legislators and Courts Have Recognized and Relied on the New Understanding of the Vulnerabilities of Individuals Between Ages 18 and 20

This new research on the brain of late adolescents has been used to justify legislation relating to people ages 18, 19 and 20 in non-criminal contexts, particularly in California. Legislatures have

cited recent advances in the biological understanding of the vulnerability of young people under age 21 as a basis for new protections for this group. For instance, in arguing for tobacco legislation revisiting the appropriate age for a protected status, legislators cited medical evidence that the parts of the brain associated with characteristics of maturity, susceptibility to outside influences and underdeveloped character are still developing past 18. (Cal. Sen., Bill Analysis of Sen. Bill 7 X2 (Hernandez), p. 4 (Reg. Sess. 2015-2016) <http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0001-0050/sbx2_7_cfa_20160303_100126_asm_floor.html> ["The author notes that adolescent brains are more vulnerable to nicotine addiction, and people who reach the age of 21 as nonsmokers have a minimal chance of becoming a smoker"] [as of Nov. 15, 2019].)

The legislative history of recently enacted Welfare and Institutions Code section 625.6, creating new statutory requirements for custodial interrogations of individuals 15 years of age or younger also cited emerging science.

> Developmental and neurological science concludes that the process of cognitive brain development continues into adulthood, and that the human brain undergoes "dynamic changes throughout adolescence and well into young adulthood" (see Bonnie et al., *Reforming Juvenile Justice: A Developmental Approach*, National Research Council (2013), page 96, and Chapter 4).

(Cal. Sen. Bill No. 395 (2017-2018 Reg. Sess.) § 1, subd. (a) <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB395> [as of Nov. 15, 2019].) Citing "a large body of research," the Legislature further found that "adolescent thinking tends to either ignore or discount future outcomes and implications,

and disregard long-term consequences of important decisions." (*Ibid.*)[45]

Following the United States Supreme Court's decision in *Miller*, *supra*, 567 U.S. 460, the California Legislature amended Penal Code section 2905 to require that all offenders below age 22 be classified at lower custody facilities whenever possible. (Statement

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[45] Other states have also cited research relating to the development of young brains as a justification for additional protections for individuals under 21 years old. (See, e.g., Mich. Legislature, House Fiscal Agency Legislative Analysis, House Bill 4069, as enacted, p. 6 (2015) <http://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-4069-C35FCC45.pdf> [as of Nov. 15, 2019] [finding that "development of the brain" connected to the "ability to make good decisions and judgments" occurs at ages later than 18]; Hawaii Sen. Bill 1340 (2013 Reg. Sess.) [basing its legislation on foster care in part on brain development research]; Williams-Mbengue & McCann, National Conference of State Legislatures, *The Adolescent Brain — Key to Success in Adulthood, Extending Foster Care Policy Toolkit* <http://www.ncsl.org/Portals/1/Documents/cyf/Extending_Foster_Care_Policy_Toolkit_5.pdf> [as of Nov. 15, 2019] [premising its 21 age cutoff on brain growth and development relating to "decision-making and impulse control"]; Alaska Dept. of Health and Social Services, *Get the Facts About Marijuana*, <http://dhss.alaska.gov/dph/Director/Pages/marijuana/facts.aspx> [as of Nov. 15, 2019] [basing marijuana legislation in part on studies showing that brain development is not complete until age 25]; Bonnie, *supra*, 22(2) Current Directions in Psychological Science at p. 160 ["Across the country, neuroscience research indicating that teenage brains differ from those of adults has been offered in support of a broad range of policies dealing more leniently with young offenders. For example, the Washington State Legislature in 2005 cited developmental brain research in abolishing mandatory minimum sentences for juveniles, as did Governor Bill Owens of Colorado in explaining his support for abolishing the application of a harsh sentencing statute to juveniles"].)

of Legislative intent for Pen. Code, § 2905.) The Assembly focused on the "neurological and developmental changes [that] are occurring in people who are in their late teens through early adulthood. The Legislature recognizes that these factors enhance the prospect that, as development progresses and youth mature into adults, these individuals can become contributing members of society." (Cal. Assem. Bill No. 1276 (2013-2014 Reg. Sess.) <https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201320140AB1276> [as of Nov. 15, 2019].) Again, in 2013, the California Legislature provided additional protections for teenagers by providing mandatory hearings before the Board of Parole Hearings for youthful offenders and requiring the Board to examine youth as a factor in mitigation. (Pen. Code, § 3051.) Once again, the Senate outlined the diminished culpability and greater potential for rehabilitation of teenagers, noting that such considerations continue beyond the age of majority. "Recent scientific evidence on adolescent development and neuroscience" shows that "certain areas of the brain, particularly those that affect judgment and decision-making, do not fully develop until the early 20's." (Cal. Assem. Appropriations Comm., Bill Analysis, Sen. Bill No. 260, as amended Aug. 12, 2013 (2013-2014 Reg. Sess.) <http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_260_cfa_20130813_150553_asm_comm.html> [as of Nov. 15, 2019]; see Cal. Assem. Pub. Saf. Comm., Bill Analysis, Sen. Bill No. 260 (2013-2014 Reg. Sess.) <http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_260_cfa_20130701_101048_asm_comm.html> [as of Nov.

15, 2019] ["the fact that young adults are still developing means that they are uniquely situated for personal growth and rehabilitation"].)

In 2015, California updated its Penal Code again to permit youth offender parole hearings for individuals up to the age of 23. (Pen. Code, § 3051.) The legislative history of that statutory change explicitly referenced the importance of an understanding of the continuing development of late adolescents and emergent adults: "The rationale, as expressed by the author and supporters of this bill, is that research shows that cognitive brain development continues well beyond age 18 and into early adulthood. The parts of the brain that are still developing during this process affect judgment and decision-making, and are highly relevant to criminal behavior and culpability." (Cal. Assem. Pub. Safe. Comm., Bill Analysis, Sen. Bill No. 260, as amended June 1, 2015, p. 6 <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB260> [as of Nov. 15, 2019].) Elsewhere in the legislative history of this statute, the Legislature explicitly connected the change in the youth offender statute to the United States Supreme Court's case law relating to juveniles, *Roper*, *Graham* and *Miller*.[46] In 2018, the statute was again amended to

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[46] The Legislature stated: "This [extending the youthful parole hearing eligibility to 23] reflects science, law, and common sense. Recent neurological research shows that cognitive brain development continues well beyond age 18 and into early adulthood. For boys and young men in particular, this process continues into the mid-20s. The parts of the brain that are still developing during this process affect judgment and decision-making, and are highly

(footnote continued)

extend the eligibility for a youth offender parole hearing to those whose committing offense occurred when they were 25 years or younger. Again the rationale, "… is that research shows that cognitive brain development continues into the early 20's or later."[47]

Lower courts throughout the United States have acknowledged that this growing body of evidence is widely accepted. (*In re Detention of Leyva* (Wash. Ct. App., May 6, 2014, No. 30853-7-II) 181 Wash.App. 1004, 2014 WL 1852740 at *6 (nonpub. opn.)

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relevant to criminal behavior and culpability. Recent US Supreme Court cases including *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama* recognize the neurological difference between youth and adults. The fact that youth are still developing makes them especially capable of personal development and growth." (Cal. Assem. Appropriations Comm., Bill Analysis, Sen. Bill No. 261, p. 3 <http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_261_cfa_20150707_100628_asm_comm.html> [as of Nov. 15, 2019].)

[47] The sponsors of the legislation explicitly cited scientific progress in understanding of brain development in adolescents and young adults: "Scientific evidence on adolescence and young adult development and neuroscience shows that certain areas of the brain, particularly those affecting judgement and decision-making, do not develop until the early-to-mid-20s. Research has shown that the prefrontal cortex doesn't have nearly the functional capacity at age 18 as it does at 25. The prefrontal cortex is responsible for a variety of important functions of the brain including: attention, complex planning, decision making, impulse control, logical thinking, organized thinking, personality development, risk management, and short-term memory. These functions are highly relevant to criminal behavior and culpability. (Cal. Assem. Public Saf. Comm., Bill Analysis, Assem. Bill No. 1308, p. 2 <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB1308#> [04/24/17 – Assembly Public Safety] [as of Nov. 15, 2019].)

[affirming that it is a "widely-accepted premise" that a juvenile brain is "not fully formed and appears to develop until a person's mid-twenties"]; see also *People v. House* (Ill. App. Ct. 2015) 72 N.E.3d 357, 387 [holding that *Roper* does not create a bright-line rule demarcating juvenile from adult at 18, and that recent research in neurobiology and developmental psychology justifies extending the ban on mandatory life sentences for juveniles to the 19-year-old defendant]; *Horsley v. Trame* (7th Cir. 2015) 808 F.3d 1126, 1133 [quoting Declaration of Ruben C. Gur, Ph.D.: "The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable"]; *Cruz v. United States*, *supra*, 2018 WL 1541898 at * 24 [quoting Steinberg that he is that he is "'absolutely confident' that development is still ongoing in late adolescence."])

3. International Support

Trends in international law demonstrate that the death penalty as a whole, and, in particular, as applied to young adults, is disfavored and outside of established standards of decency. This provides support for the conclusion that the death penalty is a disproportionate punishment for adolescents and young adults. (See *Roper*, *supra,* 543 U.S. at p. 553 ["The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18."])

One hundred and six countries prohibit the death penalty for any crime. (DPIC, *Abolitionist and Retentionist Countries* <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries> [as of Nov. 15, 2019]; Amnesty International, *Death Sentences and Executions*, <https://www.amnesty.org/download/Documents/ACT5098702019ENGLISH.PDF> [as of Nov. 15, 2019]; see also, *Glossip v. Gross* (2015) 135 S. Ct. 2726, 2775 (dis. opn. of Breyer, J.) ("I note...that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional have abolished it in practice....In 2013, only 22 countries in the world carried out an execution..... No executions were carried out in Europe or Central Asia, and the United States was the only country in the Americas to execute an inmate in 2013. ... Only eight countries executed more than 10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen). ...And almost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia.")

Another eight countries prohibit capital punishment for all but crimes committed in times of war or other limited circumstances. (Amnesty International, *supra*, *Death Sentences and Executions*, [as of Nov. 15, 2019].) An additional 28 countries have abolished capital punishment in practice in that they have not executed anyone during the past ten years, or have a policy or established practice not to use the death penalty. (*Ibid*.)

Four countries recognize the continuing maturation of young individuals and prohibit execution of those below the age of 20.[48] A number of multilateral treaties, including article 6(5) of the International Covenant on Civil and Political Rights, article 4(5) of the American Convention on Human Rights and article 37(a) of the Convention on the Rights of the Child, also prohibit the execution of juveniles.[49]

Recently, the international medical and psychological community has now explicitly recognized that "young adults are distinct from older adults in terms of both their needs and their outcomes." (House of Commons Justice Committee, *The Treatment of Young Adults in the Criminal Justice System, Seventh Report of Session 2016-17* <https://publications.parliament.uk/pa/cm201617/cmselect/
cmjust/169/169.pdf> [as of Nov. 15, 2019].) As the House of Commons report observed, recent scientific evidence has identified

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[48] See, e.g., Law No. 62, Penal Code, art. 29(2), 1988 (Cuba); U.N. Convention on Rts. Of Child, Concluding Observations: Egypt, TT 27-28, U.N. Doc. CRC/C/15/Add.145 (Feb. 21, 2001); Penal Code Law No. 111 of 1969, art. 79 (Iraq); Intl. Federation for Human Rights, The Death Penalty in Thailand, 20 (Mar. 2005).

[49] The International Covenant on Civil and Political Rights is available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> [as of Nov. 15, 2019]. The American Convention on Human Rights is available at <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> [as of Nov. 15, 2019]. The Convention on the Rights of the Child is available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> [as of Nov. 15, 2019].

"a distinctive phase of development occurring between the ages of 18 and 24." (*Id.* at p. 6). There is now an "irrefutable body of evidence from advances in behavioral neuro-science that the typical adult male brain is not fully formed until at least the mid-20s, meaning that young adult males typically have more psycho-social similarities to children than to older adults." (*Id.* at p. 7). "[T]he effect of trauma in childhood and adolescence compounds issues with maturation as those affected experience heightened levels of flight or fight reactions, and hence increased chances of risk-taking behaviour." (*Id.* at p. 11). "Other adverse life circumstances can similarly impact on young adults' maturity and affect typical brain development." (*Ibid.*) "Young adults are still developing neurologically up to the age of 25 and have a high prevalence of atypical brain development[.]" (*Id.* at p. 61)

Furthermore, several European countries maintain broad approaches to treatment of late adolescents who commit crimes. In countries such as England, Finland, France, Germany, Italy, Sweden, and Switzerland, late adolescence is a mitigating factor either in statute or in practice that allows many 18 to 21 year olds to receive similar sentences and correctional housing to their peers under 18. (Pruin & Dunkel, *Transition To Adulthood, Better In Europe? European Responses To Young Adult Offending: Executive Summary* (2015) Ernst Moritz Arndt Universitat Greisfwald, pp. 8-10, <https://www.t2a.org.uk/wp-content/uploads/2016/02/T2A_Better-in-Europe.pdf> [as of Nov. 15, 2019].)

D. California Cases Are Not Dispositive

In *People v. Gamache*, *supra*, 48 Cal.4th at pp. 404-405, this Court rejected Gamache's argument that his death sentence was

unconstitutional even though he was 18 at the time of his offense. Citing *Roper*, in *Gamache*, this Court stated that the United States Supreme Court identified an "emergent consensus" that executions of juveniles was cruel and unusual, noting that it "identified no comparable consensus for crimes committed by those age 18 or older (*Ibid.*) It does not appear that Gamache presented anything regarding the actual practice of not executing young adults and not sending such people to death row, as appellant does here. Additionally, as appellant has shown, since this Court's decision in *Gamache*, a national consensus has evolved excluding late adolescents and young adults from execution. There is also a significant new body of science regarding young persons, ages 18-21, which was not available to the Court in 2010 and which shows that imposition of the death penalty on this age group is disproportionate. In any event, the "evolving standards of decency" query necessarily evolves; so that what may have been true in 2010 does not hold true today.

More recently, in *People v. Powell* (2018) 6 Cal.5th 136, this Court again rejected the argument that *Roper*, *supra*, 543 U.S. 551 and *Atkins*, *supra*, 536 U.S. 304, "'stand for the principle that it is cruel and unusual, by evolving standards of decency, to execute someone who is over 18, but whose brain functions at a level equivalent to a juvenile.'" (*People v. Powell*, *supra*, 6 Cal.5th at p. 191.) Observing that some individuals who are under the age of 18 "have already attained a level of maturity some adults will never reach" (*Ibid.*, citing *Roper*, *supra*, 543 U.S. at p. 574), this Court reasoned those cases did not bar the death penalty for an individual

"merely because that person may share certain qualities with some juveniles." (*People v. Powell*, *supra*, 6 Cal.5th at p. 192.)

This holding does not foreclose relief. Appellant has shown above that societal norms have evolved since *Roper* was decided 14 years ago, and that a new national consensus has formed that young offenders, under the age of 21, should categorically be excluded from the death penalty because (1) the use of the death penalty to execute individuals who were between the ages of 18 and 21 at the time of the crime has become rare and (2) legislative changes evince a new national consensus that individuals under the age of 21 should be considered less culpable. Additionally, new scientific research demonstrates that the developmental characteristics identified in *Roper* that made the death penalty disproportionate (impulsivity, rash decision-making and the inability to evaluate consequences) are likely present in individuals up until the age of 21, so that the death penalty for members of that group is grossly disproportionate and forbidden by the Constitution. Given the recent societal consensus that the death penalty is grossly disproportionate for young adults, it is immaterial that some of those young adults are not immature. Just as the United States Supreme Court drew a line in *Roper* barring the death penalty for those under 18, this Court should now draw a line barring the death penalty for young offenders who were between the ages of 18 and 21 at the time of the crime.

Accordingly, the penological justifications for a death sentence are weakened for individuals between the ages of 18 and 21 who commit homicide, just as they were for the 16 and 17-year-old

defendants that were the subject of *Roper*. The retributive purpose of such a punishment is attenuated because "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." (*Roper*, *supra*, 543 U.S. at p. 571.) Likewise, the same characteristics of young people between ages 18 and 21 that render them less culpable — their impulsivity, rash decision-making, biased attention to anticipated immediate rewards rather than longer-term costs and lesser ability to consider and evaluate the future consequences of their actions — substantially weaken the deterrence justification for such punishment. (*Ibid*.) Sentencing these young people to death disregards entirely the signature characteristics of youth. Sentencing such an immature and less culpable young adult to death notwithstanding the likelihood that "[m]aturity can lead to . . . remorse, renewal, and rehabilitation" (*Graham*, *supra*, 560 U.S. at p. 79), is grossly disproportionate punishment and forbidden by the federal Constitution.

E. Appellant Is Categorically Excluded from the Death Penalty Because of the Risk That it Will Be Arbitrarily Applied

Execution of young people between the ages of 18 and 20 at the time of their crimes is forbidden by the Eighth Amendment's prohibition against cruel and unusual punishment and by the due process clause of the federal Constitution and under California Constitution article 1, section 7, because of the severe challenge youth presents to the reliability of a death sentence. This is so for at least two reasons. First, the immature traits of a young offender presents the risk that the defendant will not receive individualized

consideration of his or her sentence. Second, the death penalty as applied to youthful offenders is racially discriminatory.

1. Youth Presents a Barrier to the Individualized Consideration of the Appropriate Penalty

In *Furman v. Georgia* (1972) 408 U.S. 238 (*Furman*), the United States Supreme Court found that the death penalty was unconstitutional because states used it in an arbitrary and capricious manner. Since *Furman*, numerous limitations have been placed on the death penalty to ensure "that the death penalty decision can be a rational decision-making process while fully considering the capital defendant as an individual." (Sundby, *The True Legacy Of Atkins And Roper: The Unreliability Principle, Mentally Ill Defendants, and The Death Penalty's Unraveling* (2014) 23 Wm. & Mary Bill Rts. J. 487, 493.) Most importantly, in *Woodson v. North Carolina* (1976) 428 U.S. 280, the Court held that the Eighth Amendment requires a principle of individualized consideration. "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Id*. at p. 286.) The full scope of *Woodson's* constitutional imperative of "individualized consideration" was first made clear in *Lockett v. Ohio* (1978) 438 U.S. 586, which held that the principle of individualized consideration required that the sentencer be allowed to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that

the defendant proffers as a basis for a sentence less than death." (*Id.* at p. 604.)

The *Lockett* Court tied the individualized consideration of a defendant to the requirement that capital sentencing be reliable. The death penalty "call[ed] for a greater degree of reliability" because "the penalty of death is qualitatively different from any other sentence." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) The Court then expressly linked the heightened reliability with *Woodson's* requirement of individualized consideration:

> Given that the imposition of death is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

(*Id.* at p. 605.) In effect, the Court found that the need for greater reliability based on individualized consideration means that a death sentence cannot stand if the sentencing carried the risk that the sentencer "did not fully hear or consider mitigation." (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 500.)

> [P]revent[ing] the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

(*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.)

In *Penry v. Lynaugh*, *supra*, 492 U.S. 302, the Court again explicitly tied the individualized consideration of the defendant's mitigation with the reliability of the death penalty. In *Penry*, the defendant had introduced his intellectual disability as mitigation, but because of Texas' mitigation statute, there was no way for the jury to give that mitigation effect. The Court reversed Penry's death sentence finding that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer[;] the sentencer must also be able to consider and give effect to that evidence in imposing sentence." (*Id.* at p. 328, citing *Hitchcock v. Dugger* (1987) 481 U.S. 393.) The Court explained that the full presentation and consideration of mitigation was constitutionally essential, and it was essential because of reliability:

> Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. [*Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 304, 305.] Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.

(*Ibid.*) The Court has sent the "unambiguous message that the Eighth Amendment right to individualized consideration was to be construed broadly because it was a critical underpinning of the Court's efforts to construct a constitutional death penalty system after *Furman*." (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 504.)

The Court's reliance on individualized consideration in analyzing the constitutionality of the death penalty continued in *Atkins*, *Roper* and *Graham*. In addition to its conclusion that the

death penalty was disproportionate for the intellectually disabled in *Atkins*, and for juveniles in *Roper*, both cases rely upon the principle that facts about the offenders in these classes make the death penalty unreliable because the sentencer cannot give individualized consideration to offenders in the class. In *Atkins*, the Court stated that there is "risk that the 'penalty will be imposed [on intellectually disabled offenders] in spite of factors which may call for a less severe penalty' (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." (*Atkins*, *supra*, 536 U.S. at p. 320.) Additionally, intellectually disabled offenders "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." (*Id.* at p. 321.) Finally, "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." (*Ibid.*) The Court thus acknowledged in *Atkins* a principle that certain categories of defendants must be excluded from the death penalty if there is a risk that the penalty cannot be reliably imposed. (See Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 496 [finding an "unreliability principle" articulated in *Atkins* such that: "if too great a risk exists that constitutionally protected mitigation cannot be properly comprehended and accounted for by the sentencer, the

unreliability that is created means that the death penalty cannot be constitutionally applied"].)

The Court returned to this principle in *Roper*. In that case, the government had argued that a categorical ban on the death penalty for juveniles was unnecessary because jurors could take youth into account as a mitigating circumstance. In rejecting this argument, the Court invoked the idea that the mitigation at stake was beyond the sentencer's ability, asserting that the very nature of a capital crime made it impossible for a jury to properly assess the mitigating circumstance. "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." (*Roper*, *supra*, 543 U.S. at p. 573.)

The Court also relied upon the dangers of an unreliable sentence in *Graham* when it struck down life without parole sentences for juveniles who had committed non-homicide crimes. The Court invoked the unreliability principle to reject the idea that the states could rely on a "case-by-case proportionality" approach to decide if a life without parole sentence violated the Eighth Amendment. Specifically, the *Graham* Court "brought the unreliability principle into play by turning to *Atkins* and *Roper*'s theme that the very nature of the mitigation rendered an assessment of the defendant's culpability unreliable" (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 507):

> [T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal

> proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. [Citations.] Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. [Citation.] These factors are likely to impair the quality of a juvenile defendant's representation. [Citation.]

(*Graham*, *supra*, 560 U.S. at p. 78.) The Court concluded that these "special difficulties" meant that the risk was simply too great that the sentencer would not be able to assess how a particular juvenile defendant might act in the future. "For even if we were to assume that some juvenile nonhomicide offenders might have 'sufficient psychological maturity, and at the same time demonstrate sufficient depravity' [citation] to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." (*Id.* at p. 77, brackets omitted.) The Court concluded that the solution was a categorical ban of juvenile offenders from the punishment of life without the possibility of parole. "A categorical rule [barring life without parole sentences thus] avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a non-homicide." (*Ibid.*) The *Graham* Court's categorical exclusion of juveniles who committed non-homicide crimes from a sentence of life without parole thus relied on the

Eighth Amendment "unreliability principle and the danger that such a severe sentence might be erroneously imposed because of the sentencer's inability to make a reliable assessment on a case-by-case basis." (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 508.)

Additional support for an unreliability principle can be found in *Hall*, the case in which the Court struck down Florida's rule that *Atkins* could not apply unless a defendant had an IQ test score of 70 or under. The Court expressly acknowledged "protect[ion] [of] the integrity of the trial process" as one of the key rationales in *Atkins*. (*Hall*, *supra*, 572 U.S. at p. 709 [quoting *Atkins* as to the "special risks" that the intellectually disabled face at trial and sentencing].) Moreover, *Hall* concluded that Florida's IQ cut-off rule "create[d] an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." (*Id.* at p. 704.)

The unreliability principle underlying the exclusion of the intellectually disabled offender and the juvenile offender from the death penalty applies equally to young people between 18 and 21 years old.[50] This is so for the reasons articulated in *Atkins*, *Roper*

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[50] Under the unreliability principle, offenders between the ages of 18 and 20 are excluded from the death penalty regardless of whether there is a national consensus required for a proportionality analysis. Because this principle is an expression of the line of cases requiring that a sentencer give individual consideration to the offender, rather than the evolving standards cases, the prerequisite of a national consensus has no bearing on the constitutional inquiry. "[T]he *Woodson-Lockett* line of cases instituted the Eighth Amendment mandate that the sentencer must be able to give effect to constitutionally protected mitigation because it was a necessary 'cure' to the arbitrariness *Furman* identified: without proper consideration of mitigation, the death penalty is not sufficiently

(footnote continued)

and *Graham*. The characteristics of individuals ages 18, 19 and 20 impair the ability of such young people to cooperate with defense counsel and also impair the ability of the lawyer to prepare a defense. Just as with younger juveniles, individuals that age "mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense." (*Graham*, *supra*, 560 U.S. at p. 78.) In addition to concerns over how a mitigating factor impairs trial preparation, the Court in *Atkins* focused on how a mitigating factor may adversely affect the defendant's ability to have his mitigation heard at the trial itself. Just as with the juvenile offender and the intellectually disabled offender, the defendant between ages 18 and 20 is especially likely to make a "poor witness." (*Atkins*, *supra*, 536 U.S. at p. 321.)

As noted, the Court in *Graham* highlighted the unreliability produced by a juvenile's "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel . . . lead[ing] to poor decisions . . . ." (*Graham*, *supra*, 560 U.S. at p. 78.) As with a juvenile defendant, the reliability of the penalty phase for an 18, 19 or 20-year-old is jeopardized by the necessity of relying on a young defendant to

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reliable to satisfy the Eighth Amendment. [Fn. 119 (*Furman*, *supra*, 408 U.S. at p. 274 (conc. opn. of Brennan, J.)).] This requirement, however, has no logical nexus to whether or not a national consensus has coalesced about the mitigation." (Sundby, *supra*, 23 Wm. & Mary Bill Rts. J. at p. 510.)

make key strategic decisions involving constitutional rights. Research has shown that youth are more likely than adult offenders to be wrongfully convicted of a crime. (Bluhm Legal Clinic Wrongful Convictions of Youth, *Understand the Problem* <http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem> [as of Nov. 15, 2019].)[51]

Additionally, as part of *Atkins*' rationale in finding that intellectually disabled defendants faced a "special risk of wrongful execution" was the potential for mental retardation to be used as a "two-edged sword." (*Atkins*, *supra*, 536 U.S. at p. 320.) The *Atkins* Court noted that a defendant who raises intellectual disability as mitigation may perversely undermine his case for life by also "enhanc[ing] the likelihood that the aggravating factor of future dangerousness will be found by the jury." (*Ibid*.) *Roper* focused even more directly upon the double-edged risk that "a defendant's youth may even be counted against him." (*Roper*, *supra*, 543 U.S. at p. 573.) Just as with juveniles and the intellectually disabled, the youthfulness of the 18, 19 and 20-year-old offender may be counted against him, rather than the jury weighing it as mitigation.

In excluding juveniles from the death penalty, the *Roper* Court relied heavily on the fact that the mental health field itself is unsettled in understanding juvenile behavior. (*Roper*, *supra*, 543 U.S. at p. 573.) As the Court stated: "If trained psychiatrists with

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[51] An analysis of known wrongful conviction cases found that individuals under the age of 25 are responsible for 63 percent of false confessions. (Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* (2004) 82 N.C. L.Rev. 891, 945.)

the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation — that a juvenile offender merits the death penalty." (*Ibid.*) Identical concerns run through the assessment of young people between the ages of 18 and 21, so that jurors should not be asked to condemn members of this group to death. Finally, as noted above, part of *Roper's* finding of unreliability rested on the grounds that "the brutality or cold-blooded nature of any particular crime" would overpower mitigating arguments based on youth, even where there was evidence of a juvenile "lack of true depravity" that "should require a sentence less severe than death." (*Ibid.*) The danger is equally present for individuals who are between the ages of 18 and 21. For these reasons, mitigation is beyond reliable assessment for the 18 to 20-year-old defendant, so that such individuals should not be executed, in keeping with the concepts and constitutional principles announced in *Atkins* and *Roper*.

In this case, defense counsel argued that appellant's youth should be considered a mitigating factor, noting expert testimony that the frontal lobe of the brain – the portion that that regulates impulse control and moral judgment – is not fully developed until the age of 22. (25RT 3252, 3131.) The prosecutor, however, argued that appellant's youth at the time of the crime did not "outweigh the [factor] A and B evidence." (25RT 3241.) This case thus underscores the concern expressed in *Roper* that juries in capital cases cannot reliably assess youth as a mitigating factor because of the nature of

the crime, and here more pointedly, because of the prosecutor's misleading argument. Thus, as in *Roper*, the only remedy for the "unacceptable likelihood" that capital juries will not be able to take into account a young defendant's age and immaturity as mitigation is to extend the categorical ban on the death penalty to young offenders between the ages of 18 and 20 at the time of the capital crime.

2. The Death Penalty for Youthful Offenders Is Disproportionately Imposed on People of Color and Carries an Unacceptable Risk of Arbitrariness

As was pointed out by Justices Marshall and Douglas, in the years before *Furman,* people of color were disproportionately sentenced to die. (*Furman*, *supra*, 408 U.S. at p. 364 (conc. opn. of Marshall, J.) ("a look at the bare statistics regarding executions [was] enough to betray much of the discrimination . . . ."); *Id.* at pp. 256-257 (conc. opn. of Douglas, J.) ("[Death sentencing schemes] are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."). A recent study shows that the imposition of the death penalty for youthful offenders is even more racially discriminatory than the death penalty for older adults. "More specifically, 25% of youthful offenders are white and 74% are black or Latinx. A higher proportion of adult offenders are white, 43% compared to black and Latinx (54%). But while 43% of the adult offenders sentenced to death are white, and 54% are black and Hispanic, 74% of young offenders sentenced to death were black or Latinx." (Blume, et al, *supra,* Forthcoming 2019 Tex. Law Rev., p. 27.) That same study

showed that that the racial composition of the pool of youthful offenders versus adult offenders who are executed is significantly different: "Black and Latinx youth are overrepresented in executions of youthful offenders (46% and 16%, respectively), compared to adult offenders (32% and 11%, respectively)." (*Ibid*.) The difference cannot be explained by differences in homicide arrests. "Most youthful homicide offenders are white (59%) and fewer are black (38%). Most adult homicide offenders are also white (53%) and fewer are black (44%). In addition, Hispanic youth are 25% of known youthful offenders and 29% of known adult offenders. (*Id.* at p. 29 [citations omitted].)

There were also differences in offender and victim race across youthful and adult offenders. "Of the death penalty cases with one victim since *Roper*, white offenders and white victims were 36% of adult offender cases, but only 24% of youthful offender cases. Black defendant and white victim cases are 19% of adult offender cases and 24% of youthful offender cases: black youthful offenders are disproportionately likely to receive a death sentence for killing a white person" (Blume, et al., *supra*, Forthcoming 2019 Tex. Law Rev., p. 29.) Finally, there were differences in execution rates based on the race of the victim. (*Id*. at p. 30.) Sentencing youthful offenders to death carries the impermissible risk of arbitrariness. Black and Hispanic youthful offenders are disproportionately likely to receive death sentences, and to have their death sentences vacated.

F. Appellant Cannot Be Sentenced to Death for a Murder Committed When He Was 18 years Old

As discussed above, in *Roper* the Court held that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Roper*, *supra*, 543 U.S. at p. 568, quoting *Atkins*, *supra*, 536 U.S. at p. 319; see also *United States v. Fell*, *supra*, 224 F.Supp. 3d at p. 355 ("[T]he requirements of *Furman* and *Gregg* [are] that death penalty statutes clearly separate the minority of the worst murderers who are subject to the death penalty from other offenders charged with homicide.").) As further discussed above, in *Roper*, the United States Supreme Court identified three "hallmarks" of juveniles that excluded young offenders from the death penalty. (See *Miller*, *supra*, 567 U.S. at p. 477 [denominating the relevant characteristics as "hallmarks"].) First, juveniles' immaturity and lesser sense of responsibility often result in "'impetuous and ill-considered actions and decisions.'" (*Roper*, *supra*, 543 U.S. at p. 569.) Second, juveniles are more vulnerable to negative influences and outside pressures. (*Ibid*.) Third, juveniles have character traits that tend to be more malleable, and may prove less accurate as portents of future conduct. (*Id*. at p. 570.) In light of these differences, the court concluded that juveniles are categorically less culpable than adults are. (*Id.* at p. 561.)

Roper's holding limiting the applicability of the death penalty to juveniles rests on general features of adolescence (immaturity, vulnerability, malleability) and recognizes that those general features must inform where a state draws the limits of the death

penalty. These features constrain a state's considerations as to what defendants can receive what punishments under the Eighth Amendment. So, for example, in *Miller*, *supra*, 567 U.S. at p. 465, citing the same characteristics of juveniles articulated in *Roper* (*Id.* at pp. 461-475), the Supreme Court concluded that juveniles who commit murder cannot receive mandatory sentences of life without the possibility of parole (LWOP). The Court held that "[b]y making youth (and all that accompanies it) irrelevant to [eligibility for] that harshest . . . sentence, such a scheme poses too great a risk of disproportionate punishment." (*Id.* at p. 479.) No state can conclude that juveniles who commit murder should receive mandatory LWOP sentences, as this is forbidden by the Eighth Amendment. (See *People v. Salazar* (2016) 63 Cal.4th 214, 259 (conc. opn. of Cuéllar, J.) ["For example, it might conceivably be "rational" for the Legislature to conclude that juveniles who commit multiple murders should receive mandatory LWOP sentences—but that is a scheme the Eighth Amendment plainly forbids. (*Miller*, *supra*, 567 U.S. at p. 470.)

Similarly, no state can conclude that a young person, under the age of 21, who commits murder should be executed without running afoul of the Supreme Court's determination under the Eighth Amendment that "[a] juvenile . . . transgression 'is not as morally reprehensible as that of an adult.'" (*Graham*, *supra*, 560 U.S. at p. 68, quoting *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 835.) In sum, because appellant was 19 when he committed the murder for which he was sentenced to death, the judgment of death in this case violates the Eighth and Fourteenth Amendments, and

parallel provisions of the California Constitution, and must be reversed.

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

In Argument IX of his opening brief, appellant identified numerous aspects of the application of California's capital sentencing scheme that facially and as-applied violate the requirements of the United States Constitution. (AOB 384-401.) .) Recently, the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584, because the sentencing judge, not the jury, made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___ (136 S.Ct. 616, 624) (*Hurst*).) *Hurst* provides new support to appellant's claims in Argument IX.C of his opening brief. (AOB 387-388, 390-392.) In light of *Hurst*, this Court should reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14); does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106); and does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, Must Be Found by a Jury Beyond a Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 (*Ring*); *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 (*Apprendi*).) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at pp. 494, 482-483.) Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential

part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst*, *supra*, 136 S.Ct. at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst*, *supra*, 136 S.Ct. at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (Ibid.)[52]

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "*Ring*'s claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*,

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[52] The Court in *Hurst* explained: "[T]he Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.' Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" (§ 921.141(3); see [*State v.*] *Steele*, [(Fla. 2005)] 921 So.2d [538,] 546). (*Hurst*, *supra*, 136 S.Ct. at p. 622.)

536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty"'].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle: any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) At the outset of the opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) The Court reiterated this fundamental principle throughout the opinion.[53] The

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[53] See *id*. at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id*. at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id*. at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance,

(footnote continued)

Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates Hurst by Not Requiring That the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, § 190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman*, *supra*, 60 Cal.4th at p. 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law,

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independent of a jury's factfinding, that is *necessary for imposition of the death penalty*," italics added].

however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi*/*Ring*/*Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first-degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a special circumstance (Pen. Code, § 190.2) and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. § 13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fla. Stat. § 921.141(3)).[54]

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[54] As *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra*, 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury

(footnote continued)

Although *Hurst* did not decide the standard of proof issue, the Court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612,

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determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) At bottom, the Ring inquiry is one of function.

In California, when a jury convicts a defendant of first-degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, § 190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5].) When the jury returns a verdict of first-degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, § 190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a "capital case" within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes

that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first-degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[55]

C. This Court's Interpretation of the California Death Penalty Statute in *People v. Brown* Supports the Conclusion That the Jury's Weighing Determination Is a Factfinding Necessary to Impose a Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512 (rev'd. on other grounds *sub nom*. *California v. Brown* (1987) 479 U.S. 538) does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id*. at pp. 538-539.) As the Court explained:

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[55] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) 571 U.S. 1045 [134 S.Ct. 405, 410-411] (dis. opn. from denial of certiorari, Sotomayor, J.).)

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id*. at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id*. at p. 545, fn. 17), and construed this language to avoid violating the federal Constitution (*id*. at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under

> the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, 40 Cal.3d at p. 541 (*Brown*), footnotes omitted.)[56]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death,

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[56] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown's* gloss on the sentencing instruction.

the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla. Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He may impose death if satisfied in writing "(a) [t]hat sufficient

> [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id.*, subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown's* interpretation of section 190.3.[57] The requirement that the jury

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[57] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided: "*In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.*"

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part: "*The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so*

(footnote continued)

must find that the aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), vol. 1, Preface, p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622, which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

D. This Court Should Reconsider its Prior Rulings That the Weighing Determination Is Not a Factfinding under *Ring* and Therefore Does Not Require Proof Beyond a Reasonable Doubt

This Court has held that the weighing determination—whether aggravating circumstances outweigh the mitigating

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substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

circumstances—is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman*, *supra*, 60 Cal.4th at p. 106, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 595, citations omitted; accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However, the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under

the due process clause].)[58] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 (*Rauf*) supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Rauf*, *supra*, 145 A.3d at pp. 433-434 (*per curiam* opn. of Strine, C.J., Holland, J. and Steitz, J.).) In Delaware, unlike in Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at p. 456 (conc. opn. of Strine, C.J.).) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[59]

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[58] The *Apprendi*/*Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

[59] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on her own additional factfinding of non-statutory aggravating circumstances" (*Rauf*, *supra*, 145 A.3d 430 at pp. 433-434 (*per curiam* opn.) [addressing

(footnote continued)

(*Id.* at pp. 433-434 (*per curiam opn.*).) One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (*Ibid.*; see *id.* at pp. 485-487 (conc. opn. of Holland, J.).) With regard to this defect, the Delaware Supreme Court explained:

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Rauf*, *supra*, 145 A.3d at p. 485 (conc. opn. of Holland, J.), quotation and fns. omitted.)

The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi*/*Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*,

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Questions 1-2]; *id.* at p. 484 (conc. opn. of Holland, J.) [same]; and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at p. 434 (*per curiam* opn.) [addressing Question 3]; *id.* at pp. 485-487 (conc. opn. of Holland, J.) [same]).

64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that – under *Apprendi* – the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made, by a jury and beyond a reasonable doubt. As appellant's jury was not required to make this finding, appellant's death sentence must be reversed.

CONCLUSION

For all the foregoing reasons, the sentence and judgment of death must be reversed.

Dated: January 16, 2020

Respectfully submitted,

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/s/
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Attorney for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I, Jessica K. McGuire, am the Assistant State Public Defender assigned to represent appellant Refugio Ruben Cardenas, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 39,776 words in length, excluding the tables and this certificate.

Dated: January 16, 2020

/s/
JESSICA K. McGUIRE
Assistant State Public Defender

Attorney for Appellant

DECLARATION OF SERVICE

Case Name: ***People v. Refugio Ruben Cardenas***
Case Number: **Supreme Court Case No. S151493**
Tulare Superior Court No. VCF117251

I, **Joy E. Rapp**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a true copy of the following document:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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The envelopes were addressed and mailed on **January 16, 2020,** as follows:

REFUGIO R. CARDENAS, #F-70949 CSP-SQ 2-EY-25 San Quentin, CA 94974	

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **January 16, 2020,** at Sacramento, CA.

/s/
JOY E. RAPP

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S151493**
Lower Court Case Number:

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