IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff / Respondent, vs. RICHARD TULLY, Defendant/Appellant.	California Supreme Court Case No. S030402 **VOLUME II**

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda
(Superior Court No. H9798)

Honorable William R. McGuiness

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STATEMENT OF FACTS - PENALTY PHASE

The following evidence was presented at the penalty phase:

Uncharged Acts Evidence

The prosecution introduced the testimony of Robert Pinkerton and Michael Perkins, two jail officers. Pinkerton saw an altercation between Mr. Tully and inmate Derrick Mendoca in January 1988. (RT 3412-3414.) Pinkerton did not see who started the fight, and could not remember whether he saw any punches land. Mr. Tully was injured and required stitches. Mendoca had no visible injuries. (RT 3415.) Mendoca testified that he swung the first punch and hit Mr. Tully in the mouth after Mr. Tully wiped mustard or ketchup on his shirt. (RT 3514-3515.)

Perkins saw Mr. Tully and another inmate wrestling in September 1991. (RT 3416, 3419.) Both men tried to throw punches. Perkins did not see any punches land. He did not see who started the incident. When jailers intervened, the inmates stopped fighting. Mr. Tully's opponent was 6' tall and weighed 174 pounds. Mr. Tully was 5'7" and weighed 155 pounds at the time. (RT 3423.)

Victim Impact Evidence

The remainder of the prosecution's penalty phase case was devoted to victim impact evidence. Ms. Olsson's son and daughter, her sister and her father testified.

Ms. Sandra Walters, Olsson's daughter, was very close to her mother. She visited her and talked to her on the phone. (RT 3425.) She testified that she was a loving, caring and happy person. (RT 3425, 3440.) Walters testified that her parents divorced when she

was 22. She was angry with her father at the time, but formed a relationship with him before her mother's death. (RT 3434-3435.) She was angry because her mother was taken away from her when she was killed. (RT 3437, 3541-3542.) Her mother's killing made her afraid. She slept with a night light and with a hatchet under her bed. (RT 3428).

Elbert Walters, Ms. Olsson's son, testified that his family moved a lot when he was a child. (RT 3445.) His mother was his "anchor." (RT 3444.) He had been wild in his youth but had put his life together, started a business, met his wife and got married, all after his mother's death. (RT 3446.) He said that she had suffered from breast cancer (RT 3438.)

Jan Dietrich, Ms. Olsson's sister, testified about Ms. Olsson's employment history. After high school, Ms. Olsson went to Northwestern, then to Evanston Hospital. Ms. Olsson spent four years in the military. While her children were growing up, she did not work, but returned to work in 1977. She ended up at the VA Hospital in Livermore. (RT 3458.) Dietrich testified she was close to her sister. After their children had grown, they traveled together often. Olsson planned to retire in three years and had plans to travel. (RT 3459.) Dietrich described how painful it was to break the news of Olsson's death to her father. (RT 3461.)

Clifford Sandberg, Ms. Olsson's father, testified at the penalty phase. He last saw his daughter two months before the crime. He had spoken to her on the phone a week before. (RT 3485.) He and his daughter had discussed traveling together after she

retired. (RT 3486.) After her death, he had trouble sleeping. (RT 3488.)

All the family members described how they heard about Ms. Olsson's death. It occurred two days before she was scheduled to attend her father's 85th birthday. (RT 3428-3431; 3461-3463; 3468.) Instead, the family all met at Ms. Olsson's house, which was covered with fingerprint powder, and there was blood on the carpet. (RT 3441-3443; 3469-3471.) All the witnesses expressed experiencing a greater impact from their mother's death than they would have endured if she died of illness or other natural causes. (RT 3434; 3448-3449; 3472-3474.)

The trial court rejected the prosecutor's request to recall Ms. Olsson's coworker, Barbara Green, to testify at the penalty phase. (RT 3404.) Despite this ruling, the prosecutor read portions of Green's guilt phase testimony to the jury during his closing argument. (RT 3738-3741.)

The Case in Mitigation

Mr. Tully's older sister, Shirley Brown, and his older brother, Roger Tully, testified for the defense. They testified that Mr. Tully was born in Turkey. His father was in the U.S. Air Force and was stationed there when he was born. (RT 3561.)

There were five children in the family. The children were fathered by three different men. Shirley and Roger have a different father from Mr. Tully. They never learned their fathers identity. (RT 3519-3520; 3558-3559.) Mr. Tully's father sometimes was on military assignments away from home for long periods of time. The family moved often. After they left Turkey, they lived in Wyoming, California and Alaska. (RT

3523.). The home life of the Tully family was "confusing." (RT 3563.)

Mr. Tully's father (Roger's stepfather) had a severe drinking problem. He was always drinking. (RT 3521; 3525; 3563.) Their home was a "social club." Roger's stepfather and mother would clear the apartment to have parties, forcing the children to stay in the bedroom with the furniture. (RT 3570.) Shirley Brown described the smell of stale alcohol and beer. She had to clean up after her stepfather. (RT 3525-3526.) While in the Air Force, he was demoted, because of his drinking.

Roger Tully testified that his stepfather drank to the point of hallucinating. He described a camping trip with his stepfather and Mr. Tully in Alaska. His stepfather drank himself into such a stupor that he thought they were in the lake. He began screaming to get out because "we're going down." (RT 3576.) Mr. Tully was around six years old at the time. (RT 3592.)

Roger recalled that his stepfather was often brought home by Air Force Police because he was drunk, or else didn't come home at all. Sometimes when he came home he had black eyes or his face was swollen shut. (RT 3563; 3577.)

Shirley Brown remembered an incident when she was 11 years old and her stepfather wanted to teach her how to kiss boys and tried to lay her down on the bed. She told her mother, who did nothing. (RT 3526-3527.) Mr. Tully's mother and father kept pornographic books in the house, including books on father-daughter incest. (RT 3578.)

Because Mr. Tully's father was absent and/or drunk most of the time, his older siblings had to look after him and help him with his homework. (RT 3562-3563.) Mr.

Tully was not very "bright," and needed a lot of help to get through school. (RT 3584.)

Although Shirley acted like Mr. Tully's mother and tried to take care of him, she left home right after she graduated from high school. (RT 3584.) Roger moved out immediately afterwards. Mr. Tully was around 12 years old. (RT 3569.)

Mr. Tully's father and mother were always fighting over his drinking and staying out late. Mr. Tully's mother was the physical aggressor in these fights. The children witnessed a lot of violence at home. (RT 3524, 3563; 3569-3570.) Roger Tully remembered coming out of his bedroom one night and finding broken glass everywhere. He was sent back to his room. He came out later and found his stepfather on the kitchen floor with a skillet over his head or on his stomach, apparently having been knocked out cold. (RT 3570.)

Mr. Tully's mother was described as "worse than a drill sergeant," "difficult to deal with," "volatile,"and someone who would "go off on a dime." They never knew what the rules were and they always seemed to change. She never complimented the children about anything. (RT 3525; 3578; 3579, 3599.) She would take her anger out on her husband and by berating the children. (RT 3571.) Shirley described an incident when she returned home after she had moved out. Her mother kept telling Mr. Tully, who was 13 at the time, that he was stupid. Mr. Tully sat on the bed and cried. (RT 3528.)

Mrs. Tully hit the children with a belt or her hand and would just start flailing at them without control. (RT 3572.) Roger recalled that Richard caught the bulk of his mother's anger. (RT 3573.)

Mr. Tully's mother accused her husband of having a reputation for extramarital affairs. She took her children with her when she went to visit her male friends. She told them not to reveal the visits to her husband, whom she referred to as "that God awful Richard Tully." (RT 3577.) Both Roger and Shirley testified that, when they lived in Wyoming, their stepfather was stationed out of the country and their mother had an affair. (RT 3524.) Her lover moved in with the family, and Roger, who was in the third grade, actually found the two in bed together. (RT 3577-3578.) Mr. Tully's stepfather and mother separated when Mr. Tully was around 14. (RT 3534.)

When Roger was around 16, the turbulent relationship between his mother and stepfather drove him to experiment with drugs, join the carnival, and run away from home. (RT 3564-3565.) After he returned home, he met some religious missionaries. and had a dramatic religious conversion in 1971.

At age 18, during his senior year of school, Roger's mother decided that since he liked the church people so much, he should go live with them. She packed a bag and put it on the front lawn and told him to leave. (RT 3567.) He lived with a family from church for the rest of high school and until he left for college in the late fall of the following year. It was there that he learned what a "normal" life was like. (RT 3568.)

Mr. Tully was only 12 when his brother left the house. Roger attributed the differences between himself and his brother to his conversion and his experiences with the family he had lived with from the church. (RT 3567-3568; 3590.)

Roger became a robbery detective with the Baton Rouge, Louisiana Police

Department and teaches ethics at the police academy. He has a degree in theology and was in the ministry. (RT 3558-3560.) He had last seen his mother in 1986, when he had to take her to the hospital after she overdosed on pills in an apparent suicide attempt. He had to handcuff her to keep her from taking more pills. (RT 3579-3582.)

Shirley Brown testified that she had had problems because of the family difficulties. She was arrested in 1984 for assaulting a police officer. Her brother Roger realized she was having a psychotic breakdown and had her hospitalized. (RT 3589.) She testified that she had been hospitalized twice for mental and emotional problems in 1984. (RT 3529.) She was advised by a therapist to Adult Children of Alcoholics' meetings and she followed that advice. She takes medication to calm her down and help her cope with life. (RT 3523.)

Regina, another older sister of Mr. Tully, also had problems. According to Roger Tully, she may have been borderline mentally retarded and had learning disabilities. (RT 3561.) She was arrested for distribution of marijuana in 1982. (RT 3589.) The youngest Tully child, Russell, was arrested for cultivation of marijuana. (RT 3589.)

Mr. Tully's 18 year old niece, Ursula Schorr testified that she began corresponding with her uncle four years before the trial. They write each other every week or two. (RT 3551.) She confides in Mr. Tully and he gives her advice. She wanted to be able to keep communicating with him. (RT 3552.)

Mr. Tully had a son, Richard Anthony (Tony), and daughter, Tonya Tully. Tony was 14 years old. He testified that he corresponds with his father, and talks to him

frequently on the phone from the school counselor's office, or at his home in Marysville. (RT 3602; 3607-3608; 3610.) The last time Mr. Tully lived with his mother and sister was when Tony was in the second grade. He would come to visit the family often. (RT 3611-3512.) He saw his father just a week before he was arrested. (RT 3610.) He testified that he wanted his father to live. (RT 3603.)

XIII. EVIDENCE OF TWO UNCHARGED MISDEMEANOR BATTERIES SHOULD NOT HAVE BEEN ADMITTED AS AGGRAVATING FACTORS IN THE PENALTY PHASE

During the six years between his arrest and the completion of his trial, Mr. Tully was involved in four minor scuffles with other inmates at the county jail. The prosecutor sought to introduce testimony about these incidents at the penalty phase pursuant to section 190.3(b). The Court allowed the prosecutor to introduce two of the incidents as misdemeanor batteries. (RT 491-492.)[79] Other than victim impact testimony, this was the only evidence in aggravation the prosecutor introduced at the penalty phase.

These "aggravators" were so minimal that the prosecutor was forced to acknowledge that the only injury suffered by the "victims" was "hurt feelings." (RT 3650.) These two matters should not have been admitted as aggravating evidence because they were not evidence of "criminal activity by the defendant which involved the use or attempted use of force or violence." (Cal. Penal Code § 190.3(b).

The trial court held an evidentiary hearing on the jail incident allegations to determine whether the evidence was sufficient to establish criminal activity by Mr. Tully involving the use of force or violence. (See *People v. Phillips* (1985) 41 Cal. 3d 29.) Jail officer Robert Pinkerton testified that he saw Mr. Tully and another inmate, Derrick Mendoca, "standing and fighting" in the jail dining hall in January 1988. Pinkerton did not recall seeing any punches thrown by any either inmate. Nor did he see who started

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[79] The court prohibited the prosecutor from introducing the other two incidents.

the incident. The two men were easily separated. Mr. Tully was transported to the hospital where he received stitches. Mendoca suffered no injuries. (RT 248-249.)

Jail Officer Michael Perkins testified regarding the second incident, which almost four years later, while Mr. Tully was still awaiting trial in September 1991. Perkins saw inmates Tully and McKinley "clutched in a wrestling match." (RT 257-258.) Perkins saw them try to throw punches at each other. Perkins did not see who threw the first punch. He did not actually see any punches land on either inmate. (RT 260-262.) The men were easily separated. Both men suffered minor injuries. McKinley was 6' tall and weighed approximately 174 pounds. Mr. Tully is 5'7" and weighed 155 pounds at the time. (RT 268.)

Aggravation evidence of other criminal activity under section 190.3(b) may only be introduced if there is substantial evidence to prove each element of the other crime. (*People v. Phillips, supra,* 41 Cal. 3d at p. 72, fn. 25.) The use of these two incidents as aggravation violated Article I of the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments. Use of such minimal acts to condemn a man to death violates all notions of a fair trial, due process, fundamental fairness, equal protection, and the "heightened reliability" required in capital cases.

First, the evidence supporting these alleged batteries was *de minimus* and insufficient to satisfy the elements of battery. No criminal charges were ever brought against Mr. Tully for his alleged participation.

The testimony at the hearing never showed that Mr. Tully touched Mendoca.

Touching is a requisite element of battery. Without that element, no battery was proved. The evidence regarding this incident should have been excluded from the penalty phase. Even if a battery could have been technically established, this scuffle did not amount to an act of violence or force under factor (b) and was insufficient as an aggravating factor under the Constitutions. Accordingly, the trial court should have found the evidence inadmissible.

Moreover, the evidence presented at the penalty phase itself demonstrates that the Mendoca incident was not proper aggravating evidence. Mendoca testified that he started the fight with Mr. Tully because Mr. Tully had wiped ketchup or mustard on his shirt. He threw the first and only punch, hitting Mr. Tully in the mouth. (RT 3514-3515.) Mr. Tully never struck his assailant. There was no evidence of Mr. Tully's "use of violence" as required under factor(b). Its consideration as an aggravating factor was unwarranted even if the incident may have technically satisfied the "unwanted touching" element of misdemeanor battery.

Based on these facts, the prosecutor argued that Mr. Tully's act of putting mustard on Mendoca's shirt was sufficient to prove a battery. To even make the argument to the jury that this was a "battery," the prosecutor had to argue that it would be enough if the unwanted touching merely hurt the victim's feelings. (RT 3650.) Indeed, Mendoca threw the only blow, and only Mr. Tully suffered any injuries. That is simply not enough to warrant the admission of this evidence.

As for the incident between Mr. Tully and McKinley, officer Perkins never saw any

blows land on either participant. He described it as mutual "wrestling." Mutual wrestling does not rise to the level of battery because the touching is consensual. This incident did not meet the elements of battery and thus was not "criminal activity" under factor (b). Accordingly, evidence of the McKinley incident should have been excluded.

Second, the introduction of the evidence violated state law, and accordingly, Mr. Tully's right to due process. The jail scuffles did not constitute admissible evidence under section 190.3(b) because Mr. Tully was not the aggressor and did not use force or violence. A state evidentiary error violates due process where, as here, a verdict of death was based on inflammatory and inadmissible evidence. (*Estelle v. McGuire* (1991) 502 U.S. 62.) Moreover, the failure of a state to abide by its own statutory commands implicates a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state. (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300, citing *Ballard v. Estelle* (9th Cir.1991) 937 F.2d 453.)

Third, section 190.3(b) is unconstitutional as applied here because this evidence allowed the jury to punish Mr. Tully for prior bad acts of "violence" that were wholly unrelated to any crimes proven at the guilt phase. The Supreme Court has recently held that, in the context of civil punitive damages, due process requires some relation to prior transgressions before they can be used to increase punishment. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423, quotations omitted.) If principles of due process hold that a civil "defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages," *id.* at p.

422, it must follow that a criminal "defendant's dissimilar acts," independent from the capital offense, may not serve as the basis for the most extreme punishment of all, a death sentence. As stated in the Maxims of Jurisprudence: "Where the reason is the same, the rule should be the same." (Cal. Civ. Code § 3511.)

Fourth, if *de minimus* jailhouse scuffles are admissible as evidence in aggravation under factor (b), that factor is unconstitutional as applied in this case. It allowed the introduction of conduct that had no bearing on any issue relevant to the penalty determination. Factor (b) evidence involving the defendant's pretrial jail behavior typically requires a showing that the defendant was the aggressor, includes acts or threats of significant violence, or the possession of a potentially deadly weapon. (See e.g., *People v. Combs* (2004) 34 Cal.4th 821, 856-860 [factor (b) evidence of jail conduct consisted of three separate incidents where the defendant threatened jail deputies with homemade knives and razor blades]; *People v. Monterroso* (2004) 34 Cal.4th 743 [factor (b) evidence of jail conduct consisted of an incident where the defendant exposed himself, disobeyed orders and then charged headfirst into the jail deputies, requiring four deputies to wrestle him to the ground; and an incident where he "went into an absolute rage, shook the cell door, and screamed repeatedly that he was going to kill" another deputy]; *People v, Sapp* (2003) 31 Cal.4th 240, 252 [factor (b) evidence of jail conduct consisted of possession of homemade knife, along with non-jail related evidence the defendant had murdered his mother and attempted to murder two others]; *People v. Prieto* (2003) 30 Cal.4th 226, 269 [factor(b) evidence of jail conducted included the discovery of

two 6-7 inch long homemade knives with cloth handles taped under defendant's bed in his cell].) In contrast to the evidence in these cases, the mere push and shove incidents here did not demonstrate that Mr. Tully deserved greater punishment.

Fifth, if "courts must ensure that the measure of punishment is both reasonable and proportionate" in cases where mere money is at stake, *State Farm Mut. Auto. Ins. Co. v. Campbell, supra*, 538 U.S. at p.426, then the Eighth Amendment requirement of "heightened reliability" surely mandates that the punishment be reasonable and proportionate when a man's life is at stake. Mr. Tully's death sentence was obtained by relying on acts wholly dissimilar to the capital offense and wholly unrelated to any relevant penalty phase issue. Use of evidence that Mr. Tully may have been involved in two scuffles with other inmates in the jail as aggravation to support a death sentence is neither reasonable nor proportionate.

Accordingly, introduction of such *de minimis* acts in aggravation "inject[s] irrelevant and prejudicial evidence into the sentencing equation." *(Barclay v. Florida* (1983) 463 U.S. 939. There is a significant likelihood that factor (b) evidence of the minimal type introduced here seriously infected the balancing process crafted by the state statute. *Wainwright v. Goode* (1983) 464 U.S. 78.) Introduction of this evidence under "factor b" violated the Eighth Amendment.

While the evidence here was minor, its introduction as factor (b) evidence was harmful. The two incidents were the only aggravation evidence introduced not associated with the victim impact testimony. Mr. Tully had no prior felony convictions and no

evidence of any other unadjudicated violence was presented. Nevertheless, this constitutionally infirm evidence of aggravation tipped the scales towards death.

The prosecutor capitalized on these two innocuous acts in highly prejudicial ways. He asked the jury to count them as aggravating factors under factor(b), thus giving the jury something other than the circumstances of the crime to balance in their weighing of the aggravating and the mitigating factors. He also used them, with the court's erroneous permission, as evidence to show inadmissible non-statutory aggravating "factor" of future dangerousness. Although the events presented were very minor, the prosecutor painted a picture for the jury, based on speculation and without any evidence, that this misdemeanor level conduct proved Mr. Tully would be a future danger in prison to "some other prisoner, some other guard, some hospital or some jail prison nurse or social worker." (RT 3696.)

Neither evidence nor argument concerning future dangerousness should be permitted at the penalty phase in a California capital trial. (See, Argument XVIII, *infra.*) This is especially true in the present case where the two incidents presented did not suggest that Mr. Tully would pose a risk of future dangerousness if he were sentenced to life in a maximum security prison without the possibility of parole. After five years in jail awaiting trial, all the prosecutor could point to on this issue was evidence that Mr. Tully had engaged in two minor scuffles with other inmates. Mr. Tully's jail record should have been considered mitigating, rather than aggravating evidence.

Sixth, the prosecutor brought out that inmate witness Mendoca had been convicted

of rape, and that he was Mr. Tully's *friend.* He used this "guilt-by-association"evidence to bolster his argument that Mr. Tully himself was a rapist. The prosecutor rhetorically asked the jury during his argument: "How many of you would have guessed [Mendoca is] a rapist? But he is a *friend* of the defendant's." (RT 3648-3649.) Since the only reason the defense put Mendoca on the stand was to counter the prosecutor's erroneously admitted jailhouse evidence, this argument was particularly unfair.

Here, the admission of the factor (b) evidence was reversible error. Penalty phase error is reversible error under state law where there is a reasonably possibility that, absent the error, the jury would not have sentenced the defendant to death. (*People v. Brown* (1988) 46 Cal.3d 432, 448 .) However, where, as here, federal constitutional error is involved, then the burden shifts to the state 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Chapman v. California* (1967) 386 U.S. 18, 24.)" (*People v. Bolton, supra*, 23 Cal.3d at p. 214.) The error cannot be deemed harmless under either state or federal standards. The two jailhouse scuffles were not evidence of unadjudicated acts of force or violence that rose to the level of an aggravating factor and thus should never have been presented to the jury. Moreover, the prejudicial impact was heightened by the prosecutor's use of this inadmissible evidence to argue that Mr. Tully would be dangerous if the jury did impose the death penalty. Accordingly, Mr. Tully's death sentence must be reversed.

XIV. THE TRIAL COURT ERRED IN ADMITTING VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE

A. Background

In 1986, when the crime occurred in this case, victim impact evidence was not admissible at the penalty phase of a capital trial under California law. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267; *People v. Boyd* (1985) 38 Cal.3d 762). The Supreme Court expressly prohibited the admission of victim impact evidence at the penalty phase in 1987. (*Booth v. Maryland* (1987) 482 U.S. 496). In 1991, *Booth* was overruled by *Payne v. Tennessee*, (1991) 501 U.S. 808. Mr. Tully's trial was held in 1992. During the controlling time period - the time of the crime in this case - victim impact evidence was prohibited. Nevertheless, it was admitted in this case.

On June 9, 1992, the prosecutor served defense counsel with a notice of evidence to be presented at the penalty phase. (CT 15478.) This notice came six years after the case was filed, and just before the start of trial, on June 22, 1992. The prosecutor only disclosed that he intended to present victim impact evidence. The defense objected that the notice was untimely and that it was inadequate because it did not contain any information as to the substance of the proposed victim impact testimony. (RT 3-4.) It merely listed Ms. Olsson's father, sister, son and daughter, as well as some of Ms. Olsson's coworkers, as witnesses.

The prosecutor offered excuses for his delay in providing this required and minimal information to the defense. He said that the case was trailing on the court's calendar and

that there was no firm trial date. He said that the notice listed family members and the defense had their addresses on the police reports. He said that the defense should have drawn "a reasonable inference that family members" would have been called to testify. He said that he had only just thought of using Ms. Olsson's hospital coworkers to testify about victim impact. Then, prosecutor argued he wasn't required to present any details about the proposed victim impact evidence. (RT 6-8.) The trial court issued a preliminary ruling that the prosecution's notice was timely. (RT 10-11.) The court scheduled an evidentiary hearing on the uncharged factor(b) incidents. (See *People v. Phillips, supra,* 41 Cal. 3d 29.)

On June 17, 1992 defense counsel filed a "Motion re: Evidence in Aggravation" raising challenges to the prosecutor's proposed victim impact testimony. (CT 1871.) On June 22, 1992, jury selection began. (RT 341.) Arguments on the motion were heard on June 26, 1992, after jury selection was already underway. (RT 402.) Importantly, the court did not rule on the scope of the admissible victim impact evidence until just before the penalty phase started. (RT 3401-3402.)

The defense argued that the evidence from hospital workers went beyond the scope of admissible victim impact testimony. Its admission would be unconstitutional and would violate Evidence Code § 352 because it was more prejudicial than probative. The defense objected that the prosecutor had, in his response to the defense motion, added yet another person to the proposed victim impact witnesses, coworker Barbara Green. When the defense stated it had no notice of what she would testify about, the prosecutor said he

had not yet interviewed Green to find out what she would say. In an effort to avoid disclosure, he asserted he did not need to provide notice because Green's status was the same as the family member witnesses. "The impact is one that speaks for itself and that is why I didn't go running out to get a detailed statement from her." The court took the motion under submission. (RT 402-433.)

Eleven days later, on July 7, 1992, as jury selection continued, the court ruled on the defense motion. It stated that, after a review of the current law, it had determined that victim impact evidence is "not limitless," and that in order to determine whether the proffered evidence was admissible, it would have to engage in "a weighing process pursuant to Evidence Code § 352." (RT 497.) The court then ruled that the prosecutor's proffer, People's Exhibit 11, describing prosecution interviews with Ms. Olsson's coworkers, did not "generally describe" evidence admissible at the penalty phase. (RT 497.)

On July 28, 1992, the jurors and alternates were sworn. (RT 1941-1945.)

After the guilt phase and special circumstance verdicts were returned, the defense made a renewed motion to preclude the introduction of any victim impact evidence at the penalty phase. The motion was based on the fact that the jury had already heard, over defense objection, victim impact testimony during the guilt phase, through the testimony of Clifford Sandberg and Sandra Walters. The defense repeated its prior objection to the testimony of Barbara Green because she was not a family member, and to the lack of notice of the substance of any of the victim impact testimony. The prosecutor continued

to insist he did not need to provide any further notice of victim impact testimony. The defense also argued that Mr. Tully had been prejudiced by the court's refusal to exclude Ms. Olsson's sister, Jan Detrick, or her son, Elbert "Trip" Walters, III , from the courtroom during the guilt phase proceedings because they were now going to testify at the penalty phase, (See Argument V, *supra.*) The court took the defense motion under submission. (RT 3273-3294.)

Several days later, on August 27, 1992, the court stated that it could not rule on the defense motion without an offer of proof from the prosecutor as to the questions he would pose to the witnesses, and the anticipated answers to those questions. (RT 3335-3337.) The prosecutor provided other excuses for not complying with the order. He said that he had not provided any further notice because the court had already ruled the testimony of coworkers would not be admissible (See RT 497). He said he felt there was sufficient notice as to the family members' testimony.

The court again required the prosecutor to provide an offer of proof. (RT 3337-3339.) Reluctantly, the prosecutor listed some areas he might explore with Barbara Green, and very general areas he might inquire into with the family members. When the court said it needed some idea of what the witnesses answers might be, the prosecutor continued to protest and accused the court of seeking "depositions." He argued that the specificity was not required under the law. (RT 3354.) Finally, the court told the prosecutor that he could either submit more specific information, or the court would simply rule on the basis of what was before it. The matter was continued until the next

day. (RT 3355.)

When court reconvened, the prosecutor provided an oral description of the proposed testimony. (RT 3365-3375.)[80] The court heard the arguments and continued the hearing. (RT 3375-3396.) On September 1, 1992, just two days before the start of the penalty phase, the court announced its ruling. The court first addressed evidence relating to the victim's personal characteristics:

> **Admissible** victim impact evidence relating to the victim's personal characteristics, much of which has already been admitted in the guilt phase, would include her profession and such details about her job, which have already been received, her family and friends again to the extent that it has already been received, and that she was a caring individual which seem to be implicitly in the information previously admitted, and that she looked forward to retirement;
>
> **Inadmissible** victim impact evidence would include, again, relating to the offer of proof, evidence as to her military service, leisure time pursuits and financial sacrifices which may have been made toward retirement. (RT 3401-3402, emphasis added.)

The court then addressed evidence relating to the victim's family:

> **Admissible** victim impact evidence relating to the victim's family would include that a family member enjoyed a close relationship with the victim and that she was loved and is missed, that the reality of her death was brought home while packing belongings and making other arrangements, that a son or daughter married and had children after her death, the impact of the loss of a child on a parent as a general matter, and the loss of her companionship during her anticipated retirement, and that would include traveling together ***but not*** the specific plan or details of that travel, the impact of the nature of the death here as distinguished from accidental death or death from other causes, ***but specifically, excluding*** any opinion about the crime, the defendant, or what the appropriate sentence should be which is prohibited by the *Payne* decision and the

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[80] This proffer did not accurately reflect the testimony that was actually introduced at the penalty phase.

impact of having to tell a family member of the victim's death.

> **Inadmissible** victim impact evidence, however understandable relating to family members, would include a family member's difficulties with alcohol abuse, fear for personal safety or that of another family member, guilt feeling because of a failure to contact the victim by phone on the night of the death . . . a sense of suspicion as to other people, or testimony about what the victim's thoughts may have been immediately prior to her death. (RT 3401-3402, emphasis added.)

To ensure compliance with its order, the court told the prosecutor to ask leading, rather than open-ended, questions. The court expected "relatively brief direct testimony" from each victim impact witness. (RT 3403.)

The trial court explained that it was overruling defense objections that the evidence was cumulative to guilt phase evidence, but that it expected "that the limitations the court outlined would be strictly adhered to." (RT 3402.) The court denied the defense objection as to lack of notice because it did not anticipate the introduction of evidence that was not "already adduced at the guilt phase," or that was in the range of testimony that could have reasonably been anticipated from the notice that was given. (RT 3403.) Addressing the question of prejudice from allowing witnesses who had not been excluded at the guilt phase to testify, the court merely referred back to its pretrial ruling. (RT 3403-3404.)[81] The court held that no further testimony from Barbara Green would be allowed

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[81] When it denied the defense motion to exclude family victim impact witnesses from the guilt phase, the trial court gave no reason other than it "was not going to issue an omnibus order at this time."(RT 1940.) It told the defense it could request to exclude a particular witness for a particular portion of testimony if they "get to a witness or get into an area with a witness" where they felt exclusion would be warranted. (RT 1940.) Given the lack of any notice as to the substance of the victim impact testimony until after the guilt phase had concluded, the defense had no basis on which to move to exclude any family members during any portion of the guilt

(continued...)

because she covered the same areas in her guilt phase testimony. (RT 3404-3405.)[82] The court informed counsel that if they needed further clarification of its ruling the questions should be raised outside the presence of the jury. (RT 3405.)

B. The Prosecution's Victim Impact Presentation at the Penalty Phase[83]

At the penalty phase, the prosecution first called Ms. Olsson's daughter, Sandra Walters. She testified that her mother was very loving and caring and that she was her best friend. Her mother meant "everything" to her, and made her who she is today. She described how she would go shopping, on walks and on drives with her mother. She said they were very close. (RT 3425.)

Walters said that she and her mother discussed having children. In response to the prosecutor's question, "and what were her thoughts about that?," Walters answered that she had one guilt in life, and that was that she had not provided her mother with a grandchild. The court sustained an objection, but only after the witness had answered. (RT 3424-3426.) Walters testified she no longer wanted to have children because she

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[81](...continued)
phase. (See Argument V, supra.)

[82] The prosecutor evaded this ruling by reading substantial portions of the guilt phase testimony of Green during his penalty phase arguments.

[83] The prosecutor committed misconduct repeatedly during his questioning of the victim impact witnesses. He elicited answers that went beyond the scope of the court's ruling time and time again. During the testimony of Sandra Walters, the defense was forced to object 11 times during her testimony, and each objection was sustained by the court. During the testimony of Elbert Walters, the defense was forced to object eight times. Seven of these objections were sustained by the court. During the testimony of Jan Dietrich, the defense was forced to object 18 times, and 17 of these objections were sustained by the court. (See Argument XV, *infra.*)

didn't want anybody to have to go through what her mother did that night. (RT 3427.) She told the jury that her mother's death had an impact on her ability to be intimate with anyone. A defense objection to this answer was sustained. (RT 3427.)

Walters was asked how she learned about her mother's death. She said she didn't believe it. (RT 3428-3431.) She wouldn't get out of the car when she arrived at the police station because "she still had hope." She described feeling "lost and very, very afraid, very scared." When asked in what way her mother's murder has left an impact she stated that she slept "with a night light on, and a hatchet under her bed." (RT 3432.) She stated that any time she sees a knife, it represents the horror of her mother's death. (RT 3432.)

Walters described how her mother had breast cancer and how she had expected her mother to die from it. "If she would have died by cancer, I could have at least said good bye to her. I would have had some time ." (RT 3434) The prosecutor asked what she meant when she testified that she had difficulty "being intimate." Walter's answered that she prevented herself from getting close to anyone because she was afraid they would die like her mother. (RT 3439.)

Elbert Kersh Walters, III, (Elbert) Ms. Olsson's son, testified that his mother was a happy person who enjoyed life. He testified that she was a caring person who enjoyed being of service to others. He described how he first thought his mother's death was a bad dream until they packed up her belongings and he realized he would "not wake up out of this nightmare." (RT 3441-3442.) The family stayed in Livermore for 10 -14 days. "It

was absolutely hell." He testified that finding fingerprint powder all over the house was part of the nightmare. (RT 3443.) When he was at the house, he saw his mother's collection of dolls that she had obtained when in the military overseas and he recalled seeing the turtles he had given her. He testified it felt "eerie" because his mother was not there anymore. (RT 3444.)

Elbert had been wild in his youth and that his mother was an anchor for him. He said that she loved him unconditionally. He testified, over defense objection, that his family moved many times when he was young and that was why he was especially close to his mother. The loss of his mother was devastating, and "turned his world upside down." (RT 3446.) He missed sharing his marriage and the changes he has made in his life with his mother. He missed her comforting him during bad times. (RT 3446.)

Elbert and his wife were planning a family and that his mother "loves grandchildren." He had talked to his mother about having a grandchild. (RT 3447.) He believed that if he had a child, his mother, "through spirit," could share it with him. (RT 3448.)

Elbert last saw his mother at Christmas in 1985, six months before her death. He last spoke to her on her birthday. (RT 3448) Over defense objection he testified that, if his mother had died of cancer or in an accident, he would be able to understand, but he cannot understand that she was murdered. (RT 3449.)

Jan Dietrich, Ms. Olsson's sister, described her sister's nursing career. She stated that Ms. Olsson had been in the military for four years. She was close friends with her

sister, especially when they got older. She and Ms. Olsson traveled together and would see each other once a year. They talked on the phone frequently. They were best friends. (RT 3459.)

Dietrich testified that Ms. Olsson planned to travel when she retired. She explained that Ms. Olsson had been saving money so she could travel, visit her, and do things with her dad when she retired. She testified that Ms. Olsson suffered due to her work and that "her back hurt, her knee, she limped by the end of the day." (RT 3460.)

Dietrich described learning of her sister's death while she was alone in Washington, D.C. She had to wait until the next morning to get an airplane. The first thing she did was fly to Kansas, to tell her father in person that his daughter had been killed. (RT 3460-3461.) She was worried that her father, who was 85 and on heart medication, would have a heart attack from the shock of the news. It took her two hours to tell him. (RT 3461.) It was particularly difficult, because when she arrived in Topeka, her father was cooking dinner and getting ready for Ms. Olsson's arrival that day. (RT 3463.)

Dietrich testified about flying to Livermore and talking to Sandra and Elbert Walters, and making the funeral arrangements. (RT 3465.) The family divided responsibilities for calling friends and family, not only about the funeral, but about the killing itself. (RT 3466.) She then described how the funeral home was filled with people, including the police. (RT 3467.)

Dietrich testified that the day after the funeral was her father's 85th birthday. She said: "The hardest most painful part about that was Dad opened presents that my sister

had already wrapped for him." (RT 3468) The day after that, there was a memorial service at the hospital where patients and nurses spoke of what Ms. Olsson meant to them. The whole family attended. (RT 3468.)

The prosecutor asked Dietrich to describe going into Ms. Olsson's house. She told the jury she went with Walters at the request of the police to determine if anything was different from when she was last there. She said the house was the same, but she was terrified to be in there. She described it as "alien" and "awful." (RT 3469.) 3470. She described seeing "fingerprint powder all over the house, every place. It was – it's black sticky stuff. It was awful. And obviously, the bedroom was a disaster. There was blood on the floor." (RT 3470.)

She described being affected by the media taking pictures of the house and golf course. The police had asked her to speak to the media. "And I got on television and begged people to come forward to the crime -- just anyone who knew anything." (RT 3470.) She described having to clean up "that awful powder," before disposing of her sister's belongings. She couldn't get the blood out of the carpet. (RT 3471.)

The prosecutor asked whether she had "recurring thoughts that have resulted from the impact of what had happened to her even existing today?" She answered: "the terror." Too late to prevent the witness from answering, a defense objection was sustained, but no admonition given. (RT 3473.) She also testified, before an objection could be raised, that she worried "about [Olsson's] last 15 or 20 minutes, as I do all the time, when I wasn't there to help her." The defense objection was sustained, but the answer remained. (RT

3473.)

Even though the previous objection had been sustained, the prosecutor next asked whether Dietrich thought about at what point Olsson's "spirit actually left her body?" Dietrich answered "yes" before an objection could be mounted. The answer was struck, but it had been heard by the jury. (RT 3475.)[84]

As the last witness, Ms. Olsson's 91 year-old father, Clifford Sandberg testified. He had already been a guilt phase witness. He testified that he had last seen his daughter on Memorial Day, 1986, when she and his granddaughter came to visit in Kansas. He told the jury about Ms. Olsson's retirement plans and how they both liked to travel. They had plans to buy a car and were going to outfit it so that they could travel to Canada and the Yukon. (RT 3487.)

Sandberg testified he had experienced death in his family many times, including the death of his siblings and his parents. He had been married twice and both parents had died. Ms. Olsson's death was different because he "knew she has been tortured to death." The jury heard this inadmissible answer before it was stricken. (RT 3488.) His daughter's death made it difficult for him to sleep at night.[85]

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[84] As with the other family witnesses, the prosecutor persisted in asking objectionable questions, eliciting inadmissible answers and failing to control his witnesses. At the conclusion of Dietrich's testimony, the defense requested a mistrial, which was improperly denied. (RT 3478.) (See Argument XV, *infra.*)

[85] The defense moved for another mistrial at the close of Sandberg's testimony. That motion was improperly denied. (RT 3498.)(See Argument XV, *infra.*)

C. The Admission of any Victim Impact Evidence Was Improper

1. Admission of Victim Impact Evidence is Unconstitutional

This Court long ago prohibited the introduction of evidence whose only purpose was to show the jury how much the victim had suffered. (*People v. Love* (1960) 53 Cal.2d 843, 854-857.) In *Booth v. Maryland* (1987) 482 U.S. 496, the Supreme Court held that admission of victim impact evidence at the penalty phase of a capital trial violated the Constitution. This Court expressly found that "the effect of the crime is not relevant to any material circumstance. Nor is sympathy for the victim." (*People v. Gordon, supra*, 50 Cal.3d at pp. 1266-1267.) There has been no relevant change in California's death penalty statute since *Gordon*. What was irrelevant and admissible in 1990 remains irrelevant and inadmissible now notwithstanding recent decision by this Court.

In 1991, the Supreme Court overruled *Booth* in part and found that there was no absolute Eighth Amendment bar to victim impact evidence. It held that some victim impact evidence may be admissible in capital trials. (*Payne v. Tennessee, supra,* 501 U.S. 808, overruling *Booth v. Maryland, supra*, 482 U.S. 496; *see People v. Taylor* (2001) 26 Cal.4th 1155, 1182.) The *Payne* opinion did not mandate the introduction of this evidence, nor did it suggest that the evidence should be admitted in all capital cases. It merely permitted states to include victim impact as a sentencing factor under their own death penalty schemes. As Justice O'Connor stated: "We do not hold today that victim impact evidence must be admitted, or even that it should be admitted." (*Payne v.*

Tennessee, supra, 501 U.S. at 831.) While *Payne* holds that the Eighth Amendment does not bar victim impact evidence *per se*, its admission is still controlled by state statutory guidelines and state and federal constitutional limits.

Under the California statutory scheme, even after *Payne,* there is no "victim impact" sentencing factor. In *People v. Boyd* (1985) 38 Cal.3d 762, 773, this Court explained that California's death penalty scheme "requir[es] the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute." The sentencing factors listed in section 190.3 "properly require the jury to concentrate upon the circumstances surrounding both the offense and the offender, rather than upon extraneous factors having no rational bearing on the appropriateness of the penalty." (*People v. Jackson* (1980) 28 Cal. 3d 264, 316.) Thus, "matters not within the statutory list are not entitled to any weight in the penalty determination." (*People v. Boyd*, 38 Cal.3d at p.773.)

However, in *People v. Edwards* (1991) 54 Cal.3d 787, 835-836, this Court held that evidence and argument on the specific harm caused by the defendant, including the impact of the crime on the family of the victim, was generally admissible as part of the "circumstance of the crime" sentencing factor, pursuant to Penal Code § 190.3(a). (*Ibid*; *People v. Zapien* (1993) 4 Cal.4th 929, 992.) The *Edwards* opinion is incorrect and must be reconsidered by this Court.

Before *Edwards,* this Court had held that "the effect of the crime on the victim's family *is not relevant to any material circumstance.* Nor is sympathy for the victim."

This Court explained: "Obviously, evidence on these matters is inadmissible. Just as obviously, argument on them is barred. *It is manifest that the remark [about victim impact] was improper under Boyd in these respects."* (*People v. Gordon, supra,* 50 Cal.3d at pp. 1266-1267.)

Nonetheless, this Court, *post hoc*, determined that its prior opinion in *Gordon* did not really mean what it had said. (*People v. Edwards*, *supra,* 54 Cal.3d at pp. 834-835.) Despite the express and clear statement in *Gordon* that victim impact evidence was not relevant and inadmissible under *Boyd*, this Court said that the holding in *Gordon* was "colored by" and "largely based on" on the then-existing constitutional prohibition against victim impact evidence established by *Booth*, rather than on the limitations imposed by *Boyd*. "The assumption in *Gordon, supra,* 50 Cal.3d at page 1267, that the 'effect of the crime on the victim's family is not relevant to any material circumstance,' is suspect . . . and was largely based on *Booth* and *Gathers*. The assumption is no longer valid under *Payne*." (*People v. Edwards*, *supra,* 54 Cal.3d at pp. 834-835.) This Court then found that victim impact evidence *was* relevant prior to 1991, and had only been deemed inadmissible in *Gordon* pursuant to *Booth* and *Gathers*. (*Id.*)

This Court ignored *Gordon's* primary reliance on *Boyd* and its prohibition of the use of non-statutory aggravating factors. Dismissing precedent in such a manner runs afoul of principles of *stare decisis*. Further, if the Court in *Gordon* itself misunderstood what factors are relevant to the jury's consideration at the penalty phase, than California's death penalty scheme is unconstitutionally vague. If this Court reasonably understood

victim impact evidence was not included in "the circumstances of the crime," then it cannot be said that the statute has a common meaning sufficient to meet constitutional standards.

Edwards should be reconsidered by this Court for other reasons as well. Even if, at present, there is no constitutional limitation on the state's right to include victim impact evidence as a sentencing factor, the Constitution still requires the states to ensure that "the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) The question whether an individual defendant should be executed is to be determined on the basis of "the character of the individual and the circumstances of the crime." (*Zant v. Stephens, supra*, 462 U.S. at p. 879; see also *Eddings v. Oklahoma*, *supra*, 455 U.S. at p.112; *Enmund v. Florida* (1982) 458 U.S. 782, 801.) Unless the evidence introduced in aggravation has some bearing on the defendant's personal responsibility or character, its admission creates the risk that a death sentence will be based on considerations that are constitutionally impermissible or totally irrelevant to a proper sentencing process. Allowing the jury to impose a death sentence based on the characteristics of the victim or her place within the family or community invites the jury to base their sentencing decision on emotion and bias, wholly unrelated to the defendant or the gravity of the offense.

Generally, and in this case in particular, victim impact evidence is wholly unrelated to the defendant's personal responsibility or moral culpability. Mr. Tully would not be less culpable if Ms. Olsson had no surviving family or if her survivors were uncaring or

estranged. Nor was he more culpable because, unbeknownst to him, Ms. Olsson had retirement plans she would not get to realize, because her death coincided with her elderly father's birthday, or because she enjoyed collecting turtles, reading and gardening. All these factors were outside the proper scope of aggravating evidence.

Moreover, recent Supreme Court opinions cast a looming shadow over the *Payne* holding. The opinion in *Ring v. Arizona*, supra, 536 U.S. 584, overruled *Walton v. Arizona* (1990) 497 U.S. 639 and the opinion in *Atkins v. Virginia* (2002) 122 S.Ct. 2242 overruled *Penry v. Lynaugh* (1989) 492 U.S. 302. That prior opinions have been reconsidered and overruled by the Supreme Court show that capital jurisprudence is moving away from *Payne*-era precedent. This Court should follow that trend and reevaluate its own precedent in light of the growing concerns over the fairness of the death penalty and the reliability of the process by which it is imposed.

The introduction of victim impact evidence violated Mr. Tully's rights under the Eighth and Fourteenth Amendments. The jury was allowed to impose death based on a non-statutory aggravating factor that has no relation to Mr. Tully's individual characteristics nor to any circumstances of the crime which would increase his moral responsibility. The admission of an invalid aggravating factor has a serious effect on the constitutionally required individualized sentencing because there is a real risk that the jury's decision to impose the death penalty rather than life imprisonment may have turned on the weight it gave to an invalid aggravating factor. Eighth Amendment error occurs "when the sentencer weighs an 'invalid' aggravating circumstance in reaching the

ultimate decision to impose a death sentence." (*Sochor v. Florida* (1992) 504 U.S. 527, 532.)

In this case, without the victim impact evidence, the aggravating evidence was not sufficient to outweigh the mitigating evidence. This Court cannot find the error in admitting the victim impact evidence harmless beyond a reasonable doubt. Thus, Mr. Tully's death sentence must be reversed.

2. The Admission of Victim Impact Evidence in this Case Violated *Ex Post Facto* Principles and Due Process

The crime in this case occurred in 1986, before the Supreme Court held that victim impact evidence could be admitted in a capital case. At the time of the crime, and until shortly before the trial in this case, victim impact evidence was inadmissible under *both* the federal Constitution and California law. Accordingly, its introduction in Mr. Tully's case violated the Due Process Clause of the Fourteenth Amendment because it operated as an *ex post facto* application of a judicially created law.

Prior to the Supreme Court's opinion in *Booth* in 1987, this Court did not allow the introduction of victim impact evidence. (*People v. Love, supra*, 53 Cal.2d at pp. 854-857.) Indeed, this Court held that evidence of the impact of the crime on the victim's family was inadmissible in a case where the crime occurred in 1983. (*People v. Gordon, supra,* 50 Cal.3d at pp. 1266-1267.) In *Booth*, the Supreme Court reversed a conviction stemming from a 1983 crime. (*Booth v. Maryland, supra,* 482 U.S. 496.) Thus, at the time of the crime in this case, victim impact evidence was not admissible at the penalty

phase because it was not relevant to any statutory sentencing factor.

Following the Supreme Court's opinion in *Payne v. Tennessee supra*, 501 U.S. 808, this Court disavowed *Gordon.* (*People v. Edwards*, *supra,* 54 Cal.3d at pp. 835-836.) By the time the trial in this case began in June 1992, *Booth* had been overruled by *Payne*, and *Gordon* had been overruled by *Edwards.* (See *People v. Ochoa* (1998) 19 Cal. 4th 353, 455, fn. 9.) Although victim impact evidence had been deemed admissible by the time of Mr. Tully's trial, it was not admissible at the time of the crime in this case. (*People v. Love, supra*, 53 Cal.2d at pp. 854-857; *People v. Gordon*, *supra,* 50 Cal.3d at pp. 1266-1267.)

Ex post facto laws are prohibited by both the state and federal Constitutions. (U.S. Const., art. I;§ 10; Amendment XIV; Cal. Const., art. I, § 9.) In California, this Court, and not the legislature, expanded the state's death penalty law to allow for the introduction of victim impact evidence. The *ex post facto* analysis is controlled by the Due Process clause rather than the *Ex Post Facto* clause of the Constitution. (*Bouie v. City of Columbia* (1964) 378 U.S. 347.) The fact that the expansion of section 190.3(a) to include certain types of victim impact evidence came from the judiciary rather than the Legislature does not affect the analysis here. Judicial changes of law operate in the same manner as statutory changes for the purpose of the *ex post facto* clauses of the United States and California Constitutions. (*Id.* at p. 354; *People v. Davis* (1994) 7 Cal.4th 797, 811.)

The prohibition against *ex post facto* laws is universal. The "principle that the legal

effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." (*Kaiser Aluminum & Chemical Corp. v. Bonjorno* (1990) 494 U.S. 827, 855 (conc. opn. of Scalia, J.).) The Supreme Court has recently reaffirmed that Justice Chase, in *Calder v. Bull* (1798) 3 Dallas 386, 390, provided "an authoritative account of the scope of the *Ex Post Facto* Clause." (*Stogner v. California* (2003) 539 U.S. 607, citing *Carmell v. Texas* (2000) 529 U.S. 513, 539; *Collins v. Youngblood,* 497 U. S. 37, 46 (1990).

In *Calder*, the Supreme Court described four different categories of changes in the law that violate *ex post facto* principles. Two categories, the third and fourth, are directly implicated by introduction of victim impact evidence in this case.[86] *Ex post facto* principles are violated by "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime," and by "every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." (*Stogner, supra,* 539 U.S. at p. 612; *Carmell, supra,* 529 U.S. at p. 522 [identifying these as the 3rd and 4th *Calder* categories, respectively.) The Supreme Court found: "All these, and similar laws, are manifestly unjust and oppressive." (*Calder v. Bull* (1798) 3 Dallas at p. 390.)

In *Carmell,* the Supreme Court distinguished between "[s]tatutes which simply enlarge the class of persons who may be competent to testify in criminal cases," and

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[86] As the Supreme Court recognized in *Stogner, ex post facto* violations may fall into more than one of the four categories. (*Stogner v. California, supra,* 539 U.S. at 615.)

statutes that "alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." The Supreme Court there held that:

> "[A]lterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but--leaving untouched the nature of the crime and the amount or degree of proof essential to conviction--only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecution or trials thereafter had, without reference to the date of the commission of the offence charged." (*Carmell v. Texas, supra,* 529 U.S. at pp. 543-544, quoting *Hopt v. Territory of Utah* (1884) 110 U.S. 574, 589-590.)

In sharp contrast to this rule, the *Edwards* opinion altered the "ultimate facts" and the "degree of proof" necessary to obtain a death sentence. At the time of the crime in this case, the controlling law was set forth in *People v. Gordon*. *Gordon* held that "the victim's family *is not relevant to any material circumstance*." (*People v. Gordon, supra,* 50 Cal.3d at pp. 1266-1267.)

Notwithstanding this Court's subsequent dismissal of the *Gordon* holding, it was the law in effect, and as understood by this Court itself, at the time of the crime. Because under the law at the time, it was improper for the jury to consider victim impact in determining the penalty, *Edwards* altered the quantum of proof and ultimate facts to be decided by the penalty phase jury. It allowed the prosecutor to use a new and additional factor, the impact of the victim's death on his or her family and community, to obtain a death sentence. Given that California is a weighing state (*Sanders v. Woodford, supra,*

373 F.3d at p. 1062), the addition of another factor to prosecution side of the penalty scale alters both the facts and the quantum of proof in the prosecution's favor.

In *People v. Brown*, this Court, however, concluded there was no due process or *ex post facto* violation by the retroactive application of *Edwards*. (*People v. Brown* (2004) 33 Cal.4th 382, 394-96.) It reached this conclusion by relying on an out-of-circuit federal case that addressed the constitutionality of an Ohio statute that permitted introduction of victim impact evidence. (*Id.*, discussing *Neill v. Gibson* (10th Cir.2001) 278 F.3d 1044, 1052.) In *Neill*, the 10th Circuit Court of Appeals quoted *Thompson v. Missouri* (1898) 171 U.S. 380:

> [The legislative change] did nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offence was committed . . . . The statute [at issue] did nothing more than remove an obstacle . . . that withdrew from consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established. . . . (*Neill,* at p. 1052.)

Because the Ohio statutory change was merely a change in what evidence was admissible to prove an issue of fact, the 10th Circuit concluded there was no *ex post facto* violation. In *Brown,* this Court reached the same result with regard to the admission of victim impact evidence in California. (*People v. Brown, supra*, 33 Cal.4th at pp. 394-96.)

Brown's conclusion must be reconsidered because *Edwards* did much more than change the rules of evidence. In *Edwards,* this Court added an additional factor not included in the legislative death penalty scheme that the jury may now weigh in aggravation - negative impact on the victim's family. The jury could not permissibly

consider that fact before *Edwards*. (*People v. Gordon, supra,* 50 Cal.3d at pp. 1266-1267.) In *Brown*, this Court acknowledged that victim impact evidence was not admissible via legislative fiat, but rather only by its own "judicial construction" of the death penalty statute. (*People v. Brown, supra,* 33 Cal.4th at p. 394.) As the Supreme Court held:

> The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. (*Bouie v. City of Columbia, supra*, 378 U.S. at pp. 362-363, quoting *United States v. Wiltberger*, 5 Wheat. 76, 96.)

Even if properly considered as "a circumstance of the crime," victim impact is not a particular *type* of evidence such as hypnotically induced testimony, polygraph test results or DNA, but rather is a substantive component of a factor in aggravation. *Edwards* did not merely allow introduction of a particular type of evidence that was previously inadmissible, *i.e.* it did not merely hold that testimony from the family members of the victim is now an admissible form of evidence. *Edwards* did not discuss specific types of evidence. Nor can *Edwards* be read as merely expanding "the mode in which the facts constituting guilt may be placed before the jury." (*Carmell v. Texas, supra,* 529 U.S. at p 544.) It held instead that victim impact is a relevant substantive fact that may now be considered by the jury when determining penalty, when it had previously been irrelevant and inadmissible.

Thus, *Edwards* did not merely " remove an obstacle . . . that withdrew from

consideration of the jury testimony which . . . tended to elucidate the ultimate, essential fact to be established" (*Neill, supra*, at p. 1052), but it actually changed the "ingredients" to establish whether the death penalty is appropriate. (*Carmell v. Texas, supra,* 529 U.S. at pp. 543-544.) After *Edwards,* impact on the victim's family became an additional ultimate fact that could be used by the prosecution to establish aggravation.

The jury cannot impose a death sentence in the absence of *some* factor to increase the enormity of the crime, and victim impact was not deemed to be such a factor before *Edwards.* However, victim impact is now sufficient on its own to constitute an "ingredient" in aggravation where it was not sufficient or relevant before. The jury could find the only aggravating factor to be the impact on the victim's family, and impose a death sentence solely because of that impact.

Moreover, victim impact is different in kind from other aggravating factors, because of its unique ability to inflame emotion and passion in the jury by positing the perceived virtue of the victim against the heinousness of defendant. Thus, allowing the jury to consider victim impact evidence alters the quantum of proof required to impose death as prohibited by the Due Process Clause. Because *Edwards* was a judicially imposed change in the law that altered the quantum of proof and the essential facts that must be determined to impose a greater punishment, a death sentence, it violates the *Ex Post Facto* Clause, the right to due process, the California Constitution, and undercuts the reliability of the capital sentence as required by the Eighth Amendment.

Even if a retroactive change in the rules regarding victim impact evidence is not

held to violate the federal Constitution, this Court should hold that it violates the California Constitution. (Cal. Const., art. I, §§ 7, 15; *see State v. Fugate* (Or. 2001) 26 P.3d 802, 813-814 [the *Ex Post Facto* Clause of the Oregon Constitution applies to any change in the rules of evidence which would benefit only the prosecution and make it easier to convict].) The rights secured by the California Constitution are not dependent on those secured by the federal charter. (Cal. Const., art. I, § 28; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351-355.

3. Admission of Victim Impact Evidence that is Not Limited to the Facts or Circumstances Known to the Defendant When He Committed the Crime is Unconstitutional

In *Edwards,* this Court noted: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne.*" (*People v. Edwards, supra,* 54 Cal.3d at pp. 835-836.) Since *Edwards* was decided, this Court has said little about the boundaries of the *Edwards* decision.[87]

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[87] In his dissent in *People v. Bacigalupo,* (1993) 6 Cal.4th 457, 492 fn. 2, Justice Mosk noted that this Court's expansive extension of the "circumstances of the crime" lacked specificity:

> It is manifest that this aggravating factor as construed in *Edwards* is vague under the Eighth Amendment. Could a jury-or anyone, for that matter- divine therefrom just what it was required to find in order to impose the death penalty? True, it might believe it must ascertain whether something "surrounded" the crime "materially, morally, or logically." But whether something "surrounds" a crime "materially, morally, or logically" is theoretically indeterminate and practically meaningless. Indeed, it might reach matters such as whether the capital defendant [or victim] -like defendant here-had been born in the Southern Hemisphere under the astrological sign of Libra. (*Ibid.*)

Despite this Court's silence on the issue, there are constitutional and state law limits to the admission of evidence at the penalty phase. In this case, the trial court permitted the prosecutor to present victim impact evidence. Although the court's ruling did limit, to some extent, the evidence that could be presented, the limits did not comply with state and federal constitutional requirements. The trial court's ruling on the admissibility and scope of the victim impact evidence was erroneous because it allowed for the introduction of a broad range of irrelevant and prejudicial evidence. Moreover, the prejudicial impact was heightened by the prosecutor, who failed to abide by this overbroad order in presenting victim impact testimony, and by the trial court itself, which failed to enforce its ruling.

The trial court ruled that the prosecutor could present evidence of Ms. Olsson's personal characteristics, her profession and her job, her family and friends, and that she was a caring individual.[88] The evidence on these topics was to be limited to what had already been presented at the guilt phase. (RT 3401.) The prosecutor was allowed to present testimony to show that Ms. Olsson looked forward to retirement, that her family lost the chance to travel with her during her anticipated retirement, that she had close relationships with her family, that she was loved and missed, and that a son or daughter married and had children after her death. Finally, the prosecutor was permitted to introduce testimony about the impact on the witnesses of making funeral arrangements

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[88] The trial court's complete ruling is set forth in the text at RT 3401-3404.

and packing Ms. Olsson's belongings, and of the nature of the death here compared to accidental death or death from other causes. (RT 3401-3402.)

The appropriate scope of victim impact evidence, if admissible at all, was set forth by Justice Kennard in her concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173, 264:

> As used in section 190.3, "circumstances of the crime" should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase. This definition appears most consistent with the rule of construction that listed items should be given related meaning and with the United States Supreme Court's understanding of the term as reflected in its opinions.

(*Id.*, at p. 264.) Justice Kennard's interpretation should be followed. Guided by this interpretation, only those characteristics of the victim that the prosecution can prove were known to the defendant should be admissible at the penalty phase (*See, e.g.*, *Edwards, supra,* 54 Cal.3d at p. 832 [photographs of the victims at the time of the shooting admitted to show their size and stature at the time the defendant saw them.]; *People v. Wash* (1993) 6 Cal.4th 215, 267 [evidence of the victim's plans to join the Army, which she had discussed with the defendant, allowed as relevant to circumstances of the crime.].)

Here, because the trial court did not limit the victim impact evidence to information that Mr. Tully knew when the crime was committed, its ruling was erroneous. The trial court impermissibly authorized introduction of evidence about Ms. Olsson's nursing career, her retirement plans, her father's planned birthday party, her caring personality,

her desires for and lack of grandchildren, and her relationships with her family. None of these details about Ms. Olsson were known by Mr. Tully.

While the ruling by the trial court was too broad, the prosecutor failed to even adhere to the trial court's express limitations. Thus, over repeated defense objection, the jury heard even more evidence concerning factors unknown to Mr. Tully. Testimony concerning Ms. Olsson's military career, her family history of frequent moves, her collection of dolls and turtles given to her by her son, her specific retirement plans, as well as the details of Jan Dietrich's arrival in Kansas to break the news of her sister's death to her elderly father, who was cooking dinner for his birthday celebration, was impermissibly heard by the jury. The jury heard about the witnesses' guilt and fears, and their opinions about the crime. None of these facts were part of the guilt phase evidence. Significantly, the prosecutor did not prove any of these facts were known to Mr. Tully, nor could they have been adduced from the facts of the crime as presented at the guilt phase.

The victim impact evidence was unrelated to Mr. Tully's knowledge, and unrelated to his moral culpability. The evidence did not show that Mr. Tully knew Ms. Olsson. He had no knowledge of her retirement plans, no knowledge that she was on her way to celebrate her father's 85th birthday, no knowledge of her family or their history and relationship with Ms. Olsson, and no knowledge about what activities she had enjoyed while alive.

Because of Mr. Tully's lack of knowledge about the victim, the evidence presented

had no bearing on his moral culpability or his character. Whether an individual defendant should be executed is to be determined on the basis of "the character of the individual and the circumstances of the crime." (*Zant v. Stephens, supra*, 462 U.S. at p. 879; *see also Eddings v. Oklahoma, supra*, 455 U.S. at p. 112; *Enmund v. Florida* (1982) 458 U.S. 782, 801.) Introduction of victim impact evidence without reasonable limits creates the risk that a death sentence will be based on considerations that are constitutionally impermissible or totally irrelevant to a proper sentencing process. Limiting introduction of victim impact evidence to that which relates to "circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase," as suggested by Justice Kennard in *People v. Fierro, supra,* 1 Cal.4th at 264), addresses some of these constitutional concerns. Without these limits, the risk of an unreliable sentence is too great.

Here, the relationship of Ms. Olsson with her family was not, and could not have been known, by Mr. Tully. The specifics about Ms. Olsson's children, their marital status and emotional problems before or after the crime were beyond the knowledge or reasonable apprehension of Mr. Tully. Because of the risk that the jury based its death sentence on these irrelevant considerations, the death sentence was unconstitutionally imposed.

4. The Admission of Victim Impact Evidence in the Case Was Unduly Prejudicial and Inflammatory

As the majority held in *Payne*, even if victim impact evidence is generally admissible, it is still subject to the Due Process Clause, which protects against the introduction of evidence that is so unduly prejudicial that it renders the trial fundamentally unfair. (*Payne v. Tennessee, supra,* 501 U.S. at 825.) Justice Souter wrote that "victim impact" evidence is improperly admitted where it undermines the fairness and reliability of the penalty decision. "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." (*Payne v. Tennessee, supra,* 501 U.S. at 836, (conc. opn. of Souter, J.).) Victim impact evidence is still subject to exclusion if it is improperly inflammatory. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Zant v. Stephens, supra*, 462 U.S. at p. 874, quoting *Gregg v. Georgia, supra,* 428 U.S. at p.189 (plur. opn.).)

The trial court here should have excluded all victim impact evidence because it was so prejudicial that it rendered the trial fundamentally unfair. It should have found the evidence unduly distractive and inflammatory and that its probativeness was outweighed by unfair prejudice. Instead, the trial court restricted the penalty phase evidence to only allow evidence *already presented* in the guilt phase, or what could be reasonably inferred

therefrom. The trial court summarily rejected the defense argument that such evidence was cumulative, and it did not address the argument that it was more prejudicial than probative.

The trial court's ruling was erroneous under both state law and the Fourteenth Amendment. If this evidence was already before the jury, then it was not probative and there was no reason to allow its repetition at the penalty phase.[89] The trial court would not have allowed the prosecutor to call the coroner to describe the details of crime again at the penalty phase because such testimony, although relevant to "the circumstances of the crime," would have been cumulative, a waste of time, and prejudicial. Repetition is a particularly effective form of persuasion. When emotional information is presented to the jury twice, its effect is heightened and its importance emphasized. Nonetheless, the court expressly allowed the prosecutor to call both Walters and Sandberg to testify about matters they had already covered at the guilt phase.

Independent of the trial court's error, the prosecutor ignored the court's limitations on what was and what was not admissible victim impact testimony. The trial court failed to adequately enforce its orders. Thus, despite the court's advance ruling, the evidence that was heard by the jury was extremely prejudicial and not probative of any legitimate

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[89] It appears from the trial court's primary concern was over the lack of adequate notice of the substance of the victim impact testimony, and not its cumulative nature. The court limited the information about Ms. Olsson herself and her plans to that which had already been presented at the guilt phase and summarily rejected the argument that such evidence would be cumulative and thus more prejudicial than probative. The court stated that it was limiting the admissible testimony to evidence that was "already adduced at the guilt phase" or that was in the range of testimony that could have reasonably been anticipated therefrom. (RT 3043.)

factor.

In violation of the trial court's order, and despite sustained defense objections, the jury heard that Ms. Olsson died before her children could provide her with grandchildren and how they felt guilty about it, that her son had problems but Ms. Olsson had been an "anchor" to him; that her daughter now had a fear of being intimate with anyone, could not look at a knife without remembering the crime, and slept with a nightlight turned on and hatchet under her bed because she feared intruders; that her sister had to tell her father about Ms. Olsson's death as he was preparing for his birthday party and she was afraid he might die from a heart attack; that her sister felt guilty because she could not be with her sister during her last minutes alive; and that her father believed his daughter had been "tortured." This evidence plainly was not admissible under *Payne*, *Edwards* or the reasonable limits set forth in Justice Kennard's opinion in *Fierro*.

Moreover, the admission of evidence that is unfairly prejudicial to a criminal defendant and has negligible probative value violates the due process right to a fair trial. (*People v. Sutton* (1993) 19 Cal.App.4th 795, 799-802; see *McGuire v. Estelle* (1991) 502 U.S. 62; *Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) The evidence introduced here had no genuine probative value to the jury's assessment of Mr. Tully's moral culpability or his individual character. For these reasons, state law, due process, fair trial as well as Eighth Amendment and Article I of the California Constitution grounds required the exclusion of the victim impact evidence in this case.

5. The Victim Impact Evidence Should Have Been Excluded Because of Inadequate Notice.

The defense objected to the prosecutor's failure to provide sufficient notice of the content of its proposed victim impact evidence both before the guilt phase even began, and again before the penalty phase. The prosecutor vigorously resisted defense requests to provide notice of the scope and substance of the prosecution's victim impact case. Indeed, the first time the defense heard *any* information about what the prosecutor intended to elicit from family members was on August 28, 1992. The trial court did not announce its ruling on the matter until September 1, 1992, only two days before the start of the penalty phase. The defense had no notice of the substance of the victim impact testimony prior to jury selection, or even prior to its guilt phase presentation.

Section 190.3 provides: "Except for evidence in proof of the offense or special circumstances . . . no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, *prior to trial*." (Cal. Penal Code § 190.3, emphasis added.) This Court has held that the failure to give specific notice of victim impact evidence was improper where the defense did not reasonably anticipate that the evidence might be presented. (*People v. Taylor, supra,* 26 Cal.4th at 1182.)

The Constitution requires that a criminal defendant have notice of the charge and a chance to prepare and respond to the evidence. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be

heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Cole v. Arkansas* (1948) 333 U.S. 196, 201; see *People v. Toro* (1989) 47 Cal.3d 966, 973, see also *Jones v. United States* (1999) 526 U.S. 227, 243 fn.6.) A criminal defendant must have this notice "in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial." (*People v. Anderson* (1975) 15 Cal.3d 806, 809.) While aggravating evidence at the penalty phase is not the same as the specific charge at guilt phase, the Supreme Court has said that the same fairness principles, and the same constitutionally mandated notice provisions, should apply. (*Lankford v. Idaho* (1991) 500 U.S. 110, 122-127; *see Gardner v. Florida* (1977) 430 U.S. 349.)

Here, because of the lack of notice, the defense had no opportunity to voir dire prospective jurors to determine bias concerning the particular victim impact testimony in this case. It also could not coordinate its guilt phase case with an eye towards the penalty phase.[90] Further, the defense had no basis on which to request exclusion of family members from the guilt phase based on potential prejudice that might arise in connection with their penalty phase testimony, despite the trial court's order that they do so if necessary. (RT 1940.)

Both before the guilt phase, and again before the penalty phase, the defense had

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[90] It is crucial that both phases of a death penalty trial be planned together, with a cohesive strategy. *Nixon v. Florida* (2004) __U.S.__, 125 S.Ct. 551, 563. *See*, Balske, *New Strategies for the Defense of Capital Cases* (1979) 13 Akron Law Review 331, 354. Because counsel did not have notice of the victim impact evidence, their ability to devise an effective trial strategy was impeded.

protested that it had an obligation to fully investigate victim impact evidence, just as it had an obligation to investigate any other factors in aggravation presented by the prosecution at the penalty phase. The defense specifically warned that without adequate notice, it would have to violate a cardinal rule of cross-examination: "Never ask a question you do not know the answer to." (RT 3383.) The trial court apparently attempted to avoid this legitimate notice problem by restricting the penalty evidence to matters that had already been presented at the guilt phase or could reasonably be anticipated from those matters. This was not a sufficient response because it did not address the inadequate notice, nor the scope of admissible victim impact evidence.

Moreover, the prosecutor did not limit his presentation to matters that had already been presented at the guilt phase. The defense did not have any notice that the prosecutor would elicit prohibited testimony concerning Ms. Olsson's children's personal relationships, their mental and emotional difficulties before or after the crime, Ms. Olsson's saving for retirement, or the police presence at the funeral. Without notice, the defense did not have an opportunity to conduct its constitutionally required investigation into the aggravating factors. Without notice, the defense was required to break the cardinal rule of cross-examination in an attempt to question Ms. Olsson's family members. (See e.g. RT 3435-3436, Walters cross-examined about her own relationships with men and with her father; RT 3439, and about any counseling she had undergone.)

The prosecutor violated both the death penalty statute and the Constitution in failing to give proper notice. It did not give any notice prior to trial, as required by section

190.3, and indeed, it was not until the eve of the penalty phase itself that prosecutor even attempted to give notice of the victim impact evidence. Because this evidence was improperly noticed and contained irrelevant prejudicial inferences, the trial court should have should have excluded it or granted the motions for mistrial made by the defense. Its failure to do so violated Mr. Tully's constitutional and statutory rights.

D. The Introduction of Victim Impact Evidence at the Penalty Phase in this Case was Prejudicial

Here, the penalty decision in this case was a close one. The jurors struggled with the penalty phase decision. They deliberated a full two days over whether to impose the death sentence. (CT 2024-2028.)

Where improper aggravating evidence has been admitted in a penalty phase trial, this Court must assess whether the error could have affected the penalty phase verdict. (*People v. Phillips, supra*, 41 Cal.3d 29, 83.) Should this Court find the admission of victim impact evidence to be impermissible, it must remand for resentencing or determine whether the sentencing body's consideration of the invalid aggravating circumstance was "harmless beyond a reasonable doubt." (*Sochor v. Florida, supra,* 504 U.S. at p. 532; *Sanders v. Woodford, supra,* 373 F.3d at p. 1059-60.)

The prosecutor's penalty argument focused on two aggravators only, Mr. Tully's involvement in two minor uncharged acts at the jail and "the circumstances of the crime," which included victim impact evidence. The prior acts were no more than mutual scuffles between Mr. Tully and fellow inmates in the jail that occurred during the five

years Mr. Tully was awaiting trial. Virtually no injury resulted from these fights. Mr. Tully had no uncharged felonies, and he had no prior felony convictions.

As he had done in the guilt phase, the prosecutor framed his entire argument in terms of victim impact. He began his opening penalty argument by asking the jurors to imagine they were Ms. Olsson. He began: "You're 59 years old, just celebrated a week ago, ten days ago, 59th birthday; three years and you will be able to retire. You come from a close family, you're looking forward to that family, spend time with your sister, your father, and of course, your kids . . ." (RT 3630). He then walked them through each second of the crime, demanding that the jury put themselves in Ms. Olsson's shoes, imagining they suffered each thing she did. (RT 3630-3635.) He returned to this theme again, when he argued: "And you've got to walk in her shoes and place yourself there, the pain, what she felt." He proceeded to provide a blow-by-blow speculative description of every stab wound and injury the victim suffered, consuming a full seven pages of the transcript of his argument. (RT 3730-3737.)

During his first argument the prosecutor repeatedly asked the jury to consider the impact of the crime on Ms. Olsson's family. "Justice will weep, just as the family of Sandy Olsson have wept for the last six years." (RT 3635.) "*I can't let you forget what Sandy Olsson went through . . .*" (RT 3730). He insisted:

> "For you to do justice, you have to weigh and you have to weigh what he did and the impact that he had on these people. And to ignore that, or to not make it that graphic gives him an advantage that he is not entitled to, because that takes away from the seriousness of what he did, and it does an injustice to Sandy Olsson, and her family, and to us all, if we crowd that away out of our minds." (RT 3731.)

The prosecutor compared victim impact to a natural disaster, arguing that violence has a "tremendous effect of blasting out and rippling out in waves. And those waves of violence touch other people, not as severely because you're not dead, but it has a horrendous impact on you, a tremendous impact on folks that aren't, themselves, the personal receivers of the direct violence." (RT 3736-3737.)

The prosecutor then reiterated all the victim impact evidence the jurors had heard at both the guilt and penalty phases. Although the court had specifically excluded Barbara Green as a victim impact witness, the prosecutor read the jurors a good portion of her guilt phase testimony. He emphasized the more graphic sections, and elaborated on points she had mentioned in passing. (RT 3737-3841.)

The prosecutor did the same with each of the family members who had testified at the penalty phase, and even highlighted for the jury evidence that the trial court had ruled would not be admissible. (See e.g, RT 3742, referring to Sandra Walter's guilt; RT 3743, her fear of having children or intimate relationships, RT 3745, and that she slept with a hatchet under he bed; RT 3748 Jan Dietrich's fear she would lose her father too; RT 3572, having to deal with news media while grieving, etc.) The prosecutor argued: "Do you think, given what you've heard that Cliff Sandberg has ever had a happy birthday, since then a truly happy birthday? Look at what that date is forever tied with, the brutality of what that did to his oldest daughter, his oldest child. Look at how that poison, how it spews out, pollutes thing, hurts them." (RT 3751.) He even reread Sandberg's guilt

phase testimony describing how he would find his daughter, after she had fallen asleep reading, pull the covers up and tell her to "scoot down, honey." (RT 3755-3756.)

The prosecutor devoted the bulk of his penalty presentation to this evidence, and a significant portion of his argument to it as well, insisting that "Justice will weep" if the jurors ignored the impact of Ms. Olsson's death on her family (RT 3635). The introduction of such evidence cannot be considered harmless under either the state or federal standards of review.

Introduction of victim impact evidence in this case deprived Mr. Tully of his rights to due process and a fair trial under the Fourteenth Amendment. It also violated Mr. Tully's rights to a fair and reliable determination whether he should be sentenced to death under the Eighth Amendment. These same rights, as guaranteed by Article I of the California Constitution were also violated. For all these reasons, the introduction of victim impact evidence requires reversal of Mr. Tully's sentence of death.

XV. THE PROSECUTOR COMMITTED EGREGIOUS MISCONDUCT DURING THE PRESENTATION OF VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE AND THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTIONS FOR A MISTRIAL BASED UPON THE PROSECUTOR'S REPEATED AND FLAGRANT VIOLATIONS OF THE COURT'S RULINGS

A. Introduction

Once the prosecutor began the heart of his penalty phase presentation - the victim impact testimony - he flagrantly ignored the rulings of the trial court and repeatedly exceeded the court's explicit limitations on what evidence would be admissible. The defense objected. He elicited answers that went beyond the scope of the court's ruling time and time again. During the victim impact testimony, the defense was forced to object 37 times. Although virtually all of the defense objections were sustained, the prosecutor put the defense in the extremely prejudicial position of having to constantly interrupt the emotional testimony of Ms. Olsson's family with objections, thereby alienating the jury against Mr. Tully and highlighting the very evidence it sought to exclude. The prosecutor's behavior was reprehensible and demonstrated a pattern of conduct so egregious that it infected the entire penalty trial with unfairness. Despite this egregious misconduct, the trial court denied the defense motions for a mistrial.

Before testimony, and after hearing the prosecution's proffer of victim impact evidence, the court specifically ruled that only certain aspects of the evidence would be admissible. The court specifically held the following evidence was *inadmissible*:

"[E]vidence as to [Olsson's] military service, leisure time pursuits and financial

sacrifices which may have been made toward retirement;" "the specific plan or details of [Olsson's planned retirement travel];" "any opinion about the crime, the defendant, what the appropriate sentence should be or the impact of having to tell a family member of the victim's death,""a family member's difficulties with alcohol abuse," "fear for personal safety or that of another family member," "guilt feeling because of a failure to contact the victim by phone on the night of the death," "a sense of suspicion as to other people," and "testimony about what the victim's thoughts may have been immediately prior to her death." (RT 3401-3402.)

In the same way, the trial court listed exactly what evidence was *admissible*. The court restricted most of the evidence to what was already presented at the guilt phase. The penalty phase evidence was limited to testimony relating to the victim's personal characteristics, her profession and details about her job, that she was a caring individual, that she looked forward to retirement; her family members' close relationship with her, the reality of her death, the impact of the loss of a child on a parent as a general matter, and the loss of her companionship. (RT 3401-3402.)

The trial court stressed: "The limitations the court outlined would be strictly adhered to." (RT 3403.) To accomplish that ruling, the court told the prosecutor to ask leading questions and further limited the presentation of victim impact evidence by requiring "relatively brief direct testimony." (RT 3403.) Despite this ruling, during his direct examination of the very first victim impact witness, the prosecutor showed that he had no intention of following the court's order. He blatantly refused to follow the court's

directive to ask leading questions of his witnesses in order to prevent the introduction of inadmissible testimony. He did not keep his presentation brief. The direct examination of the victim impact witnesses comprises 46 pages of the 54 pages the prosecutor's entire direct penalty phase presentation.

B. The Examination of Sandra Walters

The first family witness called by the prosecutor was Ms. Olsson's daughter, Sandra Walters. She had already testified at the guilt phase. Within the first few minutes of her testimony, the prosecutor stopped using leading questions and opened up the testimony, by asking: "Tell us about your mother." The court sustained the defense objection to this improper, open-ended question. (RT 3424.) During the remainder of Walter's testimony, the defense made many similar objections to questions that drew narrative or open-ended answers. The trial court sustained the objections time after time. Undaunted, the prosecutor continued asking broad, open-ended questions-- questions that were designed to draw objections and make the defense appear callous, cruel and without regard for the victim and her family.[91]

> "When you say she made you the person you are today, what do you mean by that?" (RT 3425.)
>
> "What were your mother's thoughts about your having children?" (RT 3426.)
>
> "Has the impact of her murder had any impact on your relationships with

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[91] The prosecutor argued this very point during his summation by accusing Mr. Tully "through his attorneys" of wanting to "take away" Ms. Olsson's "status as a victim in this case." (RT 3635.)

people?" (RT 3427.)

"Has her murder had an impact on your relationships with people?" (RT 3427.)

"[When you learned about the murder] how did that make you feel?" (RT 3428)
"Did you receive anymore information about what, if anything, had happened to your mother?" (RT 3430.)

"What are the hardest times of year for you?" (RT 3433.)

"In what way did her death bring home her mortality to you?" (RT 3434.)

By design, the prosecutor asked questions that elicited improper answers. This tactic, which required the defense to object, was akin to committing a flagrant foul, and renders the misconduct that much more serious.

Walters was asked: "Did [your boyfriend] tell you anything about the murder?" The court sustained an objection on both hearsay and relevancy grounds, only to have the prosecutor ask seconds later: "Did you receive anymore information about what, if anything, had happened to your mother?" The witness answered before the objection could be raised, and the court tried to strike the response that had already been heard. The prosecutor then pressed on with his misconduct by arguing with the court, in front of the jury and after the court had struck the answer, that the question "goes to the information this witness had and the impact it had on her about learning about her mother." (RT 3430.) This comment telegraphed that the prosecutor had additional relevant information that was being withheld from the jury.

Not only were these questions a direct violation of the court's order to ask leading

questions, but they served to elicit material the court had expressly ruled inadmissible. The trial court had excluded testimony regarding a witness' "fear [for] personal safety or that of another family member" or "a sense of suspicion as to other people." When the prosecutor asked Walters the open-ended question "in what way [her mother's murder] had an impact on [her] relationships," the witness responded: "It's had a big impact on me being intimate with anybody." (RT 3427.) The prosecutor purposefully returned to this prohibited theme in his redirect examination, where he asked: "You indicated that you had some difficulty being intimate. What do you mean by that?" Walter's answered: "It's very hard for me to be close with somebody. I prevent myself to be close enough to love somebody because I'm afraid they're going to go away like my mother did." (RT 3439.)

Similarly, in response to the expansive question: "In what way" [has the manner of her murder affected you?]," Walters responded with an answer that violated the court's order: "I am 35 years old, and I sleep with a night light on, and I have a hatchet underneath my bed because I am afraid." (RT 3432.) When asked " has the impact of her murder had any impact on your plans to have children?," Walters responded: "Yes, I don't want to have children because I don't want anybody to have to go through what I have, to lose your mother." (RT 3427.)

The trial court specifically ruled that testimony regarding a witness' "guilt" would not be admissible at the penalty phase. Yet, the prosecutor deliberately elicited testimony on that topic with open-ended questions. For example, the prosecutor asked broadly:

"What were your mother's thoughts about your having children?" In response, the witness answered: "I have one guilt, that I never provided my mom with a grandchild, something she always wanted." The objection was sustained and a request to strike granted.

The prosecutor asked questions calling for the witness to engage in speculation about emotional but irrelevant matters. After his question about how Ms Olsson's previous bout with breast cancer " brought home her mortality" drew an objection, he asked Walters how the impact was different because her mother was murdered rather than if she died from cancer. Walters answered "I could have at least said good-bye. I would have had some time." (RT 3434.) In asking these questions, the prosecutor elicited inadmissible testimony. The invitation for Walters to speculate about whether she would have preferred to see her mother die of cancer was not designed to elicit the impact of what actually happened.

C. The Examination of Elbert Walters

During the examination of the next witness, Ms. Olsson's son, Elbert Walters III, the prosecutor again refused to ask leading questions. Instead he asked: "Describe going into [your mother's] house after the murder." (RT 3443.) This question elicited several areas of inadmissible evidence before an objection could be voiced. For example, the jury learned that Ms. Olsson collected dolls when she was "stationed over in Japan and Korea in the service," and that Elbert had given her a collection of over 200 turtles throughout his childhood. (RT 3443.) This was admitted despite the trial court's ruling

that evidence concerning Ms. Olsson's military service or her leisure time pursuits would not be allowed. (RT 3401.) Following the objection, the court merely told the prosecutor to ask his next question. The trial court did not rule on the objection, strike the testimony, or admonish the jury to disregard it.

The prosecutor then launched into a series of questions concerning how often the Olsson family had moved during Elbert's childhood. The court sustained a relevancy objection to the first question. The prosecutor persisted, drawing a second objection to the same question. Undaunted, the prosecutor asked a different question that drew the irrelevant response he sought because the witness had, by then, been cued what to answer by the objected-to questions.[92] Elbert was asked: "Was there something about the family dynamics that fed into the closeness that you had with her?" Instead of answering "yes" or "no," the witness answered: "We, we moved, and I lived in 19 different homes in nine different states before I was 11 years old. We moved all throughout the south, and we finally settled in Marin in 1966." (RT 3444-3445.)

More than once, the prosecutor asked questions that had been deemed objectionable by the trial court during the testimony of Sandra Walters. ("What was the impact of how she died on you?" RT 3446; "Your mother's murder, what impact has that had on your family?" RT 3448.) Although the court overruled the objection to the speculative

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[92] The witness may not have had any bad intention, but instead may have feared he was doing something wrong by not providing the "correct" answer. Nevertheless, the result was the same -- the jury heard impermissible evidence because of the prosecutor's misconduct. And no admonition was given to cure the resultant harm.

question whether there was a difference losing his mother by murder rather than from cancer, it drew the inadmissible answer: "For her to be murdered . . . it's absolutely asinine." (RT 3448-3449.) This response violated the court's order prohibiting any family members' opinions concerning the crime. (RT 3401.)

D. The Bench Conference on Misconduct

After the testimony of these first two victim impact witnesses, the defense requested a conference outside the presence of the jury. The defense complained to the trial court that the prosecutor was forcing them to make a continuing series of objections to open-ended questions calling for narrative answers. The defense objected to the cumulative nature of the questions. (RT 3453.) Defense counsel requested that the prosecutor ask narrower questions or that he ask leading questions, as previously instructed by the trial court. In response, the court again told the prosecutor "to utilize that form of question [i.e. leading] wherever possible, and be as specific as possible with respect to questions that are articulated." (RT 3554.)

The prosecutor confronted the trial court over this straightforward and proper order. He first claimed that he was not asking cumulative questions. The court informed him that the court's rulings to the defense objections were on the record and it would not revisit the issue. The prosecutor next argued that he shouldn't have to ask leading questions because they would weaken the impact of the testimony. (RT 3454-3455.)[93]

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[93] The trial court properly required leading questions to assure the emotional victim (continued...)

Continuing, he made a sarcastic response to the defense's complaint over having to object: "And with regard to the fact that counsel doesn't want to object, I mean, *that's too bad*." This response is particularly telling as to the willfulness of the prosecutor's misconduct. Despite the myriad of sustained defense objections to his victim impact presentation, the prosecutor insisted his questions had been limited to permissible areas. (RT 3455.)

After allowing the prosecutor to "make his case," the trial court stated that it had been specific as to the scope of permissible evidence and, one more time, instructed the prosecutor to "provide as many guidelines to the witness, consistent with his rulings." (RT 3456.) The trial court concluded with this warning:

> So all I am going to do at this point is reiterate what I already asked you in terms of my ruling where certain areas have been ruled inadmissible, and where a question very naturally and inadvertently, on the part of a witness, could invite a response that would be inconsistent with my rulings, it is in those areas that we have covered at some length that I am requesting that you ask leading questions wherever possible, subject to objection by the other side. (RT 3457.)

The court's orders were clear. The prosecutor was to instruct its witnesses in advance as to particular areas that the trial court had held inadmissible. Moreover, the prosecutor was directed to ask leading questions, even when he did not know in advance what the witness would say, as a means to curb the introduction of inadmissible evidence. The prosecutor failed to abide by this ruling throughout the remaining penalty

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[93](...continued)
impact evidence wasn't given undue weight by the jury.

examination.

E. The Examination of Jan Dietrich

Unfazed by the court's ruling, the prosecutor called his next witness, Ms. Olsson's sister, Jan Dietrich. The prosecutor continued to ask questions that drew narrative answers, rather than asking leading questions as directed. The court sustained defense objections over and over to the form of questioning:

> "Did you get a sense of the professional esteem [your sister] was held in?"(RT 3458-3459.)
>
> "How would you describe the week that followed once you got to Livermore?" (RT 3466.)
>
> "Aside from finding a funeral parlor, what else did that entail?" (RT 3466.)
>
> "What transpired [after her father's birthday]?" (RT 3468.)
>
> "As a result of your sister's murder, have there been any recurring thoughts that have resulted from the impact of what had happened to her even existing today?" (RT 3472.)
>
> "Given the manner in which she died, are there any thoughts that constantly reoccur?" (RT 3472.)
>
> "In what way [did the manner of her sister's death have an impact different than had she died of cancer or an accident]?"(RT 3473.)

Compounding the harm arising from his use of open-ended questions, the witnesses were not instructed to limit the areas or scope of their testimony. It was apparent from Dietrich's answer to the prosecutor's very first question that she had not been instructed as to inadmissible testimony, nor that she was to restrict her answers only to the questions

asked of her. Adding more problems, the prosecutor made no attempt to control the witness, instead requiring the defense to interrupt her examination time and time again.[94] In response to one of the first questions put to her about the length of Ms. Olsson's nursing career, she began an extended narrative that included details of her sister's military service, which was an area the court specifically had deemed inadmissible. (RT 3458.) The witness had to be interrupted numerous times by the defense or the court as she gave non-responsive and narrative answers to questions. (See e.g., RT 3460; 3462; 3463; 3464-3465; 3471.)

As Dietrich's testimony progressed, the prosecutor's willful disregard of the trial court's order progressed as well. The trial court had prohibited testimony about a witness having to inform a family member about Ms. Olsson's death. Nonetheless, the prosecutor engaged Dietrich in a dialogue designed to elicit her description of telling her father about Ms. Olsson's death:

> Q: Were you the one that actually told your father about your sister's murder?
>
> A: That is correct. I called the neighbors to pick me up, and so Dick could be sure that he had gotten my Dad's pills. I really though I was going to lose my Dad, too.
>
> Q: What do you mean?
>
> A: He was 85 years old, and the shock of this, I didn't – I didn't tell him right away. I told him we lost Sandy, and it took about two hours before I could tell him what happened. And he's awful smart, so he finally, after two hours, he

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[94] The prosecutor put into action the cavalier remarks he had made to the trial court when he said it was "too bad," if the defense had to object.

said, "Okay, Jan, what really happened?"
But I was – he's just elderly and I was afraid that he would have a heart attack. He is on heart pills.

Q: Now, after informing your father, what was the next thing you did?

A: I had already made reservations. I had a flight out of Kansas City, to move on to get to California as soon as I could to be with the kids.

Q: Let me back up a little bit. When you got to your father's home in Topeka. Kansas, the concerns that you had, what was he doing when you saw him?" (RT 3461-3462.)

The trial court sustained the defense objection to this line of questions, but the prosecutor elicited the desired testimony a few minutes later anyway:

Q: Now, after telling your father and while you were coming to California, what was the next – was there something more difficult that you had to come to grips with while you were waiting to come to California?

A: Sandy was supposed to have been there that day at noon, and my Dad was getting all set and prepared for her. He was making the chicken dinner when I walked in the door. (RT 3462-3463.)

The prosecutor continued by asking a wholly impermissible question: "As a result of your sister's murder, have there been any recurring thoughts that have resulted from the impact of what had happened to her even existing today?" This improper question drew a successful objection (RT 3472), but the prosecutor repeated the exact question, allowing the witness to give her dramatic two word answer before the court could sustain an objection:

Q: Given the manner in which she died, are there any thoughts that constantly reoccur?

Mr. Strellis: Your honor --

The Witness: The terror.

Mr. Strellis: The same objection.

The Court: Sustain the objection, consistent with the previous ruling on that area.

(RT 3472, emphasis added.)

Dietrich's emotional response was plainly outside the scope of the court's ruling on admissible testimony and had a chilling impact on the jury. It had been purposefully elicited by the prosecutor after he was told it was improper when he asked the question the first time. There is no excuse for such blatant misconduct.

During her examination, it became increasingly clear the prosecutor had either not informed Dietrich about the scope of the court's ruling, or had actively encouraged her to violate it. In response to the permitted question about how the "manner" of her sister's death had a different impact than if had she died of cancer or an accident, Dietrich responded: "If you lose someone, which is bad enough, but to worry about her last 15 or 20 minutes, as I do all the time, when I wasn't there to help her." This answer was in violation of the court's ruling that evidence regarding "guilt" of the family members was not admissible. The court sustained the defense objection. (RT 3473.)

The prosecutor concluded his direct examination of Dietrich by asking her another question in violation of the court's ruling: "Has the manner of her death impacted you in such a fashion that when you think of your sister, you think of what was happening to her the last fifteen minutes of her life?" (RT 3474.) The court had ruled that "testimony about what the victim's thoughts may have been immediately prior to her death" was

inadmissible. (RT 3401-3402.) The question drew the answer: "Yes." Rather than stopping the witness after she answered the question, the prosecutor encouraged her to continue. She responded: "And the guilt that I wasn't there to do something to help her." This left the jury to speculate about inadmissible matters-- speculations that the prosecutor would fill in during his closing arguments, with his own lurid and wholly imagined vision of Ms. Olsson's final minutes.

After this exchange, the prosecutor, for the first and only time, asked the witness to restrict her answers to "yes" or "no," but then he proceeded to ask the same improper question over and over again. (RT 3465.) "With regards to the thoughts that you had of your sister, and what she went through the last fifteen minutes of her life, do you also think about what thoughts must have been going through her mind?" The witness answered before an objection could be raised and sustained. This time, the court struck the answer and directed the jury to disregard it. (RT 3475.) Although the trial court asked the prosecutor to "move into another area," the prosecutor refused and asked "Do you think about how -- at what point her spirit actually left her body?" The witness answered "Yes" before an objection could be raised. The court struck the answer and *sua sponte* told the jury to disregard the question. (RT 3475.) Despite the court's admonition, the prosecutor had succeeded in ringing this inadmissible and prejudicial bell.

In addition to these impermissible questions and answers, the prosecutor asked irrelevant questions and questions calling for hearsay. (See RT 3370-3371.) These questions required the defense again to interrupt the emotional testimony with objections,

and actually draw the jury's attention to the improper evidence instead of ameliorating its prejudicial impact. (See e.g. RT 3462 - hearsay; 3467 - relevancy.) The prosecutor also elicited testimony that was outside the scope of the court's order and was not covered in his pre-penalty phase offer of proof. During the course of a narrative answer, Dietrich testified she "was terrified" to be in the house, and that it was "alien and awful." The objection that these questions and answers were beyond the scope of the court's ruling was sustained. (RT 3469- 3570.)

Going well beyond his offer of proof, the prosecutor asked "was there anything else outside [the house] that was going on that impacted you, given what had happened to your sister?" Dietrich then described the media presence in dramatic detail. None of this evidence was included in the offer of proof. (RT 3365-3375.) The witness also testified that the police were at the funeral, and about a memorial service held at the hospital on Ms. Olsson's behalf. (RT 3468.) Again, this was not a part of the offer of proof and had never been ruled admissible. The judge sustained defense objections after the witness had answered the questions. (RT 3468.)

F. The First Motion For a Mistrial

Following Dietrich's testimony, the defense moved for a mistrial based on the prosecutor's repeated questions asking for the thoughts of the victim in the last moments of her life. The defense argued that the court had ruled such testimony inadmissible, and that the questions were so prejudicial that they could not be cured by admonition. The court requested that the prosecutor explain what he was seeking to elicit through his

questions.

In a true showing of his intent to evade the court's order, the prosecutor indignantly claimed that he had not violated that order because he had asked what "[the witness] thought the thoughts were of the victim," rather than asking what the victim's thoughts were. The prosecutor's subterfuge is apparent because these seemingly different questions both require impermissible speculation into the victim's thoughts. The prosecutor also misstated the record by contending that he *had* asked a leading question and that he had expressly asked the witness before the first question to restrict her answer to "yes" or "no." (RT 3479-3480.) In fact, he did not ask for a yes or no answer until the second time he asked the question. (RT 3475.) The prosecutor then attempted to justify asking about the victim's "spirit" leaving her body, arguing that it had "nothing to do with asking for the thoughts of the victim," but rather, "with when she could no longer be experiencing what she was experiencing at the hands of this defendant." (RT 3480.)

While the trial court acknowledged they were in a "difficult" situation, it accepted the prosecutor's "explanation" and found that there was no "deliberate disregard" of its rulings. It noted that the defense had timely objected and that it believed the jury had been admonished to disregard each answer, as reflected on the record. (RT 3481.) In fact, the court had not instructed the jurors to disregard Dietrich's answers. It then denied the mistrial motion. (RT 3481.) This ruling was erroneous.

After the mistrial motion was denied, defense counsel once again requested that the prosecutor be required to ask leading questions. Defense counsel pointed out that "it is

extremely destructive" to be in the position of objecting constantly during the testimony of the victim's family. The court noted there was only one witness remaining, Ms. Olsson's father, Clifford Sandberg. It then ruled that it was "expecting that all parties have in mind my specific rulings as to the offer of proof with regard to his testimony." The court further told the prosecutor to "proceed, wherever possible, by way of leading question." (RT 3483.) The court then told the prosecutor it expected him "as an experience[d] attorney, as an officer of the court" to approach the bench if he was approaching an area that was "at all questionable" in terms of its previous ruling. (RT 3484.) Not surprisingly, the prosecutor never once asked to approach the bench.

G. The Examination of Clifford Sandberg

Following the hearing on the first motion for a penalty phase mistrial, the prosecutor continued to ask improper questions beyond the scope of the court's ruling and to elicit objectionable answers during his examination of Sandberg. The force of Sandberg's penalty phase testimony was heightened by his previous victim impact testimony at the guilt phase regarding his relationship with his daughter (See Argument VIII, *supra*), as well as by Dietrich's previous moving and inadmissible statements that Sandberg had heart problems and that she was worried about his health.

In response to a question regarding Ms. Olsson's retirement plans, Sandberg gave a detailed description of travel plans had made with his daughter. Instead of steering his witness *away* from this inadmissible testimony, the prosecutor asked for more detail: "Was it a car you were going to buy, or some other, like a van or– ?" The defense was

forced to object yet again because this questioning was outside the bounds of the court's ruling. The court had prohibited testimony concerning "the specific plan or details of [Olsson's planned retirement travel]." (RT 3460.)

Next, the prosecutor, again refusing to ask leading questions, asked Sandberg: "With regard to losing Shirley, has her death been different in its effect on you, given how she died?" Sandberg's response was extremely prejudicial. He said: "Yes, sir. Yes, sir, because *I know she was tortured to death.*" (RT 3487.) Thus, the jury heard this haunting answer from the victim's father before the court struck it *sua sponte.* (RT 3487.)

H. The Renewed Motion for a Mistrial

The defense renewed its motion for a mistrial following Sandberg's testimony. The motion was based on the question that drew Sandberg's opinion that his daughter had been tortured before her death, and the cumulative harm caused by the prosecutor's refusal to follow the court's order. (RT 3490-3491.) The defense argued that the prosecutor's conduct "flew in the teeth of the court's ruling." (RT 3490.) Although the court struck the testimony *sua sponte*, defense counsel said he had not requested an admonition because it would not cure the harm. He noted that up until the very conclusion of Sandberg's testimony, the prosecutor had not used leading questions, and his failure to do so was particularly suspect of intentional misconduct.

In response, the prosecutor claimed he didn't know what Sandberg would say and he did not anticipate Sandberg would use the word "tortured." He then argued that the

testimony was not prejudicial because the jury would already have concluded that the victim was "tortured to death." (RT 3493.) No evidence had been presented to show Ms. Olsson was tortured. Moreover, Mr. Tully had not been charged with torture, no torture special circumstance had been alleged, and no torture murder theory pled or argued at the guilt phase.[95]

The defense responded by pointing out that either the prosecutor talked to his witnesses beforehand and knew what the witnesses would say, or that he didn't prepare them adequately to know what they would say or to caution them about the scope of the court's ruling. As defense counsel argued: "Either way, [the defense] should not be penalized because [the prosecutor] puts witnesses on and does not control them." (RT 3493.) The prosecutor claimed that he expected a different answer to his question. He explained he had only gone over the "gist" of Sandberg's testimony with him and that he did not want to give his witnesses a script because he was "entitled" to have the information come from the witness. The prosecutor made the contradictory claim that his question was in fact "focused." (RT 3494-3495.)

The defense again pointed out that, whether intentional or not, the prosecutor had

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[95] Pursuant to Cal. Penal Code § 206, the crime of torture is a specific offense. It requires, *inter alia,* an "intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion or for any sadistic purpose." Murder committed by torture, as defined in section 206, is first-degree murder. (Cal. Penal Code § 189.) The torture-murder special circumstance is defined as an intentional murder involving the use of torture (Cal. Penal Code § 190.2 (18), and requires "proof the defendant intended to . . . torture the victim [statutory reference] *and* the infliction of an extremely painful act upon a living victim." *People v. Davenport* (1985) 41 Cal.3d 247, 271, emphasis added.)

failed to control his witnesses, thereby committing misconduct Defense counsel also raised several additional objections to Sandberg's testimony: 1) that "torture" has a specific legal meaning; 2) that there was no evidence of torture in the legal sense; and 3) that the witnesses' statement that he "knows" his daughter was "tortured to death" would suggest to the jury that, in the absence of trial evidence, he had learned this information from the police or the prosecutor. (RT 3493; 3496.)

The trial court denied the defense motion for a mistrial. It held the question addressed a topic:

> we had discussed with regard to our previous motions in this area. It was also an area that was taken up with the previous witnesses, if not all, at least several of the previous witnesses that have testified on this subject matter, the victim impact subject matter, and based on those questions, taking those into consideration in terms of the totality of the circumstances, those questions were answered by other witnesses without the difficulty to which you are addressing your motion. (RT 3497.)

The trial court said that it had admonished the jury to disregard the improper answer. The court then ruled that "based on the totality of the circumstances here– your record is certainly clear at this time– I deny the motion for mistrial." (RT 3498.) As shown below, the motion for a mistrial should have been granted.

I. The Prosecutor Committed Pervasive and Continuous Misconduct During Presentation of the Victim Impact Witnesses

Just as he did at the guilt phase, the prosecutor engaged in rampant, intentional misconduct during the penalty phase. The prosecutor's "intemperate behavior violate[d] the federal Constitution [because] it comprise[d] a pattern of conduct 'so egregious that it

infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Hill, supra,* 17 Cal.4th at p. 819, quoting *People v. Gionis* (1995) 9 Cal.4th 1196, 1214; see *People v. Espinoza* (1992) 3 Cal.4th 806, 820; *Donnelly v. DeChristoforo, supra,* 416 U.S. 637.) The prosecutor obtained Mr. Tully's convictions and death sentences by "deceptive or reprehensible means" violating state law as well. (*People v. Samayoa* (1997) 15 Cal. 4th 795.) This serious misconduct violated Mr. Tully's rights to due process, to confront the witnesses against him, to a fair trial, to fundamental fairness and to a reliable penalty phase determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, of the California Constitution.

The prosecutor committed pervasive and continuous misconduct in his penalty phase examination of the Olsson family. During the prosecutor's examination of the four victim impact witnesses, the defense was forced to object no fewer than 28 times. 25 of these defense objections were sustained. The objections were based on both the form of the questions, which were in direct violation of the trial court's directive for the prosecutor to ask leading questions, and to the content of the questions and the answers they were designed to elicit.

During this part of the penalty phase, the defense requested three separate conferences to discuss the prosecutor's misconduct, and twice moved for a mistrial. The defense expressly complained it was being prejudiced by having to repeatedly object. (*People v. Hill, supra,* 17 Cal.4th at p. 822.) Nonetheless, the trial court, which had

sustained virtually all defense objections, denied the motions for mistrial "based on the totality of the circumstances. " (RT 3498.) It provided no other explanation.

The prosecutor here breached prosecutorial ethical requirements. As this Court has held: "It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.' [Citations.]" (*People v. Bonin*, *supra*, 46 Cal.3d at p. 689, overruled on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.) This misconduct is exacerbated where the prosecutor continues to attempt to elicit the evidence after defense counsel has objected. (*People v. Bell* (1989) 49 Cal.3d 502, 532.) Indeed, requiring the defense to make repeated objections is particularly harmful because it directs the jury's attention to the objectionable testimony, which will only "serve to impress upon the jury its damaging force." (*People v. Kirkes* (1952) 39 Cal.2d 719, 726; *People v. Pitts* (1990) 223 Cal.App.3d 606, 809.)

The prosecutor asked questions involving areas expressly ruled inadmissible by the trial court and covering topics that ranged from opinions about the nature of the crime, speculation about the victim's thoughts in the last minutes of her death, the witnesses' fear for personal safety, and the victim's specific travel plans. Exacerbating this misconduct, the prosecutor continued to delve into these areas even after objections had been sustained. The prosecutor "seems to have been looking for an[y] opportunity" to parade these items before the jury regardless of their admissibility. (*United States v. Beckman* (9th Cir. 2002) 291 F.3d 586, 591.) "[T]hat the temptation proved irresistible does not excuse the behavior." (*Id.*)

Until his last penalty witness, the prosecutor all but ignored the court's direction to narrowly tailor his examination or to ask leading questions. He asked one objectionable question after another. When reminded by the court of its prior order to ask specific questions, the prosecutor argued that he didn't believe he should have to comply, and mocked the defense complaints of prejudice by derisively commenting, "*that's too bad.*" He argued that he had done no wrong in the first instance, but even if he had, his misconduct should be overlooked.

In the face of such arrogance, the trial court's denial of the defense motions for a mistrial was erroneous. In ruling on the mistrial motions, the trial court focused on whether the prosecutor committed deliberate misconduct when he elicited specifically prohibited testimony. This Court has held, however, that no showing of bad faith or knowledge of the wrongfulness of his or her conduct is required to establish prosecutorial misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823 & fn. 1.) The trial court did not apply the proper standard in denying the mistrial motions. The trial court never addressed the defense's argument that the prosecutor had failed to follow its orders to ask narrow or leading questions, or to otherwise control his witnesses.

Moreover, although no showing of bad faith is required, the prosecutor deliberately violated the trial court's limitations on the victim impact presentation. The trial court accepted the prosecutor's "reasons" for eliciting inadmissible testimony without question. For example, the prosecutor tried to justify asking Jan Dietrich about her sister's thoughts in the moments before her death by explaining that he was not asking what the victim's

thoughts were, but rather asked the witness what *she thought* about the victim's thoughts before she died. (RT 3479-3480.) The court accepted the prosecutor's nonsensical explanation and therefore found no error, although the prosecutor never explained what admissible testimony that question could have possibly elicited. (RT 3481.) Asking a witness what she thought about someone else's thoughts is even more speculative and objectionable than asking a witness what someone else's thoughts were. Although both questions were objectionable and impermissible, the latter question calls for an opinion or judgment *in addition* to pure speculation.

The prosecutor's tactics were unquestionably a deliberate and willful choice. The prosecutor repeatedly protested the court's requirements that he ask leading questions or otherwise control his witnesses. He steadfastly refused to follow these requirements until his last few questions of his last witness. Even then, he concluded that examination with prejudicial misconduct, by eliciting the witness' inadmissible lay opinion that his daughter had been "tortured to death." (RT 3487.)

Significantly, the prosecutor never stated that he had counseled the witnesses about the scope of permissible testimony or cautioned them about impermissible areas of testimony. It is clear from the witnesses' answers that they were not so cautioned and that the trial court's ruling was not conveyed to them. Indeed, when asked to justify his open ended question to Sandberg about the impact of the manner in which his daughter was killed, he admitted he had only gone over the "gist" of the testimony with the witnesses.

The prosecutor's misconduct was reprehensible, and it violated state law. It also

"so infected the trial with unfairness as to make the resulting [death sentence] a denial of [federal] due process." (*Donnelly v. DeChristoforo, supra,* 416 U.S. 637.) Moreover, the misconduct was so prejudicial as to require reversal of the penalty. Prosecutorial misconduct at the penalty phase constitutes reversible error under state law where there is a reasonably possibility that, absent the misconduct, the jury would not have sentenced the defendant to death. (*People v. Brown, supra,* 46 Cal.3d at p. 448). However, where, as here, federal constitutional error is involved, then the burden shifts to the state 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Chapman v. California* (1967) 386 U.S. 18, 24.)" *(People v. Bolton, supra,* 23 Cal.3d at p. 214.)

Whether the misconduct is deemed to be misconduct under state law or federal constitutional law, the penalty verdict must be reversed. The prejudice here stems not only from the testimony elicited from the witnesses, but from the prosecutor placing the defense in the position of constantly interrupting the already sympathetic and vulnerable family members of the victim. This made the defense, and the defendant, appear callous, cruel and without remorse for the victim or her family. The prosecutor highlighted this point when he referred to the defense during his closing argument. He argued that:

> You know, this filth took everything, everything that Sandy Olsson had. He took everything, and he took everything that she ever would have. And you know he's still not finished taking, he still wants more from her. ***Through his attorneys,*** *he wants to take away from her, her status as a victim in this case. . . . If you do give him his life, justice will weep, just as the family of Sandy Olsson has wept for the last 6 years.* (RT 3635, emphasis added.)

Further, the testimony that the prosecutor managed to elicit despite the defense objections was extremely prejudicial. The jury heard, for example, that Sandra Walters was afraid to become intimate with anyone due to a fear she would lose them as she had lost her mother, and that she now slept with a hatchet under her bed. The jury also heard that Walter's one guilt in life was that she had not provided her mother with a grandchild. Here, even where objections were sustained, it would be difficult for the jurors to put the witnesses' poignant testimony out of their minds. By the time of argument, it would be impossible for them to recall which testimony had been stricken out of all that was presented.

The prosecutor greatly heightened the prejudice from this testimony by repeating and expanding upon it during his closing argument, even where it had been stricken from the record:

> Six years later, you still have this pain and this anguish . . . .And this horrible situation of feeling guilty because I didn't give my mother a grandchild, because that was one of the things she was looking forward to . (RT 3745.)
>
> And you're afraid to get close to anyone. That's what Sandy says. I am afraid to get close to anyone because I am afraid I am going to lose them like I lost my mother. Not lose somebody through death but like I lost my mother. (RT 3743.)

The prosecutor also read Walter's testimony about her fear for her own safety to the jury during his argument, even though it was expressly outside the court's ruling on admissible victim impact testimony. (RT 3745.)

Because of prosecutorial misconduct, the jury heard Ms. Olsson's sister's opinion of the "terror" of Olsson's death, and her father's lay opinion that his daughter was "tortured

to death." Because there was no evidence of torture, Sandberg could only have had this information regarding the mode of death because it was told to him by someone who knew. The jurors may well have inferred that the police and prosecutor knew that this was what happened and that the whole truth had been kept from them by a legal technicality.

The jury also improperly heard Jan Dietrich's fear that her father would have a heart attack when she told him about the killing. It heard that Dietrich felt guilty because she couldn't be there to help her sister in the last minutes of her life. The jury also improperly heard, without any notice to the defense, about how the police left the house covered with fingerprint powder and blood stains. It heard that the police presence disturbed the funeral and how the media presence disrupted the family's grieving process.

The prosecutor reinforced the power of this prohibited evidence by expressly bringing it to the jury's attention during his closing argument:

> Monday is the funeral, a time for family and friends to get together . . . there should at least be sense of privacy. But the police are there. I mean, even at her funeral, you can't really forget what happened. (RT 3750.)
>
> And again, can you just group to yourselves and have support? Well you've got the news camera out there on the third tee or third hole . . . The news camera out there with the big telephoto lens, and it's zooming right into the house to see what they can see. Even if it is not filming, the fact that it's there, just is this constant – I mean there is nothing natural about this. And it can't be ignored. (RT 3652.)
>
> Not only do you start the packing, you clean up. Do you ever think about that? A crime occurs in somebody's home, and the police have to go there; right? . . . You know they put fingerprint powder over everything, everything.

> Do you ever think, who cleans up his mess? He's the one that does all this. He's the one that created it. Who cleans up his mess? Not him. It's the family. (RT 3753.)

Finally, the prosecutor repeatedly played on and drew the jury back to the impermissible question he had tried to ask Jan Dietrich, concerning the victim's thoughts in her last moments. Although the prosecutor had been prohibited from presenting any evidence on this speculative and inflammatory topic, and though he had disclaimed any intent to elicit such evidence, he devoted a large part of his argument to it. The prosecutor began his argument by taking the jurors through each moment of the crime as he speculated it had occurred, asking them to put themselves in Ms. Olsson's shoes and to imagine they suffered each thing she suffered that night. (RT 3630-3635.) At every opportunity, he underscored for the jury the question the defense had been forced to object to time and time again.

The prosecutor asked the jurors to feel "the final hour of your life, the final twenty minutes, the final thirty minutes . . . ."

> Would you have the time to think ? Would you have the time to think about your son and your daughter, your father, your sister? Would you have the time to think of them? I mean, you're at this point in your life where you want to survive, and he is raping you, you can't disassociate yourself. You can't go on a mental vacation . . . . You have to pay attention to what going on, because you don't want to do anything that's going to make him angry, that's going to cause him to use that knife. So you have to bring yourself back to what he is doing. You have to be conscious of what he is doing as he rams himself inside of you and defiles you. And as he is on top, you want to vomit, but you can't. You have to keep control. Did you have the time to think of those things, did she have the time to think of her family. Did she have the time to think: I'll never see them again? Did she the time to think there are people who love me? Did he give her that opportunity? (RT 3630-3634.)

Although he could present no evidence about Ms. Olsson's thoughts, he told the jury:

> You have to imagine the terror and pain and the horror and the fear and the anguish and the revulsion, all those emotions she went through; you have to do that. . . . The manner in which she died and what was going through her head, you have a duty to mentally visualize what he put her through. You have a duty to vicariously feel what was going on in those minutes that she was forced to be with him. You have to do that. You have to do that in order to do justice in this case. You absolutely have to . . . .(RT 3726-2727.)

It cannot be said that the misconduct did not play a large part in the jury's verdict. The jury deliberated for two days after the penalty phase evidence had been presented, a sign that the death verdict was not a foregone conclusion. But, the egregious prosecutorial misconduct made it so.

Viewed alone, or in conjunction with the numerous other acts of misconduct committed by the prosecutor during the penalty phase, the prosecutorial misconduct here was pervasive, reprehensible, egregious, and prejudicial. It violated Mr. Tully's rights to due process, a fair trial, the effective assistance of counsel and to a fair and reliable penalty verdict, in violation of state law, Article I of the California Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Tully's death sentence must be reversed.

XVI. PROSECUTORIAL MISCONDUCT AT THE PENALTY PHASE REQUIRES REVERSAL OF MR. TULLY'S DEATH SENTENCE

A. Introduction

Prosecutor Burr's penalty phase misconduct began before his opening statement and extended beyond the presentation of evidence, all the way up to the final words of his closing argument. His misconduct pervaded the penalty phase, infecting it with such unfairness that Mr. Tully's right to due process was violated. The prosecutor used deception and reprehensible means to obtain a death sentence against Mr. Tully, in violation of state law as well. His serious misconduct, encouraged by a trial court which refused to place any check upon it, violated Mr. Tully's rights to due process, to confront the witnesses against him, to a fair trial, to fundamental fairness and to a reliable penalty phase determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I of the California Constitution.

Very early on, the prosecutor demonstrated his disdain towards the constitutional requirements of due process and a fair and reliable determination of sentence in a capital trial. During arguments before the trial judge concerning the introduction of victim impact evidence at the penalty phase, the prosecutor referred to mitigation evidence as "all this garbage about the defendant." (RT 3279.) Defense counsel objected to this argument. (RT 3286.) Not long afterwards, the prosecutor told the court that factor (k) evidence is "an open garbage can." (RT 3355.)

The prosecutor's attitude that mitigation evidence is "garbage," ran afoul of the

crucial principles that are essential in any constitutional death penalty scheme. The Supreme Court held that juries must consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 (emphasis in original and added.) The Supreme Court also stressed that "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." (*Id.*)

The prosecutor's disregard for these constitutional commands, and his patent disrespect for "the uniqueness" of Mr. Tully's individual characteristics was reprehensible. More so, given his obligations both as an officer of the court, and a representative of the State and county governments. A prosecutor must act fairly, staying well within the rules of prosecutorial ethics and the Constitution. (See *Strickler v. Greene, supra*, 527 U.S. at p. 281; *Hayes v. Brown, supra,* 399 F.3d at p. 978.)

Defense counsel's warning to the court that the prosecutor would not respect Mr. Tully's constitutional rights or the rulings of the court became a reality within the first few moments of the penalty phase. The prosecutor began his opening statement blatantly disregarding the rules governing the content of opening statements and the conduct of a penalty phase trial. His disregard for these principles and rules persisted through his examination of the penalty phase witnesses and his inflammatory, speculative and improper closing arguments. The prosecutor exceeded the bounds of proper advocacy, in pursuit of his goal - a death sentence for Mr. Tully.

B. Misconduct During the Penalty Phase Opening Statement

During his opening statement, the prosecutor discussed the guilt phase evidence that had been presented, the instructions the jury might hear, and what he "expected" the defense to present in mitigation. Instead, the prosecutor's opening statement should have informed the jury of the evidence the State intended to present, and the manner in which the evidence and reasonable inferences related to the prosecution's theory of the case. Nothing more is proper. (*People v. Millwee* (1998) 18 Cal. 4th 96, 136.) Prosecution ethical rules require that "the opening statement . . . be confined to assertions of fact which [the prosecutor] intends or, in good faith, expects to prove." (Nat. Dist Attys. Assn., *National Prosecution Standards* (1991), Commentary, stds. 76.1 & 2.) They also require that a "prosecutor . . . be zealous in maintaining the propriety and fairness which should characterize his conduct as as officer of the court . . . ." (Id.)

The prosecutor first improperly told the jury that "what brings us here today is for you to decide whether this man should die for what he did to Shirley Olsson or spend the rest of his life in prison." (RT 3409.) This statement misled the jury. Their task at the penalty phase is not to simply determine whether the penalty is suited to the charged offense, but to also make an individualized assessment of the defendant. (See *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.)

Nonetheless, the jury heard the improper statement, and heard the defense object to it. The trial court however, simply told the prosecutor to "proceed," without explaining to the jury whether or not the statement was correct or whether it should be considered by

them in their deliberations. By failing to sustain an objection and explain to the jurors that the prosecutor was incorrect, the trial court signaled to the jury the prosecutor' statement of the law was correct.

The prosecutor proceeded with more impermissible comments. He told the jury: "In this phase you will hear evidence to make that determination as to what the penalty should be: "death in the gas chamber or now by lethal injection, at the first of the year, or life without possibility of parole." (RT 3409.) This was improper because the method of execution, is of course, irrelevant to the jury's penalty consideration. (See, *e.g. People v. Lucas* (1995) 12 Cal. 4th 415, 499; *People v. Fudge, supra*, 7 Cal. 4th at pp. 1123-1124 and cases cited.) Moreover, the actual death warrant issued in this case does not refer to the method of execution and reads that the death sentence will be imposed "as prescribed by [state] law." (RT 3918.)

The prosecutor recounted the guilt phase evidence, rather than what was going to be shown at the penalty phase. This drew another objection, which was sustained. (RT 3410.) Finally, the prosecutor discussed what evidence *he expected* the defense to present *in mitigation*. The defense yet again objected, but the trial court told the prosecutor to move on. (RT 3411.) Because the prosecutor overstepped the law, the defense was forced to interrupt with objections four times in four pages of opening statement. Three times, the court merely instructed the prosecutor to proceed in the "fashion of opening statement." (RT 3408-3412) Only once did the court sustain the defense's objection. No explanations or admonitions were given to the jury on these matters.

The prosecutor knew the proper scope of an opening statement. His failure to stay within those boundaries was deliberate misconduct, calculated to bring improper and inflammatory material before the jury. The repeated defense objections made the defense attorneys, and Mr. Tully himself, appear contentious, combative and secretive.[96] (See *People v. Kirkes* (1952) 39 Cal.2d 719, 726, *see People v. Hill, supra,* 17 Cal.4th at p. 831, fn. 3.) This tactic bolstered the prosecutor's guilt phase arguments, challenging the integrity of the defense. The prosecutor purposefully violated the rules of trial practice, the court's orders, state law and the state and federal Constitutions throughout the penalty phase.

C. Misconduct During the Penalty Phase Closing Arguments

The prosecutor committed repeated misconduct during his penalty phase arguments. When the defense objected, the trial court often failed to rule on the objection directly, thereby permitting the prosecutor to commit act after act of misconduct without any judicial admonition or explanation to the jury. On the few occasions the court addressed the jury following defense objections, the trial court's comments were insufficient to cure the harm caused by the misconduct. This serious and uncorrected misconduct, unchecked by the trial court, violated the Constitutions, and deprived Mr. Tully of his rights to due process, a fair trial, and to a reliable penalty phase determination

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[96] The prosecutor's intent is clearly reflected in his later statement to the court and defense counsel: "And with regard to the fact that counsel doesn't want to object, I mean, *that's too bad.*" (RT 3455.)

under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution, and Article I of the California Constitution.

1. Inflaming the Jury by Arguing Facts not in Evidence and Calling for Rank Speculation About the Crime

The prosecutor's penalty phase opening argument was built on inflammatory matters not based on the evidence. He used speculation to arouse fear and emotion in the jury. By the end of his argument, the circumstances of the crime as he described them bore no resemblance to the evidence upon which the guilt phase verdicts had been based, the penalty phase evidence, or the facts as described to the jurors during voir dire.

The prosecutor argued twice. His first penalty argument emphasized numerous points that were based on evidence that had not been admitted. He repeated the same inflammatory and speculative "facts" over and over, pummeling the jury with his own vision and version of the crime. This vision was based not on the evidence, but instead on an unsupported theory the prosecutor had developed.

Towards the end of the prosecutor's opening argument, the defense made a series of objections and moved for a mistrial based on the misconduct. The objections were meritorious. For the most part, the trial court simply failed to address the objections, and when it did address them, it failed to cure the harm caused by the misconduct.

At one point, in commenting on the knife, the prosecutor argued:

> But you know, a knife is an interesting weapon, aside from being very personal. You can do things with a knife that you couldn't do if you had a baseball bat or even a gun. You can threaten that you're going to hit him or you're going to shoot him.

> But with a knife you point. You can run it down the side of a face. You can play with buttons with a knife. You can put the knife in places that are terribly intimidating and threatening. (RT 3707-3708.)

The defense objected, arguing that there was no evidence to support this argument. They requested an admonition. The court did not rule on the objection, but simply told the jurors that "the statement is argument, the statements of the attorney's are not evidence in this case." It then told the prosecutor to "move ahead." (RT 708.)

Having escaped a ruling against him, the prosecutor continued the same argument: "With a knife you can indicate, you can more than simply kill. You can maim. You can disfigure." (RT 3708.) Several minutes later, the prosecutor continued with his impermissible speculation about his crime:

> It was cruel. It was vicious. It was cruel in that he dangled it out in front of her, that all he wanted to do is rape her. That's all he wanted. You know, "You just take your clothes off, take your clothes off, do what I tell you and you won't get hurt." (RT 3713.)

The defense objected that the prosecutor was calling for speculation and that there was no evidence of these facts in the record. Once again the defense asked for an admonition. The court again did not rule on the objection. The court simply told the jury that the statements of the attorneys are not evidence, and that they were not to speculate about things that were not presented as evidence. It was the prosecutor, however, that was engaging in speculation and presenting it as fact to the jury. Nonetheless, the court's only comment to the prosecutor's argument and the defense objection was "Let's go forward." (RT 3713.)

Again, without the benefit of any evidence, the prosecutor argued:

> She would have fought but she submitted, because he dangled out the knife in front of her. I mean, surely if she thought that he raped her and he was going to kill her, she would have started fighting, would have started struggling. You would have seen that bedroom– something in the bedroom would have knocked over, the reading lamp, the little knickknacks, little glasses that had coke in it or ice, whatever it might be. Don't you think she would have fought if you that he was going to kill you? Do you think she would have let him [defile] her body if it wasn't going to do her any good? Do you think he could have violated her body without a fight if he didn't hold up that element of hope that all I want to do is rape you. Come on. Who's kidding who? It is cruel. It is a hoax because he held out the carrot to her that he wasn't going to hurt her. (RT 3714.)

Defense counsel objected, on the same grounds. The court merely told the prosecutor to "move into another area." (*Id.*)

The prosecutor resumed his impermissible argument later by creating an "another aggravating factor" - callousness.

> Another aggravating factor is his callousness at the scene and the failure to show any remorse at the scene of that crime. Totally callous. Indifferent to what she was going through, totally and completely. (RT 3715.)

He then speculated about Mr. Tully's action at the crime scene in order provide "evidence" to support this created "aggravating factor."

> What does he do? What does he do at the scene? You see something that is hurting. You see something that is struggling to get relief from pain. You see something that needs help, and your humanity calls out to you and you reach out. You stretch out that hand, that hand of compassion, that hand to try and give some help. And what did he do? What he did as she is laying on her bed crying, because her voice box is broken and she's trying to breathe, he takes this, her purse, off the dresser and goes out in the living room and starts looking through it.

His speculations continued:

> Remember the grapes that are on the floor there and the bottles, the coke bottles, he's going through it. What else is he doing? He's trying to think, "How can I get away without being caught? What should I do here so it's clear that, you know, it wasn't a burglar who did this. It was perhaps some other type of situation."
>
> While she is struggling to live, does he lift one finger to call for help? (RT 3715-3716.)

The defense was forced to object yet again on the grounds that the prosecutor was asking the jury to speculate "what was going on in that room" and that there was no evidence in the record. The court again merely told the jury, "what is occurring here is argument" and not evidence. (RT 3716.) It then simply told the prosecutor to proceed.

At the next recess, the defense moved for a mistrial. Counsel argued that the prosecutor was repeatedly calling on the jury to speculate and "recreate a scene within that bedroom of which there is no evidence." (RT 3718.). The defense argued that the prosecutor was engaged in "a direct attempt to inflame the jury with stuff that isn't even in the record." (RT 3718.) The prosecutor's argument was not "totally" within the scope of the evidence and he was not merely drawing on inferences. The trial court denied the motion for mistrial without comment. (RT 3719.)

The defense then asked the court to adequately admonish the jury. Counsel pointed out that the court had merely told the prosecutor to "move on," and told the jury that arguments are not evidence, which was not an admonition. The defense asked the court to review its comments on the previous objections, and to admonish the jury that the prosecutor's comments were improper, that there was no evidence to support the

arguments, and the jury should disregard them. The court said it would review the transcript. (RT 3719.)

The next morning, the defense again requested an admonition. The court ruled:

> I have taken the opportunity to review those portions of the transcript at counsel's requests, and having done that, and having in mind the admonitions that were given at the time, and also having in mind, very frankly, there are often relatively close questions, I have decided the court need not strike the referenced subject matter of the motion; however, I am prepared, before we recommence argument this morning, to give an admonition to the jury to the following effect, that nothing the attorneys say in argument is evidence, if anything said by an attorney at any point in their argument conflicts with the evidence or the law, they are to rely on the evidence presented at trial and the law as stated by the court. (RT 3721-3722.)

This ruling was erroneous, and the court's subsequent comment to the jury was insufficient to remedy the prosecutor's misconduct. The court did not rule on whether the prosecutor had overstepped the bounds of permissible conduct. It did not admonish the jury that the prosecutor's comments were improper. It did not inform the jury that there was no evidence to support the arguments, or that the jury should disregard them. It denied the request to strike the offensive portion of the arguments

Without any limits set by the trial court, the prosecutor continued to inflame the jury with improper argument. In trying to persuade the jury that the crime was aggravated beyond the mere elements of a burglary-murder and assault with intent to commit rape, he argued:

> You can't forget Sandy. You can't forget Sandy Olsson. You just can't. That's what this is all about, at this phase, you can't forget her. You know, you have to imagine the terror and the pain and the horror and the fear and then anger and the revulsion, all those emotions she went through. You have to do

that. You have to. That's what you've got to do here, the manner in which she died and what was going through her head during the time she was forced to be with this thing. (RT 3725.)

The prosecutor then went on to directly attack Mr. Tully, calling him an animal, and even less than a animal.

> *You know, I really grapple with words to call him, because you hate to call him a man.* In the generic sense, that's what he is, but we'd like to think of mankind having decent values and decent things about them, and he doesn't have them. There is nothing there that reflects manliness. So then you say maybe he is an animal. *Well, you know, folks, as horrid as it is, to call him an animal is an insult to the animal kingdom, because animals, in the animal world, don't do the things that he did. They don't. They don't treat their own the way he treated Sandy Olsson.* Only we, mankind, are capable of those types of things. I mean the animal world kills, they kill, they kill -- see, to eat." (RT 3725-3726.)

The defense objected that this argument was designed to inflame the jury. The court merely told the prosecutor to move into another area.

The prosecutor then told the jury that they had to "vicariously feel" what Ms. Olsson endured, speculating again.

> The manner in which she died and what was going through her head, you have a duty, a duty to mentally visualize what he put her through. *You have a duty to vicariously feel what was going on in those minutes that she was forced to be with him. You have to do that. You have to do that in order to do justice in this case. You absolutely have to.*
>
> And what was– *you have to fully appreciate what she suffered physically, emotionally, and psychologically at his hands,* because these, too, are the facts and circumstances that go to increasing the guilt and the enormity of what he did and the injuries that he inflicted. It is part and parcel of the crime. (RT 3727.)

The defense objected that no evidence had been presented on this matter and requested an

admonition to the jury to "preclude this call for speculation." (RT 3727.) In front of the jury the prosecutor responded: "I submit this is totally appropriate argument. That is what victim impact is all about, and he wants to call it—. . . ." At that point, the defense requested to go in chambers. (RT 3727.)

According to the post-hoc memorialization of this unreported conference, the parties discussed the propriety argument placing the jury in the victim's place. The court stated its ruling on the record:

> But the court indicated that such argument was not without limitation, that victim impact argument like victim impact evidence was likewise, in the court's view, not without limitation, and that that was the guidance provided at that time in terms of that dimension of argument. (RT 3578.)

When the parties returned to the courtroom, the court stated to the jury: "I would remind you of the earlier discussion and admonition that I had with you before we commenced argument this morning." (RT 3727.) Whatever the court intended the parties to understand by its order or the jury to understand by its cryptic comment, it is certain the jury did not understand that prosecutor's argument was based on speculation and that it should be disregarded.

Further inflaming the jury and calling them to speculate, the prosecutor displayed a chart entitled "Increases Guilt/Enormity/Injurious Consequences." Among the captions on this chart, which began "You Can't Forget Sandy Olsson" was the caption "Did She

Try to Bargain With Him"(Court's Exhibit 5.)[97] The defense objected to this chart and requested a bench conference. (RT 3731.) According to the court's *post-hoc* memorialization of the conference, the defense objected that the "statement was without supporting evidence, it was inviting the jury to speculate." (RT 3758-3759.) Following the bench conference, the court said to the jury that "the subject of arguments are not evidence. And you are not, based on any argument or anything else, to speculate about matters that are not in evidence." (RT 3731.) This was not a sufficient admonition to either the jury or the prosecutor.

True to form, the prosecutor continued to speculate about Mr. Tully "playing" with the victim.

> You know, it's one thing to kill somebody, but from the evidence here, he played with her. He played with her. She submitted to a sexual assault, didn't knock anything over in that bedroom, and he took her by surprise. And we

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[97] Chart 3 read in its entirety: You Can't Forget Sandy Olsson, The Horror, Pain, Anguish Suffered by Sandy, Walk in Her Shoes That Last Hour, Did She Try to Bargain with Him, Every Woman's Worst Nightmare Come to Life, The Last Image & Touch with this World, Agonizing, Painful Death, Horror, Pain, Nightmares and Memories Of: Barbara Green, Sandy Walters, Elbert Kersh Walters, III, Clifford Sandberg

Chart 3 continued with the same caption, "Increases Guilt/Enormity/Injurious Consequences" listing the following items: Assault to Commit Rape: in Her Own Home, Forces His Way into Her Home, Forced Her to Take off Her Pjs, Used a Weapon - a Knife. Under the heading, "Actually Raped Her," was listed the following: on Her Own Bed, Humiliation, Degradation, Shame, No Control over Her Own Body. Under the heading, "Vulnerability," was: Lived Alone, 59 Years Old. The page ends with the phrase: Completely Innocent Victim.

Chart 3 continued with the same heading, listing: Burglary Special Circumstances: Planned, Broke into a Home, Knew Sandy was Home, Wanted to Confront her, Used her Decency, Compassion, Humanity to get in. Under the word "Vulnerability," the chart listed: A Woman, Lived alone, 59 Years Old. The chart continued: Used a weapon, Completely Innocent Victim, Intent to rape. (Court's Exhibit 5.)

> know the stab wounds to the front of the body occurred first. When I say "The front of the body," talking about 1,2,3,4 and 5. 1,2,3,4. 1,2,3, and 4 and 5. Which of these occurred first? We don't know. *But we know that she didn't have a chance after he raped her, before she can raise an arm to try and block, he stabs her in the chest, the side of the head, in the throat, whatever it was. He played with her.* (RT 3732.)[98]

During his rebuttal argument, the prosecutor again asked the jury to speculate about matters outside the evidence. He argued:

> Sandy Olsson had hope. She had hoped that her son, Trip, would get his act together. She had hoped that three more years, she would be able to retire. She had hoped that in two days she would join her father to celebrate his 85th birthday. She had hoped that her children would meet nice people and marry.
>
> She had lots of hopes. She had hoped that when he held the knife on her that all he wanted was perhaps money or something.
>
> When he told her to take her clothes off, she knew what was coming– (RT 3812.)

The defense objected that the prosecutor was again calling for speculation as there was no evidence to support this argument. The court told the jury not to speculate about matters that were not in evidence and to remember its "previous admonition." (RT 3812, 3813.)

By failing to sustain an objection or caution the prosecutor himself, the trial court gave the prosecutor *carte blanche* to violate Mr. Tully's rights. The prosecutor continued:

> He ordered her to [take off her clothes.]

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[98] The defense had made several prior objections to statements that Mr. Tully played with the knife, and to other descriptions of what happened in the minutes before the crime. (See e.g. (RT 3707-3708.)

> And when that situation arose, she still had hope.
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> She had hope that all he wanted to do was rape her. What a perversion of hope. Imagine that. To be in a situation to hope that all somebody wants to do is rape you. To violate your body. That you still have hope– (RT 3813.)

The defense objected to the misconduct. This time the court merely "noted" the objection. The prosecutor continued unabated:

> Life is precious. Life is precious. You're ordered onto the bed. You get on the bed. You cling to the hope of life. You still cling to it, until he crushes that hope with that knife. She hoped for life. She did everything she could to continue that life. She didn't resist. She did what she was told to.
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> And when you get into a situation like that, none of us want to believe things are going to get so bad that the ultimate thing is going to happen because that's what hope is all about. And he crushed that hope. (RT 3814.)

In the end, the case "in aggravation," as *argued* by the prosecutor, was based on speculation and an emotional appeal. The prosecutor argued the "enormity" of the crime was aggravated beyond the basic fact of burglary murder and assault with intent to commit rape by arguing over and over that Mr. Tully forced Ms. Olsson at knife point to remove her clothes, that she made an intentional decision not to fight back because she hoped he would only rape her, that he told her he would not hurt her if she complied with his wishes, that she bargained with him to spare her life, that she did not resist or struggle, that he tortured her by playing with the knife on her body, that he "actually" and brutally raped her, and that she was still alive when he left her bedroom to go through her purse. No evidence was introduced to support any of these assertions. Nevertheless the prosecutor instructed the jury it was their "duty" to engage in this very same speculation:

This Court has held that a prosecutor may not refer to facts outside the evidence because such statements "'tend[] to make the prosecutor his own witness-offering unsworn testimony not subject to cross-examination.'" (*People v. Hill, supra,* 17 Cal.4th at pp. 827-828, quoting *People v. Bolton, supra*, 23 Cal.3d at p. 213; *People v. Benson, supra*, 52 Cal.3d at p. 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"].) A prosecutor may not call upon the jury to speculate, nor may he or she argue beyond a reasonable inference. (*People v. Kirkes, supra*, 39 Cal.2d at p. 724.) Nor may a prosecutor use invective or other argument calculated to cause prejudice or to evoke an emotional response from the jury. (*People v. Love, supra*, 56 Cal.2d at p. 731.) Likewise, it is misconduct for a prosecutor to make an argument "that diverts the jury's attention from its duty," because the prosecutor's role in argument is to assist the jury in assessing the evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence." (*People v. Thomas* (1992) 2 Cal.4th 489, 537;)(ABA Standards for Criminal Justice, Standard 3-5.9.) These statements "can be dynamite" and ". . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (*Ibid,* quoting 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2901, at p. 3550.)

The prosecutor constructed an inflammatory, and entirely speculative scenario in order to arouse the passions of the jury to sentence Mr. Tully to death for "rape," a rape that was not charged in the Information, nor alleged as a special circumstance, nor even listed in the prosecutor's notice of aggravation. Moreover, there was no evidence that Mr. Tully pointed his knife at the victim, no evidence he ran it down the side of her face,

no evidence that he played with her buttons with the knife, no evidence that he put the knife in "places that are terribly intimidating and threatening" and no evidence he maimed or disfigured her body. There was no evidence of "tease" wounds and there was no torture, charged or alleged. The prosecutor dwelt on a collection of speculative details and created a piece of lurid fiction about Ms. Olsson's death, complete with made-up sadistic dialogue and gestures that had no support in the evidence.

Also, there was no evidence introduced from which the jury could infer that Ms. Olsson did not resist or that she intentionally "submitted" to Mr. Tully. She had wounds that were consistent with defensive wounds and, although there was no sign of struggle in the bedroom, there were signs of a struggle in the hallway leading to the bedroom. (RT 2701.) Even assuming that the jury could reasonably infer from these facts that she did not resist, beyond that simple inference, the prosecution simply made up facts from whole cloth.

Time and time again, and despite defense objections, the prosecutor told the jury that Ms. Olsson submitted to the "rape" in exchange for her life. He even put words in Mr. Tully's mouth and thoughts in his head: "[A]ll he wanted to do is rape her. That's all he wanted. You know, 'You just take your clothes off, take your clothes off, do what I tell you and you won't get hurt.'" The fact that there was absolutely no evidence to support this theory did not stop the prosecutor. He argued that the victim "bargained" for her life. These comments were not stated as inferences, but as fact. "It is a hoax because he held out the carrot to her that he wasn't going to hurt her." (RT 3714.)

Although this Court has generally held that the prosecutor may suggest that the jury place themselves in the victim's shoes, the misuse of this argument by the prosecutor in this case demonstrates why this type of argument should be prohibited outright. (See *People v. Slaughter* (2002) 7 Cal.4th 1187 and cases cited therein.) The prosecutor cannot properly testify as to what the victim's last thoughts were before she was killed. He cannot place thoughts in her mind, or words in her mouth, yet that is precisely what he did here.

Moreover, even if this type of argument is generally admissible, this Court has held that "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [citation omitted]." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) In determining the propriety of prosecutorial argument asking the jury to place themselves in the victim's shoes,

> . . . .the trial court must strike a careful balance between the probative and the prejudicial. [Citations omitted.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed. (*Ibid.*)

No such balance was struck by the trial court here. There was no evidence of Ms. Olsson's state of mind during the killing, yet the prosecutor told the jury, "she had hoped all he wanted was money." He told the jury Mr. Tully "told her to take her clothes off," and when he did so, Ms. Olsson "knew what was coming." She "had hope that all he wanted to do was rape her." Although the prosecutor had fabricated this notion of hope,

he then argued: "What a perversion of hope. Imagine that. To be in a situation to hope that all somebody wants to do is rape you. To violate your body. That you still have hope– " (RT 3813.) In the absence of any evidence as to the sequence of events inside the house, this line of argument, which was repeated throughout both of the prosecutor's closing arguments, and even written on a chart displayed to the jury (Court Exhibit 5), went far beyond the scope of permissible argument. It was irrelevant and inflammatory and invited an irrational, purely subjective response from the jury.

Additionally, the prosecutor used highly inflammatory rhetoric to denigrate Mr. Tully throughout his argument. He told the jury "there is nothing there that reflects manliness." He then argued, "to call him an animal is an insult to the animal kingdom, because animals, in the animal world, don't do the things that he did." (RT 3725-3726.) This Court and the federal courts have held that, "it is improper for the prosecutor to refer to the defendant as an "animal," or to use other derogatory epithets. (*Darden v. Wainwright, supra,* 477 U.S. at p. 179; *People v. Fosselman* (1983) 33 Cal.3d 572, 580, see also *People v. Mayfield, supra,* 14 Cal.4th at p. 803.) As the Supreme Court observed, this type of prosecutorial argument "deserves the condemnation it has received from every court to review it . . . ." (*Darden, supra*, 477 U.S. at p. 179.) The prosecutor's comments here were unnecessary, particularly inflammatory, and had nothing to do with any evidence presented at trial.[99]

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[99] This name calling was not an isolated incident. The prosecutor referred to Mr. Tully as (continued...)

Although the defense objected, the court did nothing, until the final moments of the prosecutor's rebuttal argument, to curb this misconduct or to lessen its prejudicial impact. When the court did act, it was simply too little and too late. First, the court only sustained an objection once, and that was done outside the presence of the jury. That objection was to the prosecutor's chart asking the jury to consider that the victim "bargained" with Mr. Tully. But the jury had already seen the chart when the objection was raised. (RT 3731.) Moreover, the prosecutor argued this prohibited theme over and over in his closing argument.

Second, the court never admonished the prosecutor himself, and never informed the jury that the prosecutor's argument was improper. The jury merely heard the defense repeatedly object, without any ruling indicating the validity of the objection. The jury was given the message that the defense objections were not justified. The court's frequent comment that arguments are not evidence, and that the jury was not to speculate, were not proper "rulings" on the objections. (*People v. Boyette, supra,* 29 Cal.4th at p. 486.)

Third, the court's comments to the jury were not adequate admonitions in light of the prosecutor's continuing misconduct. "Admonish" means: "to warn; caution against specific faults." (Webster's New Universal Unabridged Dictionary (2d. ed. 1972).) An

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[99](...continued)
"this creature" (RT 3631); "a despicable excuse for a man" (RT 3632); "this filth" (RT 3635; 3659, 3717); a "rapist" (3636), "this crumb" (RT 3706.); "this garbage" (3717); "poison" (RT 3751) and one time, after apparently running out of derogatory names, simply said: "I don't know what to call him."

admonition is a *prospective* warning, its object is to prevent further transgressions of the rules. As this Court has noted, carefully and sharply worded admonitions are required to curb prosecutorial misconduct and to avoid the need for reversal.

> [W]hen the defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred. He should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks. In the present case, such a counterbalancing statement might have taken the following form: "Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks."

(*People v. Bolton*, *supra,* 23 Cal. 3d at p. 215 fn. 5.) The trial court's admonitions in this case fell far below this standard. Further, this Court has held that where improper comments and assertions are interspersed throughout trial and/or closing argument, repeated objections might well serve to impress upon the jury the damaging force of the misconduct, and a series of admonitions will not generally cure the harmful effect of such misconduct. (*People v. Kirkes*, *supra,* 39 Cal.2d 719, 726, *see People v. Hill, supra,* 17 Cal.4th at p. 831, fn. 3.)

Here, the admonitions were insufficient, and the trial court's repetition of these inadequate comments over and over did not cure the harmful effect of the misconduct. The court never instructed the jury to disregard the inflammatory, speculative argument concerning the killing. It did not instruct them that the evidence did not support these

arguments or that the prosecutor's "insinuations" were prejudicial to the defense and could not be considered under the law. It did not warn the prosecutor to stop engaging in speculation or stop inflaming the jury.

Following the previous objection, a bench conference was held at which the court merely told the prosecutor "that victim impact argument like victim impact evidence was likewise, in the court's view, not without limitation." (RT 3578.) The court then told the jury: "I would remind you of the earlier discussion and admonition that I had with you before we commenced argument this morning." (RT 3727.) This statement conveyed nothing meaningful to the jury.

The specific prosecutorial misconduct was both reprehensible and "so infected the trial with unfairness as to make the resulting [death sentence] a denial of due process." (*Donnelly v. DeChristoforo, supra,* 416 U.S. 637.) It violated the federal Constitution as well as state law and the state Constitution. Whether the misconduct is deemed to be misconduct under state law or federal constitutional law, the penalty verdict must be reversed. Under either the standard set forth in *People v. Brown, supra*, 46 Cal.3d at p. 448 (reasonable possibility that, absent the misconduct, the jury would not have sentenced defendant to death), or the *Chapman* harmless error standard, the death sentence cannot stand. Read in the context of the entire prosecution closing argument, the misconduct did not represent brief isolated attempts to inflame the jury but was part of calculated strategy to divert the jury's attention from the evidence and push them with speculation, to a death verdict.

The prosecutor's misconduct improperly bolstered the case in aggravation, which was limited to the circumstances of the crime and Mr. Tully's prior uncharged acts of misdemeanor activity. The two incidents of shoving or grabbing fellow inmates in the jail were exceedingly weak. Mr. Tully had no prior felony convictions. He had no unadjudicated violent felonies. The prosecutor thus needed to make-up "circumstances" of the crime to go beyond the elements in order to secure a death sentence. He did so by falsely inflating the evidence to create a lurid tale of sex and torture, portraying the crime as "every woman's worst nightmare ," see Court Exhibit 5, without any facts.

By relying on speculation and overcharged rhetoric, the prosecutor described his version of the crime over and over to the jury. (RT 3630-3635; 3687-3704; 3705-3709; 3710-3711; 3713-3717; 3725, 3730-3736, 3812-3815.) He argued that the "enormity" of the burglary-murder was increased because it was a residential rather than a commercial burglary, because Mr. Tully "knew" the victim was alone and "wanted to confront her," because he used "her decency" to get into her home, because she was a woman who lived alone, and because he intended to rape her. (RT 3697-3704; RT 3710.) Yet, there was no evidence that Mr. Tully knew the victim, knew she was alone, that he wanted to confront her, or that he used her decency to get in the house.

A rape was never charged, alleged or proven in this case because the evidence was not sufficient to do so. According to the prosecutor, however, it was a fact proven

beyond all doubt.[100] The prosecutor graphically invoked the "rape" as a factor aggravating the crime, telling the jurors: "You smell him; his body odor; his foul breath. He is on top of you grunting away, and he rams himself inside," and "you have to be conscious of what he is doing as he rams himself inside of you and defiles you" (3632-3633).

In the context of the entire argument, this misconduct had a significant influence on the jury's death verdict. The prosecutor inflamed the jury by stressing an unproven theory of the crime to obtain a death sentence. It is highly probable that, had this misconduct not occurred, Mr. Tully would not have been sentenced to death.

2. Inflaming the Jury by Arguing Facts not in Evidence and Calling for Rank Speculation About Irrelevant Matters

In addition to improper argument concerning the circumstances of the crime, the prosecutor argued other facts not in evidence and called upon the jury to speculate about them as well.

In commenting on the penalty phase testimony of Roger Tully, Mr. Tully's brother, the prosecutor asked the jury to speculate as to Roger's opinion about the appropriate sentence. He asked the jury to ponder: "What is it that was ticking in Roger that he sees in that defendant, that he doesn't say, 'spare my brother'?" The defense objected immediately. Nonetheless, once again, the court did not rule on the objection but advised

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[100] The magistrate at the conclusion of the preliminary hearing specifically found the evidence insufficient to hold Mr. Tully over on rape or attempted rape charges. (CT 1005-1006.)

the jury that statements of counsel are not evidence and that they were not to speculate. (RT 3695.)

The prosecutor asked the jury to imagine what would happen if Mr. Tully was sentenced to life in prison without parole instead of death. He argued:

> What does [the fact that Mr. Tully was in a fight with an inmate in jail] tell you about this defendant and his future violence or his violence in the future? Now what is it that we do to – what happens when he gets a life prison sentence?

The defense began stating an objection that it was improper argument, but the court, without calling for any clarification, or addressing the objection, simply told the jury the statements of counsel are not evidence and that they would be instructed on the law at the end of arguments. (RT 3696.) The prosecutor continued, again exceeding the limits of permissible argument.

> He is put on the main line, with all the other prisoners, main line with all the other prisoners. *You have to keep him on death row where he is isolated because he gets on the main line with all the other prisoners*, with his life sentence, he has an American Express Platinum card to do violence at will. *Because what can they do to him? They can't give him another day, he's got life. And some other prisoner, some other guard, some hospital or some jail prison nurse or social worker does something that he doesn't like, and he acts out violently, hits, maims, hurts, he can do it at will. They can't do anything to him.* They can't give him another day because he's serving life for the rest of his life, they can't give him anymore. (RT 3696.)

This portion of the argument was improper for several reasons. First, there was no evidence presented concerning the level of isolation afforded death row prisoners compared to life prisoners. Moreover, it was not accurately represented by the prosecutor.

Second, this evidence, even if it had been proffered by either side, was patently inadmissible. This Court has held that evidence of the conditions of confinement is irrelevant to a capital sentencing scheme. (*People v. Coddington* (2000) 23 Cal.4th 529, 636, *People v. Ray* (1996) 13 Cal.4th 313, 352 ; *People v. Osband*, *supra*, 13 Cal.4th at p. 713; *People v. Lucas* (1995) 12 Cal.4th 415, 499.) Raising the matter in the setting of a penalty argument, without any factual support, is far worse than admitting evidence on the issue. The argument was factually wrong because there are punishments within the prison system for misconduct by prisoners, from loss of privileges to transfer to a Secured Housing Unit within a high security facility, like Pelican Bay State Prison.

Third, argument invoking considerations outside the proper weighing of statutory factors is misconduct. (*See Gardner v. Florida*, *supra*, 430 U.S. at 349; *People v. Miranda* (1987) 44 Cal.3d 57, 110.) In light of this Court's finding that conditions of confinement are irrelevant at the penalty phase, the prosecutor's argument invoked considerations outside of the statutory factors, violating the federal Constitution. Moreover, "[i]t is improper to state facts not in evidence, unless such facts were subject to judicial notice or are "matters of common knowledge or illustrations drawn from experience, history, or literature." (*People v. Boyette, supra,* 29 Cal 4th at p. 402, quoting *People v. Farmer* (1989) 47 Cal.3d 888, 922, overruled on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6 .) Security conditions in a state prison fall into none of these categories. (*Ibid.*)

Fourth, the argument went far beyond any evidence that was presented. The only

evidence from which future dangerousness even remotely could be inferred was testimony concerning two minor scuffles in the county jail between Mr. Tully and another inmate. The prosecutor asked the jury to impose death so that Mr. Tully would not *again* hurt or maim a prison *nurse* or *social worker*, when there was no evidence he had ever done so in the past. By doing so, the prosecutor falsely suggested that Mr. Tully had a prior history of violence against women in the helping professions, and that he knew of such crimes himself, even if the jury did not. This argument was more prejudicial because the victim in this case was a nurse. Moreover, there was no evidence Mr. Tully ever "maimed" anyone, and his minor, mutual scuffles with other jail inmates are not comparable to an attack on a fellow prisoner or prison staff in the higher security of a state prison.

In his rebuttal argument, the prosecutor returned to the impermissible and non-evidentiary theme of what a life prison sentence would be like for Mr. Tully, including receiving conjugal visits.

> Now, he can continue writing and have phone calls and continue in that type of situation on the main line of, you know, you can have a televison, *get a VCR*, use one of those libraries, those prison libraries where you can read whatever is in the library there. You can derive joy from that. Stereo, radio, listen to music. Music. That's soothing, that's enjoyable. Television is entertaining, movies, whatever. *You get conjugal visits*. You can fall in love. Now, it's restricted.
>
> That was a type of life, apparently, he had before. It's somewhat restricted, but nowhere near, obviously, I'm not minimizing it in that sense, but you see the thing of it all is that when you're talking about what he's done in the aggravating circumstances in this case, *that's too good for him. That is too good for him.* (RT 3814.)

The prosecutor continued with his improper argument by comparing Mr. Tully unfavorably with the homeless and unemployed; and making the jury despise Mr. Tully along the way.

> We have a situation where we have homeless people who live in condemned buildings, in cardboard boxes. He's going to have shelter. *We have people who work here in California who struggle, who don't have medical insurance. He'll have medical insurance.*
>
> Now, while more Californians are becoming unemployed, he's always going to have a house, a roof over his head, food on the table and medical care and he'll be able to do these things. He'll still have the choice of life. They're limited, but you have hope. Where there's life, there's hope.
>
> And you can hope about many, many, many thing. I mean you can derive pleasure out of many, many, many things.
>
> As you know, with hope, you might hit the big lottery or there might be an earthquake and the jail falls apart and the prison falls apart. It's not likely to happen, but it's a hope– (RT 3814-3815.)

The defense objected and requested an admonition.

For the first time during the prosecutor's arguments, the court admonished the jury, but only to "disregard that last comment." (RT 3815.) The prosecutor then finished his argument.[101] This entire argument was "improper," not just "the last comment." In addition to again arguing about prison conditions about which there had been no evidence presented, nor could there have been, the prosecutor falsely painted prison life. He told the jury that state prisoners have VCR's. He told them Mr. Tully would get conjugal

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[101] The prosecutor's statements are presented in full to demonstrate the full extent of his behavior in Mr. Tully's trial.

visits, when prisoners serving life without parole do not get such visits.[102]

Further, the prosecutor suggested that Mr. Tully did not deserve to live because he would be provided a house, food and medical care by the state of California, unlike other unemployed people in California. That the state has determined it more important to fund state prisons than social welfare programs cannot be blamed on Mr. Tully. In addition, by comparing Mr. Tully to other unemployed Californians, the prosecutor was making another impermissible reference to Mr. Tully's poverty.[103]

Finally, to the extent the prosecutor was asking the jury to imagine that Mr. Tully might be comforted by the hope he would someday get out of prison due to an earthquake, he not only called for speculation, but suggested that a sentence of life without parole would not be sufficient to keep him segregated from the public. This is an irrelevant and prejudicial penalty phase consideration. While this Court has held that a prosecutor may argue an inference of future dangerousness where the evidence supports it, (*People v. Bradford, supra*, 15 Cal.4th at pp. 1379-1380; *People v. Clark* (1992) 3 Cal.4th 41, 161), a prosecutor may not engage in speculation or argue beyond a reasonable inference. (*People v. Kirkes, supra*, 39 Cal.2d 719 at p. 724.)

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[102] While certain life prisoners were eligible for conjugal or "family" visits at the time of trial, this was a privilege and not a right. Moreover, life without parole prisoners are no longer eligible for family visits. (Cal. Code Regs. Tit.15 § 3174(e)(2).) The changing nature of prison conditions is one reason why this type of argument must not be permitted at the penalty phase.

[103] The poor quality of medical care within the California prison system has been the subject of repeated litigation and resulted in the imposition of consent decrees in the federal courts. The lack of evidence of the nature and quality of the medical care available at the time of Mr. Tully's trial renders this a particularly improper subject for argument.

Over defense objection, the prosecutor here was allowed to argue future dangerousness based on Mr. Tully's involvement in two minor altercations while in jail, but the earthquake argument was well beyond the bounds of propriety. The court's admonition to "disregard that last comment" was not sufficient to undo the harm caused by the specter of the prison walls crashing down and Mr. Tully being free. The admonition failed to inform the jury what was improper about the argument, especially since the "last comment" was "[i]t's not likely to happen, but it's a hope."

3. Misstating the Law

The prosecutor misstated the law concerning what constituted mitigating and aggravating evidence. He told the jury that:

> What it really comes down to is this issue of sympathy, the sympathy issue. Sympathetic or any aspect of his character or record. And it's not sympathy for his sister. It is not sympathy for his brother. It is not sympathy for his children. It is sympathy for him --"

The defense objected. The court's only response was to remind the jury that arguments are not evidence and that it would instruct them on the law. (RT 3659.)

During rebuttal argument, the prosecution again misstated the law concerning mitigating evidence. While reminding the jury of the questions asked about the facts of the crime during voir dire, he argued:

> You know, we didn't say that in order to impose death, he not only had to break into the home, sexually assault her, and intentionally kill her, and also in addition that, a horrendous criminal history in the sense of prior felony convictions. Huh-uh.
>
> That [the absence of prior convictions] certainly tells us an awful lot about

> someone's background, but we're talking about this kind of case. You know, is this the pristine case, or is this a case that is horrendous in the crime itself, and given his background, that there is no justice– (RT 3802.)

The defense objected on the grounds that the prosecutor was asking the jury to disregard mitigation evidence. The court did not rule on the objection, but again said that arguments are not evidence, that it would instruct them in the law, and that the instructions should be followed. (RT 3803.) The prosecutor then thanked the court and continued to misstate the law: "If the mitigating evidence is there, and is it there, that it so offsets what we've got in aggravation and what we've got in aggravation standing all by itself, not anything more, is the crime." (RT 3803.) This argument was improper for several reasons.

Again and again during his arguments, the prosecutor violated the rule that "it is improper for the prosecutor to misstate the law generally . . . , and particularly to attempt to absolve the prosecution from its prima facie obligation" to meet its burden of proof. (*People v. Marshall* (1996) 13 Cal.4th 799, 831; *People v. Hill, supra,* 17 Cal.4th at pp. 829-830) His comments here misstated the law regarding mitigation, and also served to lighten the prosecution's burden at the penalty phase. An argument that the jury should not consider the mitigating evidence introduced by the defense is improper. (*People v. Robertson* (1982) 33 Cal.3d 21, 56; *People v. Hamilton* (1988) 46 Cal.3d 123, 146-148.) The jury is required to consider the evidence the defense presents in mitigation. (*Lockett v. Ohio, supra,* 438 U.S. 586.)

Telling the jurors to just look at the facts of the crime in determining whether

death is warranted is a direction to disregard the case in mitigation, a direction that is not permitted by the Constitutions. (See *People v. Easley* (1983) 34 Cal.3d 858, 875-876.) Contrary to the prosecutor's misstatement of law, the penalty phase does not begin with a presumption that, because of the crime itself, death is the appropriate penalty that must be "offset" by mitigating evidence. The jury instructions state just the opposite. A death sentence may only be imposed if the aggravating circumstances so substantially outweigh the mitigating circumstances that death is warranted, and even then, only under certain circumstances. (CALJIC 8.88.)

Although the court told the jury that it would instruct on the law, the instructions do not address the matters argued by the prosecutor. No instruction was given informing the jury that sympathy is a valid mitigating circumstance. The jury was not instructed that there is no presumption of death under any circumstances nor that the mitigating circumstances need not "offset" the aggravating circumstances in order to impose a life sentence. In fact, the defendant need not show any mitigating circumstances that "offset" the facts of the crime in order to receive a life sentence. (See *People v. Brown* (1985) 40 Cal. 3d 512, 540 ["the jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty.")

The prosecutor also misstated his burden of proof with regard to Section 190.3 (b), the presence or absence of criminal activity involving the use or attempted use of force or violence. The defense was forced to object three times when the prosecutor failed to tell the jury that the acts of violence referred to had to be separate from those for which Mr.

Tully had been convicted. (RT 3644, 3645, 3662.) The third objection was made when the prosecutor displayed a chart containing the language of subdivision (b) to the jury. (RT 3662. Court Exhibit 5.) In response to each of these objections, the court advised the jury that it would be giving instructions stating the law at the end of the case. (RT 3663.)

The court's advisement was inadequate because the instructions did not explain or correct the prosecutor's misleading statement of the law. The jury was instructed that it shall consider, "the presence or absence of criminal activity by the defendant other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence . . ." (CT 2042.) Here, however, a large part of the prosecutor's case rested on an "uncharged" crime of violence, the "rape" of Sandy Olsson. Throughout both the guilt and penalty phases, the prosecutor lamented that the jury could not convict Mr. Tully of rape due to "a technicality," and an "instruction," despite his assertion that Mr. Tully "actually raped" her. He listed the "rape" on his chart showing what aggravated the crime, and in placing the jury in Ms. Olsson's shoes, described this "rape" over and over again. But Mr. Tully was not tried for rape. The prosecutor's argument misled the jury into believing the uncharged rape was a separate aggravating factor to weigh against the evidence in mitigation.

The instruction given to the jury only excluded acts of violence for which the defendant *had been tried in this case*. Mr. Tully was not tried for rape in this case. The instructions did not correct the prosecutor's misconduct. There was no instruction informing the jury that the rape could not be considered as a factor in aggravation in

addition to a "circumstance of the crime." The instructions did not clarify the prosecutor's misstatement of the law. Since the prosecutor focused on "the rape" in his penalty phase arguments, it is likely the jury gave this impermissible factor great weight.

Here, the specific prosecutorial misconduct was both reprehensible and "so infected the trial with unfairness as to make the resulting [death sentence] a denial of due process." (*Donnelly v. DeChristoforo, supra,* 416 U.S. 637.) It violated both state law and the United States Constitution. Under either the standard set forth in *People v. Brown, supra*, 46 Cal.3d at p. 448 (reasonable possibility that, absent the misconduct, the jury would not have sentenced defendant to death), or the *Chapman* harmless error standard, the death sentence cannot stand.

4. Misleading the Jury to Believe that Mr. Tully Had No Remorse

The trial court specifically excluded a caption on one of the prosecutor's charts referring to the lack of remorse. It held that any argument regarding remorse would have to be limited to lack of remorse at the time of the crime, because of the danger the argument could be construed as a reference to the defendant's failure to testify. (RT 3675.) Although the prosecutor did remove this caption from the chart, after the jury had already seen it, he did not keep his argument within permissible bounds. The prosecutor argued:

> What else didn't you learn about the defendant? That he doesn't deserve the death penalty? *You know, what is in the law, we call it a condition precedent, something has to happen before another thing follows, a prerequisite,* something that you would expect to see in existence before you give sympathy, *before you grant mercy, remorse, the presence of remorse, the fact that your*

> *sorry for what you've done can be a mitigating factor, can be a mitigating factor, but it's not present here.* (RT 3693.)

The defense objected, "based on the matters we've already discussed," and the court merely noted the objection for the record. The prosecutor continued undaunted:

> The absence of remorse, after the commission of a crime, after the crime has been completed, cannot be used as an aggravating factor. But in this particular case, when it comes to asking for mercy, the absence of remorse is not– or the fact that there is no remorse, or there isn't any evidence in this record at all, you haven't heard any evidence that this defendant has demonstrated any remorse, so it's not present here as a mitigating factor. (RT 3694.)

The defense objections should have been sustained.

While evidence of overt remorselessness at the time of the crime may be argued as an aggravating sentencing factor, *postcrime* evidence of remorselessness does not fit within any statutory sentencing factor. (*People v. Ochoa* (2001) 26 Cal.4th 398, 449; *People v. Gonzales* (1991) 51 Cal.3d 1179, 1331-1332.) The prosecutor did not limit his argument in accordance with the law. Instead, he simply told the jury to consider the lack of remorse at any time. Remorse "is not present here," he insisted. (RT 3693.) "The absence of remorse is not– or the fact that there is no remorse, or there isn't any evidence in this record at all, you haven't heard any evidence that this defendant has demonstrated any remorse." (RT 3694.) The prosecutor flouted both this court's holdings and the trial court's order to limit argument to the time of the crime.

His argument misled the jury as to the significance of remorse, or its absence. He told the jury, falsely, that remorse was "a condition precedent" to finding *any* mitigation. This was a backhanded and highly effective means of misleading the jury into thinking

the absence of remorse was an aggravating factor, indeed an aggravating factor so strong that it trumped whatever mitigation the defense had presented, and that mitigation evidence could not be presented or considered until remorse was shown. The prosecutor may not suggest that lack of remorse is an aggravating factor, *People v. Mendoza, supra,* 24 Cal.4th at p. 187, nor may he convert the absence of a mitigating factor into an aggravating one. (See *People v. Davenport, supra,* 41 Cal.3d at pp. 288-290.) Yet, that is precisely what the prosecutor's argument did here.

This Court has limited the jury's penalty determination to a review of the statutory aggravating factors. (See *People v. Boyd, supra,* 38 Cal.3d at pp. 773-74.) Evidence that is not related to the statutory factors is not relevant. The State violates the defendant's rights to due process of law and a reliable penalty verdict when it injects irrelevant and prejudicial evidence into the sentencing equation when there is a significant likelihood that this evidence will seriously infect the balancing process crafted by the state statute. *(Barclay v. Florida (1983)* 463 U.S. 939; *Wainwright v. Goode* (1983) 464 U.S. 78.). Thus, this argument violated the Eighth and Fourteenth Amendments and Article I of the California Constitution..

The prosecutor's argument drew the jury's attention to Mr. Tully's decision not to testify, by telling the jury it "hadn't heard" any evidence of Mr. Tully's remorse. It is misconduct to use the defendant's invocation of his constitutionally guaranteed right to remain silent as a reason to sentence him to death. (*Griffin v. California* (1965) 380 U.S. 609.) More so here, because when the prosecutor made his argument, the prosecutor knew

that Mr. Tully had requested leave to allocute to the jury to "express his extreme remorse for the death of Ms. Olsson and the terrible shock on her family." (RT 3622.) The prosecutor had objected and allocution was not allowed. (RT 3622-3623.) When the prosecutor made his closing argument, he knew that Mr. Tully was indeed remorseful. Knowing that Mr. Tully had tried to express remorse to the jury, he lied to the jury and told them Mr. Tully lacked remorse As the Supreme Court has stated: "'A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.'" (*Napue v. Illinois* (1959) 360 U.S. 264, 270 quoting *People v. Savvides* (NY Court of Appeals 1956) 136 N. E. 2d 853, 854-855.)

Moreover, in making his argument to the jury as to alleged lack of remorse, the prosecutor repeatedly ignored defense counsel's objections and the trial court's rulings limiting his argument. The trial court specifically held that the prosecutor's references in his charts to Mr. Tully's alleged lack of remorse were misleading and improperly commented on Mr. Tully's failure to testify. (RT 3674-3676) The trial court also warned the prosecutor not to argue to the jury that the absence of mitigating factors could be aggravating factors. (Ibid.) The prosecutor repeatedly made these very arguments to the jury.

D. Cumulative Prosecutorial Misconduct at the Penalty Phase

The prosecutor's acts of misconduct violated Mr. Tully's rights under state law and the state and federal Constitutions. Even if this Court finds that each instance, taken

individually, did not prejudicially implicate Mr. Tully's state or federal trial rights, when considered cumulatively the prosecutor's misconduct deprived Mr. Tully of his rights to due process, and a fair trial under the state and federal constitutions, and a fair and reliable penalty verdict under the Eighth Amendment and Article I of the California Constitution.

The prosecutor violated nearly every rule controlling and limiting the scope of opening and closing arguments at the penalty phase.[104] In between, he presented his penalty phase case with complete disregard for Mr. Tully's constitutional rights and the orders of the trial court. His conduct during the examination of his penalty phase witnesses drew objection after objection. During his argument he wove an elaborate story of sadism and sexual violence that had nothing to do with the provable facts of the crime. His entire penalty presentation was framed by, and reinforced with his misconduct.

To allow Mr. Tully's death sentence to stand in the face of this grave and pervasive misconduct would send a clear message to prosecutors that they may violate court orders, the rules of ethical behavior and trial practice, and the state and federal Constitutions, with impunity. It also would be a travesty of justice for Mr. Tully.

In California, felony-murder is punishable by life in prison without the possibility of parole unless the circumstances of the crime, as shown by the evidence, or the

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[104] As appellant argues elsewhere in this brief, the prosecutor also based a significant portion of his penalty argument on biblical authority thus further injecting improper considerations into the jury deliberations. (See Argument XVII, *infra*.)

defendant's background and criminal history demonstrate facts, *beyond* the mere act of murder, sufficiently aggravating to warrant imposition of the death penalty. Indeed, the Constitutions and State law have made distinctions among felony-murders and among felony-murderers, in deciding which should be punished by the severe penalty of life in prison, and which by the ultimate penalty of death. The crime in this case involved a burglary-murder and an assault to commit rape. However, the prosecutor's "aggravating factors" amounted to a fever-pitched and highly charged dramatization of the prosecutor's theories of the crime being told over and over again. He focused on the uncharged rape and unproven facts about the killing, supplying graphic and gruesome details from his own imagination and inviting the jury, in contravention of the statutory and constitutional rules governing the life or death decision, to do the same.

Moreover, to the extent the argument to the jury to rely on invalid aggravating factors, such as "callousness," rape and lack of remorse, the Eighth Amendment was violated. (*Sochor v. Florida, supra*, 504 U.S. at p. 532.) Accordingly, this Court must apply the harmless error standard of *Chapman v. California.* (*Id.*) Regardless, under either the standard set forth in *People v. Brown, supra*, 46 Cal.3d at p. 448 (reasonable possibility that, absent the error, the jury would not have sentenced defendant to death), or the *Chapman* harmless error standard, the death sentence cannot stand.

XVII. RELIGION, RELIGIOUS ARGUMENTS AND BIBLICAL AUTHORITY PERMEATED THE PENALTY ARGUMENTS

A. Introduction

During the state's penalty phase arguments, the prosecutor relied on the Bible, religious law and biblical authority to convince the jurors to return a death verdict. While calling for retribution and death, the prosecutor displayed a large chart to the jury, entitled "The Bible Sanctions Capital Punishment."

THE BIBLE SANCTIONS CAPITAL PUNISHMENT:

"WHO SHED THE BLOOD OF MAN BY MAN SHALL HIS BLOOD SHED, FOR IN HIS IMAGE DID GOD MAKE MAN."

GENESIS CHAPTER 9 VERSE 6:

"HE THAT SMITETH A MAN SO THAT HE DIE, SHALL BE SURELY PUT TO DEATH"

EXODUS, CHAP. 21 VERSE 12:

"AND IF HE STRIKE HIM W/AN INSTRUMENT OF IRON SO THAT HE DIE, HE IS A MURDERER: THE MURDERER SHALL SURELY BE PUT TO DEATH."

NUMBERS CHAP 35 VERSE 16:

"AND YOU SHALL NOT TAKE REPARATIONS FOR THE SOUL OF A MURDERER WHO DESERVES TO DIE BUT HE SHALL BE PUT TO DEATH."

NUMBERS, CHAP 35 VERSE 31:

(Court Exhibit 5.)

The prosecutor began the foray into religion during his first penalty phase argument.[105] The prosecutor went beyond asking the jury to consider biblical teachings in reaching their verdict; he argued that the Bible demanded a death sentence. The prosecutor emphasized that "The Bible Sanctions Capital Punishment," the title of his chart, throughout his argument. He forced defense counsel to answer the religion question, and continued with greater religious zeal during his final closing argument.

No objection was made to these arguments by either side. No comment or admonition was made by the trial court advising the jury that the prosecutor's biblical arguments were improper or to disregard the theological debate between counsel. The trial court simply allowed religious argument to permeate the penalty phase. As a result, the decision between life and death for Mr. Tully depended, in essence, on which side could win the battle in the "ecclesictal Court." *People v. Wash, supra,* 6 Cal 4th at p 283.

The prosecution and defense religious arguments, as a whole, violated the Fifth, Sixth, Eighth and Fourteenth Amendment's requirements of a fair trial, due process and a fair and reliable penalty decision, and the parallel provisions of the California Constitution. The prosecutor's argument violated the First Amendment's Establishment Clause and the required separation of church and state as well as the state Constitution.

For the prosecutor to urge that the Bible, or religion in general requires capital

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[105] The defense and the prosecution were each allowed to make two closing penalty phase arguments. (RT 3630, 3760, 3797, 3818.)

punishment is "patent misconduct." (*People v, Roldan* (2005) 35 Cal.4th 646, 743, citing, *People v. Hill*, supra, 17 Cal.4th at p. 836, fn. 6.) This Court has held:

> *When prosecutors invoke religious rhetoric* (see, e.g., *id.* at p. 836, 72 Cal.Rptr.2d 656, 952 P.2d 673 [" 'an eye for an eye, a tooth for a tooth'"]), when they rely on what they purport to be "God's will" (*People v. Navarette* (2003) 30 Cal.4th 458, 514, 133 Cal.Rptr.2d 89, 66 P.3d 1182), *or when they argue based on what they take to be the true meaning of scriptural passages (see People v. Wash* (1993) 6 Cal.4th 215, 274, 24 Cal.Rptr.2d 421, 861 P.2d 1107 [prosecutor explaining why apparently conflicting statements in the Old and New Testaments do not really conflict]; *Bennett v. Angelone* (4th Cir.1996) 92 F.3d 1336, 1346 [prosecutor argued commandment "thou shalt not kill" inapplicable to the government]), *all to convince a jury to impose the death penalty, they create and encourage an intolerable risk that the jury will abandon logic and reason and instead condemn an offender for reasons having no place in our judicial system* (see *People v. Hill, supra,* at p. 837, 72 Cal.Rptr.2d 656, 952 P.2d 673 [religious argument "tends to diminish the jury's personal sense of responsibility for the verdict"]). Such argument also threatens unnecessarily to consume scarce judicial resources, when an otherwise guilty offender must be retried. (See *Sandoval v. Calderon* (9th Cir.2000) 241 F.3d 765; *State v. Wangberg* (1965) 272 Minn. 204, 136 N.W.2d 853.) (*People v. Roldan, supra* at p. 743, emphasis added.)

Here, the prosecutor used every one of these prohibited methods to convince the jury to impose death. He told the jury the Bible required Mr. Tully's execution. He repeatedly invoked religious rhetoric. He asked the jury to consider God's will. Worse yet, he based his argument on his own interpretation of the "true" meaning of scriptural passages.

These violations, alone, are serious enough to require reversal. Nonetheless, the damage was compounded when the defense, having been forced into the religious quagmire by the prosecution, responded with its view of the "true" meaning of the Bible. Both the prosecutor and defense counsel argued as though they were theological experts.

Taken together, the arguments created "an intolerable risk that the jury . . . abandoned logic and reason," and instead condemned Mr. Tully to death "for reasons having no place in our judicial system" (*Roldan*, *supra,* at p. 743.) Accordingly, Mr. Tully's death sentence must be reversed.

B. Religion Improperly Pervaded The Penalty Phase

1. The Prosecutor Preached to the Jury

While displaying the "The Bible Sanctions Capital Punishment" chart to the jury, the prosecutor injected religious doctrine in his opening penalty argument. The prosecutor contrasted the testimony of Roger Tully, Mr. Tully's brother, concerning his own religious conversion, with the absence of any similar testimony from Mr. Tully. Arguing facts outside the evidence, the prosecutor assumed Mr. Tully was not religious and emphasized his purposed lack of conversion to God.

> You heard Roger tell us about what a difference in his life his religious conversion had. *Have you heard anything like that about the defendant?* Roger said he's different now, there's been this intervention. You know, Roger puts it in terms of, but for this woman, I wouldn't have been converted to God, but the reality is, it takes two to tango. (RT 3692, emphasis added.)

He continued to compare Mr. Tully with his brother:

> Now you can hit somebody over the head all day long, but if they're not willing, if they're not receptive, it's not going to happen, and there had to have been something going on in Roger's life, rather than this idea I was just uncontrollable, I was going to keep on going here but somebody reached out and grabbed me. (RT 3692-3693.)

In commenting on Roger's testimony concerning his religious conversion, the prosecutor used religion in a more troubling way. He emphasized that religious authority

would give the jurors the strength to impose a death sentence:

> Well, Roger paid attention. He didn't have to but he chose to. *And when we talk about religion, it has to be discussed in this type of setting, because remember what I told you about my concern of having fortitude?* Because this is tough. (RT 3692.)

He went on:

> And when we talk about religion, it is not something that is to be used in aggravation at all, what the Bible or Koran[106] or anything has to say, *but the one thing that is universal is this idea that murderers are to be punished, and that the death penalty is sanctioned and that it is appropriate. And just so there isn't anybody who lies awake at night saying, gee, as a good, what I am, is it permissible under my religion to do this sort of thing?* I mean, obviously, that was something that we hoped you thought of beforehand. And there is a question to that effect in various forms that asks you about your religious beliefs: Is that going to stand in the way? (RT 3692-3693.)

The prosecutor continued, urging that the "Bible sanction[s] capital punishment."

> Well, many times people get to this point, and then they start thinking about that. *When we start talking about religion, I use the Bible more out of convenience but the same concepts are found in the Koran and other religious writings, to the effect that the Bible does, in fact, sanction capital punishment. There is one that is just so right on point:*
>
> *"He who strikes him with an instrument of iron so that he die, he is a murderer, the murderer will surely be put to death. And you shall take no reparations for the soul of a murderer who deserves to die, but he shall be put to death.*
>
> *"He who shed the blood of man by man shall his blood shed. For in his image did God make man. His blood or his life will be shed by man."*
>
> Now, as I said, religion is not supposed to be the guiding factor in finding aggravation, but I just want to clear the air there that religion does not stand in the way, and that's not supposed to enter into your evaluation. (RT 3693-

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[106] The prosecutor knew that at least one juror was Muslim. (CT 14290.)

3694.) (Emphasis added.)

2. The Defense Tried to Respond

In their opening argument, defense counsel compounded the prosecutor's misconduct. Attorney Strellis first argued for the defense. At the start, he told the jury about *his* religion and *his r*eligious beliefs.

> I'm going to talk about religion for a minute and about – by the way, I'm Jewish and not Christian. I want to get that disclaimer in too because I'm about to cite the New Testament, and I don't want to pretend I'm a great authority on it. I am not.
>
> But my memory, if it serves me correct, said that Jesus at one point in time said, "Hate the sin, but love the sinner."
>
> Now, did he mean by that that you're supposed to love Richard Tully? No.
>
> You know what he meant by that? He meant that we should not lose sight of the fact that even though a bad act has been done it was done by a human being that breathes, who bleeds, who thinks.
>
> Remember the speech from Attila, "Am I not human? Do I not bleed if you cut me?" Remember that? (RT 3764.)

Strellis continued in his attempt to respond to the prosecutor's argument.

> Now, Mr. Burr has told you death is okay because all of the world's [great religions sanction it].
>
> I could be wrong, but *I don't think Buddhism does*, and 25 or 30 percent of the population in the world is Buddhist. Now, I may be wrong, but that's my best recollection. (RT 3764.)

Strellis then tried to argue that religion doesn't sanction the death penalty to counter what the prosecutor had impermissibly argued. Strellis mixed in his own religious background. He started: "Most of the statements about the propriety of death

are quoted out of the Old Testament, you know, my religion, the things those Jews throw out." (RT 3764.) He then turned to a discussion of the Talmud and the Torah.

> But there's an interesting thing that we fairly rarely hear. Along with the Old Testament, there is a book called the Talmud, and what the Talmud is is the wisdom of old Jewish rabbis who sat down and talked about those rules and those laws and what they meant.
>
> It is from the Talmud that most of the rules we think of as Kosher, as I'm sure you heard of, you're not supposed to eat pork, you're not supposed to eat shellfish, you shouldn't turn the light on during the Sabbath and so forth. *These rules came really from interpretation of the Torah. The Torah is a great force.* It is what people thought of those words. (RT 3764-3765.)

Next, Strellis discussed Jewish history, the Talmud, the Torah and capital punishment.

> Now, many, many years ago, and when I say many, we're talking several thousand, the Jews for a period of time had their own nation, and they had their own court called the Sandhedra. And the person who sat on the court were in fact rabbis and they wrote in the Talmud, and they wrote in the Talmud about capital punishment, and what they said was this:
>
> They said that a Sandhedra, that once in 30 years should you sentence a man to die, it would be called a bloody sandhedra. And then what happened, because if you've ever seen the Talmud, the Talmud has a page of the Torah in the middle and then commentary all around it. Another rabbi said, no, if they should do it once in 80 years, it would be a bloody sandhedra. And a third rabbi said, no, once in a 160 years. (RT 3765.)

Following this argument, Strellis discussed the safeguards Jewish law required before a death sentence could be imposed:.

> *Do you know what you had to do under the Jewish law to be eligible for a death penalty? At the moment that you are going to kill him, a witness had to say to you, "Do you realize this is wrong? Do you understand the gravity of your offense? Do you understand you're taking a human life?" Short of that kind of testimony, you do the following, suffice it to say, very few people were*

executed. (RT 3766.)

At the close of his argument, Strellis quoted from the Bible: "And what I'm asking you to do is look into your own souls and remember, vengeance is mine said the Lord." (RT 3796.) Strellis then told the jury that "according" to the Bible, it was not "man's" job to kill. Instead, he said, "Our job is not to use God's function, but to allow society to move forward." (RT 3796.)

3. The Prosecutor Returned to Sermon

The prosecutor started his rebuttal argument by discrediting the interpretation of the Scriptures provided by Strellis.

> We get into this process that we go through here and it's a lot different than it was in the Old Testament. The Old Testament, *when God spoke, he made it very clear. Very clear. Murderers shall die. And God also made it very clear that it was man who going to impose that penalty.*
>
> Now while Mr. Strellis got up here and quoted from, I believe it's Romans, vengeance is mine, say[eth] the Lord. In the next chapter, Paul makes it very clear *"the ruler bears not the sword in vain for he is the minister in God, a revenger to execute wrath upon him that do with evil."*
>
> Now we could bounce religions back forth all day long, but that's not the purpose here because you have to start at the very, very beginning when you, in the sense that when we start talking about religions, and as I said, *God made it clear.* When man starts getting into the act He starts softening up the rules a little bit and that's okay. You can do that.
>
> You hear about the Talmud, and I could tell you about other things . . . (RT 3797-3798.)

Rather than simply countering Strellis' argument, the prosecutor next urged the jury to sentence Mr. Tully to death based on his interpretation the New Testament story of

the Crucifixion– the execution of Christ and the two "thieves" crucified next to him.

> You're going to hear things like it shouldn't happen. You know, vengeance is mine, sayeth the Lord.
>
> Now when you start talking about religions, it's very interesting because you remember, *you know, in this country its easy to keep in mind the holiday of Easter.* You know what it represents is Christ is up there being crucified and we have the good thief and the bad thief. And we've labeled them good thief and bad thief. But what makes the difference is one of them repented, one of them said, "Forgive me Lord, I believe in you." The other one just, you know, cussed at Christ, turned his nose, whatever. Christ said to the good thief, you know, you'll be with me in heaven, he was saved. The good thief was saved. The bad thief wasn't.
>
> *Well, the moral of that story was that the good thief was not cut down off that cross until he was dead and his soul was saved in heaven. But Casesar* [sic] *law was completed. And the good thief died along with the bad thief.* (RT 3800.)

The prosecutor also argued the classic religious, pro-death penalty principle of *lex talionis*: "An eye for an eye, a tooth for a tooth."

> You know, we have evolved beyond the rule of [Hammurabi], talking about an eye for an eye. I mean I think there are some people who believe that and there's a lot to be said about it in many, many regards. . . . And punishment in a rough sense, ought to be related to the crime and the person and the culpability of what they've done and that's what our system tries to do. And that's why we got the death penalty. The sense of fairness. Because there is some kinds this is so heinous, so vicious, so violent that they outrage us and they say this person has forfeited their right not to just live in society, but to live, to live. (RT 3808.)

4. The Defense Tried To Respond Again

Attorney Wagner argued the second defense penalty argument. He repeated the theme that Mr. Tully was "one of God's children." (RT 3820; RT 3865.) He was pushed by the prosecutor to agree that religion has a role in the penalty determination.

> Now the prosecution originally broached the subject of religion by giving you quotes from the Old Testament which he claims, justifies man killing man. But then, in the same breath, turns around and says religion shouldn't play a part in the decision.
>
> And Mr. Strellis made some arguments drawing from his own heritage, and then Mr. Burr comes back and said, God made it clear that man can kill man. (RT 3863.)

Wagner tried to convince the jury that the biblical law cited by the prosecutor had been discarded in place of the New Testament.

> I am sure there's much in the religious writings that you can find anything you want, but there are other instances here. And I am not a religious expert, but *I've done my homework*, I think. And you can draw on your own experience, your own common knowledge in this. Even in the Old Testament, God did not sentence Cain to death for killing his brother. He banished him. It's clear that the message of the New Testament is love and mercy. Jesus himself in the Sermon on the Mount preached the doctrine of an eye for an eye should be discarded. But you see in a sense that is what you're getting here. If you ignore this, murder equals death. (RT 3864.)

Wagner then tried to counter the story of the Crucifixion.

> My recollection, from my research here, my recollection of– somebody here is going to know it– my recollection of Jesus on the cross at Calvary, the people on both sides of him were forgiven. But to bring religion into it as some justification for you to do it, to kill somebody is misleading. The major, the major religious groups in this country, many of them in the world, the American Baptist Convention, Episcopals and Methodist, and particularly the Roman Catholic Church have taken rigorous stands against the death penalty. (RT 3864.)

Further relying on religion, argued that the Pope's stance against capital punishment should influence the jurors' religion-based values:

> Now, I don't want to mislead you. You are here on this jury because have said that you can in these circumstances impose either of two penalties. Now there's a conflict whether religious aspect of the thing, you shouldn't be here where you could not impose the death penalty; you shouldn't be here, I am not

saying that. But there is another aspect of this, and *the Pope,* some of the other people that have been the most articulate spokesmen on this, one of the things you do, when you – one the things that you do when you evaluate these principles in– and also talk about mercy is you hear, you give what moral and sympathetic value you have. To much of us, much of our moral character and moral background in some way partly rests upon religious principles. And to the extent that your moral values, and so on, are in the way you gauge these things are based upon those religious principles, you should at least do this, you look and say that I should be reluctant except in the worst, you should be reluctant except in the most extreme circumstances, the worst of the worst, you should be reluctant to impose to kill somebody, to impose the death penalty. I should be reluctant. (RT 3864-3865.)

Finally, Wagner, argued that Mr. Tully was one of God's children.

Now, I have, as Mr. Strellis did, I have no hesitation, no shame, no ego involvement in begging you for the mercy of this man's life. *He's one of God's children.* I hope I have given you the reason to extend him that mercy . . . . (RT 3865.)

C. The Religious Arguments Were Unconstitutional

Virtually every state and federal court to address the question has held that involving the Bible or religious rhetoric as authority for imposing a death sentence is unconstitutional.[107] This Court is in agreement that the prosecutor's invocation of the Bible is "patent misconduct." (*People v, Roldan, supra,* 35 Cal.4th 646, 743.) This Court has stated that it "cannot emphasize too strongly" this principle. (*People v. Hill, supra,* 17 Cal.4th at p. 836, fn. 6).

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[107] See, e.g., *Sandoval v. Calderon*, (9th Cir. 2001) 241 F.3d 765, 776-777; *Coe v. Bell* (6th Cir.1998) 161 F.3d 320, 351; *Bennett v. Angelone,* (4th Cir.1996) 92 F.3d 1336, 1346; *Cunningham v. Zant* (11th Cir.1991) 928 F.2d 1006, 1019-1020; *United States v. Giry* (1st Cir.1987) 818 F.2d 120, 133; *State v. Middlebrooks*, (Tenn.1999) 995 S.W.2d 550, 559; *Commonwealth v. Chambers* (1991) 528 Pa. 558, 599 A.2d 630, 644; *People v. Eckles* (1980) 83 Ill.App.3d 292, 404 N.E.2d 358, 365; *State v. Wangberg* (1965) 272 Minn. 204, 136 N.W.2d 853, 854-55.

Similarly, it is well-settled that it is unconstitutional for religion play any role in the sentencing process. (See, e.g., *United States v. Giry, supra*, 818 F.2d 120 [reference to Bible is improper appeal to jurors' private religious beliefs]; *Evans v. Thigpen* (5th Cir.1987) 809 F.2d 239, reh'g and reh'g en banc denied, 814 F.2d 658, cert. denied (1987) 483 U.S. 1033 [biblical evidence irrelevant at sentencing phase.]) Argument seeking the death penalty cannot be based on biblical or religious doctrine whether that argument is made by the prosecution or defense. (*People v. Wash* (1993) 6 Cal. 4th 215, 283 (conc. & dis. opn. of Kennard, J.) ["A religious argument against the death penalty is no more acceptable at the penalty phase of a capital case than a religious argument in favor of the death penalty."

Religious-based argument has no place in the penalty phase of a capital trial. Neither the prosecutor nor defense counsel can properly instruct the jury as to the meaning of Bible scripture or any other religious writing or religion. Nor can counsel reference material outside the evidence presented at trial. (*Ibid.*, ["it is improper to answer one impermissible argument not based on the facts or the law applicable to the case with another impermissible argument not based on the facts or the law applicable to the case."])

Mr. Tully's jury should not have heard the prosecutor's religious arguments nor defense counsel attempted responses. Even if religious doctrine could, in some situations, be properly considered for a penalty determination, the argument in this case was so extensive and misleading that reversal of the death sentence is required.

The prosecutor's opening salvo improperly injected religion into the penalty equation. He first argued that Mr. Tully, unlike his brother Roger, was an unrepentant heathen, and therefore was unworthy of mercy because he had neither repented nor converted. (RT 3692-3693.) This argument was improper because the defendant's purported lack of religious beliefs is not an aggravating factor and the jury cannot consider it as a basis for imposing a death sentence. (*Zant v. Stephens, supra*, 462 U.S. at p. 885.)

In *Zant*, the Supreme Court held that a state may not authorize the jury to draw adverse inferences from factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as the race, religion, or political affiliation of the defendant. Consistent with this rule of law, this Court has held that a sentencer's religious prejudices are not constitutionally permissible considerations for the penalty phase jury. (*People v. Brown* (1985) 40 Cal.3d 512, 540 fn. 10.) The prosecutor's argument that Mr. Tully, unlike his brother, had not produced evidence of a religious conversion, violated the Eighth and Fourteenth Amendments, as well as California law.

This argument was particularly egregious because the trial court had previously ruled that the prosecutor could not "publish a caption" on a chart he had already displayed to the jury, entitled: What You Don't Know About Richard Christopher Tully." The prohibited caption read "That He Found God and Repented." (See Argument XIX, *infra*.) In making the argument, the prosecutor violated the very essence of this ruling. Instead of again displaying the prohibited language, he simply argued it.

The prosecutor next told the jury, in no uncertain terms, that religion "*has to be* discussed in this type of setting" because it would give them the fortitude to impose the death penalty. (RT 3692.) Earlier in his argument, the prosecutor said that the "real difficulty is whether all 12 of you have the fortitude to impose [the death penalty]. (RT 3640.) He told the jurors that they *had to* consider religious teachings before they could render a penalty verdict, and that religion would give them the strength to vote for death and solace in knowing they did the "right" thing in the eyes of God. Telling the jurors to turn to religion to find the fortitude to execute Mr. Tully and to find solace in religion for their death verdict served the purpose of "diminish[ing[the jury's personal sense of responsibility for the verdict." (*People v. Hill, supra*, 17 Cal.4th at p. 836). The jury was impermissibly led "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (U.S. Const. Amend. 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329.)

Continuing with his argument, the prosecutor demonstrated why counsel should not be permitted to argue religious teachings to the jury. He "testified" incorrectly that all religions sanction the death penalty. He said that "the one thing that is universal is this idea that murderers are to be punished, and that the death penalty is sanctioned and that it is appropriate." (RT 3692.) In the absence of any evidence before the jury concerning the views of "world religions" on the propriety of capital punishment, this argument was improper and irrelevant. (*People v. Pinholster, supra*, 1 Cal. 4th at p. 948.) Moreover, given that the jury is specifically instructed by the court to determine whether death is the

"appropriate" penalty, this argument improperly told the jurors they could determine that death was "appropriate" based on their religious beliefs, whatever they were, rather than on a weighing of the aggravating and mitigating factors.

The prosecutor then focused the jury on the Judeo-Christian Old Testament. (RT 3692.) He not only quoted "chapter and verse" of the Old Testament, he also displayed biblical quotes and citations. (Court Exhibit 5.) He also rewrote the Bible by piecing together two unrelated passages of the Old Testament, and read them as though they were one passage. Put together, the message of these passages was that the Old Testament not only sanctioned capital punishment, but mandated, that all murderers be killed by man, and not by God.

The prosecutor falsely told the jury he was quoting "one" "on point" writing from the Bible. (RT 3692.) In fact, "the passage" he quoted was taken from two separate parts of the Bible. The first passage is from the Book of Numbers. (Numbers 35:16.) The second passage is from Genesis. (Genesis 9:6.) (RT 3693-3694.) In biblical terms, the first passage used by the prosecutor represented later and more evolved thinking, while the second passage represented the more primitive thought that man, and not God, had the right to avenge bloodshed by more bloodshed.

Moreover, the first, but later in time, passage quoted by the prosecutor was taken out of context, compounding the violation. The prosecutor argued:

> He who strikes him with an instrument of iron so that he die, he is a murderer, the murderer will surely be put to death. And you shall take no reparations for the soul of a murderer who deserves to die, but he shall be put to death. (RT

3692-3693; Numbers 35:16).

Numbers 35:10 *et. seq* sets forth the Mosaic Code of criminal justice, requiring among other things, cities of refuge whereby "manslayers" are to find refuge from any avengers, that only "the avenger of blood himself shall put the murderer to death when he meets him," and that if that avenger acts out of enmity or anger, he too is a murderer and should be put to death himself. The Mosaic Code also requires that there be more than one witness to the crime before any person can be sentenced to death in a court. (Id.)

The Book of Numbers has no relevance to a jury deciding criminal penalties. It has no bearing on the criminal justice system. Our system does not allow manslaughterers to find refuge. It does not allow the avenger to personally kill the murderer when he meets him face to face. It alsoallows the imposition of a death sentence even when the evidence is entirely circumstantial.

The second passage quoted by the prosecutor read: "He who shed the blood of man by man shall his blood shed. For in his image did God make man. His blood or his life will be shed by man." (Genesis 9:6.) The two Bible passages the prosecutor quoted left the jury with one impression only: the Bible not only sanctioned the death penalty, but that God in fact demanded it in this case. By reciting this one excerpt from a lengthy passage, and juxtaposing it with another unrelated passage, the prosecutor falsely told the jury that religion commanded a verdict of death.

Moreover, both passages purport to reflect the word of God and, as strung together by the prosecutor, carry the message that a murderer who kills with a knife, *i.e.* "an

instrument of iron," *must* be killed, and that it is man, not God, who shall do the killing. Given that Ms. Olsson was killed with "an instrument of iron," the "passage" seemed to be, as the prosecutor told the jury, "just so right on point." (RT 3693.)

After reading from the Bible, and opining that the passages he read were "on point," the prosecutor improperly conveyed to the jury that religion, or more specifically, the lack of religion, was an aggravating factor, but not the "guiding" factor. (RT 3694.) After this religious outpouring, reinforced by the large chart he displayed to the jury, the prosecutor told the jury he was just trying "to clear the air" that religion did "not stand in the way" of imposing death, but "that's not supposed to enter into your evaluation." (RT 3694.) Given that there had been no previous religious argument by the defense, the prosecutor was creating a religious straw man that allowed him to argue a prohibited topic.

The prosecutor's misconduct here, and elsewhere in his argument, is a variation of the rhetorical device of paraleipsis, a device that this Court has warned against.

> Although the prosecutor's comments here were strategically phrased in terms of what he was *not* arguing, they embody the use of a rhetorical device -- paraleipsis -- suggesting exactly the opposite. Repetition of the statement, "I am not arguing *X*," strongly implied the prosecutor was in fact asserting the validity and relevance of *X*, but, for lack of time, was concentrating on other, presumably more important topics.

(*People v. Wrest* (1992) 3 Cal.4th 1088, 1107.) The prosecutor's argument reinforced, rather than negated, the importance of religion in the jury's penalty phase evaluation. Moreover, the prosecutor was not merely telling the jury that religion did not "stand in the

way" of imposing the death penalty. Rather, he insisted the death penalty was mandated by God and that it should be carried out by "man."

Instead of prohibiting it, the trial court allowed the religious argument to continue. The defense began its argument with an equally irrelevant and prejudicial religious discourse. Strellis' argument reinforced the prosecutor's erroneous position that major religions approve of the death penalty, rather than correcting the improper view.

After disclosing his own religious background, Strellis challenged the prosecutor's religious expertise, first regarding the "universal" approval of the death penalty by world religions, and then Buddhism in particular. (RT 3764-3765.) Strellis then engaged in a discourse on the Talmud.[108] He told the jurors that in contrast to the prosecutor's interpretation of the Old Testament, according to Jewish law, the Old Testament taught that the death penalty was to be used rarely. (RT 3765-3766.)[109] To counter the prosecutor's assertion that the Bible said all murderers should die at the hand of man, Strellis quoted another Bible passage, this time from the New Testament. "Vengeance is mine, sayeth the Lord." (RT 3796.)

This Court has explained: "What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by

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[108] The Talmud is the authoritative written body of Jewish law, tradition and commentary.

[109] As one court has noted, the Talmud also prescribes or commands a sentence of death for killing. (*Carruthers v. State* (2000) 272 Ga. 306, 308, 528 S.E.2d 217, 221.) Strellis argument thus strengthened the prosecutor's argument.

reliance on the legal instructions given by the court, not by recourse to extraneous authority." (*People v. Sandoval* (1992) 4 Cal.4th 155, 194.) When counsel engage in a religious debate, instead of relying on the facts and the law, the potential for jury distraction and confusion is enormous. "[J]ury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials." (*State v. Williams*, 350 N.C. 1, 27, 510 S.E.2d 626, *cert. denied* (1999) 528 U.S. 880.)

As this Court has recognized, prosecutors are held to a higher standard then defense counsel. "Improper argument by the prosecutor has the force of "dynamite" because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*People v. Hill*, *supra,* 17 Cal.4th at p. 828.) When the prosecutor relies on "biblical" or "scriptural" facts outside the evidence, as the prosecutor did here, the jury will hear him not only as the voice of the governmental authority, but also as the voice of religious authority. Because of this, defense counsel's attempted responses to the initial, improper argument by the prosecutor were futile, at best.

Unlike the prosecutor's argument, Strellis' did not direct the jury to follow the word of God over that of the law. Instead, he argued that certain religious scholars interpreted the Bible to mean that death is *not always* the right sentence. Strellis argued that according to the Talmud, it should be imposed sparingly. In response, the prosecutor proclaimed that in the Old Testament, "when God spoke, he made it very clear. Very

clear. Murderers shall die. And God also made it very clear that it was man who going to impose that penalty." (RT 3797.)

The prosecutor improperly implied that Strellis did not know as much about the New Testament as he did. He argued that, if Strellis had read beyond "Vengeance is mine," he would have known know that "[i]n the next chapter, Paul makes it very clear "the ruler bears not the sword in vain for he is the minister in God, a revenger to execute wrath upon him that do with evil." (RT 3797.) Use of the very biblical passage that the prosecutor quoted in his rebuttal, Romans 13:1-5, has been expressly condemned by this Court and the Court of Appeals for Ninth Circuit. (*People v. Sandoval, supra*, 4 Cal.4th at pp. 193-194; *Sandoval v. Calderon, supra,* 241. F.3d at p. 775. As the Ninth Circuit found:

> Any suggestion that the jury may base its decision on a "higher law" than that of the court in which it sits is forbidden. *See Jones v. Kemp,* 706 F.Supp. 1534, 1558-59 (N.D.Ga.1989); *Commonwealth v. Chambers,* 528 Pa. 558, 599 A.2d 630, 644 (1991). The obvious danger of such a suggestion is that the jury will give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law. *Sandoval v. Calderon, supra,* at p 776.)

Here, the prosecutor's argument undercut the jury's own sense of responsibility in determining the proper punishment, thus violating the Eighth Amendment. (*Caldwell v. Mississippi, supra*, 472 U.S. at pp. 330-34.) According to many, there is no higher court than the court of God.

The prosecutor violated the Constitutions by engaging in improper religious "vouching" during argument. He impermissibly stated his own personal beliefs about the

evidence and injected his personal opinion into argument. (See generally *United States v. Potter* (9th Cir. 1979) 616 F.2d 384, 392, *cert. denied* (1980) 449 U.S. 832; *People v. Padilla* (1995) 11 Cal. 4th 891, 946; *People v. Kirkes* (1952) 39 Cal.2d 719, 723-24.) This Court has condemned counsel for arguing "what they take to be the true meaning of scriptural passages." (*People v, Roldan, supra,* 35 Cal.4th 646, at 743, citing *People v. Wash, supra*, 6 Cal.4th at p. 274.) Here, not only did the prosecutor hold himself out as an authority on the meaning of the Bible, he also argued that he knew more about it than defense counsel.

Later in his argument, the prosecutor urged the jury to sentence Mr. Tully to death based on his interpretation of the specific precepts of Christianity as set forth in the New Testament story of the Crucifixion– the execution of Christ and the two "thieves." (RT 3800.) This argument was constitutionally prohibited for several reasons.

First, the prosecutor violated the First Amendment's Establishment Clause, which prohibits the "imprimatur of state approval" to be conferred on any particular religion, or on religion generally." (*See Widemar v. Vincent* (1981) 454 U.S. 263, 274.) He also violated the California Constitution. As the Supreme Court of Connecticut stated:

> [R]eligious references during trial are fraught with possible establishment clause complications. See, e.g., G. Simson & S. Garvey, "Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases," 86 Cornell L.Rev. 1090, 1113 (2001) ("For the endorsement test to apply there must be governmental action of some sort that may be understood as sending a message of government endorsement of religion. When the prosecutor, a governmental actor, makes religiously based closing arguments, this requirement is obviously met."). (*State v. Ceballos* (2003) 832 A.2. 14, 35 fn. 36.)

Here, the prosecutor, a representative of the State and Alameda County, told the jury that "when you start talking about religions, it's very interesting because you remember, you know, in this country its easy to keep in mind the holiday of Easter." He told the jury it was proper for them, as Americans, to be guided by the story of Easter as told in the King James Bible, in making their penalty determination. (RT 3800.) In doing so, the prosecutor gave the imprimatur of state approval to a particular, sectarian religious teaching. The prosecutor essentially endorsed Christianity as the national religion and gave biblical doctrine the force of law.

Second, the prosecutor argued that the New Testament *required* the jury to vote to execute Mr. Tully because the law could not be followed unless the "thief" was killed. It did not matter whether Mr. Tully was the "good thief" or the "bad thief." If he was "the good thief," his execution was necessary to save his soul. If he was "the bad thief," his execution was justified because he had not "repented."

> Well, the moral of that story is the good thief was not cut down off that cross until he was dead and his soul was saved in heaven . . . And the good thief died along with the bad thief. (RT 3800.)

Either way, according to the prosecutor's argument, death was required so that the "law was completed." Telling the jury that God and Jesus required them to impose death to save the defendant's soul "could be no clearer an invocation of divine authority to direct a jury's verdict." (*Sandoval v. Calderon, supra*, 241. F.3d at p.779.)

Third, the prosecutor told the jury: "*The moral of the story is* . . . ." By doing so,

the prosecutor held himself out as a theological expert. In essence, he was vouching not only for the correctness of Christianity, but for his own particular religious interpretation of a particular story in the Bible. The argument again violated the prohibition against the prosecutor arguing "the true meaning of scriptural passages" (*People v. Roldan, supra*, 35 Cal. 4th at p. 743, citing *People v. Wash*, 6 Cal.4th at p. 274.)

Moreover, the prosecutor misrepresented both the Crucifixion story and its basic meaning. According to the prosecutor, "the moral of the story" of the thieves on the cross was that Mr. Tully had to be executed. Whether he was the "good thief" who "repented" or the "bad thief," who did not, Mr. Tully had to die. The Bible, however, makes no reference to "repentance" by either the good thief or the bad thief. Instead, it is acceptance and faith in Christ that saves the soul of the good thief. (Luke 23:39-43.) The prosecutor twisted the meaning of the story to further his argument that remorse was a "condition precedent" to mercy (RT 3693), and to echo a caption on another chart that proclaimed the jury had not heard "That [Richard Tully] Found God and Repented."[110]

Not satisfied with the New Testament, the prosecutor fell back on the more ancient *lex talionis*. He exhorted the jury to apply, in "a sense of fairness," the law of "an for an eye," to Mr. Tully.

> You know, we have evolved beyond the rule of [Hammurabi], talking about an eye for an eye. I mean I think there are some people who believe that and there's a lot to be said about it in many, many regards. . . . And punishment in

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[110] After the jury had already seen this chart, the trial court ruled that this caption had to be omitted. (See Argument XIX, *infra*.)

> a rough sense, ought to be related to the crime and the person and the culpability of what they've done and that's what our system tries to do. And that's why we got the death penalty. The sense of fairness. Because there is some kinds that is so heinous, so vicious, so violent that they outrage us and they say this person has forfeited their right not to just live in society, but to live, to live. (RT 3808-3809.)

This Court has expressly held that it is misconduct for the prosecutor to argue the rule of "an for an eye," in the penalty phase of a capital trial, because doing so "may oversimplify the meaning of the pertinent scriptural passages." *(People v. Hill, supra*, 17 Cal.4th at p. 836, fn. 6.) That is precisely what happened here.

Telling the jury, "we have evolved" beyond the rule of Hammurabi, the prosecutor again used the highly effective rhetorical device of paraleipsis. He expressly invoked the *lex talionis* by making an absurd, misleading example of how we apply "an eye for an eye" in modern society. He asked the jury to agree that if Mr. Tully hadn't killed Ms. Olsson but instead merely stole her car, it would be unfair if Mr. Tully was allowed to drive his own car. However, in California, the punishment for car theft does not include forfeiture of the thief's own car, or even suspension of his driver's license. (Cal. Penal Code § 489.) Nonetheless, the prosecutor urged the jury to take Mr. Tully's life, just like taking a car, because Mr. Tully took the life of another. (RT 3809.)

The prosecutor's "eye for an eye" argument violated Mr. Tully's constitutional rights. In a capital case, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty process must be neutral and principled so as to guard against bias or caprice in the sentencing decision and

to assure that a sentencer's discretion is informed by "clear and objective standards. (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Moreover, by invoking vengeance, the prosecution exhorted the jury to improperly ignore the individual characteristics of the defendant to automatically impose death on any murderer. (*Godfrey v. Georgia*, *supra,* 446 U.S. at p. 428; *Lockett v. Ohio* (1978) 438 U.S. 586, 602-605; see *Jones, supra,* 706 F.Supp. at pp. 1559-60; *cf. Tison v. Arizona* (1987) 481 U.S. 137, 180-81 [Brennan, J., dissenting, noting the "crude proportionality of 'an eye for an eye'"]; *Coker v. Georgia* (1977) 433 U.S. 584, 620 [Burger, C.J., dissenting, "As a matter of constitutional principle, [the Eighth Amendment proportionality] test cannot have the primitive simplicity of 'life for life, eye for eye, tooth for tooth.'"]).

The prosecutor's inflammatory religious argument further embroiled the defense in religious debate. The defense rebuttal argument fanned the prejudicial fires that had been ignited by the prosecutor's insistence that the Bible commanded that Mr. Tully be executed. Although he did not disclose his personal religious beliefs to the jury, Wagner's argument also resorted to biblical principles.

Wagner began by vouching that he had done his biblical "homework." He pointed out that even in the Old Testament, God banished Cain instead of sentencing him to death for killing his brother. He then offered his interpretation of the New Testament, telling the jury: "It's clear that the message of the New Testament is love and mercy." (RT 3864.) Further challenging the prosecutor's knowledge of Christianity, Wagner used another biblical reference, telling the jury: "Jesus himself in the Sermon on the Mount

preached the doctrine of an eye for an eye should be discarded. But you see in a sense that is what you're getting here. If you ignore this, murder equals death" (RT 3864.)

Wagner exacerbated the prosecutor's introduction of the Christian story of Jesus Christ and the "thieves" on the cross, by arguing over an irrelevant detail. The prosecutor had told the jury the moral of the story was that even the good thief had to die for his sins before he could be saved. Instead of pointing out equally plausible interpretations, such as "even a thief is worthy of salvation," he argued: "My recollection, from my research here, my recollection of– *somebody here is going to know it*– my recollection of Jesus on the cross at Calvary, the people on both sides of him were forgiven." (RT 3864.)

Wagner may as well have directly instructed the jurors to go home and consult their Bibles, their ministers or their rabbis for the answer to the religious question he posed. Wagner's response did not address the prosecutor's incorrect assertion that, according to the Bible, execution is a prerequisite to salvation. Further, Wagner was incorrect in his recollection. Only the thief who accepted Jesus Christ was "forgiven" and allowed to enter Heaven. (Luke 23:39-43.)

D. The Trial Court Failed to Assure that Religious Doctrine Played No Part in the Penalty Determination

The degree and nature of the religion-based arguments in this case so undercut the reliability of the death verdict that the trial court should have stepped in to assure that Mr. Tully's rights and the integrity of the jury process were protected. These rights are guaranteed by Fifth, Sixth, Eighth and Fourteenth Amendments, and Article I of the

California Constitution. Moreover, the trial court's failure to intervene resulted in a miscarriage of justice and thus reversal is warranted under Article VI, section 13 of the California Constitution.

The prosecutor's arguments were filled with religious rhetoric. He urged the jurors to rely on higher religious authorities, which he interpreted as mandating death. He argued what he believed was the true meaning or "moral" of the scriptures. Both sides debated what the Bible said and what it meant, thus affirmatively inviting the jury to either speculate, or improperly consult "extraneous authority" to determine which side had it right.

Despite the holy war of words between the prosecutor and the defense in this case, the trial judge simply did nothing. The trial court made no *sua sponte* comment or warning to the attorneys. It never told the jury that the parties could not "ask the jury to consider biblical teachings when deliberating," (*People v. Hill, supra,* 17 Cal.4th at 836). It never instructed the jury that it could not rely "on religious authority as supporting or opposing the death penalty [because the] penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority." (*People v. Sandoval, supra*, 4 Cal.4th at p. 194.)

Under the extreme circumstances presented in this case, the trial court had a duty to assure the penalty decision would not be tainted by improper considerations. The trial court has a duty "to control all proceedings during the trial, and to limit . . . the argument of counsel to relevant and material matters, with a view to the expeditious and effective

ascertainment of the truth regarding the matters involved." (Section 1044). As this Court has stated: "In a death penalty case, we expect *the trial court* and the attorneys to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure." (*People v. Hernandez* (2003) 30 Cal.4th 835, 878, emphasis added.)

The Supreme Court has long emphasized that the trial judge has "the responsibility to maintain decorum in keeping with the nature of the proceeding," and that he "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." (*Quercia v. United States* (1933) 289 U.S. 466, 469, 593.) The trial court must assure that the reliability of the jury's verdict will not be impaired by the arguments of counsel. (See *Chandler v. Florida, supra*, 449 U.S. at p. 574 ["Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."].) The trial court here failed to meet those obligations.

The jury's decision must be based upon the evidence presented at trial and the legal instructions given by the court. Here, the jury was urged to rely on religious authority, rather than on the evidence and the legal instructions in determining the proper sentence. When allowed to permeate jury deliberations as they were here, religious arguments violate the Constitution's command that the death penalty may be constitutionally imposed only when the sentencing scheme carefully focuses the jury on the specific factors it is to consider in reaching a verdict. (See *Godfrey v. Georgia, supra,* 446 U.S. at p. 428; *Lockett v. Ohio* (1978) 438 U.S. 586, 602-605, (1978), [emphasizing

the importance of requiring the jury to make an individualized determination on the basis of the character of the individual and the circumstances of the crime]; *see also Zant v. Stephens*, 462 U.S. 862 at p. 885 [it is error for a State to authorize the jury to draw adverse inferences from "factors that are constitutionally impermissible or totally irrelevant to the sentencing process"]; *People v. Brown, supra,* 40 Cal.3d at p. 540 fn. 10.)

Given the awesome task before the jury, and the seriousness of the consequences of its penalty decision, the judge overseeing a penalty phase must be "especially vigilant" in his or her duty to assure the proper conduct is maintained. Where, as here, both the prosecutor and the defense insist on irrelevant and unconstitutional arguments, the trial court has a duty to prevent these improper arguments from occurring and to guarantee they do not influence the jury in reaching their ultimate decision of life or death for the defendant. As Justice Kennard: "A religious argument against the death penalty is no more acceptable at the penalty phase of a capital case than a religious argument in favor of the death penalty. . ." *(People v. Wash, supra*, 6 Cal.4th at 283, Kennard, J, concurring and dissenting.)

> Our courts are not ecclesiastical courts, and our juries do not base their decisions on religious law no matter whom such law may be said to favor. Because arguments by both the prosecutor and defense counsel exceeded the bounds of inferences that may be drawn from the evidence and considerations that may properly be brought to bear under the factors specified in the death penalty statute, both arguments were improper. *(Ibid.)*

Here, the prosecutor made biblical teachings a centerpiece of his argument. He

drew defense counsel in, forcing them to respond to his misconduct. The prosecutor then invoked religious authority with even more intensity in his closing argument. The trial judge did nothing. As a result, Mr. Tully was sentenced to death by a jury that considered inappropriate matters in violation of the First, Sixth, Eighth and Fourteenth Amendments, as well as the California Constitution.

E. The Religious Arguments Require Reversal of Mr. Tully's Death Sentence

1. Argument Relying on Biblical Authority Is Reversible *Per Se*

The introduction of any religious argument at the penalty phase should be strictly prohibited and reversal should be automatic. Some errors are so serious, and the likelihood of harm so great, that they constitute a "defect affecting the framework within which the trial proceeds." (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310; *People v. Flood* (1998) 18 Cal.4th 470, 500; *People v. Sarazzawski* (1945) 27 Cal.2d 7, 18-19.) These errors require reversal even if the defendant cannot affirmatively establish prejudice. The invocation of biblical authority at the penalty phase falls within this category. Accordingly, this Court should no longer apply a harmless error standard where the penalty deliberations are tainted by arguments based on religious law. *(See e.g., People v. Sandoval, supra*, 4 Cal.4th at p. 194.)

In *Commonwealth v. Chambers*, the Supreme Court of Pennsylvania found the prosecutor's single Bible reference: "As the Bible says, 'and the murderer shall be put to death'" serious enough to warrant reversal of a death sentence without any specific

showing of prejudice, even though the jury had been immediately admonished by the judge to disregard the comment. (*Chambers, supra*, 528 Pa. at p. 599, A.2d at p. 644.) The Pennsylvania Supreme Court found:

> Deliberate attempts to destroy the objectivity and impartiality of the finder of fact so as to cause the verdict to be a product of the emotion rather than reflective judgment will not be tolerated. The verdict must flow from the respective evidence presented and not represent a response to inflammatory pleas for either leniency or vengeance. (*Ibid.*)

Noting that in the past it had "tolerated" brief references to the Bible, the Pennsylvania Supreme Court drew a bright line rule, and held that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death would be reversible error *per se*. This Court should adopt the same standard.

Even if this Court does not follow the bright line rule set forth in *Chambers,* it should hold, at a minimum, that religious invocations as extensive as those in the present case require reversal *per se.* This is warranted because the prosecutor and the defense urged the jury to consider religious teachings, quoted and cited chapter and verse of the Bible and the Talmud, and the trial judge failed to either curb the arguments or to instruct the jury to disregard them. As this Court has explained:

> Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference *by either party* to religious doctrine, commandments or biblical passages tending to undermine that principle is improper. . . .What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority. (*Jones v. Kemp, supra,* 706 F.Supp. 1534, 1559.) We do not mean to rule out all reference to religion or religious figures *so long as the reference does not purport to be a religious law*

or commandment. (*People v. Sandoval* (1992) 4 Cal.4th 155, 195.)

In this case, the arguments went well beyond the simple reference to passages of the Bible at issue in *Sandoval.* Indeed, the attorneys engaged in a battle of theology that, in the words of Justice Kennard, turned the Superior Court into an "ecclesiastical court." *(People v. Wash, supra,* 6 Cal.4th at p. 283.)

Each attorney claimed to know more than the other attorney when it came to the Bible, the Talmud and Buddhist teachings. In a series of attacks and counter-attacks led by the prosecutor, the jury was led away from its constitutionally required tasks of considering the defendant's individual characteristics, applying the law, and determining whether the aggravating circumstances so substantially outweighed the mitigating circumstances that a death sentence was warranted. Instead, the jury was told to base its penalty decision on religious doctrine or law. As the prosecutor argued without any evidentiary support, Mr Tully had never "found God and repented." (Court Exhibit 5.) The jury was left with the clear message that God demanded his death no matter what religion the jurors followed.

This Court cannot allow the death sentence to stand in Mr. Tully's case. Not only was the jury repeatedly told that "God made it clear" death should be imposed, but the religious arguments steered the jury away from "the specific factors it is to consider in reaching a verdict." (See *Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) The deliberations were focused on an extraneous and irrelevant religious matters. The arguments pushed the jury into a role that was fundamentally incompatible with the

Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305 [plurality opinion].) These arguments, left uncorrected as they were here, affected the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment. (*Caldwell v. Mississippi, supra,* 472 U.S. 320.)

In *Carruthers v. State, supra, 272* Ga. 306, 528 S.E.2d 217, the Supreme Court of Georgia found the prosecutor had committed prejudicial misconduct where he made the following brief biblical argument:

> the Bible suggests to us why deterrence is appropriate. Romans tells us that every person is subject to the governing authority, every person is subject. And in Matthew it tells us, who sheddeth man's blood by man shall his blood be shed for in the image of God made [he] man. For all they who take the sword shall die by the sword, and this is a message that is very clear, that society must deter criminals.

The Georgia Supreme Court found that the prosecutor had overstepped the line by "directly quoting religious authority as mandating a death sentence. In citing specific passages, he invoked a higher moral authority and diverted the jury from the discretion provided to them under state law." (*Id.* at p. 222.) The Georgia Supreme Court held:

> One passage cited explicitly states that whoever sheds another person's blood shall have his own blood shed by man; another states that those "who take the sword shall die by the sword." The prosecutor was equally emphatic on the conclusion to be drawn from these passages: "this is a message that is very clear, that society must deter criminals." Language of command and obligation from a source other than [state] law should not be presented to a jury. (*Ibid.* at p. 222.)

In Mr. Tully's case, the prosecutor argued not only the same passages that were

prohibited in *Carruthers*, but also quoted many others and displayed them to the jury on a large chart during his protracted penalty arguments. Like the prosecutor in *Carruthers*, the prosecutor here was "equally emphatic" and drew an even more prejudicial conclusion from these passages: "God made it clear, murderers must die." (RT 3797.) As in *Carruthers*, the prosecutor clearly intended to appeal to religious authority and did so repeatedly. He returned to the religious theme again and again, especially in his closing penalty argument. He came prepared with a chart listing choice quotations to highlight those arguments. Perhaps most telling, he admitted that his argument was designed to evoke a response of passion in the jury, rather than reasoned application of the law to the facts. He argued: "*And when we talk about passion, isn't that what we're talking about with the death penalty? Isn't that what it's about?* (RT 3728-3729, emphasis added.)

Due to the serious constitutional violations raised by the argument in the present case, Mr. Tully urges this Court to follow *Carruthers* and reverse his death judgment without any further showing of harm. Practically speaking, no other harm need be shown because the arguments in this case contained far more religion than even the most conscientious jury could possibly disregard.

2. The Religious Arguments in this Case were Prejudicial

Even if this Court finds that *some* biblical argument is permissible, what occurred in this case is not permissible. The offending statements in *Chambers* and *Carruthers* pale in comparison to the repeated Bible quotations and inflammatory pleas for vengeance made by the prosecutor here. Mr. Tully's jury was urged to rely on religious

authority, rather than on the evidence and the legal instructions in determining the proper sentence. The trial court never instructed the jury not to consider that authority.

Mr. Tully was prejudiced by the pervasive reference to religious law. In determining whether improper penalty phase arguments require reversal, this Court assesses whether there is a "*possibility* that the jury would have reached a more favorable verdict had the misconduct not occurred." These include the length and intensity of the improper argument, (*see, e.g. People v. Wrest*, *supra,* 3 Cal.4th at p. 1107 (no prejudice from "brief reference" that was "totally undeveloped in the course of the argument")); whether the remainder of the prosecutor's argument was proper and specifically focused on the factors in aggravation and mitigation;" *ibid.*,[111] or whether it was part of a pattern of "serious, blatant and continuous misconduct. (*People v. Hill, supra,* 17 Cal.4th at p. 844.)

Here, the religious references were extensive, rather than brief or undeveloped. Unlike other cases where this Court has found religious argument harmless, the prosecutor here returned to religious themes over and over. (See e.g., *People v. Wash, supra,* 6 Cal.4th at p. 261 [misconduct harmless where "the prosecutor embarked upon a lengthy and detailed argument devoted exclusively to the evidence in aggravation and did

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[111] Justices Moreno and Kennard have rejected this as a basis for finding prosecutorial misconduct harmless because it "makes little sense" that the prosecutors can "freely refer to biblical authority . . . provided only that the prosecutors also present an argument focusing on statutory aggravating and mitigating factors." (*People v. Slaughter, supra,* 27 Cal.4th at p. 1211 (conc. & dis. opn. of Kennard, J. & Moreno, J.); *see also People v. Vieira*, 35 Cal.4th at p. 306 (conc. & dis. opn. of Kennard, J.).)

not return to the subject of God or religion.".) Significantly, the prosecutor's invocation of religious authority was not an isolated incident of misconduct. His penalty phase argument was built on extremely inflammatory matters falling outside the record. He did not properly focus the jury on the law and the evidence, nor did he focus the jury on proper factors in aggravation and mitigation. Taken in context, the religious arguments were part of a pattern of egregious misconduct that certainly had a strong negative impact on the jury's verdict.

In *Sandoval*, the Ninth Circuit held:

> The prosecutor's language in this case was eloquent, powerful, and unmistakably Biblical in style . . . .This was strong medicine. The lay juror would readily understand the words as referring to Scripture. The message was clear: those who have opposed the ordinance of God should fear the sword-bearing state, whose task, as an avenging minister of God, is to bring wrath upon those who practice evil. *Sandoval v. Calderon, supra*, 241. F.3d at p.778.)

Unlike the prosecutor in *Sandoval*, the prosecutor here not only argued in "Biblical style," he directly quoted "chapter and verse." All jurors, regardless of their religious acumen, would have known he was referring to Scripture.

Further, the Ninth Circuit properly found that lengthy deliberations established the existence of prejudice. (*Id.* at p. 779.) Here, the penalty jury would not have deliberated for more than two days if it were not a close case. "Appeals to divine authority in jury arguments in capital cases are prejudicial when jurors for whom the aggravating and mitigating factors appear closely balanced use religious considerations to resolve their doubts, as the prosecutor's improper argument invites them to do." (*People v. Slaughter*,

supra, 27 Cal.4th at p. 1228 (conc. & dis. opn. of Kennard, J. & Moreno, J.).)

The length of the jury's deliberations here shows that the evidence of aggravation was far from overwhelming. It consisted only of two post-arrest, uncharged misdemeanor scuffles in the jail, and the circumstances of the crime, which the prosecutor attempted to establish by victim impact testimony and his repeated, hyperbolic, speculative rendition of the victim's state of mind during the crime and Mr. Tully's purported actions. Mr. Tully had no prior convictions. He had no unadjudicated violent felonies. Religion certainly influenced the jury's verdict, and tipped the scales toward the death penalty.

The religious arguments here were not harmless under any standard of prejudice. Together with the other improper matters argued by the prosecutor, this Court cannot find that the jury determined Mr. Tully's sentence by properly weighing the statutory aggravating factors against the evidence in mitigation. The death sentence must be reversed because of the pervasive influence of religious and other improper argument on the jury's penalty phase deliberations.

XVIII. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ARGUE FUTURE DANGEROUSNESS

The trial court improperly allowed the prosecutor to tell the jury, during his penalty phase argument, that Mr. Tully would pose a danger in the future if sentenced to life in prison. The trial court's ruling was erroneous because there was no evidence that supported a reasonable inference of future dangerousness. It is unconstitutional to allow the prosecutor to argue as fact something that was neither proved nor provable by the evidence. The trial court's ruling violated Mr. Tully's constitutional rights to due process and to a fair and reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution.

This Court has held that "is uncertain and conjectural . . . whether [a] defendant, if imprisoned for life, will at some uncertain future date assault some yet unidentified victim. The calculus of risk . . . does not justify executing a defendant to avoid improbable and speculative danger." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 770.) This Court determined that "forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty." (*Id.*) This Court recognized that "such forecasts, despite their unreliability and doubtful relevance, may be extremely prejudicial to the defendant." (*Id.* at 767.)

Here, the trial court allowed the prosecutor to make his own prediction of Mr. Tully's alleged future dangerousness. During his argument concerning the aggravating evidence the prosecutor argued:

> What does [the fact that Mr. Tully was in a fight with an inmate in jail] tell you about this defendant and his future violence or his violence in the future? Now what is it that we do to – what happens when he gets a life prison sentence? (RT 3696.)

Over defense objection, The prosecutor then answered his own hypothetical question, essentially testifying as his own expert :

> He is put on the main line, with all the other prisoner, main line with all the other prisoners. *You have to keep him on death row where he is isolated because he gets on the main line with all the other prisoners*, with his life sentence, he has an American Express Platinum card to do violence at will. *Because what can they do to him? They can't give him another day, he's got life. And some other prisoner, some other guard, some hospital or some jail prison nurse or social worker does something that he doesn't like, and he acts out violently, hits, maims, hurts, he can do it at will. They can't do anything to him.* They can't give him another day because he's serving life for the rest of his life, they can't give him anymore. (RT 3696, emphasis added.)

The prosecutor's "argument" was no more than thinly disguised "expert" opinion testimony. He "predicted" that Mr. Tully would "act out violently" and hurt or maim prison workers if he was placed on the mainline, rather than on death row. The prosecutor's argument violated the principles set forth in *Murtishaw* because just as the expert testimony rejected by this Court in *Murtishaw,* the prosecutor's opinion here was "uncertain and conjectural." His forecast of Mr. Tully's future violence created an unacceptable risk that the jury voted to execute Mr. Tully "to avoid improbable and speculative danger." *Id.* Accordingly, the prosecutor should not have been permitted to argue this point.

While this Court held in *Murtishaw* that *expert testimony* on the subject of future dangerousness is not admissible because of the unreliability of such predictions, years

later, this Court stated in *dictum* that a prosecutor may *argue* future dangerousness during a penalty phase argument. (*People v. Davenport*, *supra,* 41 Cal.3d at pp. 288-289.) This Court attempted to distinguish the admission of evidence from argument, concluding that its holding in *Murtishaw* was based on the "potential for prejudice" that arises from the testimony of "an established and credentialed expert." (*Id.* at p. 288.) It found that the relevance of any expert testimony on this issue was outweighed by its prejudicial impact, whereas mere argument by the prosecutor was less prejudicial and therefore permissible. (See also, *People v. Bell* (1989), 49 Cal.3d 502, 549 ["Because the comments of the prosecutor, who can claim neither to be a neutral party nor an expert in predicting human behavior do not have the same potential for prejudice, *Murtishaw* is not controlling."].)

This Court's conclusion that it is less prejudicial for the prosecutor to present himself as an expert and argue his or her own opinions about future dangerousness, than it would be to present expert testimony on the same topic is not supported by any evidence and cannot stand. Indeed, this Court has found that prosecutorial argument on facts outside the evidence can be "dynamite."

> Such statements tend [] to make the prosecutor his own witness--offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.] "Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (*People v. Hill, supra,* 17 Cal. 4th at p. 828, quoting 5 Witkin & Epstein, *supra*, Trial, § 2901, p. 3550.)

In apparent recognition of the requirement that argument must be based on the

evidence, this Court has held that "argument directed to a defendant's future dangerousness, when based on evidence of the defendant's past conduct rather than expert opinion, is proper and does not invite speculation as to the defendant's possible release." (*People v. Hayes* (1990) 52 Cal.3d 577, 635-636.) This limitation on argument regarding future dangerousness, however, does not eliminate the prejudice that stems from allowing the prosecutor to predict a defendant's future behavior, even if there is evidence of past conduct. An expert predicting future dangerousness would undoubtedly base his or her opinion on the same evidence as the prosecutor, and unlike the prosecutor, would at least be subject to cross-examination. The prosecutor is in no better position to predict future behavior than a trained expert.

In this case, the evidence did not support any inference that Mr. Tully would pose a danger in the future. During a hearing concerning the prosecutor's use of charts during his penalty phase closing argument, the trial court improperly held that the prosecution could make "appropriate arguments on the subject matter of future dangerousness based on the evidence that was presented here." (RT 3674-3676.)[112] However, the only evidence remotely bearing on this topic was that Mr. Tully was involved in two minor

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[112] During this hearing, the defense challenged, *inter alia*, numerous captions on one chart entitled: "What You Haven't Heard About Richard Tully." The defense objected to the captions: "That He Is Not Violent in a Prison Setting" and "That this Violence Is Out of Character for Him" on the grounds that they required the defense to prove the absence of aggravating factors, and that they improperly suggested that there was other evidence of violence that had not been presented to the jury. (RT 3671-3672.) The court agreed and ruled that these captions could not be displayed again to the jury.

jailhouse scuffles with other inmates during the five years while he was awaiting trial. Relying solely on this evidence, the prosecutor predicted that the scuffles proved Mr. Tully's dangerousness. The jailhouse evidence lacked probative value as to Mr. Tully's future dangerousness. It did not support an inference that Mr. Tully would pose a threat of future danger if sentenced to life without parole instead of death because of the dissimilarity between conditions and security in the county jail and the maximum security prison in which an inmate serving life without parole will be housed.

Further, Mr. Tully was never criminally charged with these misdemeanors. The incidents were so minor that the prosecutor requested the jury be instructed that to establish a battery, "the slightest touching," is sufficient, even if only "the person's clothing" is touched. (CT 2050.) In his argument, the prosecutor told the jury it was sufficient if Mr. Tully only hurt someone's feelings by the unwanted touch. (RT 3650.) The prosecutor even displayed a chart to the jury defining the elements of battery. The chart proclaimed that a battery was any use of unlawful force: "Even Though it Causes No Pain or Bodily Harm," "Even Though it Leaves No Mark" and "Even Though Only the Feelings of Person Are Injured.." (Court Exhibit 5.) These trivial "batteries" were plainly insufficient to warrant any argument on future dangerousness.

Nonetheless, as he did with every aspect of his penalty arguments, the prosecutor inflated these incidents into "proof" that Mr. Tully would have to be executed to keep him from committing further acts of violence in prison. This argument was not based on any evidence presented at the trial. The only evidence presented concerned Mr. Tully's

behavior in the county jail. He had never been in prison and thus no proper inference could be drawn from the evidence that he would commit *further* acts of violence when incarcerated in a maximum security facility. There was no evidence about prison security on which this argument could be based.

Even worse, the prosecutor argued that, if sentenced to life, Mr. Tully could commit further acts "at will" because "[t]hey can't do anything to him. They can't give him another day because he's serving life for the rest of his life, they can't give him anymore. (RT 3696.) This argument was false because prisoners are routinely punished for misbehavior, whether by loss of privileges, confinement in the their cells, and/or transfer to a Security Housing Unit. He was not only inviting the jurors to speculate, he was taking advantage of the lack of evidence about prison security by expressly misleading the jurors about it.

Dramatically increasing the impact of his argument, the prosecutor used these uncharged jail scuffles to suggest Mr. Tully would "hit, maim, hurt "some *other* prisoner, some *other* guard, some hospital or some jail prison nurse or social worker." There was no evidence Mr. Tully had ever done injured a prisoner in a state prison, a prison guard, a prison nurse or social worker, yet the prosecutor's use of the word "other" implied Mr. Tully had done these very things before. The prosecutor's argument, in the absence of any evidence, suggested the prosecutor knew information about Mr. Tully's background that was not presented to the jury. This was particularly damaging here, where the prosecutor knew Mr. Tully had never committed any of these acts.

The trial court's ruling and the prosecutor's argument violated Mr. Tully's rights to due process and a fair trial, and his Eighth Amendment rights. Because federal constitutional error occurred, pursuant to *Chapman v. California, supra*, 386 U.S. 18, 23, the State must prove the error was not harmless beyond a reasonable doubt. It cannot do so here. But even applying the standard of prejudice for penalty phase errors under state law errors set forth in *People v. Brown, supra*, 46 Cal.3d at p. 448, there is a reasonable possibility that the jury would not have sentenced defendant to death if the trial court had prohibited the prosecutor from arguing future dangerousness.

As presented, the argument was extremely prejudicial. The prejudicial impact cannot be dismissed by contending the prosecutor's statements were "only argument." Argument that is unsupported by the evidence can be "dynamite." (*People v. Hill, supra,* 17 Cal. 4th at p. 828). Here, it was the prosecutor's argument, and not the evidence, that convinced the jury to vote for death. The only statutory aggravators were these two minor jail incidents, admitted under factor (b), as evidence of "violent criminal activity," and factor (a), the "circumstances of the crime." Mr. Tully had no prior felony convictions and no history of criminal violence. Despite these facts, the prosecutor was essentially allowed to testify, without cross-examination, that Mr. Tully's record of two jail scuffles proved he would be a danger if allowed to live.

The trial court committed error in allowing argument regarding future dangerousness, and the error violated Mr. Tully's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution.

His death sentence must be reversed.

XIX. THE TRIAL COURT COMMITTED ERROR BY ALLOWING THE PROSECUTOR TO DISPLAY INFLAMMATORY CHARTS TO THE JURY

A. Factual Background

Without notifying the defense or obtaining court approval, the prosecutor displayed six large charts to the jury during his first argument in the penalty phase. The six charts were: Chart 1. "Factors for Consideration;" Chart 2. "Battery;" Chart 3. "Aggravating Factor, Increases Guilt/Enormity/Injurious Consequences;" Chart 4. "What Didn't You Hear About Richard Christopher Tully;"Chart 5. "What Have You Heard about Richard Christopher Tully;" and Chart 6. "The Bible Sanctions Capital Punishment." (Court Exhibit 5.)[113]

The defense objected and the parties discussed the charts off the record. The unrecorded conference was later noted on the record. (RT 3670.) The defense initially objected to the prosecutor having shown the charts to the jury without first showing them to the defense. (RT 3667-3669.) The defense then objected to several captions on Chart 4:"What Didn't You Hear About Richard Christopher Tully."[114] The defense argued that

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[113] The prosecutor's charts were not numbered at trial. They have been assigned numbers for reference purposes.

[114] The defense objected to the following captions on Chart 4:

He Is Not Violent in a Prison Setting
That this Violence Is out of Character for Him
That He Is Remorseful, Sorry for What He Did
That the Family Bred Environment Bred Murderers/Rapists
That He Is a Loving, Gentle Supportive, Caring Father-husband-Brother-Human Being

(continued...)

the jury would regard the absence of any listed mitigating factor as additional factors in aggravation. Defense counsel argued "you expect to hear this, you didn't, therefore he is a bad man." (RT 3763.) The defense explained that this conclusion was improper, and argued that the charts were irrelevant and immaterial for any permissible prosecutorial argument. Finally the defense argued that the charts misstated the evidence with regard to whether Mr. Tully was "a good provider." (RT 3672).

The trial court ruled on the objection, correctly prohibiting the prosecutor from further showing certain portions of the chart to the jury because of the danger of going beyond any evidence regarding future dangerousness, the possibility the jury could conclude that the absence of these factors were aggravating factors, and the danger of misleading the jury regarding to Mr. Tully's decision not to testify. Four captions were prohibited: "He Is Not Violent in a Prison Setting;" "That this Violence Is out of Character for Him;" "That He Is Remorseful, Sorry for What He Did;" and "That He Found God and Repented." (RT 3674-3676.) The ruling excluding further use of the charts came too late, however. The prohibited text had already been displayed to the jury and the damage was already done.

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[114](...continued)
That He Was a Good Provider
That He Has Done One Decent Thing in His Life
That He Found God and Repented
That He Was Physically Abused as a Child
That He Was Sexually Abused as a Child
That He Was Addicted to And/or Abused Drugs-alcohol
That He Some Head Injury or Low IQ or Learning Disability
That He Has Some Mental Disease, Defect or Disorder Can't Help Himself

Moreover, the trial court wrongly held that the other captions were not improper *per se*, provided they weren't used to argue non-statutory aggravating factors. The court held: "[I]t can be appropriate to argue the absence of mitigating factors and to comment on the mitigating evidence that has been presented, providing that there be no reference made to the idea that lack of evidence proving statutory mitigating factors does not provide additional aggravating factors." (RT 3676.) Following this ruling, during argument, the charts were displayed to the jury by the prosecutor. He argued each item on the charts in detail. (RT 3682-3697.)

B. The Prosecutor's Use of the Chart and his Related Arguments Violated Mr. Tully's Constitutional Rights

The prosecutor's chart and arguments improperly directed the jury to convert the absence of possible mitigating factors into aggravating factors. (*People v. Davenport, supra*, 41 Cal.3d at pp. 288-290.) Because the absence of mitigators is not a statutory factor in aggravation, any argument relating to the absence of mitigation is irrelevant. (*People v. Boyd, supra*, 38 Cal.3d at p. 773-74 [aggravating evidence at penalty phase is limited to evidence relevant to the specific aggravating factors under section 190.3.]) A "prosecutor is not permitted to argue that the absence of [a] mitigating factor[] is itself an aggravating factor justifying the death penalty." (*People v. Cox* (1991) 53 Cal.3d 618, 685, citations and quotations omitted.) Argument invoking considerations outside the proper weighing of statutory factors violates principles of due process and the reliability concerns of the Eighth Amendment. (*See Gardner v. Florida, supra*, 430 U.S. at 349;

People v. Miranda (1987) 44 Cal.3d 57, 110.)

The use of Chart 4 and the prosecutor's related argument was interpreted by the jury as arguing that the absence of each listed mitigating factor was a factor in aggravation. This means that at least nine potential mitigating factors were converted into aggravating factors. Once again the prosecutor used the "highly-effective" rhetorical device of paraleipsis to drive home the point he could not argue directly. (*See People v. Wrest, supra,* 3 Cal.4th at p. 1107.) He created a select list of possible mitigating factors that the jury did not hear about, and then told the jury to consider the absence of those factors in weighing the aggravating factors against the mitigating factors. (RT 3682-3697.) This is entirely different from simply arguing that no evidence in mitigation had been presented.

This Court has held that "it is for the jury to determine which of the listed sentencing factors are applicable or 'relevant' to the particular case. (§ 190.3, par. 6.)." (*People v. Miranda* (1987) 44 Cal.3d 57, 104-105.) The instructions inform the jury that they are to consider, for example, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, but *only if applicable*. (Section190.3(d); CT 2042.) If there is no evidence before them on this factor, it is not applicable and cannot be considered at all. The same is true of sentencing factors (e) through (k).

As a result, the defense is not required to respond to these factors unless the prosecution has presented evidence to prove or disprove them. Where the record is

devoid of evidence, the jury is simply not allowed to count that factor at all. Accordingly, the prosecutor may not permissibly argue that the absence of evidence of any mitigating factor listed in factors (d) - (k) may be given weight by the jury in its sentencing determination.

If there is no evidence of these potentially mitigating factors, they are inapplicable. Argument focusing on the absence of such evidence is not permissible because it has no relevance to any "applicable" sentencing factor. Just because mitigating evidence might be presented under factor (k), for example, instead of one of the other statutory factors, the evidence still may only be considered by the jury if it is "applicable." If there is no factor (k) evidence presented, or no evidence as to a specific type of factor (k) mitigation, i.e. head injury or low I.Q., factor (k) is simply inapplicable and may not be considered at all by the jury.

While a prosecutor may fairly argue *why* the mitigating evidence *that was* presented was not truly mitigating, he may not argue that the absence of other mitigating evidence has any relevance. Here, the prosecutor listed on his chart and argued that the jury should consider and weigh that Mr. Tully had not shown the existence of certain possible factors that the prosecutor believed might have been might mitigating. His selection of non-proven factors was arbitrary. He may well have listed that Mr. Tully was not raised in abject poverty on a dirt farm in the South, or in the inner-city amidst rat infested projects, or that he was not brutally gang-raped in prison, or that he was not sexually molested by his father, or not exposed to pesticides picking fruit in the Central

Valley of California as a child, or that he did not have a hard-scrabble, fatherless upbringing in a poor back-water town in the south. All of these things, and many more, might be mitigating in another case, but their absence here was irrelevant to the jury's weighing of the mitigating and aggravating factors in this case.

In arguing each item on Chart 4, the prosecutor told the jury: "Those are the types of things that you think of when you hear about the horrible things that murderers who are charged with the death penalty, that you get into this type of situation, and you say yeah, I can understand that, that explains how he got here." (RT 3683.) This argument was based on speculation about evidence the prosecutor may have heard in mitigation in some other capital case, or that the jurors may have heard of in the news. The prosecutor used the jurors' likely knowledge of television, newspaper and magazine reporting of capital cases, by inviting the jurors to compare Mr. Tully's life history with that of other, hypothetical capital defendants and to show him less mercy than those other defendants who had been more horrendously abused or more disabled or who had been better people.

This argument shows the prosecutor's emphasis was on the absence of specific types of mitigation, particularly the types of mitigation commonly portrayed in the media, rather than on the evidence that was presented in this case. The chart and argument impermissibly showed that Mr. Tully was worse than some fictional defendant who had established the listed mitigating factors. The absence of these factors in Mr. Tully's case was an independent justification for the essentially normative decision of imposing a death sentence. The essence of the argument was that the listed items are mitigating, but

you did not hear anything about these items, therefore you must consider their absence as a reason to impose death in this case. Importantly, the defense could not have countered this illogical syllogism, because it is impossible to prove the absence of absence in terms of undisputed facts.

C. Conclusion

Mr. Tully's rights to due process, and a fair and reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, of the California Constitution were violated by the use of these charts and related argument. In light of the emphasis placed on Chart 4 by the prosecution, and his related arguments, the error was prejudicial under *Chapman v. California, supra*, 386 U.S. 18, 23.

The impact of the "What you Didn't Hear" chart and argument must be viewed in the context of the argument as a whole. Here, the prosecutor's argument improperly instructed the jury to speculate that the crime was aggravated beyond any inferences reasonably suggested by the evidence. He urged the jury to consider improper factors, such as unproven conditions in prison and the possibility that Mr. Tully would be a continuing threat to public safety if death were not imposed. He emphatically argued that the Bible demanded capital punishment for Mr. Tully. Adding to these improper aggravating factors, the prosecutor told the jury to include the absence of his potentially infinite list of hypothetical mitigators. Then he instructed the jury to weigh all of these inappropriate factors against the mitigation that was presented. Under these

circumstances, the "absence of mitigation" chart and argument cannot be deemed harmless. Mr. Tully's death sentence must be reversed.

XX. THE TRIAL COURT FAILED TO ANSWER THE JURY'S REQUEST FOR "THE LEGAL DEFINITION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE"

When a capital defendant's future dangerousness is placed in issue, and the only sentencing alternative to death is life imprisonment without possibility of parole, the Constitution requires that the jury specifically be informed that parole is not available. *Simmons v. South Carolina* (1994) 512 U.S. 154; see also *Silva v. Woodford* (9th Cir. 2000) 279 F.3d 825, 850, fn. 20.) This requirement is essential to ensure that the jury did not base its sentence in part on "the grievous misperception" that they had a "false choice between sentencing [Mr. Tully] to death and sentencing him to a limited period of incarceration." (*Simmons, supra*, 512 U.S. at p. 161.)

This misperception creates the impermissible inference that the only way to prevent the defendant's release is to sentence him to death. (See *Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047, 1050.) Accordingly, the Supreme Court has held that a trial judge commits reversible error if he fails to instruct the jury on the meaning of life without parole when the prosecution argues future dangerousness, even where no evidence on future dangerousness is presented. (*Kelly v. South Carolina (*2002) 534 U.S. 246; *Shafer v. South Carolina* (2001) 532 U.S. 36, 39.)

In this case, the prosecutor improperly placed the issue of future dangerousness before the jury during argument. He told the jury that only a death sentence would prevent Mr. Tully from committing further acts of violence. Following this argument, during penalty phase deliberations, the jurors sent a question to the judge, requesting the

"legal definition of life in prison without possibility of parole." (CT 2172.2E.) Rather than directly answering the jury's question, the trial court improperly responded:

> For the purpose of determining the appropriate sentence for this defendant you should assume that either the death penalty or confinement in state prison for life without possibility of parole would be carried out. You are not to consider or speculate as to any other possibility or any circumstance that might preclude either of the two penalties from being carried out. (RT 3891.)

The trial court failed to tell the jury whether there is a "legal definition" of life without the possibility of parole. The trial court failed to tell the jury to interpret the phrase based on the standard meaning of the words. The trial court failed to tell the jury that life without the possibility of parole meant that Mr. Tully will not be eligible for parole if so sentenced. The trial court's failure to correctly answer the jury's question violated Mr. Tully's constitutional rights.

This case falls squarely within the holding of *Simmons* and its progeny. As in South Carolina, the jury in a California death penalty case has only two sentencing options, a death sentence or life without the possibility of parole. The prosecutor argued future dangerousness during his penalty phase case. Not only did he present evidence of acts of purported "violence" committed by Mr. Tully while in jail,[115] but he expressly argued: "what does that tell you about this defendant and his future violence, or his violence in the future? Now, what is it that we do to – what happens when he gets a life prison sentence?" (RT 3696.)

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[115] The trial court had improperly ruled that the evidence was sufficient to permit an argument regarding future dangerousness. (RT 3675.) (See Argument XVIII; *infra.*)

The prosecutor improperly told the jury to consider what Mr. Tully's life in prison would be like. He argued using speculation, not facts: "The thing of it is that with the passage of time you work your way out of those environments." (RT 3811.) He told the jurors that Mr. Tully would always have hope and suggested "[t]here might be an earthquake and the jail falls apart and the prison falls apart. It's not likely to happen, but it's a hope."(RT 3815.)

The prosecutor led the jury to believe that some day Mr. Tully might be out of prison if sentenced to life instead of death,[116] or that he could commit further acts of violence if he was allowed to serve his sentence in prison. Evidence of future dangerousness is evidence with a tendency to prove dangerousness in the future. (*Kelly v. South Carolina, supra*, 534 U.S. at p. 253) In *Kelly*, the Supreme Court found: "A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, *whether locked up or free*, and whether free as a fugitive or as a parolee." (*Id.* at p. 253-254) This point was recognized in *Simmons* where the Supreme Court noted that evidence of violent behavior in prison can raise a strong implication of "generalized . . . future dangerousness." (*Simmons,* 512 U.S. *supra,* at 171)

Here, the prosecutor directly put Mr. Tully's future dangerousness at issue. (*Cf. Shafer v. South Carolina*, *supra,* 532 U.S at p. 55 [remanding for consideration of

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[116] He asked the jury to consider what would happen if Mr. Tully was sentenced to "life," which was not an option, rather than what would happen if he was sentenced to "life without the possibility of parole."

whether future dangerousness was actually at issue where prosecutor *did not* refer to future dangerousness in his argument].) Mr. Tully's alleged potential for future dangerousness was dramatically reinforced by the prosecutor's opening penalty argument where he vividly and repeatedly described Mr. Tully's criminal behavior as acts of "cruelty, viciousness, [and] vileness. . . ." (See e.g. RT 3632; *Kelly v. South Carolina, supra*, 122 S.Ct. at p. 731 [noting that the prosecutor's arguments about the circumstances of the crime raised questions of future dangerousness.])

In *Simmons*, the jury was instructed that the sentencing options were death, or "life imprisonment," where life imprisonment meant life without parole under South Carolina law. The standard California instruction, given in this case, CALJIC 8.84, states that the two sentencing options are death or "confinement in the state prison for life without possibility of parole." (CT 2059.) Relying on this distinction, this Court has held that, unlike in South Carolina, the standard penalty instructions as given are sufficient to properly inform the jury of the sentencing options and do not require any *sua sponte* elaboration by the trial court. (See e.g., *People v. Holt* (1997) 15 Cal.4th 619 at 689; *People v. Ochoa* (1998, 19 Cal.4th 353, 457; *People v. Padilla* (1995) 11 Cal.4th 891, 971.)

This distinction does not control the issue raised here. The jury's question in this case demonstrates that, contrary to this Court's conclusions about the clarity of its standard instruction on sentencing options, California jurors *are* confused as to the "plain

meaning" of the term "life without the possibility of parole."[117] Here, the jurors were not sure what life without parole meant-- that is why they asked for a "legal definition." California law and South Carolina law are indistinguishable where, as here, the jurors believed that, under the law, "life without the possibility of parole" had a different meaning from the plain meaning of the words. The trial court had an obligation to define the term properly given the jury's direct question.

Mr. Tully does not suggest that the trial court had to tell the jurors that he would *never* be released from prison, or even that he would *never* be paroled. Instead, the direct, proper, and constitutionally required answer to the question was: "Life without the possibility of parole means that the defendant will not be eligible for parole," or "'Life without the possibility of parole' has no special meaning and therefore you should interpret the terms based on the standard meaning of the words."

This Court has held that in responding to a jury question expressing confusion over *the consequences* of a verdict of life without parole, the trial court may properly instruct the jurors "to assume that whatever penalty it selects will be carried out. (*People v. Smithey* (1999) 20 Cal.4th 936, 1009, citing *People v. Kipp* (1998) 18 Cal.4th 349 at pp. 378-379.) While that is the answer the court gave in this case, it was not a proper

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[117] Mr. Tully urges this Court to reconsider its conclusion that the standard instructions sufficiently explain the sentencing options to the jury. The record here demonstrates that jurors do not understand the term "life without the possibility of parole." (See Eisenberg & Garvey (2001) *The Deadly Paradox of Capital Jurors*, 74 So. Cal. L.Rev. 371, 373 [when life without parole is the alternative to the death penalty, jurors do not believe it really means the defendant will never be released on parole].)

response to the jurors' question. The jurors expressed no confusion over "the consequences" of their verdict. In *Smithey,* jurors asked: "What we were concerned with, that in the event that we found the defendant death [*sic*], that if it went to the higher court, if the death penalty was overthrown, would it be life in prison, or would it be just life with possibility of parole?". Here, in contrast, the jurors asked only for the legal definition of the term "life without the possibility of parole," not whether that sentence would be carried out.

In this case, the jury did not know what life without the possibility of parole meant. Their confusion was heightened by the prosecutor's reference to a "life sentence" rather than "life without parole." Despite instructions and other argument referring to "life without the possibility of parole" the jury still did not know the meaning of the term and thus asked for the "legal definition of life without the possibility of parole." Instead of answering the jury's direct question, the court responded by telling the jury only that they were *to assume* either a life or death sentence would be carried out, and they were not to speculate about it. This response did not answer the question asked by the jurors. The court simply told them to assume something that they did not understand.

The court's answer only led to greater confusion because it caused the jury to question whether the sentence would in fact be carried out. As this Court has noted, although it is not improper to instruct the jury to assume that whatever penalty it selects will be carried out, "an instruction phrased in this qualified language may unnecessarily raise questions in the jurors' minds." (*People v. Kipp, supra,* 18 Cal.4th at pp. 378-379.)

Here, where the jurors did not inquire about commutation, or whether the sentence would be "carried out," the judge's response only raised further questions for the jury, and the jury wanted an answer, not more questions.

The judge's answer left the jury wondering why the judge refused to answer its direct question as to a legal definition of a term in its instructions or why the judge would tell them to "assume" their sentence will be carried out and not to speculate, if he did not think there was a reason to do otherwise They concluded that life without parole does not mean what it says, otherwise the court would have told them that it did. The court's answer resulted in the same "grievous misperception" of a false sentencing choice prohibited in *Simmons,* and led the jurors to vote for death on the false belief that death was the only way to guarantee that Mr. Tully would not get out of prison and commit more crimes.

Even beyond the requirements of *Simmons,* the Supreme Court has explained that "when a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States* (1946) 326 U.S.607, 612-13.) *Bollenbach* places on the trial court a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem. (*McDowell v. Calderon* (9th Cir, 1987) (en banc) 130 F.3d 833, 839, cert. denied, (1998) 530 U.S. 1103.) This duty exists, among other reasons, because "'in a trial by jury . . . , the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.'" (*Bollenbach, supra*, 326 U.S. at p. 612, quoting, *Quercia v. United*

States (1933) 289 U.S. 466, 469.)

When constitutional requirements are implicated, the proper execution of the trial court's duty is a matter of insuring due process of law as guaranteed by the Fourteenth Amendment. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) The Constitution requires that the jury be properly instructed on and informed of the meaning of life without parole. The trial court's failure to do so violated Mr. Tully's right to due process, to a fundamentally fair penalty proceeding, and to a reliable sentencing determination, under the Eighth and Fourteenth Amendments of the Constitution and the parallel provisions of the California Constitution.

Because the principles of *Simmons* were violated in this case, reversal of the death sentence is required without any showing of prejudice. But even assuming prejudice must be shown, the constitutional error cannot be deemed harmless. The jury directly expressed its inability to understand a crucial term in the sentencing instructions, perhaps the most crucial term. Whether a life sentence would result in parole was obviously a pivotal issue for the jury. If any juror erroneously believed that Mr. Tully would some day be eligible for parole under a sentence of "life without the possibility of parole," that factor alone would have dictated their vote for death. Several jurors indicated during voir dire that they did not believe life without the possibility of parole meant that there would be no possibility of parole. For example, Juror McCallister stated:

> I'm always fearful when they say life in prison without the possibility of parole that they mean there is a possibility of parole. And like I say, I'm sure that I'm showing my ignorance, but in some cases I feel that the death penalty is

necessary to make sure that that doesn't happen. (RT 806.)

(See also RT 1260; RT 1389.) This demonstrates the need for further explanation that life without parole means what it says.

Since there is a reasonable likelihood that the penalty phase instructions as a whole distracted the jury and prevented it from performing its proper duties, the capital sentence cannot stand. (*Boyde v. California* (1990) 494 U.S. 370, 380.) The response that the trial court gave the jurors did not answer their simple question. It also unnecessarily raised the question that a life sentence might not be carried out, which certainly distracted the jurors from their duty to make "the constitutionally mandated reasoned and informed choice between a sentence of life imprisonment without possibility of parole and a sentence of death." (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149; see *McLain v. Calderon* (9th Cir. 1998) 134 F.3d 1383, 1385-1386.)

The Ninth Circuit has observed:

> There is no one-size-fits-all response to jury disorientation, and the sizes that may fit other facts and circumstances do not fit this case. As the Supreme Court has said many times, "the penalty of death is qualitatively different from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett,* 438 U.S. at 604, 98 S.Ct. at 2964 (internal quotations and citations omitted)] . . . . The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing. (*McDowell v. Calderon*, *supra,* 130 F.3d 833, 840.)

The same must be said here in light of the trial court's inadequate response to its question. There is a significant likelihood that the jury applied the instructions in way that violates the Constitution. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72, quoting *Boyde v.*

California, *supra,* 494 U.S. at p. 380).

Here, the jury did not understand the sentencing options and were uncertain enough to make an inquiry of the court. Had the jury been told the correct sentencing information, it would have returned a verdict of life without the possibility of parole. Instead, it was misled by the court that life without the possibility of parole meant something different than its plain meaning. In light of its specific question of the court, and the fact that it clearly did consider imposing a sentence of life without the possibility of parole, the court's error was not harmless. Mr. Tully's death sentence must be reversed.

XXI. THE TRIAL COURT'S DENIAL OF MR. TULLY'S REQUEST FOR ALLOCUTION VIOLATED HIS CONSTITUTIONAL RIGHTS

Before the penalty phase arguments began, Mr. Tully requested an opportunity to personally address the jury prior to sentencing. Mr. Tully wanted to express his extreme remorse for the death of Ms. Olsson and the terrible shock to her family. (RT 3621.) The defense argued that a defendant has the right to address the sentencing judge in a non-capital case, and that Mr. Tully should have that same right before the sentencing jury in a capital case. If the court wouldn't permit Mr. Tully to appeal to the jury, the defense requested that the prosecutor be prohibited from arguing that Mr. Tully lacked remorse. (RT 3622.) The prosecutor objected to allocution. The trial court denied both defense requests, holding that it was "not aware of any authority which would be in support of the right of elocution [sic], as you've described it . . . and there being no such authority that I'm aware of, that request will be denied." (RT 3622-3623.) Keyed in, the prosecutor then argued to the jury that Mr. Tully's "lack of remorse" was a factor that supported imposition of the death penalty here. (See Argument XVI, *infra*.)

Principles of due process, the right to a fair trial, to a reliable penalty determination, and to equal protection under the Fifth, Eighth and Fourteenth Amendments, as well as state law, require that a capital defendant be allowed to address the jury before sentencing. Here, the trial court's rulings denied Mr. Tully his right of allocution under state law and the federal constitution. Moreover, the trial court in denying the request to allocute, did not exercise its discretion as required by state law.

This Court has held that federal principles of due process do not require that a capital defendant be permitted to allocute. *(People v. Clark* (1993) 5 Cal.4th 950, 1036-1037; *People v. Nicolaus* (1991) 54 Cal.3d 551; *People v. Keenan* (1988) 46 Cal.3d 478, 511; *People v.Robbins,* (1988) 45 Cal.3d 867). This Courts prior decisions are wrong. Both state law and federal law require the opportunity for the defendant to speak to the sentencing jury.

This Court has wrongly concluded that other procedural rights provided at the penalty phase, including the defendant's right to present evidence in mitigation and his right to testify, render allocution "unnecessary to a fair trial." (See *People v. Keenan*, 46 Cal.3d 478, 511.) However, the right to address the sentencing body directly is different from the right to testify, to present evidence or to have a plea for mercy made by an attorney. The Supreme Court has noted the far-reaching history of the right to allocute. Justice Frankfurter commented that although major changes had evolved in criminal procedure since the seventeenth century: "None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." (*Green v. United States* (1961) 365 U.S. 301, 304.) Justice Harlan later characterized the right as "elementary." (*United States v. Behrens* (1963) 375 U.S. 162, 167 (conc. opn.).)

First, as recognized by Justice Frankfurter, closing argument by counsel is no substitute for hearing from the defendant directly through allocution. A defendant's

responses to carefully poised questions by his counsel are no substitute for his own heartfelt plea in mitigation, made with "halting eloquence." (*Green v. United States*, *supra,* 365 U.S. at p. 304.) The capital defendant's right to make a statement to the jury is necessary to assure the jury has heard all mitigation before rendering its penalty decision. (See J. Sullivan, "*The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation*" (1987) 15 N.M.L. Rev. 41.)

Second, the trial court could limit the subject matter of the defendant's address to the jury to matters that do not require any cross-examination, such as an expression of remorse. This Court's concern that allocution is a means of "cloaking" the right to testify with immunity from cross-examination, *see, People v. Keenan*, *supra,* 46 Cal.3d at p. 511, is easily addressed where an offer of proof is made by the defendant. Here, there was an offer of proof made by Mr. Tully.[118]

The denial of allocution to capital defendants violates principles of equal protection as well.[119] One California court has given full consideration to the issue of

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[118] In *People v.Robbins,* (1988) 45 Cal.3d 867, this Court acknowledged that the Maryland Supreme Court found that, under the common law of the state, a capital defendant had the right to speak to the sentencing jury without cross-examination. (*Id.* at p. 890, citing *Harris v. State* (1986) 306 Md. 344,509 A.2d 120.) In distinguishing *Harris*, this Court found it significant that the defendant in *Harris*, unlike Robbins, had made an offer of proof before requesting to address the jury. (*Id.)* Here, like the defendant in *Harris*, and unlike Robbins, Mr. Tully did make an offer of proof.

[119] This Court has never fully addressed whether denial of allocution to capital defendant violates equal protection. In *Clark,* this Court summarily rejected an equal protection argument because no authority had been presented to support the claim and this Court "perceive[d] no merit in it." *(People v. Clark, supra,* 5 Cal. 4th at 1037.) In a footnote in *Robbins*, this Court also summarily rejected, without explanation, the notion that the right of allocution for all criminal

(continued...)

whether California has a right of allocution and concluded there is such a right, at least with regard to non-capital defendants. (*In re Shannon B.* (1994) 22 Cal.App.4th 1235.) The Court of Appeal determined that section 1200 requires a trial court to let adult criminal defendants address the jury directly. Prior to sentencing, to ask whether the defendant has any cause why judgment should not be pronounced against him. The Court in *Shannon B.* interpreted this statute as creating a right to allocute prior to sentencing for non-capital defendants. Denial of that same right to capital defendants violates principles of equal protection.

The purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person against intentional and arbitrary discrimination, whether occasioned by express terms of a state statute or by its improper execution through state agents. (*Village of Willowbrook v. Olech, supra,* 528 U.S. 562 at p. 564.) To survive an equal protection challenge, the unequal treatment must, at a minimum, be "rationally related to a legitimate state interest." (See *New Orleans v. Dukes* (1976) 427 U.S. 297, 303.) There is no such state interest here.

The fact that a non-capital defendant does not generally have a right to testify regarding his sentence, while a capital defendant may testify at the penalty phase, does not justify denying allocution to a capital defendant. All defendants have the right to testify at their trials. A non-capital defendant has the same right to testify regarding

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[119](...continued)
defendants is established by section 1200. (*People v. Robbins, supra,* 45 Cal.3d at p. 890, fn. 10).

issues that bear on culpability and responsibility, including an expression of remorse, at his trial as does a capital defendant at the penalty phase.

Despite this right to testify, non-capital defendants in California have an additional right to address the sentencer prior to sentencing, while capital defendants do not. The state can have no rational interest in providing lesser rights to those defendants facing the death penalty than to those who face much less severe sentences. If there is a statutory right to speak to the sentencing judge before sentencing, without risk of cross-examination, principles of equal protection require that the right apply equally to a capital defendant's right to speak to the sentencing jury in the same manner.

Moreover, section 1200 invests the trial court with discretion to grant or deny a request to allocute. (*Robbins, supra,* 45 Cal.3d at p. 890, fn. 10; *People v. Sanchez* (1977) 72 Cal.App.3d 356, 359-360; *People v. Wiley* (1976) 57 Cal.App.3d 149, 166; *People v. Cross* (1963) 213 Cal.App.2d 678, 681-682.) There is nothing in the statute to indicate that this discretion does not apply to capital as well as non-capital cases. But here, the trial court failed to exercise its discretion in denying the request for allocution. The trial court did not believe it had any authority to grant Mr. Tully's request. (RT 3622.) This was plainly wrong, as section 1200 does give the court the authority to allow allocution. (*People v. Robbins*, *supra,* 45 Cal.3d at p.893, concurring opn. of Justice Mosk.) Because the trial court failed to exercise its discretion, its ruling cannot be upheld.

Here, the trial court's denial of Mr. Tully's request to allocute was prejudicial and

requires reversal. Mr. Tully wished to express remorse for the crime and for the impact on Ms. Olsson's family. Mr. Tully should have been allowed to address the jury on these matters. The prosecutor had presented evidence as well as argument on victim impact and was erroneously allowed to comment to the jury that Mr. Tully had not expressed remorse.

Because federal constitutional error occurred, pursuant to *Chapman v. California, supra*, 386 U.S. 18, 23, the State must prove the error was not harmless beyond a reasonable doubt. It cannot do so here. But even applying the standard of prejudice for penalty phase errors under state law errors set forth in *People v. Brown, supra*, 46 Cal.3d at p. 448, there is a reasonable possibility that the jury would not have sentenced defendant to death if the trial court had allowed Mr. Tully to allocute

In light of the limited subject matter about which he desired to speak, the prosecutor had no need for cross-examination. Indeed, the prosecutor's closing arguments were largely unsupported, unsworn "testimony" that the defense had no opportunity to subject to cross-examination. Mr. Tully should also have been allowed to express remorse to the jury without cross-examination.

Expressed remorse is an aspect of the defendant's "character or record" that the jury should be permitted to consider under the Eighth Amendment through factor (k). In this case, not only was the jury deprived of the evidence of remorse Mr. Tully could have shown them, they were misled by the prosecutor's argument into believing it didn't exist at all. Allocution is merely one of two ways in which to present this unique evidence

information to the jury.

For all these reasons, the trial court's denial of Mr. Tully's request for allocution violated state law, as well as his rights to due process, fundamental fairness, equal protection and a fair and reliable penalty determination under the Fifth, Sixth Eighth and Fourteenth Amendments and Article I of the California Constitution. This Court should reverse Mr. Tully's death sentence.

XXII. MR. TULLY WAS SENTENCED TO DEATH BASED ON THE NON-STATUTORY, IMPROPER AND MATERIALLY INACCURATE AGGRAVATING FACTOR OF THE ABSENCE OF REMORSE

A. Introduction

The trial court allowed the prosecutor to argue at the penalty phase that Mr. Tully had not shown remorse. Prosecutorial argument concerning the lack of remorse is not constitutional under California's current death penalty statute, and it was not proper on the facts of this case. Inclusion of these arguments render California's death penalty scheme unconstitutional.

First, the absence of remorse is a not statutory aggravating factor in California. Second, the current death penalty law does not permit argument as to the "absence of remorse." Third, the prosecutor's argument that remorse was a "condition precedent to mercy" precluded the jury from considering and giving any affect to the mitigating evidence presented in this case. Fourth, because Mr. Tully did not testify or admit the killing, the argument violated his right against self-incrimination. Fifth, because there was no evidence to support an argument of overt remorselessness, the prosecutor's argument was based on impermissible speculation. Sixth, the prosecutor's argument that Mr. Tully was not remorseful was materially inaccurate. Seventh, "absence of remorse" as interpreted by this Court lacks sufficient definition to be properly considered in the penalty determination. Finally, if such argument was proper, the jury should have been instructed how to properly assess and consider the absence of remorse in deciding the penalty.

For all these reasons, the trial court's failure to preclude the prosecutor's arguments on remorse violated Mr. Tully's rights under state law and the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution. Since Mr. Tully was sentenced to death based on an irrelevant sentencing factor, he was improperly deprived of this liberty interest without due process in violation of the Fourteenth Amendment. (*Ibid.*) His death sentence must be reversed.

B. The Prosecutor was Improperly Permitted to Argue that Lack of Remorse Was a Valid Sentencing Factor in this Case

The trial court denied Mr. Tully the opportunity to express his remorse through allocution. (RT 3622). The defense then moved to prevent the prosecutor from improperly arguing lack of remorse. The defense argued that there would be no evidence of remorse presented due to the denial of the request to allocute and that the prosecutor should not be able to falsely argue that Mr. Tully lacked remorse. (RT 3622-3623.) The prosecutor responded that there was "no evidence in this record" as to remorse and that he should not be "barred from arguing lack of remorse." (RT 3623.) The trial court held it would not "issue an order at this time barring anybody from arguing that subject." (*Ibid.*)

The prosecution then argued to the jury that Mr. Tully lacked remorse. During argument, the prosecutor displayed a chart captioned "What You Didn't Hear about Richard Christopher Tully." (RT 3667.) The chart included the following subcaptions: "That He Is Remorseful - Sorry - for What He Did" and "That He Has Found God and Repented." (Court Exhibit 5, Chart 4, see RT 3670.)

Defense counsel objected to these subcaptions. (RT 3667-3671). In addition to their earlier objection, defense counsel argued that argument on lack of remorse would be improper as it had no relation to what occurred at the crime scene, and that it would violate Mr. Tully's Fifth Amendment right by calling attention to the fact that he did not testify. (RT 3671.) Counsel also objected that the chart's captions discussed "items in mitigation," which urged that "the absence of these items are, therefore, aggravation." (RT 3673-3674.)

The trial court held that it would be "impermissible for the prosecutor to argue that the absence of a mitigating factor" provides "additional aggravating factors" (RT 3674), and directed the prosecutor not to "publish" to the jury the listings on the chart involving lack of remorse and lack of repentance. (RT 3675.) As to the specific "lack of remorse" caption, the trial court held that "as stated there, *it could be misleading* in terms of the appropriate argument and could inadvertently, as stated there, *make reference to a failure to testify* as distinguished from, for example, an appropriate argument on the subject of remorsefulness as it might relate to what occurred in reference to the crime itself or at the scene of the crime." (RT 3675; emphasis added.) The trial court made the same ruling on the lack of repentance caption. (RT 3676.) The trial court further stated that although the appropriateness of the prosecutor's argument would "be dependent on the context," it had "attempted to give some guidance" to the prosecutor in that it explained that it may be appropriate "to comment on the mitigating evidence," or even "the absence of mitigating factors" provided "there be no reference made to the idea that lack of evidence proving

statutory mitigating factors [*could*] provide additional aggravating factors." (RT 3676; emphasis added.)

During argument, the prosecutor went through a litany of the alleged factors that the jury had not "heard about Richard Christopher Tully." (RT 3682.) At one point, he invoked the same argument that the trial court had held improper as to the subcaption "Found God and Repented." The prosecutor improperly told the jury: "You heard [Mr. Tully's brother] Roger tell us about what a difference in his life his religious conversion had. Have you heard anything like that about the defendant?" (RT 3691.)

The prosecutor then told the jury that they must find that remorse existed before they could return a life verdict. Specifically, he told them:

> What else didn't you learn about the defendant? That he doesn't deserve the death penalty? You know, what is in the law, we call it a *condition precedent*, something has to happen before another thing follows, a prerequisite, something that you would expect to see in existence before you give sympathy, before you grant mercy, remorse, the presence of remorse, the fact that your sorry for what you've done can be a mitigating factor, can be a mitigating factor, but it's not present here. It is not present in this case. (RT 3693, emphasis added.)

Defense counsel objected. The trial court simply stated "[i]t will be noted." (RT 3693.) The prosecutor then correctly argued that "[t]he absence of remorse, after the commission of a crime, after the crime has been completed, cannot be used as an aggravating factor" (RT 3693-3694), but quickly added: "But in this particular case, when it comes to asking for mercy, the absence of remorse is not– or the fact that there is no remorse, or there isn't any evidence in this record at all, you haven't heard any evidence

that this defendant has demonstrated any remorse, so it's not present here as a mitigating factor." (RT 3694.)

The prosecutor later argued: "Another aggravating factor is his callousness at the scene and the failure to show any remorse at the scene of that crime. Totally callous. Indifferent to what she was going through, totally and completely." (RT 3715.) He then invented a speculative version of the crime, without factual basis, to argue Mr. Tully's alleged failure to show remorse. After the prosecutor claimed, without any supporting evidence, that Mr. Tully failed to act with "humanity" and "compassion" while Mrs. Olsson was "laying on her bed crying," he argued that Mr. Tully failed to "lift one finger to call for help."(RT 3715-3716.) Defense counsel objected but again, the trial court simply noted "what is occurring here is argument." (RT 3716.)

The prosecutor continued his improper argument: "He didn't lift a finger to help. Just coldly, callously, without any remorse there, figured out what he had to do. He let her die." (RT 3716-3717.) The prosecutor concluded by arguing that these circumstances aggravated the crime. He also argued that "there is nothing that offsets the horrendousness of these aggravating factors." (RT 3717.)

Later, the prosecutor again invoked the theme of repentance when he discussed the Crucifixion and the Bible story of the good thief and the bad thief. (RT 3800.) He stated: "They're both thieves. But *what makes the difference is one of them repented*, one of them said, '*Forgive me Lord*, I believe in you.' The other one just, you know, cussed at Christ, turned his nose, whatever. Christ said to the good thief, you know, you'll be with

me in heaven. He was saved. *The good thief was saved. The bad thief wasn't.*" (*Ibid*; emphasis added.) The effect was that the jury was told that someone who has not demonstrated remorse should not be saved by them.

C. The Law Regarding Remorse

Although this Court has generally approved argument that the defendant lacks remorse, this Court's analysis of the propriety of such arguments is based on precedent from the 1960's. California's death penalty law has gone through significant changes since that time. California's death penalty statute in the1960's gave the jury "complete discretion" and allowed introduction of evidence "of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." (Former Cal. Penal Code 190.1; see *People v. Terry* (1964) 61 Cal.2d 137, 143.) That law was held unconstitutional in *People v. Anderson* (1971) 6 Cal.3d 628. In 1972, the Supreme Court found statutes similar to that used in California unconstitutional because they allowed the jury to exercise "unguided discretion" in deciding whether to impose a death sentence. (*Furman v. Georgia* (1972) 498 U.S. 238.)

In response to *Anderson* and *Furman*, the legislature enacted a new death penalty statute in 1977. The 1977 death penalty law contained a list of statutory factors that the jury had to consider in reaching its penalty decision. The presence or absence of remorse was not a listed statutory factor. As this Court has found, beyond the list of statutory aggravating or mitigating factors, "[t]he [1977] statute, however, provided no further guidance or limitation on the jury's sentencing discretion. In the absence of such a

limitation, the jury was free, after considering the listed aggravating and mitigating factors, to consider any other matter it thought relevant to the penalty determination." (*People v. Boyd* (1985) 38 Cal.3d 762, 773.) Thus, under the 1977 law, it was permissible for the jury to consider evidence that was not related to any of the statutory factors in determining the appropriate penalty. (See *People v. Murtishaw, supra*, 29 Cal.3d 733.) Further, the 1977 law merely instructed the jury to consider listed factors in determining the sentence. It did not instruct the jury to determine whether the aggravating factors *outweighed* the mitigating factors. (*Ibid.*)

In 1978, the current death penalty statute was enacted. Like the 1977 law, it contains a list of statutory aggravating and mitigating factors. Like the 1977 law, the presence or absence of remorse is not a listed statutory factor in the current statute. (Cal. Penal Code § 190.3.) Unlike the old law, however, the 1978 law specifically provides that the jury "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances. If [it] determines that the mitigating circumstances outweigh the aggravating circumstances [it] shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (Penal Code § 190.3) This Court has held that the statutory requirement that the jury weigh the listed factors against each other necessarily prohibits consideration of matters that do not fit into any of the statutory factors. (*People v. Boyd, supra*, 38 Cal.3d at p. 773.) Lack of remorse is not a statutory factor under the 1978 law.

Because this Court's jurisprudence regarding the absence of remorse is not based

on the current scheme, but on earlier laws, it must be reconsidered. As will be shown below, the current scheme does not permit absence of remorse to be considered by the penalty phase jury.

D. Inclusion of the Non-Statutory Aggravating Factor of Remorselessness Renders the California Death Penalty Scheme Unconstitutional

In *People v. Boyd*, *supra*, 38 Cal.3d at p. 773, this Court explained that California's death penalty scheme "requir[es] the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute." Matters "not within the statutory list are not entitled to any weight in the penalty determination." (*Ibid.*)

Under the 1978 statute, aggravating evidence that does not fit into any of the statutory factors is inadmissible, and the prosecutor may not argue that there are any other aggravating factors outside the statute. (*Ibid.*) While the existence of remorse – if proffered by the defendant – is a relevant mitigating factor under factor (k), "lack of remorse"is not included in the statutory list. (See § 190.3, factors (a)-(k); *People v. Keenan* (1988) 46 Cal.3d 478, 510).

This Court has correctly held that the absence of remorse, by itself, is not an "aggravating" factor under either the 1977 or 1978 California law. (*People v. Ochoa* (2001) 26 Cal.4th 398, 449; *People v. Thompson* (1988) 45 Cal.3d 86, 124; *People v. Keenan*, (1988) 46 Cal.3d 478, 509-511.) This Court, nonetheless, has repeatedly condoned prosecutorial argument pointing to the defendant's lack of remorse as a relevant

factor for consideration in determining the appropriate penalty. This Court's rulings on prosecutorial argument concerning the absence of remorse do not comport with its statements of the law, nor with constitutional principles.

The constitutionality of the current scheme depends on certain procedural safeguards to ensure the sentence is "based on reason rather than caprice or emotion" (*Gardner v. Florida* (1977) 430 U.S. 349, 358; *Zant v. Stephens* at p. 885), and that the jury does not rely on inaccurate or misleading information. (*Zant v. Stephens*, *supra,* at p. 887 n. 24.) In California, where the jury must weigh the aggravating factors against the mitigating factors, these safeguards include adequately guiding the jury's discretion to consider only relevant matters, and thus evidence and argument pertaining to non-statutory aggravating factors is strictly prohibited. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 773-74.) As the Supreme Court has held, the statutory list of relevant factors guarantees that the jury's discretion will be appropriately guided as required by the Eighth Amendment. (*Pulley v. Harris* (1984) 465 U.S. 37, 53.)

Despite the state law and constitutional prohibitions against the use of non-statutory aggravating factors, this Court has held that lack of remorse may be argued *as an aggravating factor* provided the argument is based on evidence of "the circumstances of the crime."[120] (Cal. Penal Code § 190.3(a).) Relying on section 190.3(a), this Court has approved argument that lack of remorse *is* an aggravating factor, if based on "the

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[120] This type of argument is not based on "the absence of remorse," which would require proof of a negative, but on an affirmative showing of remorselessness. Both types of arguments were made here, and both were improper and unconstitutional.

defendant's refusal to show any remorse in the context of the murder." (*People v. Ochoa, supra,* 26 Cal.4th at p. 449 [evidence showed defendant bragged about killing to his friends immediately following the crime]; *People v. Cox* (1991) 53 Cal.3d 618, 685 [defendant remarked "I just blew the bitch's head off" immediately after shooting.]) While the lack of remorse "in and of itself" cannot be used to render "defendant's crimes more reprehensible," *id.* at p. 686, this Court has, in practice, allowed its use in precisely this way.

In *People v. Gonzales* (1991) 51 Cal.3d 1179, 1331-1332, this Court held that, while overt remorselessness *at the time of the crime* comes within the "circumstances of the crime" statutory sentencing factor (Penal Code § 190.3(a), *post-crime* evidence of remorselessness does not fit within any statutory sentencing factors. This Court determined that, where the absence of remorse is exhibited by evidence of the defendant's actions at the time of, or immediately following the crime, the prosecutor can argue it is an aggravating factor. (*Ibid.*)

These rulings impermissibly broaden the scope of factor (a), the circumstances of the crime, to essentially add a non-statutory aggravating factor --the lack of remorse-- that the jury is allowed to separately weigh against the mitigating factors. While the prosecutor may constitutionally argue that certain circumstances of the crime aggravate it beyond the mere elements, he may not add an *additional* aggravating factor to the jury's weighing process. Argument that tells the jury it may specifically consider the defendant's lack of remorse as aggravation, whether that lack of remorse is evident from

the circumstances of the crime or not, adds an additional aggravating factor. Authorizing the prosecutor to argue that a specific, non-statutory factor increases the enormity of the crime beyond the elements elevates that specific "circumstance of the crime" to the status of a separate aggravating factor.

The trial court's refusal to preclude argument that the absence of remorse could be considered as an aggravating factor violated Mr. Tully's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. In addition, the state law requiring that the jury's penalty determination be based on relevant sentencing factors creates a liberty interest that is protected by the due process clause of the Fourteenth Amendment. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343.) Since Mr. Tully was sentenced to death based on an irrelevant sentencing factor, he was improperly deprived of this liberty interest without due process in violation of the Fourteenth Amendment. (*Ibid.*)

E. "Absence of Remorse" is not a Proper Penalty Consideration under the 1978 Death Penalty Statute and Its Use Renders California's Death Penalty Scheme Unconstitutional

In addition to arguing remorselessness as an aggravating factor, the prosecutor told the jury that the lack of evidence of remorse meant Mr. Tully had not demonstrated the existence of remorse as a mitigator. This argument impermissibly transformed the "absence" of evidence into the "presence"of a non-statutory lethal aggravating factor.

This Court has repeatedly held that absence of remorse is relevant to the penalty decision under the current death penalty law. (See e.g. *People v. Cox, supra,* 53 Cal.3d at p. 685, citing *People v. Ghent, supra*, 43 Cal.3d at p. 771.) In reaching this conclusion,

this Court has relied on *Ghent,* in which this Court merely observed that it had already held that "under a prior death penalty law, the presence or absence of remorse is a factor relevant to the jury's penalty decision." (*People v. Ghent, supra*, 43 Cal.3d at p. 771 citing, *People v. Coleman, supra,* 71 Cal.2d 1159.) This Court's decision in *People v. Coleman* however, was based on an interpretation of the death penalty law as it existed in 1969. It cannot and does not provide support for the consideration of non-statutory aggravating factors under the 1978 law.

As the Supreme Court noted, under California's 1960's death penalty law, "the decision whether the defendant should live or die was left to the absolute discretion of the jury." (*McGautha v. California* (1971) 402 U.S. 183, 185.) That law gave the jury "complete discretion" at the penalty phase by allowing introduction of "'*any facts in aggravation* or mitigation of the penalty.'" (*See People v. Terry* (1964) 61 Cal.2d 137, 143 *discussing and quoting* then section 190.1; other quotations and citations omitted; emphasis added.) The 1978 statute, unlike the 1977 statute or the earlier law, prohibits the prosecutor from relying on non-statutory aggravating factors. Thus, regardless of whether the absence of remorse could be properly argued under prior death penalty statutes, there is no sound basis for this Court's conclusion that it can be constitutionally argued under the current law.

This Court has held that "the absence of remorse is relevant to the determination whether the mitigating factor of remorse is present; thus, the prosecutor properly may suggest that an absence of evidence of remorse weighs against a finding of remorse as a

mitigating factor." (*People v. Crittenden, supra,* 9 Cal. 4th at p.148.) This Court's suggestion that the prosecutor can argue that the absence of evidence of remorse "weighs" against the finding of mitigation evidence transforms the absence of remorse into an aggravating factor. If the jury may weigh the absence of remorse in its penalty determination, the absence of remorse has the force of an aggravating factor, no matter what it is called.

Argument by the prosecution that an irrelevant mitigating factor does not exist distracts the jury from performing their constitutionally mandated duties to weigh relevant factors to determine whether death is the appropriate penalty. Argument by the prosecutor countering the existence of a mitigating factor proffered by the defense aids the jury by focusing it on whether the mitigating factor exists based on the evidence presented. However, argument that certain mitigation does not exist because it was not presented by the defense is entirely different.

When a prosecutor argues lack of remorse, where, as here, a capital defendant does not present evidence or argue the existence of remorse, the prosecutor is not trying to rebut the mitigating factor of remorse. The prosecutor is effectively creating an entirely new factor – the "lack of mitigating" factor. As this Court has explained, "jurors can be expected to react strongly to" this factor "whether the prosecutor brands such evidence 'aggravating' or merely 'nonmitigating.'" (*People v. Gonzales*, *supra*, 51 Cal.3d at p.1232.)

Argument that the "absence of remorse" (or any other mitigating factor not raised

by the defense) is a proper consideration for the penalty jury violates the state law and the state and federal Constitutions, including the Fifth, Sixth, Eighth and Fourteenth Amendments. It should no longer be permitted in any case, and is grounds for reversal in Mr. Tully's case in particular.

F. The Prosecutor's "Condition Precedent" Argument Prevented the Jury From Considering and Giving Effect to Mitigating Evidence

The prosecutor told the jury that, without a finding of remorse, they could not consider Mr. Tully's mitigation evidence. This argument violated state law and the Eighth and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution.

The prosecutor told the jury that "in the law," there is the notion of a "condition precedent," which means "something has to happen before another thing follows, a prerequisite." (RT 3693.) He told the jury that the "condition precedent" was "something that you would expect to see in existence before you give sympathy, before you grant mercy." (Ibid). This "something" that the jury "expected" was "remorse, the presence of remorse, the fact that your sorry for what you've done." (Ibid.) The prosecutor then told the jury that the "condition precedent" of remorse was "not present in this case." (Ibid.) Since the jury did not hear evidence as to this "condition precedent," it followed that they had not heard any reason that Mr. Tully did not "deserve the death penalty." (Ibid.) The prosecutor's message was clear: remorse was a "condition precedent" as a matter of law and the jury must find that remorse existed before it could grant sympathy or mercy to

Mr. Tully.

Although "condition precedent" is a legal term of art, the prosecutor explained it to the jury in common terms. The most common definitions for a "condition" are: "anything called for as a requirement before the performance or completion of something else;" or "anything essential to the existence or occurrence of something else; prerequisite." (*Webster's New World Dictionary* (3rd College Ed. 1988) p.290.) While a "precedent" is "an act [] that may serve as an example, reason, or justification for a later one." *(Id.* at p.1060.)

The prosecutor made clear that the jury could not consider Mr. Tully's mitigating evidence unless they first found that he was remorseful. Because Mr. Tully had not been allowed to present his remorse to the jury, a death verdict would be the inevitable result of the "condition precedent" argument. The premise of this "condition precedent" in a death penalty case runs contrary to state statute, the most basic principles of the California death penalty scheme and the federal constitution.

Section 190.3, which defines the penalty phase proceedings, does not refer to any "condition precedent." The statute directs the jury to consider and take into account all of the applicable listed factors and then reach its decision on punishment by weighing the aggravating circumstances against the mitigating circumstances. In weighing the various circumstances [the jury] determine[s] 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." (CALJIC 8.88.)

Because the jury must consider, give effect, and weigh each relevant sentencing factor, the presence or absence of one factor does not allow the jury to ignore or fail to consider others. A "condition precedent" that prevents the jury from granting a capital defendant sympathy or mercy and thus from considering his mitigation evidence prohibits the jury from considering the mitigation evidence. One sentencing factor, here the alleged lack of remorse, cannot preclude the jury from considering mitigating evidence and voting for a life verdict.

The Supreme Court has held that it is unconstitutional for the State to prevent a capital jury from considering and giving effect to mitigating evidence presented by a capital defendant. In *Lockett v. Ohio* (1978) 438 U.S. 586, 605, the Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer [] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Id.* at p.604; emphasis in original; footnote omitted; see *Woodson v. North Carolina, supra*, 428 U.S. at p. 304; *Eddings v. Oklahoma* (1982), 455 U.S. 104, 113.) This is exactly what the prosecutor told the jury here – to disregard Mr. Tully's mitigating evidence because he did not show remorse.

The effect of the prosecutor's argument was the imposition of a mandatory death sentence. However, "California has no mandatory death penalty." (*People v. Carpenter* (1987) 15 Cal. 4th 312, 408.) Indeed, a "mandatory death penalty scheme is unconstitutional because it fails to permit consideration of the accused's unique

circumstances." (*People v. Murtishaw, supra,* 48 Cal. 3d at p. 1020; *Woodson v. North Carolina, supra,* 428 U.S. at p. 303-305 (plurality opn).)

Despite these well-established rules, the prosecutor's argument misled the jury as to their constitutional and statutory duty to consider all mitigating evidence and grant him mercy and sympathy accordingly. For a prosecutor to invoke irrelevant legal principles, such as the notion of that an alleged lack of remorse is a "condition precedent" or to tell a capital jury that "they should not even consider mercy[,] misleads the jury about one of its central tasks, which is to decide whether the individual, convicted murderer standing before it should receive mercy." (*Romine v. Head* (11th Cir. 2001) 253 F.3d 1349,1368)

In *People v. Easley, supra,* 34 Cal 3d at p. 880, where a capital jury was likewise misinformed as to whether it could consider sympathetic mitigation evidence, this Court held:

> [W]e cannot know whether the jury would have returned the same verdict if it had been accurately instructed that it could properly be influenced by sympathy or pity for Easley. By directing the jury not to be swayed by sympathy or pity, however, the court in effect told the jury not to give any weight to the bulk of the evidence proffered by the defendant. Thus, the instruction may very well have eliminated any chance Easley had to escape the death penalty. (*Ibid.)*

The prejudice is even more pronounced here, where the prosecutor explicitly told the jury that they could not consider Mr. Tully's mitigating evidence. By advising the jury that they could not grant Mr. Tully sympathy or mercy, the prosecutor "significantly misled the jury with respect to the fundamental nature of its sentencing task." (*Ibid*) As this Court explained in *Easley*, "[i]t is not only appropriate, *but necessary*, that the jury weigh

the sympathetic elements of defendant's background against those that may offend the conscience." (*Ibid*; emphasis in original; quotations and citation omitted.)

G. Mr. Tully was Improperly Sentenced to Death Based on His Decision Not to Testify

The Fifth Amendment "privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner." (*Miranda v. Arizona* (1966) 384 U.S. 436, 476.) Similarly, Article 1, Section 15 of the California Constitution states: "Persons may not [] be compelled in a criminal cause to be a witness against themselves." (Cal. Const. Art. 1, Sec. 15.) This privilege is protected by state statute. (*See* Cal. Evid. Code § 940 ["To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."].)

The Supreme Court has long held that the Fifth and Fourteenth Amendments categorically "forbid [] comment by the prosecution on the accused's silence" at the penalty phase of a capital case. (*Griffin v. California* (1965) 380 U.S. 609, 615 *Mitchell v. United States* (1999) 526 U.S. 314, 329. California statutes are in accord with this constitutional rule.

> If in the instant proceeding [] a privilege is [] exercised not to testify with respect to any matter [] neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding. (Cal. Evid. Code § 913(a).)

The Fifth Amendment is "fulfilled only when a criminal defendant is guaranteed

the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence.'" (*Estelle v. Smith, supra,* 451 U.S. at p.468, quoting *Malloy v. Hogan* (1964) 378 U.S. 1, 8.) A capital defendant cannot be sentenced to death based on constitutionally protected activity, such as the right to remain silent, without violation of the Eighth and Fourteenth Amendments. (See e.g. *Zant v. Stephens, supra,* 462 U.S. at p.885; *Johnson v. Mississippi, supra,* 486 U.S. at p.584.)

Here, Mr. Tully was penalized for invoking his right to not testify. The prosecutor not only commented on his silence, but told the jury that because he would not incriminate himself, they could ignore his evidence in mitigation. As the trial court held in ruling on the prosecutor's chart, a statement that the jury hadn't heard Mr. Tully express remorse or that he had "repented" was an improper "reference to a failure to testify." (RT 3675.) Despite objections by defense counsel, the trial court never enforced its holding and allowed the prosecutor to make the same impermissible argument to the jury.

The prosecutor told the jury that the fact that they did not hear that Mr. Tully was "sorry for what [he had] done" precluded them from exercising mercy or sympathy. (RT 3693) The thrust of the prosecutor's argument was that since the jury had not "heard any evidence that this defendant has demonstrated any remorse," they must punish him more harshly and sentence him to die. (RT 3694.) However, the only manner in which the jury could have heard evidence of remorse was from Mr. Tully's "own mouth," either through testimony or incriminating statements made out of court.

Mr. Tully was not allowed to remain silent without penalty. The prosecutor told the jury that the lack of remorse was a reason to sentence Mr. Tully to death. Since "[t]estimony as to contrition or remorse can only come from the accused." (*Swallow v. State* (Tex. Crim. App. 1992) 829 S.W.2d 223, 225), Mr. Tully was sentenced to death at the urging of the prosecutor because he chose to remain silent.

The Ninth Circuit, in *Beardslee v. Woodford* (9th Cir. 2003) 358 F.3d 560, 587, found that a prosecutor's argument as to lack of remorse was improper under the Fifth Amendment. In *Beardslee,* the prosecutor told the jury, "'Wouldn't you expect a man on trial for his life would, through his statements, cry out for forgiveness, cry out for pity? He did not. Never heard any . . .'" (*Ibid.*) Disagreeing with the conclusion of this Court that such argument was proper (*People v. Beardslee* (1991) 53 Cal.3d 68, 114), the Ninth Circuit held that the argument implicated the defendant's refusal to testify. (*Id.* at p. 587.) The Ninth Circuit noted that a "prosecutor's comment is impermissible if it is manifestly intended to call attention to the defendant's failure to testify or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." (*Ibid*; quotation and citation omitted.) It further explained that "[t]he reference to the jury not being 'able to observe' whether 'there was any feeling in the man' contrasts the actual trial with a hypothetical one in which the defendant testified," and that "[t]hese comments were impermissible under *Griffin*." (*Ibid.*)

The Third Circuit Court of Appeals has held a prosecutor's comment about the defendant's failure to express remorse violated the Fifth Amendment. (*Lesko v. Lehman,*

supra, 925 F.2d at pp.1546-1547, citations omitted.) Numerous state courts – including those in Texas, West Virginia, South Carolina, Indiana[121] are in agreement. A recent decision by the Court of Appeals of Texas is particularly relevant.

As in the instant case, the prosecutor in *Hall v. State* (Tex. App. Fort Worth 2000) 13 S.W.3d 115,117, told the jury: "'Has [he] ever shown remorse for this [crime]? No.'" In reversing the sentence, the court found:

> A comment that directly focuses the jury's attention on the defendant's personal feelings of remorse, which can only be supplied through the defendant's own testimony, necessarily implicates the defendant's failure to testify. When no testimony exists concerning the defendant's lack of remorse, a comment on his lack of remorse would naturally and necessarily be one on the defendant's failure to testify because only the defendant can testify as to his own remorse. (*Id.* at pp.117-118; citations omitted.)

Similarly, there was no evidence presented here to the jury regarding remorse and the evidence of remorse could have only been supplied by Mr. Tully testifying. This improper argument violated Mr. Tully's "fundamental constitutional right against self-incrimination" and requires reversal of his death sentence. (*Id.* at p.120.)

This Court has recognized that prosecutorial argument that a defendant lacked remorse could raise an improper negative inference regarding the defendant's right not to testify in violation of *Griffin v. California.* (See e.g. *People v. Thompson, supra,* 45 Cal.3d at p. 124, citing *People v. Coleman* (1969) 71 Cal.2d 1159, 1168.) In the majority of cases where this Court has upheld arguments regarding the lack of remorse, the

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[121] See *Hall v. State* (Tex. App. Fort Worth 2000) 13 S.W.3d 115,117, *Swallow v. State* (Tex. Crim. App. 1992), 89 S.W.2d 223, 225, *State v. Mills* (W. Va. 2002) 566 S.E. 2d 891, 211, *State v. McClure* (S.C. 2000) 537 S.E.2d 273.

defendant either admitted committing the killing or testified that he did so, thereby waiving any Fifth Amendment privileges. (See e.g., *People v. Ghent* (1987) 43 Cal.3d 739, 771 [defendant did not deny the killing but raised mental state defense, and testified during trial]; *People v. Williams* (1988) 44 Cal.3d 883, 966 [the prosecutor may call to the attention of the jury an apparent absence of remorse in a defendant who has admitted that he has killed another human being]; *People v. Keenan, supra,* 46 Cal.3d at pp. 509-511 [defendant made statements admitting he killed the victim]; *People v. Cox, supra,* 53 Cal.3d at p. 685 [defendant made statements admitting he killed the victim]; *People v. Gonzales, supra,* 51 Cal.3d at 1331-1332 [defendant admitted killing the victim, both to law enforcement, and by bragging about it immediately after the crime].)

Nonetheless, this Court has not expressly limited argument concerning lack of remorse to those cases where the defendant has already incriminated himself. Instead, it has approved the argument even where there was no admission or confession. (See *People v. Thompson, supra*, 45 Cal.3d at p. 124.) In the absence of an admission to the killing, any argument that defendant *has not* expressed remorse calls upon the jury to draw an improper inference from the defendant's exercise of his right to remain silent and to not testify.

Because it is unconstitutional for the jury to consider the defendant's "silence" or failure to waive his Fifth Amendment rights against self-incrimination in its penalty decision, arguments of remorselessness must be limited to those cases in which the defendant waived his self-incrimination rights by confessing, admitting the killing to the

police, or by so testifying before the jury. (See *People v. Williams, supra,* 44 Cal.3d at p. 966 [finding no improper reference to failure to waive right against self-incrimination in prosecutor's argument of lack of remorse because the defendant had confessed].) Otherwise, the prosecutor arguing that the defendant has *failed* to present evidence of remorse is without a doubt asking the jury to consider that the defendant failed to admit his guilt, or that he failed to testify, or both. Urging the jury to consider the defendant's failure to testify or to incriminate himself is unconstitutional. (*Zant v. Stephens, supra,* 462 U.S. at p. 885.)

In the present case, Mr. Tully never admitted killing Ms. Olsson, and no evidence was presented that suggested he did admit it. Although he did make statements to law enforcement, he never admitted guilt for the crime. He did not testify at either the guilt or penalty phases, and his request to exercise his right to allocute was denied. There was only one inference that the jury could draw from the prosecutor's argument that Mr. Tully failed to demonstrate remorse -- that he should have waived his right against self-incrimination to testify or to admit guilt if he expected the jury to spare his life. The result was that Mr. Tully was sentenced to death because of his assertion of his constitutional right to remain silent in violation of the Fifth, Eighth and Fourteenth Amendments, as well as Article I of the California Constitution and state law.

H. The Prosecutor Improperly Created "Another Aggravating Factor" Based on Speculation as to Mr. Tully's Alleged Lack of Remorse at the Time of the Crime

The prosecutor here expressly argued that lack of remorse was "another" aggravating factor, beyond the factors listed in the statute. He argued: "*Another aggravating factor is his callousness at the scene and the failure to show any remorse at the scene of that crime.* Totally callous. Indifferent to what she was going through, totally and completely." (RT 3715.) This was impermissible and prohibited argument pursuant to *People v. Boyd, supra,* 38 Cal.3d at pp. 773-74. Rather than telling the jury that overt callousness or remorselessness was a part of the "circumstances of the crime" aggravating factor, the prosecutor told the jury it was "another" factor to be weighed by the jury. Remorselessness is not "another" factor, however, but rather, is included under factor (a). *People v. Gonzales* (1991) 51 Cal.3d 1179, 1231-1232.

Worse yet, there was no evidence of overt remorselessness in this case. The prosecutor did not present any evidence as to "overt remorselessness" by Mr. Tully. There was no evidence that Mr. Tully bragged about the crime at the scene. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 448-449.) Nor was there any evidence as to Mr. Tully's "attitude toward his actions and the victims at the time of the offense," such as "evidence that defendant, still bloody from the killings, returned to his friends and boasted of what he had just done." (See *People v. Cain, supra,* 10 Cal. 4th at p. 77.) There was no evidence "suggesting a callous indifference to the consequences of [the] lethal acts" charged here, such as remarks akin to "'I just blew the bitch's head off'" at the scene.

(See *People v. Cox*, *supra*, 53 Cal.3d at p. 685.) In short, there was no "*overt* evidence of [] defiance" by Mr. Tully to support an argument of remorselessness. (Compare *People v. Gonzales*, *supra*, 51 Cal.3d at pp.1231-1232; emphasis in original.)

Instead of relying on the evidence, in urging the jury to consider Mr. Tully's remorselessness at the scene, the prosecutor speculated as to Mr. Tully's behavior. For example, the prosecutor speculated that while Ms. Olsson was "laying on her bed crying," Mr. Tully failed to "lift one finger to call for help," but instead was rifling through her purse. (RT 3715-3716) Without evidence, the prosecutor even speculated as to what Mr. Tully was "trying to think" at the scene. (*Ibid.*)

Defense counsel objected to the prosecutor's speculative and improper argument. (RT 3716.) Although the trial court initially held that the prosecutor could only discuss lack of remorse in the context of *what actually occurred* at the scene of the crime (RT 3675), the trial court failed to stop the prosecutor's improper argument here. The trial court merely told the jury that "what is occurring here is argument." (RT 3716.) The prosecutor continued to speculate, arguing that Mr. Tully acted "without any remorse" at the scene of the crime. (RT 3716-3717.)

Defense counsel moved for a mistrial based on the prosecutor's repeated speculation as to events at the scene of the crime in a "direct attempt to inflame the jury." (RT 3718) Without comment, the trial court denied the motion for mistrial. (RT 3719.) The trial court then "admonished" the jury by saying that argument was only argument. (RT 3719-3723.) The harm of the prosecutor's improper and inflammatory argument was

not cured by this "admonishment."

In *People v. Cox, supra,* 53 Cal.3d at p.686, fn 24, this Court held that an argument as to remorselessness at the scene was only proper because "the tenor of the argument did not [] draw speculative inferences from a total absence of evidence," but instead "referred to testimony by family members relating defendant's statements about the crimes, and by percipient witnesses describing the circumstances of the killings." Here, the tenor of the prosecutor's argument was the exact opposite. It was impermissibly speculative.

Where the defense has proffered mitigation evidence based on remorse, the prosecution could properly rebut that case by pointing to evidence of remorselessness or by otherwise impeaching the defense presentation. Similarly, pursuant to the holdings of this Court, the prosecutor could properly point to overt evidence of remorselessness arising as an aggravating circumstance of the crime when there is evidence in the record. Here, however, the prosecutor's argument was not based on anything but the absence of evidence to prove a factor that the defense neither argued nor relied on. There was no "overt evidence of remorselessness."

The Eighth Amendment's requirement of reliability in the determination that death is the appropriate punishment in a specific case cannot be met where, as here, the penalty phase jury's consideration was not limited to matters introduced in evidence before it. (See *California v. Brown* (1987) 479 U.S. 538, 543, citing *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Without this limitation, there is no assurance that the jury did not rely on extraneous emotional factors, which are "far more likely to turn the jury

against a capital defendant than for him." (*Id.*) The failure to limit the jury's sentencing considerations to record evidence also precludes meaningful judicial review, another safeguard that improves the reliability of the sentencing process. (See *California v. Brown, supra*, at p. 543,citing *Roberts v. Louisiana* (1976) 428 U.S. 325, 335, and n. 11].)

In the present case, the prosecutor told the jury, after all the evidence had been presented and argument was underway, to consider the fact that the defense had failed to show remorse as a relevant penalty factor. This argument came completely out the blue, and the defense had no opportunity to rebut it by presenting evidence to show Mr. Tully was in fact remorseful. Without evidence on the issue of remorse, Mr. Tully's "absence of remorse" became an "extraneous emotional factor," that the prosecutor used to sway the jury against Mr. Tully without any judicial safeguards, thus rendering his sentence unreliable.

Moreover, allowing argument about the absence of mitigating evidence violates the Sixth Amendment guarantee of a jury trial and the Due Process Clause of the Fourteenth Amendment. Trial by jury in a criminal case "necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," and not merely from the mouth of the prosecutor during argument. (*Turner v. Louisiana* (1965) 379 U.S. 466 472-73. In short, unless the defense has proffered or pointed to evidence of remorse itself, or there is overt evidence of remorselessness at the time of the crime, prosecutorial argument that

the defendant has failed to show remorse is irrelevant and should be prohibited.

Because the defense did not raise the issue of remorse in either argument or evidence, and there was no overt evidence of remorselessness in this case, the prosecutor should have been prohibited from arguing the issue. The argument violated the Sixth Amendment guarantee of a jury trial, and the Eighth and Fourteenth Amendments' requirement of heightened reliability and due process in the sentencing phase of a capital case as well as Article I of the California Constitution.

I. Mr. Tully was Sentenced to Death Based on a Materially Inaccurate Sentencing Factor

Mr. Tully was sentenced to death based on a sentencing factor that was patently inaccurate. Mr. Tully had specifically requested to be able to address the jury so that he could personally "express his extreme remorse for the death of Ms. Olsson and the terrible shock on her family." (RT 3621.) On these facts, it cannot be said that Mr. Tully lacked remorse. The prosecutor could not, in good faith, argue there was no remorse and the trial court should not have permitted the argument.

In *Johnson v. Mississippi, supra*, 486 U.S. at p. 590, the Supreme Court held that the Eighth Amendment is violated where "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Here, as in *Johnson*, the materially inaccurate lack of remorse factor "provided no legitimate support for the death sentence imposed on" Mr. Tully by the jury. (*Id.* at p.586.) The constitutional error is worse than in *Johnson* because, the prosecutor and the trial court here knew that the lack of remorse

factor was inaccurate and misleading. Knowing very well that Mr. Tully wished to express remorse to the jury but was prevented from doing so, the prosecutor told the jury that Mr. Tully lacked remorse and thus deserved the death penalty.

As the Supreme Court has stated, "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system." (*United States v. Havens* (1980) 446 U.S. 620, 626; citation omitted.) The prosecutor here intentionally subverted this fundamental goal by assuring that the jury would instead consider the false allegation that Mr. Tully lacked remorse. Blatant misrepresentation to a capital jury violates the right to due process, equal protection and a fair trial under the Sixth and the Fourteenth Amendments, as well as Article 1 of the California Constitution. It also violated the Eighth Amendment and the parallel provisions of the California Constitution.

To sentence a man to death based on a materially inaccurate sentencing factor is "so extremely unfair" that it "violates 'fundamental conceptions of justice'" under the due process clause and equal protection. (*Dowling v. United States* (1990) 493 U.S. 342, 352 *quoting United States v. Lovasco* (1977) 431 U.S. 783, 790.) It is a "fundamental conception[] of justice which lies at the base of our civil and political institutions" that a person should not be sentenced to death based on false allegations. (See *United States v. Lovasco, supra,* 431 U.S. at 790; citations omitted.) Such a death verdict defies "the community's sense of fair play and decency" (*Ibid.*; citations omitted), and does not comport with the state or federal Constitution. As this Court has explained: "In a death penalty case, we expect the trial court and the attorneys to proceed with the utmost care

and diligence and with the most scrupulous regard for fair and correct procedure." (*People v. Hernandez, supra,* 30 Cal. 4th at 878.) The proceedings here fell well short of this goal.

J. Absence of Remorse Lacks Sufficient Definition to be a Proper Penalty Consideration

This Court has held that the prosecutor may comment on a defendant's remorselessness or the absence of remorse, but it has never defined either phrase. Because there is no definition, the defense is provided no notice of what facts may draw an argument the defendant lacked remorse. Without definition, the jury considering whether or not the defendant has shown remorse essentially becomes an "unguided missile," left free to establish its own penalty criteria. Factors relied on by the jury in making the sentencing determination may not be so vague that they create an unacceptable risk of randomness, thus violating the Eighth Amendment. (*Tuialepa v. California, supra,* 512 U.S. at p. 975, citing *Stringer v. Black* (1992) 503 U.S. 222; *Furman v. Georgia, supra*, 498 U.S. 238.)

This Court's jurisprudence on remorse in the current era is based entirely on *pre-Furman* and pre-*Anderson* precedent. A review of that precedent shows that this Court has failed to consider the constitutional implications of the type of argument made in the present case, or that what was authorized under the old law was quite different from "the absence of remorse" as this Court now interprets it.

This Court's relied upon authority begins with *People v. Bentley (*1962) 58 Cal.2d

458, 460, a case involving the pre-1977 death penalty law. In *Bentley*, the issue was the relevance of *evidence of other crimes*, not the propriety of evidence or prosecutorial argument concerning remorse. This Court found that evidence of additional post-capital offense criminal activity was relevant to the question of the defendant's "willingness" to kill again, as evidenced by his lack of "revulsion" in committing the subsequent offense. This Court noted that the evidence in *Bentley* was not unduly inflammatory or cumulative, but was based on eyewitness testimony of the defendant's actions and statements during the *subsequent* crimes. (*People v. Bentley, supra,* 58 Cal.2d at p. 460.)

All later cases decided by this Court can be traced back to *Bentley* and no subsequent case contains any additional definition of admissible evidence or of proper argument regarding the absence of remorse. (See e.g *People v. Cox, supra,* 53 Cal.3d at p. 685, citing *People v. Ghent, supra*, 43 Cal.3d at p. 771; *People v. Ghent, supra,* citing *People v. Coleman,* 71 Cal.2d at pp. 1168-1169; *People v. Coleman, supra,* citing *People v. Talbot* (1966) 64 Cal.2d 69, 712; *People v. Talbot, supra*, citing *People v. Mitchell* (1966) 63 Cal.2d 805, 817; *People v. Mitchell, supra*, citing *People v. Bentley*; *supra*, 58 Cal.2d at p. 460.) This Court has never given any reasons for its repeated reliance on cases tried under the 1960's law or its erroneous conclusion that lack of remorse is now a relevant penalty consideration.

In *Bentley,* this Court did explain the reasons why *evidence* of post-crime violent criminal activity might be relevant to show a defendant's lack of "revulsion" for killing again, but that explanation does not cover anything beyond the prosecutor's right to

introduce evidence. Moreover, it says nothing about permissible argument in the absence of this concrete evidence, let alone about remorse.

Remorse and revulsion are not synonymous. The lack of "revulsion" for committing a subsequent killing is not the same as a lack of remorse for the capital offense. Remorse, coming from the Latin verb for "to gnaw" is defined as 1) "a deep torturing sense of guilt felt for one's actions; the keen pain or anguish excited by a sense of guilt" or 2) sympathetic sorrow, pity, compassion." "Remorseless" is defined as "without remorse, unpitying, cruel, relentless, merciless, insensible to distress, implacable."(*Webster's New Universal Unabridged Dictionary*, Second Edition (1979.)

In contrast, revulsion is defined as 1) "a drawing or being drawn back or away, withdrawal" or 2) a sudden, complete, and violent change, particularly of feeling; an abrupt, strong reaction or sentiment." Recoil is a synonym of "revulsion." (*Ibid.*) Thus, revulsion centers on feelings of horror that might prevent further criminal behavior, while remorse speaks to the defendant's feelings of sympathy, compassion and guilt over the capital offense.

In the present case, there was no evidence that Mr. Tully committed any subsequent killings or other violent crimes and thus no evidence that he lacked "revulsion" about the crime. *Coleman*, and the cases on which it was based, provide no support for the propriety of argument or uninvited "comment" on "the absence of "remorse" under the current death penalty law.

Despite the narrowness of the prior authority on the issue, this Court has continued

to broaden what is permissible argument into something that essentially defies limits or definition. This Court has found that argument about lack of remorse is permissible when the defendant confesses or admits the crime, but does not exhibit or express remorse in his confession. (*People v. Keenan, supra,* 46 Cal.3d at pp. 509-511.) It also has found it is permissible where there is "positive" or "overt" evidence of remorselessness." (*People v. Cox, supra,* 53 Cal.3d at p. 685.)

In *Cox*, this Court held that the prosecutor could argue that the defendant's lack of remorse undermined any sympathy that might have been engendered by his family's testimony that indicated he didn't want to hurt anyone. (*Cox, supra,* 53 Cal.3d at p. 685.) In *People v. Thompson,* this Court upheld argument that pointed to the absence of any evidence of remorse in the testimony of defense witnesses, and to defendant's enjoyment of a trip to Mexico in the weeks following the crime. (*People v. Thompson, supra,* 45 Cal.3d at p.123.) In *People v. Ochoa, supra,* 26 Cal.4th at p. 449, this Court found no error in the prosecutor's argument that the defendant had failed to show remorse in the two years following the murders. This Court concluded that it was proper to argue that defendant's lack of remorse showed that the potential mitigating factor was inapplicable despite the fact that it was not based on overt remorselessness at the time of the crime. (*Ibid.)*

The prosecutor's right to comment on the apparent absence of remorse to disprove "potential mitigation" or to undermine any mitigation that was presented is limitless. Indeed, in the present case, there was no evidence that Mr. Tully took any actions

inconsistent with remorse following the crime, and yet the prosecutor was allowed to argue he was not remorseful.

This Court has rationalized judicial expansion of penalty phase considerations beyond statutory aggravating factors by proclaiming that rules limiting such factors "could not prevent a capital juror from bringing to bear on his decision knowledge gained from his life experience." (*People v. Williams, supra,* 44 Cal.3d at p. 966.) Based on that acknowledgment, this Court found that the jury "is likely to consider the absence of remorse in the exercise of its broad constitutional sentencing discretion *no matter what it is told.*" (*People v. Keenan, supra,* 46 Cal.3d at p. 510) (emphasis added.)

That the jury may consider the absence of remorse at sentencing "despite what it is told" is true of many impermissible things the jury could consider, such as the race or religion of the defendant or the victim, or that there is no such thing as a sentence of life without parole. These factors are plainly impermissible considerations, yet unfortunately, the jury is also "likely to consider [them] in the exercise of its broad constitutional sentencing discretion *no matter what it is told.*" The fact that the jury might naturally consider these things as part of their "life experience" does not render them permissible, nor does not it give the prosecutor the right to argue that they are relevant.

This Court's acknowledgment that the jury will bring its own life experiences in when deciding what is relevant at the penalty phase, regardless of "what it is told" demonstrates that California's death penalty scheme is arbitrary and capricious in violation of the Eighth Amendment. If neither the arguments of counsel, nor the court's

instructions can adequately guide the jury's sentencing discretion as required by the Eighth and Fourteenth Amendments, then the death penalty cannot withstand constitutional scrutiny. The Constitution requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. (*Gregg v. Georgia* (1976) 428 U.S. 153; *Furman v. Georgia, supra,* 408 U.S. 238. *Ad hoc* judicial expansion of the factors a jury may consider during the penalty phase, without definition, notice or instruction results in the arbitrary unpredictable application of the death penalty and violates the Constitution. Mr. Tully's rights in the present case were so violated.

K. The Trial Court Failed to Properly Instruct the Jury on Remorse

This Court has allowed lack of remorse to be argued by the prosecution under various circumstances. If this Court continues to so hold, then it must hold that the jury has to be provided instructions on how to consider the lack of remorse. No instructions were given to the jury in this case concerning remorselessness or the absence of remorse

Sentencing factors relied on by the jury in making the penalty phase determination in a capital case may not be vague. Without instructions defining "the lack of remorse," the evidence that is relevant to it, and the manner in which it may be properly considered, the jury is not adequately guided at the penalty phase. The chance that it will draw improper inferences is enormous. Indeed, this Court has repeatedly explained that since "remorse is universally deemed a factor relevant to penalty," the "jury, applying its common sense and life experience, is likely to consider that issue in the exercise of its

broad constitutional sentencing discretion no matter what it is told." (*People v. Keenan, supra,* 46 Cal.3d at p. 510.)

At the same time, this Court has found "no reasonable possibility" that an argument as to lack of remorse could affect a jury's sentencing decision because the jury is "instructed to be guided by specified sentencing factors as 'applicable,'" and "neither remorse nor the lack thereof [is] included in the list." (*People v. Keenan, supra,* 46 Cal.3d at pp. 510.) These two findings are inconsistent and illogical. Accordingly, jury instructions are necessary.

If the jury is "likely" to consider the lack of remorse – even when it is not brought to their attention – then there is a much greater likelihood that they will consider it when expressly told to do so by the prosecutor. Following the instructions will not help them because the instructions do not address this "universal" factor. Capital juries must be specifically instructed as to the limits of remorselessness or the absence of remorse when the prosecution argues it. The problems seen in this case provide a road map for the type of instructions needed.

The jury's discretion to consider lack of remorse must be expressly limited to what is shown by the evidence. The jury must be instructed that they may only consider the absence of remorse if it can be reasonably inferred *from the evidence.* A capital defendant's Fifth Amendment right to remain silent must be explicitly protected. Thus, the jury must be instructed not to speculate that a capital defendant lacks remorse simply because he did not take the witness stand or otherwise make statements as to the charges.

The jury must also be instructed that lack of remorse may only be properly considered as an aggravating factor by the jury if there is overt evidence of remorseless at the scene of the crime. The jury must be told that such lack of remorse at the scene of the crime is not another aggravating factor but simply a "circumstance of the crime" under section 190.3(a).

Most importantly, the jury should explicitly be instructed that it may only consider allegations of lack of remorse other than overt remorselessness at the scene as rebuttal argument to a defense presentation of the mitigating factor of remorse. The instructions should explain that lack of remorse allegations cannot rebut other mitigating evidence as a condition precedent and certainly can never require a death verdict.

An additional instruction is needed to assure the reliability and fairness of the death sentence and to comport with California's death penalty scheme. Since this Court has elevated remorselessness to the status of a "universal" penalty consideration, the jury must be instructed, as it is with the other factors, that it may only consider it if it is "applicable," and that if it is not applicable it is irrelevant to the sentencing equation. With regard to statutory aggravating and mitigating factors, the jury is only allowed to consider those factors that are "applicable." Where there is no evidence to demonstrate the presence or absence of that factor, the jury is supposed to simply disregard it. (*People v. Miranda* (1987) 44 Cal.3d 57, 104-105.)

Since remorse is a "universal" factor, these instructions, which merely embody established concepts of California law, are necessary and should have been given here *sua*

sponte, and whenever the prosecutor argues lack of remorse in a capital case. Allowing consideration of a non-statutory aggravating factor without giving the jury a sufficient framework renders the resulting death verdict unreliable, arbitrary and capricious in violation of the Constitutions. These instructions were not given in this case. Thus, Mr. Tully's jury was not provided a proper framework for making the penalty determination.

Moreover, after improperly allowing lack of remorse argument despite repeated defense objections and prohibiting Mr. Tully from presenting evidence of remorse via allocution, the trial court here had a duty to assure that argument was limited to what was allowed under the law and based on truth. (*See e.g. People v. Bell, supra,* 49 Cal. 3d at p. 548 [explaining that a defense objection as to improper lack of remorse argument should result in the trial court "point[ing] out to the jury the irrelevance of the argument"].) The trial court had a heightened duty here to instruct the jury on the limits of lack of remorse. The trial court failed in its duty to *sua sponte* instruct the jury here as none of these necessary instructions were given.

L. The "Absence of Remorse" Errors Require Reversal

The trial court committed grave error in allowing the prosecutor to argue the absence of remorse. Absence of remorse is a not an aggravating factor in California. The argument permitted the jury to consider an additional aggravating factor beyond what was allowed under state law. To the extent that "absence of remorse" could be a permissible sentencing consideration, it lacks sufficient definition to meet constitutional requirements. Because Mr. Tully did not testify or admit guilt, the argument violated Mr. Tully's right

against self-incrimination.

The prosecutor's specific argument in this case was also improper and unconstitutional. His argument that remorse was a "condition precedent to mercy" violated Mr. Tully's right to have jury consider the mitigating evidence that was presented. Because there was no evidence to support an argument of overt remorselessness, the prosecutor's argument was based on impermissible speculation. Moreover, the prosecutor's argument that Mr. Tully was not remorseful was materially inaccurate. Finally, if such argument was proper on the facts of this case, the jury should have been instructed how to assess and consider the absence of remorse in deciding the penalty.

Mr. Tully has shown that the argument regarding the absence of remorse violated state law as well as his right to a fair trial, to refrain from self-incrimination, to an impartial jury, to due process, equal protection and to a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments, and parallel provisions of the California Constitution. The effect of each of these errors individually and cumulatively was that the jury was misled into finding the existence of an inflammatory aggravating factor that required a death sentence.

This Court has never discussed the controlling standard of prejudice for a claim regarding improper argument on the absence of remorse. The proper standard of assessing prejudice depends on the nature of the violation The constitutional errors asserted here require reversal unless, pursuant to *Chapman v. California, supra*, 386 U.S.

18, 23, the State must prove the error was not harmless beyond a reasonable doubt. (See also *Sochor v. Florida, supra,* 504 U.S. at p. 532; *Sanders v. Woodford, supra,* 373 F.3d at p. 1059-60.)

The state cannot meet that burden here. In fact, the injection of the irrelevant and misleading "aggravating factor" of alleged lack of remorse at the scene resulted in an arbitrary and capricious death sentence that was not based on the unique facts of this case, but instead on speculation. The prosecution's creation of the illusory aggravating factor of alleged lack of remorse at the scene biased the jury's decision in favor of death in violation of the Eighth Amendment. (*Stringer v. Black, supra,* 503 U.S. at pp. 235-236.) Since the jury was "told to weigh an invalid factor in its decision," this Court "may not assume it would have made no difference if the thumb had been removed from death's side of the scale" and must invalidate Mr. Tully's death sentence. (*Id.* at pp. 232, 236.)

Moreover, the prosecutor's argument about the absence of remorse, especially when read together with the rest of his inflammatory hyperbolic comments urging the jury to sentence Mr. Tully to death was prejudicial. The only statutory aggravators were the two minor jail incidents, admitted under factor (b), as evidence of violent criminal activity, and factor (a), the "circumstances of the crime." The circumstances of the crime, despite the prosecutor's inflammatory rhetoric, consisted of the murder of a woman by multiple stab wounds during a burglary and an assault with intent to commit rape. There were no "circumstances" demonstrating a lack of remorse. Mr. Tully had no prior felony convictions and no history of uncharged criminal violence. The argument that the jury

should weigh Mr. Tully's lack of remorse added yet "another aggravating factor" to the prosecution's side of the scale. There is thus a significant possibility that the argument affected the jury's sentencing decision and thus, Mr. Tully's death sentence must be reversed.

XXIII. MR. TULLY'S DEATH SENTENCE MUST BE REVERSED BECAUSE ALL ESSENTIAL SENTENCING FACTORS WERE NOT PROPERLY CHARGED AND WERE NOT FOUND BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

A. Introduction

Mr. Tully was sentenced to death under an unconstitutional death penalty scheme that failed to require that all essential sentencing factors be charged and found by a grand jury or magistrate, and found beyond a reasonable doubt by a unanimous jury. Specifically, the jury was not required to unanimously find beyond a reasonable doubt that any aggravating circumstance existed, that any unanimously proven aggravating circumstances substantially outweighed the mitigating circumstances or that death was the appropriate penalty. The death sentence in this case must be reversed because it offends the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as Article I of the California Constitution.

B. All Essential Sentencing Facts Must Be Pled in a Charging Document and Found Unanimously Beyond a Reasonable Doubt

The Supreme Court has held that a State may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence, i.e. essential facts, are pled in a charging document, submitted to the jury, and proved unanimously beyond a reasonable doubt. *Apprendi*, 530 U.S. at pp. 477-478:

> To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties . . . [t]rial by jury has been understood to require that 'the truth of every accusation, whether

> preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . .' (*Ibid,* citations omitted.)

"Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt. (*Ibid.*)

These constitutional protections extend to sentencing factors. Any "sentencing factor" (except for those involving prior convictions) that increases the penalty for a crime "must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at 490.) These requirements must apply to the factors found by a penalty phase jury in California. In a capital case, too much is at stake for the State to be able to dispense with unanimous jury findings – "the great bulwark of [] civil and political liberties" – or the traditional and demanding burden of beyond a reasonable doubt, which represents our society's "profound" beliefs about the manner in which "justice [should be] administered." *(Apprendi,* 530 U.S. at pp.477-478.)

The Supreme Court has held that *Apprendi* applied to sentencing determinations in capital cases. "Capital defendants [] are entitled to a jury determination of *any fact* on which the legislature conditions an *increase* in their maximum punishment." (*Ring v. Arizona, supra,* 536 U.S. at p. 589; emphasis added.)[122] Recent Supreme Court decisions

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[122] In a separate opinion in *Ring*, Justice Scalia – with Justice Thomas joining – explained the reason it was so important for the jury to properly find the facts essential to imposing capital punishment:

> [O]ur people's traditional belief in the right of trial by jury is in perilous decline. . . . We cannot preserve our veneration for the protection of the jury in criminal cases

(continued...)

continue to confirm and expand application of these constitutional principles.

In *Blakely v. Washington*, the Supreme Court reiterated that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Blakely*, *supra,* 542 U.S. 296, 124 S. Ct. at p. 2536.) The Court in *Blakely* confirmed "that an accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason. (*Id.* at p. 2536; citations and quotations omitted.) The Supreme Court also held that: "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Ibid.*) The Court explained:

> In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." (*Ibid.*)

More recently, in *United States v. Booker* (2005) 125 S. Ct. 738, 746, the Supreme Court held that the Sixth Amendment as construed in *Blakely* rendered portions of the Federal Sentencing Guidelines unconstitutional. The Supreme Court found that the right

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[122](...continued)
if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it. (*Id.* at p.612 (concurring opn. of J. Scalia); emphasis in original.)

to a jury finding beyond a reasonable doubt as to the "truth of every accusation" was "unquestionably applicable" to the Guidelines since this right had its "genesis in the ideals of our constitutional tradition." (*Id.* at p. 753; citations and quotations omitted.) The same may be said for determinations made by a penalty phase jury in California.

The Fifth, Sixth, and Fourteenth Amendments, and parallel provisions of the California Constitution require that the jury unanimously find beyond a reasonable doubt that aggravating circumstances exist, that the aggravating circumstances so substantially outweigh mitigating circumstances, and that the death penalty is appropriate. California does not require that the jury make any of these findings unanimously or beyond a reasonable doubt. Thus, the California death penalty system is unconstitutional.

The Supreme Court has held that the findings necessary to increase a sentence to the death penalty be alleged in an indictment or properly plead in charging documents and properly found by a grand jury or a court during a preliminary hearing. (*Jones v. United States, supra*, 526 U. S. at p. 243, fn. 6.). This charging is not required under California's death penalty scheme, rendering it unconstitutional. (*See e.g. State v. Fortin* (2004) 178 N.J. 540, 633; 843 A.2d 974, 1027 [holding that aggravating factors in a capital case must be submitted to a grand jury].) Here, none of the aggravating factors relied on by the prosecutor, other than the special circumstance,[123] were properly plead in charging documents or found by a grand jury or magistrate during a preliminary hearing.

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[123] The non-charged aggravating factors argued by the prosecutor included victim impact, lack of remorse, uncharged acts of force or violence and future dangerousness.

The Eighth Amendment requires that all findings made by the jury at the penalty phase be made unanimously and beyond a reasonable doubt. (See e.g. *Ring*, 536 U.S. at p.614 (conc. opn. of Breyer, J.) ["jury sentencing in capital cases is mandated by the Eighth Amendment"].) Since the Eighth Amendment requires heightened reliability at the penalty phase of a capital case (*see e.g. Sumner v. Shuman* (1987) 483 U.S. 66, 72; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *People v. Hernandez* (2003) 30 Cal. 4th 835, 878), a jury must make all essential findings unanimously and beyond a reasonable doubt. [124] Because California does not require such findings, its death penalty system fails.

C. The Jury Trial Right Applies to All Essential Findings Made by the Penalty Phase Jury

Pursuant to *Apprendi*, *Ring,* and *Blakely,* when a State bases an increased statutory punishment upon additional findings, the findings must be made by a unanimous jury beyond a reasonable doubt. Notwithstanding Supreme Court law holding this true, this Court has held that the penalty jury does not need to be instructed that any of its findings have to be made unanimously and beyond a reasonable doubt. (*See e.g., People v. Martinez* (2003) 31 Cal.4th 673, p. 700; *People v. Prieto, supra,* 30 Cal.4th at pp. 262-264; *People v. Snow, supra,* 30 Cal.4th at p. 126, fn. 32.) These opinions are based on a misapplication of federal constitutional requirements to California's penalty scheme and

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[124] The standard for the findings that a jury must make in deciding whether a person lives or dies should be higher than beyond a reasonable doubt. There should be no room for any doubt when a person's life is at stake. Since the California death penalty scheme fails these Eighth Amendment requirements, it is unconstitutional for these reasons as well.

thus must be reconsidered and overruled by this Court.

This Court has wrongly interpreted California's penalty scheme as a simple, two part process, neatly divided into an "eligibility" phase and a "selection" phase. This Court has said that after guilt has been established, the jury first decides whether any special circumstance exists. Second, if special circumstances are found, the case enters the penalty phase where "the jury *merely* weighs the factors enumerated in section 190.3, and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*People v. Prieto*, *supra,* 30 Cal.4th at p. 263 quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 972, emphasis added.)

This Court has held that "once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense." (*People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.) Because any finding of aggravating factors during the penalty phase does not increase the penalty for a crime beyond the prescribed "statutory maximum," this Court has found that neither *Apprendi* nor *Ring* impose new constitutional requirements, and/or "have any bearing on the penalty phase." (*People v. Prieto*, *supra,* 30 Cal.4th at p. 262-264.) This determination is based on a faulty analysis of California's death penalty scheme.

Under *Apprendi* and *Blakely*, any fact that increases the penalty for a crime must be submitted to a jury, and proved unanimously, beyond a reasonable doubt. "[T]he 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.) In analyzing California's scheme, this Court has improperly elevated form over effect.

California's death penalty scheme is not a two step process, as described by this Court, where *the only facts* that increase the penalty are determined prior to the penalty phase. Instead, a California penalty determination involves several distinct steps, all of which require essential fact findings, before the "statutory maximum" of death is a possible punishment. The jury trial and due process protections set forth in *Apprendi* and *Ring* - notice, indictment or information, unanimity and proof beyond a reasonable doubt – must be applied to all penalty findings in order to satisfy the Constitution.

This Court has improperly focused its *Ring* analyses solely on one statute, Cal. Section 190.2. This statute establishes the punishments for special circumstance murders in California. In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court found that section 190.2(a) establishes death as the statutory maximum penalty for first-degree murder with a special circumstance, and thus held that *Apprendi* only applies to the special circumstance finding. This is incorrect because California's death penalty scheme is set out in a series of statutes, not just in section 190.2. (See sections 190, 190.1, 190.2, 190.3, 190.4, and 190.5.) Section 190(a) provides: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." Relying solely on the statutory language, the "statutory maximum" penalty for *any* first

degree murder conviction is death. However, not all first-degree murders in California are punishable by death.

Section 190.2 establishes that additional facts, beyond mere conviction for first degree murder, must be found before the death penalty can be imposed. Pursuant to that section, a defendant convicted of first degree murder is subject to the death penalty or life in prison without parole only if one or more special circumstances are found true. However, not even all first-degree special circumstance murders are punishable by death in California. The death penalty scheme requires "further" additional findings before a jury can choose between life and death. Those findings are set forth in the list of sentencing factors set forth in section 190.3, the judicial interpretation of that section and the penalty phase jury instructions.

Despite this scheme, this Court has improperly held that the "eligibility" determination ends with the special circumstance finding, and that all findings made at the penalty phase merely go to the individualized "selection" determination of whether an "eligible" defendant should actually be sentenced to death. (*People v. Prieto*, 30 Cal. at pp. 262-263.) This interpretation fails to take into account that the death penalty becomes a possible maximum sentence only after a series of factual findings by the jury.

As acknowledged by this Court, the jury must find, unanimously and beyond a reasonable doubt, that a first degree murder was committed with a special circumstance. *Apprendi* and *Ring* apply to the special circumstance finding. (*People v. Anderson, supra*, 25 Cal.4th at p. 589.) After the special circumstance finding, which is a prerequisite to

the penalty phase, additional factual findings must be made before the death penalty can properly be imposed.

Under California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences *which is above and beyond the elements of the crime itself.*" (CALJIC 8.88, emphasis added.) Although the sentencing instructions direct the jury to consider "the circumstances of the crime and the existence of any special circumstances," the penalty jury must still determine whether the circumstances of the crime or the special circumstances already established actually amount to factors in aggravation.[125]

The jury might decide that the circumstances of the crime are not an aggravating factor, even if the defendant had been found guilty of special circumstance murder. In that case, the defendant would not be subject to a possible death sentence, but would have to be sentenced to life without parole. Thus, "at the penalty phase, the class of defendants eligible for death is again narrowed by the jury's application of a series of statutorily enumerated aggravating or mitigating factors." (*Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 924 (en banc).) The existence of one or more aggravating factors, beyond the fact of a special circumstance finding, is required before

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[125] While the Legislature could have mandated that the finding of a special circumstance automatically counts as an aggravating factor to be weighed by the jury in every case, it has not done so. Instead, the jury is instructed to take the existence of the special circumstance "into account," together with the specific circumstances of the crime itself, before it performs its task of weighing the aggravators against the mitigators.

the defendant will be exposed to a greater punishment than that authorized by the jury's guilty verdict and special circumstance finding.

In California, the only aggravating factors that may be considered by a penalty jury are narrowly defined by statute. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-773.) The prosecution may not present any evidence to establish any factor that is not expressly listed in the statute and the jury is instructed as to each of these factors. This Court has found *Blakely* does not apply to judicial fact finding made under California's determinate sentencing law because, unlike the Washington scheme at issue in *Blakely*, the Legislature had not limited by statute the aggravating factors that could be considered by a judge to impose an increased sentence. (*People v. Black* (2005) 35 Cal.4th 1238, 1264.) This Court found it significant that:

> The Legislature did not identify all of the particular facts that could justify the upper term. Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.

Applying this reasoning to the death penalty scheme, California's penalty scheme is deficient. Unlike the determinate sentencing law, in California's death penalty statutes the Legislature *has* identified all the particular aggravating factors that justify the death penalty. The findings made by a penalty phase jury are more like those made by a sentencing judge under Washington's unconstitutional determinate sentencing law than those made under California's law, and are entitled to the protections established in *Apprendi* and its progeny. Therefore, the existence of any aggravating factors must be

pled in charging documents, found by a grand jury or magistrate and determined by the jury unanimously and beyond a reasonable doubt.[126]

Although this Court recognized that the jury must make certain factual findings in order to consider certain circumstances as aggravating, it nonetheless labeled the entire penalty phase determination as "inherently moral and normative, not factual...." (*People v. Prieto*, *supra,* 30 Cal.4th at p. 264, quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Because of this classification, this Court has held that penalty factors are not "susceptible to a burden-of-proof quantification." (*People v. Fairbank*, *supra*; *see also People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) This Court's description of the jury's penalty findings as "moral" and "normative" rather than "factual" is not determinative of whether *Ring* applies. Instead, it is the effect of the jury's findings on the potential range of punishment that is determinative.

As Justice Scalia succinctly stated 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,* 536 U.S. at 610 (concurring opn. by J. Scalia) The findings made by the jury at the penalty phase certainly are essential to impose the death penalty. Thus – no matter what this Court chooses to call such findings – they must be found

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[126] The jury must also determine whether there are any mitigating factors. Unlike aggravating factors, however, the jury is not limited to a statutory list of defined factors, but is free to consider anything the defense offers as mitigation. (See section 190.3(k).)

beyond a reasonable doubt by a unanimous jury.

Numerous states allocate a specific burden of proof to the penalty determination.[127] As the experience of other states shows, the addition of a moral or normative aspect to the fact-finding process does not preclude application of a burden of proof. Indeed, included in the statutory aggravating factors in Arizona are several based more on moral or normative considerations than "hard facts," yet the Supreme Court in

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[127] Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution. Three additional states have related provisions.(See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (C) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4(C) (Michie 1990); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i) (1992).)

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

Only California and four other states, Florida, Missouri, Montana, and New Hampshire, do not have similar statutory provisions.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment. (See Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.) A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.)

Ring still found they had to be established beyond a reasonable doubt. (See e.g. Ariz.Rev.Stat.Ann. § 13-703(F)(6) [offense committed in an especially heinous, cruel or depraved manner]; Ariz.Rev.Stat.Ann. § 13-703(G)(1) [defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired]; Ariz.Rev.Stat.Ann. § 13-703(G)(2) [defendant under unusual and substantial duress].) If findings of this nature must be found "beyond a reasonable doubt," despite their normative nature, then so must the aggravating factors listed in California's statute.

After making the distinctly factual findings as to the existence of aggravating factors and mitigating factors, the jury is instructed to weigh those factors. This weighing is another fact-finding task that must be completed before a defendant is subject to the death penalty. If, and only if, the aggravating factors "substantially outweigh" the mitigating factors, may the jury consider whether to impose the death penalty. (CALJIC 8.88.) If the jury finds that the aggravating factors do not substantially outweigh the mitigating factors, it does not ever reach the last step, but must impose a life sentence. Conversely, if the jury finds that the aggravating factors substantially outweigh the mitigators, the defendant is then, and only then, "eligible" for the death penalty.

If the aggravating factors substantially outweigh the mitigating factors, the jury must then decide whether death is "warranted" or "appropriate." As this Court has stated: "'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." (*People v. Brown* (1985) 40 Cal.3d 512, 544, rev'd. on other grounds in *California v. Brown* (1987) 479 U.S. 538.) The finding that the aggravating factors substantially outweigh the mitigating factors subjects a defendant to a higher penalty, because it is only after this finding is made that the jury decides whether death is warranted or appropriate.[128]

Thus, whether the aggravating factors "substantially outweigh" the mitigating factors also must be proven unanimously beyond a reasonable doubt. *Ring* describes a substantive element of a capital offense as one which makes an increase in authorized punishment contingent on a finding of fact. In California, it is the finding that the aggravators substantially outweigh the mitigators that ultimately authorizes the jury to move to the final step, whether death is an appropriate penalty.

Although this Court has found that the weighing task is not purely mechanical, it still requires a factual determination. This is evidenced by the legislatively mandated automatic review by the trial court of the jury's weighing decision. Section 190.4(e) requires the trial court to " make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (*Ibid.*) The Legislature could not have considered the weighing of aggravators against mitigators as an "inherently" moral or

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

normative process if it provided for judicial review of that process to make sure it is not *contrary to the evidence* presented.

The Legislature established the death penalty as an enhanced penalty to be imposed only upon the establishment of additional facts, including the ultimate factual finding that aggravating factors outweigh the mitigating factors, factual findings that are reviewable, as a matter of law, to determine if they comport with the evidence presented. The Legislature's repeated use of the word "find" shows the determination of observable facts. (See *Webster's Third New International Dictionary* (1961) p. 852 [defining "finding" as "the result of a judicial or quasi-judicial examination or inquiry especially into matters of fact as embodied in the verdict of a jury or decision of a court, referee, or administrative body."])

Other states have concluded that *Ring* applies to the weighing of aggravating factors against mitigating factors. The Colorado Supreme Court has concluded that the "eligibility" stage continues through the first three steps of its sentencing process, including the weighing of the mitigators against the aggravators. (*Woldt v. People* (Colo. 2003) 64 P.3d 256.) Only the fourth, and final step, determining whether under all the circumstances, death should be imposed, constitutes the "selection" stage. The Colorado Supreme Court found the weighing stage to be a fact-finding stage that is required to be determined by a jury beyond a reasonable doubt. (*Id.,* at p. 265.) There are no material differences between the third and fourth stages of a Colorado penalty determination and the weighing and imposition stages of a California penalty determination. Similarly, the

Missouri Supreme Court has found that the weighing stage goes to "eligibility" for the death penalty and results in factual prerequisites to imposition of a death sentence. (*State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 261.)

California's death penalty scheme requires additional factual findings above and beyond those made during the guilt phase before the death penalty is an available punishment. Because these additional factual decisions are required for the increased punishment of death, they constitute findings that must be proved beyond a reasonable doubt to an unanimous jury. Before a death verdict could be returned, the jury was required to unanimously find that any aggravating factors upon which it relied were true beyond a reasonable doubt, that the aggravating factor or factors outweighed the mitigating factors beyond a reasonable doubt and that death is the appropriate penalty beyond a reasonable doubt.

D. Mr. Tully's Death Sentence Was Not Premised on Unanimous Jury Findings

Prior to *Apprendi*, this Court had "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, Mr. Tully's jury was not required to agree unanimously on any particular aggravating factor. In light of *Apprendi* and its progeny, this Court's prior decisions on penalty phase unanimity must be reconsidered.

Under *Ring*, the finding of one or more aggravating factors and the finding that these factors outweigh mitigating factors, are critical elements of California's sentencing scheme. These factual findings are prerequisites to the ultimate decision made by the jury, which is whether the death penalty is appropriate in the case before it. In *Ring,* the Supreme Court held that the factual findings that subject a defendant to the death penalty must be made by a jury, and cannot be attended with fewer procedural protections than decisions of much less consequence. Thus, these findings must not only be made beyond a reasonable doubt, but also by a unanimous jury.

In addition to running afoul of *Ring*, the failure to require jury unanimity on the factual findings that lead to the jury's sentencing verdict violates principles of equal protection as guaranteed by the Fourteenth Amendment. An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (*See*, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants. (*Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less. To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) violates the principles of fundamental fairness and equal protection.

The California Constitution requires juror unanimity in all criminal cases. (Cal.

Const. Art. 1, §16; *People v. Wheeler, supra*, 22 Cal.3d at p. 265.) All findings that must be made by a jury under the Sixth Amendment, must be made unanimously pursuant to the California Constitution. This, in turn, means that a capital defendant's right to unanimous jury decisions operates as a "state created liberty interest" protected by the Due Process Clause of the Fourteenth Amendment. (*Hicks v. Oklahoma*, supra, 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295.) This interest cannot be taken away without the appropriate level of scrutiny required by the federal Constitution. There is no justifiable basis under *any* level of constitutional scrutiny to provide capital defendants with less safeguards than non-capital defendants. The failure to require unanimity as to sentencing factors in a capital case thus violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In this case, the jurors were not required to agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty, which would have lost by a 1-11 vote, had it been put to the jury as a reason for the death penalty.

In an analogous situation, the Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) In light of the "acute need for reliability in capital sentencing proceedings" and for heightened reliability, *Monge v. California, supra,* 524

U.S. at p. 732; accord *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, the Eighth and Fourteenth Amendments demand unanimity in the essential findings of a capital jury. There should be no reduction of the non-capital procedural safeguards at the penalty phase of a capital trial.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439.) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-16, the Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin,

> has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means re at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.* (*Richardson*, *supra*, 526 U.S. at p. 819 (emphasis added).)

These reasons are crucial when the issue is life or death. Where jurors are charged with the most serious task with which any jury is ever confronted, unanimity as to the existence of particular aggravating factors supporting that decision, and as to the fact that such factors outweigh the mitigating factors, is required.

E. The Essential Sentencing Facts were Not Pled in Charging Documents nor found by a Magistrate at the Preliminary Hearing

Mr. Tully was convicted of murder and assault with intent to commit rape. The jury also found the burglary-murder special circumstance true. The prosecutor argued two statutory aggravating factors at Mr. Tully's penalty phase: 1) the facts and circumstances of the crime; and 2) that Mr. Tully was involved in two minor shoving incidents with fellow inmates at the county jail. In addition to these statutory factors, the prosecutor argued the crime was aggravated based on victim impact evidence, Mr. Tully's alleged lack of remorse and his alleged future dangerousness. Other than the special circumstance, none of the statutory or non-statutory aggravators were pled in a charging document and found by a grand jury or the magistrate at a preliminary hearing.

While the Fifth Amendment's indictment and grand jury requirements for the

federal government do not apply to the states, the due process principles incorporated in the Fifth Amendment are binding on the states through the Fourteenth Amendment's Due Process Clause. (*Hurtado v. California* (1884) 110 U.S. 516.) The principles underlying the Indictment Clause of the Fifth Amendment are two-fold: the charging requirement provides notice to the defendant and the grand jury requirement interposes the public into the charging decision such that a defendant is not subject to jeopardy for a crime alleged only by the prosecution. (*United States v. Cotton* (2002), 535 U.S. 625, 634; *Stirone v. United States* (1960) 361 U.S. 212, 217 (finding "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error").) In California, these due process guarantees are to be met via the preliminary hearing and information process. (*Hurtado v. California, supra*, 110 U.S. 516.)

Because none of the aggravating factors used against Mr .Tully were presented to a magistrate at the preliminary hearing or found to have sufficient evidentiary support to bring him to trial, Mr. Tully's due process rights were not met. Similarly, because the non-statutory aggravators were not pled in a charging document, Mr. Tully was deprived his constitutionally mandated right to notice. These failures render Mr. Tully's death sentence unconstitutional.

F. Mr. Tully's Death Sentence Must be Reversed

Mr. Tully was convicted of murder and assault with intent to commit rape. The jury also found the burglary-murder special circumstance true. At the penalty phase, the prosecutor relied on the facts and circumstances of the crime and Mr. Tully's

unadjudiciated misdeanor batteries as aggravating factors. Additional aggravators argued under "the circumstances of the crime" were identified by the prosecutor as victim impact evidence, Mr. Tully's alleged lack of remorse and future dangerousness.

The prosecutor improperly insisted that a rape had occurred, despite the fact he decided not to bring a rape charge, and that the evidence had been deemed insufficient by the Municipal Court to hold Mr. Tully over on this charge. (CT 1005-1008.) Mr. Tully's jury was not instructed that it had to find that a rape occurred, nor the existence of victim impact aggravation, remorseless or future dangerousness, unanimously and beyond a reasonable doubt. With regard to the jail incidents, the jury was told the elements of battery had to be established beyond a reasonable doubt, but were also expressly told they did not have to unanimously agree whether those elements had been established. The prosecutor even emphasized in his penalty phase arguments that he did not have the burden of unanimously proving anything other than the two alleged misdemeanor batteries beyond a reasonable doubt. (RT 3646, 3797.)

The jury was not instructed that each aggravating factor, other than factor(b), needed to be established beyond a reasonable doubt. It was not instructed that the aggravating factors had to outweigh the mitigating factors beyond a reasonable doubt. The jury was not told that it needed to unanimously agree on whether there were any aggravating factors at all. The jury was not told it needed to unanimously agree on whether any particular aggravating factor had been established, nor was the jury told it needed to unanimously agree on whether the specified aggravating factors outweighed the

mitigating factors.

The failure to require the jury to return unanimous, beyond a reasonable doubt findings on the aggravating factors was particularly prejudicial. Due to the prosecutor's decision not to charge Mr. Tully with rape at the guilt phase, he was essentially able to argue the rape was an uncharged act of violence, an additional aggravating factor, without ever meeting the burden of proof required to sustain an actual rape conviction or a statutory aggravating factor under section 190.3 (b).

Prosecutorial misconduct increased the harm from these constitutional deficiencies. During argument, the prosecutor misstated the law under section 190.3 (b), and failed to explain that to be properly considered under factor(b) the uncharged acts of violence had to be separate from those occurring during the capital offense. (RT 3644, 3645, 3662.) The penalty phase arguments shows how important this uncharged, unproven, and wholly speculative aggravating factor was to the prosecutor's plea for death.

The prosecutor repeatedly insisted a rape had occurred, and described "the actual rape" over and over in lurid, yet speculative, detail. The chart on which the prosecutor listed the circumstances that aggravated the crime contained no reference to theft whatsoever, but several unsupported facts regarding the "actual rape." (Court Exhibit 5.) The alternative target felony underlying the burglary murder special circumstance, a minor theft, was completely omitted in the prosecutor's zeal and desire to send Mr. Tully to his death. The jury should have been required to find unanimously, and beyond a

reasonable doubt the uncharged aggravating factor of rape.

Before a death verdict could be returned, the jury was required to find unanimously that: (1) any aggravating factors upon which it relied were true beyond a reasonable doubt; and (2) the aggravating factor or factors outweighed the mitigating factors beyond a reasonable doubt. Without the requirements of unanimous findings beyond a reasonable doubt, there is no way to ascertain the reliability of the jury's verdict. It is likely that the jury sentenced Mr. Tully to death based on facts they never should have considered at all in the weighing process, the aggravating factor of an uncharged and unproven rape. Mr. Tully's death sentence must be reversed.

G. Conclusion

The Supreme Court cases – from *Jones* to *Apprendi* to *Ring* to *Blakely* to *Booker* – undermine the notion put forth by this Court that the penalty phase jury in California need not make its crucial findings unanimously and beyond a reasonable doubt. The right to jury trial, cherished in our constitutional system must be protected, even if inconvenient to the State. As the Supreme Court stated:

> We recognize [] that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial – a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly. As Blackstone put it:
>
> "However *convenient* these [new methods of trial] may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty

> in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns." 4 Commentaries on the Laws of England 343-344 (1769). (*Booker,* 125 S. Ct. at pp.755-756; other citations omitted; emphasis in original.)

In light of *Jones*, *Apprendi*, *Ring*, *Blakely*, and *Booker*, the California death penalty scheme is unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as Article I of the California Constitution. Since Mr. Tully was sentenced to death under this unconstitutional death penalty scheme, his death sentence cannot stand.

XXIV. THE CUMULATIVE EFFECT OF ERRORS IN THE PENALTY PHASE REQUIRES REVERSAL OF MR. TULLY'S DEATH SENTENCE

The cumulative effect of the numerous errors that occurred during the penalty phase prejudiced Mr. Tully and rendered his death sentence unconstitutional. Although this Court may find that no single alleged error may warrant reversal of his sentence, the cumulative effect of the errors deprived here Mr. Tully of his rights to due process, to a fair trial, and to a reliable sentencing determination.

The prejudicial impact of multiple errors may result in an unfair and unconstitutional trial. (*Taylor v. Kentucky*, *supra*, 436 U.S. 478, 487 & n. 15.) "'[E]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'" (*Alcala v. Woodford*, *supra,* 334 F.3d at p. 883; *Killian v. Poole* , *supra*, 282 F.3d 1204.) This Court must consider the prejudicial impact of the errors together, rather than individually. Viewed together, the errors in this case undermine all confidence in the death sentence.

Mr. Tully should not have been charged with the death penalty. He had no juvenile criminal adjudications, no prior felony convictions and no prior history of criminal violence. As a result of trial court error and prosecutorial misconduct, what was a non-aggravated felony-murder was transformed into an especially "callous" murder and Mr. Tully was painted as "filth" and less than an animal. The jury was allowed to hear impermissible victim impact testimony elicited by an unscrupulous prosecutor who went

unchecked by the trial court. The defense was forced interrupt the testimony of the victim impact witnesses time and time again in order to curtail the prosecutor, thus setting themselves up for the prosecutor's later accusations that "*through his attorneys*, Mr. Tully] wants to take away from Ms. Olsson, her status as a victim in this case. . . ." (RT 3635, emphasis added.)

The trial court impermissibly allowed Mr. Tully's two jail scuffles to be introduced as prior unadjudicated acts of "violence and the prosecutor to argue non-statutory, false and inflammatory "aggravating" factors, including future dangerousness and the lack of remorse. Mr. Tully had in fact, expressed remorse, yet was prohibited from expressing it to the jury. Nonetheless, the prosecutor told the jury to ignore all defense mitigation because remorse was "a condition precedent" to mitigation.

The prosecutor violated nearly every rule controlling and limiting the scope of opening and closing arguments at the penalty phase. During his argument he wove an elaborate story of sadism and sexual violence that had little to do with the provable facts of the crime. His entire penalty presentation was framed and reinforced by his misconduct.

In addition to the introduction of impermissible aggravation through evidence and argument, the penalty phase determination was also unconstitutionally influenced by pervasive arguments that the Bible required Mr. Tully's execution.

The constitutional errors continued during deliberations. The jury was confused by the instructions and inquired into the "legal meaning" of life without parole. Rather than

answer this question, the trial court simply referred the jurors back to the instructions.

Under these circumstances, this Court can have no confidence in the reliability of the death verdict. (*Killian v. Poole*, *supra,* 282 F.3d at p.1211.) The errors singly and cumulatively violated Mr. Tully's rights to due process, equal protection, a fair and impartial jury, to a fair trial, to present a defense, and to a fair and reliable penalty verdict, in violation not only of his rights under state law and the California Constitution but also under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Mr. Tully's death sentence must be reversed.

XXV. THE TRIAL COURT FAILED IN PERFORMING ITS DUTIES IN REVIEWING THE JURY'S DEATH VERDICT

A. Introduction

California's death penalty law requires the trial court to exercise its independent judgment in making a determination whether the jury's death verdict was contrary to law or the evidence. (Section 190.4(e).) If contrary to the law or facts, the trial court must modify the verdict.

This independent review of a jury's death verdict by the trial court is a critical stage in the California death penalty scheme. It provides a crucial check necessary to prevent arbitrary and capricious death sentences, condemned by the Supreme Court as unconstitutionally "cruel and unusual"in *Furman v. Georgia* (1972) 408 U.S. 238 and its progeny. The Supreme Court has found California's independent review requirement an important safeguard in the California death penalty scheme. (See *Pulley v. Harris* (1984) 465 U.S. 37, 52-54.) As this Court commented, both "this court and the United States Supreme Court have cited the provisions of section 190.4, subdivision (e), as a [] safeguard against arbitrary and capricious imposition of the death penalty in California." (*People v. Lewis* (2004) 33 Cal. 4th 214, 226 citing *People v. Frierson, supra*, 25 Cal.3d at p.179 and *Pulley v. Harris*, *supra*, 465 U.S. at pp.51-53.)

Section 190.4(e) states that, after a jury returns a death verdict, "the defendant shall be deemed to have made an application for modification of such verdict or finding." In ruling on this application, the trial court is required to "review the evidence [and]

consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3." (*Ibid.*) Based on this review, the trial court "shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (*Ibid.*) Section 190.4(e) "require[s] the judge to make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and applicable law." (*People v. Burgener* (2003) 29 Cal. 4th 833, 891 citing *People v. Rodriguez* (1986) 42 Cal.3d 730.)

This Court has held that "in determining whether in his or her independent judgment the weight of the evidence supported the verdict, the judge [is] required to assess the credibility of the witnesses, determine the probative force of the testimony, and weigh the evidence." (*People v. Rodriguez, supra,* 42 Cal. 3d at p.793; see also *People v. Jennings* (1988) 46 Cal. 3d 963, 995.) "[T]he evidence that the court is to review is only that which was before the jury." (*People v. Jennings, supra,* 46 Cal. 3d at p.995.)

The statute specifically requires that the judge "state on the record the reasons for his findings," and that the trial court "set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes." (Section 190.4(e).) This is necessary to ensure a fair and open process where the reliability and fairness of the death verdict is assessed on the record by the trial court and that the trial court's assessment is supported by adequate and appropriate reasons. This Court has explained:

We have made clear the importance of the statutory requirement that the trial

> judge state reasons for his grant or denial of motion under section 190.4(e). Such a statement facilitates "thoughtful and effective appellate review," and it focuses the trial judge himself on a critical analysis of the penalty evidence. (*People v. Brown* (1988) 45 Cal. 3d 1247, 1263 *quoting People v. Frierson*, *supra*, 25 Cal.3d at p.179.)

In *Frierson* this Court found that independent review by the trial court, accompanied by the requisite written findings, is an "adequate alternative safeguard [to written jury findings] for assuring careful appellate review." (*People v. Frierson, supra*, 25 Cal.3d at p. 179.) Because the trial court must justify the imposition of death with specified reasons that focus "upon the circumstances present in each particular case," this Court found the California death penalty scheme constitutional. (*Ibid.*) The Supreme Court also found the section 190.4 independent review process in California could substitute for the constitutionally required comparative proportionality review mandated by *Furman v. Georgia.* (*Pulley v. Harris, supra,* 465 U.S. at p. 53.)

This Court has specifically stated that section 190.4(e) "is a unique and integral part" of the California death penalty scheme. (*People v. Lewis, supra*, 33 Cal. 4th at p. 226.) The statute makes certain that the trial court perform an independent and thorough review of the circumstances of the case so as to assure the appropriateness of the jury's death verdict. It requires the trial court to sufficiently state its reasons on the record so that on appeal this Court can engage in the required review to guarantee that the death sentence is fair and reliable. Both this Court and the Supreme Court have held that the requirements of section 190.4(e) are critical to the constitutionality of the death penalty process in California. (*Id.* at p. 231.)

The key effect of the statute is that the trial court is required to act as a constitutional safeguard, charged with the duty of assuring reliability at the trial level and providing a record for adequate appellate review. Without this crucial safety valve, there is no way to guarantee a death sentence is appropriate, reliable, and fair, as opposed to arbitrary and capricious. Any error by a trial court in performing its duties under the statute is serious constitutional error.

In reviewing Mr. Tully's death sentence, the trial court failed to exercise its responsibilities under section 190.4(e). The statutory and constitutional errors detailed below, individually and cumulatively, prejudiced Mr. Tully and, as a result, the death sentence must now be vacated and reversed. (See e.g. *People v. Brown*, *supra*, 45 Cal.3d at p.1264 [holding that this Court "must reverse the penalty judgment on the basis of [] section 190.4(e) error"]; *People v. Sheldon* (1989) 48 Cal. 3d 935, 963 [rejecting State's contention that harmless error review should be applied when trial court failed to adequately state its reasons for denying application for modification of jury's death verdict under section 190.4(e)].)

B. The Trial Court Failed to Properly Perform Its Duties in Stating its Findings When Denying the Application to Modify the Death Verdict

At the time the court heard Mr. Tully's application to modify the jury's death verdict, defense counsel was "briefly" heard. (RT 3906-3907.) The prosecutor submitted the matter without argument. (RT 3907.) The trial court stated that it had reviewed the evidence presented and also "reviewed its own personal notes relating to the evidence

received as to all phases of the case." (RT 3911)

The trial court made several findings at the hearing:

> [T]he jury's assessment that the circumstances in aggravation outweigh the circumstances in mitigation is supported by the weight of the evidence.[129] (RT 3910.)
>
> [T]he court agrees with the implicit findings of the jury that the witnesses for the people were credible and believable. (RT 3911.)
>
> [T]he court is satisfied beyond a reasonable doubt that the defendant [] is guilty of murder in the first degree and that the special circumstance alleged is true beyond a reasonable doubt. (RT 3911-3912.)
>
> [T]he court independently finds that the circumstances surrounding the first degree murder [] were vicious and pitiless. The defendant brutally stabbed the victim numerous times and exhibited a high degree of cruelty and callousness. (RT 3912.)
>
> The court has [] examined the evidence offered in the penalty phase by the defendant and independently finds that there were no circumstances which extenuated the gravity of his crimes whether or not they be a legal excuse. (RT 3912.)
>
> The court has [] considered the evidence from the members of the defendant's family who have testified about his family history activities and background offered in the penalty phase, and the court further independently finds that none of the evidence offered by the defendant could in any way be considered a moral justification or extenuation for his conduct." (RT 3912-3913)
>
> The court further finds in evaluating all the evidence in the penalty phase that there are no factors in mitigation which will extenuate and mitigate the gravity of the crimes committed. (RT 3913.)
>
> The court further finds that at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his

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[129] The trial court repeated this general "finding" several times using varying language. (See RT 3911-3914.)

> conduct to the requirements of the law, was not impaired as a result of mental disease or defect or the effects of intoxication. (RT 3913.)
>
> The court further finds the offenses were not committed while the defendant was under the influence of extreme mental or emotional disturbance. (RT 3913.)
>
> The court has also taken into consideration the age of the defendant at the time of the crime and finds that this is not a mitigating factor. (RT 3913.)
>
> The court has further taken into consideration and independently reviewed any other circumstances which could extenuate the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's background character or record that the defendant offered as a basis for a sentence less than death, whether or not related to the offenses for which he was on trial, and finds that there are none which extenuate the gravity of the crimes or mitigates these offenses. (RT 3913-3914.)

These brief and general blanket statements were insufficient to satisfy the requirements of section 190.4(e), as well as the state and federal Constitutions.[130]

Initially, the trial court failed to make written findings. This Court has explained that, "the judge must specify in writing the findings upon which the death sentence is based." (*People v. Frierson*, *supra*, 25 Cal.3d at p.177, 179.) The failure of the trial court to make specific written findings under the statute precludes adequate appellate review and violates the Sixth, Eighth, and Fourteenth Amendments, as well as Article 1 of the California Constitution.

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[130] The trial court made oral findings on the record during the hearing and then incorporated these oral findings verbatim by attaching the Reporter's Transcript of its oral statements to the Clerk's minutes. (RT 3914; CT 2147 [the minutes]; CT 2155-2172 [attached transcript].) This argument discusses the trial court's oral statements as reported in the Reporter's Transcript.

Further, the trial court's reasons for its findings were never stated on the record as required by section 190.4(e). (*See e.g. People v. Sheldon*, *supra*, 48 Cal. 3d at p. 962. The trial court's findings were vague generalizations not sufficient for an independent review. Several standards were stated and analyzed erroneously, and relevant standards were omitted entirely.

The trial court failed to mention any specific evidence that was presented to the jury. It did not assess the credibility of the witnesses, determine the probative force of the testimony, and weigh the evidence, as the statute requires. (*People v. Rodriguez*, *supra*, 42 Cal. 3d at p. 793; *People v. Jennings, supra*, 46 Cal. 3d at p. 995.) The trial court's broad findings were often contrary to the undisputed evidence presented at trial.

The record here does not meet the statutory requirements for a trial court's findings under section 190.4. First, the trial court failed to make proper and adequate findings as to aggravation. Second, the trial court failed to make proper and adequate findings as to mitigation. Third, the trial court failed to properly and adequately weigh the aggravation and mitigation in making its "ultimate finding." This record fails to demonstrate that the trial court properly engaged in an independent review of the jury's verdict, and fails to supply this Court with the particular circumstances of this case needed for thoughtful and effective appellate review. As this Court has stated under similar circumstances:

> The trial court's statement of reasons here was [] deficient. It was insufficiently specific [] to indicate which aggravating or mitigating circumstances the court considered or the relative importance given them by the court. Thus, the trial court's generalized statement not only failed to serve the statutory purpose of causing the judge to consider with particularity each

> of the circumstances, aggravating and mitigating, but also leaves the reviewing court unable to determine that he did.
>
> Although the court's statements indicate its familiarity with the issues raised during trial, the court failed to specify "[sufficiently] 'to assure thoughtful and effective appellate review . . .'" the reasons why it concluded the aggravating circumstances exceeded the mitigating circumstances. (*People v. Bonillas* (1989) 48 Cal. 3d 757, 801 quoting *People v. Rodriguez, supra*, 42 Cal.3d 730, 794.)

On the basis of this record, it cannot be concluded that the trial court performed its constitutional duty. Reversal of the death sentence is required under the statute, as well as the state and federal Constitutions.

1. The Trial Court's Finding as to Aggravation Was Deficient

Here, the trial court's sole finding as to aggravation read as follows:

> [T]he circumstances surrounding the first degree murder [] were vicious and pitiless. The defendant brutally stabbed the victim numerous times and exhibited a high degree of cruelty and callousness. (RT 3912.)

Apparently, this general statement was meant to serve as the trial court's finding under factor 190.3(a), "the circumstances of the crime." However, the trial court failed to state any specific reasons why the particular circumstances of this case were aggravating, or what evidence supported this finding. This general statement was so vague that it does not provide any basis for a finding of evidence in aggravation.

Beyond the vague generalizations that the murder was "vicious and pitiless," done "brutally," and exhibited "cruelty and callousness," no specific reasons were given for this putative finding of aggravation by the trial court. By definition, all first-degree murders are vicious, pitiless, brutal, cruel, and callous. This Court has noted that there is

not "a conscienceless or pitiless first degree murder" in existence. (*People v. Superior Court (Engert)* (1982) 31 Cal. 3d 797, 803.)

This Court has held that a special circumstance involving the phrase "especially heinous, atrocious or cruel manifesting exceptional depravity mean[ing] a conscienceless, or pitiless crime which is unnecessarily torturous to the victim" was "so vague that men of common intelligence must guess at its meaning." (*People v. Superior Court (Engert), supra,* 31 Cal. 3d at pp.801, 803.) This Court specifically held that pejorative words such as "cruel" . . ."have no directive content." (*Id.* at p.802.) In stating its finding of aggravation here, the trial court found that the crime was "vicious," "pitiless," "brutal[]," "cruel[]," and "callous[]," language nearly identical to the vague wording that this Court held was unconstitutionally vague and violative of due process. (*Ibid.*)

As a result, this Court must guess at the meaning of the trial court's vague words, rendering "thoughtful and effective review" impossible. This guesswork fails to guarantee the fairness and reliability of death sentences as required under the Eighth and Fourteenth Amendments. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429 ["There is nothing in these few words, [outrageously or wantonly vile, horrible and inhuman] standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"]; *Maynard v. Cartwright* (1988) 486 U.S. 356; *Shell v. Mississippi* (1990) 498 U.S. 1.)

The trial court's vague words here generally described all first-degree murders and

provide no reason why the particular facts of this case could be deemed aggravating or why death was an appropriate sentence. The "circumstances of the crime" sentencing factor (§190.3(a)) can only include those circumstances that are "unique" to the case at issue. (*People v. Lenart* (2004) 32 Cal. 4th 1107, 1132.) The trial court here made no findings as why any unique circumstance of the crime were aggravating.

The trial court's finding as to aggravation consists solely of descriptions that run contrary to the definition of an aggravator. An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC 8.88) The trial court failed to state any reasons why the circumstances of the crime here increased the guilt or enormity of this first-degree murder case beyond a typical first-degree murder case.

The trial court's statement as to aggravation was similar to the trial court's broad and vague announcement in *People v. Bonillas*, *supra*, 48 Cal. 3d at 801: "I think the aggravating circumstances were there." As in *Bonillas*, the trial court's statement here was "insufficiently specific [] to indicate which aggravating [] circumstances the court considered or the relative importance given them by the court." (*Ibid.*) The trial court's generalized statement "not only failed to serve the statutory purpose of causing the judge to consider [the aggravating circumstances] with particularity," but also leaves this Court "unable to determine that he did," as well as unable to provide "thoughtful and effective appellate review" at this time. (*Ibid*; citations and quotations omitted)

2. The Trial Court's Findings as to Mitigation Were Deficient

As it did with aggravation, the trial court made faulty generalized statements regarding mitigation. These findings failed to cause "the judge to consider with particularity each of the circumstances" in mitigation. (*People v. Bonillas, supra,* 48 Cal. 3d at p.801) These inadequate findings leave this Court unable to determine that the trial court properly performed its statutory duties and are insufficient to assure the constitutionally required "thoughtful and effective appellate review." (*Ibid.*)

The trial court failed to properly address and consider the mitigating evidence presented by the defense. Numerous other important and undisputed mitigating factors were ignored by the trial court. Meanwhile, the relevant mitigating factors that were mentioned were reviewed under incorrect legal standards. The record as to the trial court's mitigation findings was thus improper and inadequate.

This Court has specifically stated that "the court must *consider* all proffered mitigating evidence" during a 190.4 hearing. (*People v. Steele* (2002) 27 Cal. 4th 1230, 1267-1268; emphasis in original; *People v. Jennings, supra*, 46 Cal. 3d at p. 993.) The trial court's mitigation findings here were as vague and overly broad as its finding on aggravation. For example, the trial court stated: "The Court has also taken into consideration the age of the defendant at the time of the crime and finds that it is not a mitigating factor." (RT 3913.) The trial court failed to give any reason to support its stated finding that Mr. Tully's age was not mitigating in this particular case. In fact, the trial court never mentioned Mr. Tully's age.

Similarly, as to sentencing factor 190.3(h), the trial court simply announced: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of the law, was not impaired as a result of mental disease or defect or the effects of intoxication." (RT 3913.) No reason was given for this finding. The trial court stated its other broad findings as to mitigation evidence as follows:

1. There were no circumstances which extenuated the gravity of his crimes whether or not they be a legal excuse. (RT 3912.)

2. There are no factors in mitigation which will extenuate and mitigate the gravity of the crimes committed. (RT 3913.)

3. The court has further taken into consideration and independently reviewed any other circumstance which could extenuate the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's background character or record that the defendant offered as a basis for a sentence less than death, whether or not related to the offenses for which he was on trial, and finds that there are none which extenuate the gravity of the crimes or mitigates these offenses. (RT 3913 - 3914.)

4. The court has further considered the evidence from the members of the defendant's family who have testified about his family history activities and background offered in the penalty phase, and the court further independently finds that none of the evidence offered by the defendant could in any way be considered a moral justification or extenuation for his conduct. (RT 3912 -3913.)

The first finding was improper because it applied a standard that this Court found to be too narrow. (*People v. Easley, supra*, 34 Cal.3d 858.) The language of the second finding echoed the improper pre-*Easley* standard that mitigation evidence relate to the crime itself. The third finding began with the proper post-*Easley* 190.3 (k) language, CALJIC 8.85; CT 2043, however, it concluded by relying on the improper pre-*Easley*

"extenuating the crime" language. The fourth finding recognized the family background evidence, but assessed its weight under an irrelevant and inappropriate sentencing factor – whether the defendant reasonably believed there was a moral justification or extenuation for the crime. (Section 190.3(f).)[131]

Here, the trial court's use of erroneous standards in its mitigation findings renders it impossible for this Court to conclude that the trial court properly considered the mitigating evidence presented in this case. Further, the trial court provided no reasons for these vague and generalized findings. Besides the passing reference, applying an inapplicable standard, of "evidence from the members of [Mr. Tully's] family," no mitigation evidence was analyzed by the trial court. (See *People v. Brown, supra,* 45 Cal. 3d at p. 1263 [explaining that section 190.4(e) requires a "critical analysis of the penalty evidence" by the trial court].) These findings failed to serve the statutory purpose and are insufficient to provide for thoughtful and effective appellate review.

Moreover, the trial court performed its review of 190.3(k) evidence under the incorrect pre-*Easley* standard. As this Court has held, the trial court has the "responsibility to consider all evidence offered in mitigation, not simply that related to the circumstances of the crime." (*People v. Jennings, supra*, 46 Cal. 3d at p. 993) The trial

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[131] Factor 190.3 (f) was irrelevant and the trial court should not have addressed it here. (*People v. Crandell* (1988) 46 Cal.3d 833, 884 ["Because defendant offered no evidence of moral justification and did not rely in argument on the factor of moral justification (§ 190.3, factor (f)), this factor was irrelevant to penalty determination. As we have noted, it would be 'rare indeed' to find mitigating evidence in a capital case which could justify or excuse the defendant's conduct."].)

court's use of the pre-*Easley* standard limited its consideration of mitigation to only that which was related to the crime. It thus failed in its duties under the statute to make proper and thorough findings as to mitigation and to act as a constitutional safeguard assuring the fairness and reliability of the death sentence. It also failed as a sentencer to properly consider mitigation evidence as required under the Eighth and Fourteenth Amendments. (See e.g. *Lockett v. Ohio, supra,* 438 U.S. at p.604; *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp.113-115; *Penry v. Lynaugh, supra,* 492 U.S. at p.319.).

Alternatively, assuming that the trial court did *not* commit error under *Easley* by using an improper standard, its findings are more flawed, because it would mean that the trial court found that *no mitigating evidence existed* in this case. This finding would be contrary to the evidence because mitigating evidence was presented under at least three separate factors. (RT 3907.) The trial court failed to acknowledge this mitigation in its findings. For instance, Mr. Tully had no prior felony convictions. This undisputed fact is mitigating under sentencing factor 190.3(c). This Court has held: "[T]he absence of prior felony convictions [is a] significant mitigating circumstance[] in a capital case, where the accused frequently has an extensive criminal past." (*People v. Crandell* (1988) 46 Cal.3d 833, 884.)

At trial, the prosecutor acknowledged in his chart[132] and in his argument that Mr. Tully's lack of prior felony convictions was a mitigating factor. (RT 3647, 3662.) The

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[132] The caption of one chart was: "MITIGATING CIRCUMSTANCES APPLICABLE IN THIS CASE." Underneath this caption, it stated: "NO PRIOR FELONY CONVICTIONS." (See Argument XIX , *infra*)

jury was specifically instructed that: "There has been no evidence presented that the defendant has been convicted of any prior felony. This circumstance should therefore be received as a circumstance in mitigation." (CT 2046; RT 3874-3875.) This mitigating factor had been noted by defense counsel in its presentation to the trial court at the 190.4 hearing. (RT 3907.)

Defense counsel noted Mr. Tully's "disadvantaged" family history and background to the trial court in its presentation. (RT 3907) Evidence of a disadvantaged family history and background is typically a powerful mitigating factor in a capital case. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 ["[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background [] may be less culpable than defendants who have no such excuse."]; *Ainsworth v. Woodford* (9th Cir. 2001) 268 F.3d 868, 876-878.) The trial court's statement as to this important mitigating evidence was improper. It simply stated generally that it had "considered the evidence from the members of the defendant's family," and that, applying the incorrect standard for factor (f) evidence, "none of [it] could in any way be considered a moral justification or extenuation for his conduct. (RT 3912-3913.)

Additionally, in its brief presentation to the trial court at the 190.4 hearing, defense counsel noted that, other than the two mutual, minor jail scuffles, there was no evidence that Mr. Tully had committed any prior acts of violence under factor 190.3 (b). (RT 3907.) These jail scuffles were so insignificant that they should not have been presented

to the jury as aggravating factors. Since the trial court failed to even mention them in its findings in aggravation, it follows that it found that these jail scuffles were so insignificant that they could not be deemed aggravating.

Much like factor (c), factor (b) instructs the sentencer to consider "[t]he presence *or absence* of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Section 190.3(b), emphasis added.) Based on Mr. Tully's lack of an extensive violent criminal history, this factor also had to be mitigating to some extent here. As this Court has held, "The absence of prior violent criminal activity [] [is a] significant mitigating circumstances in a capital case, where the accused frequently has an extensive criminal past." (*People v. Crandell, supra,* 46 Cal.3d at p. 884; emphasis added.) The trial court failed to mention this mitigating factor in its findings.

The trial court's findings as to mitigation were flawed because they failed to properly analyze the factors that were mentioned by defense counsel and which had to be mitigating as a matter of law. This Court has said that the statute requires the trial court to "*consider* all proffered mitigating evidence" in ruling on a section 190.4 application. (*People v. Steele, supra,* 27 Cal. 4th at pp. 1267-1268; emphasis in original; *People v. Jennings, supra*, 46 Cal. 3d at p. 993.) The Eighth and Fourteenth Amendments similarly require that a sentencer in a capital case consider and give effect to all mitigating evidence presented. (*Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

It is was undisputed that mitigating factors existed in this case, yet the trial court

failed to address any of the specific evidence that was presented to the jury as mitigation. Nor did it properly assess the credibility of the witnesses presented, determine the probative force of their testimony, and weigh the evidence presented as the statute requires. (*People v. Rodriguez*, supra, 42 Cal. 3d at p. 793.) No details of Mr. Tully's mitigation evidence were mentioned by the trial court. As in *Bonillas*, where the trial court similarly failed to make any specific findings as to the mitigation evidence presented, this Court cannot determine what the trial court properly considered with particularity as to each of the mitigating circumstances, and cannot provide "thoughtful and effective appellate review." (*People v. Bonillas, supra,* 48 Cal. 3d at p. 801.)

In general, the trial court's findings as to aggravation and mitigation were vague and overly broad. The trial court failed to carefully set forth the evidence to which it assigned significant weight so as to provide findings adequate to assure thoughtful and effective appellate review. (*People v. Arias* (1996) 13 Cal. 4th 92, 191-192.) The trial court made numerous findings which were irrelevant to this case. The trial court used improper standards in making its findings as to mitigation. The trial court's use of the pre-*Easley* factor (k) standard was especially improper because it demonstrates that the court failed to consider and give effect to valid mitigating evidence that was not related to the crime itself.

Further, the trial court failed to consider and give effect to the mitigating evidence presented by the defense at the penalty phase, even mitigating evidence that was never contested by the State. The trial court failed to consider the mitigating evidence presented

here "with particularity" as the statute requires. (*People v. Bonillas, supra,* 48 Cal. 3d at p. 801.) These errors failure violated the Eighth and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution.

3. The Trial Court's Ultimate Finding in Comparing Aggravation and Mitigation in this Case Was Deficient

The trial court made an ultimate finding that "the factors in aggravation outweigh those in mitigation." (RT 3914, RT 3910, 3911, 3914.) This finding did not sufficiently detail the specific aggravating evidence that it found to be true, the mitigating evidence that it found to exist, the weight given to the aggravating evidence, the weight given to the mitigating evidence, nor the reasons why it independently determined that "the aggravating circumstances [were] so substantial in comparison with the mitigating circumstances that it warrant[ed] death instead of life without parole." (CT 2059; CALJIC 8.88.) The trial court thus failed to properly "weigh the evidence" in aggravation and mitigation as the statute requires. (*People v. Rodriguez*, supra, 42 Cal. 3d at p. 793.)

Moreover, the trial court failed to properly "'focus[] upon the circumstances present in [this] particular case'"and failed to adequately "state on the record the reasons" for this ultimate finding as required by the statue and the state and federal Constitution. (*Pulley v. Harris, supra,* 465 U.S. at p. 53 quoting *People v. Frierson*, *supra*, 25 Cal. 3d at p. 179; section 190.4(e).) The trial court's ultimate finding contained no reasoning whatsoever. It was simply a conclusory statement that the aggravating factors outweighed the mitigating factors.

The trial court's ultimate finding echoes the finding deemed unacceptable in *Bonillas*: "'I think the aggravating circumstances were there, that they did exceed the mitigating circumstances.'" (*People v. Bonillas*, *supra*, 48 Cal 3d. at p. 801.) In *Bonillas*, this Court held that this finding "was insufficiently specific [] to indicate which aggravating or mitigating circumstances the court considered or the relative importance given them by the court," and that such a "generalized statement not only failed to serve the statutory purpose of causing the judge to consider with particularity each of the circumstances, aggravating and mitigating, but also leaves the reviewing court unable to determine that he did." (*Ibid.*)

The trial court's assertion here was strikingly similar to the one in *Rodriguez*, where the trial court simply declared "'that the aggravating circumstances outweigh the mitigating circumstances and that the weight of the evidence supports the jury's verdict of death.'" (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 793.) In *Rodriguez*, this Court held that such a purported ultimate finding was deficient and reversed the death sentence. (*Id.* at p.794.) The trial court's ultimate finding here as to the relative weight of the aggravating and mitigating factors was improper and inadequate and requires reversal of Mr. Tully's sentence. (See *People v. Sheldon, supra*, 48 Cal. 3d at p. 962 [reversing since "the trial court merely denied defendant's application for modification without stating any reason for his findings or his ruling"].)

4. The Trial Court Impermissibly Relied on his Notes

Meaningful appellate review is impossible for another reason as well. The trial court relied on its personal notes in ruling on Mr. Tully's application under section 190.4. The trial court stated that, in making its findings here, it "also reviewed its own personal notes relating to the evidence received as to all phases of the case." (RT 3911.) The trial court never made these notes part of the record in this case, nor has Mr. Tully been provided a copy. Not only does this lack of an appropriate record undermine the purpose of the statute, but it also renders it impossible for this Court to conclude that the trial court's consideration of the evidence was proper or accurate.[133]

That Mr. Tully was sentenced to death based on undisclosed and unknown information requires reversal under the Constitution. (*Gardner v. Florida* (1977) 430 U.S. 349.) In *Gardner,* after an advisory jury returned its verdict, the trial court read and relied upon an undisclosed presentence investigation report to sentence Mr. Gardner to death. (*Id.* at 352- 354.) The Supreme Court, although split in its reasoning, held that this procedure was unconstitutional. The plurality opinion held that Mr. Gardner "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." (*Id.* at 362 (plurality

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[133] The fact that the record on appeal does not contain these notes itself violates Mr. Tully's right to meaningful appellate review. Under the Eighth Amendment, the record must be sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed. Meaningful appellate review plays a crucial role in ensuring that the death penalty is not imposed arbitrarily or irrationally. (*Parker v. Dugger* (1991) 498 U.S. 308, 321; citations omitted.) Without the notes, Mr. Tully cannot fully present and this Court cannot fully address the challenges raised here.

opinion of J. Stevens with J. Stewart and J. Powell concurring).) Meanwhile, Justice White wrote separately that there was a violation of the Eighth Amendment since: "A procedure for selecting people for the death penalty which permits consideration of such secret information [] fails to meet the need for reliability in the determination that death is the appropriate punishment." (*Id.* at p.364 (concurring opn. of J. White); quotation omitted.)

As in *Gardner,* it is was unconstitutional for the trial court to sentence Mr. Tully to death based on undisclosed and unknown information. The trial court here improperly relied on information the defense never reviewed, much less had an opportunity to confront or explain, in sentencing Mr. Tully to death. The trial court violated the most basic notions of the right to confront witnesses, the right to present a defense, the right to notice of the allegations and evidence to be presented against you, the opportunity to be heard, the State's burden of proving every element beyond a reasonable doubt, heightened reliability in capital cases, due process, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as Article I of the California Constitution. Due to all of these statutory and constitutional errors, Mr. Tully's death sentence must now be reversed.

C. The Trial Court Impermissibly Relied on Evidence that Was Not Presented to the Jury

> The task of a judge under section 190.4, subdivision (e) is to review the *evidence* and, guided by the aggravating and mitigating circumstances set forth in section 190.3, make a determination whether the jury's decision that the aggravating circumstances outweigh the mitigating circumstances is contrary

> to law or the *evidence presented*. The evidence presented, of course, refers to 'the evidence presented to the jury.'(*People v. Burgener*, *supra*, 29 Cal. 4th at p. 888; citations omitted; emphasis in original.)

This Court has held that "a court ruling on a modification application is limited to the matters identified in section 190.4, which necessarily excludes any materials not presented to the jury." (*Id.* at p. 893; citation omitted.) A trial court "may not take into consideration any evidence [that was] not before the jury that returned the death verdict." (*People v. Lewis, supra*, 33 Cal. 4th at p. 231. The trial court here violated this rule by considering Mr. Tully's Probation Report prior to making its ruling on Mr. Tully's application for modification of the jury's death verdict.

After the trial court made its findings here, it stated that it had "read and considered the report of the probation officer" before the hearing. (RT 3917.) While the trial court stated that it only considered the report for "the purpose of sentencing on the noncapital offense and did not consider it in ruling on the previous motion" (ibid.), such a distinction is unsatisfactory. It is improper for a trial court to review *any* evidence not before the jury in ruling on a 190.4 motion. The Probation Report was not before the jury in this case.

In *People v. Lewis* (1990) 50 Cal. 3d 262, 287, this Court reversed a death sentence because the trial court similarly "had read the probation report before ruling on the application for modification of verdict." This Court held that:

> Although the court was required to read the probation report before sentencing defendant on the [noncapital] conviction [], it should not have read and considered the probation report in ruling on the application for modification of

> verdict. Under section 190.4, subdivision (e), the court is directed to review the evidence presented to the jury; a probation report is not presented to the jury. In capital cases where the defendant has been convicted of other offenses requiring a probation report, the preferable procedure is to defer reading the probation report until after ruling on the automatic application for modification of verdict. This will ensure that the probation report does not influence the ruling on the section 190.4, subdivision (e) motion. (*Ibid.*, citation omitted.)

The trial court should have made its ruling under section 190.4(e) and then recessed to read the Probation Report so as to assure that it did not influence its ruling in any manner. The trial court's comment that he considered the Probation Report only as to the non-capital offense was not sufficient to cure this error. As in *Lewis*, it cannot be "assumed that [the trial court] was not influenced by the report in ruling on the application." (*Ibid.*)

Here, the Probation Report "contained prejudicial information about the defendant," and it was "information that would not otherwise have been known." (*Ibid.*) It revealed a 1985 conviction for driving under the influence and a pending criminal case involving the alleged possession of methamphetamine. (CT 3231.) Even more prejudicial, the Probation Report contained information from a jailhouse informant who did not testify or undergo cross-examination by the defense. (CT 3232.) The Probation Report also made numerous inflammatory claims that would be impossible for a sentencer to ignore. For instance, the Probation Report claimed that the "[c]ircumstances of the present offense suggest[] that the defendant will be a danger to other[s] if not imprisoned," and that the "nature and seriousness of the present offense strongly suggests that he represents an extreme threat to the community." (CT 3234.)

The Probation Report contained prejudicial information that was not presented to

the jury in this case and that would inevitably influence a sentencer. Thus, as in *Lewis*, reversal of the death sentence is required under the statute.[134]

The trial court also improperly relied on its personal notes in ruling on Mr. Tully's application for modification of the jury's death verdict. The trial court stated that, in making its findings here, it "also reviewed its own personal notes relating to the evidence received as to all phases of the case." (RT 3911) Although the trial judge stated that his notes were related to the evidence in the case, these notes also apparently included the judge's perceptions of what occurred at the trial. The jury was never presented with the trial court's personal notes when it decided the penalty phase in this case. Thus, it was improper under the statute for the trial court to consider and rely upon these notes in making its findings here.

The trial court's errors undermined its role, and thus rendered Mr. Tully's death sentence unfair and unreliable under the Eighth and Fourteenth Amendment, as well as a parallel provisions of Article 1 of the California Constitution. Moreover, the State's burden of proving every element beyond a reasonable doubt, the right to an impartial jury, heightened reliability in capital cases, due process, equal protection, and fundamental fairness under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as related

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[134] The trial court's improper use of the Probation Report also violated Mr. Tully's state-created right via the statute to due process under *Hicks v. Oklahoma, supra,* 447 U.S. 343, as well as equal protection since other capital defendants in California are sentenced by trial court's who have not read the Probation Report in the case. For each of these reasons, reversal of Mr. Tully's death sentence is required under the Fourteenth Amendment, as well as parallel provisions of Article 1 of the California Constitution.

provisions of Article I of the California Constitution. (See e.g. *Gardner v. Florida* (1977) 430 U.S. 349.) For each of these reasons, reversal of Mr. Tully's death sentence is required.

In addition, since the trial court relied on not just one – but two different types of improper information in sentencing Mr. Tully to death, these errors not only individually, but also cumulatively, require reversal. Mr. Tully's sentence was based on prejudicial and improper evidence in violation of the statute and the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as related provision of Article I of the California Constitution.

D. The Trial Court Failed to Make An Independent Determination of Whether the Death Penalty Was Proper

This Court has held that section 190.4(e) requires that the trial court make "an *independent* determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and applicable law." (*People v. Burgener, supra,* 29 Cal. 4th at p. 891 citing *People v. Rodriguez, supra*, 42 Cal.3d at p. 793; emphasis added.) In determining whether in his independent judgment the weight of the evidence supported the verdict, the judge was required to assess the credibility of the witnesses, determine the probative force of the testimony, and weigh the evidence.

The trial court never independently assessed any evidence or testimony. The closest the trial court came to assessing the evidence during its findings was when it asserted that "the court agrees with the implicit findings of the jury that the witnesses for the people were credible and believable." (RT 3911.) This "reason" is improper since it

only discusses state witnesses, not defense witnesses. Moreover, it strongly suggests that, instead of performing its own thorough and independent review of the jury's verdict, the trial court merely "deferred to the jury's implied findings." (*People v. Burgener, supra,* 29 Cal. 4th at p.892.)

Throughout its findings, the trial court made similar statements that indicated that it was merely "agree[ing]" with the jury's assessment of the evidence without providing any independent reasons for such findings. (RT 3911.) Most notably, the trial court stated in its ultimate finding that it "*agrees* that the jury's assessment that the circumstances in aggravation outweigh the circumstances in mitigation is supported by the weight of the evidence." (RT 3910; emphasis. This Court has held that such a finding demonstrated that "the trial court did not exercise its independent judgment in reweighing the evidence" under the statute and thus reversed the death sentence. (*Ibid.*, see *People v. Rodriguez, supra*, 42 Cal. 3d at p. 793.)

Moreover, "the remainder of the [trial] court's comments offers no assurance" that the trial court "exercised its independent judgment" in this case. (*People v. Burgener, supra,* 29 Cal. 4th at p. 892.) The trial court's statements viewed in toto demonstrate that it failed to perform its role under the statute as a constitutional conduit assuring the fairness and reliability of the death verdict at the trial and appellate level. Thus, it is impossible for this Court to now "thoughtful[ly] and effective[ly] [] review" whether the trial court made any determination of the evidence, much less an independent one. (*See People v. Bonillas, supra,* 48 Cal. 3d at p. 801.)

The record here contains no indication that the trial court independently reweighed the evidence and made an independent determination that the evidence supported the jury's verdict of death. (*See People v. Burgener, supra,* 29 Cal. 4th at p. 892.) Instead, it appears the trial court did not independently reweigh the evidence and improperly deferred to the jury in making its "findings." This error prejudiced Mr. Tully and requires reversal of his death sentence under the statute.

E. Conclusion

This Court and the Supreme Court have both emphasized the importance of section 190.4(e) to the constitutionality of the California death penalty scheme. The trial court here committed numerous errors that wholly undermine this critical purpose in violation of the Eighth and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution.

The trial court failed to sufficiently state its findings and reasons on the record. The trial court's findings as to aggravation, as to mitigation, and as to the comparative weight of the aggravation and the mitigation were all improper and inadequate. The trial court failed to consider and give effect to valid mitigating evidence in violation of the Eighth and Fourteenth Amendments, and Article 1 of the California Constitution. (*Lockett v. Ohio, supra*, 438 U.S. at p. 604.) The trial court used improper standards to the detriment of Mr. Tully. The trial court also considered improper information that was not presented to the jury and which the defense never had the opportunity to confront, explain, or even review in violation of Mr. Tully's constitutional rights. The trial court

failed to make an independent determination as to the evidence and instead deferred to the implicit findings of the jury.

For each of these reasons, Mr. Tully's rights were violated under the statute and the Constitution. The state statutory requirements amount to a state-created liberty interest of which Mr. Tully was deprived in violation of his rights under the due process clause of the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Accordingly, this Court must reverse the penalty judgment. (*People v. Brown, supra*, 45 Cal. 3d at p. 1263; *People v. Sheldon, supra*, 48 Cal. 3d at p. 962 [rejecting harmless error analysis and reversing because trial court failed to state any reason for its findings]; *People v. Rodriguez, supra*, 42 Cal.3d at p. 794 [reversing for deficiencies in the disposition of the application to modify the penalty verdict]; *People v. Bonillas, supra*, 48 Cal 3d. at p. 801 [reversing because trial court's statement of reasons was deficient and insufficiently specific].)

The trial court's duties under section 190.4(e) are critical to the constitutionality of the California death penalty scheme. (*Pulley v. Harris, supra,* 465 U.S. at pp. 52-54; *People v. Frierson, supra*, 25 Cal.3d 142, 178-180) Section 190.4 is an "integral part" of the California scheme. (*Id.* at p. 231.) "[S]tructural defect[s] affecting the framework" of the death penalty law aren't subject to harmless error review. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) Here, the errors were structural, both because they cannot be reviewed by this Court and also because they prevent this Court from providing "thoughtful and effective review" as to jury's death verdict. The errors undermine

constitutionality of the California death penalty scheme.

For each of these reasons, reversal of Mr. Tully's death sentence is required.

XXVI. DEATH QUALIFICATION VOIR DIRE IS UNCONSTITUTIONAL

A. The Death Qualification of Juries in California Is Unconstitutional

California capital cases suffer constitutional imperfections because juries are death qualified. "A 'death qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6; internal citations and quotations omitted.) Death qualification in California, in general and as applied in this case, violates the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as Article I of the California Constitution.

Death qualification inquires "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Ashmus* (1991) 54 Cal. 3d 932, 961-962 citing *Wainwright v. Witt* (1985) 469 U.S. 41, 424 and *Adams v. Texas* (1980) 448 U.S. 38, 45.) If a juror's ability to perform his or her duties is substantially impaired under this standard, they are subject to dismissal for cause. This Court has held that the only question that a trial court needs to resolve during death qualification is "whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Mattson* (1990) 50 Cal. 3d 826, 845.)

This test focuses on the abstract, conscientious, or religious scruples of prospective jurors, not case specific considerations. (*People v. Pinholster* (1992) 1 Cal. 4th 865, 918.) A scruple is "an ethical consideration or principle that inhibits action." (*Merriam-Webster's Collegiate Dictionary* (1995) 10th Edition.) Accordingly, the "views" that matter here are, ultimately, moral ones. (*People v. Mattson, supra*, 50 Cal. 3d at p. 846.)

In capital cases, death qualification revolves around a juror's ability to perform his or her duties under California death penalty law. Under section 190.3, a juror's duty at the penalty phase is to "determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole." The jury is required to take into account a number of listed sentencing factors. (Penal Code §190.3 (a)-(k).) The jury then determines penalty.

A jury is authorized to "impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (Section 190.3) Only this general guidance to consider and weigh the evidence is provided. Jurors are not told which factors in the unitary list are aggravating and which are mitigating.

According to this Court, the penalty phase jurors' duty entails three "moral and sympathetic judgments." First, they must determine if evidence exists to support a factor on the list. Second, they must determine whether that factor is aggravating or mitigating

based on its moral context. Finally, they must determine the weight of each factor. At each stage, the jury makes moral determinations. A jury's "moral and sympathetic judgment" is not limited to the 190.3 mitigating factors. It must determine "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death," (*People v. Easley* (1983) 34 Cal. 3d 858, 879, fn 10, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604), whether or not related to the offense for which he is on trial. (CALJIC 8.85, CT 2043.)

The jury's duty at the penalty phase in California is quite different from a jury's guilt phase duty. Guilt phase juries find facts and apply the law to those facts. This Court has held that, unlike the guilt phase determination, the penalty phase determination in California is "'inherently moral and normative, not factual.'" (*People v. Prieto* (2003) 30 Cal. 4th 226, 263 quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 779; see also *People v. Box* (2000) 23 Cal.4th 1153, 1216.) [135] "Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision." (*People v. Smith* (2003) 30 Cal. 4th 581, 634; *People v. Padilla* (1995) 11 Cal.4th 891, 956-957; *People v. Haskett* (1982) 30 Cal.3d 841, 863.) This Court has held: "A penalty phase jury

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[135] This Court has regularly described a jury's duty at the penalty phase in California as "moral" and "normative." (See e.g. *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Hughes* (2002) 27 Cal.4th 287, 394; *People v. Weaver* (2001) 26 Cal.4th 876, 985; *People v. Anderson* (2001) 25 Cal.4th 543, 589 and 591-592; *People v. Jenkins* (2000) 22 Cal.4th 900, 1053-1054; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Sakarias* (2000) 22 Cal.4th 596, 639.)

performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if death or life is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192.) The jury instructions inform the jurors: "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." (CT 2059; CALJIC 8.88.)

There is a serious, underlying problem in the death qualification standard as it applies to the California death penalty scheme. Under the standard, a potential juror is removed for cause if their moral views will substantially impair their duty. However, their duty in California is to make a "moral and normative" judgment, and by law, they are required to make "moral and sympathetic" determinations.

In California, neither the legislature nor the electorate has ever enacted a statute for death qualification of penalty phase jurors. The statutes governing jury selection in criminal cases actually forecloses death qualification. Code of Civil Procedure §229(h) states:

> A challenge for implied bias may be taken for one or more of the following causes, *and for no other*:
>
> . . .
>
> (h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as *would preclude* the juror finding the defendant *guilty*; in which case the juror may neither be permitted nor compelled to serve. (Code of Civil Procedure §229(h); emphasis added.)

The California statute provides for removal of jurors only when those death penalty views would affect their guilt phase determination. The statute is designed to prevent jury nullification at the guilt phase.

No other reason for removing a juror is authorized under this statute. However, this Court has provided a "judicial gloss" to the statute that, contrary to its express language, allows the removal of jurors whose views would affect their penalty determination. (See *Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 9, fn. 7, 9 and cases cited therein [interpreting the same language in the old statute, section 1074(8).]) Death qualification was approved by the Supreme Court in *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522.) Under *Witherspoon,* a juror could be excused for cause if he or she would "*automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case," or "his attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's *guilt.*" (*Ibid,* emphasis in original.) These standards were refined in *Adams v. Texas* (1980) 448 U.S. 38, 45 and then clarified further in *Wainwright v. Witt* (1985) 469 U.S. 412, which allows for removal of a juror whose ability to perform his duties are "substantially impaired."

While the "substantially impaired" test may be proper in the context where the jury has its typical role of finding facts, according to this Court, that is not the role of a California penalty phase jury:

It is not simply a finding of facts which resolves the penalty decision, but the

> jury's moral assessment of those facts as they reflect on whether defendant should be put to death. The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty. (*People v. Brown* (1985) 40 Cal 3d 512, 539-540; citations, quotations, and footnotes omitted.

This Court has maintained that a California death penalty jury does not make a narrow factual determination, like the typical jury alluded to in *Witt*'s traditional test, but instead it makes a broad "moral and normative" determination. (*People v. Prieto, supra,* 30 Cal. 4th at p. 263; *People v. Snow* (2003) 30 Cal. 4th 43.)

The Supreme Court substituted the *Witt* standard for the *Witherspoon* standard because sentencing juries "could no longer be invested with such [unlimited] discretion [as was the case in *Witherspoon*]," and "that many capital sentencing juries are now asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty." (*Wainwirght v. Witt, supra,* 469 U.S. at pp. 421-422.) The Supreme Court adopted a test that was in "in accord with traditional reasons for excluding jurors" in non-death penalty cases. (*Id.* at 423.)

In *Witherspoon,* the Supreme Court noted that the jury was "given broad discretion to decide whether or not death is 'the proper penalty' in a given case." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519.) This broad discretion is no different than a California death penalty jury's freedom to decide what an "appropriate" penalty is in an individual case. As this Court stated:

> [T]he focus of the penalty selection phase of a capital trial is more normative and less factual than the guilt phase. The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on

> a defendant who has already been determined to be "death eligible" . . . In such a penalty selection undertaking . . . The gist of defendant's argument – that the trial court's penalty phase instructions failed to guide the jury in reaching a penalty decision, allowing it "complete discretion" – is correct. It is not a mechanical finding of facts that resolves the penalty decision, but the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. (*People v. Musselwhite* (1998) 17 Cal. 4th 1216, 1267; citations and quotations omitted.)

In *Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 73, fn 122, this Court noted that the jury in *Witherspoon* had "unguided and unchecked" discretion and that *Furman* had held that such discretion was unconstitutional. This Court then stated that, although it was not addressing the constitutionality of the California death penalty scheme, "it cannot be gainsaid that a capital jury in this state exercises *considerable discretion* in identifying and weighing the circumstances in aggravation and mitigation which it is directed by statute to consider." (*Ibid*; emphasis added.) Since a California death penalty jury is given the same broad discretion as the jury in *Witherspoon*, the *Witt* test is not applicable to the California death penalty scheme.

In *Witt,* the Supreme Court determined that "*Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment." (*Wainwright v. Witt, supra*, 469 U.S. 412, 423.) This statement is incorrect.[136] Moreover,

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[136] The Court in *Witt* was incorrect in labeling *Witherspoon* as a Sixth Amendment case. While the Supreme Court stated at one point that the "jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 518), this Court has opined that the "precise constitutional basis for [the *Witherspoon*] holding is not entirely certain." (*Hovey v. Superior Court, supra*, 28 Cal.

(continued...)

> one of the most important functions any jury can perform in making [the death penalty] selection is to maintain a link between contemporary community values and the penal system – a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." (*Witherspoon v. Illinois, supra*, 391 U.S. 510, 520, fn 15 quoting *Trop v. Dulles*, 356 U.S. 86, 101.)

Trop's "evolving standards of decency" language is a cornerstone of Eighth Amendment death penalty jurisprudence. Under the Eighth Amendment, the Supreme Court determines whether a punishment is cruel and unusual, i.e. whether the evolving standards of decency have reached the point where society deems the punishment to be cruel and unusual.

The Supreme Court has held repeatedly that one of the best sources of objective information on such evolving standards are verdicts of jurors who have the responsibility of deciding whether to impose the punishment. (*See e.g. Furman v. Georgia* (1972) 408 U.S. 238, 278-279, and 299 (concurring opinion of J. Brennan); *Id.* at pp. 439-442 (J. Powell, C.J. Burger, J. Blackmun, and J. Rehnquist dissenting).) The process of analyzing jury determinations as evidence of the "evolving standards of decency" is one of the few, long standing, consistent areas of Supreme Court death penalty law. In fact, three Supreme Court justices recently wrote separately to emphasize their belief that the

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[136](...continued)
3d at p.11, fn 17 [noting that although *Witherspoon* did mention the "impartial jury" requirement of the Sixth Amendment, "this interpretation does not withstand scrutiny" since that right did not yet apply to the States]) This Court stated that it appeared that *Witherspoon* involved "due process, as seen through the filter of Sixth Amendment values." (*Ibid.*)

actions of sentencing juries, along with legislative judgments, are the *sole reliable factors* in the "evolving standards" analysis. (*See Atkins v. Virginia* (2002) 536 U.S. 304, 322-325 and 328 (C.J. Rehnquist, J. Scalia, and J. Thomas dissenting).) Chief Justice Rehnquist wrote:

> Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "'is a significant and reliable index of contemporary values,'" *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion) (quoting *Gregg, supra*, at 181), because of the jury's intimate involvement in the case and its function of "'maintaining a link between contemporary community values and the penal system,'" *Gregg, supra*, at 181 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n. 15 (1968)). In *Coker*, 433 U.S. at 596-597, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. And in *Enmund v. Florida*, 458 U.S. 782, 793-794 (1982), where evidence of the current legislative judgment was not as "compelling" as that in *Coker* (but more so than that here), we were persuaded by "overwhelming [evidence] that American juries . . . repudiated imposition of the death penalty" for a defendant who neither took life nor attempted or intended to take life.
>
> In my view, these two sources – the work product of legislatures and sentencing jury determinations – ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments. (*Id.* at pp. 323-324.)

This opinion confirms the crucial role death penalty juries have in providing the data needed by the courts to assess the evolving standards of decency.

Since juries represent community values,[137] their penalty verdicts inform the judicial determination of the evolving standards. As this Court has stated: "A penalty jury can speak for the community only insofar as the pool of jurors from which it is drawn represents the full range of relevant community attitudes." (*Hovey v. Superior Court, supra*, 28 Cal. 3d at p. 73.) Nonetheless, in California, potential jurors are removed from serving on death penalty juries *because of* their views on the death penalty. Death qualification, which disqualifies certain members of the community, breaks the essential link between community values and the penal system. By excluding certain community members from penalty deliberations, their community values will never be represented in jury sentencing determinations, "the indicators" by which the courts ascertain contemporary standards of decency.

"Evolving standards of decency" are constantly changing. (Compare *Penry v. Lynaugh* (1989) 492 U.S. 302 [holding that society had yet to evolve to the point where the death penalty for the mentally retarded is unconstitutional] and *Atkins v. Virginia* (2002) 536 U.S. 304 [holding that society has evolved to the point where the death penalty for the mentally retarded is unconstitutional].) In order to assess the changing

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[137] This view of the death penalty jury dovetails precisely with this Court's view that death penalty juries in California make a "moral and normative" decision. (*See People v. Jackson* (1996) 13 Cal.4th 1164, 1229-1230.) [A penalty phase jury "performs a normative function, *applying the values of the community* to the decision after considering the circumstances of the offense and character and record of the defendant."]; *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *see also People v. Mendoza* (2000) 24 Cal.4th 130, 192 [referring to the penalty phase jury as "the representative of the community at large"]; *People v. Allen* (1986) 42 Cal.3d 1222, 1287 [referring to the penalty phase jury as "the community's representative"].)

standards, the courts must have accurate and representative data of sentencing values. Death qualification skews the data provided by jury sentencing determinations and thus renders it impossible for the courts to fairly assess evolving standards concerning the constitutionality of the death penalty. This violates principles of due process under the Fourteenth Amendment.

Death qualification results in an unconstitutional death penalty scheme. Based on statute, jury instructions, and this Court's opinions, the current "substantially impairs" test is irrational and violates the Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution. Death qualification in California is contrary to long-standing jurisprudence that death penalty juries represent the values of the community and that this function is crucial to provide information from which the courts discern evolving standards of decency.

B. Death Qualification in California Violates Equal Protection and Due Process

Death qualification in California results in capital defendants having their guilt or innocence determined by juries that are materially different from juries deciding the same issues in non-capital trials. The Supreme Court has recognized that "'death qualification' in fact produces juries *somewhat* more 'conviction-prone' than 'non-death-qualified' juries." *Buchanan v. Kentucky* (1987) 483 U.S. 402, 415, fn. 16, quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 173.) It also produces juries prone to impose a death verdict. (See Haney, Hurtado, and Vega., *"Modern" Death Qualification: New Data on*

Its Biasing Effects (1994) 18 Law & Hum. Behav. 619, 631 ["Death-qualified juries remain significantly different from those that sit in any other kind of criminal cases."])

This unequal system violates the Equal Protection Clause of the Fourteenth Amendment and Article I of the California Constitution.[138] The unequal treatment of capital jurors cannot withstand the scrutiny required by the Equal Protection and Due Process Clauses of the Fourteenth Amendment and Article I of the California Constitution. Since an unconstitutionally selected jury decided Mr. Tully's guilt, his convictions must be reversed.

The penalty phase determination implicates several fundamental constitutional rights. A capital defendant has a constitutional right to a jury trial at the penalty phase under the Sixth Amendment. (*Ring v. Arizona* (2002) 536 U.S. 584.) Life is also a fundamental right for purposes of the Fourteenth Amendment. It is the jury that ultimately deprives capital defendants of this fundamental right.

By providing different schemes for selecting juries in capital and non-capital cases, California discriminates between two classes of defendants. Since the different schemes result in juries that are more "conviction prone" for capital defendants, this discrimination impinges on the fundamental right to an impartial jury at the guilt phase. It also impinges on the fundamental right to life at both the guilt and penalty phases.

To survive an equal protection challenge where fundamental rights are involved,

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[138] This Court has power and authority to construe the state Constitution independently of the federal Constitution. (*See Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 352-354.)

California must demonstrate that death qualification is "necessary to promote a compelling governmental interest." (*Dunn v. Blumstein* (1972) 405 U.S. 330, 342.) Strict scrutiny places "a heavy burden of justification [] on the State." (*Id.* at p. 343.) Here, the State cannot meet this burden in justifying death qualification at either the guilt or penalty phase.

In *People v. Fields* (1983) 35 Cal. 3d 329, 352, this Court held that although California "arguably" may have a "significant state interest" in death qualification at the guilt phase, this Court was "certain" that such an interest "would not . . . justify a suspect classification excluding persons on grounds of race or gender." The test for suspect classifications is the same strict scrutiny test applied when a fundamental right is involved. (See *San Antonio Independent Sch. Dist. v. Rodriguez, supra,* 411 U.S. at p. 17.) Thus, this Court has already found that death qualification does not serve a compelling government interest for the selection of a guilt phase jury.

California's only articulated interest in death qualification at the guilt phase is "the legislative preference to use a single jury to determine guilt and penalty." (*People v. Ayala* (2000) 23 Cal. 4th 225, 304; *Lockhart v. McCree* (1986) 476 U.S. 162, 175-176 [The State has a "legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial"].) The mere preference to conserve state resources through the use of one jury is not a sufficient interest under a strict scrutiny analysis. It is not a compelling state interest. (See *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, 263.)

The Supreme Court in *Lockhart* addressed a fair cross section challenge, as opposed to the equal protection challenge involved here. The Supreme Court held that the State had a "legitimate interest," not a compelling interest. (*Lockhart v. McCree*, *supra* at pp. 175-176.) A legitimate State interest can only satisfy the lesser standard of rational basis review, not strict scrutiny. (See *San Antonio Ind. School Dist. v, Rodriguez*, *supra*, 411 U.S. at p. 40.) *Lockhart* thus does not control the issue here.

Further, California allows the impanelment of a new penalty phase jury for "good cause" shown. Section 190.4(c) "does not [] require a single jury for both guilt and penalty phases when the parties agree that in their particular situation use of separate juries would be to their mutual advantage, and the trial court finds good cause to so order." (*People v. Beardslee* (1990) 53 Cal. 3d 68, 102 .) If the state interest in a single jury can be trumped by "good cause," stipulation, or the trial court's discretion, it cannot be deemed a compelling or legitimate State interest.

Death qualification also fails the second prong of the strict scrutiny analysis. A law infringing on a fundamental right must be "necessary," *i.e.* drawn with precision, narrowly tailored, and use the least drastic means. (See *Dunn v. Blumstein*, *supra*, 405 U.S. at p. 343; *Wygant v. Jackson Bd. of Education* (1986) 476 U.S. 267, 280, fn. 6.) Whatever State interest California has for having death qualification at the penalty phase, it cannot be said that death qualification is "necessary" at the guilt phase. California can impanel two juries for capital cases in the event of a conviction. One jury for the guilt phase, as a typical guilt jury is chosen, and a second jury for the penalty phase.

Death qualification violates the Equal Protection Clause in another way as well. The Supreme Court has held that fundamental rights cannot be denied based upon arbitrary and disparate statewide "standards." (*Bush v. Gore* (2000) 531 U.S. 98.) Where a single state entity has the power to assure uniformity in implementing a fundamental right, there must be at least *some* assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. (*See Id.* at p. 109.) This basic principle controls here.

Since the California legislature has not authorized death qualification by statute, it has not enacted any standards for death qualification. It has been left up to this Court to set the standards. This Court has not done so. Without uniform standards, trial judges are free to use whatever standards they choose in ascertaining whether a cause challenge should be granted or denied. The standard of review for cause challenges articulated by this Court allows for virtually unfettered and unreviewable discretion by the trial court. Death qualification in California occurs without standards.

This Court reversed a death sentence based upon improper death qualification jury selection in *People v. Cash* (2002) 28 Cal. 4th 703. This Court noted that it had "endorsed particularized death-qualifying voir dire in a variety of situations." (*Id.* at p. 721 citing *People v. Pinholster* (1992) 1 Cal. 4th 865, 916-917, *People v. Ochoa*, *supra*, 26 Cal. 4th at p. 431, *People v. Ervin, supra*, 22 Cal. 4th at pp. 70-71, *People v. Livaditis* (1992) 2

Cal. 4th 759, 772-773, *People v. Bradford, supra*, 15 Cal. 4th at p. 1320.)[139] This Court acknowledged that "language in some of [its] prior decisions [was] to the effect that death qualification voir dire 'seeks to determine only the views of the prospective jurors about capital punishment in the abstract' and 'without regard to the evidence produced at trial.'" (*Id.* at p. 721 *quoting People v. Medina* (1995) 11 Cal. 4th 694, 746 and *People v. Clark* (1990) 50 Cal. 3d 583, 596-59.)[140]

This Court acknowledged the inherent dilemma of particularized death qualification by stating:

> Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (*Id.* at 721-2; citations omitted)

Beyond announcing the inherent problem, this Court only stated: "In deciding where to strike the balance in a particular case, trial courts have considerable discretion. They may not, however, as the trial court did here, strike the balance by precluding mention of any general fact or circumstance not expressly pleaded in the information." (*Id.* at p. 722.) No other guidance beyond this simple case-specific bright line was given. Nor has this Court told the trial courts how to navigate between the "two extremes" and still conduct

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[139] All cases cited here involve instances where the prosecutor was allowed to make case-specific inquiries.

[140] All cases cited here involve instances where the defendant was not allowed to make case-specific inquiries.

an adequate voir dire. After *Cash,* this Court has continued to struggle with the confusing nature of its death qualification "standards." (See e.g. *People v. Navarette, supra,* 20 Cal.4th 458, 489-90.) As a result, trial courts have been given unlimited, unguided discretion on the issue of death qualification.

This discretion inevitably results in non-uniform standards and unequal treatment just like the disparate treatment of voters ruled unconstitutional in *Bush v. Gore.* Trial courts in California have been given no more guidance on how to death qualify juries than the county canvassing boards in Florida were given on how to count "hanging chads." These non-uniform standards result in wildy disparate and arbitrary treatment of similarly situated capital defendants. Every capital defendant's jury is chosen by different standards, just as every voter in Florida's ballot was judged by different standards. (*Bush v. Gore, supra,* 531 U.S. at p. 109.) When a right as important and fundamental as the right to a jury, which decides whether you live or die, is at stake, such unequal treatment is unconstitutional.

Mr. Tully's jury was death qualified. This jury then decided his guilt on various issues, made the special circumstance finding, and determined his penalty. Death qualification impacts several fundamental rights. California cannot justify its infringement on these rights, its unequal treatment of similarly situated people with respect to these rights, or its lack of standards for enforcing these rights, under the Fourteenth Amendment and parallel provisions of Article I of the California Constitution.

Due to death qualification in California, capital defendants face significantly

different juries at the guilt phase than non-capital defendants. Capital defendants face guilt juries that are more prone to convict and more prone to issue a death sentence. This Court has failed to establish any uniform guidelines for death qualification, resulting in disparate treatment of capital defendants in violation of the Fourteenth Amendment and parallel provisions of Article I of the California Constitution. This unequal treatment is completely unacceptable, especially when a person's life is at stake. Death qualification in Mr. Tully's case was unconstitutional. His convictions, special circumstance finding, and penalty must be reversed.

C. Current Empirical Studies Prove That Death Qualification Is Unconstitutional

In *Hovey, supra*, 28 Cal. 3d 1, and *Fields, supra,* 35 Cal. 3d 329, this Court began to examine the vast body of evidence on the myriad problems of death qualification. Based on the statistical evidence presented in those cases, this Court found death qualification in California did not violate the Sixth Amendment right to an impartial guilt phase jury. Similarly, in *Lockhart v. McCree* (1986) 476 U.S. 162, 165, the Supreme Court relied on available statistical data and rejected a claim that death qualification violated a defendant's Sixth and Fourteenth Amendment right to have guilt or innocence determined by an impartial jury selected from a representative cross section of the community. (*Id.* at p.167.)

The lingering statistical issues arising in *Hovey* and *Fields* have been now resolved. New evidence establishes that the factual basis on which *Lockhart* rests is no

longer valid, and that its decision was based on faulty science[141] and improper logic. The questions raised in these cases must be reevaluated in light of the new evidence.

As one expert opined, the most telling aspect of the scientific data on death qualification is that it now consistently points to the conclusion that death qualification results in a jury that is prone to convict and vote for death. (Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 573.) Death qualification also impermissibly excludes women, African-Americans, and religious persons. Accordingly, death qualification in California is unconstitutional under the Sixth, Eighth and Fourteenth Amendments and Article 1 of the California Constitution.

1. The *"Hovey* Problem" Has Been Solved

This Court in *Hovey* generally accepted the vast research condemning death qualification. This Court found one flaw in the scientific data available at the time. The "*Hovey* problem" was that the studies did not take into account the fact that California also excluded automatic death penalty jurors via "life qualification." (*Hovey v. Superior Court, supra*, 28 Cal. 3d at pp. 18-19.)

This problem has been solved and the opinion in *Hovey* must be taken to its full

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[141] As one commentator stated: "The majority opinion in *Lockhart v. McCree* demonstrates the inability of the highest court in the land to accurately interpret and apply social science data. The tragedy here – and there is a far reaching one – is that the Supreme Court has licensed the imposition of death sentences by juries who are more likely to convict than juries empaneled in any other type of criminal case." (Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 573.)

conclusion. Death qualification of "guilt phase includables" renders the jury partial towards guilt and inhibits the purpose and functioning of the jury. (*Hovey v. Superior Court, supra*, 28 Cal. 3d at pp. 18-19.) This Court must now find that death qualification in California violates the Sixth Amendment and Fourteenth Amendments guarantee of trial by impartial jury and due process, and Article I of the California Constitution.

After *Hovey*, a study was conducted that specifically addressed the *Hovey* problem. (Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure* (1983) 78 J. American Statistical Assn. 544.) The article reviewed two studies presented in *Hovey*: the 1984 Fitzgerald and Ellsworth study and the 1984 Cowan, Thompson, and Ellsworth study. (*Id.* at pp. 545-546.) The article addressed the "*Hovey* problem" and reopened these two studies to account for it. (*Id.* at p. 547.) The conclusion was that excluding the "always or never" group, i.e. the automatic death and life jurors, results in a "distinct and substantial anti-defense bias" at the guilt phase. (*Id.* at p. 551.)

Professor Kadane conducted further research using data unavailable at the time of *Hovey*. (See Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors* (1984) 8 Law & Human Behavior 115 (hereafter Kadane, *After Hovey*).) The latter study, "as requested by the *Hovey* Court," proved that "the procedure of death qualification biases the jury pool against the defense. (*Id.* at p. 119.) This conclusion was a direct and specific answer to the *Hovey* problem. More recent studies have reached the same result. (See e.g., Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571 (hereafter Seltzer

et al).)

Two years later, social scientists studied jurors actually called to service and their attitudes toward the death penalty. (Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials* (1988) 12 Law & Human Behavior 263 (hereafter Luginbuhl & Middendorf).) The study's findings took account of the automatic death jurors as required by *Hovey*. Its findings were critical of death qualification and reinforced many of the studies that *Hovey* discussed. (*Id.* at pp. 276-278.)

A more recent study updated the past research on death qualification based on numerous changes in society and the law, including the increase in support for the death penalty and the Supreme Court's decision in *Morgan v. Illinois* (1992) 504 U.S. 719, which required "life qualification," or the removal of the automatic death jurors. (See Haney, et al., *"Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Human Behavior 619, 619-622.) The study was "likely the most detailed statewide survey on Californians' death penalty attitudes ever done." (*Id.* at p. 623, 625.) It found that: "Death-qualified juries remain significantly different from those that sit in any other kind of criminal case." (*Id.* at p. 631.)

These studies are the exact type of research that this Court sought in *Hovey*. They now show that death qualification violates the Sixth Amendment and Fourteenth Amendments and Article I of the California Constitution.

2. *Lockhart*'s Factual Basis is No Longer Sound

The *Lockhart* opinion has been criticized for its analysis of both the data and the law related to death qualification. (See e.g. Smith, *Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries* (1989) 18 Sw. U.L.Rev. 493, 528 (hereafter Smith) [The Court's analyses in *Lockhart* was "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended."]; Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree* (1989) 13 Law & Human Behavior 185, 202 (hereafter Thompson) [The opinion is "poorly reasoned and unconvincing both in its analysis of the social science evidence and its analysis of the legal issue of jury impartiality."]; Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U. L. Rev. 287, 318 (hereafter Byrne) [The opinion was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury."].)

Scholars have roundly condemned the Court's handling of the social science data relied on in *Lockhart*. (See generally Moar, *Death Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L. Rev. 369, 374 (hereafter Moar) [detailing criticism of the Court's analysis of the scientific data]; *See also* Bersoff & Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research* (1995) 2 U Chi L Sch Roundtable 279; Tanford, *The*

Limits of a Scientific Jurisprudence: The Supreme Court and Psychology (1990) 66 Ind L J 137.)

This Court should not defer to the general holdings in *Lockhart* in deciding the numerous federal issues at stake here. Because the "constitutional facts" upon which *Lockhart* was based are no longer correct, the Supreme Court's holding is no longer controlling under the federal Constitution. (*United States v. Carolene Products* (1938) 304 U.S. 144, 153.) This Court needs to review the new data and reevaluate this issue.

Lockhart also does not control the issues raised under the California Constitution. (*Raven v. Deukmejian, supra,* 52 Cal. 3d at pp. 352-354.) "*Lockhart* lacks both persuasive force and rhetorical validity, and should not serve as a guide for state legislatures and judiciaries examining their own capital jury selection methods. Courts that have chosen to follow the ruling (if not the rationale) of *Lockhart* should adopt appropriate remedial measures to overcome the improper and unfair jury selection methods that the case condones." (Smith, *supra,* 18 Sw. U.L.Rev. at p. 499.) This Court should continue the path it began in *Hovey* and find death qualification unconstitutional under the California Constitution.[142]

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[142] Two other state courts have decided that death qualification has no place within their jurisdictions. (*See State v. Lee* (Iowa 1894) 60 N.W. 119, 121, 91 Iowa 499, 503 ["the state has no right to a trial by jurors who have no objection against inflicting the death penalty"]; *see also State v. Garrington* (S.D. 1898) 76 N.W. 326, 327, 11 S.D. 178, 184 ["Then a verdict of guilty necessarily involved the death of the accused, and conscientious scruples against capital punishment precluded a juror from finding a defendant guilty: but as the law now stands the entertaining of such opinions does not have that affect, and is not cause for challenge."].)

a. Misinterpretation of the Scientific Data

Despite the fact that the studies presented in *Lockhart* were carried out in a "manner appropriate and acceptable to social or behavioral scientists," the Supreme Court categorically dismissed them. (Smith, *supra*, 18 Sw. U.L.Rev. at p. 537.) This improper scientific assessment was key, yet fatal to *Lockhart*'s holding. Moreover, the Supreme Court did not look at the studies as a whole body of data, allowing it to ignore the studies' powerful cumulative effect. (*Ibid.*) When the Supreme Court found a "'flaw' in a study, or a group of studies, [the Supreme Court] dismissed it from further consideration, never considering that alternative hypotheses left open by shortcomings in studies of one type might be ruled out by studies of another type." (Thompson, *supra,* 13 Law & Human Behavior at p. 195.) Any study that was deemed less than definitive was wrongly thrown out as completely uninformatitive. (*Ibid.*)

"The Court's adamant refusal to acknowledge the strength of the evidence before it casts grave doubts upon its ultimate holding in *Lockhart*." (*Ibid.*) As one researcher concluded:

> The fact that the Supreme Court can misrepresent and grossly misinterpret the findings in this study renders the Court's interpretation of all the empirical evidence before it in [*Lockhart v.*] *McCree* suspect. Social science research cannot provide answers with *absolute* certainty. We will never know precisely how many convicted defendants in death penalty cases would have been acquitted if death qualification did not take place prior to the guilt-innocence stage. (Seltzer et al., *supra,* 29 How. L.J. at p. 590.)

The Supreme Court "erred in its rejection of the empirical evidence." (Moar, *supra,* 19 Colum. Hum. Rts. L. Rev. at p. 396.) "Although there are valid criticisms of some of the

Witherspoon studies and the potential effects studies, none of their independent weaknesses appear to justify the Court's rejection of the studies' significance for McCree's claim that the death qualification procedure tends to produce guilt-prone juries." (Moar, *supra,* 19 Colum. Hum. Rts. L. Rev. at p. 382.)

In *Lockhart*, the Supreme Court was presented with over fifteen years of scholarly research on death qualification using a "wide variety of stimuli, subjects, methodologies, and statistical analyses." (*Id.* at p.386-387.) From both a scientific and legal perspective, "[g]iven the seriousness of the constitutional issues involved [] and the extent and unanimity of the empirical evidence, it is hard to justify [the Court's] superficial analysis and rejection of the social science research." (*Id.* at p.387.) The Supreme Court "ignored the evidence which indicates that a death-qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants than a typical jury which sits in all noncapital cases." (*Byrne*, supra, 36 Cath. U. L. Rev. at p. 315.) The Supreme Court's analysis of the statistics cannot be relied upon by this Court in deciding this issue.

b. Incorrect Legal Observations

The Supreme Court in *Witherspoon* had all but accepted that, once the "fragmentary" scientific data on death qualification's effect on the guilt phase was solidified, the Court would act to prevent impartial guilt phase juries. "It seemed only inadequate proof of 'death-qualified' juror bias caused the court to uphold *Witherspoon*'s guilty verdict." (Smith, *supra,* 18 Sw. U.L.Rev. at p. 518.) This Court should not follow

this faulty lead, but should instead continue on its own path as laid out by *Hovey* both in construing and applying the federal and state Constitution properly. "The Court's holding in *Lockhart* infers that the Constitution does not guarantee the capital defendant an 'impartial jury' in the true meaning of the phrase, but merely a jury that is capable of imposing the death penalty if requested to do so by the prosecution." (Peters, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?* (1987) 26 Washburn L.J. 382, 395.) This is not the meaning of impartiality that this Court forged out in *Hovey* under either the federal or the state Constitution, nor is it the proper one.

3. The Scientific Evidence

a. Post-*Lockhart* Data on the Guilt Phase Jury

All scientific research on death qualification shows that death qualification results in juries that are more prone to convict. (Moar, *supra,* 19 Colum. Hum. Rts. L. Rev. at pp. 382-383.) "It is most impressive that every study, either directly or indirectly, suggests that the death qualification procedure tends to produce conviction-prone juries." (Id at 395.) "In fact, there are no competent empirical studies which reach contrary conclusions." (Seltzer et al., *supra.* 29 How. L.J. at p. 581.)

On the whole, the major studies since 1978 "conclusively demonstrate that death qualified juries are conviction-prone, biased in favor of the prosecution, and underrepresentative of the communities from which they are drawn." (Id. at p. 577.) This study found that excluded jurors were less conviction prone than those who survived

death qualification. (*Id.* at pp.603-604.) "Seltzer concluded by finding that his study, "combined with the body of empirical data on death qualification, conclusively shows that the removal for cause of *Witherspoon* excludables results in a petit jury that is prone to convict and underrepresentative of the community from which it is drawn." (*Id.* at p.607.)

b. Data on Penalty Phase Jury Studies

Studies have consistently demonstrated that death qualification drastically affects the penalty determination. "[C]apital juries do not now fully represent the community; they are more likely to accept prosecution evidence than defense evidence and are more likely to believe in harsh measures for criminals than is the population as a whole." (Smith, *supra,* 18 Sw. U.L.Rev. at p. 509; see also Allen et al., *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-analysis* (1998) 22 Law & Hum. Behav. 715, 725 [finding that a death qualified jury is more likely to invoke death penalty].)

Following *Lockhart,* jurors' views of aggravating and mitigating circumstances were studied to determine if any relationship existed between belief in the death penalty and a juror's attitude toward aggravating and mitigating evidence. (Luginbuhl & Middendorf, *supra,* 12 Law & Hum. Behav. 263, 267.) The result turned a general principle supporting death qualification on its head – the principle that potential jurors who oppose the death penalty will not be able to consider aggravating evidence properly and thus cannot obey their oaths. This research shows that the opposite is true.

The study found that those who opposed or supported the death penalty did not differ in their perception of aggravating circumstances. (*Id.* at p.270.) However, there was a "strong relationship between opposition to the death penalty and one's consideration of mitigating circumstances." (*Ibid.*) As death penalty opposition increased, the consideration of mitigation evidence increased. (*Ibid.*) The researchers concluded that: "while most people can understand and accept that there are some circumstances that make a particular murder 'worse' and merit harsher punishment for the defendant, only those with strong opposition to the death penalty are willing to consider favorable evidence (or facts) that supports statutory or nonstatutory mitigating circumstances and that points toward a more merciful sentence." (*Id.* at p.271.) Death penalty opponents can consider aggravators, but death penalty proponents have difficulty considering mitigation. This result is especially disturbing since there is a constitutional right to have sentencers consider mitigation, but no such equivalent right for aggravation. A second study verified these results when the proper legal standards for exclusion were used, including the exclusion of automatic death penalty jurors as required by *Hovey*.[143] (*Id.* at pp.271-272.)

The study also demonstrated that death qualification results in jurors who may not be able to consider non-statutory mitigating circumstances. (*Id.* at p. 277.) Importantly,

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[143] This study addresses the criticisms of the prior case law. Not only does it address the evidence as to death qualification's effect on the penalty phase, but used actual jurors, which was purportedly an issue for the Supreme Court in *Lockhart*. It also addressed the automatic death penalty jurors of the "*Hovey* problem." This study also removed "nullifiers" from its analysis, which was another potential issue noted by *Lockhart*. (*See Id.* at p. 274.)

the researchers opined that these general attitudes will influence the jurors' final determination of the death penalty. (*Id.* at pp. 277-279 [explaining individual schema and juror's behavior].) The researchers found that a death-qualified jury "may well be more likely to impose a penalty of death" since they are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances. (*Id.* at p. 279.)

c. Data on Death Qualification's Impact on Race, Gender, and Religion

The Supreme Court in *Lockhart* did not address whether death qualification had an negative impact on race, gender, and religion in jury composition. This Court acknowledged in *Fields* that these issues are of constitutional dimension and required more research. That research is now available, and it compels a finding that death qualification has an adverse effect on these important classes.

Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, *supra,* 19 Colum. Hum. Rts. L. Rev. at p. 386.) Death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," impacting two distinctive groups under a fair cross-section analysis. (*Id.* at p. 388.) Death qualification has a "detrimental effect on the representation of blacks and women on capital juries." (*Id.* at p. 396.)

Professor Seltzer also found that "the process of death qualification results in juries which underrepresent blacks." (Seltzer et al., *supra,* 29 How. L.J. at p. 604.)

Luginbuhl & Middendorf found that there is significant sex, race, age, and education effects on death penalty attitudes. (Luginbuhl & Middendorf, *supra*, 12 Law & Hum. Behav. at p. 269.) They found that females were significantly more opposed to the death penalty than males. (*Ibid.*) They also found a significant race effect. (*Ibid.*)

d. Prosecutor Misuse of Death Qualification

Research has shown that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, *supra,* 13 Law & Human Behavior at p. 199 citing Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data* (1984) 8 Law & Hum. Beh. 7, 13.) "The ability to screen jurors may invite prosecutorial gamesmanship, tempting prosecutors to charge cases as capital crimes solely to produce a "friendlier" jury. In his 1986 dissent [in *Lockhart*], Justice Marshall noted that it was all but impossible to prove that a prosecutor had engaged in this sort of 'tactical ruse.' Though facts suggesting the tactic have been present in at least a half-dozen cases, no court has overturned a conviction on this ground." (Liptak, *Facing a Jury of (Some of) One's Peers*, New York Times, July 20, 2003, Section 4.)

Prosecutors now acknowledge that death qualification skews the jury and that they use this unconstitutional practice to their advantage in obtaining conviction-prone juries. (*See* Garvey, *The Overproduction of Death* (2000) 100 Colum. L. Rev. 2030, 2097 & fn163-4, quoting Rosenberg *Deadliest D.A.* (1995) N.Y. Times, July 16, 1995, Magazine

at p. 42.)[144] The prosecutors use this voir dire practice to eliminate the segment of the jury pool that is most likely to be critical of police and forensic testimony and most likely to discount the "beyond a reasonable doubt" standard. (*Ibid.*)

In *Lockhart,* the Supreme Court declined to consider the prosecutorial motives underlying death qualification, noting that the petitioner had not argued that death qualification was instituted as a means "for the State to arbitrarily skew the composition of capital-case juries." *(Lockhart v. McCree, supra,* 476 U.S. at p. 176.) The dissent in *Lockhart* predicted that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict." (*Lockhart v. McCree*, 476 U.S. at p. 185 (dis. opn of Marshall, J., Brennan, J., & Stevens, J.)

The prosecutor's use of death qualification in this case violated Mr. Tully's Sixth, Eighth and Fourteenth Amendment rights and his rights under Article 1 of the California Constitution.

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[144] The Rosenberg article quotes "various former and current Pennsylvania prosecutors explaining the Philadelphia district attorney's practice of seeking the death penalty in nearly all murder cases as self-consciously designed to give prosecutors 'a permanent thumb on the scale' enabling them to 'use everything you can' to win, including . . . "'everyone who's ever prosecuted a murder case wants a death-qualified jury,' because of the 'perception... that minorities tend to say much more often that they are opposed to the death penalty,' so that '[a] lot of Latinos and blacks will be [stricken from capital juries as a result of] these [death qualification] questions.'" (Tina Rosenberg (1995) *Deadliest D.A.,* N.Y. Times, July 16, 1995, Magazine at p. 42.)

D. Death Qualification in California Violates the Eighth Amendment

Death qualification skews the jury so that it is more conviction prone and more prone to inflict death upon capital defendants. Non-capital defendants do not face such skewed juries. This result is unacceptable under the Eighth Amendment and Article I of the California Constitution.

The Eighth Amendment requires "heightened reliability" in capital cases because "death is different."

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opinion).)

Since death qualification impacts the jury to make a death sentence more likely, it cannot survive the "heightened reliability" requirement. The Supreme Court has recognized the same principle when it comes to guilt determinations.

> To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 638; citations, quotations, and footnotes omitted.)

In California, instead of the "utmost care" and "heightened reliability," capital defendants are provided with juries that are not allowed in any other circumstance. Death qualification only targets capital defendants. It results in capital defendants receiving

juries at both phases that are far less "impartial" than juries provided to any other defendant.

Accordingly, it violates the "heightened reliability" requirement of due process and the Eighth Amendment because it is utterly "cruel and unusual" to put a human being on trial for his life yet systemically force him to face a jury that is prone to convict and condemn him to die by excluding all of the jurors who would be open to the defense evidence. Since Mr. Tully faced such treatment via his death qualified jury, all of his convictions, the special circumstance finding, and the penalty must be reversed.

E. The Process of Death Qualification is Unconstitutional

Even if this Court does not condemn death qualification in general, the process of death qualification nevertheless is unconstitutional. The Supreme Court did not reach this issue in *Lockhart*. This Court in *Hovey* reviewed the evidence on this issue and generally accepted it. However, this Court's solution in *Hovey* only addressed some of the problems presented by the evidence. In *Fields*, this Court improperly allowed more specific death qualification voir dire, which exacerbated the problems of the process.

"The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case.' The influence of the voir dire process may persist through the whole course of the trial proceedings." (*Powers v. Ohio* (1991) 499 U.S. 400, 412 *quoting Gomez v. United States* (1989) 490 U.S. 858, 874.].) As detailed in *Hovey* and recent studies, the process of voir dire death qualification indoctrinates jurors to a pro-conviction and pro-death view. The result is that particular views on guilt and

the penalty are removed from the panel. *Fields* creates a more serious problem because it allows jurors to be indoctrinated on the particular facts of the case before any evidence has been presented. This pre-trial bias violates the principles of fundamental fairness and due process.

The very process of death qualification in this case influenced the deliberative process and the mind set of the jurors concerning their responsibilities and duties. The process of death qualification voir dire in California violates the Sixth and Fourteenth Amendments and Article I of the California Constitution. Any verdict reached by a jury chosen in this manner cannot stand since a skewed jury is a structural error.

F. Death Qualification Violates the Right to a Jury Trial

In *Taylor v. Lousiana* (1975) 419 U.S. 522, 530-531, the Supreme Court identified three purposes underlying the Sixth Amendment right to a jury trial. Death qualification defeats all three purposes underlying that constitutional right

First, "the purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Ibid.*) Death qualification fails to guard against "the exercise of arbitrary power." Potential jurors who tend to question the prosecution, and would thus keep their power in check, are the very people excluded from the jury via death qualification.

Death qualification makes the "commonsense judgment of the community"

unavailable. The evidence now shows that a death qualified jury fails to represent the judgment of the excluded community members.

Death qualification also removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (*Ibid.*) Evidence shows that prosecutors intentionally use death qualification to remove potential jurors so that there is no "hedge" to prevent their overzealousness.

The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. (*Ibid.*) Death qualification fails to preserve confidence in the system, and discourages community participation. (See e.g, Moller, *Death-Qualified Juries Are the 'Conscience of the Community'?* (May 31, 1988) L.A. Daily Journal, p.4, Col. 3 [noting the "Orwellian doublespeak" of referring to a death qualified jury as the "conscience of the community."];"(Smith, *supra,* 18 Sw. U.L.Rev. at p. 499 ["the irony of trusting the life or death decision to that segment of the population least likely to show mercy is apparent..]; Liptak, *Facing a Jury of (Some of) One's Peers* (July 20, 2003) New York Times, Section 4.)

The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (*Taylor v. Lousiana, supra,* 419 U.S. at p. 532.) The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

Finally, because death qualification undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement and the Equal Protection Clause. "We think it obvious that the concept of "distinctiveness" must be linked to the [three] purposes of the fair-cross-section requirement." (*Lockhart v. McCree*, 476 U.S. at p. 175.)

For these reasons, death qualification violates the Sixth and Fourteenth Amendments, as well as Article I of the California Constitution.

G. The Prosecutor's Use of Death Qualification via Peremptory Challenges was Unconstitutional

The prosecutor's use of peremptory challenges to systematically exclude jurors with reservations about capital punishment denied Mr. Tully his constitutional rights. After all jurors who declared they could not impose a death sentence were excused, various prospective jurors remained who had reservations about the death penalty, but who were not excludable under *Witherspoon* and *Witt*. These prospective jurors stated that they could vote for the death penalty in an appropriate case. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667-668.)

When these jurors was called to the jury box, the prosecution systematically used a peremptory challenge to exclude them. The prosecutor's actions denied Mr. Tully his federal and state constitutional rights to due process, equal protection, an impartial jury, a jury drawn from a fair cross-section of the community and a reliable determination of

guilt and sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments and related provisions of Article I of the California Constitution.

The peremptory exclusion of these jurors prejudiced Mr. Tully's rights at the guilt phase for the same reasons as the "death-qualification" of the jury. Furthermore, unlike death-qualification through for-cause challenges, which excludes from the jury only those whom the trial court determines would be unable to follow their oath at the penalty phase, the elimination of these jurors through peremptory challenge involves the exclusion of persons whose ability to follow their oath and instructions at the penalty phase is unaffected by their reservations about capital punishment. Even assuming their exclusion was harmless at the guilt phase, reversal of the death judgment is required nonetheless. (See e.g. *Gregg v. Georgia*, *supra*, 428 U.S. 153, 188; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) The prosecution "stacked the deck" in favor of death by exercising its peremptory challenges to remove these jurors. The exclusion of these jurors while including death penalty supporters and abstainers, resulted in a "jury uncommonly willing to condemn a man to die." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521, 523.)

The prosecutor shares responsibility with the trial court to preserve a defendant's right to a representative jury and can only exercise peremptory challenges for legitimate purposes. Since the State is forbidden from excusing a class of jurors for cause based on their death penalty skepticism, those views are not a proper basis for a peremptory challenge. The State has no legitimate interest in the removal of jurors who can follow their oaths. A jury shorn of the significant community viewpoint that these prospective

jurors provide is not ideally suited to the purpose and functioning of a jury in a criminal trial. (*Ballew v. Georgia*, *supra*, 435 U.S. at pp.239-242.) Even if these jurors do not constitute a cognizable class for purposes of the Sixth Amendment's representative cross-section of the community analysis (*Lockhart v. McCree*, *supra*, 476 U.S. at pp.174-177), they are distinct for ensuring both the reliability of a capital sentencing decision and the need for the jury to reflect the consensus of the community. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 519.)

The Supreme Court in *Gray* held the wrongful exclusion for cause of a prospective juror who was a death penalty skeptic constituted reversible error. The plurality opinion emphasized the potential prejudice to a capital defendant when death penalty skeptics are systematically excluded from a jury by peremptory challenges. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp.667-668.) The systematic, peremptory exclusion of death penalty skeptics in Mr. Tully's case requires reversal of the penalty verdict.

H. Errors in Death Qualifying The Penalty Jury Requires Reversal of the Guilt Verdicts As Well

In *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, the Supreme Court identified three separate problems regarding death qualification. First, death qualification can be so extreme as to make the jury biased at the penalty phase. Second, death qualification that is so extreme may also make the jury biased at the guilt phase. Third, even death qualification that is not so extreme biases the jury at the guilt phase.

The first issue is the one that formed the basis for the limits on death qualification

in *Witherspoon*. The second and third issue were left open by *Witherspoon* for more studies. However, it appears that courts have erroneously compounded these issues. (*See e.g. Hovey v. Superior Court, supra*, 28 Cal. 3d at pp. 11-12; footnotes omitted [summarizing *Witherspoon* and discussing the two issues as if they were identical]; *see also People v. Fields, supra*, 35 Cal. 3d at p. 344.)

This joining of issues is incorrect. The second issue is whether death qualification that did not meet the proper standard for removal of penalty phase jurors was improper at the guilt phase. (*Id.* at pp. 516-518.) *Witherspoon* held that the evidence on this second issue was not yet developed and thus only reversed the penalty phase. (*Ibid.* and *Id.* at p. 522, fn. 21.) The third issue is whether, assuming the State properly death qualified the jury as to the penalty phase, it was proper for such death qualification to also exclude potential jurors from the guilt phase. (*Id.* at pp. 521, fn. 19.) This was the issue involving the "guilt phase includables" discussed in *Lockhart* and *Hovey*.

This Court has routinely asserted that *Witherspoon* error as to the penalty phase jury only requires reversal of the penalty and not the guilt verdicts. (See e.g. *People v. Ashmus* (1991) 54 Cal. 3d 932, 962.) However, no court has addressed this issue since *Witherspoon*. This Court should find that error as to the death qualification of the penalty phase jury requires reversal of the guilt phase as well.

Since the evidence shows that a death qualified jury is conviction prone and different from a typical jury, the conclusion that *Witherspoon* error requires penalty reversal only must be reconsidered. The State's only conceivable legitimate interest in

death qualification is at the penalty phase. If it committed error in achieving this interest, then it has no interest in death qualifying the guilt phase jury. Since the State did death qualify the jury in this case, Mr. Tully improperly faced a biased guilt phase jury. Moreover, an error resulting in a biased jury can not be harmless. When this Court finds error as to the penalty phase jury's death qualification, it must also reverse Mr. Tully's guilt phase convictions.

I. Conclusion

Death qualification in California is irrational and unconstitutional. It prevents citizens from performing as jurors in capital cases based on their "moral and normative" beliefs despite the fact that the law specifically requires capital jurors to make "moral and normative" decisions. These citizen's voices are eliminated from the data that the courts rely on to determine whether a particular punishment offends evolving standards of decency under the Eighth Amendment. To make matters worse, California allows case-specific death qualification whose effect, among others, is to remove jurors who would be highly favorable to specific mitigation evidence in violation of the Eighth Amendment.

Death qualification in California also violates the equal protection and due process clauses of the Fourteenth Amendment. To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with other defendants. Capital defendants charged with different varieties of capital murder receive vastly different juries at the penalty phase from each other and this Court has not ensured state wide standards to prevent these results. In addition, since death qualification results in

conviction- and death-prone juries, capital defendants' guilt and penalty determinations are not made with heightened reliability as required by the Eighth Amendment.

The scientific data demonstrates that death qualified juries are far more conviction prone and death prone than any other juries. The data shows that minorities, women, and religious people are disproportionately removed from sitting on juries via death qualification in violation of the Sixth and Fourteenth Amendments. Moreover, the State engages in death qualification with the intent of achieving these results. The very process of death qualification skews capital juries to such a degree that they can no longer be said to be impartial and fully represent the community.

All of these errors are present in the instant case. From beginning to end, death qualification violated Mr. Tully's rights. The process accomplished was what was expressly prohibited by the Supreme Court:

> In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. (*Lockhart v. McCree, supra,* 476 U.S. at p. 179, quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521 (footnotes omitted). [internal citations omitted].)

Thus, death qualification in general, and as applied in this particular case violated Mr. Tully's Fifth, Sixth, Eighth and Fourteenth Amendment rights and Article 1 of the California Constitution. His conviction and death sentence must be reversed.

XXVII. CALIFORNIA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PROPERLY NARROW THE CLASS OF DEATH PENALTY OFFENDERS AND OFFENSES

The California death penalty scheme fails to properly narrow the class of offenders who are "eligible" for the death penalty. As a result, the scheme permits the arbitrary selection of offenses and offenders for capital prosecution in violation of due process and the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendment, as well as Article 1 of the California Constitution. Since Mr. Tully was sentenced to death under this unlawful death penalty scheme, his death sentence is unconstitutional and must be vacated.

The Supreme Court has held that the Constitution requires that legislatures enact statutes that quantitatively and qualitatively narrow the class of death-eligible murderers in a genuine and rational manner. (*Gregg v. Georgia* (1976) 428 U.S. 153, 193.) The special circumstances set forth in section 190.2. purportedly narrow the class of first degree murderers subject to the death penalty in California. Current section 190.2 is not a legislative statute, but rather was created in 1978 by the electorate through California's ballot initiative process. Section 190.2 expands, instead of narrows, the class of offense and offenders who are subject to the death penalty. This Court's interpretation of the section and failure to curb the prosecutor's charging decisions under section 190.2 in specific cases has further expanded its reach.

An analysis of section 190.2 and the empirical data demonstrates that the special

circumstances fail to narrow the class of death-eligible offenders in any numerical or meaningful manner. The result is a system that arbitrarily chooses from thousands of murderers in California those people who will suffer the ultimate sanction. California's death penalty scheme is unconstitutional for the various reasons enumerated below, both individually and cumulatively.

A. California's Special Circumstances

In a capital trial, the trier of fact decides the issue of defendant's guilt or innocence of first degree murder. If the defendant is found guilty, a determination must be made as to the existence of any special circumstances. (*People v. Bacigalupo* (1993) 6 Cal. 4th 457, 467.) This Court has explained that the purpose of the "special circumstances" is to "'guide'" and "'channel'" jury discretion "by strictly confining the class of offenders eligible for the death penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 539-540, revd. on other grounds *sub nom. California v. Brown*, *supra*, 479 U.S. 538.) This Court held that the section 190.2 special circumstances perform the same constitutionally required narrowing function as the "aggravating circumstances" or "aggravating factors" that some of other states use in their capital sentencing statutes. (*People v. Bacigalupo*, *supra*, 6 Cal. 4th at pp.467-468.)

If a jury finds an alleged special circumstance to be true, the case proceeds to the penalty phase. (*Id.* at p.467.) At the penalty phase, "'[a]dditional evidence may be offered and the jury is given a list of relevant factors' from section 190.3 to guide it in deciding whether to impose a sentence of life without the possibility of parole or a

sentence of death." (*Id.* at p. 468 quoting *Pulley v. Harris* (1984) 465 U.S. 37, 51.) This Court made clear that, "[t]he sole purpose of the penalty phase is to select the punishment for a defendant who has been found to be within the narrowed class of murderers for whom death would be an appropriate penalty." (*People v. Bacigalupo*, *supra*, 6 Cal. 4th at p.468 citing *People v. Brown*, *supra*, 40 Cal.3d at pp.539-540.)

In California, the special circumstances are meant to limit the class of murderers who are "eligible" to receive the death penalty. Section 190.2 lists 22 separate special circumstances, with one special circumstance containing 13 separate crimes. California thus has a total of thirty-three (33) distinct circumstances that render the offender eligible for the death penalty. Including aiders and abettors and this Court's removal of the intent to kill requirement further increased the breadth of the thirty-three ennumerated special circumstances.

B. The *Furman* Mandate to State Legislatures to Genuinely and Rationally Narrow the Class of Death-Eligible Murders

In *Furman v. Georgia* (1972) 408 U.S. 238, the Supreme Court found existing death penalty statutes were unconstitutional. Four years later, in *Gregg v. Georgia* (1976) 428 U.S. 153, a plurality of the Supreme Court explained that "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Id.* at p. 189.) *Furman* stands for the central principle that when a death penalty scheme

allows unlimited discretion in the process of selecting who should be subject to the death penalty, it creates an unconstitutional risk of arbitrariness. The conclusion in *Furman* that the death penalty was being applied in an arbitrary and capricious manner was "grounded in empirical data concerning death sentence ratios at the time." (Steven Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*(1997) 72 N.Y.U. L.Rev. 1238, 1287 (hereafter Shatz & Rivkind).)

In *Gregg,* the Supreme Court explained how death penalty states could meet the requirements of *Furman*:

> As the types of murders for which the death penalty may be imposed become *more narrowly defined and are limited* to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries – even given discretion not to impose the death penalty – will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. (*Gregg v. Georgia*, *supra*, 428 U.S. at p.222; emphasis added (concurring opn. of J. White).)

Georgia responded by narrowing the number of circumstances where death can be imposed and limiting the death penalty to particularly serious murders. Many other death penalty states responded to *Furman* with mandatory death penalty statutes. The Supreme Court subsequently concluded that mandatory death penalty statutes were unconstitutional and that the *only* constitutional route to address the problem identified in *Furman* was to require state legislatures to narrow the number and limit the class of those who are eligible to receive the death penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at

p.286, 301, 303.) In *Zant v. Stephens* (1983) 462 U.S. 862, 874-876, the Supreme Court summarized the "*Furman* mandate" and stated that the key principle:

> To avoid this constitutional flaw, 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. (*Id.* at p.877; emphasis added.)

In *Tuilaepa v. California* (1994) 512 U.S. 967, 971-972, the Supreme Court explained that "[t]o render a defendant eligible for the death penalty in a homicide case [] the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent)."[145] The Supreme Court added that these narrowing circumstances "must apply only to a subclass of defendants convicted of murder." (*Id.* at p.972.) "[A] State's capital sentencing scheme [] must genuinely narrow the class of persons eligible for the death penalty" and "the [narrowing] circumstance must provide a principled basis" for distinguishing "those who deserve capital punishment from those who do not." (*Arave v. Creech* (1993) 507 U.S. 463, 474; citations and quotations omitted.) This requires that the death-eligible class of murderers be narrowed in both a quantitative[146] and a qualitative[147] manner. (Shatz & Rivkind,, *supra,* 72 N.Y.U. L.Rev. at

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[145] In the California death penalty scheme, "special circumstances" are meant to achieve the purpose of what the Supreme Court refers to as "aggravating circumstances" here. (*People v. Bacigalupo*, *supra*, 6 Cal. 4th at pp.467-468.

[146] The quantitative requirement is indicated by language such as: "more narrowly define[]," "genuinely narrow," "circumscribe," and "only to a subclass of defendants."

[147] The qualitative requirement is indicated by language such as: "meaningful basis," (continued...)

p. 1294.)

This Court has acknowledged the importance of the *Furman* mandate. To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

> The high court has drawn a distinction between two aspects of capital sentencing: "narrowing" and "selection." "Narrowing" pertains to a state's "legislative definition" of the circumstances that place a defendant within the class of persons eligible for the death penalty. To comport with the requirements of the Eighth Amendment, the legislative definition of a state's capital punishment scheme that serves the requisite "narrowing" function must "circumscribe the class of persons eligible for the death penalty." (*People v. Bacigalupo, supra*, 6 Cal.4th at p.465.)

In sum, the *Furman* mandate has three requirements for a valid death penalty scheme. First, the legislature must genuinely narrow the class of death-eligible offenders in a quantitative sense by limiting the number of death-eligible offenders to a small subclass of all first-degree murderers. Second, it must rationally narrow the class of death-eligible offenders in a qualitative sense, i.e. there must be some valid reason why the small subclass of death-eligible murders are distinguished from and deemed worse than the vast majority of first-degree murders. Third, it must properly narrow the death-eligible class to a "demonstrably smaller" group of "more blameworthy" murders.

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[147](...continued)
"limited to those which are particularly serious," "peculiarly appropriate," "reasonably justify," "rationally distinguish," "valid penological reason," "threshold," "rational criteria," and "principled basis."

California's scheme not only fails all three of these requirements, but these failures result in the arbitrary death penalty scheme condemned by *Furman*.

C. California's Never Ending Expansion of the Death Penalty Scheme

1. California Death Penalty Scheme from 1872-1977

In 1972, this Court declared the 1957 death penalty scheme to be invalid under the cruel or unusual punishment clause of article I of the California Constitution. (*People v. Anderson* (1972) 6 Cal. 3d 628; (See *People v. Ray, supra,* 13 Cal. 4th at p.371 (concurring opn. of J. Mosk).) Later that year, the Supreme Court decided *Furman.*

On November 7, 1972, Section 27 was added to article I of the California Constitution, "stating that the 1957 law was in 'full force and effect' and did not authorize a punishment that was 'cruel or unusual . . . within the meaning of' the state charter." (*Id.* at p.372.)

In 1973, in response to *Furman*, the 1957 death penalty scheme was replaced by the legislature with a new death penalty scheme that provided for a mandatory death penalty without a penalty phase. Under the 1973 scheme, every person convicted of first-degree murder would be sentenced to death if one of an enumerated list of special circumstances was found. In July 1976, the Supreme Court held that mandatory death penalty schemes such as the 1973 California scheme were unconstitutional under *Furman*. (*Woodson v. North Carolina, supra*, 428 U.S. 280; *Roberts v. Louisiana* (1976) 428 U.S. 325.) In December 1976, this Court declared the 1973 mandatory scheme unconstitutional in light of these cases. (*Rockwell v. Superior Court* (1976) 18 Cal. 3d

420.)

The legislature respond in 1977 by replacing the 1973 death penalty scheme. (See *People v. Ray, supra*, 13 Cal. 4th at p.373 (concurring opn. of J. Mosk), at p.366 (concurring opn. of C.J. George).) The 1977 death penalty statute was the legislature's attempt to comply with the *Furman* mandate to genuinely narrow death-eligible offenses to a small subset of extraordinary cases. (*Id.* at p.49.)

2. The 1978 Briggs Initiative

On November 7, 1978, the 1977 death penalty scheme was replaced by the Briggs Initiative. (See e.g. *People v. Ray, supra,* 13 Cal. 4th at p.373 (concurring opn. of J. Mosk); *People v. Rodriguez* (1986) 42 Cal.3d 730, 777.) The 1978 initiative was not meant to narrow, but to broaden and expand the class of death-eligible offenders.

The initiative stated that it "*expands* categories of first degree murder for which penalties of death or confinement without possibility of parole may be imposed." (Summary of Prop. 7, approved by initiative, Gen. Elec. (Nov. 7, 1978).) The Legislative Analyst wrote that "[t]he proposition would also expand and modify the list of special circumstances which require either the death penalty or life without the possibility of parole." (Analysis by Legislative Analysis of Prop. 7, approved by initiative, Gen. Elec. (Nov. 7, 1978).) The Legislative Analyst noted that "this proposition would specifically "broaden the liability of persons" subject to the death penalty or life imprisonment without possibility of parole under specified circumstances." (*Ibid.*) The Legislative Analyst warned that "[t]here could also be an increase in the number of executions as a

result of this proposition." (*Ibid.*)

According to its author, State Senator John V. Briggs, the initiative was specifically intended to "give Californians the toughest death-penalty law in the country." (*California Journal Ballot Proposition Analysis*, 9 Calif. J. Special Section, November 1978 at 5.) As expressed in the ballot arguments, the purpose was to make the death penalty applicable to *every murderer*, not just "extraordinary cases."[148] The ballot argument stated:

> Since 1972, the people have been demanding a tough, effective death penalty law to protect our families from ruthless killers. But, every effort to enact such a law has been thwarted by powerful anti-death penalty politicians in the State Legislature.
>
> In August of 1977, when the public outcry for a capital punishment law became too loud to ignore, the anti-death penalty politicians used their influence to make sure that the death penalty law passed by the State Legislature was as weak and ineffective as possible.
>
> That is why 470,000 concerned citizens signed petitions to give you the opportunity to vote on this new, tough death penalty law.
>
> Even if the President of the United States were assassinated in California, his killer would not receive the death penalty in some circumstances. Why? Because the Legislature's weak death penalty law does not apply. Proposition 7 would.
>
> If Charles Manson were to order his family of drug-crazed killers to slaughter your family, Manson would not receive the death penalty. Why? Because the Legislature's death penalty law does not apply to the master mind of a murder such as Manson. Proposition 7 would.
>
> And, if you were to be killed on your way home tonight simply because the

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[148] Under California law, ballot arguments constitute the legislative history used to interpret initiative measures. (See e.g. *White v. Davis* (1975) 13 Cal.3d 757, 775, fn. 11.)

> murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*
>
> Proposition 7 would also apply to the killer of a judge, a prosecutor, or a fireman. It would apply to a killer who murders a citizen in cold blood because of his race or religion or nationality. And, it would apply to all situations which are covered by our current death penalty law.
>
> In short, your YES vote on Proposition 7 will give every Californian the protection of the nation's toughest, most effective death penalty law. (*1978 Voter's Pamphlet* at 34; emphasis added.)

The intent of the 1978 Initiative was an attempt to expand the class of death-eligible offenders so that every murderer was included. It was meant to overcome the legislature's narrowing of the death-eligible class mandated by *Furman*.

Indeed, the Attorney General and this Court have long acknowledged the expansive goal of the 1978 Initiative. Citing the ballot argument's language that the initiative would "'give every Californian the protection of the nation's toughest, most effective death penalty law,'" the Attorney General has argued to this Court that "the enactment of the initiative shows the voters wanted a 'tough' law, and, in essence, that the 'toughest' death penalty law is the one *which threatens to inflict that penalty on the maximum number of defendants*." (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 145, fn 13, *overruled by People v. Anderson* (1987) 43 Cal.3d 1104; emphasis added; see also *People v. Davenport, supra*, 41 Cal. 3d at p.266, 269.)

The 1978 initiative reached its goal of enacting the "nation's toughest" death penalty scheme by adding to and expanding the enumerated special circumstances. *(See*

e.g. People v. Ray, supra, 13 Cal. 4th at p.375 (concurring opn. of J. Mosk).) It expanded It *more than doubled* the number of enumerated special circumstances. There were only twelve special circumstances in 1977 but twenty-seven special circumstances in the 1978 law. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1313 and fns 156-160.)

The initiative broadened the death-eligible class by expanding the definitions of the special circumstances, at times replacing the precise language of the 1977 act with vague and broad generalities. (*People v. Bigelow* (1984) 37 Cal.3d 731, 750.) The 1978 scheme drastically expanded the felony-murder special circumstances. It also added an "accomplice" provision to the various felony-murder special circumstances. (Compare section 190.2(c)(3) [1977] with section 190.2(a)(17) [1978].)

3. The Expansion Has Continued Since 1978

Since the 1978 initiative, death eligibility has continued to expand in violation of the *Furman* mandate. In 1981, the legislature eliminated two mental state defenses for first-degree murder, thus broadening the class of first-degree murder offenders. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1314 and fns 172-176.) In addition, ten new types of first-degree murder have been added since the 1978 initiative.

In 1982, the legislature added murder by the "knowing use of ammunition designed primarily to penetrate metal or armor" to the enumerated list of first-degree murders. (See 1982 Cal. Stat. 950, 1 (codified as amended at Cal. Penal Code 189 (West 1988).)

In 1990, Proposition 115 was enacted, adding five more felony-murders,

kidnapping, trainwrecking, sodomy, oral copulation, and rape by instrument, to the list of first-degree murder. (State of California, Crime Victims Justice Reform Act, Initiative Measure Proposition 115, 9 (approved June 5, 1990).)

Propositions 114 (also enacted in 1990)[149] and 115 also added numerous special circumstances, including two new felony-murder special circumstances, mayhem and rape by instrument, and other individual special circumstances, including murder of witnesses, robbery felony-murder, and torture-murder special circumstance, and altered the phrasing of the "heinous, atrocious, and cruel" special circumstance. (Sections 190.2(a)(10), 190.2(a)(17(i), 190.2(a)(17)(x), 190.2(a)(17(xi).)

Moreover, Proposition 115 expanded the scope of section 190.2(b) and added sections 190.2(c) & (d). (See Prop 115 § 10, adopted by voters effective June 6, 1990) The changes expanded the class of death-eligible offenders to include actual killers regardless of intent to kill, various accomplices who had the intent to kill and various felony-murder accomplices who did not have the intent to kill, but merely had the constitutionally minimum mens rea of "reckless indifference." (Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p.1315 citing *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137.)

In 1993, the legislature added carjacking to the list of first-degree felony- murders and added non-felony murder perpetrated by means of discharging a firearm from a motor

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[149] See *Yoshisato v. Superior Court* (1992) 2 Cal. 4th 978, 982-984 (explaining the history of Proposition 114 and 1989 Amendment, Cal. Pen. Code § 190.2 (Deerings 2004).

vehicle. (1993 Cal. Stat. 611, 4.) In 1999, it added torture-murder under Penal Code section 206 to the list of first-degree felony murders. (1999 Amendment, Cal. Pen. Code § 189 (Deerings 2004).) In 2002, the legislature added murder by "a weapon of mass destruction." (See 2002 Amendment, Cal. Pen. Code § 189 (Deerings 2004).)

In 1996, Proposition 196 was enacted. (See Stats 1995 ch 478 § 2, approved by the voters, at the March 26, 1996, primary election (Prop 196), effective March 27, 1996.) Three (3) more special circumstances were added to the statute. (Ballot Pamp., Title and Summary and Analysis by the Legislative Analyst., Prop. 196, Primary Elec. (March 26, 1996). In 1996, Proposition 21 also added a new criminal street gang special circumstance. (See Prop 21 § 11, adopted by voters effective March 7, 1996; see also Cal. Pen. Code § 190.2(a)(22).)

In 2000, two more initiatives were passed amending the enumerated list of special circumstances, Proposition 18 and Proposition 21. (See Editor's Notes, Cal. Pen. Code § 190.2 (Deerings 2004) [noting that "Section 190.2 was further amended by Stats 1998 ch 629 § 2, approved by voters (Prop 18 § 2) at the March 7, 2000 primary election, and also by initiative measure, Prop 21 § 11.]). Proposition 18 greatly expanded the "lying in wait" special circumstance and lessened the intent requirement of the arson and kidnaping special circumstance. (Stats 1998 ch 629 § 2, approved by voters (Prop 18 § 2) at the March 7, 2000 primary election.)

After the 2000 initiatives, the death penalty scheme now has thirty-three (33) broad special circumstances. The list of special circumstances was expanded greatly, both in

sheer number and in breadth, by the initiative process. Where the 1977 death penalty scheme was an attempt by the legislature to comply with the *Furman* mandate to quantitatively and qualitatively narrow the class of death-eligible offenders, the various changes since that time have had the opposite result.

4. This Court's Decisions Have Further Expanded the Breadth of the Special Circumstances

In the initial years after the enactment of the broad 1978 initiative, this Court made a conscientious effort assure the death penalty scheme met constitutional standards. For example, in 1982, this Court held that the catchall "heinous, atrocious or cruel" special circumstance was unconstitutional. (*People v. Superior Court (Engert)* (1982) 31 Cal. 3d 797.) However, many of the decisions limiting the special circumstances by this Court were altered by later voter initiatives. Moreover, after this initial period of proper review, this Court not only ceased limiting the special circumstances, but began to expand them by its own decisions.[150]

In 1983, this Court concluded that the 1978 initiative "should be construed to require an intent to kill or to aid in a killing as an element of the felony-murder special circumstance." (*Carlos v. Superior Court, supra*, 35 Cal. 3d 131, 135.) This Court explained that the initiative "completely rewrote the special circumstance provision of the

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[150] This sea change in behavior by this Court coincided with the 1986 recall of then-Chief Justice Bird and Justices Grodin and Reynoso. (See Shatz & Rivkind,, *supra,* 72 N.Y.U. L.Rev. at p.1316 and fn 184 [noting that "[i]n the ten years since [the recall], the California Supreme Court has imposed no significant limits on the scope of section 190.2."].)

1977 law" by omitting the requirements that the murder be "wilful, deliberate, and premeditated," that there be physical presence, and that there be intention to cause death. (*Id.* at pp.139-140.) This Court feared that if there was no intent to kill requirement for those offenders convicted of felony-murder then the California death penalty scheme would not rationally narrow the death-eligible class.

However, in 1987, this Court overruled *Carlos*' intent to kill requirement for actual killers. (*People v. Anderson* (1987) 43 Cal.3d 1104; *People v. Bolden* (2002) 29 Cal. 4th 515, 560 [explaining effect of *Anderson* on *Carlos*].) After again analyzing the language of the 1978 initiative, this Court held that *Carlos* was incorrect and that "on further reflection . . . section 190.2(a)(17) provides that intent is not an element of the felony-murder special circumstance," *id.* at p.1143, and that such a "reading of the statutory provision raises grave and doubtful constitutional questions." (*Id.* at p.1146.) Without ever fully addressing this concern, this Court held that intent to kill is not required for the actual killer. (*Ibid.*). Similarly, this Court held that intent to kill was no longer an element of the prior-murder-conviction special circumstance. (*People v. Hendricks* (1987) 43 Cal.3d 584, 596)

Anderson and *Hendricks* are just a few of the long line of cases where this Court has expanded the special circumstances. Various past and present justices of this Court have voiced their concerns, relying on the language and principles of the *Furman* mandate, that these expansions were improper. For instance, as then-Chief Justice Bird explained, this Court's expansive interpretation of the kidnaping

felony-murder circumstance was "questionable." (*People v. Bigelow* (1984) 37 Cal. 3d 731,.757, dissenting opn. of Bird, C.J.)

Later, Justice Kennard found that this Court, had improperly expanded the prior murder special circumstance by allowing it to include murder convictions from other states even if their definitions of murder did not encompass "all the elements of the offense of murder in California." (*People v. Martinez* (2003) 31 Cal. 4th 673, 685 concurring and dissenting opn. of Kennard, J) Justice Mosk found that the "majority's analysis expand[ed] the crime of robbery in an altogether novel fashion and beyond any reasonable limit," and thus he would have set aside the felony-murder robbery special circumstance finding since it "of course, requires a robbery." (*People v. Webster* (1991) 54 Cal. 3d 411, 460-461 (concurring and dissenting opn. Mosk,J.) Justice Kennard agreed that the majority had improperly expanded the definition of robbery. (*Id.* at p.469 (concurring and dissenting opn. of Kennard, J.) Justice Broussard joined in Justice Mosk's opinion. (*Id.* at p.463, concurring and dissenting opn. of J. Broussard.)

Justice Moreno has recently "urge[d] this court to reconsider its holding in [*People v. Howard* (1988) 44 Cal.3d 375] that the limiting construction placed on the financial-gain special circumstance in *People v. Bigelow* (1984) 37 Cal.3d 731, 751, applies only when necessary to avoid overlap of multiple special circumstance allegations." (*People v. Crew* (2003) 31 Cal. 4th 822, 861 (concurring opn. of Moreno, J.)

> The Eighth Amendment of the United States Constitution requires that a special 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 v. Stephens* (1983) 462 U.S. 862, 877, fn. omitted.) I am concerned that the financial-gain special circumstance as interpreted in *Howard* and applied here does not meet this standard. (*Ibid.*)

Justice Moreno concluded that "the financial-gain special circumstance, as applied today, is too broad" since it "fails to narrowly define a set of cases to differentiate the special situation in which death is warranted." (*Id.* at pp.862-863 citing *Zant v. Stephens, supra*, 462 U.S. at p. 877.)

In fact, this Court has expanded the special circumstances to such a degree that there is now an entire body of jurisprudence governing whether capital defendants' "due process rights were denied by a judicial expansion of California's definition of death-qualifying special circumstances in violation of Bouie v. City of Columbia (1964) 378 U.S. 347." (*Webster v. Woodford* (2004) 369 F.3d 1062, 1065, cert. denied Webster v. Brown, 125 S.Ct. 626; see also *People v. Wharton* (1991) 53 Cal. 3d 522, 586; emphasis added [noting that *Bouie* involves "unexpected" or "unforeseeable *judicial enlargement* of a criminal statute"]; *People v. Webster, supra,* 54 Cal. 3d at p.448, fn 21; *People v. Poggi* (1988) 45 Cal. 3d 306, 326-327.)

The history of the California death penalty scheme demonstrates a consistent pattern whereby the class of death-eligible offenders has been consistently expanded by initiative and this Court in direct opposition to the *Furman* mandate. In 1973, there were ten special circumstances. In 1977, there were twelve special circumstances. Under the

1978 Initiative, which is the cornerstone of the current scheme, there were twenty-seven (27) special circumstances.

This Court initially attempted to limit this expansive death penalty scheme, but the political recall of several justices in 1986 ended that attempt. Since 1986, this Court has repeatedly expanded the scope of the special circumstances. Meanwhile, initiatives have eliminated any limitations left by this Court and continued to expand the list and breadth of the special circumstances. By 1990, there were twenty-nine special circumstances and they continue to grow. By 1996, there were thirty-two special circumstances and by 2000, there were thirty-three. Instead of narrowing eligibility for the death penalty, California has expanded the special circumstances threefold, from 10 to 33.

D. The California Death Penalty Scheme Violates All Three Requirements of the *Furman* Mandate

The California death penalty scheme does not meaningfully, rationally, or genuinely narrow the class of death-eligible offenders. It does not narrow in a quantitative manner. It does not narrow in a qualitative manner. It was not carefully crafted by the legislature, but instead was enacted through a misleading initiative process. It has grown further with the assistance of expansive *ad hoc* decisions by this Court. California's death penalty fails all three aspects of the *Furman* mandate and must now be deemed unconstitutional.

1. The Special Circumstances Fail to Quantitatively Narrow the Class of Death-Eligible Offenders

"Special" is defined as "distinguished by some unusual quality;" "easily

distinguishable from others of the same category;" "unique;" and "being other than the usual." (Webster's New Collegiate Dictionary (1977) 1115.) When a list of circumstances is tripled, they inevitably lose their special or "unique" nature, especially when the circumstances have been written and interpreted in an expansive manner. The term "special circumstances," which included twenty-nine different crimes at the time of this case, is an oxymoron.

A comparison between California's special circumstances and other death penalty states' narrowing circumstances demonstrates the unconstitutional breadth of California's scheme. (See e.g. *State v. Young* (Utah 1993) 853 P.2d 327, 396-411 (dissenting opn. of J. Durham).) In the *Young* opinion, Justice Durham analyzed all of the death penalty states' then-current schemes. (*Id.* at p.399.) Justice Durham concluded that "Utah's statutory definition of capital homicide excludes so few categories and so few actual murders that it has in effect returned the state to where it was before *Furman* was decided; there is no meaningful narrowing of the class of death-eligible murders pursuant to objective, rational standards." (*Ibid.*) This same conclusion must be reached concerning the California death penalty scheme.

a. The Felony-murder and Lying in Wait special Circumstances

In California, the over all breadth of the special circumstances has been expanded by two broad factors. First, California has made felony-murder *simpliciter* a special circumstance. (*People v. Anderson, supra,* 43 Cal.3d 1104, 1145-1146 and fn 8.) Any

person who kills "in the commission of, or attempted commission of, or the immediate flight after committing or attempting to commit" any of the enumerated felonies is not only guilty of first-degree murder, but is also automatically death-eligible regardless of their mental state. (Cal. Penal Code § 190.2 (a)(17).) Second, California has made "lying in wait" a special circumstance.

(1) The Felony-Murder Special Circumstances

In California, virtually all first degree felony-murders are special circumstances.[151] In addition, the felony-murder rule is exceedingly broad. First, the felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary. Second, the felony-murder rule in California applies to killings even if they occur after the completion of the felony as long as the killing occurs during an escape. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1166-1167.) Third, the felony-murder rule is not limited in its application by typical rules of causation and thus it applies to altogether accidental and unforeseeable deaths. (See e.g. *People v. Johnson* (1992) 5 Cal. App. 4th 552, 561.)

Despite the breadth of the felony-murder rule, California's felony-murder special circumstances are even broader. The felony-murder special circumstances are so numerous that they include situations such as where the defendant yanked a purse off a

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[151] The only felony-murderers which are not part of the death-eligible class are accomplices who did not have at least a mens rea of "reckless indifference." (See section190.2(d).) This provision merely excludes the same group of defendants that cannot constitutionally be executed under the *Enmund/Tison* line of decisions. The fact that the California death penalty scheme excludes this class of offenders is meaningless since they could never be eligible for death under the Constitution.

victim who then gave chase and died of a heart attack, triggering the felony-murder robbery special circumstance; or where the defendant stole clothes from a department store and while fleeing, ran a red light, hitting another car, and killing the passenger, triggering the felony-murder burglary special circumstance. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at pp.1321-1322 and citations within.) A death penalty scheme that renders such offenders death-eligible cannot be said to genuinely narrow the class of death-eligible offenders to a small subclass of murderers most deserving of death.

It is not surprising that other state courts have found that broad felony-murder provisions violate the narrowing requirement. As the Tennessee Supreme Court held in *State v. Middlebrooks, supra*, 840 S.W.2d at p.346:

> We have determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, *no narrowing occurs* under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the [felony-murder] aggravating circumstance [] *does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution*, and Article I, § 16 of the Tennessee Constitution. (emphasis added)

Similarly, in *Engberg v. Meyer*, *supra*, 820 P.2d at p.89, the Wyoming Supreme Court held that:

> The constitutional difficulty with [the Wyoming death penalty statute] was that it allowed Engberg's felony murder to both convict him and, without more, sentence him to death . . . This statute provided no requirements beyond the crime of felony murder itself to narrow and appropriately select those to be sentenced to death and therefore, on its face, permitted arbitrary imposition of the death penalty. This statutory scheme of death sentencing preserved in felony murder the very evil condemned and held unconstitutional in *Furman v. Georgia*, 408 U.S. 238. It permitted in felony murder cases a sentence to

> death without applying any standards that generally narrowed the class of crimes and persons who were given the death penalty. The statute recreated a sentencing scheme that the United States Supreme Court found resulted in death sentences being imposed unevenly, unfairly, arbitrarily and capriciously. (*Ibid.)*

The California death penalty scheme is similarly unconstitutional since its broad felony-murder special circumstances fail to properly narrow the death-eligible class of offenders.

(2) The Lying in Wait Special Circumstance

The lying in wait special circumstance, section 190.2(a)(15), is so all-encompassing that it includes nearly every premeditated murder. The term "lying in wait" on its face carries with it some connotation of an ambush from hiding. However, this Court has given this special circumstance a far more expansive interpretation.

Neither the 1973 nor the 1977 death penalty schemes included lying in wait as a special circumstance. The first-degree murder statute read: "All murder which is perpetrated by means of . . . lying in wait. . ." (Section 189.) However, the 1978 initiative added a lying in wait special circumstance where "[t]he defendant intentionally killed the victim *while* lying in wait." (Section 190.2(a)(15).) This Court has not narrowed the lying in wait special circumstance and, in fact, has expanded it so that it is now virtually identical to the lying in wait definition of first-degree murder. It now covers nearly all premeditated first-degree murders. (See e.g. *People v. Edelbacher* (1989) 47 Cal. 3d 983, 1023; *People v. Morales* (1989) 48 Cal. 3d 527, 554-557.) Justice Mosk strenuously disagreed with this Court's holding in *Morales*. Justice Mosk provided his reasons:

> First, this special circumstance does not distinguish the few cases in which the

> death penalty is imposed from the many in which it is not. Indeed, it is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim. Second, the lying-in-wait special circumstance does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not. To my mind, the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly. (*Id.* at pp.574-575; see also *People v. Webster* (1991) 54 Cal. 3d 411, 448 (concurring and dissenting opn of J. Mosk; *id.* at p.463 (concurring and dissenting opn. of J. Broussard).)

Despite these concerns, this Court continued to expand the lying in wait special circumstance. In *People v. Edwards* (1991) 54 Cal. 3d 787, 822-823, this Court expanded the definition of the lying in wait special circumstance to include a murder that occurred immediately *after* the period of lying in wait instead of *during* the lying in wait. Justice Mosk again dissented. (*Id.* at p.850 (concurring and dissenting opn. of J. Mosk.)

In *People v. Ceja* (1993) 4 Cal 4th 1134, this Court again addressed the lying in wait special circumstance. In her concurring opinion, Justice Kennard explained that "[r]ecent decisions of this court have given expansive definitions to the term 'lying in wait,' while drawing little distinction between 'lying in wait' as a form of first degree murder and the lying-in-wait special circumstance, which subjects a defendant to the death penalty." (*Id.* at p.1146-1147 (concurring opn. of J. Kennard).) Although Justice Kennard felt constrained by principles of *stare decisis,* she expressed a "growing concern however, that these decisions may have undermined the critical narrowing function of the lying-in-wait special circumstance: to separate defendants whose acts warrant the death

penalty from those defendants who are "merely" guilty of first degree murder." (*Ibid.*) .

Nonetheless, this Court continued to expand the lying in wait special circumstance. In *People v. Sims* (1993) 5 Cal. 4th 405, 433, this Court re-interpreted and expanded the language of the element from "watching and waiting" to "watchful waiting" This Court then held without analysis that this special circumstance was constitutional because it "has clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty." (*Id.* at p.434.)

This Court has continued the trend to expand this special circumstance in recent years. (See e.g. *People v. Hillhouse* (2002) 27 Cal. 4th 469, 480-481 & 500-501.) Justices Kennard and Moreno wrote separate opinions criticizing the majority holding. (*Id.* at p.512, 515.)

The lying in wait special circumstance has been applied by this Court to a wide range of intentional first-degree murders ranging from the true ambush (*People v. Roberts* (1992) 2 Cal. 4th 271), to murders where the defendant follows the victim for a period before killing, *People v. Edwards, supra*, 54 Cal.3d 787, lures the victim into a trap, *People v. Morales*, *supra,* 48 Cal. 3d 527; *People v. Sims, supra,* 5 Cal.4th 405, engages the victim in conversation and then stabs the victim from behind, *People v. Webster, supra,* 54 Cal.3d 411), or kills the victim in his or her sleep, (*People v. McDermand* (1984) 162 Cal.App.3d 770). It has been applied where the defendant knocked on the victims door and visited with her, *People v. Ceja, supra,* 4 Cal. 4th at p.1142, or when the

defendant spent the evening drinking and driving with the victim, stopped the car at the victim's request, and then told victim that he "ought to kill him." (*People v. Hillhouse, supra*, 27 Cal. 4th at pp.480-481 & 500-501.).

Under this Courts interpretation, lying in wait can apply and has been applied to virtually any first-degree murder case. The lying in wait special circumstance "has been expanded to the point that it is in great danger of becoming a 'general circumstance' rather than a 'special circumstance,' one which is present in most premeditated murders not just a narrow category of those killings." (Osterman & Heidenreich, *Lying in Wait: A General Circumstance, supra,* 30 U.S.F. L. Rev. at p.1279; citations omitted.) It has gone beyond that point - it has become a general circumstance. This Court has abandoned a strict adherence to the language of "while" lying in wait, does not require physical concealment, does not require that the actual period of lying in wait include "watching," or that the killing occur simultaneously with the waiting. It thus has made all intentional murders eligible for the death penalty via this special circumstance. (*Id.* at p.1273.)

Even if this expansive special circumstance did somehow narrow the number of death-eligible murders, it does nothing to "distinguish those murders which are particularly heinous and warrant death." (*Id.* at p.1274.) This special circumstance alone violates both the quantitative and qualitative prongs of the *Furman* mandate.

In sum, the combination of twenty-nine broad special circumstances, along with the existence of the felony-murder special circumstances and the lying in wait special circumstance, encompass virtually all first-degree murders. Section 190.2 thus does not

perform its constitutionally required function of genuinely narrowing the class of death-eligible offenders.

b. The Class of Special Circumstance Murderers is Broader than the Class of Non-Special Circumstance Murderers

That California's statute fails to narrow is confirmed by comparing the categories of special circumstance murderers under section 190.2 with the number of non-special circumstance first-degree murderers under section 189. A comparison of these two statutes shows that, at the most, there are seven theoretical categories of first-degree murderers excluded from death eligibility. There are more special circumstances categories than "excluded" categories numerically, and the special circumstances categories are far broader than the "excluded" categories.

In contrast to the broad sweep of the special circumstance categories, the seven "excluded" categories of first-degree murder are exceedingly narrow. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1324.) Five of the seven "excluded" categories involve first-degree murders where the killings occurred by unusual means. (Shatz & Rivkind, supra, 72 N.Y.U. L.Rev. at p.1324.) They do not represent a significant class of first-degree murderers.

In contrast to the number and breadth of the special circumstances categories, these seven "excluded" categories are so narrow that these rare noncapital murder cases represent a small subset of all first-degree murderers who could possibly be punished by death. Rather than performing the constitutionally required function of providing

statutory criteria for identifying the relatively few cases for which the death penalty is allowed under the law, the special circumstances achieve the opposite result.

2. Empirical Data Shows that the California Death Penalty Scheme Violates *Furman*

Empirical data confirms that the very defect that was condemned as unconstitutional by the Supreme Court in *Furman* still exists in California.[152] Professors Shatz and Rivkind initially analyzed 404 direct appeals of first-degree murder convictions in California. (*Id.* at p.1326.)

This study covered all 253 of the published decisions of this Court and the Courts of Appeal, as well as unpublished decisions of the Court of Appeal for the First Appellate District in 151 cases, during the period of 1988-1992.[153] (*Id.* at p.1326 & fn 252.) The First Appellate District includes Alameda County, which is where Mr. Tully was sentenced to death in 1992. (*Id.* at p.1326, fn 251.) The study includes both the county and time period of Mr. Tully's conviction making it highly relevant here.

During this five year period, an average of 346 people per year were convicted of first-degree murder and an average of 33.2 people per year were sentenced to death in

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[152] The empirical data stems from the research conducted by Steven F. Shatz, the Philip and Muriel Barnett Professor of Trial Advocacy at the University of San Francisco School of Law, and Nina Rivkind, a Lecturer in Law at the University of California, Berkeley, as reported in detail in Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. 1283.

[153] According to its authors, "[t]he study relied on appellate opinions because they provide the most accessible descriptions of the facts supporting such convictions." (*Id.* at p.1328.)

California. (*Id.* at pp.1327-1328 and fn 253 & fn 254.) During this five year period, 9.6% of those convicted of first-degree murder were sentenced to death in California. (*Id.* at p.1328.) Since the death-eligible class in California includes those offenders whose crime would meet the special circumstances in section 190.2, Professors Shatz and Rivkind analyzed the pool of 404 appellate cases to determine whether, based on the facts, a reasonable juror could have found a special circumstance true beyond a reasonable doubt.[154] (*Id.* at p.1328 & fn 256.)

a. The Published First-Degree Murder Cases

The study found that of the 253 published decisions of this Court and the Court of Appeal, there were 159 death judgments, 41 first-degree murder cases with special circumstance findings but no death judgment, and 53 first-degree murder cases without special circumstance findings. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1328.) Adding the 159 death judgment cases with the 41 cases where special circumstances were found by the factfinder shows that 79% of the published decisions involved special circumstance findings.

The study found that 242 of the published first-degree murder cases, based on the facts, could have involved special circumstances, while a mere eight cases could not have been charged as special circumstance murder. (*Id.* at p.1329, Table 1.) Of the 250

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[154] This test for special circumstances was based on the Supreme Court's holdings in *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 364 and *Godfrey v. Georgia*, *supra*, 446 U.S. at pp. 428-429. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1328, fn 256.)

published first-degree murder cases, 96.8% involved special circumstances and only 3.2% did not factually involve special circumstances. A class that includes 96% of the entire pool is not narrow.

The empirical data confirms that the special circumstances do not genuinely narrow the class of death-eligible murders to a small subclass of offenders. Instead, the special circumstances perform the opposite function. Only a small subclass of offenders, 3.2%, are not eligible for death and nearly all the remaining offenders, 96.8%, are eligible for death.

The study found that the felony-murder special circumstances "play the predominant role in defining death-eligibility" in California. (*Id.* at p.1329.) The broad felony-murder special circumstances alone guarantees that more than two-thirds of all first-degree murderers are eligible for the death penalty in California. There were *almost 21 times* as many felony-murder special circumstances cases than there were non-special circumstance "excluded" cases. This data demonstrates the truly upside-down nature of the California's narrowing system. (See *id.* at p.1332.)

b. The Unpublished First-Degree Murder Cases

The Shatz and Rivkind study found that the "data for the unpublished cases generally confirm[ed] the data for the published cases." (*Id.* at p.1330.) It found that 121 of the 142 total unpublished first-degree murder cases, or 85.2%, actually involved special circumstances. (*Id.* at p.1330 & p.1331, Table 2.) Only 21 of the 142 cases, or 14.8%, did not involve special circumstances. (*Id.* at p.1331, Table 2.) The study of the

unpublished cases confirms that the California death penalty scheme fails to properly narrow the class of death-eligible offenders.[155]

c. The Combined First-Degree Murder Case Samples

The end result of the study showed that 363 of the 392 total cases, or 92.6%, based on the facts, involved special circumstances. The total included published death judgment cases (157 of 158, or 99%), the published non-death judgment cases (85 of 92, or 92%), and the unpublished non-death judgment cases (121 of 142, or 85%). The "excluded" class of first-degree murderers is only 7.3% in California. More than *twelve out of every thirteen* first-degree murderers are death-eligible in California.

d. California's Death Sentence Ratio

In addition to proving that California fails to genuinely narrow the class of death-eligible offenders, the study examined the death penalty scheme to address the ratio of death-eligible offenders who actually received death sentences. The death sentence ratio found to be unconstitutional in *Furman* was 15- 20%.

Eighty-four percent of first-degree murderers were considered death-eligible, yet only 9.6% of all first-degree murderers are in fact sentenced to death in California. (*Ibid.*) The death sentence ratio of these two figures (9.6% and 84%) was only 11.4%, indicating that only one out of eight death-eligible offenders is actually sentenced to death in

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[155] Again, the majority of the unpublished factual special circumstance cases, namely 58.7% or 71 of 121 cases, involved the felony-murder special circumstances. (*Id.* at p.1330.) The study also found that 71 of the 142 total unpublished first-degree murder cases, or 50%, involved the felony-murder special circumstances. (See *id.* at p.1331, Table 2.)

California. (*Ibid.*) The study concluded that "[t]his 11.4% death sentence ratio is significantly lower than Georgia's death sentence ratio at the time of *Furman*." (*Ibid.*)[156] The empirical data proves that the California death penalty scheme is actually far more arbitrary, capricious, wanton, freakish, and random than the death penalty schemes deemed unconstitutional in *Furman*.

e. Summary of the Study's Findings

The study's various findings demonstrate that California's special circumstances fail to genuinely narrow the class of death-eligible offenders. These consistent findings demonstrate that more than eighty percent of all first-degree murderers are eligible for the death penalty in California. When all the findings are combined, the study shows that 90% of all first-degree murderers in California are death-eligible. Only 10% of murder offenders are in fact excluded by the special circumstances. Such a total lack of narrowing is not sufficient for purposes of the *Furman* mandate.

A death penalty scheme must narrow the class of death-eligible offenders to the

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[156] In fact, the results are more stark. The death sentence ratio (9.6% and 92.6%) is only 10.4%. On average 33.2 of 346, or 9.6%, of the people convicted of first-degree murder were actually sentenced to death in California during the study's five (5) year time period. (*Id.* at pp.1328.) This means that 166 people were sentenced to death out of 1730 first-degree murderers during the study's time period. The study found that 363 of the 392, or 92.6%, of its sample of appealed first-degree murder cases factually involved special circumstances. If one adjusted this sample for the total 1730 first-degree murder cases – by multiplying 1730 by .926 – the figure would be 1602. This figure means that, given the data in this sample, 1602 of the 1730 first-degree murder cases would involve special circumstances. One can then compare this figure of 1602 cases involving special circumstances with the 166 people who were sentenced to death. 166 divided by 1602 also equals .104, or 10.4%. Thus, of all those who are eligible for death in California, only 10.4% in fact are sentenced to death.

few who are eligible for death as opposed to the *many* who are not. As the Ninth Circuit has stated: "The Eighth Amendment requires that a jury's discretion be sufficiently channeled to allow for a principled distinction between the subset of murders for which the sentence of death may be imposed and *which are not subject to the death penalty*." (*Wade v. Calderon*, *supra*, 29 F.3d at p.1319 citing *Zant v. Stephens*, *supra*, 462 U.S. at pp.876-877 and *Godfrey v. Georgia*, *supra*, 446 U.S. at pp.428-429.) California impermissibly allows 90% of all of first-degree murderers to be eligible for the death penalty.

This Court has stated that the special circumstances in California are suppose to limit the class of death-eligible offenders to "extraordinary" first-degree murder cases. (*People v. Green, supra,* 27 Cal.3d at p.48; citations omitted.) Much like the term "special," "extraordinary," by definition, means "going beyond what is usual, regular, or customary," or "exceptional to a very marked extent." (Webster's Collegiate Dictionary, *supra,* at p. 407.) When nine out of every ten first-degree murderers are death-eligible, it can no longer be said that these cases are "exceptional to a very marked extent." Instead, it is the 10% of non-death-eligible first-degree murder cases that are, in fact, the "exceptional" or special cases in California. The Supreme Court has noted that the special circumstances in California are supposed to "limit[] the death sentence to a *small subclass* of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53; emphasis added.) Ninety percent is not a small subclass.

The death-sentence ratio found to be unconstitutional in *Furman* was 15-

20%. Even the most favorable sample to California in the study suggests that, at most, California's death-sentence ratio is only 11.8%, while other samples suggest it is much lower.

Combining all the cases analyzed, the death-sentence ratio is 10.7%. A death penalty scheme that has a death-sentence ratio of 10.7% is simply unconstitutional. The empirical data demonstrates that this lack of narrowing leads to the very arbitrariness deemed intolerable by the Supreme Court.

Based on their various empirical data, the study by Professors Shatz and Rivkind reached the following ultimate conclusions:

> The California death penalty scheme [] cannot be reconciled with any reasonable interpretation of the Furman principle. (*Id.* at p.1339.)
>
> California now has a death penalty scheme with a higher risk of arbitrary and discriminatory death sentences than the *McGautha*-era California scheme. (*Id.* at p.1339-1340.)
>
> Simply stated, a significant percentage of those now on death row would not be there but for the overbreadth of the California scheme. (*Id.* at p.1340.)
>
> Either the Court will have to enforce the Furman principle by holding California's scheme unconstitutional, or it will have to abandon that principle and, with it, any pretense that the Constitution requires the death penalty to be administered in an evenhanded and nonarbitrary manner. (*Id.* at p.1343.)

Accordingly, this Court should find California's death penalty scheme unconstitutional because the special circumstances fail to genuinely narrow the class of death-eligible offenders in a quantitative manner as required by the *Furman* mandate.

3. The Special Circumstances Fail to Narrow the Class of Death-Eligible Offenders in a Qualitative Manner

The empirical data shows that the special circumstances fail to properly narrow the class of death-eligible offenders in a *qualitative* sense as well. The special circumstances must not only narrow the class of death-eligible offenders to a numerically smaller subclass of offenders, but also to a more blameworthy class of offenders. Since 90% of all first-degree murder offenders are eligible for death in California, there is simply no way to ensure that only the "most blameworthy" and the "worst of the worst" is included within this group.

The few categories of "excluded" first-degree murderers are by no more blameworthy than the many categories of death-eligible offenders. For instance, there is no discernable basis for punishing the "excluded" offenders who maliciously and intentionally kill via armor-piercing ammunition or destructive devices less severely than death-eligible *unintentional* felony-murderers. It also is irrational to punish unintentional felony-murderers more severely than the "excluded" class of "simple" premeditated murderers. California's felony-murder circumstances fail to properly narrow in a qualitative sense as required under the *Furman* mandate. (See *State v. Middlebrooks, supra*, 840 S.W.2d at pp.344-346 and *Engberg v. Meyer, supra,* 820 P.2d at p.89.)

Similarly, as Justice Mosk has explained, "the lying-in-wait special circumstance does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not" since "the killer who waits,

watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly." (*People v. Morales, supra*, 48 Cal.3d at p.575 (concurring and dissenting opn. of J. Mosk).) Justice Broussard eloquently described in detail the numerous reasons why "those first degree murderers who lie in wait are no more deserving of death than those who act with dispatch." (*People v. Webster, supra,* 54 Cal. 3d at p.468 (concurring and dissenting opn. of J. Broussard); see also *id.* at pp.464-468.) Justice Kennard has expressed her "concern" that the lying in wait special circumstance does not adequately narrow in a qualitative sense and no longer performs its "critical narrowing function" in California, which is "to separate defendants whose acts warrant the death penalty from those defendants who are 'merely' guilty of first degree murder." (*People v. Hillhouse*, *supra*, 27 Cal. 4th 469, 512 (concurring opn. of J. Kennard); *People v. Ceja*, *supra*, 4 Cal. 4th at p.1147 (concurring. opn. of Kennard, J.).) Justice Moreno has voiced his similar concern with the lying in wait special circumstance. (See *id.* at pp.513-515 (concurring and dissenting opn. of J. Moreno).)

The data leads to only one conclusion. California's death penalty scheme *as a whole* does not adequately narrow the death-eligible class in a qualitative manner. (See e.g. *People v. Adcox, supra,* 47 Cal.3d at pp.275-276 (concurring opn. of J. Broussard) Death-eligible first-degree murderers on a whole are no more blameworthy than the "excluded" categories of first-degree murderers. The California death penalty scheme does not meet the qualitative narrowing prong of the *Furman* mandate and is unconstitutional for this reason as well.

4. California's Death Penalty is Unconstitutional Because the Special Circumstances Were Not Enacted by the Legislature

California's special circumstances were enacted by a series of expansive voter initiatives. Some of these initiatives overturned earlier decisions by this Court limiting the scope of the special circumstances. In addition, for nearly two decades, this Court has expanded the special circumstances on an *ad hoc* basis.

The creation and definition of death eligibility factors by the voters and this Court, rather than by the Legislature, may explain why the special circumstances do not properly narrow in a quantitative or qualitative manner as required by *Furman*. The *Furman* mandate specifically requires the legislature to devise narrowing circumstances. California violates this third prong of the *Furman* mandate

Furman mandated that the legislatures enact statutes to perform the required narrowing. In *Zant v. Stephens, supra*, 462 U.S. at p.878, the Supreme Court stated that its "cases indicate [] that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." In *Lowenfield v. Phelps, supra,* 484 U.S. at p.244, the Supreme Court again referenced this requirement of an "objective legislative definition." (Citations omitted.) This Court has also acknowledged that *Furman* provides a mandate directed to the state legislature. (*People v. Bacigalupo*, *supra*, 6 Cal.4th at p.465.)

The plurality in *Gregg* held that the post-*Furman* Georgia death penalty scheme

was constitutional because "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." (*Gregg v. Georgia*, *supra*, 428 U.S. at pp.206-207 (plurality opinion).) There are good reasons why the creation and definition of narrowing circumstances must be done by the Legislature.

In *Gregg* the plurality noted that the specifications of punishments for crimes are "peculiarly questions of legislative policy." (*Id.* at p.176) "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." (*Id.* at p.186.) The plurality made reference to the "the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction." (*Id.* at pp.186-187 .)
The Ninth Circuit has observed that "*Gregg* is replete with references to the peculiarly legislative character of sentencing determinations." (*United States v. Harper* (9th Cir. 1984) 729 F.2d 1216, 1225.)

Although the principles enunciated in *Gregg* were discussed in the context of deferring to legislative judgments as to punishment, they are "just as germane to the question of *where* the required guidelines must come from" since "[i]f the 'will and . . . moral values of the people,' are particularly important in sentencing decisions, and if specification of punishments is therefore peculiarly a legislative function, then specifying the circumstances under which someone may be put to death must also be a function of

the elected representatives of the people." ((*United States v. Harper*, *supra*, 729 F.2d at p.1225; quoting *Gregg v. Georgia*, *supra*, 428 U.S. at p.175; emphasis in original.) It is for these reasons that "[t]he [Supreme] Court has thus plainly required that guidelines be expressly articulated *by the legislature* in the statute authorizing the death penalty." (*Ibid.*) As the Federal Government conceded in *Harper*, "[t]he conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable." (*Id.* at pp.1225-1226.)

Due to its unique abilities to evaluate studies and gauge the consensus of its constituents, punishment is the peculiar domain of the legislature. It follows that the legislature should create and define the narrowing circumstances that would make someone eligible for the ultimate punishment. Recognizing this, the California legislature created the 1977 death penalty scheme.

This 1977 death penalty scheme was deemed not "tough" enough by certain legislators, who then turned to the electorate to accomplish what the legislative process could not. While legislation undergoes constitutional analysis prior to enactment, voter initiatives do not. Thus, while the 1977 statute was intended to conform with the narrowing requirement, the 1978 initiative was intended to evade it. The voters usurped the legislature's power by passing a broad initiative unchecked by any constitutional concerns. Other initiatives soon followed, and this Court also began to re-define and expand the special circumstances. The scheme under which Mr. Tully was sentenced under was not created and defined by the legislature as constitutionally required by the

Furman mandate, but instead by the political initiative process and this Court. Such a death penalty scheme is unconstitutional.

The legislative power of the State of California is vested by the California Constitution in the California Legislature. (Cal. Const. Art. 4 §1.) The California Constitution reserves the power of initiative to the people. (Ibid.) "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const. Art. 2 § 8(a).) The people have the power under the California Constitution to enact statutes.

The California Legislature can amend or repeal an initiative statute with legislation, but only if it is approved by the electors. (Cal. Const. Art. 2, § 10(c).) This process chills legislative independence because changes to initiative statutes must pass through the distorting lens of the popular election. With the enactment of the 1978 initiative, the legislature's power to define the parameters of California's death penalty scheme was stripped away. The legislature could not respond by any means other than another initiative. The California Legislature has no independent means of assuring the constitutionality of California's death penalty without voter approval. Even if the California Constitution authorizes the use of voter initiatives to enact statutes, the process cannot be used to evade constitutional mandates. (See e.g. *Kopp v. Fair Pol. Practices Com* [judiciary has limited power to revise or reform voter initiative statutes to assure constitutionality.]

The initiative process is subject to considerable abuse. Political rhetoric during

public debate may obfuscate the issues at stake, especially when the initiative involves hotly disputed and complicated issues, such as capital punishment. The initiative process often carries with it a grave risk of voter confusion. Justice Mosk warned of the danger:

> There are two factors which greatly inhibit [the electorate's] thoughtful consideration of the issues presented by all but the most simple initiative: the complexity of the ballot measure and the nature of the political campaign waged in its behalf." When a ballot proposal is lengthy "only the most diligent voter [will] wade through [it]", the result being a "superficial intellectual exercise that leaves voters vulnerable to emotional – and perhaps misleading – advertising." (Id. at p. 936.)
> . . .
>
> [A] proposition may contain 20 good features, but have one bad one secreted among the 20 good ones. The busy voter does not have the time to devote to the study of long, wordy, propositions and must rely upon such sketchy information as may be received through the press, radio or picked up in general conversation. If improper emphasis is placed upon one feature and the remaining features ignored, or if there is a failure to study the entire proposed amendment, the voter may be misled as to the over-all effect of the proposed amendment." (*In re Lance W.* (1985) 37 Cal. 3d 873, 910 (dissenting opn. of J. Mosk.); see *Knoll v. Davidson* (1974) 12 Cal.3d 335, 352; *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14 [same].)

The 1978 death penalty initiative process was fraught with such abuses. This Court has acknowledged that the voters were misled by the "political rhetoric" of the ballot initiative that created the current death penalty scheme.

> the proponents of the 1978 initiative asserted that "[if] you were killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would."
>
> *The statement is doubly misleading. Proposition 7 did not and could not*

constitutionally render every murderer subject to the death penalty. (*Carlos v. Superior Court*, *supra*, 35 Cal.3d at p.143, fn 11.)

The fact that the deception occurred and has gone unremedied for so long demonstrates why the *Furman* mandate placed the power of defining who should die in the hands of the legislature. It is not surprising that the California death penalty scheme fails to narrow the class of death-eligible offenders both in a quantitative manner or in a rational, qualitative manner. Initiative drafters can, and did, use political rhetoric to trick the voters into passing an unconstitutional law. The current death penalty scheme is altered and expanded every few years by ad hoc initiatives. There is no semblance of the calm, nuanced, coherent, and reasoned judgment of the legislature that *Gregg* indicated was required to meet the *Furman* mandate.

"The point of *Furman* was to require the legislatures to take responsibility for defining, for the community, who are the worst murderers." (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1340.) Ever since the 1977 law was replaced by the 1978 initiative, the legislature of California has not exercised this responsibility. The initiative process prohibits legislators from directly narrowing the death penalty statute.

As a result, California is saddled with a scheme that renders 9 out of 10 first-degree murderers death-eligible under criteria that have no relation to the circumstances of the crime. The decision as to which of these death-eligible offenders will actually be charged with the death penalty is left to the local prosecutor, who has unlimited discretion. Thus, California's scheme is characterized by the same arbitrariness and

capriciousness as those found unconstitutional in *Furman*.

5. Summary

The California death penalty scheme violates all three requirements of the *Furman* mandate. The special circumstances, especially the felony-murder and lying in wait special circumstances are so broad that they are unrivaled in the breadth by any other State's death penalty scheme. The result of such a scheme is that non-special circumstances murders are a narrower class than special circumstance murders.

Empirical data confirms that at least nine out of ten first-degree murderers are eligible for the death penalty in California. This scheme cannot be said to genuinely narrow the class of death-eligible offenders in a quantitative sense as required by the *Furman* mandate. The empirical data demonstrates that California's death sentence ratio is just as arbitrary, if not more so, than the death penalty schemes that were deemed unconstitutional in *Furman*.

In addition, the scheme does not rationally narrow the class of death-eligible offenders in a qualitative sense as required by the *Furman* mandate. The special circumstances do not identify the most blameworthy first-degree murderers for death. Relatively less egregious murders are punishable by death, while murders that are typically deemed among the aggravated are among the few groups that are excluded from the death-eligible class.

The scheme's failure to meet the quantitative and qualitative narrowing requirements of the *Furman* mandate can be explained by its failure to meet the third

requirement of the *Furman* mandate, which is that the narrowing circumstances must be created and defined by the legislature. The Supreme Court had good reason to want the legislature with its special skills be the entity that create objective guidelines for who should be eligible for the ultimate punishment. However, ever since 1978, such objective legislative definition has not existed in California. Instead, the current death penalty scheme was created by an initiative characterized by political rhetoric that specifically stated its goal was to make every murderer death-eligible in violation of the *Furman* mandate.

The California death penalty scheme violates all three requirements of the *Furman* mandate. It does not narrow in a quantitative sense. It does not narrow in a qualitative sense. It was not enacted and defined by the legislature. It thus suffers from the same arbitrariness and capriciousness that was deemed unacceptable in *Furman*. For each of these reasons, the California death penalty scheme is unconstitutional. Since Mr. Tully was sentenced to death under this unconstitutional scheme, his sentence must be reversed and vacated.

E. This Court Has Not Properly and Fully Addressed These Grave Constitutional Issues

This Court has repeatedly rejected arguments similar to those raised here. These decisions are incorrect. Further, this Court has never fully addressed the legal and empirical claims that are detailed here. This Court has never addressed claims as to the qualitative narrowing requirement or the requirement that the legislature create the

narrowing circumstances under the *Furman* mandate. For these reasons, this Court's prior decisions on these issues are inapposite and incorrect.

This Court's routine rejection of various challenges to the California death penalty scheme for its failure to genuinely narrow the class of death-eligible offenders is in violation of the State and Federal Constitution. (See e.g *People v. Jones* (2003) 30 Cal. 4th 1084, 1127-1128; *People v. Michaels* (2002) 28 Cal. 4th 486, 541; *People v. Arias* (1996) 13 Cal.4th 92, 187; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. Crittenden* (1994) 9 Cal.4th 83, 155; *People v. Wader* (1993) 5 Cal.4th 610, 669.) This Court has never addressed the empirical data that demonstrates that the death sentence ratios in California are equivalent, or worse, than the death sentence ratios that found unconstitutional in *Furman*. Beyond acknowledging that the 1978 initiative was "doubly misleading," (*Carlos v. Superior Court*, *supra*, 35 Cal.3d at p.143, fn 11) this Court has never addressed the fact that the *Furman* mandate requires that the narrowing circumstances be created and defined by the legislature, not by voter initiative or this Court. In addition, this Court has never appropriately addressed the other requirement that death penalty schemes qualitatively narrow the class of death-eligible offenders. Accordingly, this Court's prior decisions do not foreclose the claims raised here.

F. Conclusion

Over thirty years ago, the Supreme Court began to seriously address the volatile issue of capital punishment in this country. While its constitutional decisions in this complicated area of law have not always been consistent over the years, one aspect of its

jurisprudence has continually been consistent. The cornerstone principle of the Supreme Court's death penalty jurisprudence is that people cannot be sentenced to die in a manner that is arbitrary and capricious for that is truly "cruel and unusual."

In *Furman* and its progeny, the Supreme Court required those jurisdictions that wish to retain the death penalty to narrow the class of death-eligible offenders in certain manners so as to prevent the arbitrary infliction of death that characterized the broad death penalty schemes of the past. *Furman* had three requirements. First, the scheme must narrow the class of death-eligible offenders in a quantitative manner to a small subset of first-degree murderers. Second, the scheme must narrow the class of death-eligible offenders in a qualitative manner by limiting the class to those first-degree murderers who are the most blameworthy. Third, the narrowing must occur via objective guidelines as created and defined by the legislature with their unique abilities to craft a coherent death penalty scheme.

Within the California death penalty scheme, this constitutional narrowing allegedly occurs via the so-called special circumstances of section 190.2. However, on their face, the special circumstances are enormously broad, now encompassing some thirty-three (33) different circumstances. An analysis of these special circumstances reveals that California's death penalty scheme is uniquely broad because of the breadth of the circumstances themselves, especially the felony-murder and lying in wait special circumstances. The result is that the non-special circumstances are the narrow category both in their number and in the number of actual murders that they cover.

Empirical data supports this analysis. In fact, even when a study skews its results so that it favors the constitutionality of the statute in every possible manner, it still reveals that it is likely that nine out of every ten first-degree murderers are eligible for death in California. Moreover, empirical data reveals that California's death sentence ratio is worse than the death sentence ratios of the death penalty schemes deemed to be unconstitutionally arbitrary in *Furman*. California's scheme is unconstitutional for its failure to narrow in a quantitative manner.

In addition, the special circumstances do not qualitatively narrow the class of the death-eligible offenders in a rational manner. First-degree murders that are typically deemed relatively less egregious are covered by the special circumstances, while other first-degree murders that are typically deemed to be more egregious are not. For this reason as well, the California death penalty scheme is unconstitutional.

These constitutional deficiencies are the product of the initiative process that misled the voters. The special circumstances were then further expanded by similar initiatives and decisions by this Court. The scheme is unconstitutional for failing to meet the requirement as that the legislature, and not the Courts or the voters create and define the narrowing circumstances.

These constitutional deficiencies had a very real effect on Mr. Tully's case. He was "eligible" for death because of the breadth of the felony-murder special circumstances, the sole special circumstance in his case. He was "eligible" for death not based on the circumstances of the crime alleged, but solely because the murder for which

he was convicted occurred during the course of a burglary.

Under this scheme, where so many murderers could be charged with death, it is the prosecutor who ultimately decides whether the crime is appropriate to charge as a capital case. (See *People v. Adcox* (1988) 47 Cal.3d 207, 275-276; emphasis added (concurring opn. of J. Broussard).) Because there are no uniform guidelines channeling prosecutorial discretion, the system has become as "arbitrary and capricious" as pre-*Furman* death penalty schemes. Indeed, the prosecutor in Mr. Tully's case improperly exercised that discretion in seeking the death penalty for a simple felony-murder, against a defendant with no prior history of serious violence, no juvenile offenses and no prior felony convictions.

Moreover, the jury who decided Mr. Tully's fate also had ultimate discretion in deciding whether he lived or died. Since special circumstances are so broad as to fit any first-degree murder case, the jury's finding of such a circumstance did not limit their discretion in any manner. The jury was allowed to make a "moral and normative" decision whether Mr. Tully lived or died without any objective guidelines whatsoever. This unbridled discretion is the very type of discretion condemned in the *Furman* line of cases.

The Supreme Court recognized long ago that if the administration of the death penalty is to be even minimally rational, assuring that the death-eligible class is properly limited is a necessary first step. California's death penalty scheme constitutes a profound undermining of the *Furman* mandate. As Schatz and Rivkind concluded, this Court will

either "have to enforce the *Furman* principle by holding California's scheme unconstitutional, or it will have to abandon that principle and, with it, any pretense that the Constitution requires the death penalty to be administered in an evenhanded and nonarbitrary manner." (*Id.* at p.1343.) The former option is compelled by the empirical date, the Supreme Court's jurisprudence, this Court's holdings, fundamental fairness, justice, and the Constitution.

For all of these reasons, individually and cumulatively, California's death penalty scheme is unconstitutional. Since Mr. Tully was sentenced to death under this unconstitutional death penalty scheme, his death sentence must be reversed.

XXVIII. CALIFORNIA'S DEATH PENALTY SCHEME AS INTERPRETED BY THIS COURT AND AS APPLIED AT MR. TULLY'S TRIAL IS UNCONSTITUTIONAL

A. Introduction

California's capital sentencing scheme violates the California and United States Constitutions. Although this Court has rejected various challenges to the California death penalty scheme,[157] this Court must reconsider its prior rulings because they are incorrect both in their analyses and their conclusions. The various fatal constitutional defects in California's death penalty law and the trial court's failure to instruct the jury in accordance with the constitutional mandates discussed below require that Mr. Tully's

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[157] For example, between January 2000 and January 2003, this Court rejected hundreds of constitutional claims in 33 capital cases. (See *People v. Ervin* (2000) 22 Cal. 4th 48, 101-102; *People v. Sakarias* (2000) 22 Cal. 4th 596, 632; *People v. Bemore* (2000) 22 Cal. 4th 809, 858-859; *People v. Jenkins* (2000) 22 Cal. 4th 900, 1050-1055; *People v. Ayala* (2000) 23 Cal. 4th 225, 303-304; *People v. Coddington* (2000) 23 Cal. 4th 529, 656; *People v. Lucero* (2000) 23 Cal. 4th 692 ,740-741; *People v. Kraft* (2000) 23 Cal. 4th 978, 1078-1079; *People v. Box* (2000) 23 Cal. 4th 1153, 1217-1219; *People v. Mendoza* (2000) 24 Cal. 4th 130, 190-192; *People v. Ayala* (2000) 24 Cal. 4th 243, 290; *People v. Staten* (2000) 24 Cal. 4th 434, 462; *People v. Anderson* (2001) 25 Cal. 4th 543, 584-586, 600-606; *People v. Lewis* (2001) 25 Cal. 4th 610, 676-678; *People v. Cunningham* (2001) 25 Cal. 4th 926, 1040-1043; *People v. Catlin* (2001) 26 Cal. 4th 81, 157-159, 174, 178-179; *People v. Lewis*, (2001) 26 Cal. 4th 334, 393-395; *People v. Ochoa* (2001) 26 Cal. 4th 398, 452-454, 458-459, 462-464; *People v. Seaton* (2001) 26 Cal. 4th 598, 686-691; *People v. Weaver* (2001) 26 Cal. 4th 876, 989, 991-993; *People v. Kipp* (2001) 26 Cal. 4th 1100, 1136-1141; *People v. Taylor* (2001) 26 Cal. 4th 1155, 1176-1184, *People v. Lawley* (2002), 27 Cal. 4th 102, 166-169; *People v. Hughes* (2002) 27 Cal. 4th 287, 404-406; *People v. Hillhouse* (2002) 27 Cal. 4th 469, 510-511; *People v. Koontz* (2002) 27 Cal. 4th 1041, 1094-1096; *People v. Steele* (2002) 27 Cal. 4th 1230, 1268-1269; *People v. Slaughter* (2002) 27 Cal. 4th 1187, 1224-1225; *People v. Michaels* (2002) 28 Cal. 4th 486, 541-542; *People v. Gurule* (2002) 28 Cal. 4th 557, 637, 645-646, 663-664; *People v. Gutierrez* (2002) 28 Cal. 4th 1083, 1148-1149, 1150-1151; *People v. Boyette* (2002) 29 Cal. 4th 381, 439-440, 464-467; *People v. Bolden* (2002), 29 Cal. 4th 515, 566-567.) It has continued to reject these same claims in multiple cases up until the present time. (See e.g. *People v Wilson* (July 11, 2005) California Supreme Court Case No. S039632, ___ Cal.4th ___ (Slip Opn. at pp 62-65).

sentence be set aside.

B. Section 190.3(a) As Applied is Vague and Overbroad and Results in an Arbitrary and Capricious Death Penalty System

Penal Code section 190.3(a) [hereafter factor(a)] directs the jury at the penalty phase of a capital case to "take into account . . . [t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (Cal. Pen. Code § 190.3(a).) CALJIC 8.85, as read in this case, instructs the jury at the penalty phase that it "shall consider, take into account and be guided by . . . [t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (CALJIC 8.85(a); CT 2042.)

Factor (a) has been applied in such a "wanton and freakish" manner that almost every circumstance attending any murder can be, and has been, characterized by a prosecutor as "aggravating." The prosecution routinely uses, as did the prosecutor in Mr. Tully's case, "facts and circumstances of the crime" as their primary aggravating factor. Despite the obvious constitutional problems, this Court has never limited the construction of the vague and overbroad language of factor (a). Instead, the Court has expanded the scope of this factor.

The purpose of section 190.3, as a whole, is to inform the jury of the factors to be considered in assessing the appropriate penalty. Although factor (a) survived an earlier facial Eighth Amendment challenge in *Tuilaepa v. California* (1994) 512 U.S. 967, 987-

988, factor (a), as applied, is arbitrary and contradictory in violation of the guarantee of due process of law and the Eighth Amendment's requirement for heightened reliability in capital cases, as well as Article 1 of the California Constitution.

Given the vague and overbroad language of factor (a), and this Court's failure to limit it, prosecutors throughout California have argued that the jury should weigh as aggravation almost every conceivable circumstance of the crime, even those that reflect opposite circumstances. Prosecutors have been permitted to argue that it is aggravating that the defendant struck many blows and inflicted multiple wounds,[158] *and* that the defendant killed with a single execution-style wound[159] or that the defendant killed the victim in cold blood[160] *and* that the defendant killed the victim during a savage frenzy,[161] or that the victim struggled prior to death[162] *and* that the victim did not struggle.[163] Without any limitation on this factor, different prosecutors in different counties have been

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[158] See e.g. *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[159] See e.g. *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[160] See e.g. *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[161] See e.g. *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[162] See e.g. *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[163] See e.g. *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

allowed to urge juries to vote for death based on all of these contradictory circumstances.

In addition, because it lacks definition, prosecutors have manipulated factor (a) to embrace facts that cover the entire spectrum of facts present in every homicide. Prosecutors have argued, and juries were allowed to find, that factor (a) was "aggravating" because the victim was: a child, an adolescent, a young adult, in the prime of life, or elderly.[164] Prosecutors have argued, and juries were allowed to find, that factor (a) was "aggravating" because the victim was: strangled, bludgeoned, shot, stabbed, or consumed by fire.[165] There is simply no circumstance that the prosecution has not used as aggravating under factor (a).

Factor (a)'s actual application throughout California demonstrates that it is used as an "aggravating" factor in every case, by every prosecutor, without any limitation and no matter what the facts. As a consequence, from case to case, prosecutors are allowed to turn entirely opposite facts that are inevitable variations of every homicide into

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[164] See e.g. *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[165] See e.g. *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

"aggravating" factors, which the jury is then urged to weigh on death's side of the scale.

It is irrational that all "circumstances of the crime" can be considered as evidence in aggravation. As the Wyoming Supreme Court has explained, an "aggravating" factor is "meaningless" if it is merely part and parcel of the crime itself since, by definition, an "aggravating" factor must be a "'circumstance attending the commission of a crime [] which increases its guilt or enormity or adds to its injurious consequences, *but which is above and beyond the essential constituents of the crime* [] *itself.*'" (*Engberg v. Meyer* (Wyo. 1991) 820 P.2d 70, 90 quoting Black's Law Dictionary (5th ed. 1979) 60; emphasis in original.)

In California, juries are required by law and urged by the prosecution to consider the facts of the crime itself, no matter what they are, as an "aggravating" factor. There is "'no principled way to distinguish [one] case, in which the death penalty was imposed, from the many cases in which it was not.'" (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 quoting *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.) In practice, factor (a) allows indiscriminate imposition of the death penalty for no reason other than the facts surrounding a murder. Yet, the Supreme Court has "plainly rejected" as unconstitutional the notion that "a particular set of facts surrounding a murder, however shocking they might be, [are] enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Id.* at p.363.)

This Court has routinely rejected all challenges to the constitutionality of factor (a), citing the Supreme Court's decision in *Tuilaepa v. California* (1994) 512 U.S. 967.

(See e.g. *People v. Ray* (1996) 13 Cal. 4th 313, 358; *People v. Lucero* (2000) 23 Cal. 4th 692, 727.) *Tuilaepa* does not control the outcome here. As Justice Blackmun noted, the Supreme Court's decision in *Tuilaepa* did not "give[] the California [death penalty] system a clean bill of health." (*Tuilaepa v. California*, *supra*, 512 U.S. at p.994 (dissenting opn. of J. Blackmun).)

In *Tuilaepa*, the Supreme Court addressed whether three of the section 190.3 sentencing factors, including factor (a), were "unconstitutionally vague" under the Eighth Amendment. The Supreme Court explained that its capital jurisprudence "under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision." (*Id.* at p.971.) The Supreme Court acknowledged that section 190.3 contains the selection factors in the California death penalty scheme. (*Id.* at pp.975-976.) It then held that factor (a) was not unconstitutional *on its face* because its "capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty." (*Tuilaepa v. California, supra,* 512 U.S. at p. 976, citing *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

This holding does not address the issues raised here as to whether factor (a) is constitutional when applied in a manner that allows the prosecutor to argue the facts of every murder are aggravating. As Justice Blackmun pointed out in his dissent, the majority in *Tuilaepa* "leaves the door open to a challenge to the application of one of these factors in such a way that the risk of arbitrariness is realized." (*Id.* at pp.993-994

(dissenting opn. of J. Blackmun).) Mr. Tully has shown that factor (a) creates "the risk of arbitrariness" as it is used by California prosecutors.

It is telling that in *Woodson*, cited in *Tuilaepa*, the Supreme Court held that death penalty schemes that require the death penalty in all first-degree murder cases are unconstitutional. (See *Woodson v. North Carolina, supra,* 428 U.S. at pp.303-305.) Factor (a) as applied allows the prosecution to argue that the facts of every first-degree murder case require the death penalty. The result in California is similar to the result condemned in *Woodson*.

The Supreme Court in *Tuilaepa* held that factor (a) on its face instructs the jury in "understandable terms" and is thus not vague or improper under the Eighth Amendment. (*Tuilaepa v. California, supra,* 512 U.S. at p.976.) However, as applied, factor (a) is not "understandable," but rather vague and overbroad. The "[u]se of a vague or imprecise aggravating factor in the weighing process invalidates the [death] sentence." (*Stringer v. Black* (1992) 503 U.S. 222, 237.) Factor (a) is weighed by the jury in determining the penalty. Because it vague and overbroad prosecutors have used every variation of the "circumstances of the crime" to urge the jury to vote for death. The effect is that the jury inevitably believes that every capital defendant's case involves undefined "aggravating" circumstances, predisposing the jury towards death and allowing death sentences to be imposed at random.

There remains another reason why factor (a) is vague and improper. Without delineation or express limitation, factor (a) allows the prosecutor to argue non-statutory

aggravators as "circumstances of the crime." A capital sentencing scheme is invalid if the state fails ""to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty."" (*Godfrey v. Georgia, supra*, 446 U.S. 420, 428.) It remains an open question whether the California statute ""complies with the narrowing requirement defined in *Lowenfield [v. Phelps* (1988) 484 U.S. 231.]"" (*Tuilaepa v. California , supra*, 512 U.S. at p.984 (con. opn. of Stevens, J.))

Adding the unspecified and broad view of the ""circumstance of the crime"" that allows for the introduction of non-statutory aggravators including victim impact and the lack of remorse creates even more improper vagueness. (See *People v. Bacigalupo* (1993) 6 Cal 4th 457, 492, fn 2 (dis. opn. of Mosk, J.).) Both these non-statutory aggravators were argued in Mr. Tully's case.

A system that allows the jury unfettered consideration of whatever the prosecutor manages to get before them concerning the victim, his or her family, or the loss to the community does not channel the juror's discretion as required by the Constitution and can only result in arbitrary sentencing decisions. The inclusion of ""victim impact"" evidence or "the lack of remorse" in this manner renders the phrase ""circumstances of the crime"" unconstitutionally vague and overbroad in violation of the Constitutions.

Prosecutors, including the one in this case, use factor (a) to convince juries to vote for death in every case. Jurors must be guided by statute and instructed accordingly as to what is and is not relevant evidence at the penalty phase of a capital case. If the due process and the Eighth Amendment stand for anything in the post-*Furman* era, they stand

for the principle that the jury cannot simply be "trusted" to perform properly in a capital case without guidance.

The vagueness and overbreadth of factor (a) as applied results in death sentences that are arbitrary and capricious in violation of the Eighth and 14th Amendments, as well as parallel provisions of Article 1 of the California Constitution. Since factor (a) played the defining role at Mr. Tully's penalty phase, this Court must now reverse his death sentence.

C. California's Death Penalty Scheme Has No Safeguards to Avoid Arbitrary and Capricious Sentencing

California's death penalty scheme fails to properly narrow the class of death-eligible offenders as required under the *Furman* mandate. It allows the prosecution to manipulate factor (a) to argue for death in every case. Capital defendants such as Mr. Tully, who are convicted of first-degree murder via a felony-murder theory are automatically eligible for death via the felony murder special circumstance, without any additional aggravating facts.

Permitting the use of the same facts to sustain a first degree felony-murder conviction and a felony-murder "special" circumstance finding at the guilt phase and to establish a factor in aggravation under section 190.3(a) at the penalty phase is also improper. It is unconstitutional to permit a penalty jury to separately consider more than one felony-murder "special" circumstance under section 190.3(a), especially when the killing occurred during an indivisible transaction with a single criminal intent. It is

unconstitutional as applied because it enables a jury to "triple-count" the circumstances that a murder was committed in the course of a burglary and a robbery: (1) under the felony-murder rule, to elevate the offense to first degree murder; (2) as a special circumstance, to make defendant eligible for the death penalty; and (3) at the penalty phase, as a "circumstance of the offense." Accordingly, this Court's holdings to the contrary must be reconsidered. (See e.g. *People v. Seaton* (2001) 26 Cal. 4th 598, 690-691; *People v. Hughes* (2002) 27 Cal. 4th 287, 406); *People v. Taylor* (2001) 26 Cal. 4th 1155, 1183; *People v. Seaton* (2001) 26 Cal. 4th 598, 690; *People v. Slaughter* (2002) 27 Cal. 4th 1187, 1225; *People v. Lewis* (2001) 25 Cal. 4th 610, 676.)

In addition, the California scheme, as interpreted by this Court, provides none of the safeguards required to guard against the arbitrary imposition of death. Under California law:

1. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances.

2. Juries do not have to believe beyond a reasonable doubt that aggravating circumstances are proved.

3. Juries do not have to believe beyond a reasonable doubt that aggravating circumstances outweigh the mitigating circumstances.

4. Juries do not have to believe beyond a reasonable doubt that death is the appropriate penalty.

5. Juries are not instructed on any burden of proof at all, except as to the existence of other criminal activity and prior convictions.

6. Inter-case proportionality review is not required and not permitted.

The fundamental components of reasoned decision-making that apply to other parts of the law have been eliminated from the process of making the most consequential decision a juror can make, whether or not to sentence a man or woman to death.

1. The Lack of a Penalty Phase Burden of Proof Violated Mr. Tully's Constitutional Rights

Mr. Tully's death sentence was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances be proven beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on any burden of proof when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358.) Under Supreme Court law, the prosecutor bears the burden of proving the requisite findings that one or more aggravating factors are present, and that such factors outweigh the mitigating factors, beyond a reasonable doubt. (See Argument XI, *supra*.) California juries are not so instructed.

Constitutionally, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts so that the death penalty is evenhandedly applied and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112)

The burden of proof is one of the most fundamental concepts in our system of

justice, and any error in articulating it is reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.) Instructions given without a burden of proof fail to provide the jury with the guidance legally required for administration of the death penalty. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case. The same is true, where there is no burden of proof, but nothing informs the jury of this fact. Jurors who believe the burden should be on the defendant to prove mitigation in the penalty phase will continue to abide by that belief if not instructed to do otherwise. The constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof violates the Sixth, Eighth and 14th Amendments

Even assuming the "normative" nature of penalty phase determinations, *People v. Hayes, supra,* 52 Cal.3d at 643, it is inevitable that one or more jurors will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that these jurors and the juries on which they sit respond uniformly. It is unacceptable, "wanton" and "freakish," *Proffitt v. Florida, supra*, 428 U.S. at p. 260, and the "height of arbitrariness," *Mills v. Maryland* (1988) 486 U.S. 367, 374, that one defendant should live and another die simply because one jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either. (See *Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) In

cases in which the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and 14th Amendments, as well as parallel provisions of Article 1 of the California Constitution, that one man should live and another die simply because one jury assigns the burden of persuasion to the state, and another assigns it to the defendant. (See *O'Neal v. McAninch* (1995) 513 U.S. 432, 436 [when the court is in "equipoise as to the harmlessness of error" the defendant "must win."]

The error in failing to instruct the jury on the proper burden of proof is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 279-281.) Accordingly, Mr. Tully's sentence must be reversed.

2. At a Minimum, Each Sentencing Finding Must be Proven by a Preponderance of the Evidence

Due process requires the prosecutor to prove that the death penalty is appropriate, and to prove each subsidiary finding, by at least a preponderance of evidence. A preponderance standard is the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose a sentence unless whatever considerations underlie their sentencing decisions have, at least, been proven by a preponderance. Judges have never had the power that a California capital sentencing jury has been accorded, which is to find aggravating factors without any burden of proof on the prosecution, and sentence a person to die based thereon. The absence of any authority for a sentencer to impose a sentence based on aggravating circumstances found with

proof less than 51% demonstrates the unconstitutionality of failing to assign a burden of proof for penalty determinations. (See e.g. *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

In non-capital cases, California does impose on the prosecution the burden to prove to the sentencer by a preponderance of the evidence that aggravating circumstances exist such that the defendant should receive the upper term. (Cal. R. Ct. 420(b)). To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and 14th Amendments, and the Sixth Amendment's guarantee to a trial by jury, and Article 1 of the California Constitution. (*Ring v. Arizona, supra*, 122 S.Ct at 1443; *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

Moreover, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In a capital case, any aggravating factor relates to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Evidence Code section 520 creates a reasonable interest in adjudication with a properly allocated burden of proof, and is thus constitutionally protected under the due process clause of the 14th Amendment. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

This Court has held that a burden of proof is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) *Hayes,* in which this Court did not consider the applicability of section 520, is erroneously decided. The word "normative" applies to courts as well as jurors, and does not apply at all to the finding of the existence of aggravating factors. There is a long judicial history requiring decisions that affect life or liberty to be based on reliable evidence that the decision-maker finds more likely than not to be true.

Mr. Tully's jury, at a minimum, should have been instructed that the state had to prove by a preponderance of the evidence the existence of any factor in aggravation, and the propriety of the death penalty. Sentencing Mr. Tully to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and 14th Amendments, as well as parallel provisions of Article 1 of the California Constitution, and is reversible *per se.*

3. California Law Fails To Require Unanimous Jury Agreement On Aggravating Factors

It would violate the Eighth and 14th Amendments for a jury verdict to be based on each juror finding a different set of aggravating circumstances or the jury voting separately on whether each juror's individual set of aggravating circumstances warrants death; or for each such vote to be 1-11 against death. For example, because other jurors were not convinced that all of those circumstances actually existed, and were not

convinced that the subset of those circumstances that they found to exist actually warranted death. Nothing in this death penalty scheme precludes this possibility. A death sentence under those circumstances would be so arbitrary and capricious as to fail Eighth and 14th Amendment scrutiny. (See, e.g., *Gregg v. Georgia*, supra, 428 U.S. at pp. 188-189.) Under *Ring v. Arizona*, *supra*, 122 S.Ct at 1443, it would also violate the Sixth Amendment's guarantee of a trial by jury. The finding of one or more aggravating factors, and the finding that these factors outweigh mitigating factors, are essential elements of California's sentencing scheme, and a prerequisite to the weighing process in which normative determinations are made. These determinations must be made by a jury, and cannot be somehow attended with fewer procedural protections than decisions of much fewer consequences.

4. California Law Fails To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors violates federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at p. 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195.) Given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances, *Tuilaepa v. California, supra,* 512 U.S. at pp. 979-980, there can be no meaningful appellate review without at least written findings. Otherwise, it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372

U.S. 293, 313-316 .) This Court has held that the absence of these protections does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) That determination is wrong, and needs to be reconsidered by this Court.

In a non-capital case, the sentencer is required to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Under the Fifth, Sixth, Eighth and 14th Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994). Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause, see generally *Myers v. Ylst, supra,* 897 F.2d at p. 421, the sentencer in a capital case must be constitutionally required to identify for the record the aggravating circumstances found.

Written findings are essential for a meaningful appellate review of the sentence imposed. In *Mills v. Maryland, supra,* 486 U.S. 367, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See e.g., *id.* at 383, n. 15.) Even if the decision to impose death is "normative," *People v. Hayes*, supra, 52 Cal.3d at 643, and "moral," *People v. Hawthorne, supra*, 4 Cal.4th at 79, its basis can, and should be, articulated.

The importance of written findings is recognized throughout the States. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form

of written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[166]

Written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. The Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence, including, under section 190.3, the finding of an aggravating circumstance (or circumstances), and finding that these aggravators outweigh any and all mitigating circumstances. (See Argument XXIV, *supra.*) Absent written findings as to the aggravating circumstances, there is no way of knowing whether the jury has made the unanimous findings required under *Ring*. Without a requirement of written findings, the jury is given no instruction or other mechanism to encourage it to engage in such a

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[166] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(i) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

collective fact finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment and Article I of the California Constitution.

5. California Law Fails to Provide the Inter-Case Proportionality Review Required to Prevent Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty

The Eighth Amendment and parallel provisions of Article 1 of the California Constitution forbid punishments that are cruel and unusual. In a capital case, the Eighth Amendment requires that death judgments be proportionate, and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).)

One mechanism to ensure reliability and proportionality in capital sentencing is comparative proportionality review. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and as applied in fact, has become such a sentencing scheme.

California's expanded list of "special" circumstances fails to meaningfully narrow

the pool of death-eligible defendants and permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman*. The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions and the statute's principal penalty phase sentencing factor, factor (a) has proven to be an invitation to arbitrary and capricious sentencing. Comparative proportionality review is the only mechanism under this scheme that would enable it to pass constitutional muster.

Indeed, the Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2248, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. at 821, 830-31; *Enmund v. Florida* (1982) 458 U.S. 782, 796 n. 22; *Coker v. Georgia* (1977) 433 U.S.584, 596.) Moreover, thirty-one of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman [v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259, 49 L.Ed.2d 913, 96 S.Ct. 2960.)

Twenty states have statutes similar to that of Georgia,[167] and seven have judicially instituted similar review.[168]

This Court has rejected the argument that the lack of inter-case proportionality review renders California's scheme unconstitutional. (See, e.g., *People v. Hayes, supra,* 52 Cal.3d at p. 645; *People v. Howard* (1988) 44 Cal.3d 375, 444-446. It has held that such review is not required "[u]nless the state's capital punishment system is shown by the defendant to operate in an arbitrary and capricious manner. (*People v. McLain*, (1988) 46 Cal.3d 97, 121.) That showing has been made here. Proportionality review is required due to the overbroad reach of the special circumstances and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence.

This Court's failure to engage in inter-case proportionality review violates the

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[167] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

[168] See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

Eighth Amendment, as well as Article 1 of the California Constitution. Judge Alex Kozinski of the Ninth Circuit has written that an effective death penalty statute must be limited in scope to :

> insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more that we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev.1, 30 (1995).)

California's 1978 death penalty scheme suffers the same arbitrariness and discrimination condemned in *Furman*. (*Gregg v. Georgia, supra,* 428 U.S. at p. 192, citing *Furman v. Georgia, supra,* 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth and 14th Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

6. The Prosecution May Not Constitutionally Rely on Unadjudicated Criminal Activity as An Aggravating Factor

The prosecution presented evidence at the penalty phase regarding two unadjudicated criminal acts allegedly committed by Mr. Tully. (RT 3512-3515, (RT 3416 -3419.) The prosecution used these acts to argue future dangerousness. (RT 3696; see Argument XVIII, *supra.*)

Factor (b) is unconstitutionally vague especially in the absence of a requirement of unanimity. It fails to provide guidance to the jury on how to distinguish a death-worthy case from one that is not and fails to guide the jury's discretion in deciding the appropriate

penalty. Allowing the jury to consider unadjudicated criminal activity results in an unreliable sentence, permits consideration of a factor that is vague, and violates due process and equal protection principles protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments as well as Article 1 of the California Constitution, rendering the death sentence unreliable. (*See e.g. Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

7. Factor 190.3(c) is Unconstitutionally Vague

California's death penalty scheme is unconstitutional since it permits the jury to hear the underlying facts of a prior felony conviction admitted as aggravating evidence. The jury should not be permitted to consider prior felony convictions at the penalty phase of a case.

In addition, jury consideration of a defendant's prior felony convictions under section 190.3(c) constitutes double jeopardy and violates fundamental fairness. Further, together with 190.3(b), section 190.3(c) allows improper double counting of violent criminal conduct.

Accordingly this Court's holdings to the contrary are incorrect. (See e.g. *People v. Weaver* (2001) 26 Cal. 4th 876, 991; *People v. Hillhouse* (2002) 27 Cal. 4th 469, 510; *People v. Anderson* (2001) 25 Cal. 4th 543, 600-601; *People v. Bolden* (2002) 29 Cal. 4th 515, 566; *People v. Seaton* (2001) 26 Cal. 4th 598, 690.)

8. Restricting the List of Potential Mitigating Factors is Unconstitutional

Section 190.3 uses limiting language to qualify the potential mitigating factors. The use of adjectives "extreme" in factor (d); "reasonably" in factor (f); "substantial" in factor (g); "impaired" in factor (h); and "time frame" in factor (h) improperly restricts the jury from considering relevant mitigation evidence. This restriction on considering mitigating evidence violates of the Fifth, Sixth, Eighth, and 14th Amendments, as well as Article 1 of the California Constitution. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

Section 190.3(h), in its limitation to the time of the offense, also impermissibly restricts the jury's consideration of relevant mitigating circumstances and makes the factors impermissibly vague. The inclusion of temporal language precludes the jury from considering mitigating evidence merely because it did not relate specifically to defendant's culpability for the crimes committed.

The jury instruction based on factor (h), can be improperly interpreted by the jury as excluding consideration of this evidence as mitigating if it did not influence the commission of the crime. It is unconstitutional in its formulation and application since it uses the term "impaired" in section 190.3(h), which improperly suggests that the illness caused the crime. This Court's holdings to the contrary are incorrect. (See e.g. *People v. Boyette*, (2002) 29 Cal. 4th 381, 465, 467; *People v. Koontz*, (2002) 27 Cal. 4th 1041, 1094-1095; *People v. Burgener*, (2003) 29 Cal. 4th 833; *People v. Kipp* (2001) 26 Cal.

4th 1100, 1137–1138; *People v. Hughes* (2002) 27 Cal. 4th 287, 404-405; *People v. Taylor* (2001) 26 Cal. 4th 1155, 1179.)

9. Factor 190.3(i) is Unconstitutionally Vague

Section 190.3(i), the defendant's age, is an unconstitutionally vague factor since prosecutors typically argue that age is aggravating, no matter whether the defendant is old or young. It fails to require the trial court to instruct the jury that defendant's age is a mitigating factor. Age should only be a mitigating factor, yet this Court improperly allows it to be aggravating.

It is impermissible for the prosecution to refer to the defendant's age, and to the victim's age under 190.3(a), as aggravating factors. Factor (i) improperly permits juries to consider defendant's youth as an aggravating factor via standard jury instructions and allows prosecution arguments that defendant "was certainly old enough to know better" and was "old enough to understand the wrongfulness of his conduct." This court's holdings to the contrary are incorrect. (See e.g.*People v. Slaughter* (2002) 27 Cal. 4th 1187, 1224; *People v. Mendoza* (2000) 24 Cal. 4th 130, 190; *People v. Jenkins* (2000) 22 Cal. 4th 900, 1051-1052; *People v. Box* (2000) 23 Cal. 4th 1153, 1217.)

10. Factor 190.3(k) is Unconstitutionally Vague

Section 190.3(k) is unconstitutionally vague. Factor (k) fails to provide guidance to the jury on how to distinguish a death-worthy case from one that is not and fails to guide the jury's discretion in deciding the appropriate penalty. In addition, empirical research demonstrates that there is no instruction about factor (k) that is sufficient to

properly guide a jury's discretion. Accordingly this Court's opinion in *People v. Mendoza* (2000) 24 Cal. 4th 130, 192, was incorrect.

11. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Was Unconstitutional

In accordance with customary state court practice, the instructions did not advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. The jury was told to "take into account" . . ."whether or not" factors (d), (e), (f), (g), (h), and (j) existed. (CALJIC 8.88.) These factors, however, are relevant only as possible mitigators. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.)

California's death penalty scheme is unconstitutional since it fails to identify which factors are aggravating and which are mitigating. The trial court should be required to identify to the jury which sentencing factors are aggravating and which are mitigating, as well as instruct that the "absence of a mitigating factor should not count as a factor in aggravation." Section 190.3 and related jury instructions do not inform the jury that certain sentencing factors are relevant only in mitigation of penalty. The trial court should be required to inform the jury that certain sentencing factors are relevant only in mitigation and that only three factors can be aggravating.

The California death penalty scheme is unconstitutional because it permits the jury generally to treat the absence of a mitigating factor as an aggravating factor. The statutory language to consider "whether or not" certain mitigating factors are present unconstitutionally suggests that the absence of such factors amount to aggravation. This Court's opinions to the contrary are incorrect. (See e.g. *People v. Weaver* (2001) 26 Cal. 4th 876, 991, 993; *People v. Box* (2000) 23 Cal. 4th 1153, 1217-1219; *People v. Anderson* (2001) 25 Cal. 4th 543, 600-601; *People v. Cunningham* (2001) 25 Cal. 4th 926, 1040-104; *People v. Boyette* (2002) 29 Cal. 4th 381, 465-466.)

The jury in this case was left free to conclude that a "not" answer as to "whether or not" these sentencing factors existed would establish an additional aggravating circumstance. This invited the jury to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors. The failure to instruct precluded the reliable, individualized capital sentencing determination required by the Eighth and 14th Amendments, as well as Article 1 of the California Constitution. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-85.)

The likelihood that the jury in this case was misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's erroneous statements during penalty phase closing argument and his use of a chart listing all the potential mitigating factors that the jury "had not heard." (See Argument XIX, *supra.*) It is likely that the jury counted and weighed non-existent factors as aggravating, as the

prosecutor's chart and argument suggested. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated Mr. Tully "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black, supra*, 503 U.S. at p. 235.)

Even without this misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely count and weigh different numbers of aggravating circumstances based on their individual differing constructions of the jury instructions. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" *Tuilaepa v. California*, supra, 512 U.S. 967, quoting *Gregg v. Georgia*, 428 U. S. 153, 189 (1976), and ensure that the death penalty is evenhandedly

applied. (*Eddings v. Oklahoma, supra*, 455 U.S. at 112.) The instructions did not meet that requirement.

12. The Denial of Safeguards to Capital Defendants Violates the Constitutions

The Supreme Court has demanded that a greater degree of reliability when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (*See e.g. Monge v. California, supra,* 524 U.S. at 731-732.) California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Here, where the interest identified is "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.)[169] A state may not create a classification scheme that affects a fundamental interest without showing that it has a compelling interest justifying the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.) The state cannot meet this burden.

In this case, the equal protection guarantees of the state and federal Constitutions

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[169] In 1975, this court held that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, `the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E. 2d 662, 668, 367 Mass 440, 449.)

must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the People of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

The Equal Protection Clause of the 14th Amendment, as well as Article 1 of the California Constitution, guarantee each and every person that they will not be denied their fundamental rights and prohibit arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) The Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments.

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the refusal to require written findings by the jury, or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. These procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra,* 524 U.S. at 731-732.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and

fragmented, and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

D. The Trial Court Erred in Failing to Instruct the Jury in Accordance with Constitutional Requirements

In addition to constitutional infirmities identified above, the failure of the standard jury instructions, CALJIC 8.85 and 8.88, to instruct the jury in accordance with constitutional principles violates the State and Federal Constitutions. The use of these unconstitutional penalty phase instructions in this case deprived Mr. Tully of his rights to a fair trial, due process and a reliable penalty determination under the Fifth, Eighth, and Fourteenth Amendments and Article I of the California Constitution.[170]

The standard instruction includes factors inapplicable and irrelevant to a particular case. The instruction does not require deletion of irrelevant factors. Jurors are led to believe that the absence of mitigating factors is itself aggravating. Trial courts should be required to omit inapplicable factors when instructing the jury. The instruction also fails to define the terms "aggravating" and "mitigating"

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[170] To the extent this Court's holdings have rejected the challenges herein, they are incorrect. (See e.g. *People v. Boyette* (2002) 29 Cal. 4th 381, 464-465; *People v. Gutierrez* (2002) 28 Cal. 4th 1083, 1150-1151; *People v. Bolden* (2002) 29 Cal. 4th 515, 566; *People v. Hughes* (2002) 27 Cal. 4th 287, 404-405; *People v. Michaels* (2002) 28 Cal. 4th 486, 541-542; *People v. Taylor* (2001) 26 Cal. 4th 1155, 1177, 1178, 1181; *People v. Anderson* (2001) 25 Cal. 4th 543, 600; *People v. Cunningham* (2001) 25 Cal. 4th 926, 1040-1042; *People v. Kipp* (2001) 26 Cal. 4th 1100, 1137–1138; *People v. Ochoa* (2001) 26 Cal. 4th 398, 452; *People v. Seaton* (2001) 26 Cal. 4th 598, 688; *People v. Catlin* (2001) 26 Cal. 4th 81, 174; *People v. Box* (2000) 23 Cal. 4th 1153, 1217; *People v. Ayala* (2000) 23 Cal. 4th 225, 303 *People v. Mendoza* (2000) 24 Cal. 4th 130, 190-191; *People v. Brown* (1988) 46 Cal. 3d 432, 450-454.)

The trial court's error in reading the standard instructions in this case violated Mr. Tully's rights. The instruction on factor (a) as applied here was vague and failed to channel jury discretion. The sentencer must not be given unbridled discretion in determining the appropriate penalty. It may only consider in aggravation those aspects of the crime that make it an aggravated one for the purposes of reaching a death verdict. Its consideration must be informed by principles that enable it to distinguish the defendant's crime from the majority of murders, crimes for which the perpetrators receive sentences less than death. The bare "circumstances of the crime" instruction lacks this guiding principles.

The jury here was given no instruction limiting the "circumstances of the crime" aggravating factor. As a result of this erroneous instruction, Mr. Tully's sentencing jury assigned aggravating weight to whatever aspects of Mr. Tully's crime it chose, including those common to many homicides: for example, that the perpetrator used a knife, that the victim was subjected to fear for her life, that the victim, a living person, undeserving of death, was killed, and that the appearance of the victim after death had the power to shock and/or to evoke pity. These circumstances of the crime for which Mr. Tully was convicted were among those argued to the jury by the prosecutor here. (See e.g., RT 3802.)

The prosecutor's argument to the jury focused most heavily on Mr. Tully's lack of remorse, victim impact and a lurid and speculative recounting of the crime. This argument exploited the failure of the "circumstances of the crime" instruction to limit the

jury's consideration of "aggravation" only to those aspects of the crime that actually made it aggravated. The instructional error thus violated Mr. Tully's rights and was prejudicial.

Mr. Tully's jury was instructed with a slightly modified version of CALJIC 8.88 (CT 2059.) This instruction was deficient in numerous respects. It was vague and misleading. It failed to inform the jury that if aggravation did not outweigh mitigation a verdict of life without the possibility of parole was mandatory, that a verdict of life without the possibility of parole could be returned even if aggravation outweighed mitigation, or that a death verdict required findings beyond a reasonable doubt that aggravation outweighed mitigation and that death was the appropriate penalty. It failed to inform the jury which party if any bore the burden of persuasion as to the appropriate penalty. These failures are especially problematic, since after *Ring*, the prosecutor bears the burden of proving aggravators, that aggravators substantially outweigh mitigators, and that death is appropriate, beyond a reasonable doubt.

This standard instruction guides the jury through the sentencing process. Its numerous flaws deprived Mr. Tully's of his rights to due process, equal protection, a fair jury trial, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments.

The jury in this case was instructed:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are *so substantial* in comparison with the mitigating circumstances that it *warrants* death instead of life without parole."

The phrase "so substantial" called for an impermissibly subjective treatment of the evidence in favor of a death sentence and failed to instruct the jury that such a sentence requires that aggravation *outweigh* mitigation. The use of the term "warrants" misled the jury with respect to the requirement that death may only be imposed if it is the appropriate penalty in a given case. The words "so substantial" provide no inherent restraint on the arbitrary and capricious infliction of the death sentence." The death verdict here that followed this instruction does not meet the reliability requirements of the Eighth Amendment scrutiny. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 36 quoting *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429.)

A capital sentencing scheme must adequately inform the jurors of "what they must find to impose the death penalty . . . ." *Id.*, at 361-362. The words "so substantial" did not inform Mr. Tully's jurors of what they had to find in order to impose the death penalty. The phrase is so varied in meaning, so broad in usage, that it is incapable of understanding in the context of deciding between life and death. It conveys a purely subjective standard.

This instruction failed to inform the jury that to return a judgment of death it must find not just that death was "warranted" but that it was *appropriate*. Webster's New World Dictionary defines the verb "warrant" as "to give (someone) authorization or sanction to do something" or "to authorize (the doing of something) . . . ." Death is thus "warranted," in the sense that it is an authorized punishment, in all cases where a special circumstance has been found true. By contrast, "appropriate" is defined as "right for the

purpose; suitable; fit; proper." The Eighth Amendment demands that the decision to impose death be an *appropriate* one, rather than one that is merely warranted. Because death may be warranted or authorized does not mean it is appropriate, the instruction as worded was misleading.

The instruction given here told the jury that the deliberative process amounts to no more than simply weighing the factors without regard to the appropriateness of the punishment selected. It was thus misled in its understanding of the sentencing function. The instruction came after the prosecutor's argument that Mr. Tully's conviction of a special circumstance murder alone was enough to merit a death sentence. Rather than countering the harmful implications of the flawed sentencing instruction, the prosecutor's argument only reinforced them.

If the jury, in weighing the factors in aggravation and mitigation, finds that the former do not outweigh the latter, it is required to return a life verdict. (Section 190.3) The instruction given here did not include this clear directive, and was thus flawed.

This instruction was also defective because it implied that if the jury found the aggravating evidence "so substantial in comparison with the mitigating circumstances," death was the permissible and proper verdict. It told the jury that if aggravation was found to outweigh mitigation, a death sentence was compelled. Under California law, the penalty jury may return a verdict of life without parole even if the circumstances in aggravation outweigh those in mitigation. The instruction had the effect of an improper directed verdict should the jury find mitigation outweighed by aggravation.

Even if the instruction did not constitute a directed verdict of death, it failed to tell the jury that it could return a life-without-parole verdict even if the circumstances in aggravation outweighed those in mitigation. An affirmative instruction was required in light of the trial court's duty to instruct *sua sponte* on the general principles of law governing the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.) The court was thus obligated to instruct the jury of its terms. Since the defect in the instruction deprived Mr. Tully of an important procedural protection that California law affords capital defendants, it deprived him of due process, and rendered the resulting verdict unreliable. (*Furman v. Georgia, supra*, 408 U.S. 238.)

Prior to its guilt phase deliberations, Mr. Tully's jury was instructed to "reach a just verdict regardless of the consequences." (CT 2061; CALJIC No. 1.00.) At the penalty phase, the jury was not told to disregard this earlier instruction, giving a false impression of the importance of its sentencing task. This denied Mr. Tully due process, a fair jury trial and a reliable capital sentencing determination under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Under California law, capital penalty jurors who served at the guilt phase are presumed to have remembered the guilt phase instructions in their penalty phase deliberations. Unless the jury is instructed to the contrary at the penalty phase, it will apply the law in accordance with the earlier instructions.

The instruction to disregard the consequences of the verdict is inapplicable at the penalty phase, and any suggestion that a jury should follow it is misleading. The jury was

misled as to the gravity of its sentencing responsibility, thus violating due process and the Eighth Amendment. The error also violated the Sixth Amendment right to a jury trial because it placed an unauthorized burden on the defense. The reduction of the jury's sense of responsibility for its verdict had the effect of lightening the prosecution's burden of persuading the jury of the appropriateness of a death sentence.

Pursuant to this instruction, CALJIC No. 1.00, the jury was specifically told that jury instructions represent the correct statement of the law. The jury was specifically instructed that it was to follow the law as stated in the jury instructions, and that they were to consider the instructions as a whole. (CT 2031, 2062.) In the absence of a penalty phase instruction telling them otherwise, the jury reasonably would have interpreted the instructions as mandating that they disregard the consequences of both their penalty phase verdict as well as their guilt phase verdicts.

For these reasons, the standard penalty phase instructions in general, and as applied in this case, violate the Constitutions and deprived Mr. Tully's of his rights to due process, equal protection, a fair jury trial, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments, and Article I of the California Constitution.

E. The Death Penalty Is Unconstitutional

State sponsored killing as a form of punishment has now become simply unacceptable in American society. Although the Supreme Court in *Gregg* held that the death penalty was not per se "cruel and unusual," it also acknowledged that the Eighth

Amendment is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (*Gregg v. Georgia*, *supra,* 428 U.S. at p. 171 (plurality opinion); internal citations and quotations omitted.) "[T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Id.* at p.173 quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101.) Recent events and shifting public opinion prove that modern standards of decency have evolved to the point where the death penalty is now viewed as inhumane.

This evolution of standards is demonstrated by the growing movement across the country calling for moratoria on the death penalty. Illinois began the trend and other states have followed suit with moratoria. Cities across the nation have also called for moratoria, including many in California. It appears that, as Justice Marshall predicted, the American people are finally becoming "fully informed as to the purposes of the death penalty and its liabilities" and have concluded that as such it is "morally unacceptable." (*Gregg v. Georgia*, *supra,* 428 U.S. at p. 232 (dissenting opn of Marshall, J.)

Further, California's use of the death penalty as a regular form of punishment violates international norms of humanity and decency. "The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment . . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former apartheid regime] as one of the few nations which has executed a large number of persons . . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom:*

Whether the Continued Use of the Death Penalty in the United States Contradicts International 225 *Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; *see also People v. Bull* (1998) 185 Ill.2d 179,[235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) [171]

The abolishment of the death penalty, or its limitation to "exceptional crimes such as treason" is particularly uniform in the nations of Western Europe. (*See e.g. Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dissenting opn.of J. Brennan); *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 (plurality opinion).) All nations of Western Europe have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)[172]

Although this country is not bound by the laws of any other sovereignty in its administration of criminal justice, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1,

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[171] In 1995, South Africa abandoned the death penalty, making only nine nations that still have a high killing rate.

[172] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Ibid.*)

quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 (dissenting opn. of J. Field); *Hilton v. Guyot, supra,* 159 U.S. at p. 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.)

"Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra*, 408 U.S. at p. 420 (dissenting. opn. of J. Powell).) The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, *supr*a, 122 S.Ct. at 2249-2250, *Roper v. Simmons* (2005) 125 S.Ct. 1183.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons and juveniles, the Supreme Court relied in part on the fact that within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.

Even were capital punishment not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes, as opposed to extraordinary punishment for extraordinary crimes, runs afoul of these laws. Nations in

the Western world no longer accept the death penalty. The Eighth Amendment requires jurisdictions in this nation to keep pace with the evolving standards in the rest of the world. (See e.g. *Atkins v. Virginia*, *supra,* 122 S.Ct. at 2249.) The law of nations now recognizes the impropriety of capital punishment as regular punishment. Inasmuch as international law is a part of our law, capital punishment is also improper in this country (*Hilton v. Guyot* (1895) 159 U.S. 113, at p. 227; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

California's broad penalty scheme, and the use of the death penalty as arbitrarily but routinely imposed punishment, offends evolving standards of decency under the Eighth and Fourteenth Amendments, as well as parallel provisions of Article 1 of the California Constitution and International Law. Mr. Tully's death sentence should be set aside.

XXIX. MR. TULLY'S CONVICTION AND SENTENCE WERE OBTAINED IN VIOLATION OF INTERNATIONAL LAW

In the previous portions of the Opening Brief, Mr. Tully has stated the arguments warranting relief upon domestic law. Many of the arguments are supported by instruments and customs of international law as well. International law is fully applicable and binding upon domestic courts. Mr. Tully's convictions and sentence were obtained in violation of his rights to due process, a fair trial, equal protection of the law, to be free from cruel and/or unusual punishment and to a reliable, individualized, and non-arbitrary penalty determination in violation of international treaties and customary international law.

The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 175 (hereafter ICCPR) was adopted by the U.N. General Assembly on December 16, 1966 and entered into force on March 23, 1976. Article 2(1) of the ICCPR provides that a state that becomes party to the treaty "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind." Among those rights a state "undertakes to respect and ensure" are the right to life, see Art. 6; freedom from torture, see Art. 7; the right to a fair trial, see Art. 14; freedom of opinion and expression, see Art. 19; and freedom of association, see Art. 22. On September 8, 1992, the United States, following the advice and consent of the Senate, became a party to the ICCPR, at which time the treaty became, coexistent with the United States Constitution and federal statues, the

"Supreme Law of the Land." (U.S. Const. art. VI.). The obligations imposed by the ICCPR and the other treaties mentioned here, and the attendant rights granted thereby, are owed separately and independently to Mr. Tully.

Customary international law refers to a set of principles that are so widely accepted by members of the international community that they have evolved into binding rules of law. United States courts may not ignore the precepts of customary international law. (*The Charming Betsy* (1804) 6 U.S. (2 Cranch) 64; (1900) *The Paquete Habana* 175 U.S. 677, 694-700; *The Nereide* (1815) 13 U.S. (9 Cranch) 388, 423. In general, customary international law has the same status as domestic legislation. (Restatement (Third) of Foreign Relations Law § 701, Comment E.) The obligations imposed by international common law and the attendant rights granted thereby are owed separately and independently to Mr. Tully.

Mr. Tully was convicted and sentenced in violation of due process rights. Article 14 of the ICCPR enumerates due process rights relating to criminal proceedings. Article 14 provides for rights including equality before the courts and tribunals, a fair and public hearing by a competent, independent and impartial tribunal, a presumption of innocence; and the rights to obtain the attendance of his own witnesses and to confront witnesses against him.

Article 6 of the ICCPR provides that the death penalty may be imposed only where these standards are observed. The United Nations Human Rights Committee has held that when a State violates an individual's due process rights under the ICCPR, it may not carry

out his execution. (See, e.g., *Johnson v. Jamaica* (1966) No. 588/1994, H.R. Comm. para. 8.9 [reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed]. The State's failure to abide by international law in this regard renders Mr. Tully's convictions and death sentence void.

In addition, Articles 6 and 14 of the ICCPR guarantee the right to a fair trial at all stages of the proceedings. International common law requires that capital defendants be granted special protection above and beyond the protection afforded in non-capital cases. The United Nations' "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (hereafter Safeguards), mandate that: "Capital punishment may only be carried out pursuant to a formal judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights." (United Nations, Economic and Social Counsil Resolution (May 25, 1984.)

Further, article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Because of the long delay between arrest and trial and between sentencing and execution, and the conditions in which Mr. Tully is kept, execution of the death penalty in this case violates this provision of the ICCPR. The norm against cruel, inhuman, or degrading treatment is universally recognized as a violation of international law distinguishable from torture. The Universal Declaration of Human Rights, article 5, provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." (Universal Declaration of

Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); see also Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doe. A/39/51 (1984) (entered into force June 26, 1987); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); the American Convention on Human Rights, art. 5, opened for signature Nov. 22, 1969, O.A.S. T.S. No. 36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (entered into force July 18, 1978).) International law bars execution when delay in carrying out the penalty is particularly protracted, a practice referred to as the "death row phenomenon." (*Pratt and Morgan v. The Attorney General of Jamaica* (Privy Council 1993) 3 SLR 995 2 AC 1, 4 All ER 769 (en banc); *Soering v. United Kingdom* (1989) 161 Eur. Ct. H.R. (Ser. A); see *Knight v. Nebraska* (1999) 528 U.S. 990 (Breyer, J., dissenting from denial of certiorari); *Ellidge v. Florida* (1998) 525 U.S. 944 (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas* (1995) 514 U.S. 1045 (Stevens, J., respecting denial of certiorari); *Lewis v. Attorney General of Jamaica* (P.C. 12 September 2000) 3 WLR 1785.) Because of the long delay in capital cases and the conditions in which Mr. Tully is kept confined, execution of the death penalty in this case violates international law.

The right to life is the most fundamental of the human rights contained in the International Bill of Rights. (See, e.g., Universal Declaration on Human Rights, G.A.

Res. 217A (III), U.N. GAOR, 3d Sess. art. 3, U.S. Doc. A/810 (1948) ["Everyone has the right to life, liberty, and security of the person"]; ICCPR, art. 6 ["Every human being has the inherent right to life"].). A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." (See e.g., ICCPR, art 6; American Convention on Human Rights, art. 4, 1144 U.N.T.S. 123.) The imposition of the death penalty in this case constitutes the arbitrary deprivation of life in violation of international law.

Mr. Tully's trial was the product of arbitrariness and discrimination in violation of the ICCPR and the ICEAFRD. The State's failure to abide by international law in this regard renders the convictions and death sentence void.

The ICCPR and the International Convention for the Elimination of All Forms of Racial Discrimination (hereafter ICEAFRD) serve to protect defendants in criminal cases from discriminatory application of the laws. Article 26 of the ICCPR specifically guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Moreover, article 14 states that all persons "shall be equal before the courts and tribunals." (See also article 2.1 of the ICCPR.) The ICEAFRD was signed by the United States September 28, 1966, 600 U.N.T.S. 195, and was subsequently ratified. The ICEAFRD obligates member states to "prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law." (*Id* at art. 5(a).) Article 6 of the ICEAFRD provides that parties "shall

assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention."

The failure of the state to prohibit discrimination by law and to "guarantee to all persons equal and effective protection against discrimination" on the basis of identifiable group violates the mandates of the ICCPR and the ICEAFRD.

In 1998, the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions concluded that the application of the death penalty in the United States was both "discriminatory and arbitrary." He concluded that "race, ethnic origin, and economic status appear to be key determinants of who will, and who will not, receive a death sentence." (Report of United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to the United States of America, U.N. Doc. E/CN.4/1998/68/Add. 3, para. 2, para. 148 (1998).)

Mr. Tully was charged with capital murder, tried, convicted, and sentenced to death in violation of Article 6(2) of the ICCPR. This Article provides that the death penalty may only be imposed for the "most serious crimes." (See also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996).) The Human Rights Committee has observed that this expression must be "read restrictively," because death is a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), para.7.) The imposition of the death penalty in this

case violates the ICCPR and the Convention on Human Rights. The State's failure to abide by international law in this regard renders Mr. Tully's death sentence void.

Violations of these rights afforded Mr. Tully by international law warrant the granting of relief without any determination of prejudice. In any event, the errors alleged in the Opening Brief so infected the integrity of the proceeding against Mr. Tully that the errors cannot be deemed harmless and the State will be unable to meet its burden of showing this error harmless. Additionally, the violations of Mr. Tully's rights rendered the judgments fundamentally unfair, and resulted in a miscarriage of law. Accordingly, Mr. Tully's death sentence must be reversed.

XXX. MR. TULLY'S DEATH SENTENCE WAS IMPOSED THROUGH THE ARBITRARY AND DISPARATE APPLICATION OF CALIFORNIA'S DEATH PENALTY LAWS

In addition to the failure of California's death penalty statute to sufficiently narrow the class of murderers eligible for the death penalty by limiting it to a few specific special circumstances, actual application of the statute is arbitrary and standardless. The decision whether to actually seek the death penalty in a special circumstance murder case is left up to the individual district attorney in each county. Because of the prosecutorial discretion, some offenders will be chosen as candidates for the death penalty by one prosecutor, while others with similar characteristics in different counties will not be singled out for the ultimate penalty. This process further increases the substantial risk of arbitrariness in violation of the Eighth Amendment, and violates principles of due process and equal protection as guaranteed by the 14th Amendment.

The circumstances under which a defendant may be deemed eligible for the death penalty must be narrowly drawn and "fit the crime within a defined classification." (*Arave v. Creech*, *supra,* 507 U.S. at p. 471.) Where the eligibility decision is based, in part, on the subjective and changing views of individual prosecutors, there is no "defined classification," "so as to 'make rationally reviewable the process for imposing a sentence of death.'" (*Tuilaepa, v. California*, supra, 512 U.S. at p. 973.) Due to the unchecked discretion of the prosecutor in determining actual eligibility, California's system is not "rationally reviewable" and thus violates the Eighth Amendment and Article I of the California Constitution.

Implementation of the death penalty in an arbitrary manner violates principles of substantive due process as well. The Due Process Clause protects both liberty interests that are created by state law, (*see e.g. Evitts v. Lucey* (1985) 469 U.S. 387 (due process protections attach to state created right to appeal criminal appeals)), as well as those "fundamental rights and liberties" which are "objectively deeply rooted in this Nation's history and tradition," (*Moore v. East Cleveland*, 431 U.S. 494, (plurality opinion); *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." (*Palko v. Connecticut* (1937) 302 U.S. 319, 325.) "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell* (1974) 418 U.S. 539, 558, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective. (*County of Lewis v. Sacramento* (1998) 523 U.S. 833, 845-46. Punishment for crimes, and certainly, imposition of the gravest punishment of all, must be based on reviewable, articulable and evenly applied criteria.

Arbitrary implementation of the death penalty violates the Equal Protection Clause where, as here, it fails to provide assurances that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution by its duly constituted agents."

(*Sioux City Bridge Co. v. Dakota County* (1923) 260 U.S. 441, 445.) In *Bush v. Gore*, (2000) 531 U.S. 98, the Supreme Court applied this principle and recognized that fundamental rights cannot be denied based upon arbitrary and disparate statewide "standards." The Court held that, where a single state entity has the power to assure uniformity in implementing a fundamental right, there must be at least *some* assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. (*Id.* at p. 109.)

In *Bush*, the fundamental right at issue was the right to vote, and the state entity was the Florida Supreme Court. The Supreme Court found that the state court's authorization of standardless manual recounts of challenged votes, with standards differing from county to county, violated the Equal Protection Clause. Even in the absence of discriminatory intent, the equal protection is violated where the discriminatory impact of having no statewide uniformity was shown. (*Id.*) Because the recount procedures authorized by the Florida Supreme Court did not guarantee statewide uniformity, the recount itself was prohibited in order to protect the fundamental rights of voters. The Court applied principles of equal protection to protect the state created right to vote in presidential elections, even though that right is not specifically identified in the United States Constitution.

Implementation of the death penalty plainly involves fundamental rights, including the most fundamental right of all -- the right to life. (*Ford v. Wainwright* (1986). 477 U.S. 399, 409.) The fundamental rights of liberty and due process are also implicated

when the state imposes its authority to execute one of its citizens, as well as the right to be free from the arbitrary and capricious imposition of the death penalty and the constitutionally express right to be free from cruel and unusual punishment. Equal protection precludes the state from engaging in arbitrary and disparate treatment that would deprive one person of his or her fundamental rights, and requires implementation of adequate statewide standards to prevent such disparate treatment. (*Bush v. Gore, supra,* 531 U.S. at p. 109.) California lacks such statewide standards to prevent disparate treatment in implementation of the death penalty.

The California Attorney General is the chief law officer of the state, with supervisory power over "every district attorney." California has fifty-eight (58) counties with fifty-eight (58) District Attorneys. "It is the duty of the Attorney General to see that the laws of the State are *uniformly* and adequately enforced." (California Constitution, Art. 5, § 13.)[173]

Despite the authority and duty of the state Attorney General to guarantee equal and uniform enforcement of the law of the state, discretion is vested in each District Attorney in each county to make death eligibility and charging decisions. Each District Attorney is solely responsible for decisions respecting the prosecution of defendants within their county, including the decisions when to file special circumstance charges against persons

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[173] The California Constitution thus also creates a liberty interest, protected by the Due Process and Equal Protection Clauses, that criminal laws be "uniformly applied" to all citizens of the state. (See *Evitts v. Lucey*, *supra*, 469 U.S. 387.)

accused of first-degree murder, and when to seek the death penalty against those charged with special circumstances first-degree murder. (Cal. Gov. Code § 26501; *Keenan v. Superior Court* (1981) 126 Cal.App.3d 576, 581-585.)

In the absence of any statewide standards to determine which of those defendants who meet the special circumstance criteria will actually be deemed death-eligible and charged with death by the prosecutor, whether one's life will be put at risk a death penalty trial turns more on the county in which the killing occurred than it does on the facts and circumstances of the killing or the individual characteristics of the defendant. Since *Gregg v. Georgia, supra,* 428 U.S. 153, was decided, seventeen (17) of California's fifty-eight (58) counties have not imposed a single death sentence.[174] Twelve (12) of California's fifty-eight (58) counties have each imposed only a single death sentence.[175] (California Department of Corrections, Condemned Inmates List Summary, www.cdc.state.ca.us/issues/capital/capital7.htm.)

The remaining counties produce death sentences at a disproportionate rate to their homicide or population numbers. For example, in 1997, Orange County sent more people to death row than did Los Angeles County which has triple the population and ten times the homicides. (S. Pfeifer, *the Rate at Which Orange County Prosecutor Are Deciding to*

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[174] These counties are: Alpine, Del Norte, El Dorado, Inyo, Lassen, Mariposa, Mendocino, Modoc, Mono, Nevada, Plumas, San Benito, Sierra, Siskiyou, Tehama, Trinity, and Yolo.

[175] These counties are: Amador, Calaveras, Colusa, Glenn, Imperial, Marin, Merced, Napa, Santa Cruz, Sutter, Tuolumne and Yuba.

Seek the Death Penalty Has Doubled, Records Show, The Orange County Register, November 14, 1997, B1, 1997 WL 14884516.) Between 1978-1996, neighboring San Diego County, with a slightly larger population than Orange County, had sentenced 28 percent fewer people to death. (S. Pfeifer, *DA's Crowded Death-row Docket*, The Orange County Register, October 20, 1996, B1, 1996 WL 13260459.)

In a statewide study of homicides committed during 1985 and 1986, Professor Gerald Uelmen of the University of Santa Clara School of Law found wide variations among counties in the percentage of death penalty cases filed per homicides in the county. (See C. Finnie et al., *Location is Key in Capital Cases: Death Decisions Vary by County*, L.A. Daily J., Apr. 23, 1992, at 1.)

A Columbia University study of how the death penalty has been applied in the United States from 1973 through 1995 finds that relatively "[h]eavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur." (J. Liebman, *et al.*, *A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It*, Executive Summary, available at www.law.columbia. edu/ brokensystem2 exe_summary.html (hereafter Liebman).) The Columbia University study compiled data on the death-sentencing rate of counties that imposed five or more death sentences between 1973-1995. The study provided the number of death verdicts and the number of homicides and calculated the death verdicts per 1000 homicides. The results show startling county-by-county disparities.

Counties with vastly different homicide rates returned the same number of death sentences. Shasta County and San Joaquin County each imposed nine death sentences, although San Joaquin County (with 769 homicides) had five times the number of homicides as Shasta County (with 145 homicides). (Liebman, *supra*, at *Part II*,, http://www.law. columbia edu / brokensystem2/ appendixb2. html.)

Counties with roughly the same number of homicides produced wildly divergent death sentencing rates. Kern County had 961 homicides during the study period and Contra Costa County had slightly more, 1015 homicides; however, Kern County returned more than twice the number of death sentences (22) as Contra Costa County (9). Urban Los Angeles County, the most populous county, had the second lowest ratio of death verdicts per homicides (8.33%), while rural Shasta County, a much less populous county, had the highest ratio of death verdicts per homicides (62.07%). (*Ibid.*) These numbers are, in the words of the Supreme Court describing the divergent election recount results from Broward and Palm Beach Counties, "markedly disproportionate to the difference in population between the counties." (*Bush v. Gore, supra,* 531 U.S. at p. 107.)

While the criteria for death-eligibility set forth in section 190.2 are applicable in all counties, and California places on the Attorney General the responsibility for overseeing the uniform enforcement of state law, California's death-eligibility criteria are not applied uniformly, or anywhere near uniformly, in the different counties. There are no statewide standards in California to guide the District Attorneys of each county in the state in determining whether to seek the death penalty against a potentially death eligible

defendant (i.e. where special circumstances are charged). This decision is left solely to the discretion of the prosecutor in the county where the crime was committed and each county may and does, in fact impose its own standards (or none at all), for deciding who will face death.

Moreover, these county-by-county disparities are not due to homicide rates, but to arbitrary factors, including the personal ideology of the prosecutor, political pressures from constituents, the budgetary constraints of the county, as well as "race, politics, and poorly performing law enforcement systems." (Liebman, at *Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It*, Executive Summary, www.law.columbia.edu/ brokensystem2 exe_summary.html.) Some counties, like Imperial, have not sought the death penalty for fiscal reasons. (Stephen Magagnini, *High-stakes Gamble: Execution Price Tag Pegged at $15 Million*, The Orange County Register, April 10, 1988, 1988 WL 4450609.) Personal opinions, political concerns, and/or fiscal restraints have no " factual nexus to the crime or the defendant." Accordingly, they should have no bearing on the death eligibility decision making process.

Even within a given county, the choice as to who might receive a death sentence is the product of an arbitrary and standardless process. At the time of Mr. Tully's's trial, Alameda County had no written policy or published standards regarding who would be charged with death.

Just as in *Bush,* there is a single state entity (the California Attorney General) that has the power, as well as the duty, to assure uniformity in implementing the fundamental right to life, and liberty, as well as the rights to due process and freedom from cruel and unusual punishment, but has instead allowed charging decisions to be made without any rules, in a standardless and inconsistent fashion from county to county, and within each county, without any assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. Just as in *Bush,* "the want of those rules here has led to unequal evaluation" of who should live and who should be subject to death, and the standards for deciding who should be charged with the death penalty "might vary not only from county to county but indeed within a single county. . . ." (*Bush v. Gore, supra.* at p. 106.)

The discriminatory impact from the lack of uniform standards is apparent in this case where the Alameda County District Attorney chose to seek the death penalty against a man who was charged with a single victim felony-murder, had no prior convictions for crimes of violence, and no history of violence of any kind save two alleged jail scuffles while awaiting trial. Similarly situated defendants in many other counties, or even in Alameda County, would not have been subjected to the death penalty, despite the fact that under state law, they were charged with a capital offense and thus death could have been sought by the local district attorney.

The imposition of the death penalty on Mr. Tully violated the cruel and unusual punishment clause of the Eighth Amendment, the Due Process and Equal Protection

Clauses of the 14th Amendment, along with article 14 of the International Covenant on Civil and Political Rights, and Article 24 of the American Convention on Human Rights and his death sentence must be set aside.

CONCLUSION

For the reasons discussed, appellant requests that this Court reverse the convictions, the special circumstance finding, and the sentence of death.

DATED: July 15, 2005

Respectfully submitted,

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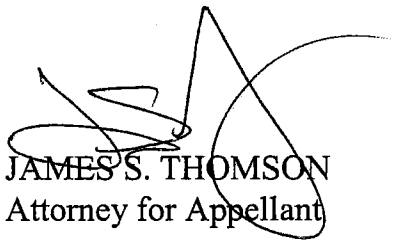
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 36(b)(2), I hereby certify that, according to our word processing software, this brief contains 202,496 words.

DATED: July 15, 2005



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PROOF OF SERVICE BY MAIL

I, Saor E. Stetler, declare:

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and am not a party to the within-entitled action. My business address is 819 Delaware Street, Berkeley, California. On July 18, 2005, I served the within **APPELLANT'S OPENING BRIEF** on the below-listed parties, by depositing a true copy thereof in a United States mailbox regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed as follows:

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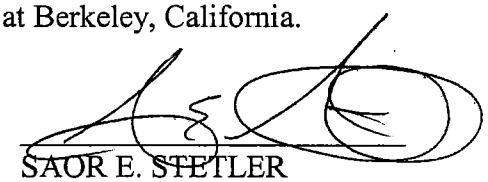
I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on July 18, 2005, at Berkeley, California.



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