IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | ) | |
| Plaintiff and Appellee, | ) | No. S067678 |
| v. | ) | (San Bernardino Superior Court No. FMB 01787) |
| MARTIN MENDOZA, | ) | |
| Defendant and Appellant. | ) | |

**APPELLANT'S OPENING BRIEF**

**STATEMENT OF THE CASE**

On April 24, 1996, an Information (CT 190-199) was filed in San Bernardino Superior Court, charging Appellant Martin Mendoza as follows:[1]

COUNT 1: On or about January 25, 1996, in San Bernardino County, Martin Mendoza and Jose Delgado Soria, did wilfully, and unlawfully, with malice aforethought, murder Sandra Resendes, pursuant to

[1] Abbreviation code:
CT = Clerk's Transcript on Appeal
RT = Reporter's Transcript on Appeal
SuppCT = Supplemental Clerk's Transcript on Appeal
SuppRT = Supplemental Reporter's Transcript on Appeal

Penal Code section 187(a). It was further alleged that this offense was a serious felony pursuant to Penal Code section 1192.7(c)(1). It was also alleged that in commission or attempted commission of this offense, Appellant personally used a semi-automatic gun within the meaning of Penal Code section 12022.5(b)(2). The Information charged that this use of the weapon constituted a serious felony under Penal Code section 1192.7(c)(8). The Information further alleged that under Penal Code section 12022(d), Appellant, as the principal actor, was armed with a firearm during commission of above offense, and that Jose Delgado Soria, while not personally armed, knew that Appellant was armed.

COUNT 2: On or about January 25, 1996, Appellant and Jose Delgado Soria did wilfully and unlawfully, with malice aforethought murder Wendy Cervantes, pursuant to Penal Code section 187(a). It was further alleged that this offense was a serious felony pursuant to Penal Code section 1192.7(c)(1). It was also alleged that in commission or attempted commission of this offense, Appellant personally used a semi-automatic gun within the meaning of Penal Code section 12022.5(b)(2). The Information charged that this use of the weapon constituted a serious felony under Penal Code section 1192.7(c)(8). The Information further alleged that under Penal Code section 12022(d), Appellant, as the principal actor, was armed with a firearm during commission of above offense, and that Jose Delgado Soria, while not personally armed, knew that Appellant was armed.

COUNT 3: On or about January 25, 1996, Appellant and Jose Delgado Soria, did wilfully and unlawfully, with malice aforethought murder Eric Resendes, pursuant to Penal Code section 187(a). The Information charged that this use of the weapon constituted a serious felony

under Penal Code section 1192.7(c)(8). The Information further alleged that under Penal Code section 12022(d), Appellant, as the principal actor, was armed with a firearm during commission of above offense, and that Jose Delgado Soria, while not personally armed, knew that Appellant was armed.

Notice was given that the offenses charged in Counts 1, 2, and 3 are a special circumstance within the meaning of Penal Code section 109.2(a)(3) - multiple murder.

COUNT 4: On or about January 25, 1996, Appellant and Jose Delgado Soria, in violation of Penal Code sections 664 and 187(a), wilfully and unlawfully, with malice aforethought, attempted to murder Martin Mendoza Jr.

It was further alleged that the attempted murder was committed wilfully, deliberately and with premeditation and deliberation, within the meaning of Penal Code section 664(a) and that this crime is serious felony per Penal Code section 1192.7(c). The Information further alleged that Appellant personally used a semi-automatic handgun within the meaning of Penal Code section 1192(7)(c). This act also caused the above offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8). The Information further alleged that under Penal Code section 12022(d), Appellant, as the principal actor, was armed with a firearm during commission of above offense, and that Jose Delgado Soria, while not personally armed, knew that Appellant was armed.

COUNT 5: On or about January 25, 1996, Appellant and Jose Delgado Soria, in violation of Penal Code sections 664 and 187(a), wilfully and unlawfully, with malice aforethought, attempted to murder Julio Cervantez. It was further alleged that the attempted murder was committed

wilfully, deliberately and with premeditation and deliberation, within the meaning of Penal Code section 664(a) that this crime is serious felony per Penal Code section 1192.7(c). The Information further alleged that Appellant personally used a semi-automatic handgun within the meaning of Penal Code section 1192(7)(c). This act also caused the above offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8). The Information further alleged that under Penal Code section 12022(d), Appellant, as the principal actor, was armed with a firearm during commission of above offense, and that Jose Delgado Soria, while not personally armed, knew that Appellant was armed.

COUNT 6: On or about January 25, 1996, Appellant and Jose Delgado Soria, in violation of Penal Code sections 664 and 187(a), wilfully and unlawfully, with malice aforethought, attempted to murder Antonio Cervantez. It was further alleged that the attempted murder was committed wilfully, deliberately and with premeditation and deliberation, within the meaning of Penal Code section 664(a), and that this crime is serious felony per Penal Code section 1192.7(c). The Information further alleged that Appellant personally used a semi-automatic handgun within the meaning of Penal Code section 1192(7)(c). This act also caused the above offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8). The Information further alleged that under Penal Code section 12022(d), Appellant, as the principal actor, was armed with a firearm during commission of above offense, and that Jose Delgado Soria, while not personally armed, knew that Appellant was armed.

COUNT 7: On or about January 25, 1996, Appellant and Jose Delgado Soria, in violation of Penal Code sections 664 and 187(a), wilfully and unlawfully, with malice aforethought, attempted to murder Deputy

Mark Kane. Notice was given that the offense was a serious felony pursuant to Penal Code section 1192.7(c)(1). It was further alleged that in the commission and attempted commission of this offense, Appellant discharged a firearm at an occupied motor vehicle which caused great bodily injury and death to another pursuant to Penal Code section 12022.5(b) (1). This act also caused the offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8).

COUNT 8: On or about January 25, 1996, Appellant and Jose Delgado Soria, in violation of Penal Code sections 664 and 187(a), wilfully and unlawfully, with malice aforethought, attempted to murder Deputy Stan Gordon. Notice was given that the offense was a serious felony pursuant to Penal Code section 1192.7(c)(1). It was further alleged that in the commission and attempted commission of this offense, Appellant discharged a firearm at an occupied motor vehicle which caused great bodily injury and death to another pursuant to Penal Code section 12022.5(b)(1). This act also caused the offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8).

COUNT 9: On or about January 25, 1996, Appellant and Jose Soria Delgado wilfully and unlawfully committed the crime of assault with a semi-automatic firearm on Rocio Mendoza Cervantez, in violation of Penal Code section 245(b). It was further alleged that Appellant and Jose Delgado Soria used firearm pursuant to Penal Code sections 12022.5(a) and (d). Notice was given that this act also caused the offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8).

It was further alleged that in the commission or attempted commission of this offense, Appellant personally used a semi-automatic handgun within the meaning of Penal Code section 1192.7(c)(8). It was

further alleged, pursuant to Penal Code section 12022(d), that a principal was armed with a firearm during the commission of this offense and that Jose Delagdo Soria though not personally armed, knew that a principal was personally armed with a firearm.

COUNT 10: On January 25, 1996, Appellant and Jose Delgado Soria, wilfully and unlawfully, committed an assault with a semi-automatic firearm pursuant to Penal Code section 245(b), upon Sergio Mendoza. It was further alleged that Appellant and Jose Delgado Soria used a firearm pursuant to Penal Code sections 12022.5(a) and (d).

Notice was given that this offense is serious felony pursuant to Penal Code section 1192.7(c)(1). It was further alleged that in the commission or attempted commission of this offense, Appellant personally used a semi-automatic firearm, pursuant to Penal Code section 12022.5(b)(2). This act also caused this offense to be serious felony per Penal Code section 1192.7(c)(8). It was further alleged pursuant to Penal Code section 12022(d) that a principal was armed with a firearm during commission of above offense, and Jose Delgado Soria, while not personally armed, knew the principal was armed.

The prosecution also demanded defense discovery as required by Penal Code sections 1054.5(b) and 1054.3.

Jury trial began before Judge James Edwards on June 9, 1997. Jury selection was conducted between June 9 and July 23. The jury was selected and sworn on July 23. Alternates were selected and sworn the same day. (CT 543-544, 572-573. 577-578.)

The prosecution and the defense each gave opening statements on July 24. The prosecution case in chief began that day also. (CT 585-586.)

The prosecution guilt phase case in chief concluded on August 25.

The defense case was presented and concluded on August 25. (CT 632-633.) The court instructed the jurors and closing arguments by both prosecution and defense were presented on August 26 and 27. (CT 657-660.) Deliberations began at 10:37 A.M. (CT 659-660.)

On August 28, 1997, at 12:04 P.M., the jury announced it had reached a verdict. The jury found Appellant guilty on almost all counts,[2] and found true all of the special circumstances and special allegations. (CT 727-728.)

The penalty trial began on September 16, 1997, with opening statements by both the prosecution and defense. The prosecution presented and rested its case in aggravation on this date. (CT 864-865.)

The defense mitigation case was presented on September 17 and 18. (CT 86-867.)

The court instructed the jury and closing arguments were given by both sides on September 18. The jury retired to consider its verdict at 4:00 P.M. (CT 867-868.)

Jury deliberations continued on September 22, at 9:40 A.M. At 10:40 A.M., the jury announced that it had a verdict. Recess was declared until September 23. (CT 889.)

On September 23, the verdict was read. The jury sentenced Appellant to death. (CT 890-893.)

Formal sentencing took place on December 24, 1997. Appellant's Motion to Modify Sentence was denied. Judge Edwards sentenced Appellant to death. (CT 1132-1139.)

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[2] The jury hung on Count 4 - the attempted murder of Martin Mendoza, Jr., Appellant's son.

## STATEMENT OF FACTS

***Guilt Phase***

Appellant lived in Carson City, Nevada, with his wife, Rocio, and their children - Sandra and Eric Resendes[3], and Sergio, Martin Jr., and Edwardo. They lived together for some years before getting married in June, 1994. Appellant had a green card, and was employed full time, working construction. He seemed to love Rocio very much. (RT 2009-2011, 2060).

Rocio had been the subject of two separate complaints to social services for beating her son, Eric. With regard to the first complaint, Eric had reported that his mother hit him, not his father, and that he was afraid to go home. (RT 2082-2083.) The second complaint involved Rocio beating Eric with a belt. After a social services investigation, Rocio was told by two social workers not to beat the children with a belt or spank them. (RT 2011-2014.)

On January 5, 1996, after the social workers had told Rocio not to use belts on the children, Appellant disciplined Sandra for not helping him wash his truck. Appellant hit Sandra with a belt but stopped after Rocio told him to. Appellant told Rocio he would not let Sandra sleep that night and would make her stand all night long as punishment. Rocio then left Appellant and Sandra alone. (RT 2014-2017.)

When Rocio returned, she heard Sandra telling Appellant, "No," and then saw Appellant pulling her by the hand. Appellant told Rocio not to meddle, and that Sandra was not going to sleep. Appellant, who had been drinking that night, eventually fell asleep on the couch. Rocio called 911

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[3] These were Rocio's children from a prior marriage.

because she felt something was not right. (RT 2017-2021, 2022, 2073.)

Appellant awoke to find police officers in his bedroom to arrest him. He was taken to jail. (RT 1709-1711.)

Sandra told the police that Appellant hit her with a belt seven times, and had also hit the other children with a belt. Sandra denied to the police that Appellant had molested her. (RT 2075-2077.)

After the police arrested Appellant, Sandra told Rocio that Appellant had been bothering her sexually for the past seven or eight months, since Edwardo was born. (RT 2019-2023 2030-2033.) Sandra told Rocio that Appellant would come into her room at night, kiss her, touch her breasts, and told her she would be his woman when she got older. (RT 2077-2081.)

According to Sandra, on the night Appellant was arrested, he kissed Sandra, said she would not be allowed to have a boyfriend, and told her not to tell Rocio anything. Sandra also said that Appellant also apologized for what he had done, and said it had happened when he was drinking. Sandra also said that Appellant threatened to kill "us" if she told anyone what had happened. (RT 2022-2024.)

Rocio left Carson City and went to her brother Antonio's house in Landers. Appellant, who had been bailed out of jail the day after his arrest, came home and found his family had left. The situation was extraordinary for Appellant that everyone had left. (RT 1709-1711.)

Appellant called Rocio, who confronted Appellant about Sandra's allegations. Appellant denied the allegations and became angry. Appellant asked Rocio to come home to him. (RT 2010, 2020, 2030-2033.)

Rocio also told Appellant's brother, Hector, about Sandra's allegations. (RT 2030-2033.) She also told Deputies Wolf and Cavenaugh

that Sandra mentioned the molestation when they got to Landers. (RT 2077-2081.)

Rocio returned to Carson City to be with Appellant, and took their three children (Sergio, Martin, Jr., and Edwardo) with her. She left Eric and Sandra in Landers. She spoke to Appellant again about Sandra's allegations and Appellant continued to deny that anything had happened. Rocio went back to Landers again three days later. (RT 2033-2036, 2068.) She left Appellant a note. (RT 2036-2037.)

Appellant called Rocio at her brother's house and was very upset. Appellant was very angry that Rocio had left and was angry about Sandra's allegations, which he continued to deny. Rocio and Appellant spoke on the phone six or seven times up until January 25. (RT 2036-37.)

Appellant was again profoundly affected by this loss. He was unable to concentrate and to go to work. He slept excessively, began drinking heavily and using a small amount of cocaine. He couldn't stay at his apartment alone so he went to his brother Hector's home, where he would fall asleep on the couch. Appellant became unable to take care of his daily responsibilities. He was focused on trying to put his family back together. Appellant's brother urged him to go home to Mexico, put his wife behind him, rest, and collect his thoughts. (RT 1711-1714, 1754-1756.)

Appellant wanted to get his family back but he was about to lose his apartment too. He planned to try to get the family back but if he couldn't, he would return to Nevada, stay with his brother, regain his strength, and then return to work. Appellant was upset because he had tried to discipline all the children in the same manner, and Sandra had betrayed him by falsely accusing him of molesting her. He felt Sandra had done this because he had disciplined her with the belt. Appellant felt it was Sandra's fault that Rocio

left and took the children. (RT 1714-1716.)

Appellant was so angry about what had happened, that he thought he might slap, or was in danger of slapping Rocio when he saw her. Appellant knew that Rocio's brother had a gun, and he thought that if he did slap her, that they might use the gun against him. (RT 1719-20.) Appellant had carried a weapon for about five months before these events. (RT 1719.)

Appellant went to his brother Hector's house to get a car to drive to California. He had in mind that he would go to San Diego and visit relatives, then fly to Mexico to be with his mother and the rest of his family. Appellant's brother Hector loaned him his car - a red Chevy Baretta. Hector asked his son - Appellant's nephew - Jose Soria Delgado (hereafter Soria) - to accompany Appellant on his journey. Hector was worried about Appellant's mental state and felt he needed a companion on the trip south. (RT 1039.)

Soria is a Mexican national. He was prosecuted in connection with this case and found not guilty. (RT 1534-1536.) At the time of his testimony, Soria was in prison, serving a sentence for a drug case. (RT 1531-1534.) Soria grew up in Mexico and went to school through about fourth grade. He does not understand English. (RT 1537-1538.)

Soria testified about the trip from Nevada to Carson City. Appellant continued to be very sad and distressed as he and his nephew drove south, as Soria told Detective Wolf, when Wolf interviewed him after these events. During his interview with Detective Wolf, Soria said things to him that were not true because he thought if he did, Wolf would let him go. (RT 1541-15, 1636-16.)

Soria testified that while he knew his uncle had a gun but he had no idea he was going to use it in the way that he did. Appellant and Soria

arrived in Landers, at Rocio's brother's house, around 5:30 A.M. on January 25, 1996. It was very cold so both of them stayed in the car and tried to keep warm. (RT 991, 1116-1117.)

Around 6:30 or 6:45 A.M., Appellant went to the door of the house and knocked. Angelica Cervantes - Rocio's niece - answered the door and told Rocio that Appellant was there and wanted to talk to her. Rocio came to the door. Appellant was carrying a brown bag and was drinking a bottle of beer. He was drunk. Rocio told him that she had to get the children ready for school. Appellant pleaded with Rocio to come home with him, with the children. Rocio noticed a red car outside the house when Appellant was at the front door. (RT 987-988, 997-998, 2037-2038, 2051, 2064.)

Rocio was not comfortable talking with Appellant because she assumed he had a gun. He had purchased the gun for family security. She came outside to talk to him and let him hold the baby. Appellant took the baby for a while. Appellant told the baby that he was very little, that he was not involved in what was going to happen. Rocio then gave the baby to Angelica. (RT 2039-2040, 2066.)

Julio Cervantes, Antonio's son, walked out of the house around 7:00 A.M., saw Appellant and said hello to him. He took his wife and brother to school. (RT 991-994, 2041.)

Rocio went back inside to take care of the children and get them ready for school. Sandra and Wendy (Antonio's daughter) told Rocio Appellant was knocking on another door, so Rocio went outside again. Rocio told Appellant she was not afraid of him but she was afraid.

Julio returned around 8:00. Appellant was still standing on the porch, talking to Rocio. Julio was trying to get ready to take the kids to

school and then go to work himself. (RT 991-994, 2041.)

The children came to the door to go to school while Rocio was on the porch talking to Appellant. Appellant said the children were not going to school. Up to this time, Appellant had not threatened anyone. He was talking to Rocio. (RT 2042, 2070-2071.)

Appellant had a .10 blood alcohol level. He was becoming progressively more upset because Rocio avoided talking to him and dealing with the situation. People were coming and going from the house and ignoring him. (RT 1721-1724, 1728-1732.)

Antonio and Julio were arguing with Appellant, who did not want the children to go to school but wanted to take the children with him. Antonio and Julio were insisting that the children were going to school. Antonio refused to let Appellant take his children. Julio, Antonio and Appellant argued about Appellant taking the children. Rocio did not think Appellant would hurt them. (RT 995-997, 999-1000, 2071-2072, 2085.)

Rocio finally began talking to Appellant, and then agreed that the children could stay home. However, Antonio and Julio told the children to ignore Appellant, and told them to go to the car, and not to listen to Appellant's instructions. Julio told Sandra, Eric, Sergio, Martin Jr. and Wendy to get in the car. (RT 2042. ) All of these circumstances contributed to exacerbating Appellant's evolving depressive disorder. (RT 1721-1724, 1728-1732.)

Appellant then took his gun out but fumbled with it. Appellant grabbed Rocio around the neck, and pointed a gun at her head. (RT 997-998, 2042.) Appellant then shot in Julio's direction. At that moment, Soria drove away from the house. Soria drove away because he was afraid he'd be blamed for whatever was going to happen. (RT 1541-15, 1636-16.)

Julio asked Appellant what he wanted. Appellant said he wanted his family to return with him. Julio took Sergio and Martin out of the car, and stood with them on the porch, and told Appellant to take them. Julio got closer and closer to Appellant and then Appellant took another shot in Julio's direction. Antonio also was arguing with Appellant at this time. (RT 2043, 2051, 2061-2062.)

Rocio's brother Antonio came outside, and Appellant yelled at him not to run and get "something." Appellant wanted Antonio to go and get his weapon and pull it out. Appellant was challenging Antonio. (RT 2043-2046, 2062-2063.)

Appellant let go of Rocio and held Sandra by her neck, with the gun to her head. Appellant had told Sandra that if she did not come to him, he would kill her mother. Sandra began crying and Appellant told her to stop. Appellant told her not to cry because he was going to kill them anyway. Appellant told Rocio to turn the car the children were in around, and told the children to all get in the front seat. Rocio did so and got out of the car. (RT 2047-2050.)

Appellant told Rocio to go inside and tell people not to call the police. He told Rocio to tell Antonio that he also had his daughter. Appellant said that if the police were called, he would kill the children. He had never said such a thing before to her and the children. Appellant told Rocio to get a knapsack by the porch and give it to him. (RT 2050, 2052-2053, 2085.)

Appellant was upset and nervous, and said he did not know what would happen next. About three or four minutes passed. Appellant then told Sandra, "Turn around to look at your mother. Look how she is and remember that this is your fault. If you wouldn't have told your mother

anything, she would be with me. And now both of you are going to die." He told Sandra not to cry or he would kill Rocio first. (RT 2054-2055.)

At this time, the patrol car sirens became audible. Julio was on the phone with the 911 dispatcher when the police officers arrived, with sirens blaring. Julio was angry that they were using sirens because he felt they would endanger the children by doing that. (RT 983, 987, 997, 1006.)

As Dr. Moral, a forensic psychiatrist, testified, a person with petitioner's depressive disorder, facing these circumstances and combined with the arrival of the police, would be in a crisis state, and may be unable to reason through how to properly react to the situation in front of him. (RT 2097-2106.)

Appellant began shooting the children. Rocio began to go to the door but Angelica held her back and said that Appellant was "like crazy." Antonio began to come outside, and Appellant fired towards the house. Antonio yelled that Appellant had his son, and then more shots were heard. (RT 1009-1010, 2055-2057, 2067, 2086.)

Appellant shot Sandra. He told her that "it was all her fault, if you hadn't told mom." Then Appellant began shooting at the officers, and they returned fire. Appellant then shot the gun inside the car where the children were. Martin Jr. was wounded. Appellant was shot at the scene by Deputy Kane. (RT 1007-1009, 1051.)

After the Appellant and the police exchanged gunfire, Appellant ran around the house, in the same area where Julio had gone. (RT 1009-1010, 2056.) Julio had been inside on the telephone with the 911 operator. Julio dropped the phone and ran after Appellant. Julio confronted Appellant as he slipped in some sand, and took his gun away from him. (RT 1010-1012.)

Rocio ran to see her children. Sandra was lying in a pool of blood. Wendy was lying against the car. Martin Jr. was under the car. Eric was lying on the ground. The adults comforted Sandra, Eric, Wendy and Martin while they waited for an ambulance to arrive. The children died before emergency personnel got there. (RT 2057-2058.)

Rocio identified a note that was written in Appellant's handwriting, and which he had left in his car. It said "Mexican Power Kill" and also had Sandra's name on it, but Rocio was not sure if Appellant had written her name. (RT 2059.)

At the time these events occurred, Captain Ronald Perret (Perret) of the San Bernardino County Sheriff's Department was the Station Commander of the Morongo Basin station in Joshua Tree, which covered the Landers area. The office is about eighteen miles from 299 Geronimo, where the Cervantes family lived. The area served by the law enforcement personnel assigned to this station covers about fifty-five hundred square miles. (RT 1061-1063.)

At the time of trial, Perret had been with the Department for 25 years, twenty of those years working in field operations. He worked his way up to Lieutenant, and spent a little over three years in the career criminal SWAT division. Perret was second in command of that team. He was then promoted to Captain. He went on to work in the Emergency Services Bureau, and the Volunteer Forces division, of which he was the officer in charge. In February, 1994, Perret was reassigned as Commander of the Morongo Basin Station. (RT 1063-1064.)

Perret's work on the SWAT team included dealing with hostage situations. The members of the SWAT team received specialized training at the beginning of their assignment and also on a weekly basis. Regular

patrol officers do not receive this training. They receive limited training at the academy about such situations. (RT 1064-1066.)

Perret responded to the crime scene that day. He also listened to two tapes made during these events. One was the 911 tape. The other was the dispatch tape. Perret also listened to the belt recorder tape of Deputy Mark Kane, which Kane had turned on during the events. (RT 1066-1067.)

During these events, officers communicated with each other on the tactical channel. It is used so as not to tie up the dispatch channel, which is used for emergency traffic and other critical information. (RT 1068.)

Perret was on the way to his office the morning of these events. It took him about fifteen minutes to reach 299 Geronimo. Perret had his siren and lights going as he drove. (RT 1071-1072.)

Dispatch told Perret and others to turn off their sirens and lights at some point, which Perret did. Houses in this area are poorly marked. The area is sparsely populated. (RT 1072-1073.)

Dispatch information showed that a 911 call was received at 8:09 A.M. The first officer arrived at 299 Geronimo fifteen minutes after the 911 call came in, according to information maintained by dispatch. Officers were told to turn off their sirens and lights when they reached an area near the scene, otherwise they were to remain on. (RT 1074-1075.)

No SWAT team members were located in the Morongo Basin area on this day. The SWAT team gets called in after patrol officers arrive and assess the situation. Then a supervisor decides whether SWAT should respond. In Perret's opinion, Deputies Gordon and Kane responded to the situation correctly, given the information they had received from dispatch and Deputy Gary Rossi, from Kane's belt tape, and based on information

they were taught in training classes regarding hostage situations. (RT 1077-1091, 1102-1006, 1117.)

Gordon arrived at the staging point first, followed by Kane. Kane said that he and Gordon were going to go to the house. Perret believed this was the right choice based on information the officers had at that time. In Perret's experience, hostage takers usually do not kill the hostages. He'd never had a hostage killed before. If Perret had disagreed with Kane and Gordon's decision, he would have said something about it. (RT 1090-1094.)

Kane and Gordon were not given alternative way to approach the house until they were almost there. Kane and Gordon arrived at the house, got out of their cars, pulled their weapons and told Appellant to put his gun down. Instead of doing so, Appellant shot Sandra, and then shot the children in the car. (RT 1096-1099, 1125-1134.)

Perret arrived two to three minutes later. He saw the patrol cars and people in the driveway. He saw that children had been shot. The situation was chaotic. Perret heard on his radio that the suspect had run to the back yard, so he went there, and observed Appellant being taken into custody. Perret then assisted with the children. (RT 1100- 1010. )

Deputy Stan Gordon learned of the problem at 299 Geronimo in Landers as he overheard it on his radio. Deputy Rossi was initially assigned to this case, but Gordon figured out he was much closer than Rossi. He responded to the scene with siren on and lights flashing. Deputy Kane was behind him. When he turned off his siren, he could hear the sirens of other officers who were responding from a greater distance. Kane had turned his siren and lights off too. (RT 1235-1239, 1277, 1352, 1399.) The sirens could be heard from miles away though. (RT 1401.)

Gordon and Kane met at the staging area: State Route 247 and Hondo. They had heard all the information about the situation on the radio. Children were getting on a school bus at that time, at that intersection. Kane and Gordon talked for three to five minutes about what they were going to do when they went in. Gordon's training taught him that he should go to the situation. (RT 1239-1243.)

Gordon did not know where the house was located, so he was listening to radio traffic to help him find it. Gordon was surprised to arrive immediately at the scene as described by dispatch. Kane was in front of him. He saw the subject standing next to a brown car, with a child in a headlock, with his gun pointed to her head. (RT 1243-1246.)

Kane pulled into the north driveway and Gordon pulled into the south driveway. Gordon got out of his car and stood behind the driver's door. At that moment, the girl was shot. Gordon had not yet drawn his weapon. But once she was shot, Gordon drew his gun and demanded that Appellant drop his gun, which he did not do[4]. The shooting took place no more than 10 or 15 seconds after Gordon arrived. (RT 1246-1247, 1283.) Kane's account of the events was similar. (RT 1380-1383.)

Gordon saw Appellant shoot towards the vehicle he was near and also towards Kane, and then towards Gordon himself. About five seconds

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[4] At the prior trial of co-defendant Soria, Gordon testified under oath that the sequence of events was the opposite. Gordon testified that he pulled up to the residence, exited the door of his car, sought cover behind the car door, drew his handgun, and saw that Appellant had a girl in a headlock with a gun pointed to her head. Gordon yelled to Appellant and identified himself and ordered him to drop the gun. It was then that Appellant shot the girl he was holding. RT 1279-80. Gordon gave an identical report to Detective Tom Bradley just hours after the shooting. RT 1281-83.

elapsed between the shot at the girl and the shots into the car. Both officers fired back. (RT 1261-69.)

After shots were fired at Appellant, he turned and ran towards the breezeway. Gordon chased Appellant, and saw that Kane had him at gun point near another vehicle. Gordon assisted Kane with the arrest. Appellant refused to get down on the ground, so Kane struck him several times with his nightstick until he fell. Then they tried to find his gun, which was being held by Yucca Valley Fire Chief Chuck Hollier. Gordon does not know if Appellant speaks some English. (RT 1269-1273.)

Gordon went to attend to the children who had been shot. Three were deceased and one child had a head wound. He waited for the paramedics with the injured child. (RT 1273-75.)

Officer Gary Rossi also responded to the scene. He is aware of how the situation was handled by Kane and Gordon, and would not have done anything differently. Rossi arrived as Appellant was being arrested. Rossi saw items taken from Appellant's possession. These included a wallet, a nine millimeter ammunition clip and a pocket knife. (RT 1313-1315, 1318-1321, 1331-1335.)

Rossi had been at this address about three weeks earlier in response to a kidnaping call. Rossi never wrote up a report about this incident, until the prosecutor requested he do so in July, 1997. When Rossi went to the residence, it turned out there was no kidnaping - some of the people there were afraid one might happen. He was told that the subject was in jail in Carson City on abuse charges. Rossi advised them to seek a restraining order and have it served while the person was in custody. Rocio told Rossi she was afraid that Appellant would come to the house and take the kids to Mexico. Rossi did not inquire about who had custody of the children. He

did not learn that Rocio had voluntarily gone back to Appellant. (RT 1313-1318, 1325-1326.)

Rossi realized that this was the same place he'd visited before, and provided this information to the other officers who were responding. He told them that the suspect had come from Carson, Nevada, and was probably there to take the children. He commented to the other officers, "We're gonna have to have a plan on this one." A plan would have involved staging and then going to the scene. (RT 1326-1327.)

Deputy Mark Kane was trained in responding to and dealing with hostage situations during his basic law enforcement training. He responded to 299 Geronimo on January 25. Kane was about 15 miles away when he responded. Kane monitored the information from dispatch and made a decision to stage due to the nature of the call. Kane and Gordon discussed what they were going to do. They decided they had to go in right away as shots had been fired and a girl was being held with a gun to the head. They felt they needed to go there and stabilize the situation. (RT 1343-1351.)

Kane approached the house slowly. Kane believes he was the first to tell Appellant to put his gun down. Appellant shot the victim before Kane ordered him to put the gun down. Appellant shot the girl in a matter of seconds after seeing Kane. Five to ten seconds later, Appellant moved to the side of the car and shot inside. Then Appellant shot at the officers. (RT 1352-1355, 1361-1364, 1380, 1384-1387.)

Kane returned fire, and hit Appellant. Kane knows he hit him as Appellant fell to the ground. Kane noticed blood on Appellant's shirt when he was in the back yard. Julio and Antonio had begun hitting and kicking Appellant. Kane told them to back off. (RT 1391, 1393-1395.)

Frank Saunders, a police practices expert, testified for the defense.

Mr. Saunders was a police officer in Santa Monica for 15 years - from 1966 until 1980. He was awarded the Medal of Valor, and a citation for heroism during his law enforcement career. In 1981, he began taking police procedures and practices cases, in both civil and criminal cases. He has qualified as an expert in this field over 300 times, at all levels of both state and federal courts. (RT 1780-1888.)

Based upon a review of the relevant materials about the case, and about San Bernardino Sheriff's Department, which were provided by the defense, Mr. Saunders concluded that while the officers' initial response to the situation was proper, the officers escalated the problem by essentially confronting the suspect, and leaving him only two choices - shoot or surrender. It was Mr. Saunders' opinion that the use of sirens, flashing lights, and the approach right to the front of the house, when the officers knew Appellant was threatening to kill if the police arrived, was flawed. Mr. Saunders testified the officers should have staged with other officers and then developed a plan to go into the situation. The officers had information that called for them to figure out a way to de-escalate the situation, and keeping it static until an experienced negotiator and/or additional officers arrived, particularly Rossi, because he had been there before. Mr. Saunders described various ways that the situation could have been handled differently, hopefully resulting in less or no bloodshed. (RT 1791-1825.)

The prosecution presented the testimony of Robert Thomas in rebuttal, who attacked defense expert Frank Saunders' experience and qualifications to offer this testimony. (RT 1825-1871, 1880-1906.) The prosecution also presented the testimony of Ronald McCarthy, another police practices expert, who has long term, extensive experience with

hostage situations. Mr. McCarthy estimated that he has trained about 20,000 law enforcement officers about how to deal with hostage situations during his career. Although he had never viewed the crime scene, Mr. McCarthy testified that the manner in which the police handled the situation in this case was proper, and that law enforcement officers in other jurisdictions learned that waiting to stage when there is a hostage situation can lead to the extraordinary loss of life. (RT 1907-1982.)

Dr. Frank Sheridan conducted the autopsies, and explained that the gunshot wounds were near contact wounds. (RT 1415-1451.) He also testified there was no evidence that Sandra had been molested. (RT 1431-1432.) Dr. Sheridan testified that Appellant's blood was drawn at 10:10 A.M., on January 25, and had an alcohol level of .0583. At 11:14 A.M., more blood was drawn from Appellant, and it showed an alcohol level of .039. Appellant would have been around .10 at the time of these events. This level of intoxication can impair mental functioning. (RT 1453-1466.)

William Matty of the San Bernardino Sheriff's Crime Lab testified that the children were shot by Appellant, not by the police. (RT 1474-1509.)

Deputy Gale Duffy testified that about his search of the car in which Appellant and his nephew drove to Landers. Among other items, he found a handmade map, a ski cap, a K Mart bag with an empty knife box in it, a fanny pack, an empty 9mm ammunition box. The map has written on it "Mexican power kill", "Sandra", and "good bye everyone", and a swastika type sign - all in Spanish, signed by Appellant. (RT 1512-1530, 1552-1553.)

Detective Wolf testified about his January 25th interview with Soria. Soria told him that he drove with his uncle from Carson City to California,

because his uncle was going to say goodbye to his children in Landers, then go to Los Angeles, and then fly to Mexico. Soria went along so he could drive the car back to Nevada. Soria said he knew nothing about the violence that was going to take place. Later in the interview, he seemed to express some knowledge about the violence that eventually erupted, and that Appellant wanted to complain to Rocio about what had happened in Carson City. (RT 1555-1636.)

***Penalty Phase***

The prosecution's case in aggravation consisted of four witnesses. The witnesses were Sergio Mendoza, Appellant's son (RT 2386-2391); Rocio Mendoza Cervantes, Appellant's wife, mother of Sandra Resendes and Eric Resendes (RT 2391-2406); Antonio (RT 2407-2414) and Antonia Cervantes (RT 2416-2421), parents of Wendy. They gave victim impact testimony, which described the sense of loss each felt due to the deaths of their family members.

The mitigation case consisted of five witnesses. Dr. Joseph Lantz testified about Appellant's limited mental functioning, and low intellectual abilities. He explained how overwhelmed Appellant felt about his wife leaving him, and how his intellectual limitations made him unable to cope with the complexities of the situation in which he found himself the day the deaths occurred. (RT 2426-2487.)

The four remaining witnesses were two family members and two friends. Evelia Garcia, Appellant's half brother testified. Mr. Garcia testified that Appellant was very young and very small when he began working. His family needed his help in order to survive because they were very poor. Appellant left Mexico to come to the United States when he was 17. When he lived at home, Appellant helped with his younger brother who

is mentally unwell. Another sibling also has Downs' Syndrome, and Appellant tried to help her speak. (RT 2488-2492; 2502-2506.)

Jose DeJesus Caballero-Guiterrez testified. He is a life long friend of the family and lived next door to them. He has known Appellant since he was a young boy. Appellant worked very hard at very difficult work from the time he was a child because his family needed his help. He tried to provide fatherly guidance and assistance because Appellant needed it and did not have it. (RT 2506-2511.)

Jesus Mendoza Ramirez testified. He is 85 years old and is Appellant's father. He left when his children were very little. He cares for his son. (RT 2511-2514.)

Adrian Obeso Hernandez testified. Appellant is one of his closest friends. They have known each other nine years. They worked together in construction. Appellant was a very hard worker who loved his family. (RT 2515-2517.)

Ramona Garcia Garcia testified. She is Appellant's mother. She apologized for what has happened. She said that Appellant was very poor and that he tried to help the family when he was little. He would pick fruit from the time he was very young. He left to come to the United States so he could help his family. Appellant sent money to Mexico so his family could buy land and build a house. (RT 2517-2520.)

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## ARGUMENT

### INTRODUCTION

Martin Mendoza is a citizen of the Republic of Mexico. He had three years of education in rural Mexico before he went to work picking fruit in order to feed and support his mother and numerous other siblings. He left Mexico when he was 17 in order to work in the United States, and send money home to his family. Expert testimony showed that Appellant has limited intellectual abilities, and therefore an inability to resolve emotionally demanding conflicts and life situations. These limitations all contributed to the tragic events involved in this case.

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## I

## THE TRIAL COURT IMPROPERLY ADMITTED SANDRA'S ACCUSATION OF SEXUAL MISCONDUCT AGAINST APPELLANT

### *Factual Background*

Several weeks before the tragic events in this case occurred, Appellant and his thirteen year old step daughter had an altercation. Appellant asked Sandra to help him wash his truck. She refused. Angry with her refusal to obey, Appellant struck Sandra with a belt. (RT 2023-2024).

Appellant was intoxicated and fell asleep on the couch in their home. Sandra complained to her mother that Appellant had struck her. Rocio called the police, who responded, saw red marks caused by the belt, and arrested Appellant for battery on a child. The police asked Sandra whether she had been molested. Sandra denied to the police that she had been molested, and wrote out a report in which she denied it. (RT 563, 2075-2083.)

Later, Sandra told Rocio that Appellant had molested her. She allegedly told Rocio that Appellant had touched her leg, had kissed her, and had told her that when she got older, she wouldn't have boyfriends because she would be Appellant's. (RT 2023-24, 2029-33.)

Rocio moved out of the house and took her children to live with her brother in Landers. Rocio stayed for several days, and eventually returned to Carson City to live with Appellant. Rocio's return to the family home lasted only a few days, when she decided to go back to her brother's house with the children. (RT 2033-35.) Weeks later, Appellant traveled to Landers and the shootings occurred.

Appellant moved to exclude these statements.[5] Appellant's motion argued that the statements were inadmissible because the event did not happen - therefore it was not relevant to any issue in the proceeding. Appellant also argued that the evidence did not come within any exception to the hearsay rule. The motion also argued the evidence was more prejudicial than probative and that other evidence existed concerning Appellant's motive upon which the prosecution could rely.

The prosecution did not file any written motion or response concerning Sandra's statements, and relied on arguments made to the trial judge about the admissibility of this evidence. The prosecutor told the court that he had no evidence of a molestation other than Sandra's claim that it happened. (RT 145-147, 556-564.)

The prosecutor argued that the statements were not being offered for the truth of the matter asserted. Rather, the statements were being offered to show motive, intent, premeditation, why Appellant was so angry and what caused him to carry out these killings. The prosecutor stated that Appellant had been told by Rocio that Sandra made these allegations. Appellant denied that he had molested her, and was very angry about it. He also argued that the evidence was admissible under Evidence Code section 1101. The prosecutor said the evidence was essential for his case. The prosecutor invited the court to give an admonition to the jury about the limited circumstances under which the evidence was being admitted.

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[5] Counsel notified the court of his objection to the admission of the molestation evidence orally in pre-trial proceedings, on June 10. (RT 145-147.) Defendant's Motion in Limine to Exclude Hearsay (CT 493-509) was filed on June 26, 1997. The defense renewed its objection to the admission of this evidence in a post trial Motion to Set Aside the Verdict. (CT 1121-29.)

The trial judge noted that even if Rocio fabricated the molestation allegation, the prosecution was offering the evidence to show why Appellant committed the killings. For that reason, the court found, the statements were not hearsay. The court also found that the statements were relevant, and could come in to show motive, intent and Appellant's mental state. Furthermore, the court ruled, a limiting instruction would be given to the jury about the limited purpose for which the evidence was being admitted. (RT 563-564.)

While the prosecutor assured the court that he was not using this evidence to prove that, in addition to killing his step daughter, Appellant sexually abused her first, the way in which the evidence came before the jury suggested exactly that.

In his guilt phase opening statement, the prosecutor emphasized the molestation. He stated:

"And Sandra, the 13 year old child, made a claim to her mother that the defendant had molested her. Now, let me make something very clear to you. She's dead. We cannot and will not even try to prove that he did, in fact, molest her. That's not why we're bringing this to your attention. You must not assume that he did, okay? It's only fair that you just disregard the, the horrific, negative aspects of that, because we cannot and will not even try to prove that he, in fact, molested her, okay, but she told her mother that she had, Rocio.

"She turned him into the police officers, who arrested him for battery charges, and ultimately he pled guilty to a misdemeanor battery and spent some time in jail. But he denied molesting her, even she -- even little Sandra, when she was interviewed by the police officers, denied that, in fact, he had molested her. So that's, it's not the point of the case that he

molested her, okay? I want to make that real clear. So don't hold it against him because that claim was made." (RT 755-56.)

The prosecutor asked the forensic pathologist about evidence of molestation - certainly an unnecessary inquiry with this witness, given the circumstances under which this evidence was admitted.

"Q. (by Mr. Whitney): I wanted to ask you, did you also conduct an examination of her body to ascertain whether or not there was any evidence that she might have been molested?

A. Sexual molest?

Q. Yes, sir.

A. Yes, we did.

Q. And how do you, what do you look for when you look for that kind of thing?

A. Basically one looks for any evidence of obvious trauma to the genital area. And then we do what's called a sex kit examination, where we take specimens from the vagina, the mouth, etcetera, and those are submitted to the Crime Lab for evaluation.

Q. And in this case, did you find any evidence at all about, about that issue?

A. No, there was no evidence.

Q. And so from your failing to find any, do you conclude that there was no evidence that at the time you examined her she had been molested?

A. By the way, I should qualify that last answer. I don't think I ever saw the results from the Crime Lab, but I think I would have heard if there had been something, 'cause I don't do the actual testing on the sex kit.

Q. Okay.

A. But –

Q. Assume, I'll represent to you, that we have no evidence that showed anything to suggest molestation. Assume that.

A. From my point of view, from the direct examination, I didn't find any evidence either." (RT 1415, 1432.)

The prosecutor's examination of Rocio went far beyond merely relating the fact that the misconduct accusation was made, and into details of the alleged molestation.[6]

"Q. Okay. So, she said from the day Edwardo was born, he had been bothering her?

A. Yes.

Q. And did she explain to you what she meant by that?

A. Yes.

Q. What did she say?

A. She told me that that night he had been drinking at his brother's house, Hector. All my children were with him. And when they returned home at nighttime, Martin wanted Sergio, Sergio and Martin sleep in his bedroom, to sleep with him, Eric in the living room, and Sandra in the other bedroom alone.

And she said that in the nighttime the children started falling asleep. When he went to the bedroom, she told me that he hugged her, and was telling her not to yell, that I wasn't home, and no one was gonna say anything. And she also told me that, that he had kissed her, and had told her that he was never gonna allow her to have a boyfriend. That he liked

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[6] During penalty phase, the supposed truthfulness of the allegations was revisited when Rocio testified as an aggravation witness, and was permitted to testify that she wondered why Sandra didn't confide in her about "what was happening". (RT 2396.)

her, and not to tell me anything.

Q. Not to tell you anything about what he was doing?

A. Yes.

Q. Was Sandra his own child, or was he - or she had a different father?

A. She had a separate father.

Q. Okay. Did her ever tell – did she ever say that he had, in the past, touched her inappropriately? Did Sandra tell you that?

MR. KATZ: Vague as to time.

MR. WHITNEY: That's fine. I can change it.

MR. KATZ: I mean, when did she tell her?

MR. WHITNEY: That's fine.

THE COURT: All right.

Q. (by Mr. Whitney): You said that Sandra told you that he had started bothering her since - for the past 8 months, that it was after your son Edwardo was born. During that 8 months, did she tell you this evening that she's talking to you, did she tell you that he had touched her inappropriately in the past?

A. Yes.

Q. And what did she say about that to you that night?

A. She told me that, for example, that night, after that happened, he told her that - to forgive him. That he was drunk. That this was never gonna happen again. Not to tell me anything. And he also told her that we were alone in Carson City, and that if she said something, he was gonna kill us. She was very afraid.

Q. Did she ever tell you the parts of her body that she touched?

THE COURT: Excuse me counsel. Can I see you at sidebar for just

a second?"

(RT 2023-2025.)

Counsel and the court retired to chambers, where Judge Edwards expressed concern about the extent of the sexual misconduct details the prosecutor was eliciting from Rocio.

Judge Edwards stated: "You need to find out. Off the record will you find out out of the presence of the jury what she told Mr. Mendoza? Even though we've cautioned the jury not to consider this for the truth of the matter stated, we're going into a lot of details, if he was not made aware of, I think are irrelevant." (RT 2026.)

Later in Rocio's testimony, the prosecutor returned to these details.

"Q. What kind of bothering?

A. Sexual molestation.

Q. And did you ask him specifically about certain types of sexual molestation?

A. Yes.

Q. What kinds of things did you ask him? You said kissing. What else?

A. Yes. He had been hugging her. He told her that she – that he liked her a lot. And that when she was older, she was gonna be for him. And I told him this." (RT 2032.)

During his closing argument, the prosecutor also highlighted the molestation:

"There's this big controversy in his mind as to when she was first told. Rocio said she was told the night of the arrest of the defendant, and he says, no, no, it wasn't the night of. It was later, etcetera, and I don't know why that matters. Because the bottom line is, whatever day she was told, it

still was well in advance of when he came down here.

"And one of the reasons that we bring this to your attention is that he was mad about that. Whether the allegations were true or false, is not for to you consider. That's not what we're here about. He's not being tried for molestation. Sandra is not here to testify about it. So just remember, it's only there to help you understand that he was angry, one way or the other. Either that he did and she copped on him, or that he didn't do it and she lied about it, but he was mad at her." (RT 2268-69.)

"The allegations that she had made, if you'll take a look at Exhibit 104 on page 215. I won't read the entire thing, but one sentence in there is of interest, and this was a sentence she wrote in her own handwriting, apparently on January 5th at 3:28. And that's, that's what this date says here. This is the same day, I believe -- it might be a 6. It's hard for us to read. The same day he was arrested for beating her with a belt, and she talks about him beating her with the belt about seven times. And then she says this, "At one time he told me that he was going to touch me and he did."

"So, she is telling the police officers[7] at that time that he was planning to touch her, and he did. Again, it doesn't really matter when, but I just wanted to give you that to think about because of this argument Mr. Katz has made as to Rocio not being told the night of the battery. Okay.

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[7] The police report of the molestation allegation was admitted into evidence. Sandra told her mother the facts of the molestation in connection with the police interview in Carson City (RT 2075-2078.)

Again, it was well before these incidents occurred in any event." (RT 2269-2270.)

### A. General Principles Of Relevant Law

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Sixth Amendment has been made applicable to the States through the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 403-405; *Davis v. Alaska* (1974) 415 U.S. 308, 315.) "Hearsay" is defined in Evidence Code section 1200 as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Read literally, the Sixth Amendment would exclude all hearsay. However, as discussed below, the United States Supreme Court has interpreted the Sixth Amendment as allowing the admission of non-testimonial hearsay provided sufficient indicia of reliability can be demonstrated. It prohibits the admission of testimonial hearsay unless the declarant is unavailable and there has been a prior opportunity for cross-examination.

The U.S. Supreme Court recently held that testimonial evidence can be admitted consistent with the Confrontation Clause only if the witness was unavailable and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 1374 (*Crawford*).) The High Court ruled that, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Ibid*.) The Court did not attempt to define all types of statements that might come within the category of "testimonial," but it held

that, at a minimum, "testimonial" statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid*.)

Where non-testimonial hearsay is at issue, *Crawford* held that the Sixth Amendment, consistent with *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*), affords states more flexibility in developing hearsay law. (*Crawford*, *supra*, 124 S.Ct. at p. 1374.) In *Roberts*, the Supreme Court held that hearsay would be admissible where the prosecution demonstrated the unavailability of the declarant whose statement it wished to use against a defendant and where the hearsay bore certain "indicia of reliability." (*Roberts, supra*, at p. 65; *Snyder v. Massachusetts* (1934) 291 U.S. 97,107.) In assessing whether a particular hearsay statement bears sufficient "indicia of reliability" to satisfy the Confrontation Clause, courts "essentially determine whether the historical reasons for believing that a particular type of statement is inherently reliable have withstood the test of time." (*People v. Farmer* (1989) 47 Cal.3d 888, 905.) This test may be satisfied if the statement falls within a long-recognized hearsay exception. (*Ibid.*)

Thus, non-testimonial hearsay is inadmissible unless it qualifies under an exception, and the proponent of the evidence has the burden of proof that a statement comes within an exception to the hearsay rule. (*People v. Ramos,* (1997) 15 Cal.4th 1157, 1177; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.) Each hearsay exception has its own foundational requirements that must be met before the admission of any statement. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 57, citing *Chambers v. Mississippi, supra,* 410 U.S. at p. 302.)

As argued below, Sandra's statements were testimonial in nature and, therefore should have been excluded given the lack of opportunity for

cross-examination. Even assuming the statements were non-testimonial hearsay, they do not fall within a proper exception to the hearsay rule.

Because confrontation ensures the reliability of the fact finding process (*Crawford*, *supra*, 124 S.Ct. at pp. 1373-1374; *Roberts*, *supra*, 448 U.S. at pp. 63-64), the trial court's erroneous admission of this large volume of hearsay testimony not only violated Appellant's Sixth Amendment confrontation rights, but lessened the reliability of the jury's determination of appellant's guilt in violation of the Eighth and Fourteenth Amendments. Furthermore, to the extent that the introduction of some of these hearsay statements violated only state evidentiary law, appellant's rights to due process, equal protection, a fair trial by an impartial jury, and a reliable death judgment were violated by the State arbitrarily withholding a nonconstitutional right provided by its laws. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 1, 7, 15, 16; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Gardner* v. *Florida* (1977) 430 U.S. 349; *Ross v. Oklahoma* (1988) 487 U.S. 81, at pp. 88- 89; see *Hicks v. Oklahoma* (1980) 447 U.S. 343.)

**B. The Confrontation Violation**

In *Bockting v. Bayer* (9th Cir. 2005), 399 F.3d 1010, 1022, the Ninth Circuit held that the admission of similar evidence at Bockting's trial was unconstitutional pursuant to *Crawford*. In *Bockting*, the defendant's six year old step daughter accused the defendant of sexual abuse. When she testified at his preliminary hearing, she could not recall what happened. Frustrated with this turn of events, the prosecutor succeeded in having the step daughter declared unavailable and had her police interview admitted as evidence. The Ninth Circuit found that the sex abuse conviction based on that evidence was constitutionally flawed.

In *People v. Sisivath* (2004) 118 Cal.App.4th 1396, 1402-03, the court reversed Sisivath's sex abuse convictions because the trial court admitted statements made to a sex abuse investigator, where the child never testified and was never subject to cross examination.

Here, although the prosecutor asserted that this evidence was not being admitted for its truth[8], the repeated references to the evidence, questioning the pathologist about the molestation as a subtle reminder to the jury, the details elicited from Rocio, and the prosecutor's own statements ("Either he did it and she copped on him, or he didn't do it, and she lied about it, but he was mad at her,") (RT 2269), all amounted to a sly subversion of the purpose for which this evidence was submitted. Sandra gave conflicting accounts about what had occurred. On the one hand, she wrote in a report that she had been touched. On the other, she denied under questioning that she had been molested. Her credibility was an important issue in this case, and her damning accusatory statements should not have been admitted under any circumstances.

The admission of Sandra's accusatory statements to the police and others clearly violated appellant's Sixth Amendment right to confrontation. The *Crawford* Court held that, with regard to testimonial hearsay, the Confrontation Clause demands that the declarant be both unavailable **and** that the defendant had a prior opportunity to cross-examine the declarant. (*Crawford*, *supra*, 124 S.Ct. at pp. 1365-1367, 1369.) While the Court in *Crawford* left "for another day any effort to spell out a comprehensive

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[8] See RT 2269, 2547. As this Court noted in *People v. Wrest* (1992) 3 Cal.4th, 1088, 1107: "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."

definition of 'testimonial,'" it specifically held that "statements taken by police in the course of interrogations are [. . .] testimonial" for Confrontation Clause purposes. (*Crawford, supra*, 124 S.Ct. at pp. 1364-1365, 1374.) The only way such evidence could have been admitted is if there was a prior opportunity to cross-examine was a necessary condition for its admission (*Id*. at p. 1366-1367), and appellant had no such prior opportunity to cross-examine Sandra. The admission of these statements at appellant's trial therefore violated appellant's Sixth Amendment right to cross-examine witnesses.

### C. Sandra's Statement Was Inadmissible Hearsay

The prosecutor argued that Sandra's statement was admissible as evidence of "motive, intent and premeditation", or which bore on his mental state. (RT 557-558.) None of these justifications is an exception to the hearsay rule[9], (Evid. Code §§ 1220-1370). The state of mind exception to hearsay rule refers to the state of mind of the "declarant." (Evid. Code §§ 1250.)

The prosecutor's approach was to gain admittance of the evidence

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[9] The prosecutor also argued that the evidence was admissible under Evidence Code section 1101. Motive, intent and mental state are bases upon which prior bad acts may be admitted under section 1101(b). Evidence which is admitted under 1101(b) comes in when there is proof the defendant committed the prior bad act; thus, Sandra's statement would be admitted as proof that Appellant committed the molestation – the very evidentiary use the prosecutor disavowed. Thus, Sandra's statements could not be properly be admitted under this theory.

for a nonhearsay purpose and then utilize it for its truth. This should not be tolerated by this Court.

The prosecutor essentially asked the court to admit Sandra's statements on a nonhearsay theory of relevance to the declarant's mental state. This theory holds that a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not a hearsay statement. This is because it is not being received for the truth of the matter stated. The theory is that whether the statement is true or not, the fact the statement was made is relevant to a determination of the declarant's state of mind. (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.)

If a statement, regardless of its truth or falsity, justifies an inference concerning the declarant's mental state, it may be admissible as circumstantial evidence of that mental state. The reason it is not barred is because the statement is not being used to induce a belief in any assertion it may contain. The assertion, if there is one, is to be totally disregarded and the only thing to be considered is the indirect inference alone. (See *Skelly v. Richman* (1970) 10 Cal.App.3d 844, 858.)

In order to properly utilize this theory, the proponent of the evidence must demonstrate two essential predicates. The first is that the declarant's state of mind is relevant to an issue in the case. The second is that the statement being utilized as circumstantial evidence actually bears a nexus to the state of mind at issue. (See *People v. Ortiz* , 38 Cal.App.4th at pp. 389-390.) In this case, neither of these predicates was met by the prosecution.

Sandra's state of mind was irrelevant to this case. Neither the prosecutor nor the defense ever suggested it was. Since her state of mind is not at issue, this theory for admissibility fails.

The Court in *Ortiz* recognized that limiting instructions could be futile when explosive evidence is admitted in this manner:

"If the statement is a lie, it cannot constitute circumstantial evidence of fear. In this situation, it is more difficult to fashion, and more demanding to expect the jury will follow, a limiting instruction. However, the jury would have been instructed not to consider the statement itself as true, because it is not admitted for its truth, but only as circumstantial evidence of state of mind. The difficulty is compounded the more inflammatory the prior conduct." (*People v. Ortiz*, 38 Cal.App.4th at p.390.)

This evidence should not have been admitted under any exception to the hearsay rule, or under the umbrella of Evidence Code section 1101.

**D. The Evidence Was Inadmissible Under Section 352**

The trial court ruled that Sandra's statements were more probative then prejudicial. This Court has previously held just the opposite in a similar case.

In *People v. Coleman* (1985) 38 Cal.3d 69, this Court held that the trial court improperly admitted letters the victim had written to family members about violence which the defendant had allegedly perpetrated on the her in the past, and which she feared would occur in the future. This Court found that the admission of these letters violated Coleman's confrontation rights.

This Court found that the prosecutor's repeated references to the letters, and the fact that the letters were made available to the jury[10], demonstrated why admission of the evidence was more prejudicial than

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[10] Sandra's written statement was part of an exhibit submitted to the jury. The prosecutor invited the jury to review it during his closing argument. (RT 2269.)

probative. This Court went on to say:

"The limiting instructions given by the trial court were not adequate to insure that the letters would only be used for proper purposes because of the inflammatory nature of the hearsay involved... The accusations of prior threats played such a central role in the prosecutor's theory of the case, it was unrealistic to expect the trier of fact not to consider the letters for the truth of their assertions. This potential improper use of the letters went to the heart of the defenses offered and the error must be considered prejudicial." (*Coleman*, 38 Cal.3d at pp. 94-95.)

The court in *Ortiz* described the prejudice quotient in this manner: "evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*Ortiz*, 38 Cal.App.4th at p. 394.)

It is hard to conjure up an allegation which inspires more distaste and enmity than that of sexually abusing a child. The prosecution did not need this evidence to prove its case.[11] They could have sanitized Sandra's statements in a way that did not refer to the molestation. Other evidence existed which supported the prosecutor's premeditation theory - the fact that Appellant bought a gun and bullets in the weeks preceding these events, that Appellant brought these items with him from Carson City to Landers, that Appellant threatened to kill Sandra or her mother 10 to 15 minutes

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[11] *Coleman* noted that the prosecution could have used evidence in the letters at issue there without admitting the prejudicial evidence. (*Id.*, 38 Cal.3d at p.87.)

before the shootings actually took place all fell into this category of evidence.

The prosecutor had abundant evidence upon which to argue that Appellant went to Landers with a pre-existing plan to kill, yet felt compelled to introduce this sexual misconduct evidence in order to ensure that any doubt a juror might have about Appellant's mental state would evaporate given the explosive nature of the allegation - precisely the reason such evidence should have been excluded under section 352.

**E. Prejudice**

Under *Chapman*, the State has the burden to prove beyond a reasonable doubt the error did not contribute to the verdict obtained. (*Chapman*, *supra* 386 U.S. at p. 24.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

Applying the *Chapman* standard, appellant was indeed prejudiced by the admission of Sandra's molestation accusations at both the guilt and penalty phases of his trial.

The admission of this evidence was particularly prejudicial at the penalty phase. Although the jury was instructed not to rely on the molestation under Factor (b) (CT 874), this did not preclude the jurors from weighing it under Factor (a). In fact, according to the prosecution's theory of this case, it was under Factor (a) that such evidence should be

considered. The prosecution theory was that the molestation[12] allegation was inextricably linked to the deaths - in fact, that Sandra's accusation set off this entire series of events. While the instruction told the jurors that they could not consider the "possible molestation" of Sandra under Factor (b), no such limitation was made with regard to Factor (a).

The prosecutor's closing argument told the jurors that the could consider the molestation evidence to explain why Appellant did what he did; in other words, the molestation evidence was inextricably tied up with the circumstances of the crime.[13]

The prosecutor also told the jurors that they could take into account the suffering experienced by the victims under Factor (a).

And, the prosecutor's repeated exhortations that the jurors should act as the "conscience of the community"[14] was another invitation to the jurors to focus on the molestation evidence.

The end result of the trial was that the jury was permitted to use this unconstitutionally admitted, highly inflammatory evidence, as a factor in

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[12] The penalty instructions suggest that Sandra may indeed have been molested after all. The instruction states, "You have heard evidence in this case regarding hearsay statements involving the possible molest of Sandra Resendes which were not admitted for their truth, and the defendant's conviction for misdemeanor battery in Carson City. You are instructed that you may not [emphasis in original] use either of these events as factor (b) evidence." (CT 874).

[13] RT 2547.

[14] RT 2540, 2542, 2544, 2553.

deciding whether Petitioner should live or die. This error was prejudicial and reversible.

**F. Conclusion**

The facts of this case are sorrowful and tragic enough. As trial counsel said, the prosecutor wanted this evidence just because it was "icing on his cake," (RT 563), not because he needed it. For all of the reasons stated above, the improper and unconstitutional admission of this evidence requires that Appellant's guilt phase convictions be set aside.

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## II

## APPELLANT'S GUILT AND PENALTY JUDGMENTS MUST BE SET ASIDE DUE TO PROSECUTORIAL MISCONDUCT

The prosecutor committed repeated acts of prejudicial misconduct which require that the guilt and penalty judgments in this case be set aside.

### A. The Special Role Of The Prosecutor And The Standard Of Review

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction . . . ." (*People v. Andrews* (1970) 14 Cal.App.3d 40, 48.) A prosecutor is held to an "elevated standard of conduct" because he or she exercises the sovereign powers of the state. (*People v. Hill* (1997) 17 Cal.4th 800, 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) As the United States Supreme Court has explained:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocents suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a

wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States* (1935) 295 U.S. 78, 88.) Put differently: "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; accord *United States v. Blueford* (9th Cir. 2002), 312 F.3d 962, 968; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-649 (disn. opn. of DOUGLAS, J.) ["The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws that give those accused of a crime a fair trial"].)

Misconduct by a prosecutor may deprive a criminal defendant of the guarantee of fundamental fairness and thereby violate the Due Process Clause of the Fifth and Fourteenth Amendments. (*Darden v. Wainwright* (1986) 477 U.S. 168, 178-179; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects 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, internal quotations omitted.) Misconduct by a prosecutor may also violate a defendant's right to a reliable determination of penalty under the Eighth Amendment. (*Darden v. Wainwright*, *supra*, 477 U.S. at pp. 178-179.)

**B. Disparaging Marks About Counsel and The Evidence**

During the guilt phase, the prosecutor made disparaging remarks about trial counsel and the defense evidence that was being presented.

"Q. (BY MR. WHITNEY) [to Deputy Stan Gordon] Even when

you testified in the prior trial, that had not been raised as an issue in that case?

A. No, it was not.

Q. In other words, that defense attorney didn't try to blame the cops for this?

A. No, he did not.

Q. So the issue didn't come up?

MR. KATZ: Excuse me, counsel has tried to disparage the defense a number of times. I would like an order that he knock it off.

MR. WHITNEY: It takes a big man to admit he's wrong.

THE COURT: All right. All right. Counsel, if your objection is to that comment or question, I will sustain the objection.

MR. KATZ: Yes, and I'd like the jury to be ordered to disregard his attempting to disparage the defense.

THE COURT: The jury is not to draw any inferences form the questions or the comments of Mr. Whitney. (RT 1289-1290.)

These unprofessional remarks continued shortly thereafter.

"MR. KATZ: Your honor, I don't know if there's something that this witness needs his memory refreshed by listening to the recorder. Perhaps Mr. Whitney could ask him the questions first, and if he doesn't remember, then he might have to refresh his recollection.

MR. WHITNEY: Clever objection, but it's not the point. He has to authenticate the voices on the tape, and he has to hear them before he can do that.

THE COURT: Overruled." (RT 1358.)

Defense counsel renewed his objections and concerns about the

prosecutor's disparagement of both counsel and the defense being pursued in the guilt phase.

"MR. KATZ: Yes. I'd like to go on the record out of the presence of the jury, if I might? Thank you.

Mr. Whitney perhaps misspoke when he was speaking to Deputy Kane, and I didn't want to interrupt at that point. He indicated something about when he saw the murders. Now, that's a fact for the jury to determine as to what level of culpability the killings were.

MR. WHITNEY: That's fair. I agree.

MR. KATZ: The second thing I'd like to talk about is, and I didn't, in the beginning, think Mr. Whitney would keep up with it, but the next time he disparages the defense in the manner that he has been, I will be asking for a finding of prosecutorial misconduct and mistrial, and I just wanted to make it clear. I have not turned this into some kind of personal accusations against Mr. Whitney personally, and I really think that his statements and, you know, one off the cuff or offhanded statement so be it, but it has become a repetition now, and I just wanted to make it clear that I will intend to ask for a mistrial if it continues. Thank you.

MR. WHITNEY: Well, in the words of a famous bumper sticker, mistrials happen. The bottom line is, I don't know what he means by disparaging defense. If I ask an officer a question, he's certainly entitled to object to it, and I certainly intend to do my job professionally. If there's something that comes up, we can deal with it, but I don't know exactly what he's talking about.

THE COURT: Well --

MR. WHITNEY: Because of the issues raised, he has told this jury, and the nature of his cross-examination is such that he continually tries to disparage the police officers in this case, tries to make it turn it around as

though it was their fault that these children died. Since he is making that argument in his opening statement, and in his cross-examination of witnesses, and intends to make it in his closing statement, it's only fair that we give these officers an opportunity to respond to that allegation. He's raised the issue, let them give their statements about whether --

THE COURT: Well, I don't know that Mr. Katz has taken the position that it's the officer's fault that these children were killed. I'm not going to speak for Mr. Katz. He can make whatever arguments he feels is appropriate to the jury based on the evidence. I'm assuming that he is objecting to any comments that you may have made, either in your questions or passing, that somehow it belittles, or I guess him personally, from making such an argument. I would agree that would not be a appropriate.

MR. WHITNEY: And that's not my intent.

THE COURT: So --

MR. WHITNEY: What else could he be doing by his statement to the jury, and in his cross-examination, his intent to call a so-called expert on behalf of the defense, but for to say that it was the officer's fault. I guess I'm missing something. Maybe I'm just dense.

THE COURT: I'm not, I'm not privy to Mr. Katz' theory, and I'm not going to try to --

MR. WHITNEY: I guess until I hear something different from Mr. Katz, I have to assume that he intends to make that kind of an argument. And certainly while I mean no disrespect to my friend and colleague Mr. Katz, I think it's only fair to let these officers respond to that kind of allegation. It's only fair to let them have their day, too.

THE COURT: I have no problem with you asking them if they believe they were acting within the policy of the Department.

MR. WHITNEY: Okay.

THE COURT: Or if they would have done it differently. I mean, that's fine, and I've ruled that it's irrelevant to get into their personal feelings and the impact that this has had upon them, their mental processes and so forth, and the emotions that that brings out. I think that's not appropriate at this phase of the trial, if any phase of the trial for that matter. And another thing that I'm a little concerned with, too, is the objection has not been raised recently, but it was initially. Mr. Whitney, your leading manner in questioning the witness I think is getting to the point where it needs to be curtailed tremendously.

MR. WHITNEY: That's fair. I understand.

THE COURT: You're using these witnesses as sounding boards for your arguments.

MR. WHITNEY: As an old defense attorney, it's hard to break habits, but I understand, and I'll do the best I can. I would ask the Court to think about this problem. You said that at this point, although the phrase you used was at this phase, it's inappropriate for these officers to give testimony regarding their feelings. The reason I think it's relevant, and I just ask your guidance, is that he, Mr. Katz, has been attacking on cross-examination their testimony in the sense that they gave previous inconsistent statements at the time of the original interview through Bradford and later on. Do you not think it's relevant to the issue of credibility that when they gave their statements they were still emotionally upset?

THE COURT: And I think I ruled the last time that objection was made.

MR. WHITNEY: Okay.

THE COURT: That for the purpose of showing their mental state at the time that they were interviewed that it's relevant.

MR. WHITNEY: Okay. I just wanted to make sure.

THE COURT: I think it was with Deputy Rossi, his breakdown on the stand. I understand that. I'm not critical of that, but I just don't know that there's a place for that in this trial.

MR. WHITNEY: Okay. That's fine, your honor." (RT 1375-1379.)

During his cross examination of defense psychiatrist Dr. Jose Moral, the prosecutor brought forth information about Appellant's prior criminal record, without first seeking a ruling on the admissibility of the evidence.

"Q. And, in fact, he had known about his anger problems for much longer than 1997, right?

A. Well, the -- he didn't perceive himself as having an anger problem. I think he had problems, but I think he wasn't perceiving it that way. He just was looking at it the other way, that he was abandoned. He was like a righteous anger. And when a person is feeling a righteous anger, the person doesn't have an insight about, about other alternatives about the anger.

Q. He knew he had been arrested in earlier years for a battery in 1986 in San Diego, and for discharging a firearm in Los Angeles in 1993, and so on. He knew he had prior problems with anger and alcohol, right?

A. I wasn't aware of --

MR. KATZ: Your honor, objection. We're going to have to have a hearing.

THE COURT: All right. We'll have to -- let's take about a 10

minute break, ladies and gentlemen. Do not discuss the case among yourselves or with anyone else.

THE BAILIFF: Court is in recess for 10 minutes.

(The following proceedings were held in open court out of the presence of the jury.)

MR. KATZ: Firstly, counsel is trying to use this witness to get into areas of my client's mental status that he has been screaming all morning I couldn't get into, and I find that interesting, to say the least.

MR. WHITNEY: I have only done that -- I'm sorry. Go ahead.

MR. KATZ: Secondarily, to use a rap sheet to impeach my client in terms of my client's state of mind, which Nunn prohibits, and which counsel's been yelling I can't get into; to use just the face of a rap sheet without the underlying facts of the case, and these are misdemeanors, which cannot be used to impeach certainly, but this is really a back door effort, without any prior notice, to besmirch my client with God knows what implications without the facts of the case as to whether or not they relate to anger. You can certainly commit a battery without anger. You can certainly have a weapons charge without anger. Counsel well knows that. And to go in through the back door that way, asking the psychiatrist about my client's state of mind, which Mr. Whitney says can't come in any way, and to use misdemeanors in order to do that, I find highly offensive. I would ask that the jury be requested to disregard Mr. Whitney's questions, his line of questions as not only irrelevant, but improper.

MR. WHITNEY: Well, it's entirely proper. Number 1, as to the latter, the misdemeanor we're talking about is a battery with serious bodily injury, and in the past he has sought no treatment for any of his problems, indicates that he just didn't give a dam about his anger problems or his alcohol problems. He'd had prior contacts with the law about those very

things and chose not to seek any help for them, and that's the thrust of the area. It has nothing to do with besmirching his client's character with a misdemeanor. Comparing what he has done in this case to having a battery is, is -- what am I trying to say -- the killing of three children in front of a bunch of people is far more besmirching of his character than any 1986 battery could be.

But this psychiatrist has indicated that he went into a lot of these records with the defendant. He is aware of them, and he is discussing here the elements of the defendant's anger, his hostility, and his feelings of depression, and yet he had these previous instances of contacts with the law involving batteries, and involving firearms, and involving alcohol, and he chose not to do anything about those problems. It's an entirely appropriate area to go into.

Secondarily, I have not asked him what his -- what Mr. Mendoza's state of mind was, or his mental state on the day of the killings. We are, again, restricted to the Court's guidelines of prior to that, which you allowed them to testify about.

THE COURT: Well, the Court naturally gets a little concerned whenever we start getting into somebody's prior criminal record in front of the jury without having an opportunity to assess the situation, to determine whether it's proper to come in or not, at least under a weighing process or a 352.

I am concerned that now we're -- the cat's out of the bag, and I'm going to have to deal with it.

Secondly, the Penal Code 28 and 29 work both ways as far as whether the defendant had the requisite mental intent or didn't have it, and this witness cannot give opinions on that.

MR. WHITNEY: I agree.

THE COURT: But at this point in time, I mean, I would agree that compared to the seriousness of the charges against him, that these prior misdemeanors pale in comparison; but, nevertheless, you're offering this to impeach this witness' credibility or his opinion, apparently, about what?

MR. WHITNEY: I'm not necessarily trying to impeach his opinion so much as I am trying to point out that this defendant was aware of his problems with anger and so forth in the past and chose not to do anything about them. Mr. Katz made a big demonstration about taking this document to the witness where he went to a clinic, and where he had an opportunity to, to seek help with his anger. The implication was that, well, this is the first time you've ever had an opportunity. There is no evidence that he did anything about trying to treat his anger or his alcohol problems in the past 10 years, and he had plenty of opportunity to do that. That's the reason for getting into that area.

The Hendricks case, for example, entirely permits me to go into these kinds of things with an expert regarding his opinion, and certainly the expert has said he relied on all these materials, including page 75 and including page 97, the rap sheets of the defendant, in forming his opinions. So, I'm going to say, why do you then say this kind of just happened? That all of a sudden these events just came up? And that previous to this he was just Mr. mild-mannered, milk-toast defendant. This guy's been doing stuff like this --

THE COURT: Is that what he said?

MR. WHITNEY: He said these things just kind of happened in the

last two weeks, that prior to this there was no indication of any problems.

MR. KATZ: That's not what he said.

MR. WHITNEY: That's what I understand him to say.

MR. KATZ: He was relaying my client's impression of the dynamics of the family. He said, according to Mr. Mendoza, he felt that there were no problems with the family. He wasn't having problems with the family prior to January 5th. He was very specific about that.

MR. WHITNEY: He also --

MR. KATZ: Now, I couldn't get in what my client's state of mind was, but Mr. Whitney now is driving a truck threw it, flashing all kinds of improper priors that would otherwise be impeach -- impeachment had they risen to the level of either a felony, or a misdemeanor with moral turpitude if my client were to take the stand. They're coming in, not only through the back door, but without a hearing as to whether or not they do rise to any kind of impeachable level. There is no showing that in these priors there was any kind of anger involvement. Mr. Whitney is creating a straw man some very side issue, so he can knock down his own straw man by flashing priors in front of the jury.

MR. WHITNEY: I just disagree entirely. And what I'm trying to get this witness to explain to us is how can he paint a picture of a man who was just leading a wonderful life until all of this happened? The impression being given by this witness is that, well, gee, none of this would have came up until Sandra made the battery claim. When, in fact, we know in 1986 he had a battery with serious bodily injury on another party.

THE COURT: Wait a minute. We're talking about something 10 years prior to the event.

MR. WHITNEY: So what?

THE COURT: And we're talking about a battery on a family

member?

MR. WHITNEY: On an ex-wife. And it was assault with a deadly weapon on an ex-wife, and we're talking about battery with serious injury being charged. I mean, they cannot paint a picture of this defendant just being, you know, Mr. milk-toast, and all of a sudden in 1996 --

THE COURT: I haven't seen that picture being painted. It's not been my understanding that that is the picture that is being painted here, that he was Mr. milk-toast.

MR. WHITNEY: Okay.

THE COURT: I'm going to sustain Mr. Katz' objection, and I'll admonish the jury to disregard the last questions, statements.

MR. WHITNEY: Okay.

THE COURT: If you want to get into it further, then we're going to have to have a separate hearing out of the presence of the jury to determine whether or not the probative value is outweighed by the prejudicial effect.

MR. WHITNEY: Can I ask this question of him? Are you aware of, of anything in his background which should have alerted him to his problems with anger and alcohol without him getting into the actual --

THE COURT: If he says yes then you're going to ask him to explain. If he says no, then you're going to confront him with those.

MR. WHITNEY: I'll follow the Court's rules. If you don't want me to get in those, I won't. But I want to ask him at least that question. Then I want to ask him, are you aware of any attempts by him to seek any treatment throughout that entire 10 year period, or in any period.

MR. KATZ: The psychiatrist didn't paint any picture back then. All he said was Mr. Mendoza felt his family -- everything was working properly. That's his own opinion. I don't know how a ten-year-old prior can affect that opinion.

MR. WHITNEY: Well, they're trying to make it sound as though this was an isolated incident, and it's not. This is something that this defendant does. He uses weapons on people and he beats up on women.

THE COURT: I'm going to sustain the objection.

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.....

(Proceedings resumed in open court in the presence of the jury.)

THE COURT: All right. Ladies and gentlemen, Court is instructing you to disregard the last question of Mr. Whitney, and the statements about any prior arrests of Mr. Mendoza. You are to disregard that and treat it as though you had not heard it. (RT 1770-1777.)

During the guilt phase closing argument, defense counsel was forced to make repeated objections to the prosecutor's argument.

"Look at some instructions, 842, for example, is a good one to look at. And you will find throughout that instruction the notion of an ordinarily reasonable person is what we're talking about. And who is the ordinarily reasonable person? You folks are.

MR. KATZ: Your honor, I'm sorry. Forgive the interruption. But that is an incorrect statement of the law. The jury is not to put themselves in as a reasonable person. That's simply incorrect, and I'd like the jury to be admonished.

MR. WHITNEY: That's not correct. They're the conscience of the community.

THE COURT: The Court's instructions are what you are to follow in

this case, not what counsel argues." (RT 2220-2221.)

The prosecutor returned to this theme moments later.

"You see what we're saying here? I mean, this is a situation where again you have to impose the reasonable person standard. It's not what Mr. Mendoza may have felt, or what he may have gone through. He's not entitled to set up his own standard of conduct. Can you imagine a society that allowed us to do that? Would any of you do what he did here and say that's reasonable? Would any of you do that? No. Would any of you put a gun to people's heads? Would any of you do what he did here? Is that reasonable?

MR. KATZ: Your honor, I'm sorry to interrupt, but again, that's improper argument.

MR. WHITNEY: I disagree.

MR. KATZ: I object to it.

THE COURT: Well, the standard is the ordinarily prudent person, which is an objective test, not an individual's personal beliefs, but an objective test of what you think an ordinarily prudent, reasonable person would do or would not do." (RT 2222-2223.)

Next, defense counsel felt compelled to move for a mistrial based on the prosecutor's remarks.

" Who can forget the very chilling testimony of little Sergio when he talks about how his father was holding the gun to people's head and saying he was gonna kill mom if he didn't -- if Sandra didn't stop crying. How outrageous is that? Is that the act of a reasonable person? Shut up, stop crying, or I'm gonna kill your mom. I don't know about you, I'm an old war

horse. I've been through a lot of these. That choked me up when I saw that testimony.

MR. KATZ: May we approach?

THE COURT: All right.

(The following proceedings were held at the bench between the Court and counsel:)

MR. KATZ: I'm going to ask for a mistrial at this time. Mr. Whitney has injected his own personal opinion. He's constantly going beyond the bounds into prosecutorial misconduct. I object to his last statement, what chokes him up or what doesn't choke him up. He's, he's injecting his own opinion. I'd ask for the Court to, to find prosecutorial misconduct, and I'm asking for a mistrial.

It's not just based on that one statement, starting from the very beginning of the statement there was argument talking about sadistic terrorism, asking the jury to interpose their own moral standard on a subjective basis when Mr. Whitney knows full well, and the Court instructed them, it is -- a reasonable person standard is an objective test, not a subjective one. They don't interpose their own moral standards, and Mr. Whitney is constantly going beyond the boundaries of the law in his closing argument, and I'm asking for a mistrial at this time.

THE COURT: All right. Well, I'm going to deny the motion. I will caution Mr. Whitney. I do agree this last comment was probably not appropriate, your personal feelings about, about this. This is probably inappropriate, but I don't think it rises to the level of a mistrial. The other problem you mentioned with the standard, the Court admonished the jury, and has instructed them, and I think that problem is corrected. In any event,

I will deny the motion but with that admonition to Mr. Whitney." (RT 2229-2230.)

Yet another defense mistrial motion followed soon thereafter.

" Do you remember the thing he said to little Sandra just before he executed her with a gun at her head? Can you imagine the terror that this child is going through, and that all the people are going through? Certainly the children. Can you imagine that terror? It's not in the courtroom. We're not here doing some scientific experiment. Imagine yourselves at that scene. And what does he do?

MR. KATZ: Your honor I'd like to approach.

(The following proceedings were held at the bench between the Court and counsel:)

MR. KATZ: This argument is clearly inciting the passions of the jury. Mr. Whitney is asking them to place themselves at the scene, to imagine the terror the victims were going through. That has nothing to do with the elements of murder in this case. This is the second time Mr. Whitney has mentioned the terror of the victims. Not only has it nothing to do and it's irrelevant, it's so highly prejudicial. It is prosecutorial --

THE COURT: I guess it's appropriate for the penalty phase if we have a penalty phase.

MR. WHITNEY: Except it affects the way he's thinking. It's an element as to how the defendant is thinking at the time and still chooses to kill.

MR. KATZ: Asking the jury to put themselves in the place of the victim is simply asking them to let passion control their verdict. It is prosecutorial misconduct. I'm asking for a finding of it. I'm asking for a mistrial.

MR. WHITNEY: I respectfully disagree with that.

THE COURT: Well, I will again deny that request, but let's move off that subject and move on with your argument.

MR. WHITNEY: That's fine.

THE COURT: As I say, that would be more appropriate in a different phase of the trial. (RT 2233-2234.)

In addition, a prosecutor's behavior is misconduct under California law when it involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury," even if such action does not render the trial fundamentally unfair. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. Espinoza*, *supra,* 3 Cal.4th at p. 820.) A showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct. *(People v. Hill*, *supra,* 17 Cal.4th at pp. 822-823 & fn.1; accord *People v. Smithey* (1999) 20 Cal.4th 936, 961.) When a claim of misconduct focuses upon comments made by the prosecutor before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Smithey, supra,* 20 Cal.4th at p. 960.)

It is misconduct for a prosecutor to attack the integrity of defense counsel, cast aspersions on defense counsel or suggest that defense counsel has fabricated a defense. (*People v. Bemore* (2000) 22 Cal.4th 809, 846; *People v. Hill*, *supra,* 17 Cal.4th at pp. 832-834; *People v. Jones* (1997) 15 Cal.4th 119, 167 [improper for a prosecutor to accuse defense counsel of lying to the jury]; *People v. Sandoval* (1992) 4 Cal.4th 155, 183 ["improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case"]; *People v. Bell* (1989) 49 Cal.3d 502, 538 [prosecutor committed misconduct by

attacking integrity of defense counsel); *United States v. Rodriguez* (9th Cir. 1998) 159 F.3d 439, 451 [prosecutorial misconduct denied defendant fair trial where prosecutor misstated law and slandered defense counsel]; *American Bar Association Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and the Defense Function* (Approved Draft 1971).)

**1. Penalty Phase**

Defense counsel felt so strongly about the misconduct that occurred during argument that he brought the issue up with the trial court when they re-convened for the penalty phase.

"MR. KATZ: Yes. For the record, we're all present. My client's here, Kathleen Hilz, my assistant, and the interpreter.

We're starting the penalty phase today, and I think that puts us in a, in a somewhat different posture. Certainly the Eighth Amendment heightened scrutiny comes into play in a real or a more serious way, because it's not simply guilt phase looking possibly to a penalty phase, we are in penalty phase. And as the Court knows, many times during the guilt phase, I objected to Mr. Whitney's statements and asked the court to assign them as prosecutorial misconduct, and even asked for a curative instruction.

The problem with an instruction, of course, is the classic problem of unringing the bell. Mr. Whitney, as the Court remembers, in guilt phase paraded my client's misdemeanors in front of the jury, convictions which he could get in legally in no way, neither in guilt nor in penalty, and the Court, at my request, asked the jury to disregard his statements. I have prepared -- actually copied a requested instruction that the Judge, should prosecutorial misconduct happen again, a curative instruction. I'm not saying that that it would necessarily end the matter, because, as I said, it's difficult, if not impossible to unring the bell. Mr. Whitney, as, I believe, the most

experienced homicide prosecutor in the entire D.A.'s office, certainly knows the effects of statements on the jury, even if the Court tells them not to -- to disregard it. In any event, I have given counsel a copy of my proposed curative instruction." (RT 2316-2317.)

The prosecutor went overboard yet again in his penalty argument.

"When a child is murdered, we all suffer. We have all been made victims, haven't we? You are victims in the sense that you have to make a decision as to whether or not somebody lives or dies. Certainly the victim's family members in this case are victims. There are some who actually were literally living victims, like Antonio and Julio who were shot at.

MR. KATZ: Your honor, I'm sorry, we're going to have to approach.

(The following proceedings were held at the bench.)

MR. KATZ: I'm sorry to interrupt Mr. Whitney's argument, but he's asking the jurors to consider themselves victims of Martin Mendoza, and that is clearly inappropriate. It's clearly prosecutorial misconduct, and as to that phrase, I would ask the Judge to decide that that is prosecutorial misconduct, and I would ask for the curative instruction that I submitted to the Court regarding that phrase inviting them to consider themselves victims of Martin Mendoza because they've had to be here to decide this case.

MR. WHITNEY: There is no law that says that. That is simply inaccurate. There is nothing saying that.

THE COURT: I'm not sure I agree. I don't think, I don't think that's a legitimate argument that the jurors are victims.

MR. WHITNEY: I can withdraw that.

THE COURT: I will admonish the jury to disregard that.

MR. KATZ: I would ask the Judge to read the, the instruction that I have previously given the Court regarding prosecutorial misconduct in an

attempt to cure that.

MR. WHITNEY: No, that's going too far.

THE COURT: The Court will make it's own admonition.

(The following proceedings were held in open court.)

THE COURT: All right. Ladies and gentlemen, the Court advises you that it was not proper for the district attorney to refer to you as victims in this case, and you are to disregard that statement. It's not to enter into your consideration in any way." (RT 2545-2546.)

Defense counsel also objected to the on-going trial misconduct in his Notice of Motion for New Trial or in the Alternative, To Reduce Penalty, filed in connection with proceedings pursuant to Penal Code section 190.4(e). (CT 1125-1126.)

It is misconduct for a prosecutor to suggest to the jury that defense counsel's role in a criminal trial is something other than facilitating the discovery of truth. (*See, e.g. People v. Hawthorne* (1992) 4 Cal.4th 43, 60; *People v. Perry* (1972) 7 Cal.3d 756, 789-790 [misconduct for prosecutor to suggest that role of defense counsel is to obscure the truth and confuse the jury]; *see also United States v. Matthews* (9th Cir. 2001) 240 F.3d 806, 819 [prosecutor "walked – and may have overstepped – the line by insinuating that defense counsel was trying to hide the truth"].)

It is improper for the prosecutor to misstate the law generally. (*People v. Hill, supra,* 17 Cal.4th at p. 289; quoting *People v. Bell,* 49 Cal.3d at p. 538.)

Trial counsel repeatedly objected to the prosecutor's misconduct. He doggedly brought the missteps to the court's attention. Although the court acted to curb the prosecutor's persistent abuses, these actions were insufficient to safeguard Petitioner's right to a fair trial.

The trial court was ineffective in controlling the prosecutor's

misbehavior, which resulted in the misconduct permeating the entire trial. The impact of the prosecutor's misconduct was to deprive appellant of his federal and state constitutional rights to due process, counsel, a fair trial, an impartial jury, confrontation, present a defense, equal protection, and a reliable guilt verdict. (U.S. CONST. 5th , 6th 8th and 14th Amends.; CAL. CONST., art. I, §§ 1, 4, 7, 15, 16, & 17.) Accordingly, the guilt determination must be reversed. (*Darden v. Wainwright, supra,* 477 U.S. at p. 181; *People v. Hill, supra,*17 Cal.4th at pp. 820-821.)

**C. Cumulative Misconduct Requires Reversal**

The cumulative effect of the above-described misconduct was to violate appellant's rights to due process of law, a fair jury trial and a reliable and nonarbitrary penalty determination, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (*Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; *Johnson v. Mississippi, supra*, 486 U.S. at p. 584; *Beck v. Alabama, supra*, 447 U.S. at p. 638; *People v. Bell, supra*, 49 Cal.3d at p. 534; *People v. Hill, supra*, 17 Cal.4th at p. 819; *Boyle v. Million* (6th Cir. 2000) 201 F.3d 711 [cumulative prejudice from prosecutorial misconduct will compel reversal even if no single act of misconduct would do so].)

Where, as in the present case, prosecutorial misconduct deprives a defendant of rights guaranteed by the United States Constitution, review is

required under the standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24, and reversal is mandated unless the state can prove beyond a reasonable doubt that the error did not contribute to the verdict. (*People v Bolton*, *supra*, 23 Cal.3d at pp. 214-215 fn. 4; *Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Barajas* (1983) 145 Cal.App.3d 804, 810-811.) This respondent cannot do.

The individual and cumulative effect of the instances of misconduct described above distorted the record, injected improper considerations into the sentencing calculus and encouraged the jurors to make a decision based on emotion rather than reason. They therefore violated appellant's Eighth Amendment right to a reliable, individualized, and non-arbitrary sentencing determination. (*Sumner v. Shuman* (1987) 483 U.S. 66, 85; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329.) In addition, as noted earlier in connection with the discussion of the individual errors, many of the prosecutors' transgressions also violated other specific constitutional rights.

All of the misconduct identified here either unfairly added to the reasons why a death sentence should be imposed, unfairly discredited the reasons why a life sentence should be imposed, or unfairly undermined the credibility of the attorneys whom appellant was relying on to convince the jury that the reasons for a life sentence were substantial. Empirical research has shown that jurors who are exposed to such improper influences are significantly more likely to impose a death sentence than those who are not. (Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Arguments in Capital Trials* (1999) 23 Law & Human Behavior 471, 483.)

If the scales had been more fairly balanced, it is likely that a life sentence would have been imposed. Therefore, the misconduct must be deemed prejudicial, and the judgment must be reversed.

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## III

## APPELLANT IS ENTITLED TO HAVE HIS DEATH JUDGMENT SET ASIDE BECAUSE IT WAS OBTAINED IN VIOLATION OF THE VIENNA CONVENTION

As shown below, the International Court of Justice has held that Appellant's rights under the Vienna Convention were violated by the State of California during pre-trial and trial proceedings in this case. Evidence in the record before this Court shows that trial counsel sought to have the death penalty set aside based on the violation of the Vienna Convention. As a result, this Court must vacate Appellant's death sentence.

### A. The Vienna Convention and Its Optional Protocol

#### 1. *LEGAL BACKGROUND*

The Vienna Convention on Consular Relations ("Vienna Convention"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." DEPT OF STATE TELEGRAM 40298 TO THE U.S. EMBASSY IN DAMASCUS (February 21, 1975), *reprinted in* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145 (2d ed. 1991).

Article 36 of the Convention enables consular officers to protect nationals who are detained in foreign countries. Article 36(1)(b) requires the competent authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. Finally, Article 36(2) requires that a country's "laws and

regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended." The United States has described the rights and obligations set forth in Article 36 as "of the highest order," in large part because of the reciprocal nature of the obligations and hence the importance of these rights to United States consular officers seeking to protect United States citizens abroad.[15]

> The Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"), *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261, provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, art. I.

The United States played a leading role at the 1963 diplomatic conference that produced the Vienna Convention and its Optional Protocol. *See* Report of the United States Delegation to the United Nations Conference on Consular Relations in Vienna, Austria, March 4 to April 22, 1963, (1st Sess. 1969) *reprinted in* S. Exec. E., 91st Cong. at 59-61. Among other things, the United States proposed the binding dispute settlement provision that became the Optional Protocol and successfully led the resistance to efforts by other states to weaken or eliminate altogether the dispute settlement provisions. *See id.* at 72-73.

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[15] ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973 (1973), at 161. As Judge Stephen Schwebel, the former United States Judge on the International Court of Justice, has observed, "the citizens of no State have a higher interest in the observance of [Vienna Convention] obligations than the peripatetic citizens of the United States." Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 248, 259 (Provisional Measures Order of Apr. 9) (declaration of President Schwebel).

The United States signed the Vienna Convention and its Optional Protocol on April 24, 1963, and President Nixon sent it to the Senate for approval on May 8, 1969. The Senate held hearings on October 7, 1969, and unanimously ratified the instruments on October 22, 1969. *See* 115 CONG. REC. 30,997 (Oct. 22, 1969). To date, 166 States have ratified the Vienna Convention and 45 States the Optional Protocol.[16] The Vienna Convention is among the most widely ratified multilateral treaties in force today. LEE, at 23-25.

**2. The International Court of Justice**

Often referred to as the "World Court," the International Court of Justice is "the principal judicial organ of the United Nations." U.N. CHARTER art. 92; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 1, 59 Stat. 1055 ("ICJ STATUTE"). The Court's Statute is annexed to the U.N. Charter, so that States that become Members of the United Nations also become parties to the Statute. U.N. CHARTER art. 93, para. 1.

> Here, too, the United States proposed the draft ICJ Statute and led the effort to create the Court. RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: **THE ROLE OF THE** UNITED STATES 1940-1945 (1958), at 865. The United States saw the Court as a means to pursue its longstanding objective to promote the rule of law on the international level:
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> > Throughout its history the United States has been a leading advocate of the judicial settlement of international disputes. Great landmarks on the road to the establishment of a really

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[16] See Status of Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

> permanent international court of justice were set by the United States. . . . As the United States becomes a party to [the U.N.] Charter which places justice and international law among its foundation stones, it would naturally accept and use an international court to apply international law and to administer justice.

EDWARD R. STETTINIUS, JR., SECRETARY OF STATE AND CHAIRMAN OF THE UNITED STATES DELEGATION, CHARTER OF THE UNITED NATIONS: REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE (1945), 137-38.[17]

The United States has brought ten cases to the Court either as an applicant or by special agreement with another State. In another eleven cases, including *Avena*, the United States has been a respondent in an action brought by another State or States.[18]

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[17] The Court is composed of fifteen judges, none of whom may have the same nationality. ICJ STATUTE, art. 3(1); *see also id.*, arts. 4, 9. "Judges are picked in their individual capacity, and are not political appointees of their respective governments." David J. Bederman et al., *International Law: A Handbook for Judges* (2003), 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76. As a result, "the judges of the ICJ are rarely politicized." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS (2001) 240.

[18] *See* International Court of Justice: List of Contentious Cases by Country, *at* http://www.icj-cij.org/icjwww/idecisions/icasesbycountry.htm#UnitedStatesofAmerica.

### 3. The *Avena* Judgment

On January 9, 2003, the Government of Mexico initiated proceedings in the International Court of Justice against the United States, alleging violations of the Vienna Convention in the cases of Appellant and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. *See* Mexico's Application Instituting Proceedings (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003).[19]

On June 20, 2003, Mexico filed a 177-page Memorial and 1300-page Annex of written testimony and documentary evidence in support of its claims. On November 3, 2003, the United States filed a 219-page Counter-Memorial and 2500-page Annex, also containing written testimony and documentary evidence in rebuttal. Both parties' submissions exhaustively addressed the factual predicate for each of the Vienna Convention violations alleged, including those in the case of Appellant, and argued all relevant points of law.

During the week of December 15, 2003, the International Court held a hearing. *Avena* Judgment, para. 11 (188A). The 18-person United States team was led by the Honorable William Howard Taft IV, Legal Advisor to the State Department, and included lawyers from the Departments of State and Justice and distinguished professors of international law and comparative criminal procedure from France and Germany.

On March 31, 2004, the International Court issued its Judgment. The *Avena* Judgment built on the Court's earlier holdings in LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27) ("*LaGrand* Judgment"), which

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[19] The parties' written and oral pleadings as well as the orders and press releases of the Court in the *Avena* case are available at http://www.icj-cij.org/icjwww/idecisions.htm.

Germany also brought on the basis of the Optional Protocol, and in which the United States also fully participated.[20] However, in *Avena*, unlike *LaGrand*, the applicant State was able to seek relief on the merits for nationals who had not yet been executed.

As a result, in *Avena*, the International Court expressly adjudicated Appellant's own rights. *First*, the International Court held that the United States had breached Article 36(1)(b) in the cases of 51 of the Mexican nationals, including Appellant, by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena* Judgment, paras. 106(1)-(2), 153(4) (244A-245A, 272A).

*Second*, the International Court held that in 49 cases, including that of Appellant, the United States had violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 (c) of that Article regarding the right of consular officers to visit their detained nationals." *Id.*, paras. 106(3), 153(5)-(6)(245A, 273A). The International Court also held that in 34 cases, but not that of Appellant, the breaches of Article 36(1)(b) also violated the United States's obligation under paragraph 1(c) "to enable Mexican consular officers to arrange for legal

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[20] In *LaGrand*, the International Court held that, *first*, Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; s*econd*, by applying procedural default rules in the circumstances of those cases, the United States had applied its own law in a manner that failed to give full effect to the rights accorded under Article 36(1) and hence violated Article 36(2); and *finally*, if the United States failed to comply with Article 36 in future cases involving German nationals who were subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand* Judgment, paras. 77, 90-91, 125.

representation of their nationals." *Id.*, paras. 106(4), 153(4), 153(7) (245A-246A, 272A, 273A).

*Finally*, as to remedies, the International Court first denied Mexico's request for annulment of the convictions and sentences. *Id*., para. 123 (255A). The Court held, however, that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. *Id.*, paras. 121-22, 153(9) (254A, 274A). The International Court explained, *first*, that the required review and reconsideration must take place as part of the "judicial process;" *second*, that procedural default doctrines could not bar the required review and reconsideration; *third*, that the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and *finally*, that the forum in which the review and reconsideration occurred must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.*, paras. 113-14, 122, 134, 138-39, 140 (249A-250A, 254A, 259A-260A, 262A-263A).

The International Court reached each of these holdings by a vote of fourteen to one. Both the United States and Mexican judges voted with the majority.

**4. Relevant Proceedings in Appellant's Case**

Officer Gary Rossi testified that he had contact with Appellant's family about three weeks before the deaths in this case. He interviewed Rocio at her brother's house in Landers, because she was afraid Appellant might come from Nevada, and try to take their children to Mexico. Rocio spoke Spanish, so her niece translated the conversation between Rossi and Rocio. (RT 1317, 1324-1325.) While officers were responding to the scene,

Rossi told them that Appellant might be there to take the children away, and that he'd had prior contact with the family. (RT 1318.)

Even at the time of trial, Officer Gordon - one of two primary law enforcement officials at the scene - was unable to say whether Appellant spoke any English. (RT 1273.) When Detective Wolf interviewed co-defendant Soria-Delagdo on the afternoon of January 25, 1996, the interview was conducted only in Spanish. (CT 382-467.) Soria-Delgado told Wolf that Appellant was going to Mexico to see his mother. (CT 391.)

The state knew that Rocio spoke only Spanish. The state knew that she feared her husband would take the children to Mexico. The state was aware that Appellant spoke Spanish, perhaps no English at all, and that his mother lived in Mexico. Further the state knew the day these events occurred that the co-defendant spoke only Spanish. Given this set of circumstances, the state was under a duty to immediately establish Appellant's nationality and comply with the requirements of the Vienna Convention. The state did not do so.

The first time there is any inkling of the involvement of the Republic of Mexico in this case came as the result of the efforts of trial counsel. On June 17, 1997, Attorney Katz filed an Ex Parte Declaration of Counsel Re: Request For Cooperation of Republic of Mexico. (CT 482-84.) Attorney Katz asked the trial court to issue an order requesting the assistance of the Republic of Mexico with travel arrangements for defense witnesses, and informing Mexico that the pending proceeding involved the death penalty. The trial court signed the order. (CT 485-87.) This filing establishes that the Mexican consulate had to rely on Appellant's counsel for the notification that Appellant, a Mexican National, was subject to capital prosecution, and that no assistance had been provided until this juncture.

In connection with the motion to modify the judgment, pursuant to

Penal Code section 190.4(e), trial counsel moved to set aside the death judgment due to the Vienna Convention violation. (CT 1116-1129.) Trial counsel submitted a letter from the Coordinator General of Protection and Consular Matters, Lt. Enrique Loaeza Tovar, which described how Appellant had been harmed by the state's failure to timely notify Appellant of his right to consular assistance. The letter described that the Consulate could have assisted Appellant, in his native language, with pre-trial and trial matters, with family contacts in connection with the trial, and other related matters. (CT 1116-1120.) The court denied the motion without commenting on the Vienna Convention issue. (RT 2599-2606.)

***ARGUMENT***

Because the United States is party to the Vienna Convention and its Optional Protocol, the *Avena* Judgment constitutes a binding adjudication of the Vienna Convention rights of Appellant and fifty other Mexican nationals.

### B. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Are Binding International Law

The *Avena* Judgment is binding on the United States, and the State of California, as a matter of international law for the simple reason that the United States agreed that it would be binding.

The jurisdiction of the International Court of Justice is based entirely on consent.[21] Under Article 36(1) of the Statute of the Court, the Court has

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[21] David J. Bederman et al., *International Law: A Handbook for Judges*, (2003) 35 STUD. IN TRANSNAT'L LEGAL POL'Y 76, 76-77. ("Every matter that comes before the ICJ does so because of the consent of the litigants. The only question is how that consent is manifested. The Court does not – and cannot – exercise a mandatory form of jurisdiction over states.").

jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." ICJ STATUTE, art. 36(1). The Optional Protocol to the Vienna Convention constitutes a compromissory clause covering just such a "class of matters specially provided for." DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS (2001) 242. The Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Optional Protocol, art. I.

> Hence, by ratifying the Optional Protocol, the United States both gained the right to sue and agreed to be subject to suit in the International Court of Justice in order to resolve disputes with other parties to the Optional Protocol regarding the "interpretation and application" of the Vienna Convention.[22] Though neither the United Nations Charter nor the ICJ Statute, both treaties to which the United States is party, provide the requisite consent, the binding character of the Court's adjudication in cases in which a State has given consent is reinforced by both those instruments. Article 59 of the ICJ Statute provides that decisions of the Court are binding on the parties to the

[22] Indeed, the United States was the first State to take advantage of that instrument, when in 1979 it sued Iran in the International Court to enforce rights, among others, under the Vienna Convention, and founded the Court's jurisdiction in part on the Optional Protocol. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24), (1980) *reprinted in* 19 I.L.M. 553.

case. And by Article 94(1) of the Charter, the United States unequivocally agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." RESTATEMENT (THIRD) FOREIGN RELATIONS (1987) § 903 cmt. g.

The rule of *pacta sunt servanda* – that parties should perform their treaty obligations in good faith – "lies at the core of the law of international agreements and is perhaps the most important principle of international law." RESTATEMENT (THIRD) FOREIGN RELATIONS (1987) § 321 cmt. a.[23] Here, the application of the rule could not be more straightforward: having agreed to submit disputes involving the Vienna

[23] *See* THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961) ("[A] treaty is only another name for a bargain[;] it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.") (emphasis in original). *See also Am. Dredging Co. v. Miller*, (1995) 510 U.S. 443, 466 (Kennedy, J., dissenting) ("Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce.").

Convention to the International Court, the United States must now abide by its adjudication of those disputes.[24]

### C. The Vienna Convention, the Optional Protocol, and the *Avena* Judgment Are Binding Federal Law

The United States Constitution places the power to make treaties in the hands of the democratically elected branches of the federal government. Article II, section 2, clause 2, provides that the President "shall have Power . . . to make Treaties." U.S. CONST. art. II, § 2, cl. 2. The President may do so, however, only "with the Advice and Consent of the Senate." *Id.* For the Senate to grant consent, "two thirds of the Senators present [must] concur." *Id.* This structure ensures that the United States takes on international treaty obligations only with the clear support of the elected representatives of the American people. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION (2d ed. 1996) 36-37.

Under the Supremacy Clause, a ratified treaty has the status of preemptive federal law, and therefore is binding on the states.[25] Hence, as

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[24] *See* ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 67 (Terry D. Gill, (2003) ed., 6th ed. ("Neither the Charter of the United Nations, nor any general rule of present-day international law, imposes on States the obligation to refer their legal disputes to the Court—but once consent has been given, the decision of the Court is final and binding and without appeal, and the States parties to the litigation are obliged to comply with that decision."); *see also La Abra Silver Mining Co. v. United States*, (1899) 175 U.S. 423, 463 ("[A]n award by a tribunal acting under the joint authority of two countries is conclusive between the governments concerned and must be executed in good faith unless there be ground to impeach the integrity of the tribunal itself.").

[25] Emphasis added, Article VI, clause 2, provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and *all Treaties made, or which shall be made*, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every (continued...)

this Court has long held, a ratified treaty is a law of the land as an act of Congress is, *whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. *.Edye v. Robertson (Head Money Cases),* (1884) 112 U.S. 580, 598-99 (emphasis added).

The treaty obligations reflected in the Vienna Convention and its Optional Protocol are entirely self-executing; they required no implementing legislation to come into force. *See Hearing Before the Senate Comm. on Foreign Rel.*, S. EXEC. REP. NO. 91-9, (1st Sess. 1969) 91st Cong. at 5 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State). As President Richard M. Nixon stated when he announced their entry into force the [Vienna] Convention and Protocol . . . and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

21 U.S.T. 77, 185.

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(...continued)
State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *See* Sandra Day O'Connor, *Federalism of Free Nations, in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (1996) 13, 18 ("The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

### D. The Court Must Ensure that California Complies with the International Obligations Imposed by the Convention

Because the Vienna Convention and its Optional Protocol are fully effective as federal law, this Court must apply *Avena* as the rule of law applicable to this state.[26]

This *Avena* judgment must be binding on this Court in order to prevent the breach of treaty that would otherwise result. As James Madison emphasized at the Constitutional Convention:

> The tendency of the States to th[e] violations [of the law of nations and of treaties] has been manifested in sundry instances. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1966), at 316. Alexander Hamilton made the same point when he said that "the peace of the whole ought not to be left at the

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[26] For example, in *Wildenhus's Case*, (1887) 120 U.S. 1, New Jersey sought to try a Belgian crewmember who was subject to a treaty allocating criminal jurisdiction over sailors on ships in American ports between the local courts and the Belgian consulate. Asserting a right under the treaty to try the crewmember, the Belgian consul sought a writ of habeas corpus. After noting that "[t]he treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere," this Court held that "[i]f it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States." 120 U.S. at 17. *Cf. Sosa v. Alvarez-Machain*, (2004) 124 S. Ct. 2739, 2767 (denying relief under Alien Tort Statute, 28 U.S.C. § 1350, in part because treaties at issue were not self-executing and thus could not "establish the relevant and applicable rule of international law").

disposal of a part," so that "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." THE FEDERALIST NO. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961), at 476.

The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal.

THE FEDERALIST NO. 22, (Alexander Hamilton) (Clinton Rossiter ed., 1961), at 150.[27]

Acting on behalf of the United States, the President, with the consent of the Senate, has agreed to abide by the *Avena* Judgment. In fact, on February 28, 2005, President Bush issued a Memorandum For the Attorney General, the subject of which was "Compliance with the Decision of the International Court of Justice in *Avena*." In that Memorandum, President Bush stated that the United States would discharge its international obligations under the *Avena* decision, "by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51Mexican nationals addressed in that decision." While Appellant believes he is entitled to relief based on the facts and arguments contained herein, he recognizes that the *Avena* decision contemplates that an

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[27] *See also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881) ("[T]he provision for judicial power over cases arising under treaties], sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect.") (statement of James Wilson).

evidentiary proceeding will be held in order to establish the facts and harm to Appellant with respect to the Vienna Convention violation.[28] Appellant anticipates that habeas corpus counsel (who is not yet appointed) will likely provide additional supporting and dispositive facts concerning this issue. By asserting his Vienna Convention claim in this appellate proceeding, during which the state does not provide any procedure for further factual development, Appellant does not waive any right to further evidentiary proceedings concerning this claim which he is entitled to pursue under the *Avena* decision.[29]

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[28] Avena, ¶131, 138, 139, 121.

[29] On May 23, 2005, the United States Supreme Court dismissed as improvidently granted a case in which the Court had earlier granted Certiorari to the question whether a Federal Court is bound by the ruling of the International Court of Justice in *Avena* (*Medellin v. Dretke* (2005) 544 U.S. __.). Because the Supreme Court dismissed the case, it did not reach the merits of *Medellin's* claims, but recognized these issues were in the litigation in State Court in Texas.

## IV

## THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases. The failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, 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* (1976) 428 U.S. 242, 251 [opinion of Stewart, Powell, and Stevens, JJ.]).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to

ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the

Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris* to be reevaluated, since the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[30]

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[30] 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, 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. § 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).

Many states have judicially instituted similar review. (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. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d

(continued...)

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death-eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in the arguments following this one. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment rights to not be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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(...continued)
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]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121).

## V

## THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. As discussed herein, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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### A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538; see *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[31]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ...." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774.) However, this Court's

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[31] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code, § 190.3, subd. (b)) must be proved beyond a reasonable doubt.

reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey, (2000)* 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. ___, 124 S. Ct. 2531, 159 L.Ed.2d 403.)

*Apprendi* considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id*. at pp. 471-472.) The high court 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 (other than a prior

conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[32] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding

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[32] Justice Scalia distinctively distilled the holding: "All facts essential to the 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 made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Id*.)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id*. at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "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." (*Blakely v. Washington, supra*, 124 S.Ct. at p. 2537, emphasis in original.)

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, and three additional states have related provisions.[33] Only

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[33] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-

(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not

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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); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; 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 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. *(State v. Ring* (Az. 2003) 65 P.3d 915.)

"susceptible to a burden-of-proof quantification"].) (See penalty instructions, Inst. 2, CT 877.)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, Penal Code section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[34] [35] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "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

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[34] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id*. at p. 460.)

[35] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

which is above and beyond the elements of the crime itself." (CT 885-886; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that the aggravating factors substantially outweigh the mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[36]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code, § 190.2, subd. (a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See, e.g.., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]."

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[36] 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, supra*, 42 Cal.3d at pp. 1276-1277; *People v. Brown, supra*, 40 Cal.3d at p. 541.)

(See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2551, (dis. opn. of Breyer, J.), emphasis in original.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code, § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541, (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus

findings that the aggravating factor or factors outweigh any mitigating factors, and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604 (quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible

aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. Further, *Blakely* makes clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, this Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, 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.' (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 263 (emphasis added).)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by Penal Code section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under

the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[37]

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely* In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The Supreme Court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington, supra*, 124 S. Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment

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[37] See Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in Ring as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[38]

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[38] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*. (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin, supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra*, 532 U.S. at p. 429.)

This finding, which was a prerequisite to the award of punitive damages, is very much like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed de novo. Although the Court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id*. at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are

(continued...)

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The answer to which is that the maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The answer to which is that the maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto, supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify its failure to require a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

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(...continued)
prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 606 (quoting with approval *Apprendi v. New Jersey*, 530 U.S. at 539 (dis. opn. of O'Connor, J.)).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California*, *supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

### B. The State and Federal Constitutions Require That The Jurors Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That The Aggravating Factors Outweigh the Mitigating Factors And ThatDeath Is The Appropriate Penalty

#### 1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an

appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments. (*In re Winship, supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra*, 430 U.S. at p. 358; *see also Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

**2. Imposition of Life or Death**

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at pp. 363-364; see *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general, and the jury in particular, the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the

decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors ... the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Ca1.3d 306 [same]; *People v. Thomas* (1977) 19 Ca1.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 [appointment of conservator]. The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," *Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 755 (quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427).)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "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.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[*I*]n *a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 (quoting *Addington v. Texas* (1979) 441 U.S. 418, 423-424 (emphasis added).) The sentencer of a person facing the death penalty is required by the Due Process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt that

not only are the factual bases for its decision true, but that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37.)

In sum, the need for reliability is especially compelling in capital

cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

### C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell*) (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme

provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida*, *supra*, 428 U.S. at p. 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has made a "true" finding as to at least one special circumstance. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code, §190.3), and may impose such a sentence even if no mitigating

evidence was presented. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4, subdivision (e), requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and 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."[39]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, Rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) In *any* capital case, *any* aggravating factor will relate 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

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[39] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

section 520 creates a legitimate expectation under state law and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments. In addition, to provide greater protection to noncapital than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

It is inevitable that one or more jurors on a given jury 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 such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, 428 U.S. at 260 – the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or 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 jury.

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### D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. (CT 877, 885-886.) The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent

with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[40]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id*. at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[41]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth

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[40] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[41] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

Amendments. "Jury unanimity … is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, 524 U.S. at p. 732; accord *Johnson v. Mississippi*, 486 U.S. at p. 584; *Gardner v. Florida*, 430 U.S. at 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[42] For example, in cases where a criminal defendant has

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[42] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo.

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been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could 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), would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the

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Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); 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(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

United States 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 are 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.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators, and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk that: (a) the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do, and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital

context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

### E. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence (see CT 872) violated appellant's right to due process of law (U.S. Const. 14th Amend.; Cal. Const. art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th and 14th Amends.; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id*. at p. 190.) However, as the other subsections of this argument demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

**F. Conclusion**

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and by failing to require unanimity regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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## VI

## THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, CALJIC No. 8.88, read in pertinent part as follows:

"It is now your duty to determine which of the two penalties, confinement in the State Prison for life without possibility of parole, or death, shall be imposed on the defendant Martin Mendoza.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

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. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating or reducing circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of the factors on each side of an emergency scale, or the arbitrary assignment of weights to any of them. Each individual juror is free to assign whatever moral, compassionate or sympathetic value each of you deems appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, each of you determines under the relevant evidence which penalty is justified and appropriate by considering the totality of the

aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each individual juror 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. However, if the aggravating circumstances do not substantially outweigh those in mitigation, you must return a verdict for confinement in the State Prison for life without parole."

(CT 885-886.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. The flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

### A. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were persuaded that the aggravating circumstances were "so substantial" in comparison with the mitigating circumstances that a sentence of death was warranted rather than a sentence of life without parole. The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates

the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id*. at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. That court held in *Arnold v. State* (Ga. 1976) 224 S.E.2d 386 that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*Id*. at p. 391; *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(*Arnold v. State*, *supra*, 224 S.E.2d at p. 392, fn. omitted.)[43]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold v. State*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid*., emphasis added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the aggravating evidence in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id*. at p. 391.)

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[43] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const,, 8th & 14th Amends.), the death judgment must be reversed.

### B. The Instructions Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment, Not Simply An Authorized Penalty

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did

not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id*. at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id*. at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different finding than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence demands that a death sentence be based on the conclusion that death is the appropriate punishment, not merely the punishment that is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; *i.e.*, it must be appropriate. To say that death must be warranted is essentially to return to

the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," *i.e.*, that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the instructions earlier use of the word "appropriate." The sentence containing the word "appropriate" did not tell the jurors they could only return a death verdict if they found it to be the appropriate punishment. Moreover, the sentence containing the word "appropriate" was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) because it was obtained by denying appellant due process of law (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and must be reversed.

### C. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[44] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*See Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v.*

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[44] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

*Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281, original emphasis.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[45]

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[45] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process (continued...)

*People v. Moore* (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the … instructions … do not incorrectly state the law …, but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id*. at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on

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(...continued)
rights under the Fourteenth Amendment. (See *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 YALE L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" … there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

**D. The Instructions Failed To Inform The Jurors That**

### Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643 ["Because the determination of penalty is essentially moral and normative … there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense. That was especially a problem in this case because the judge also informed the jury that the defense may bear a burden at the penalty phase. (RT 8348.)

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

Illinois, like California, did not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id*. at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions

were defective because they failed to apprise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

**E. Conclusion**

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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## VII

## THE INSTRUCTIONS REGARDING THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3 AND THE APPLICATION OF THESE SENTENCING FACTORS RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3, pursuant to CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (CT 872-873), and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors. (CT 885-886) These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional.

First, the application of Penal Code section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments. Third, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fourth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Fifth, the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Sixth, and finally, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to

capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be reversed.

### A. The Instruction On Penal Code Section 190.3, Subdivision (a) And Application Of That Sentencing Factor Resulted In The Arbitrary And Capricious Imposition Of The Death Penalty

Penal Code section 190.3, subdivision (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account the circumstances of the crime of which appellant was convicted and the existence of any special circumstance found to be true. In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

However, an analysis of how prosecutors actually use section 190.3, subdivision (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decisionmaking that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly

arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

As applied in California, however, section 190.3, subdivision (a), not only fails to minimize the risk of wholly arbitrary and capricious action in the death process, it affirmatively institutionalizes such a risk.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that – from case to case – reflect starkly opposite circumstances. Thus, prosecutors have argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[46] or because the defendant killed with a single execution-style wound;[47]

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[48] or because the

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[46] See, e.g., *People v. Morales*, Cal.Sup.Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera*, No. S004569, RT 160-161 (same).

[47] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-3027 (same).

[48] See, e.g.., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-969 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

defendant killed the victim without any motive at all;[49]

- because the defendant killed the victim in cold blood,[50] or because the defendant killed the victim during a savage frenzy;[51]

- because the defendant engaged in a cover-up to conceal his crime,[52] or because the defendant did not engage in a cover-up and so must have been proud of it;[53]

- because the defendant made the victim endure the terror of anticipating a violent death,[54] or because the defendant killed instantly without any warning;[55]

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[49] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[50] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

[51] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy (trial court finding).

[52] See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[53] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-3031 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[54] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S14636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

[55] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant (continued...)

- because the victim had children,[56] or because the victim had not yet had a chance to have children;[57]

- because the victim struggled prior to death,[58] or because the victim did not struggle;[59]

- because the defendant had a prior relationship with the victim,[60] or because the victim was a complete stranger to the defendant.[61]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's

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killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[56] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[57] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[58] 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).

[59] See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[60] See, e.g.., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[61] See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the circumstances-of-the-crime aggravating factor to embrace facts which cover the entire spectrum of facts inevitably present in every homicide:

- **The age of the victim** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[62]

- **The method of killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[63]

- **The motive for the killing** -- Prosecutors have argued, and

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[62] See, e.g., *People v. Deere*, No. S004722, RT 155-156 (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 (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 4715-4716 (victim was "elderly").

[63] See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an axe); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT 8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[64]

- **The time of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[65]

- **The location of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[66]

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation

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[64] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[65] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-2604 (late at night); *People v. Lucero*, No. S012568, RT 4125-4126 (middle of the day).

[66] See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.

The circumstances-of-the-crime aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, … were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright, supra*, 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

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### B. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. However, the trial court did not delete those inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (See, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration

for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation – in this case, only factor (a) was an applicable aggravating factor. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in

mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an *ad hoc* determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama* (1980) 447 U.S. 625, 637.) Reversal of appellant's death judgment is required.

### C. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable And Evenhanded Application Of The Death Penalty

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" was

relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Failing to provide appellant's jury with guidance on this point was reversible error.

### D. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

CALJIC No. 8.85 includes the use of adjectives such as "extreme" (see factors (d) and (g)) and "substantial. (See factor (g).) The inclusion of these adjectives in the instruction acts as a barrier to the jury's consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

### E. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Violated Appellant's Constitutional Rights To Meaningful Appellate Review And Equal Protection Of The Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to

meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1984) 512 U.S. 967, 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland, supra*, 486 U.S. 367, the requirement of written findings in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id*. p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id*. at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See *People v. Martin* (1986) 42 Cal.3d

437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code, § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes, supra,* 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven

require a written finding as to at least one aggravating factor relied on to impose death.[67] California's failure to require such findings renders its death penalty procedures unconstitutional.

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[67] *See* Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); 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(8)(a)-(b) (2003); 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., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); 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); 41 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., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

## VIII

## APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

The United States in one of the few nations that regularly uses the death penalty as a form of punishment. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) And, as the Supreme Court of Canada recently explained:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan … According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant

raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390, dis. opn. of Brennan, J.)

**A. International Law**

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const. art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[68] The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States*

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[68] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties*, (1991) 68 Chi.-Kent L. Rev. 571, 608 ); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty. (See Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582.

*v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284 ; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. Appellant recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487, dis. opn. of Norris, J.) Thus, appellant requests that the Court reconsider and, in the context of this case, find his death sentence violates international law.

**B. The Eighth Amendment**

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky, supra,* 492 U.S. at p. 389 dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830.) Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or

<http://www.deathpenaltyinfo.org>.)[69]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "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.'" (*Miller v. United States* (1870) 78 U.S. 268, 315, dis. opn. of Field, J., quoting l Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57, dis. opn. of Field, J.)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of

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[69] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (*See* Amnesty International's "List of Abolitionist and Retentionist Countries.")

Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus 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 supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p, 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming arguendo that capital punishment itself is 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 – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113.) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence should be set aside.

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## IX

## REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a

reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The cumulative effect of the errors relating to the penalty phase of the trial undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

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### IF THE CONVICTION PURSUANT TO ANY COUNT IS REVERSED OR THE FINDING AS TO ANY SPECIAL CIRCUMSTANCE IS VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

The jury made its decision to impose a death judgment after having convicted appellant of three counts of first degree murder, four counts of attempted murder, and use of a semi automatic weapon. They had also found the special circumstances of multiple murder to be true, along with various enhancements for the use of a weapon. If this Court sets aside the convictions on any of the counts or the findings on any of the special circumstances, the entire matter must be remanded for a new sentencing determination. (See *Silva v. Woodford*, 279 F.3d 825, 849 (9th Cir. 2002) [court found prejudice, noting that three of the four special circumstances the jurors found to be true were invalidated on appeal].)

Penal Code section 190.3 codifies the factors that a jury may consider in determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, appellant's penalty phase jury was instructed that it "shall" consider and be guided by the presence of enumerated factors, including, inter alia, "the circumstances of the crime of which the defendant was convicted." (CT 874-875.)

A reversal of any of the charges or allegations would significantly alter the landscape the jury was considering when making its determination to assess death. The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reversal of any of the counts or the vacating of any of the special circumstances. Accordingly, to

meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, appellant must be granted a new penalty trial, to enable the fact finder to consider the appropriateness of imposing death.

Moreover, in *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 to capital sentencing procedures, and concluded that specific findings the legislature makes prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. In this State, jurors have two critical facts to determine at the penalty phase of trial: 1) whether one or more of the aggravating circumstances exists, and 2) if one or more aggravating circumstances exists, whether they outweigh the mitigating circumstances. If this Court reverses or reduces any of the convictions or special findings, the delicate calculus juries must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding by the jury that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt.

Further, this Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" (See *Ring v. Arizona*, *supra*, 536 U.S. at p. 589, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483.) Accordingly, because jury findings regarding the facts supporting an increased sentence is constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors and that death is the appropriate sentence must be made when any count or special circumstance is reversed or reduced.

## CONCLUSION

Appellant's guilt and penalty judgments must be set aside.

DATED: May 27, 2005

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

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Attorneys for Appellant

**CERTIFICATE OF COUNSEL**
**(Cal. Rules of Court, rule 36(b)(2))**

I, Marianne D. Bachers, am the Senior Deputy State Public Defender assigned to represent appellant, Martin Mendoza, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is **43,529** words in length.

Dated: May 27, 2005

_____
Marianne D. Bachers
Attorney for Appellant

**DECLARATION OF SERVICE**

Re: *People v. MARTIN MENDOZA* No. S067678

I, JA KEITH TURK, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. On this day, I served true copies of the attached:

**APPELLANT'S OPENING BRIEF**

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

DAVID DELGADO
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**(For delivery to Hon. James E. Edwards)**

Each said envelope was then, on May___, 2005, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on May ___, 2005 at San Francisco, California.

_____
JA KEITH TURK