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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN DIEGO**

11 THE PEOPLE OF THE STATE OF)
CALIFORNIA,)

12)
13 Plaintiff,)

14 v.)

15 JACK HENRY LEWIS, JR.,)

16 Defendant.)
17)
18)

Case No. SCD 193558
DA No. ABP085

PRETRIAL MOTION NO.: 3

**NOTICE OF MOTION AND MOTION
TO BAR DEATH PENALTY FOR
FAILURE TO COMPLY WITH THE
EIGHTH AMENDMENT'S
NARROWING REQUIREMENT**

19 **TO: District Attorney Bonnie Dumanis and her representative, Nicole Cooper:**
20

21 **NOTICE IS HEREBY GIVEN** that on the date and time set for motions hearing in this
22 case, defendant JACK LEWIS, will move the Court for an order barring the imposition of the
23 death penalty in this case on the grounds that the 1978 death penalty statute, as written,
24 interpreted and applied, violates the Eighth Amendment to the United States Constitution and
25 its California counterpart.

26 This motion is based upon this notice, the attached memorandum of points and
27 authorities, the pleadings and documents already on file in this case, the declaration of

28 ///

1 Professor Steven F. Shatz attached as Exhibit A, and any further testimony, evidence,
2 arguments or authorities to be presented at the hearing on this motion.

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4 Dated: _____

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Respectfully Submitted,
STEVEN J. CARROLL
Public Defender

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JULIANA B. HUMPHREY
Deputy Public Defender

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Attorneys for Defendant
JACK HENRY LEWIS, JR.

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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
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11 THE PEOPLE OF THE STATE OF)
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15 JACK HENRY LEWIS, JR.)
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Case No. SCD 193558
DA No. ABP085

PRETRIAL MOTION NO.: 3

**MEMORANDUM ON POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO BAR DEATH
PENALTY FOR FAILURE TO
COMPLY WITH THE EIGHTH
AMENDMENT'S NARROWING
REQUIREMENT**

18 **I.**

19 **INTRODUCTION:**

20 **THE CONSTITUTION REQUIRES AN**
21 **OBJECTIVE, GENUINE NARROWING**
22 **OF PERSONS ELIGIBLE FOR DEATH**

23 The Eighth Amendment¹ to the United States Constitution requires that "death penalty
24 statutes be structured so as to prevent the penalty from being administered in an arbitrary
25 and unpredictable fashion." (*California v. Brown* (1987) 479 U.S. 538, citing *Gregg v.*
26 *Georgia* (1976) 428 U.S. 153 and *Furman v. Georgia* (1972) 408 U.S. 238.) If a state
27 chooses to enact a death penalty, it must "rationally distinguish between those individuals for

28 ¹ The term "Eighth Amendment" is used herein to represent a claim based upon Article I, Sec. 17 of
the California Constitution also. (Cf. *People v. Mincey* (1992) 2 Cal.4th 408, 476.)

1 whom death is an appropriate sanction and those for whom it is not." (*Spaziano v. Florida*
2 (1984) 468 U.S. 447, 460.)

3 While the *Furman* text is difficult to decipher², its central theme is clear: a state's
4 death penalty scheme cannot be arbitrary at any phase. The jury cannot arbitrarily decide to
5 execute a defendant any more than the state may arbitrarily select a defendant for exposure
6 to the penalty of death. It is the latter prohibition that is the subject of this motion.

7 What the Justices commented on, over and over again, was, on the one hand, the
8 arbitrariness with which the state created a huge "death eligible" class of defendants, and on
9 the other, the small percentage of those "death eligible" convicted murderers who were
10 actually sentenced to death. In other words, there appeared to be no funneling of cases, no
11 rational method for weeding out those defendants who should not be eligible for death from
12 those who should be eligible. Instead of providing a fair, consistent, predictable and
13 reviewable mechanism for the infliction of the ultimate punishment, Georgia's system, with its
14 rare, random, unpredictable and unreviewable death penalty process, was the legal system
15 equivalent to being "struck by lightning."

16 This is what the Justices in *Furman* said:

17 "[T]he extreme rarity with which applicable death penalty provisions are put to
18 use raises a strong inference of arbitrariness."

19 (*Furman, supra*, at 248 [Justice Douglas] quoting Goldberg & Dershowitz, *Declaring the*
20 *Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1792.)

21 In determining whether a punishment comports with human dignity, we are aided
22 also by a second principle inherent in the Clause -- that the State must not
23 arbitrarily inflict a severe punishment. This principle derives from the notion that
24 the State does not respect human dignity when, without reason, it inflicts upon
25 some people a severe punishment that it does not inflict upon others.

26 (*Id.* at 274 [Justice Brennan].)

27 [W]hen a severe punishment is inflicted "in the great majority of cases" in which it

28 ² See Defendant's Pretrial Motion No. 2, part one, for an in-depth discussion of *Furman* and progeny.

1 is legally available, there is little likelihood that the State is inflicting it arbitrarily.
2 If, however, the infliction of a severe punishment is "something different from that
3 which is generally done" in such cases (citation omitted) there is a substantial
4 likelihood that the State, contrary to the requirements of regularity and fairness
5 embodied in the Clause, is inflicting the punishment arbitrarily. This principle is
6 especially important today. There is scant danger, given the political processes
7 "in an enlightened democracy such as ours," (citation omitted.) that extremely
8 severe punishments will be widely applied. The more significant function of the
9 Clause, therefore, is to protect against the danger of their arbitrary infliction.

8 (*Id.* at 276-277 [Justice Brennan].)

9 The outstanding characteristic of our present practice of punishing criminals by
10 death is the infrequency with which we resort to it. The evidence is conclusive
11 that death is not the ordinary punishment for any crime.

12 (*Id.* at 291 [Justice Brennan].)

13 These death sentences are cruel and unusual in the same way that being struck
14 by lightning is cruel and unusual. For, of all the people convicted of ... murders in
15 1967 and 1968, many just as reprehensible as these, the petitioners are among a
16 capriciously selected random handful upon whom the sentence of death has in
17 fact been imposed. ... I simply conclude that the Eighth and Fourteenth
18 Amendments cannot tolerate the infliction of a sentence of death under legal
19 systems that permit this unique penalty to be so wantonly and so freakishly
20 imposed.

19 (*Id.* at 309-310 [Justice Stewart].)

20 [T]here is no meaningful basis for distinguishing the few cases in which [the
21 death penalty] is imposed from the many cases in which it is not,

22 (*Id.* at 313 [Justice White].)

23 *Furman's* progeny, from *Gregg* forward, spell out an undisputed constitutional
24 mandate: death penalty statutes must, by rational and objective criteria, genuinely narrow the
25 group of murderers from whom the ultimate penalty may be exacted:

26 [T]here is a required threshold below which the death penalty cannot be
27 imposed. In this context, the State must establish rational criteria that narrow the
28 decision maker's judgment as to whether the circumstances of a particular
defendant's case meet the threshold.

1 (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305; see *Arave v. Creech* (1993) 507 U.S. 463,
2 473; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465.)

3 This narrowing function must be accomplished by the legislature through defining
4 those categories of murderers eligible for the most severe penalty. Thus, in response to the
5 *Furman/Gregg* mandate, "the States have adopted various narrowing factors which limit the
6 class of offenders upon which the sentencer is authorized to impose the death penalty."
7 (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341-342.)³

8 To survive constitutional challenge, the narrowing factors must not simply *appear* to
9 narrow the class eligible for the death penalty, or narrow it "in theory." The state's statute
10 must in fact **genuinely narrow** the class eligible for the death penalty.

11 To avoid this constitutional flaw [of arbitrary and capricious sentencing], an
12 aggravating circumstance must genuinely narrow the class of persons eligible for
13 the death penalty and must reasonably justify the imposition of a more severe
14 sentence on the defendant compared to others found guilty of murder. ... Our
15 cases indicate, then that statutory aggravating circumstances play a
16 constitutionally necessary function at the stage of legislative definition: *they*
circumscribe the class of persons eligible for the death penalty.

17 (*Zant v. Stephens* (1983) 462 U.S. 862, 877-878.) (Emphasis added.)

18 The requirement that the jury find at least one objectively-defined narrowing factor
19 before moving to the next step (the actual consideration of life v. death) satisfies the
20 *Furman/Gregg* concerns by channeling the jury's discretion. (*Blystone v. Pennsylvania* (1990)
21 494 U.S. 299, 306; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 245.)⁴

24 ³ These narrowing factors which a jury must find to make a murderer death-eligible are often
25 denominated "aggravating circumstances" or "aggravating factors" in other states. (*See People v.*
26 *Bacigalupo, supra*, at 468.) To avoid confusion with California's "aggravating factors" (Pen. Code
§190.3), they will be referred to throughout as "narrowing factors."

27 ⁴ A statutory scheme which failed to "genuinely narrow" the class of murderers who were death
28 eligible, would not only violate the Eighth Amendment, but would also violate due process because it
would leave to the complete discretion of the prosecutor to choose the few defendants as to whom the
death penalty would be sought. As the Supreme Court has explained:

1 An analysis of the evolution of the California death penalty scheme reveals that,
2 despite its appearance, and even its originally sincere effort, our state's statute does not
3 come close to meeting the *Furman/Gregg* standard for narrowing of death-eligible
4 defendants. In truth, history shows that since 1978, California's law has been on one giant
5 slide back into the pre-*Furman* ooze of unconstitutionality.

6 II.

7 **CALIFORNIA LAW HAS ABANDONED**
8 **ANY ATTEMPT TO NARROW THE CLASS OF**
9 **FIRST DEGREE MURDERERS ELIGIBLE FOR DEATH**

10 From 1874 until the Supreme Court's decision in *Furman*, California jurors had
11 complete discretion in imposing the death penalty in all cases of first degree murder. In
12 1973, just after *Furman*, the California legislature adopted a mandatory death penalty to be
13 applied upon proof of one of five special circumstances. (Stats. 1973, ch. 719, §§ 1-5, pp.
14 1297-1300.) However, because of its mandatory nature, this statute was held
15 unconstitutional in *Rockwell v. Superior Court* (1976) 18 Cal.3d 420.⁵

16 In response, when the California legislature again reestablished the death penalty in
17 1977, it returned discretion to the jury in applying the death penalty but attempted to limit that
18 discretion by requiring that one of twelve "special circumstances" be found beyond a
19 reasonable doubt to make a murderer "death-eligible." (Stats. 1977, ch. 316, pp. 1255-1266.)

20 Where the legislature fails to provide ... minimal guidelines, a criminal statute may permit
21 "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their
22 personal predilections.

23 (*Kolender v. Lawson* (1983) 461 U.S. 352, 358, quoting *Smith v. Goguen* (1974) 415 U.S. 566, 575
24 [emphasis added].) By contrast, if prosecutorial discretion is limited by constitutional narrowing
25 factors, exercise of that discretion will not raise due process concerns:

26 [O]ne sentenced to death under a properly channeled death penalty scheme cannot prove
27 a constitutional violation by showing that other persons whose crimes were superficially
28 similar did not receive the death penalty. The same reasoning applies to the prosecutor's
29 decision to pursue or withhold capital charges at the outset.

30 (*People v. Keenan* (1988) 46 Cal.3d 478, 506, cert. den. (1989) 490 U.S. 1012 [citation omitted and
31 emphasis added].)

32 ⁵ See generally *Woodson v. North Carolina* (1976) 428 U.S. 280; *Sumner v. Shuman* (1987) 483 U.S.
33 66. The Supreme Court has consistently held that the constitution demands individualized sentencing
34 procedures; thus, any mandatory death penalty law, no matter how circumscribed, is unconstitutional.

1 Under the new statute, first degree murder was "punishable by life imprisonment except for
2 extraordinary cases in which special circumstances are present." (*Owen v. Superior Court*
3 (1979) 88 Cal.App.3d 757, 760, quoted with approval in *People v. Green* (1980) 27 Cal.3d 1,
4 48.)

5 The heart of that statute was the concept of 'special circumstances.' The jury's
6 discretion to impose the death penalty was strictly limited to those cases of first
7 degree murder presenting one or more of several enumerated special
8 circumstances; in all other cases the murder, no matter how willful, deliberate
and premeditated, was a non-capital offense.

9 (*Id.* at 49.) In short, "special circumstances" were intended to constitutionally define and limit
10 death eligibility in this state:

11 At the very least, therefore, the Legislature must have intended that each special
12 circumstance provide a rational basis for distinguishing between those murderers
13 who deserve to be considered for the death penalty and those who do not.

14 (*Id.* at 61.)

15 Whether the special circumstances in the 1977 statute in fact performed the
16 constitutionally-required narrowing function was never specifically decided by the courts. In
17 finding the 1977 law constitutional, the United States Supreme Court *presumed* that the
18 special circumstances narrowed the class of those eligible for the death penalty⁶, but left
19 open the possibility that additional evidence might be presented to show that the law did not
20 comply with the *Furman/Gregg* narrowing mandate. (*Pulley v. Harris* (1984) 465 U.S. 37, 53-
21 54.)⁷ However, before a thorough constitutional analysis of the existing "special
22 circumstances" scheme could take place, the proverbial floodgate was opened.

23 The 1977 law was quickly superseded in 1978 by the enactment of Proposition 7 (the
24 "Briggs Initiative"). According to its author, the initiative "would give Californians the toughest
25

26 ⁶ The Court said: "By requiring the jury to find at least one special circumstance beyond a reasonable
27 doubt, the statute limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v.*
Harris (1984) 465 U.S. 37, 53.)

28 ⁷ The California Supreme Court also had left open this constitutional question. (See *People v. Green*,
supra, 27 Cal.3d at p. 49.)

1 death-penalty law in the country." (California Journal Ballot Proposition Analysis, 9 Calif. J.
2 [Special Section, November 1978] p. 5.) The intent of the voters, as clearly expressed by the
3 authors of the ballot proposition arguments, was absolutely unconstitutional: to make the
4 death penalty applicable to **ALL** murderers.

5 "And, if you were to be killed on your way home tonight simply because the
6 murderer was high on dope and wanted the thrill, the criminal would not receive
7 the death penalty. Why? Because the Legislature's weak death penalty law
8 does not apply to every murderer. Proposition 7 would."
(1978 Voter's Pamphlet, p. 34.)⁸

9 The Briggs Initiative sought to make every murderer "death eligible" by drastically
10 expanding the number of special circumstances from 12 to 26. Later, three additional special
11 circumstances, (murder of a peace officer, mayhem, and rape by foreign object) were added
12 by Propositions 114 and 115 in 1990. (See *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978,
13 985.) Three more special circumstances (carjacking, killing a juror, and drive-by shooting)
14 were added by Propositions 195 and 196 in 1996. At the time of the instant offense and
15 since the passage of Proposition 21, there are now 33 "special circumstances."⁹

16 Although it has never directly addressed the historical development of this incredibly
17 expanding law, the California Supreme Court has continued to *assume* that California's
18 "special circumstances" scheme continues "to channel jury discretion by narrowing the class
19 of defendants who are eligible for the death penalty." (*People v. Visciotti* (1992) 2 Cal.4th 1,
20 74; accord, *People v. Bacigalupo*, supra, 6 Cal.4th at p. 467.)

21 Under our death penalty law, therefore, the section 190.2 'special circumstances'
22 perform the same constitutionally required 'narrowing' function as the

23
24 ⁸ The goal of the voters could not be more plainly stated or more plainly unconstitutional, a fact
25 glaringly absent from any discussion of this law – despite the fact that the Supreme Court has
26 repeatedly held that election ballot arguments are entitled to great weight in interpreting statutes.
(*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 740 fn. 14; *Long Beach City Employees Assn. v. City
of Long Beach* (1986) 41 Cal.3d 937, 943 fn. 5.)

27 ⁹ One of the 33 special circumstances, while remaining in the statute – PC§190.2(a)(14): "especially
28 heinous, atrocious, or cruel" – was invalidated in *People v. Superior Court (Engert)* (1982) 31 Cal.3d
797; See also, *Godfrey v. Georgia* (1980) 446 U.S. 420 (Supreme Court held that "outrageously or
wantonily vile, horrible or inhuman" did not provide any restraint against the arbitrary and capricious
application of the death penalty. (*Id.* at 428-429.))

1 'aggravating circumstances' or 'aggravating factors' that some of the other states
2 use in their capital sentencing statutes.

3 (*People v. Bacigalupo, supra*, at 468.)

4 More recently, in *People v. Sanchez* (1995) 12 Cal.4th 1, the Supreme Court
5 addressed the narrowing issue in the very context raised here. The defendant in *Sanchez*
6 raised the narrowing issue by offering proof of empirical, case-related data¹⁰ to the court
7 which supported the proposition that California's so-called "special circumstances" scheme
8 allowed nearly all defendants convicted of first degree murder to be eligible for the death
9 penalty in violation of the Constitution. Previous challenges had been turned away for lack of
10 such data: "[D]efendant has not demonstrated on this record, or through sources of which we
11 might take judicial notice, that his claims are empirically accurate, or that, if they were correct,
12 this would require the invalidation of the death penalty law." (*People v. Crittendon* (1994) 9
13 Cal. 4th 83, 155, quoting *People v. Wader* (1993) 5 Cal.4th 610, 669.)

14 The California Supreme Court made surprisingly quick work of this important and
15 complex issue with the following statement:

16 We have repeatedly considered and rejected this identical claim beginning with
17 our decision in *People v. Rodriguez* (1986) 42 Cal. 3d 730, 770-779. (See *People*
18 *v. Crittenden* (1994) 9 Cal. 4th 83, 154-156.) Moreover, in *Tuilaepa v. California,*
19 *supra*, and in a number of previous cases, the high court has recognized that "the
20 proper degree of definition" of death-eligibility factors "is not susceptible of
21 mathematical precision"; the court has confirmed that our death penalty law
22 avoids constitutional impediments because it is not unnecessarily vague, it
23 suitably narrows the class of death-eligible persons, and provides for an
24 individualized penalty determination. (*Tuilaepa v. California, supra*, 512 U.S. at
25 pp. - [129 L. Ed. at pp. 761-764] and cases cited.) Defendant's argument fails
26 to convince us to revisit the issue. (*Ashmus, supra*, 54 Cal. 3d at pp. 1009-1010.)

25 (*People v. Sanchez* (1995) 12 Cal.4th 1, 60-61.)

27
28 ¹⁰ Sanchez relied upon the first study of murder cases accomplished by Professor Steven Shatz later reported in S. Shatz & N. Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U.L.Rev. 1283, 1326-1339 (December 1997).

1 The trouble with the Supreme Court's terse analysis is that the cases it cites in support
2 of its dismissal of Sanchez' constitutional challenge do not support its holding. As stated
3 above, *Crittenden* rejected the "narrowing" argument for lack of specific data – data that was
4 presented in *Sanchez*. (*People v. Crittenden*, supra, at 155.) In *People v. Rodriguez* (1986)
5 42 Cal. 3d 730, the appellant did not raise this particular constitutional challenge. Likewise,
6 in *Tuilaepa v. California*, the appellant raised issues regarding the constitutionality of certain
7 **§190.3 factors without raising constitutional questions regarding §190.2.** (*Tuilaepa v.*
8 *California*, supra, at 975.) Likewise, in *Ashmus*, there is no discussion of the narrowing
9 requirement of *Furman*. The Court describes the appellant's claim as follows: the "1978
10 death penalty law is facially invalid under the United States and California Constitutions, and
11 hence that the judgment of death entered pursuant thereto is unsupported as a matter of
12 law." The court then "follows" *Rodriguez* and summarily denies the claim. (*People v.*
13 *Ashmus* (1991) 54 Cal. 3d 932, 1009-1010.)

14 In contrast, the California Supreme Court has, on several occasions, addressed the
15 constitutionality of particular individual special circumstances.¹¹ However, neither our court,
16 nor the United States Supreme Court, has addressed whether the California scheme as a
17 whole complies with the *Furman/Gregg* narrowing mandate.

18 For example, what *Tuilaepa* really involved was a review of companion cases, each of
19 which objected to three factors found in §190.3 for Eighth Amendment violations based upon
20 vagueness: factors (a) "circumstances of the crime"; (b) defendant's prior criminal activity";
21 and (i) "age of the defendant at the time of the crime." (*Tuilaepa v. California* (1994) 512 U.S.
22 967, 975-977.) As stated above, the court took great pains to differentiate the "eligibility"
23 decision under §190.2 – in *Tuilaepa*'s case, felony murder – from the "selection" process
24 under §190.3. "Petitioners do not argue that at the special circumstances found in their
25 cases were insufficient, so we do not address that part of California's scheme save to

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27 ¹¹ See, e.g., *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797 (holding unconstitutional
28 subsection (a)(14) ["heinous, atrocious, or cruel"]); *People v. Coleman* (1988) 46 Cal.3d 749, cert.
den. (1989) 489 U.S. 1100 [103 L.Ed.2d 943, 109 S.Ct. 1578] (upholding subdivision (a)(17) [felony-
murder]); *People v. Edelbacher* (1989) 47 Cal.3d 983 (upholding subdivision (a)(15) ["lying in wait"]);
People v. Raley, supra, 2 Cal.4th 870 (upholding (a)(18) ["torture"]).

1 describe its relation to the selection phase.” (*Tuilaepa v. California, supra*, at 975.) The court
2 went on to affirm the death sentences finding that none of the challenged sentencing factors
3 violated the Constitution.

4 In his dissent in *Tuilaepa*, Justice Blackmun notes the limitations of the majority’s
5 decision:

6 Of particular significance, the Court’s consideration of a small slice of one
7 component of the California scheme says nothing about the interaction of the
8 various components -- the statutory definition of first-degree murder, the special
9 circumstances, the relevant factors, the statutorily required weighing of
10 aggravating and mitigating factors, and the availability of judicial review, but not
11 appellate proportionality review -- and whether their end result satisfies the
12 Eighth Amendment’s commands. **The Court’s treatment today of the relevant
13 factors as "selection factors" alone rests on the assumption, not tested,
14 that the special circumstances perform all of the constitutionally required
15 narrowing for eligibility. Should that assumption prove false, it would
16 further undermine the Court’s approval today of these relevant factors.**

15 (*Tuilaepa v. California, supra*, at 994-995, dis. opn.) (Emphasis added.)

16 Justice Blackmun emphasized that, despite its holding, the United States Supreme
17 Court has *never* given California’s system "a clean bill of health:"

18 [T]he Court’s opinion says nothing about the constitutional adequacy of
19 California’s **eligibility** process, which subjects a defendant to the death penalty if
20 he is convicted of first-degree murder and the jury finds the existence of one
21 "special circumstance." By creating nearly 20 such special circumstances,
22 California creates an **extraordinarily large death pool**. *Because petitioners
23 mount no challenge to these circumstances, the Court is not called on to
24 determine that they collectively perform sufficient, meaningful narrowing.*

24 (*Id.* at 994-995 [footnote omitted]; *see also, Id.* at 984, Stevens, J. concurring in the
25 judgment.) (Emphasis added.)

26 If anything, Justice Blackman was conservative in his description of California’s death
27 penalty scheme by counting “felony murder” as only one special circumstance instead of the
28 13 they now represent. And since the time of Justice Blackmun’s observations, California’s

1 “extraordinarily large death pool” has only grown deeper and wider. By original design and
2 continued additions, California’s “special circumstances” system does nothing to narrow the
3 numbers of first degree murderers eligible for the death penalty – a clear violation of the
4 principles of *Furman* and its progeny.

5 **A. Penal Code Section 190.2 on its Face Fails to Narrow The Class of**
6 **Death Eligible Murderers**

7 In enacting the 1978 version of the present California Penal Code section 190.2, the
8 voters came close to achieving their stated purposes: they gave California one of the
9 broadest -- probably the broadest -- death penalty statutes in the country¹² and assured that
10 a substantial majority of first degree murderers (and a majority of all murderers) would be
11 death-eligible. Because of the substantial overlap between the special circumstances listed
12 in §190.2 and the factors listed in Penal Code §189 (definition of first and second degree
13 murder), most first degree murders are “death eligible.” Further, the sweeping nature of §189
14 makes most murders able to be charged as first degree murders. Combining the effects of
15 §190.2 with §189, and most first degree murderers are [unconstitutionally] “death eligible.”

16 In general, §189 creates three categories of murders which are first degree murders:
17 murders committed by one of **seven listed means** [destructive device or explosive, weapon
18 of mass destruction, knowing use of armor/metal penetrating ammunition, poison, lying in
19 wait, torture, and “drive-by”]; **killings committed during the perpetration of one of thirteen**
20 **felonies** [arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking,
21 torture, sodomy, lewd act on a child, oral copulation, and penetration with a foreign object];
22 and murders committed with **premeditation and deliberation**. The overlap between the
23
24

25 ¹² Overall comparisons of death penalty statutes between states are necessarily imprecise, because
26 of the different combinations of narrowing circumstances in the various statutes, because of
27 differences in statutory language used to identify the particular circumstances, and because of
28 differences in courts' interpretation of the circumstances. Nevertheless, the sheer number of special
circumstances, the breadth of definition or interpretation of the various circumstances, the frequency
of occurrence of the circumstances in actual murder cases, and the existence of certain collateral
doctrines, (e.g., that the various felony-murder special circumstances apply even to unintentional and
unforeseeable killings) sets California apart from all other states.

1 special circumstances listed in §190.2 and the three groups of factors listed in §189 varies
2 according to whether the murder is intentional or unintentional.

3 According to Professor Shatz' Declaration, in 2005 there exist only seven fact
4 situations where a defendant could theoretically be found guilty of first degree murder and *not*
5 be "death-eligible:"

- 6 1. the murder was by means of a destructive device or explosive that was
7 neither planted, hidden or concealed in any place area, dwelling building or
8 structure, nor mailed or delivered or attempted or caused to be mailed or
9 delivered;
- 10 2. the murder was by means of ammunition designed primarily to penetrate
11 metal or armor;
- 12 3. the murder was unintentional and by poison;
- 13 4. the murder was unintentional and by lying in wait;
- 14 5. the murder was unintentional and by torture;
- 15 6. the murder was premeditated and not committed
 - 16 (a) against a listed victim (e.g., peace officer, fire fighter, witness),
 - 17 (b) with a listed motive (financial gain, escape from custody or avoidance
18 or arrest, racial or ethnic bias),
 - 19 (c) while the defendant was lying in wait or by any other listed means
20 (poison, torture, destructive or explosive device),
 - 21 (d) while the defendant was engaged in the commission or attempted
22 commission of a listed felony, or ,
 - 23 (e) by a defendant previously or contemporaneously convicted of murder;
- 24 7. the defendant was not the actual killer and did not act with at least reckless
25 indifference as a major participant in a special circumstances felony.¹³

26 It does not require complex analysis to conclude that the seven "theoretical" cases of
27 first degree murder which are not death-eligible are at best rare and unlikely scenarios, cases
28 of first degree murder that do not exist in the real world. This list vividly illustrates the point
that practically all first degree murders could be charged as capital cases because one or

¹³ Declaration of Professor Steven F. Shatz at p. 4.

1 more Penal Code §190.2 “special circumstances” would apply and thus the statute fails to
2 narrow the death-eligible class of first degree murderers.

3 For example, in cases of *intentional* killings, five of the seven "means" listed in §189
4 (murders by destructive device or explosive, poison, torture, lying in wait and drive-by) are
5 also enumerated special circumstances. (See Pen. Code §190.2, subds. (a)(4), (a)(6),
6 (a)(15), (a)(18), (a)(19), and a(21).)¹⁴ It is likely that the remaining two “means” which do not
7 intersect with §189 – use of a weapon of mass destruction or by armor piercing ammunition –
8 would not otherwise be death-eligible under several other special circumstances (e.g.,
9 multiple murder where a WMD was used, or murder of a law enforcement officer using armor
10 piercing ammunition. Pen. Code §190.2, subds. (a)(3) and (a)(7) and (8).) In addition, all
11 thirteen felonies listed in §189 are also special circumstances. (See Pen. Code §190.2,
12 subds. (a)(17)(A)-(L), (a)(18).)

13 Other cases of *intentional* first degree murders listed by Professor Shatz¹⁵ which do
14 not expressly qualifying for the death penalty are those where the first degree murder is
15 established by proof of premeditation and deliberation *and nothing else* – a highly unlikely
16 scenario given the fact that some of these murders are capital murders because the
17 defendant committed another murder (Pen. Code §190.2, subds. (a)(2), (a)(3)), the defendant
18 acted with a particular motive (Pen. Code §190.2, subds. (a)(1), (a)(5), (a)(16)) or the
19 defendant killed a particular victim (Pen. Code §190.2, subds. (a)(7) - (a)(13)). Many, many
20 others qualify as capital murders because they are committed during an enumerated felony
21 (Pen. Code §190.2, subds. (a)(17)(A)-(L)). Virtually all of the remaining premeditated
22 murders also would be capital murders because, by definition, most premeditated murders
23 are done while the defendant is “lying in wait.” (Pen.Code §190.2, subd. (a)(15).)¹⁶

24 _____
25 ¹⁴ There are some slight differences in wording having no substantive effect.

26 ¹⁵ Declaration of Professor Steven F. Shatz at p. 4 -- number (6), (a) through (e).

27 ¹⁶ While every state includes lying in wait as a theory of premeditation, California is one of only four
28 states that include lying in wait as either a special circumstance or a factor in aggravation. Two of the
states, Montana and Colorado, require the killing occur while the defendant is lying in wait. (*State v.*
Fitzpatrick (1980) 186 Mont. 187, 260-261; *People v. Dunlap*, (1999) 975 P.2d 723, 751-52.) The

1 Historically, lying in wait is established if the defendant: (1) concealed his purpose to
2 kill the victim, (2) watched and waited for an opportune time to act and (3) immediately
3 thereafter launched a surprise attack on the victim from a position of advantage. (*People v.*
4 *Morales* (1989) 48 Cal.3d 527, 557, cert. den. (1989) 493 U.S. 984.) The second element –
5 watching and waiting – adds nothing to premeditation and deliberation since the duration of
6 the watching and waiting need only be "such as to show a state of mind equivalent to
7 premeditation or deliberation." (*People v. Edelbacher, supra*, 47 Cal.3d at 1021 [emphasis
8 omitted].) As for the other two elements, it will be a rare premeditated murder -- i.e., "as a
9 result of careful thought and weighing of considerations . . . carried on coolly and steadily,
10 [especially] according to a preconceived design" (*People v. Bender, supra*, 27 Cal.2d at p.
11 183) – where the defendant reveals his purpose in advance or fails to try to take the victim
12 from a position of advantage. As Justice Mosk succinctly stated:

13 [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all
14 intentional killings. Almost always the perpetrator waits, watches, and conceals his
15 true purpose and intent before attacking his victim; almost never does he happen on
16 his victim and immediately mount his attack with a declaration of his bloody aim.
17 (*People v. Morales, supra* at 575 [dis. opn. of Mosk, J.]; see also *People v. Ceja* (1993) 4
18 Cal.4th 1134, 1147 [conc. opn. of Kennard, J.]

18 The 1978 Death Penalty Initiative "lying in wait" special circumstance read as follows:
19 "The defendant intentionally killed the victim while lying in wait." (Penal Code §190.2 (a)(15).)
20 The court in *People v. Domino* (1982) 129 Cal.App.3d 1000, 1012, was asked to address the
21 "narrowing" issue raised by the two nearly identical code sections which did not seem to
22 distinguish between defendants guilty of first degree murder and those eligible for the death
23 penalty. The Court concluded that the category of murders committed "while" lying in wait
24 (§190.2) was narrower than those committed "by means of" (§189) lying in wait. *Domino*
25 found that the killing "must take place during the period of concealment and watchful waiting,
26 or the lethal acts must begin at and flow continuously from the moment concealment and
27

28 third, Indiana, requires actual physical concealment for the lying in wait aggravant. (*Davis v. State*
(Ind. 1985) 477 N.E.2d 889, 895-97, Ind. Code Ann. 35-50-2-9(A)(3).)

1 watchful waiting ends [or...], the circumstances calling for the ultimate penalty do not exist.
2 (*Id.*)

3 Even though in *People v. Edelbacher* (1989) 47 Cal.3d 983,1022, the California
4 Supreme Court expressed doubts about the validity of this distinction, and in *People v.*
5 *Morales* (1989) 48 Cal.3d 527, 558, expressly “declined to decide” whether *Domino* was
6 correct, the Court increasingly came to rely upon the temporal distinction without such
7 qualification.

8 *Morales*, however, was the beginning not the end of efforts to define and distinguish
9 California’s special circumstance lying in wait, particularly after later decisions from the
10 Supreme Court seemed to broaden the application of lying in wait. *Morales* itself concluded
11 that no actual concealment was required (*Morales, supra*, 48 Cal.3d at 554; *People v.*
12 *Webster* (1991) 54 Cal.3d 411, 448.) In later cases, the Court found that the “substantial”
13 watching and waiting period need only be a few minutes (*People v. Edwards* (1991) 54
14 Cal.3d. 787, 825-26); that the defendant need not strike his blow from the place of
15 concealment. (*People v. Hardy* (1992) 2 Cal.4th 86, 164); that the defendant need not
16 actually watch the victim as long as he was “alertly watchful” of her arrival. (*People v. Sims*
17 (1993) 5 Cal.4th 405, 433.)

18 This Court has found the victim could be “surprised” within the meaning of lying in wait
19 even though she was arguing with the defendant when the killing occurred. (*Ceja, supra*, at
20 1142-1145.) And the killer could still “surprise” if he was behind the victim, or if he shouted
21 at the victims to get their attention, or he could openly approach the victim as long as his
22 purpose was concealed. (*People v. Edwards, supra*, at 825; *People v. Webster, supra*, at
23 448.)

24 The killer could even announce his purpose if the announcement came close in time to
25 the killing. In *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, the Supreme Court held
26 that the jury could reasonably have found the lying in wait special circumstance proven
27 beyond a reasonable doubt in a case where the defendant held a knife to the victim who was
28 unquestionably aware of his presence and said “why don’t I just kill you right now.”

1 Justice Kennard discussed the implications of this Court's decisions broadening the
2 application of lying in wait:

3 Unlike first degree murder perpetrated by lying in wait, the lying in wait special
4 circumstance **must provide a meaningful basis for distinguishing capital and**
5 **noncapital cases, so that the death penalty will not be imposed in an arbitrary**
6 **or irrational manner.** [Citation omitted.] Recent decisions of this court have given
7 expansive definitions to the term "lying in wait," while drawing little distinction
8 between "lying in wait" as a form of first degree murder and the lying in wait special
9 circumstance, which subjects a defendant to the death penalty.... I have a growing
concern ... that these decisions may have undermined the critical narrowing function
of lying in wait special circumstance[.] (Emphasis added.)

10 (*People v. Ceja, supra*, 4 Cal.4th at 1147, see also *People v. Hillhouse, supra*, 27 Cal.4th. at
11 513, conc. opn. Kennard J.; *Id.* at pp. 513-515, conc. and diss. opn. Moreno, J.)

12 That "critical narrowing function" was completely obliterated by the passage of
13 Proposition 18 in 2000. Before the voters passed this proposition, there was a difference,
14 albeit "thin," between the special circumstance "lying in wait" allegation and requirements
15 under §189. Now there is none. Proposition 18 specifically eliminated the distinction between
16 §189 and §190.2:

17 This measure amends state law so that a case of first degree murder is eligible
18 for a finding of a special circumstance if the murderer intentionally killed the
19 victim "by means of lying in wait." In so doing, this measure replaces the current
20 language establishing a special circumstance for murders committed "while lying
21 in wait." This change would permit the finding of a special circumstance not only
22 in a case in which a murder occurred immediately upon a confrontation between
23 the murderer and the victim, but also in a case in which the murderer waited for
the victim, captured the victim, transported the victim to another location, and
then committed the murder.

24 California Legislative Analyst, Proposition 18 proposal (2000). The change to Penal Code
25 §190.2(a)(15) literally changed the statute to mirror the text and interpretation of §189: "The
26 defendant intentionally killed the victim *by means of* lying in wait."

27 ///

28 ///

1 In sum, while there will be occasional premeditated murders not done with any of the
2 other listed means or during the listed felonies¹⁷, it is undeniable that the overwhelming
3 majority of intentional first degree murderers, particularly after the expansion of the “lying in
4 wait” special circumstance, are death-eligible.

5 The situation is similar with regard to *unintentional* first degree murders. Since an
6 unintentional killing cannot be done with premeditation and deliberation, virtually all
7 unintentional first degree murders qualify as such because of the first degree felony-murder
8 rule; and, even an *unintentional* killing during one of the listed felonies makes the actual killer
9 death-eligible. While there are occasional unintentional first degree murders based on the
10 listed means¹⁸ or based on vicarious liability for a felony-murder¹⁹ -- neither of which
11 situations invokes the death penalty -- such prosecutions are rare in comparison with ordinary
12 felony-murders.

13 It is apparent not only that, definitionally, most first degree murders are capital
14 murders, but also that most murders in California are first degree murders²⁰. Most murders
15 are first degree murders primarily because of the broad interpretation of lying in wait
16 (discussed above) and because of the felony-murder rule. The expansive sweep of the
17 felony-murder rule is a product of three factors. First, the felony-murder rule applies to the
18

19
20 ¹⁷ See, e.g., *People v. Beltran* (1989) 210 Cal.App.3d 1295 (defendant's decision to kill apparently
21 made after victim already being held at gunpoint).

22 ¹⁸ See, e.g., *People v. Laws* (1993) 12 Cal.App.4th 786, 795-796 (defendant lay in wait to assault the
23 victim and killed her by accident). However, some such unintentional killings can make the defendant
24 death eligible. In *People v. Morse* (1992) 2 Cal.App.4th 620, 652, 654-655, after the defendant was
25 arrested for possession of an anti-personnel bomb, two police officers were killed attempting to
26 dismantle the bomb. Although the court overturned a first degree murder conviction based on the
27 felony-murder rule (since reckless possession of bomb is not one of the listed felonies), it
28 acknowledged that defendant could have been convicted of first degree murder on an implied malice
theory for killing with a bomb. Defendant would then have been death-eligible because of the multiple
murder. (See Pen. Code § 190.2(a)(3).)

¹⁹ See, e.g., *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1969-1970.

²⁰ The constitutionally required narrowing function might be served by a sufficiently narrow definition
of the capital offense, but this is not the California scheme. (*People v. Bacigalupo, supra*, 6 Cal.4th at
pp. 465-466, 468.)

1 most common felonies resulting in death, particularly robbery and burglary²¹, crimes which
2 are defined exceedingly broadly by statute and court decision. With regard to robbery, the
3 courts have given the broadest interpretation to the "force or fear" element²² and the
4 "immediate presence" element²³. With regard to burglary, California makes nearly any entry –
5 even “entry” only by a tool;²⁴ or entry followed by felonious intent and subsequent entry into a
6 room within the residence;²⁵ or entry with the intent to commit *any* felony or theft²⁶ -- a
7 burglary. (Pen. Code §459.)²⁷ Second, the felony-murder rule applies to killings occurring
8 even after completion of the felony, if the killing occurs during an escape²⁸ or as a "natural
9 and probable consequence" of the felony²⁹. Third, the felony-murder rule is not limited in its
10 application by normal rules of causation³⁰ and applies to altogether accidental and
11 unforeseeable deaths:

14 ²¹ Among all of the other death penalty states, eleven do not make felony-murder robbery a narrowing
15 circumstance, and eleven do not make felony-murder burglary a narrowing circumstance, and several
16 others only apply the narrowing circumstance when the killing is intentional. (See Colorado Revised
17 Stats. § 16-11-103(5)(g); Texas Pen. Code § 19.03(a)(2); and Wyoming Stats. 6-2-102(h)(xii).)

17 ²² See *People v. Mungia* (1991) 234 Cal.App.3d 1703 (forceful pursesnatch).

18 ²³ See *People v. Webster* (1991) 54 Cal.3d 411, 440-441, cert. den. (1992) 503 U.S. 1009 (property
19 taken was one-quarter of a mile away from victim).

20 ²⁴ See *People v. Davis*, 18 Cal. 4th 712 (1998) (“We agree that a burglary may be committed by using
21 an instrument to enter a building--whether that instrument is used solely to effect entry, or to
22 accomplish the intended larceny or felony as well. Thus, using a tire iron to pry open a door, using a
23 tool to create a hole in a store wall, or using an auger to bore a hole in a corn crib is a sufficient entry
24 to support a conviction of burglary.” *People v. Davis*, 18 Cal. 4th 712, 717,718.).

25 ²⁵ See *People v. Sparks* (2002) 28 Cal. 4th 71 (defendant may form intent to commit a felony after
26 entering a residence but before entering a specific room).

27 ²⁶ See *People v. Salemme* (1992) 2 Cal.App.4th 775 (entry to sell fraudulent securities is a burglary).

28 ²⁷ It does not appear that any of the other twenty-four states that list burglary as a narrowing
29 circumstance would apply it to as many situations.

30 ²⁸ See *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165.

²⁹ See *People v. Birden* (1986) 179 Cal.App.3d 1020, 1024-1025.

³⁰ See *People v. Johnson* (1992) 5 Cal.App.4th 552, 561.

1 [F]irst degree felony murder encompasses a far wider range of individual
2 culpability than deliberate and premeditated murder. It includes not only the
3 latter, but also a variety of unintended homicides resulting from reckless
4 behavior, or ordinary negligence, or pure accident; it embraces both calculated
5 conduct and acts committed in panic or rage, or under the dominion of mental
6 illness, drugs, or alcohol; and it condemns alike consequences that are highly
7 probable, conceivably possible, or wholly unforeseeable.

7 (*People v. Dillon* (1983) 34 Cal.3d 441, 477.)

8 **B. Penal Code Section 190.2 in Practice Does Not Narrow The Class of**
9 **Death Eligible Murders**

10 The breadth of §190.2 is more than just theoretical. The results from Professor
11 Shatz's studies confirm what is apparent from the face of the statute: in practice, §190.2
12 performs no genuine narrowing function³¹.

13 California's statutory scheme violates the Eighth Amendment in practice because it
14 fails adequately to narrow the class of offenders eligible for the death penalty. This failure,
15 reflected in the data set forth in Professor Shatz's declaration, manifests itself in two ways.
16 First, there is a nearly complete overlap between the definitions of first-degree murder and
17 the criteria for death eligibility, thereby making the vast majority of first-degree murders
18 statutorily death-eligible. Second, as a result of the breadth of the death-eligibility criteria,
19 only a relative handful of the statutorily death-eligible class are actually sentenced to die.
20 Just as in pre-*Furman* Georgia, there is a *de facto* "narrowing" that occurs, but the narrowing
21 is determined not by statutory eligibility criteria, but rather by the exercise of essentially
22 *unguided* and *unreviewable* discretion by prosecutors and juries. Under California's death
23 penalty scheme, as in pre-*Furman* Georgia, being sentenced to die is akin to be struck by
24 lightning.

26 ³¹ Professor Shatz's 1977 study of was admitted into evidence in a federal habeas corpus proceeding.
27 See, *Karis v. Calderon* (E.D. Cal. March 1, 1996) No. Civ. S-89-527 ("the magistrate judge found that
28 the Shatz declaration is relevant to the issues . . . and that it will be helpful to the consideration of the
claim. . . Such a finding is well supported. . ."). The issue continues to be litigated in *Karis* and in
Frye v. Ayers, CIV S-99-628 LKK/JFM (E.D. Cal.); *Ashmus v. Ayers*, C 93-0594 TEH (N.D. Cal.). See
Declaration of Prof. Steven Shatz, p. 9.

1 In *Furman*, the Supreme Court, for the first time, invalidated a state’s entire death
2 penalty scheme because it violated the Eighth Amendment. As stated in Part I, because
3 each of the justices in the majority wrote his own opinion, the scope of, and the rationale for,
4 the decision was not determined by the case itself. In *Furman*, Justices Stewart and White
5 concurred with one another in holding that the death penalty was unconstitutional because a
6 handful of murderers were arbitrarily singled out for death from the much larger class of
7 murders who were death-eligible. (*Id.* at 309-310 (Stewart, J., concurring), 331-313 (White,
8 J., concurring)).

9 In *Gregg v. Georgia* (1976) 428 U.S. 153, the plurality understood the Stewart and
10 White view to be the “holding” of *Furman* (*Id.* at 188-189); and in *Maynard v. Cartwright*,
11 (1988) 486 U.S. 356, a unanimous Court cited to the opinions of Stewart and White as
12 embodying the *Furman* holding. (*Id.* at 362.) See also *Walton v. Arizona* (1990) 497 U.S.
13 639, 658-659 (Scalia, J., concurring). At the time of the decision in *Furman*, the evidence
14 before the court established, and the justices understood, that approximately 15 to 20 percent
15 of those convicted of capital murder were actually sentenced to death. Chief Justice Burger
16 stated this statistic on behalf of the four dissenters (408 U.S., at 386 n.11), and Justice
17 Stewart relied on Justice Burger’s statistics when he said: “[I]t is equally clear that these
18 sentences are ‘unusual’ in the sense that the penalty of death is infrequently imposed for
19 murder.” (408 U.S. at 309 n.10.)³² Thus, while Justices Stewart and White did not address
20 precisely what percentage of statutorily death-eligible defendants would have to receive
21 death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital
22 sentencing, *Furman*, at a minimum, must be understood to hold that any death penalty
23

24
25 ³² In *Gregg*, the plurality reiterated this understanding: “It has been estimated that before *Furman* less
26 than 20% of those convicted of murder were sentenced to death in those States that authorized
27 capital punishment.” (428 U.S. at 182 n.26, citing *Woodson v. North Carolina*, 428 U.S. 280, 295-96
28 n.31).

The pre-*Furman* experience in California was consistent with the Court’s understanding. Evidence
before the Court for the years 1964, 1967, and 1969 indicated that approximately 16% of California’s
first degree murderers were being sentenced to death. (*Aikens v. California* (1972) 406 U.S., 813
(Brief for Petitioner, Appendix F at 4f-5f).

1 scheme under which less than 15 to 20 percent of statutorily death-eligible defendants are
2 sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment.

3 It cannot be overstated: in order to meet the concerns of *Furman*, the states were
4 required to genuinely narrow, by rational and objective criteria, the class of murders eligible
5 for the death penalty:

6 Our cases indicate, then, that statutory aggravating circumstances play a
7 constitutionally necessary function at the state of legislative definition: they
8 circumscribe the class of persons eligible for the death penalty.

9 (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) It was the Court's understanding that, as the
10 class of death-eligible murderers was narrowed, the percentage of those in the class
11 receiving the death penalty would go up and the risk of arbitrary imposition of the death
12 penalty would correspondingly decline:

13 As the types of murders for which the death penalty may be impose become more
14 narrowly defined and are limited to those which are particularly serious or for which
15 the death penalty is peculiarly appropriate...it becomes reasonable to expect that
16 juries -- even given discretion not to impose the death penalty -- will impose the
17 death penalty in a substantial portion of the cases so defined. If they do, it can no
18 longer be said that the penalty is being imposed wantonly and freakishly **or so**
infrequently that is loses its usefulness as a sentencing device.

19 (*Gregg v. Georgia*, (1976) 428 U.S. 153, 222 (White, J., concurring) (Emphasis added.)

20 States could accomplish this statutory narrowing in one of two ways: by very narrowly
21 redefining capital murder to exclude a substantial proportion of traditional first-degree
22 murders³³ or, in states (like California) with broad definitions of first-degree murder (and in
23 the few states with no degrees of murder), by the use of statutory-aggravating circumstances.
24 To meet this constitutional narrowing requirement, the aggravating circumstances ("special
25 circumstances" in California) had to "genuinely narrow" the class eligible for the death
26

27 ³³ This was the route taken by Louisiana and approved by the Supreme Court in *Lowenfield v. Phelps*
28 (1988) 484 U.S. 231.

1 penalty, (*Zant v. Stephens, supra*, at 877), reducing that class to less than a majority (*Wade*
2 *v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319) of pre-*Furman* death-eligible murders.

3 As the attached declaration shows, the California scheme found at Penal Code §190.2
4 does not come close to satisfying *Furman*. Professor Shatz examined data from first degree
5 murder cases during 1988-1992 (“1997 Study”) and from 2001-2005 (“Alameda Study”). In
6 the 1997 Study he concluded that the overwhelming majority (at least 84 percent) of first-
7 degree murderers are statutorily death-eligible³⁴. During the same time frame, the California
8 Department of Justice statistics reported only 8.2 to 11.8 percent of convicted first-degree
9 murderers in California being sentenced to death.³⁵ If that conclusion is correct the special
10 circumstances cited in §190.2 do not narrow the death-eligible class to anywhere near to a
11 number less than the majority of first-degree murders. In fact, if at least 84 percent of first-
12 degree murderers are statutorily death-eligible, taken together with the Justice Department
13 statistics, the death penalty is being imposed on no more than approximately 9.6 to 14
14 percent of death-eligible first-degree murderers. That percentage is substantially lower than
15 the percentage that the *Furman* Court – which was held to be so low as to violate the Eighth
16 Amendment. The overall death sentence rate fell to 5.8 percent in the Alameda study, even
17 farther below the unconstitutional rate that existed at the time of *Furman*.

18 In *Loving v. United States* (1996) 517 U.S. 748, 754-756, the Court cited *Furman*, and
19 subsequent cases, in support of the constitutional proposition that a death penalty statute
20 which restricted death-eligibility to only premeditated and felony murders “does not narrow
21 the death-eligible class in a way consistent with our cases.” A statute like California’s which
22 permits death-eligibility for virtually all first degree murderers is certainly no less violative of
23 the Eighth Amendment.

24
25
26 ³⁴ Notably, former Justice Broussard of the California Supreme Court reached this same conclusion
27 without benefit of a formal survey: “California’s 1978 statute...sweeps so broadly that most murders
28 are subject to the death penalty, and only a few are excluded.” *People v. Adcox* (1988) 47
Cal.3d 207, 275, cert. denied, (1990) 494 U.S. 1038. (Broussard, J., concurring).

³⁵ S. Shatz & N. Rivkind, *supra* note 10 at p. 1327-1328.

1 It is not as though our death penalty system, once down an unconstitutional path, is
2 helpless in remedying its glaring constitutional flaws in order to attempt to travel down a
3 constitutional road. In the ongoing discussion surrounding the continued vitality of the death
4 penalty in the United States, commentators and reformers alike have discussed the issue of
5 narrowing and how to resolve it. The solution to the problem is simple: statutorily reduce the
6 pool of death-eligible first degree murderers, thus allowing this pool to face the death penalty
7 in a non-arbitrary fashion. In California, that means decreasing the number of “special
8 circumstances” so that the term has some real meaning.³⁶

9 Commentators from other states facing the same issue reached a similar conclusion.
10 For example, after its exhaustive review of the Illinois death penalty system, the Ryan
11 Commission unanimously agreed that reducing the list of 20 eligibility factors existing under
12 Illinois law would be one way of limiting the danger of arbitrariness in its death penalty
13 scheme. The majority of members favored limiting the statute to five factors³⁷. “While
14 Commission members believe that all murders are very serious, the death penalty should be
15 reserved for only the most heinous of these crimes.” (Commission on Capital Punishment,
16 April 2002, Recommendations Only, Ch. 4, Recommendations 27, 28.) Once the death
17 penalty pool is limited, the imposition of the death penalty will not be so arbitrary as to
18 compare with being struck by lightning.

19 ///

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21 ///

22 ///

23 ³⁶ See Kozinski, Alex & Gallagher, Sean, *Death: The Ultimate Run-On Sentence*, (Fall 1995) 46 Case
24 W. Res. 1. Justice Kozinski, a clear supporter of the death penalty, suggests that the most viable
25 solution to the problem courts face dealing with the glut of death penalty cases – short of the courts
26 repudiating decades of Eighth Amendment law – is for the legislature to curtail the numbers of
persons eligible for the death penalty.

27 ³⁷ The five eligibility factors recommended by the Commission are: (1) murder of a peace officer or
28 firefighter in performance of/retaliation for duties; (2) murder of any person inside prison; (3) murder of
two or more persons; (4) intentional murder involving the infliction of torture; (5) murder by person
under investigation/convicted for a felony of anyone involved in the investigation, prosecution, or
defense of that crime, including witnesses, jurors, judges, prosecutors and investigators.

1 IV.

2 **Conclusion**

3 In *Bacigalupo*, the Supreme Court upheld the California death penalty scheme on the
4 *assumption* that §190.2 served the constitutionally required function of defining "some
5 narrowing principle" providing an objective basis for distinguishing the few cases in which the
6 death penalty is imposed from the many in which it is not and thus "strictly confining" the
7 class of death eligible murderers. (*People v. Bacigalupo, supra*, 6 Cal.4th at 465-468.) It is
8 abundantly clear that the Court's assumption was ill-founded: §190.2 serves no such
9 narrowing function. The problem with the California scheme is not that any one of the special
10 circumstances taken alone is unconstitutional – each arguably identifies a subclass of all first
11 degree murderers more deserving of the death penalty than other members of the class. The
12 trouble is that taken together, the special circumstances cover virtually all first degree
13 murders (and a substantial majority of *all* murderers), and, thus, they perform no
14 constitutionally mandated narrowing function at all.

15 The basic concern in *Furman* was that when a state fails to place any objective limits
16 on the imposition of the death penalty, it will necessarily be imposed in a random and
17 unpredictable fashion, in violation of the Eighth Amendment:

18 These death sentences are cruel and unusual in the same way that being struck by
19 lightning is cruel and unusual. For, of all the people convicted of rapes and murders
20 in 1967 and 1968, many just as reprehensible as these, the petitioners are among a
21 capriciously selected random handful upon whom the sentence of death has in fact
been imposed.

22 (*Furman v. Georgia, supra*, 410 U.S. at pp. 309-310 [footnote omitted].)

23 The voters of California, beginning with the Briggs Initiative, have voiced their intention
24 to, and have accomplished, making virtually all first degree murderers death-eligible. Since
25 1978, it has become *de rigueur* for law enforcement and politicians to urge additions to the
26 §190.2 rolls every time there is a high profile case. The end result, however, is plainly
27 unconstitutional: on the one hand, a gigantic, indistinguishable pool of death penalty
28 candidates, while on the other hand, the death penalty being sought, and actually being

1 imposed, upon only a “freakish” few, in violation of both the Eighth Amendment of the United
2 States Constitution, and article I, section 17 of the California Constitution. For this reason,
3 JACK HENRY LEWIS, JR. asks this Court to bar the prosecutor from seeking the death
4 penalty in this case.

5
6 Dated: _____

Respectfully Submitted,
STEVEN J. CARROLL
Public Defender

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10 _____
JULIANA B. HUMPHREY
Deputy Public Defender

11 Attorneys for Defendant
12 JACK HENRY LEWIS, JR.

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26 Lewis/mot/narrowing.jbh(final)

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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF SAN DIEGO**

11 THE PEOPLE OF THE STATE OF)
CALIFORNIA,)
12)
Plaintiff,)
13)
v.)
14)
JACK HENRY LEWIS, JR.,)
15 Defendant.)
16)
17)

Case No. SCD 193558
DA No. ABP085

PRETRIAL MOTION NO.: 3

**REPLY TO OPPOSITION TO THE
MOTION TO BAR DEATH
PENALTY FOR FAILURE TO
COMPLY WITH THE EIGHTH
AMENDMENT'S NARROWING
REQUIREMENT**

18 **I.**

19 **A MOTION TO BAR THE DEATH PENALTY**
20 **IS RIPE AT ALL STAGES OF A CAPITAL CASE**

21 Trial courts have the inherent power to ensure the orderly administration of justice.
22 (*People v. Castello* (1998) 65 Cal. App. 4th 1242, 1247.) In criminal cases specifically, the
23 court has the power to “develop rules of procedure aimed at facilitating the administration of
24 criminal justice and promoting the orderly ascertainment of the truth.” (*Id.*, citing *Joe Z. v.*
25 *Superior Court* (1970) 3 Cal. 3d 797, 801-802.) “Some of the court's inherent powers are set
26 out by statute, but the inherent powers of the courts are derived from the Constitution and are
27 not confined by or dependent on statute. (Cal. Const., art. III, § 3; *id.*, art. VI, § 1).” (*Castello*,
28 *supra*, at 1247-1248.)

1 The inherent power of the court includes discretion to hear and decide on pretrial
2 motions prior to trial. In this case, it is particularly apt to rule on the defense motions where
3 the outcome dramatically affects the trial process itself. If Jack Lewis is no longer facing the
4 death penalty, defense trial strategy changes, jurors are no longer “death qualified”, the
5 length of trial decreases, and jury instructions change dramatically. (See *United States v.*
6 *Cheely* (9th Cir. 1994) 36 F.3d 1439, 1441: “*Before the commencement of trial*, the district
7 court directed the parties to address the applicability of the capital punishment provisions of
8 the relevant federal statutes. It did this because several procedures different from those for
9 an ordinary criminal trial would be implemented were this a death penalty case.”)

10 The prosecution cites two cases in support of abridging this court’s right to hear
11 challenges to the constitutionality of the death penalty prior to trial. Neither of these cases is
12 a capital case; both were decided during a time when capital punishment was not permitted
13 in our state. Legally speaking, waiting until the outcome of a capital case to review the
14 constitutionality of the statute under which the case is tried is completely backward.
15 Pragmatically speaking, such a posture potentially wastes the limited resources of the court
16 and defense counsel.

17 II.

18 **“NARROWING” THE CLASS OF DEATH-ELIGIBLE DEFENDANTS** 19 **IS DISTINCT FROM THE “SELECTION” OF WHO SHOULD** 20 **ULTIMATELY RECEIVE THE DEATH PENALTY**

21 It is clear from the prosecution’s opposition papers, and, unfortunately, from some
22 published decisions, that confusion surrounds the nomenclature used to discuss the
23 constitutionally mandated “narrowing function” that must effectively operate in every state’s
24 death penalty system. For example, the term “aggravating factor” is often conflated to mean
25 either the fact-finding process of narrowing of murders to determine death-eligibility, as used
26 in Louisiana¹; or as part of the morals-based process for selecting which death eligible
27

28 ¹ E.g. *Lowenfield v. Phelps* (1988) 484 U.S. 231.

1 defendants receive the death sentence, as used in California². The distinction is critical,
2 however, to this court's analysis and must therefore be reexamined and reexplained for
3 clarity.

4 "Narrowing" has a very specific meaning in the capital jurisprudence. It refers to the
5 process of determining death eligibility, i.e., discerning the small group of murderers who will
6 be exposed to the punishment of death:

7 The high court has drawn a distinction between two aspects of capital
8 sentencing: "narrowing" and "selection." "Narrowing" pertains to a state's
9 "legislative definition" of the circumstances that place a defendant within the
10 class of persons eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S.
11 862, 878; *Godfrey v. Georgia, supra*, 446 U.S. at p. 428.) To comport with the
12 requirements of the Eighth Amendment, the legislative definition of a state's
13 capital punishment scheme that serves the requisite "narrowing" function must
14 "circumscribe the class of persons eligible for the death penalty." (*Zant v.*
15 *Stephens, supra*, 462 U.S. 862, 878.) Additionally, it must afford some objective
16 basis for distinguishing a case in which the death penalty has been imposed from
17 the many cases in which it has not. (*Godfrey v. Georgia, supra*, 446 U.S. at p.
18 433.) A legislative definition lacking "some narrowing principle" to limit the class
19 of persons eligible for the death penalty and having no objective basis for
20 appellate review is deemed to be impermissibly vague under the Eighth
21 Amendment. (*Maynard v. Cartwright, supra*, 486 U.S. at p. 361; *Godfrey v.*
22 *Georgia, supra*, 446 U.S. at p. 428.)

23 (*People v. Bacigalupo* (1992) 6 Cal. 4th 457, 465.)

24 Different states have complied with the constitutional mandate to legislatively define or
25 narrow death-eligible defendants in three basic ways: a "weighing" approach, a "threshold"
26 approach, and a "directed" approach.³ Confusion is caused by the fact that many states use
27 the term "aggravating factors" to refer to what the jury considers in determining death
28 eligibility in the guilt phase; while others use aggravating factors only in the penalty phase to
both narrow the death eligible group and weigh the evidence in the selection of who should
get the death penalty. California's system, although termed a "weighing" approach, differs

² E.g. *People v. Bacigalupo* (1992) 6 Cal. 4th 457.

³ See Defense Motion No. 2, for a discussion of these different approaches.

1 even from other “weighing” states (such as Florida) in that the “narrowing” is accomplished in
2 the guilt phase of trial by jurors finding “special circumstances” to be true. “Aggravating
3 circumstances” – which have *nothing* to do with “narrowing” or death-eligibility in California –
4 are then weighed against mitigating circumstances in the penalty phase to select a sentence:

5 Under our death penalty law, therefore, the section 190.2 "special
6 circumstances" perform the same constitutionally required "narrowing" function
7 as the "aggravating circumstances" or "aggravating factors" that some of the
8 other states use in their capital sentencing statutes. (See *Gregg v. Georgia*
9 (1976) 428 U.S. 153, 193, and fn. 44.) In those states that use aggravating
10 factors or aggravating circumstances as criteria to circumscribe the class of
11 murderers eligible for the death penalty, *the truth of the allegations of*
12 *aggravating factors or aggravating circumstances is determined in the second or*
13 *penalty phase of the trial.* (See Ariz. Rev. Stat. Ann. § 13-703 (1993); Fla. Stat. §
14 921.141(1), (2) & (3) (1992); Ga. Code Ann. § 17-10-2(c), 17-10-30, 17-10-31
15 (1993).) *By contrast, in California the existence of the "special circumstances"*
16 *that render a defendant charged with capital murder eligible for the death penalty*
17 *is determined at the first or "guilt" phase of the trial, together with the issue of the*
18 *defendant's guilt or innocence of first degree murder. (§ 190.4, subd. (a) [Upon a*
19 *finding by the trier of fact that the defendant is guilty of first degree murder, "the*
20 *trier of fact shall also make a special finding on the truth of each alleged special*
21 *circumstance[,]" which must be proved beyond a reasonable doubt.].) In this*
22 *respect, California's capital scheme is unique.*

19 (*People v. Bacigalupo* (1992) 6 Cal. 4th 457, 468.) (Emphasis added.)

20 Our Supreme Court declared a clear distinction between the two steps in the California
21 death penalty trial process⁴:

22 California's death penalty law contains two types of statutory criteria: special
23 circumstances, *which define the conduct that renders a defendant eligible for the*

24 ⁴ This process does not, as suggested by the prosecution, go “farther than is constitutionally necessary
25 to narrow the class of death-eligible defendants.” (See Prosecution Opposition at p. 3-4.) With its
26 system of “special circumstances,” California law, in theory, narrows the group of first degree
27 murderers to establish a death-eligible group from among them. If the law did not narrow the group of
28 those convicted of first degree murder, it would be unconstitutional on its face. “To be eligible for the
death penalty, the defendant must be convicted of a crime for which the death penalty is a
proportionate punishment.” (*Tuilaepa v. California* (1994) 512 U.S. 967; *Coker v. Georgia* (1977) 433
U.S. 584.) Capital punishment is not a “proportionate” punishment for defendants convicted of second
degree murder, manslaughter, or non-homicide cases, so statutorily removing them from “death
eligibility” is meaningless on the issue of “narrowing”.

1 *death penalty*; and sentence selection factors, which assist the trier of fact in
2 deciding whether a defendant already found to be eligible for the death penalty
3 should actually be sentenced to death.

4 (*People v. Bacigalupo* (1992) 6 Cal. 4th 457, 462.) (Emphasis added.)

5 The distinction between the determination of death-eligibility which occurs in the guilt
6 phase (“narrowing”), and the determination of appropriate sentence which occurs in the
7 penalty phase (“selection”) was discussed at length in *Bacigalupo*.

8 In *Bacigalupo*, the defendant urged the Supreme Court to extend the same Eighth
9 Amendment protections against “vagueness” to the *sentence selection factors* that were
10 applied to *death-eligibility factors* pursuant to the United States Supreme Court’s decision in
11 *Stringer v. Black* (1992) 503 U.S. 222. The defendant analogized the constitutional
12 narrowing function of 190.2, to the selection from the group of death-eligible persons of who
13 actually receives the death penalty under 190.3. Confusing the matter, the defendant
14 referred to the process of sentence selection process as “narrowing”:

15 According to counsel, the section 190.3 factors that could "weigh" in favor of a
16 penalty of death must provide some "narrowing" principle to guide sentencer
17 discretion so as to avoid arbitrariness in the selection and imposition of the death
18 penalty. Further, defense counsel argued, the section 190.3 factors must be
19 sufficiently objective that a reviewing court can determine why a sentence of
20 death was imposed in a particular case.

20 (*People v. Bacigalupo* (1992) 6 Cal. 4th 457, 464.)

21 The Supreme Court rejected the defendant’s argument and retained separate Eighth
22 Amendment analyses for each procedure:

23 The standard that defendant would have us employ to evaluate the section 190.3
24 sentencing factors--whether they are statutorily defined narrowly and precisely
25 enough to channel jury discretion and to enable a reviewing court to objectively
26 determine whether the facts of each case fall inside or outside the definition--is
27 the standard that the United States Supreme Court has mandated for the
28 evaluation of laws that circumscribe the class of *death-eligible* defendants. Were
 we to accept defendant's argument, factors that our state law uses only in
 penalty selection, to determine whether death or the alternative penalty of life

1 without possibility of parole is the more appropriate sentence, would have to be
2 specific and narrow enough for determining death eligibility, that is, defining the
3 criminal conduct punishable either by death or by life without possibility of parole.
4 This merging of death-eligibility and penalty-selection criteria cannot be
5 reconciled with the distinction the United States Supreme Court has consistently
6 drawn between the "narrowing" and "selection" aspects of capital sentencing.

6 (*People v. Bacigalupo* (1992) 6 Cal. 4th 457, 475.) (Emphasis in original.)

7 In sum, "narrowing" only describes the process by which those convicted of first
8 degree murder are found to be "death eligible." This process is fact-based, and each alleged
9 special circumstance must be found by the jury unanimously and by proof beyond a
10 reasonable doubt.⁵ While a state's entire capital trial process must be subject to meaningful
11 appellate review to be found constitutional⁶, the procedure of narrowing lends itself most
12 readily to such review:

13 The eligibility decision fits the crime within a defined classification. Eligibility
14 factors almost of necessity require an answer to a question *with a factual nexus*
15 *to the crime or the defendant* so as to "make rationally reviewable the process for
imposing a sentence of death."

16 (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, quoting *Arave v. Creech* (1993) 507 U.S.
17 463 at 471.) (Emphasis added.)

18 Unlike the procedure in other states, death-eligibility in California is a fact-based, non-
19 evaluative decision, thereby lending itself well to scientific and mathematical analysis. Either
20 the factual scenario exists to allow filing of a special circumstance in a complaint, or it does
21 not. These factual scenarios can be examined after a case is completed to determine
22 whether the law is operating as it should. Further, analyses of large samples of cases, such
23 as the type performed by Professor Shatz, are subject to scientific confirmation or refutation,

24
25 ⁵ In contrast, the "selection" process occurs after death eligibility, in a separate penalty phase, and
26 involves the jury's consideration of aggravating and mitigating factors related to the moral question of
27 whether the defendant should live or die. The jury's discretion must be "guided" and "channeled" but it
28 can never be limited in the type and number of mitigating circumstances it considers when pondering
the questions of life or death. Moreover, the jury need not find mitigation unanimously or by proof
beyond a reasonable doubt. It must only choose the punishment in a manner that minimizes "the risk
of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.)

⁶ *Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.

1 by replication of the analysis, using the same static set of facts available to the scientific
2 community and to the public.

3 Nevertheless, the prosecution cites the oft-repeated (and often abused) phrase that
4 the death eligibility factors are “not susceptible of mathematical precision” in support of its
5 argument to disregard the sound analysis of Professor Shatz.⁷ (*People v. Sanchez* (1995)
6 12 Cal.4th 1, 60-61; quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 973.) The trouble is,
7 when the United States Supreme Court *originally* used this phrase, it was referring to specific
8 factors – admittedly for both eligibility and selection – that were indeed “by necessity
9 somewhat general.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 193-194 (e.g. “especially
10 heinous, atrocious or cruel”); see also *Jurek v. Texas* (1976) 428 U.S. 262, 279 (prediction of
11 future dangerousness); *Walton v. Arizona* (1990) 497 U.S. 639, 653 (“especially heinous,
12 cruel or depraved”).)

13 Throughout capital jurisprudence, the phrase, “not susceptible of mathematical
14 precision” uniformly refers to *qualitative, evaluative* considerations made by the jury in the
15 selection process, and specifically where, as in Georgia, the narrowing and selection take
16 place at the same time, in the penalty phase. (*Gregg v. Georgia, supra*, at 196-197.) It had
17 never been used to specifically refer to the type of factual determinations called for by
18 §190.2...until *Sanchez*.

19 There are two reasons this court is not bound by the holding in *People v. Sanchez*,
20 one evidentiary and the other pragmatic. First, the Supreme Court did not have the
21 completed work of Professor Shatz before it – raw data from the then-ongoing study was
22 submitted to the trial court, but no testimony was taken. Professor Shatz had not yet testified
23 at the trial level regarding his study and findings at that time.⁸ Moreover, the professor can
24 testify to different information available to this court that was not available to the trial court in
25 *Sanchez*, or to any other court yet to rule on this subject. In the instant case, the defense will

27 ⁷ Prosecution Opposition at p.10.

28 ⁸ The evidentiary situation appears to have been the same in *People v. Frye* (1998) 18 Cal.4th 894,
1028-29.

1 present different, additional information to this court which will empirically prove that §190.2
2 performs virtually no “narrowing” function.

3 Another evidentiary difference between our case and the *Sanchez* case is that
4 *Sanchez*, as a defendant in a 1987 case, fell within the “*Carlos* window,” and proof of intent
5 to kill was required to make a defendant death-eligible under a felony-murder theory, thus
6 providing a specific, judicially interpreted narrowing criterion. (*Carlos v. Superior Court*
7 (1983) 35 Cal.3d 131.) *People v. Anderson* (1987) 43 Cal.3d 1104, 1147, overruled *Carlos*,
8 requiring proof of intent to kill only for aider and abettors, thereby re-expanding the felony-
9 murder special circumstance to felony murder *simpliciter*. In addition, death-eligibility has
10 been expanded three times since 1987 (1990, 1996 and 2000); thus, the present statute, and
11 its judicial interpretation, is far broader than the statute at issue in *Sanchez*.

12 Second, as a pragmatic matter, the Court in *People v. Sanchez*, is simply wrong. In
13 addition to citing cases which did not support its conclusions,⁹ the court failed to answer the
14 question, “how?” How, in operation, does California’s system “suitably narrow the class of
15 death-eligible persons”? It is one thing for our Supreme Court to assert that the “evidence”
16 before it was unpersuasive; it is another to leave open the question – what **evidence**
17 convinces the High Court that the assumption of constitutionality is well-founded? There
18 have been no studies published counter to Professor Shatz’s studies in the decade since
19 their publication. No reported case before or since *Sanchez* provides, as Justice Blackman
20 termed, “a clean bill of health” to California’s death penalty system.¹⁰ All of the cases
21 *assume* that the scheme works in a constitutionally sound manner but NEVER analyze how
22 this is occurs in operation.

23 A prime example of this legal “house of cards” is the frequent citation of *Tuilaepa* for
24 the proposition that § 190.2 sufficiently narrows the death-eligible pool, a case which never
25 even considered this aspect of the law: “Petitioners do not argue that at the special
26 _____

27 ⁹ See page 8 of Defense Motion No. 3.

28 ¹⁰ See page 10 of Defense Motion No. 3; *Tuileapa v. California, supra*, at p.994-995.

1 circumstances found in their cases were insufficient, so we do not address that part of
2 California's scheme save to describe its relation to the selection phase." (*Tuilaepa v.*
3 *California, supra*, at 975.) As Justice Blackmun observed in his dissent:

4 The Court's treatment today of the relevant factors as "selection factors" alone
5 rests on the assumption, not tested, that the special circumstances perform all of
6 the constitutionally required narrowing for eligibility. *Should that assumption*
7 *prove false*, it would further undermine the Court's approval today of these
8 relevant factors.

8 (*Tuilaepa v. California, supra*, at 994-995.) (Emphasis added.)

9 Nonetheless, *Tuilaepa* is thereafter cited for the proposition that the narrowing scheme has
10 been determined to be constitutionally sound. (See, e.g. *People v. Sanchez, supra*, at 60-61;
11 *People v. Arias* (1996) 13 Cal.4th 92, 187; *People v. Ray* (1996) 13 Cal.4th 313, 357.)

12 *Bacigalupo* is another case frequently cited in support of the constitutionality of
13 §190.2...trouble is, *Bacigalupo*, once again, was an analysis of §190.3 not §190.2.
14 Nonetheless, the citations to the contrary have been many and are continuing. (See, e.g.
15 *People v. Crittendon* (1994) 9 Cal.4th 83, 155; *People v. Arias* (1996) 13 Cal.4th 92, 187;
16 *People v. Ray* (1996) 13 Cal.4th 313, 357; *People v. Holt* (1997) 15 Cal.4th 619, 697; *People*
17 *v. Frye* (1998) 18 Cal.4th 894, 1029; *People v. Earp* (1999) 20 Cal.4th 826, 904-905.)

18 It is troubling enough that the both Supreme Courts have deferred explanation of just
19 how California's "special circumstances" work to narrow the pool of death-eligible persons,
20 instead relying, in circular fashion, on cases which did not decide the question. But it is
21 absurd, and disingenuous, for the prosecution (and the Supreme Court in *Sanchez*) to hide
22 behind an empty platitude by continuing to claim that the narrowing process in California is
23 "not susceptible to mathematical precision," in essence perpetuating a legal myth with no
24 proven validity. §190.2, unlike §190.3, is uniquely "susceptible to mathematical precision,"
25 and proof of its failure to meaningfully narrow death-eligibility should be presented for this
26 court to consider.

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II.

**WHETHER OR NOT §190.2 “NARROWS” THE
CLASS OF DEATH ELIGIBLE DEFENDANTS IS
A FACTUAL QUESTION SUBJECT TO PROOF**

At times it seems that the law's ignorance of its actual impact is one of the most severe threats to basic civil liberties. When justice is blind to the fruits of scientific and social scientific research, and to the demonstrable effects of a statute in operation, rules of law are divorced from the empirical world.

(Pine, Rachel, *Speculation And Reality: The Role Of Facts In Judicial Protection Of Fundamental Rights*, 136 U. Pa. L. Rev. 655, 656-657 (January, 1988); attached as Exhibit A to this Reply.)

Since the mid-20th century, fact-finding on the underpinnings of legislative acts by trial courts has been increasingly accepted:

Commentators recognized that judicial scrutiny of the factual bases for legislation was not only inherent in judicial review generally, but was **crucial to the protection of fundamental rights**.

(Pine, *Speculation and Reality, supra*, at 663-664.) (Emphasis added.)

There can be no more fundamental right than the right to a fair determination of eligibility for the punishment of death. Understanding this, the Supreme Court anticipated that the justification for, and procedures surrounding, capital punishment would face continuous challenges, not merely in light of our “evolving standards of decency” under the Eighth Amendment¹¹, but in light of a continually growing body of scientific knowledge regarding the effects of these laws in the real world.

Jack Lewis mounts this challenge of the provisions of §190.2 by employing the three premises articulated in the Pine article:

[F]irst, that standards of constitutionality should be informed by empirical truth; second, that judicial protection of fundamental rights is facilitated by proof of and reliance upon the facts underlying constitutional determinations; and third, that a

¹¹ See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 321; Defense Motion No. 4.

1 degree of inconsistency among lower courts can and should be tolerated to
2 permit the zealous protection of basic rights and liberties, at least pending
3 Supreme Court review on a *full factual record of the real effects of a law.*"

4 (Pine, *Speculation and Reality, supra*, at 657.) (Emphasis added.)

5 Such a challenge cannot be termed either "facial" or "as applied" – these terms, by
6 definition, limit inquiry to whether statute could ever be constitutional under any conceivable
7 circumstance based upon the four corners of the statute (facial), or merely unconstitutional
8 as to this defendant, based upon facts relating to the defendant (as applied.) Neither of
9 these generic constitutional challenges take into consideration how a system of laws, as a
10 whole, is operating in the real world; that is, such a challenge is a look "at the forest" not just
11 the individual trees. Such a challenge has been termed an "operational challenge," that is, a
12 challenge to the constitutionality of the operation of the law based upon proof from real life
13 applications. (Pine, *Speculation and Reality, supra*, at 657.)

14 [T]his Article proposes that the term "operational challenge" be adopted to
15 identify an across-the-board constitutional challenge to an operating statutory
16 scheme when: a) that challenge is based on empirical evidence as to the
17 statute's operating record drawn from the totality of statutory applications; and b)
18 the statute in question is or previously has been held valid on its face. Again, a
19 case litigated in this fashion is neither "facial" nor "as applied" as these terms
20 traditionally have been understood.

21

22 The very essence of an operational challenge is the availability and presentation
23 of *factual proof as to the statute's application while in operation.* It is upon this
24 sort of evidence that assumed legislative or constitutional facts may at last be
25 conclusively evaluated.

26 (Pine, *Speculation and Reality, supra*, at 702-703; 705.) (Emphasis added.)

27 *Furman* itself is an excellent example of a successful "operational challenge" to the
28 death penalty, although decided over a decade before the term was coined. Death penalty
laws within individual states had long been upheld constitutionally so the challenge to
Georgia's law was not appropriately deemed "facial." That is, the court did not decide that
the death penalty as a punishment was forbidden by the Constitution. Likewise, there was

1 nothing about the defendant or his particular factual scenario that made Georgia's law
2 unconstitutional "as applied" specifically to Mr. Furman alone. Rather, the challenge in
3 *Furman* was to the operation of the system as a whole and each of the plurality of justices
4 treated it as such:

5 The generality of a law inflicting capital punishment is one thing. What may be
6 said of the validity of a law on the books and *what may be done with the law in its*
7 *application* do, or may, lead to quite different conclusions.

8 *Furman v. Georgia* (1972) 428 U.S. 238, 242.) (Emphasis added.)

9 Another example of an operational challenge to the death penalty, albeit an
10 unsuccessful one, occurred in *McCleskey v. Kemp* (1987) 481 U.S. 279.¹² McCleskey
11 argued, generally, that Georgia's capital punishment system operated in a manner to
12 discriminate against racial minorities. In support of his contention, McCleskey presented
13 social science studies which presented statistical information to the Court which indicated
14 that the law *actually operated* in a discriminatory manner. (*McCleskey v. Kemp* (1987) 481
15 U.S. 279, 298-299.) The Supreme Court dismissed this contention on the ground that the
16 study relied upon by the defendant did not prove, *inter alia*, that racial discrimination was
17 intended by the legislature during its enactment of the law: "There was no evidence then,
18 and there is none now, that the Georgia Legislature enacted the capital punishment statute
19 to further a racially discriminatory purpose." (*Id.* at 298.)

20 First, there has never been a requirement that a defendant need prove the explicitly
21 unconstitutional motivation behind a statute in order to prevail in a constitutional challenge¹³.
22 However, in this case there exists such proof of the intent of California's capital scheme: the
23 intent to include ALL murderers within its reach. The Briggs Initiative of 1978 promised
24 voters that all murderers would be eligible for the death penalty. And since the enactment of

25 ¹² See, Pine, *Speculation and Reality*, *supra*, at 703-706.

26 ¹³ See, e.g. *Brown v. Board of Education* (1954) 347 U.S. 483; this landmark decision was not based
27 upon proof of racist intent by legislatures which adopted "separate but equal" laws and policies, but
28 upon numerous scientifically validated studies which proved the deleterious effect on students as a
result of the operation of such laws. For further discussion see Pine, *Speculation and Reality*, *supra*,
at 721-725.

1 the 1978 ballot measure, this hugely broad law has only ballooned larger and more
2 encompassing. The legislative intent behind California’s law has remained unequivocal; and
3 patently unconstitutional on paper and in operation.

4 Perhaps because they cannot rely on the legislative history to support the
5 constitutionality of §190.2, courts have consistently relied upon the “presumption of
6 constitutionality” afforded to most statutes. However, by couching their approval of §190.2 in
7 terms of making an “assumption” about its validity, both the state and federal Supreme
8 Courts have invited this operational challenge (See, e.g., *Tuilaepa v. California, supra*, at
9 975, 994-995; *Pulley v. Harris* (1984) 465 U.S. 37, 53-54 (“on its face” and “as we are
10 presently informed” California statute is constitutional); *People v. Green* (1980) 27 Cal.3d 1,
11 49 (“*On the record before us, however, we need not reach the constitutional question.*).

12 Clearly in *Sanchez*, and other cases, our Supreme Court has left open the possibility
13 that it could be persuaded by sufficient evidence and argument:

14 But defendant has not demonstrated *on this record, or through sources of which*
15 *we might take judicial notice*, that his claims are empirically accurate, or that, if
16 they were correct, this would require the invalidation of the death penalty law.

17 (*People v. Wader* (1993) 5 Cal.4th 610, 669.) (Emphasis added.)

18 [D]efendant has not demonstrated "through sources of which we might take
19 judicial notice, that his claims are empirically accurate, or that, if they were
20 correct, this would require the invalidation of the death penalty law", and
21 *defendant fails to present any evidence or argument* that would cause us to
reconsider our previous holdings.

22 (*People v. Samayoa* (1997) 15 Cal.4th 795, 863.) (Emphasis added.)

23 The prosecution is correct about one assertion: the defense is indeed arguing that
24 “the Constitution requires a significant numerical disparity” between convicted first degree
25 murderers and those who are “death eligible.”¹⁴ Evidence that persons were “wantonly,”
26 “arbitrarily,” and “freakishly” made eligible for the death penalty was borne out by numbers

27
28 ¹⁴ Prosecution Opposition at p. 4.

1 referred to repeatedly by the justices in *Furman*:

2 [T]he *extreme rarity* with which applicable death penalty provisions are put to
3 use raises a strong inference of arbitrariness."

4 (*Furman v. Georgia*, (1972) 408 U.S. 238, at 248 [Justice Douglas] quoting Goldberg &
5 Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1792.)
6 (Emphasis added.)

7 [W]hen a severe punishment is inflicted "*in the great majority of cases*" in which it
8 is legally available, there is little likelihood that the State is inflicting it arbitrarily.
9 If, however, *the infliction of a severe punishment is "something different from that*
10 *which is generally done"* in such cases (citation omitted) there is a substantial
11 likelihood that the State, contrary to the requirements of regularity and fairness
embodied in the Clause, is inflicting the punishment arbitrarily.

12 (*Id.* at 276-277 [Justice Brennan].) (Emphasis added.)

13 The outstanding characteristic of our present practice of punishing criminals by death
14 is the *infrequency with which we resort to it*.

15 (*Id.* at 291 [Justice Brennan].) (Emphasis added.)

16 These death sentences are cruel and unusual in the same way that being struck
17 by lightning is cruel and unusual. For, of all the people convicted of ... murders in
18 1967 and 1968, many just as reprehensible as these, *the petitioners are among a*
19 *capriciously selected random handful upon whom the sentence of death has in*
20 *fact been imposed*. ... I simply conclude that the Eighth and Fourteenth
21 Amendments cannot tolerate the infliction of a sentence of death under legal
systems that permit this unique penalty to be so wantonly and so freakishly
imposed.

22 (*Id.* at 309-310 [Justice Stewart].) (Emphasis added.)

23 After *Furman*, when states sought the Supreme Court's approval for their systems of
24 capital punishment, each recognized that numbers were indeed constitutionally significant
25 and made the touchstone of each system – whether threshold, weighing, or directed
26 approaches – the creation of a "**genuinely narrow**"¹⁵ "**subclass**"¹⁶ of death-eligible
27

28 ¹⁵ *Zant v. Stephens* (1983) 462 U.S. 862, 876.

1 persons who would then face the sentencing process in a non-arbitrary manner:

2 The Eighth Amendment requires that a jury's discretion be sufficiently channeled
3 to allow for a principled distinction between the *subset of murders* for which the
4 sentence of death may be imposed and the *majority of murders* which are not
5 subject to the death penalty.

6 (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319.) (Emphasis added.)

7 Additionally, it must afford some objective basis for distinguishing a case in which
8 the death penalty has been imposed *from the many cases* in which it has not.

9 (*People v. Bacigalupo, supra*, at 465, citing *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.)
10 (Emphasis added.)

11 Narrowing cases are uniformly rife with numerical language and words such as “limit”
12 and “circumscribe” – in short, it is a legal discussion which is all about numbers. “Doing the
13 math” has everything to do with the constitutional analysis of §190.2. The constitutional
14 mandate is clear: states must limit the death-eligible pool to a minority of convicted first
15 degree murderers, then, upon review, it must be clear that a substantial number of those
16 eligible for the death penalty actually receive it. Our law does just the opposite: the death-
17 eligible pool is nearly indistinguishable from the pool of convicted first degree murderers; and
18 then rarely does any death-eligible person actually receive the ultimate punishment.
19 California has a system, like pre-*Furman* Georgia, which imposes the death penalty in a
20 “rare, random, unpredictable and unreviewable process,” the legal system equivalent to
21 being “struck by lightning.”

22 For what is wanton and freakish if not the fact that less than 15 percent of all death-
23 eligible persons receive the death penalty? This seems the very definition of a “freakishly
24 random handful.” The force and logic of Professor Shatz’ analysis, including his reference to
25 the percentages of death-eligible persons discussed in *Furman*, is undeniable. Certainly, by
26 2006, capital systems should be meeting the minimum standards of *Furman* and it should be
27 provable. Clearly, by the numbers, California’s system is not.

28 ¹⁶ *Tuilaepa v. California* (1994) 512 U.S. 967, 972.

1 The fact no defendant has yet prevailed on this point is of no moment to this court.¹⁷
2 The reality of our legal system is that it takes years, even decades for our Supreme Court
3 jurisprudence to “catch up” with the arguments percolating within trial and appellate courts.
4 At this very time in federal district court, defendants in the capital cases of *Frye v. Ayres*¹⁸ (a
5 case relied upon by the prosecution) and *Ashmus v. Ayres*¹⁹ are engaged in discovery
6 proceedings and evidentiary hearings on this very issue: whether our law constitutionally
7 narrows those eligible for the death penalty. *Frye* is nearly a decade from its California
8 affirmance; *Ashmus* is 16 years out. Precisely because of the presumptions afforded to our
9 statutory schemes, it takes time and patience to challenge them.

11 IV.

12 Conclusion

13 The prosecution’s apparent argument – taken to its logical conclusion – is that once a
14 court rules on the constitutionality of a law, end of story, despite any facts developed and
15 evidence provided to prove the presumption of constitutionality wrong. As set forth above,
16 however, the cases cited for the proposition that the California law sufficiently narrows death-
17 eligibility never really explored the information that will be available to this court. In essence,
18 our courts have said that the law provides a meaningful narrowing function...because they
19 have always said the law provides a meaningful narrowing function, and will continue to
20 assume this to be true. As Oliver Wendell Holmes said: "It is revolting to have no better
21

23 ¹⁷ “The People are unaware of any case decided in the 35 years since Furman that interprets that
24 decision as having established any statistically acceptable measure of death frequency.” Opposition at
25 p. 8. This is a fact: “the Supreme Court has never undertaken a quantitative analysis to check
26 whether the long lists of aggravators [i.e., special circumstances] generated by most legislatures in fact
render too great a percentage of murderers death-eligible.” McCord, *Lightning Still Strikes: Evidence
From The Popular Press That Death Sentencing Continues To Be Unconstitutionally Arbitrary More
Than Three Decades After Furman*, 71 Brooklyn L. Rev. 797, 814 (2005).

27 ¹⁸ Case No. CIV S-99-0228 LKK JFM (Eastern District of California); *People v. Frye* (1998) 18 Cal.4th
28 894

¹⁹ Case No. C 93 594 TEH (Northern District of California); *People v. Ashmus* (1991) 54 Cal. 3d 932.

1 reason for a rule of law than that so it was laid down in the time of Henry IV." (Pine,
2 *Speculation and Reality, supra*, at 720.)

3 "Rigid application of precedent to a new or changing reality unnecessarily restricts the
4 evolution of constitutional principle. Such a factblind process of adjudication as much as
5 guarantees that constitutional law will at times be entirely out of step with what is fair, right, or
6 just. (Pine, *Speculation and Reality, supra*, at 726.) California law is clearly "out of step" with
7 reality and with the "fair, right, and just" systems the justices envisioned in *Furman*. It must
8 be struck down.

9
10 Dated: _____

Respectfully Submitted,

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27 Lewis/mot/narrow.narrow.REPLY
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