S034800

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD LUCIO DeHOYOS, Defendant and Appellant.	Orange Co. Sup. Ct. No. C-77640

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
for the County of Orange

HONORABLE EVERETT W. DICKEY, JUDGE

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TABLE OF CONTENTS

Page

STATEMENT OF APPEALABILITY 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 6

A. Guilt Phase 6

1. Prosecution Case 6

2. Defense Case 13

a. Testimony of Lay Witnesses 13

b. Expert Testimony Regarding Appellant's Brain Damage and Other Impairments 26

3. Prosecution Rebuttal Testimony 49

B. Sanity Phase 51

1. Defense Case 51

a. Appellant's Testimony 51

b. Testimony of Dr. Consuelo Edwards 59

c. Testimony of Dr. Jose LaCalle 62

d. Testimony of Dr. Paul Berg 63

e. Testimony of Dr. John Reid Meloy 65

2. Prosecution Case 68

TABLE OF CONTENTS

Page

C. Penalty Phase 68

1. The Prosecution's Evidence in Aggravation 68

2. The Defense Case in Mitigation 69

a. Testimony of Teodora Munoz DeHoyos . . . 69

b. Testimony of Erundina Itzel Martinez 70

c. Testimony of Edna Maritza Carrera 70

d. Testimony of Rubin Dario Martinez 71

e. Testimony of Norman Morein 72

f. Testimony of Dr. William Logan 73

g. Testimony of Lucio DeHoyos, Sr. 77

h. Testimony of Lucio DeHoyos, Jr. 77

i. Testimony of Alexander DeHoyos 78

j. Testimony of Martha DeHoyos 79

k. Testimony of Gloria Lara 79

l. Testimony of Sandra DeHoyos 80

TABLE OF CONTENTS

Page

ARGUMENT 82

I THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE MINORITY PROSPECTIVE JURORS FROM THE PETIT JURY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY 82

A. Introduction 82

B. Applicable Legal Principles 83

C. The Prosecutor's Stated Reasons for Exercising Peremptory Challenges As To the Five Prospective Jurors 87

1. The Prosecutor's Stated Reasons and Defense Counsel's Responses 87

a. Prospective Juror L.M. 87

b. Prospective Juror E.V. 89

c. Prospective Juror A.M.-F. 90

d. Prospective Juror R.M. 92

e. Prospective Juror M.L. 93

2. The Trial Court's Rulings 94

TABLE OF CONTENTS

Page

D. The Prosecutor's Reasons for Exercising the Peremptory Challenges Do Not Withstand Scrutiny, Requiring Reversal of Appellant's Convictions and Judgment of Death 98

1. Legal Principles 98

2. A Review of the Record Demonstrates That the Prosecutor's Reasons for Striking the Minority Prospective Jurors Were Pretextual 101

a. Prospective Juror L.M. 107

b. Prospective Juror E.V. 116

c. Prospective Juror A.M.-F. 119

d. Prospective Juror R.M. 122

e. Prospective Juror M.L. 124

E. The Prosecutor's Improper Peremptory Challenges In This Case Requires That the Entire Judgment Be Reversed 125

II THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING STATUTORILY INADMISSIBLE TESTIMONY DURING THE PROSECUTOR'S CROSS-EXAMINATION OF DR. SEAWRIGHT ANDERSON AT THE GUILT PHASE 128

A. Factual Background 128

B. Legal Analysis 129

TABLE OF CONTENTS

Page

C. The Trial Court's Error Was Prejudicial 132

III THE TRIAL COURT ERRED IN ADMITTING EVIDENCE REGARDING AN EXPERT WITNESS'S DISPOSITION OF DISCOVERY MATERIAL IN A PREVIOUS CASE 137

A. Factual Background 137

B. The Trial Court Abused Its Discretion In Admitting Evidence Regarding Her Handling of Discovery Material in a Prior Case 140

C. The Trial Court's Error Was Prejudicial 142

IV THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT REFUSED TO ALLOW AN EXPERT WITNESS TO GIVE HER OPINION REGARDING THE EXTENT TO WHICH EVENTS IN APPELLANT'S WORKPLACE CONTRIBUTED TO THE COMMISSION OF THE CHARGED OFFENSES 145

A. Introduction 145

B. Factual Background 145

C. Argument 149

1. General Legal Principles 149

2. The Trial Court Prejudicially Erred in Excluding the Testimony of Dr. Fossum Regarding the Link Between Appellant's Job Loss and the Charged Crimes 151

TABLE OF CONTENTS

Page

V THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT EXCLUDED CRITICAL LAY WITNESS OPINIONS SUPPORTING APPELLANT'S MENTAL HEALTH DEFENSE 156

A. Introduction 156

B. Factual Background 156

1. The Trial Court's Restriction of the Testimony of Paul Shawhan 156

2. The Trial Court's Restriction of the Testimony of Sam Morrison 158

3. The Trial Court's Restriction of the Testimony of Maria Esparza 159

C. Argument 161

1. General Legal Principles 161

2. The Trial Court's Exclusion of Lay Opinion Testimony In This Case Was Prejudicial Error 164

VI THE TRIAL COURT ERRED IN GIVING A PREJUDICIAL JURY INSTRUCTION REGARDING THE APPOINTMENT OF EXPERT WITNESSES 170

A. Introduction 170

B. The Jury Instruction Unfairly Highlighted the Cost to the Public of Both Prosecuting and Defending Appellant 174

TABLE OF CONTENTS

Page

C. The Error Was Prejudicial 179

VII THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S REQUEST FOR A JURY INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF EVIDENCE OF HIS PRIOR ACTS OF MISCONDUCT 181

A. Evidence of Prior Misconduct 183

B. The Trial Court Erred in Failing to Give a Limiting Instruction as Requested by the Defense 185

VIII THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING HEARSAY TESTIMONY THAT APPELLANT REGISTERED FOR TWO GUESTS AT THE HA' PENNY INN 189

A. Factual Background 189

B. Applicable Legal Principles 191

C. The Trial Court Erred in Admitting Hearsay Testimony That Appellant Registered for Two Persons 192

1. The Motel Records Did Not Constitute Admissions 193

2. The Motel Records Did Not Fall Within the Business Records Exception 195

TABLE OF CONTENTS

Page

D. The Admission of Testimony Based Upon Inadmissible Hearsay Violated Appellant's Constitutional Rights to Due Process, a Fair Trial, and Reliable Guilt and Penalty Determinations 197

E. Reversal of the Entire Judgment Is Required 199

IX THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH ONE COUNT OF SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187 201

X THE TRIAL COURT'S FAILURE TO MODIFY CALJIC NO. 4.01 AS REQUESTED BY APPELLANT DENIED HIM A FAIR SANITY PHASE 210

A. Introduction 210

B. The Trial Court Erred in Refusing Appellant's Request That It Modify CALJIC No. 4.01 by Deleting Language Regarding Outpatient Treatment 212

C. The Defective Instruction Violated Appellant's Rights to Due Process and a Jury Trial 217

D. The Trial Court's Error Was Prejudicial 218

TABLE OF CONTENTS

Page

XI THE PROSECUTOR'S ARGUMENT REGARDING A SOCIAL CONTRACT MINIMIZED THE JURORS' SENSE OF RESPONSIBILITY REGARDING THE CAPITAL SENTENCING DECISION IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS 229

A. Introduction 229

B. Appellant Was Sentenced by a Jury That Was Operating with a Diminished Sense of Responsibility for Its Penalty Determination 230

XII CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION 235

A. Penal Code Section 190.2 Is Impermissibly Broad 235

B. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights 236

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof 238

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt 238

TABLE OF CONTENTS

Page

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof 240

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings 241

   a. Aggravating Factors 241

   b. Unadjudicated Criminal Activity 242

4. The Instructions Caused the Penalty Determination to Turn on An Impermissibly Vague and Ambiguous Standard 243

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment 244

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole 245

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances 246

8. The Penalty Jury Should Be Instructed on the Presumption of Life 247

TABLE OF CONTENTS

Page

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review 248

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights 249

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors 249

2. The Failure to Delete Inapplicable Sentencing Factors 249

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators 250

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty 251

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause 251

H. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms 252

XIII THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO AGGRAVATED AND/OR CONSECUTIVE TERMS ON COUNTS 2, 3, 5 AND 6 BECAUSE IT RELIED UPON (1) INAPPLICABLE FACTORS AND (2) FACTORS NOT FOUND TRUE BEYOND A REASONABLE DOUBT BY THE JURY 253

TABLE OF CONTENTS

Page

A. Introduction 253

B. The Sentencing Hearing 254

C. The Case Should be Remanded for Resentencing Because At Least Two of the Factors Used by the Court to Impose the Upper Term on Count 2 Were Inapplicable and the Trial Court Gave No Reason As to Why It Imposed the Upper Terms on Counts 3, 5 and 6 256

D. The Upper Terms and/or Consecutive Sentences Imposed by the Trial Court Violated the Federal Constitution Because the Court Relied on Factors Not Found True Beyond a Reasonable Doubt by a Jury 262

1. The Imposition of the Upper Term Sentences for Counts 2, 3, 5 and 6 Violates the Federal Constitution under *Cunningham*, *Blakely* and *Apprendi* 264

2. The Full Maximum Consecutive Term Imposed As to Count 3 Pursuant to Section 667.6, Subdivision (c), Violated the Federal Constitution and Should Be Vacated 266

E. The Lack of Jury Fact-finding and/or Proof Beyond a Reasonable Doubt Was Not Harmless in This Case 272

TABLE OF CONTENTS

Page

XIV REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT 274

CONCLUSION 282

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

Apprendi v. New Jersey
(2000) 530 U.S. 466 . . . . . passim

Arizona v. Fulminante
(1991) 499 U.S. 279 . . . . . 86, 127

Ballew v. Georgia
(1978) 435 U.S. 223 241

Batson v. Kentucky
(1986) 476 U.S. 79 . . . . . passim

Beck v. Alabama
(1980) 447 U.S. 625 . . . . . passim

Bennett v. Collins
(E.D. Tex 1994) 852 F.Supp. 570 . . . . . passim

Blakely v. Washington
(2004) 542 U.S. 296 . . . . . passim

Blystone v. Pennsylvania
(1990) 494 U.S. 299 244

Boyde v. California
(1990) 494 U.S. 370 . . . . . 179, 245, 246

Brecht v. Abrahamson
(1993) 507 U.S. 619 86

Brewer v. Quarterman
(2007) 550 U.S. 286, __ [127 S.Ct. 1706, 167 L.Ed.2d 622] 246

TABLE OF AUTHORITIES

Pages

Burks v. Borg
(9th Cir. 1994) 27 F.3d 1424 ..... passim

Caldwell v. Maloney
(1st Cir. 1998) 159 F.3d 639 103

Caldwell v. Mississippi
(1985) 472 U.S. 320 ..... passim

Carter v. Kentucky
(1981) 450 U.S. 288 239

Chambers v. Mississippi
(1973) 410 U.S. 284 ..... 149, 162, 274

Chapman v. California
(1967) 386 U.S. 18 ..... passim

Coleman v. McCormick
(9th Cir. 1989) 874 F.2d 1280 135

Cooper v. Fitzharris
(9th Cir. 1978) 586 F.2d 1325 274

Coulter v. Gilmore
(7th Cir. 1998) 155 F.3d 912 105

Crane v. Kentucky
(1986) 476 U.S. 683 136

Crawford v. Washington
(2004) 541 U.S. 36 198

Cunningham v. California
(2007) 549 U.S. 270 ..... passim

TABLE OF AUTHORITIES

Pages

Davidson v. Harris
(8th Cir. 1994) 30 F.3d 963 ..... passim

DeJonge v. State of Oregon
(1937) 299 U.S. 353 208

Delaware v. Van Arsdall
(1986) 475 U.S. 673 ..... 179, 188, 199

Delo v. Lashley
(1983) 507 U.S. 272 247

Devose v. Norris
(8th Cir. 1995) 53 F.3d 201 103

Donnelly v. DeChristoforo
(1974) 416 U.S. 637 ..... 274, 277

Doss v. Frontenac
(8th Cir. 1994) 14 F.3d 1313 103

Estelle v. McGuire
(1991) 502 U.S. 62 ..... 134, 179

Estelle v. Williams
(1976) 425 U.S. 501 247

Ford v. Wainwright
(1986) 477 U.S. 399 135

Furman v. Georgia
(1972) 408 U.S. 238 235

Gardner v. Florida
(1977) 430 U.S. 349 279

TABLE OF AUTHORITIES

Pages

Garrett v. Morris
(8th Cir. 1987) 815 F.2d 509 126

Green v. LaMarque
(9th Cir. 2008) 532 F.3d 1028 103

Green v. United States
(1957) 355 U.S. 184 207

Gregg v. Georgia
(1976) 428 U.S. 153 248

Hamling v. United States
(1974) 418 U.S. 87 208

Harmelin v. Michigan
(1991) 501 U.S. 957 242

Harris v. Wood
(9th Cir. 1995) 64 F.3d 1432 277

Hewitt v. Helms
(1983) 459 U.S. 460 134

Hitchcock v. Dugger
(1987) 481 U.S. 393 281

Hollingsworth v. Burton
(11th Cir. 1994) 30 F.3d 109 103

Johnson v. California
(2005) 545 U.S. 162 . . . . . 83, 85

Johnson v. Mississippi
(1988) 486 U.S. 578 . . . . . passim

TABLE OF AUTHORITIES

Pages

Jones v. Ryan
(3rd Cir. 1993) 987 F.2d 960 105

Jones v. United States
(1999) 526 U.S. 227 263

Jordan v. Lefevre
(2nd Cir. 2000) 206 F.3d 196 103

Kesser v. Cambra
(9th Cir. 2006) 465 F.3d 351 126

Killian v. Poole
(9th Cir. 2002) 282 F.3d 1204 277

Lewis v. Lewis
(9th Cir. 2003) 321 F.3d 824 . . . . . 101, 103, 107, 119

Lockett v. Ohio
(1978) 438 U.S. 586 . . . . . 246, 249, 279

Mahaffey v. Page
(7th Cir. 1998) 162 F.3d 481 104

Maynard v. Cartwright
(1988) 486 U.S. 356 . . . . . 237, 244

McClain v. Prunty
(9th Cir. 2000) 217 F.3d 1209 . . . . . 103, 105

McKoy v. North Carolina
(1990) 494 U.S. 433 . . . . . 241, 246

Miller-El v. Cockrell
(2003) 537 U.S. 322 . . . . . 101, 102, 106, 116

TABLE OF AUTHORITIES

Pages

Miller-El v. Dretke
(2005) 545 U.S. 231 124

Mills v. Maryland
(1988) 486 U.S. 367 . . . . . 246, 247, 249

Monge v. California
(1998) 524 U.S. 721 242

Myers v. Ylst
(9th Cir. 1990) 897 F.2d 417 242

Ohio v. Roberts
(1980) 448 U.S. 56 198

Parle v. Runnels
(9th Cir. 2007) 505 F.3d 922 274

Powers v. Ohio
(1991) 499 U.S. 400 83

Purkett v. Elem
(1995) 514 U.S. 765 . . . . . 98, 100, 102

Riley v. Taylor
(3rd Cir. 2001) 277 F.3d 261 105

Ring v. Arizona
(2002) 536 U.S. 584 . . . . . 238, 241, 243

Rock v. Arkansas
(1987) 483 U.S. 44 136

Roper v. Simmons
(2005) 543 U.S. 551 252

TABLE OF AUTHORITIES

Pages

Rose v. Clark
(1986) 478 U.S. 570 218

Satterwhite v. Texas
(1988) 486 U.S. 249 281

Sheppard v. Rees
(9th Cir. 1990) 909 F.2d 1234 135

Silva v. Woodford
(9th Cir. 2002) 279 F.3d 825 279

Skipper v. South Carolina
(1986) 476 U.S. 1 281

Snowden v. Singletary
(11th Cir. 1998) 135 F.3d 732 . . . . . 133, 134

Snyder v. Louisiana
(2008) ___ U.S. ___, 128 S.Ct. 1203 . . . . . passim

Splunge v. Clark
(7th Cir. 1992) 960 F.2d 705 104

Stringer v. Black
(1992) 503 U.S. 222 . . . . . 250, 279

Taylor v. Illinois
(1988) 484 U.S. 400 . . . . . 149, 161

Trop v. Dulles
(1958) 356 U.S. 86 252

Tuilaepa v. California
(1994) 512 U.S. 967 237

TABLE OF AUTHORITIES

Pages

Turner v. Marshall
(9th Cir. 1997) 121 F.3d 1248 ..... 103, 125

United States v. Alanis
(9th Cir. 2003) 335 F.3d 965 98

United States v. Alcantar
(9th Cir. 1996) 897 F.2d 436 100

United States v. Chinchilla
(9th Cir. 1989) 874 F.2d 695 ..... 105, 114

United States v. David
(11th Cir. 1986) 803 F.2d 1567 125-126

United States v. Miller
(9th Cir. 1976) 546 F.2d 320 218

United States v. Vasquez- Lopez
(9th Cir. 1994) 22 F.3d 900 86

United States v. Wallace
(9th Cir. 1988) 848 F.2d 1464 ..... 275, 278

Vasquez v. Hillery
(1986) 474 U.S. 254 ..... 86, 127, 235

Wardius v. Oregon
(1973) 412 U.S. 470 246

Washington v. Recuenco
(2006) 548 U.S. 212 272

Washington v. Texas
(1967) 388 U.S. 14 ..... 149, 161, 162

TABLE OF AUTHORITIES

Pages

Webb v. Texas
(1972) 409 U.S. 95 . . . . . 149, 154, 161, 168

Williamson v. United States
(1994) 512 U.S. 594 192

Woodson v. North Carolina
(1976) 428 U.S. 280 . . . . . passim

Zant v. Stephens
(1983) 462 U.S. 862 . . . . . passim

STATE CASES

Cummiskey v. Superior Court
(1992) 3 Cal.4th 1018 204

Gamble v. State
(Ga. 1987) 357 S.E.2d 792 105

Holmes v. Great Atl. & Pac. Tea Co.
(La.App. 1993) 622 So.2d 748 104

Huffman v. Lindquist
(1951) 37 Cal.2d 465 153

In re Eichorn
(1998) 69 Cal.App.4th 383 . . . . . 149, 161

In re Hess
(1955) 45 Cal.2d 171 208

In re Marquez
(1992) 1 Cal.4th 584 280

TABLE OF AUTHORITIES

Pages

Lucero v. Superior Court
(1981) 122 Cal.App.3d 484 176

Mattison v. State
(Ga. 1994) 451 S.E.2d 807 104

Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.
(1968) 69 Cal.2d 33 196

People v. Adanandus
(2008) 157 Cal.App.4th 496 89

People v. Alcala
(1984) 36 Cal.3d 604 187

People v. Alvarez
(1996) 14 Cal.4th 155 84

People v. Anderson
(2001) 25 Cal.4th 543 . . . . . 238, 239, 243

People v. Anderson
(2007) 152 Cal.App.4th 919 107

People v. Arias
(1996) 13 Cal.4th 92 . . . . . passim

People v. Avila
(2006) 38 Cal.4th 491 249

People v. Babbitt
(1988) 45 Cal.3d 660 . . . . . 150, 154, 162, 168

People v. Bacigalupo
(1993) 6 Cal.4th 457 244

TABLE OF AUTHORITIES

Pages

People v. Barraza
(1979) 23 Cal.3d 675 . . . . . 174, 177, 178

People v. Barton
(1995) 12 Cal.4th 186 . . . . . 173, 201

People v. Belmontes
(1983) 34 Cal.3d 335 . . . . . 268, 269

People v. Benavides
(2005) 35 Cal.4th 69 141

People v. Black
(2005) 35 Cal.4th 1238 263

People v. Black
(2007) 41 Cal.4th 799 . . . . . 262, 263, 265

People v. Blair
(2005) 36 Cal.4th 686 . . . . . 237, 239

People v. Bonilla
(2007) 41 Cal.4th 313 120

People v. Box
(2000) 23 Cal.4th 1153 . . . . . 206, 207

People v. Boyer
(2006) 38 Cal.4th 412 198

People v. Breaux
(1991) 1 Cal.4th 281 244

People v. Bradford
(1997) 15 Cal.4th 1229 . . . . . 205, 206

TABLE OF AUTHORITIES

Pages

People v. Breverman
(1998) 19 Cal.4th 142 239

People v. Brown
(2004) 34 Cal.4th 382 237

People v. Brown
(2003) 31 Cal.4th 518 . . . . . 179, 188, 199

People v. Brown
(2001) 96 Cal.App.4th Supp. 1 163

People v. Brown
(1988) 46 Cal.3d 432 . . . . . 277, 279, 280, 281

People v. Carpenter
(1997) 15 Cal.4th 312 206

People v. Castro
(1985) 38 Cal.3d 301 142

People v. Cegars
(1992) 7 Cal.App.4th 988 151

People v. Chatman
(2006) 38 Cal.4th 344 . . . . . 164, 165, 166

People v. Cleveland
(2004) 32 Cal.4th 704 230

People v. Coddington
(2000) 23 Cal.4th 582 131

People v. Cole
(2004) 33 Cal.4th 1158 198

TABLE OF AUTHORITIES

Pages

People v. Cook
(2006) 39 Cal.4th 566 . . . . . 248, 250, 252

People v. Cooper
(1988) 53 Cal.3d 771 209

People v. Cornett
(1948) 33 Cal.2d 33 216

People v. Criscione
(1981) 125 Cal.App.3d 275 . . . . . 274, 279

People v. Crittenden
(1994) 9 Cal.4th 83 85

People v. Czahara
(1988) 203 Cal.App.3d 1468 130

People v. Dancer
(1996) 45 Cal.App.4th 1677 260

People v. Daniels
(1991) 52 Cal.3d 815 280

People v. Davenport
(1985) 41 Cal.3d 247 250

People v. Davenport
(1995) 11 Cal.4th 1171 85

People v. Dennis
(1985) 169 Cal.App.3d 1135 . . . . . 213, 216, 217, 228

People v. Dillon
(1983) 34 Cal.3d 441 . . . . . 205, 206, 207

TABLE OF AUTHORITIES

Pages

People v. Duncan
(1991) 53 Cal.3d 955 245

People v. Duarte
(2000) 24 Cal.4th 603 192

People v. Edelbacher
(1989) 47 Cal.3d 983 235

People v. Ernst
(1994) 8 Cal.4th 441 254

People v. Ervin
(2000) 22 Cal.4th 48 100

People v. Estrada
(1986) 176 Cal.App.3d 410 260

People v. Fairbank
(1997) 16 Cal.4th 1223 238

People v. Falsetta
(1999) 21 Cal.4th 903 . . . . . 185, 187

People v. Farmer
(1989) 47 Cal.3d 888 232

People v. Farnam
(2002) 28 Cal.4th 106 . . . . . 163, 164, 166

People v. Fauber
(1992) 2 Cal.4th 792 248

People v. Fernandez
(1990) 226 Cal.App.3d 669 . . . . . 258, 270, 273

TABLE OF AUTHORITIES

Pages

People v. Fierro
(1991) 1 Cal.4th 173 251

People v. Flood
(1998) 18 Cal.4th 470 . . . . . 173, 202

People v. Flores
(1981) 115 Cal.App.3d 924 . . . . . 258, 259, 261

People v. Franklin
(1994) 25 Cal.App.4th 328 261

People v. Fuentes
(II) (1991) 54 Cal.3d 707 . . . . . passim

People v. Gainer
(1977) 19 Cal.3d 835 174

People v. Ghent
(1987) 43 Cal.3d 739 252

People v. Ginese
(1981) 121 Cal.App.3d 468 . . . . . 258, 260, 261

People v. Gonzalez
(1989) 211 Cal.App.3d 1186 . . . . . 85, 116, 119, 126

People v. Graham
(1969) 71 Cal.2d 303 216

People v. Granice
(1875) 50 Cal. 447 203

People v. Granillo
(1987) 197 Cal.App.3d 110 . . . . . 99, 116, 119, 126

TABLE OF AUTHORITIES

Pages

People v. Grant
(2006) 113 Cal.App.4th 579 185

People v. Griffin
(2004) 33 Cal.4th 536 . . . . . 85, 239

People v. Hall
(1983) 35 Cal.3d 161 98

People v. Hamilton
(1963) 60 Cal.2d 105 280

People v. Hamilton
(1989) 48 Cal.3d 1142 250

People v. Hammon
(1997) 15 Cal.4th 1117 260

People v. Hansen
(1994) 9 Cal.4th 300 203

People v. Hart
(1999) 20 Cal.4th 546 206

People v. Hawthorne
(1992) 4 Cal.4th 43 238

People v. Hayes
(1990) 52 Cal.3d 577 279

People v. Henderson
(1963) 60 Cal.2d 482 207

People v. Henderson
(1977) 19 Cal.3d 86 209

TABLE OF AUTHORITIES

Pages

People v. Hernandez
(1977) 70 Cal.App.3d 271 153

People v. Hetherington
(1984) 154 Cal.App.3d 1132 260

People v. Hill
(1998) 17 Cal.4th 800 . . . . . 213, 274, 278

People v. Hillhouse
(2002) 27 Cal.4th 469 250

People v. Hinton
(2004) 121 Cal.App.4th 655 174

People v. Hinton
(2006) 37 Cal.4th 839 . . . . . 162, 164

People v. Holt
(1984) 37 Cal.3d 436 278

People v. Howard
(1988) 44 Cal.3d 375 216

People v. Howard
(1992) 1 Cal.4th 1132 . . . . . 86, 94, 125

People v. Hudson
(2006) 38 Cal.4th 1002 217

People v. Hughes
(2002) 27 Cal.4th 287 . . . . . 204, 205

People v. Jennings
(1991) 53 Cal.3d 334 . . . . . 149, 162

TABLE OF AUTHORITIES

Pages

People v. Johnson
(1989) 47 Cal.3d 1194 . . . . . 85, 94, 115

People v. Johnson
(2003) 30 Cal.4th 1302 85

People v. Jones
(1992) 10 Cal.App.4th 1566 261

People v. Jones
(1997) 15 Cal.4th 119 213

People v. Jones
(1998) 17 Cal.4th 279 . . . . . 173, 202

People v. Kelly
(1976) 17 Cal.3d 24 151

People v. Kelly
(1980) 113 Cal.App.3d 1005 245

People v. Kelly
(1992) 1 Cal.4th 495 . . . . . 213, 216, 217, 228

People v. Kennedy
(2005) 36 Cal.4th 595 237

People v. Kobrin
(1995) 11 Cal.4th 416 209

People v. Lancaster
(2007) 41 Cal.4th 50 140

People v. Lenart
(2004) 32 Cal.4th 1107 240

TABLE OF AUTHORITIES

Pages

People v. Lenix
(2008) 44 Cal.4th 602 106

People v. Leung
(1992) 5 Cal.App.4th 482 256

People v. Lewis
(2006) 39 Cal.4th 970 . . . . . 100, 106

People v. Lewis
(2008) 44 Cal.4th 415 106

People v. Livaditis
(1992) 2 Cal.4th 759 192

People v. Macias
(1997) 16 Cal.4th 739 185

People v. Maglaya
(2003) 112 Cal.App.4th 1604 163

People v. Maki
(1985) 39 Cal.3d 707 . . . . . 194, 195

People v. Manriquez
(2005) 37 Cal.4th 547 252

People v. McAlpin
(1991) 53 Cal.3d 1289 154

People v. Medina
(1990) 51 Cal.3d 870 163

People v. Medina
(1995) 11 Cal.4th 694 242

TABLE OF AUTHORITIES

Pages

People v. Melton
(1988) 44 Cal.3d 713 231

People v. Mendoza Tello
(1997) 15 Cal.4th 264 . . . . . 186, 198

People v. Miller
(2006) 145 Cal.4th 206 270

People v. Milner
(1988) 45 Cal.3d 227 232

People v. Montiel
(1993) 5 Cal.4th 877 . . . . . 86, 125

People v. Moon
(2005) 37 Cal.4th 1 230

People v. Moore
(1954) 43 Cal.2d 517 245

People v. Moore
(1985) 166 Cal.App.3d 540 . . . . . passim

People v. Morse
(1964) 60 Cal.2d 631 280

People v. Murat
(1873) 45 Cal. 281 204

People v. Nakahara
(2003) 30 Cal.4th 705 206

People v. Nunn
(1996) 50 Cal.App.4th 1357 130

TABLE OF AUTHORITIES

Pages

People v. Partida
(2005) 37 Cal.4th 428 198

People v. Perez
(1979) 23 Cal.3d 545 201

People v. Pitts
(1990) 223 Cal.App.3d 606 233

People v. Price
(1991) 1 Cal.4th 324 261

People v. Pride
(1992) 3 Cal.4th 195 . . . . . 94, 206

People v. Prieto
(2003) 30 Cal.4th 226 . . . . . 239, 241

People v. Quinones
(1988) 202 Cal.App.3d 1154 . . . . . 258, 260

People v. Ramos
(1997) 15 Cal.4th 1133 192

People v. Randall
(Ill.App. 1996) 671 N.E.2d 60 104

People v. Ray
(1975) 14 Cal.3d 20 216

People v. Rice
(1976) 59 Cal.App.3d 998 245

People v. Reynoso
(2003) 31 Cal.4th 903 100

TABLE OF AUTHORITIES

Pages

People v. Saille
(1991) 54 Cal.3d 1103 213

People v. Sandoval
(2007) 41 Cal.4th 825 . . . . . 262, 265, 272, 273

People v. Schmeck
(2005) 37 Cal.4th 240 235

People v. Schroeder
(1991) 227 Cal.App.3d 784 . . . . . 149, 154, 161, 168

People v. Scott
(1994) 9 Cal.4th 331 258

People v. Sedeno
(1974) 10 Cal.3d 703 239

People v. Sengpadychith
(2001) 26 Cal.4th 316 . . . . . 251, 272

People v. Silva
(2001) 25 Cal.4th 345 . . . . . passim

People v. Smith
(1984) 155 Cal.App.3d 359 268

People v. Smithey
(1999) 20 Cal.4th 936 . . . . . 129, 131, 133, 151

People v. Snow
(1987) 44 Cal.3d 216 118

People v. Snow
(2003) 30 Cal.4th 43 252

TABLE OF AUTHORITIES

Pages

People v. Soto
(1883) 63 Cal. 165 204

People v. St. Martin
(1970) 1 Cal.3d 524 . . . . . 173, 202

People v. Stanley
(1995) 10 Cal.4th 764 236

People v. Stevens
(2007) 41 Cal.4th 182 106

People v. Stoll
(1989) 49 Cal.3d 1136 . . . . . 151, 155, 169

People v. Tallman
(1945) 27 Cal.2d 209 140

People v. Taylor
(1990) 52 Cal.3d 719 241

People v. Thomas
(1990) 218 Cal.App.3d 1477 268

People v. Turner
(1986) 42 Cal.3d 711 . . . . . passim

People v. Turner
(1994) 8 Cal.4th 137 85

People v. Velasquez
(2007) 152 Cal.App.4th 1503 265

People v. Waidla
(2000) 22 Cal.4th 690 232

TABLE OF AUTHORITIES

Pages

People v. Ward
(2005) 36 Cal.4th 186 243

People v. Watson
(1956) 46 Cal.2d 818 . . . . . passim

People v. Watson
(1981) 30 Cal.3d 290 . . . . . 203, 207

People v. Watson
(2008) 43 Cal.4th 652 . . . . . 106, 151

People v. Webster
(1991) 54 Cal.3d 411 134-135

People v. Wheeler
(1978) 22 Cal.3d 258 . . . . . passim

People v. Wheeler
(1992) 4 Cal.4th 284 142

People v. Wickersham
(1982) 32 Cal.3d 307 . . . . . 173, 201

People v. Williams
(1971) 22 Cal.App.3d 34 275

People v. Williams
(1988) 44 Cal.3d 883 . . . . . 162, 163, 241

People v. Willis
(2002) 27 Cal.4th 811 86

People v. Wilson
(1982) 135 Cal.App.3d 343 269

TABLE OF AUTHORITIES

Pages

People v. Witt
(1915) 170 Cal. 104 . . . . . 204, 205

People v. Young
(1983) 146 Cal.App.3d 729 273

People v. Zambrano
(2007) 41 Cal.4th 1082 106

Price v. Superior Court
(2001) 25 Cal.4th 1046 131

Rogers v. Superior Court
(1955) 46 Cal.2d 3 203

State v. Belnavis
(Kan. 1990) 787 P.2d 1172 105

State v. Reliford
(Mo.App. 1988) 753 S.W.2d 9 104

Young v. State
(Tex.Crim.App. 1992) 826 S.W.2d 141 105

CONSTITUTIONS

U.S. Const., Amends. 6 . . . . . passim
8 . . . . . passim
14 . . . . . passim

Cal. Const., art. I, §§ 1 . . . . . 83, 187
7 . . . . . passim
15 . . . . . passim
16 . . . . . passim
17 . . . . . passim

TABLE OF AUTHORITIES

Pages

COURT RULES

Cal. Rules of Court, rules 409 259
420 . . . . . 256, 257, 264, 272
421 . . . . . 257, 260, 265
423 257
425 268
426 268
441 . . . . . 258, 260
4.406 261
4.409 259
4.420 264
4.425 268
4.426 268
8.204 2

STATUTES

Evid. Code, §§ 350 . . . . . 140, 141, 192
355 185
520 240
720 . . . . . 151, 154
721, subd. (a) 140
801 . . . . . 147, 150, 153
1101 . . . . . 181, 182, 186
1200 . . . . . 191, 192
1220 193
1221 193
1271 195

Pen. Code, §§ 25 . . . . . 129, 151, 168, 218
28 . . . . . passim
29 . . . . . 129, 151
187 2
189. . . . . 202-204, 206

TABLE OF AUTHORITIES

Pages

190.2 . . . . . 2, 209, 235, 236
190.3 . . . . . 236, 243, 245
190.4 254
207 . . . . . 2, 259, 264
208 264
261 . . . . . 2, 256
264 264
286 . . . . . 2, 256, 264
288 . . . . . passim
664 2
667.6 . . . . . 261, 267
987 . . . . . 171, 172, 176
1026 . . . . . 38, 129, 168, 218
1158a 242
1170 . . . . . 253, 256, 257, 261
1239 1
1259 202
1469 202
1601 . . . . . 210, 214-216

Veh. Code, § 502 121

JURY INSTRUCTIONS

CALCRIM. Nos. 223 107
224 107

CALJIC Nos. 1.00 219
2.00 . . . . . 68, 107
2.01 107
2.02 107
2.20 143
2.21.2 143
2.23 107
2.50 . . . . . passim

TABLE OF AUTHORITIES

Pages

2.50 (5th ed.) 181
2.50.1 . . . . . 181, 187
2.50.2 182
3.32 187
4.01 . . . . . passim
8.10 201
8.11 201
8.21 201
8.30 201
8.31 201
8.40 201
8.45 201
8.85 . . . . . passim
8.87 (1989 rev.) 238, 242
8.88 (1989 rev.) . . . . . passim
17.41 213

TEXTS AND OTHER AUTHORITIES

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TABLE OF AUTHORITIES CITED

Pages

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§ 42, p.375 187

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD LUCIO DeHOYOS, Defendant and Appellant.	S034800 Orange Co. Sup. Ct. No. C-77640

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.)[1]

STATEMENT OF THE CASE

On February 2, 1990, the prosecution filed a six-count information against appellant. (1 CT Vol. 1 4-8; 2 CT Vol. 1 171-173.)[2] Count 1

[1]All statutory references are to the Penal Code unless otherwise indicated.

[2] The Clerk's Transcript is referred to as "CT" and the Reporter's Transcript as "RT." Appellant refers to transcripts from his first trial as "1 CT" and "1 RT," and to transcripts from his second trial as "2 CT" and "2

(continued...)

alleged that appellant committed the March 20, 1989, murder of Nadia Puente. (§ 187, subd. (a).) Count 2 alleged that on March 20, 1989, appellant kidnaped Nadia Puente for the purpose of child molestation. (§ 207, subd. (b).) Count 3 alleged that on March 20, 1989, appellant committed the forcible rape of Nadia Puente. (§ 261, subd. (a)(2).) Count 4 alleged that on March 20, 1989, appellant committed an attempted forcible rape of Nadia Puente. (§§ 664/261, subd. (a)(2).) Count 5 alleged that on March 20, 1989, appellant committed sodomy upon Nadia Puente, a child under the age of 14. (§ 286, subd. (c).) Count 6 alleged that on March 20, 1989, appellant committed lewd or lascivious acts upon Nadia Puente, a child under the age of 14. (§ 288, subd. (a).) The information further alleged that the murder of Nadia Puente was committed while appellant was engaged in the commission of: kidnapping (§ 190.2, subd. (a)(17)(ii)); rape (§ 190.2, subd. (a)(17)(iii)); attempted rape (§ 190.2, subd. (a)(17)(iii)); sodomy (§ 190.2, subd. (a)(17)(iv)); and lewd and lascivious acts with a child under the age of 14 (§ 190.2, subd. (a)(17)(v)).

On February 2, 1990, appellant plead not guilty as to each count. (1 CT Vol. 1 8.) On June 28, 1991, appellant entered an additional plea of not guilty by reason of insanity as to each count. (1 CT Vol. 1 215.)

Jury selection for appellant's first trial began on July 24, 1991. (1 CT Vol. 1 369.) The jury was sworn to try the case on August 15, 1991. (1 CT Vol. 1 444.)

The guilt phase of appellant's first trial began on August 21, 1991.

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[2](...continued)
RT." Except where otherwise indicated, appellant cites to the record in the following manner: "[1 or 2] [CT or RT] [volume number] [page number]." (Cal. Rules of Court, rule 8.204, (a)(1)(C).)

(1 CT Vol. 1 456.) On September 18, 1991, the jury commenced deliberations. (1 CT Vol. 2 665.) On September 20, 1991, the jury returned verdicts of guilty as to Counts 1 through 3 and Counts 5 and 6, and found him not guilty as to Count 4. (1 CT Vol. 2 678-681; 1 CT Vol. 3 827-832.) The jury found all of the special circumstances to be true other than that the murder occurred in the commission of attempted rape. (1 CT Vol. 2 682-683; 1 CT Vol. 3 833-837.)

On September 24, 1991, the sanity phase of appellant's first trial commenced. (1 CT Vol. 3 854.) Jury deliberations began on September 26, 1991. (1 CT Vol. 3 858.) On September 30, 1991, the jury determined that appellant was sane at the time he committed the crimes. (1 CT Vol. 3 909-913.)

On October 2, 1991, the penalty phase of appellant's first trial commenced. (1 CT Vol. 3 927.) The jury began deliberating on October 8, 1991. (1 CT Vol. 3 971.) On October 15, 1991, the jury returned a verdict of death. (1 CT Vol. 3 983.)

On December 3, 1991, appellant filed a motion for new trial/modification of verdict. (2 CT Vol. 1 174-194; see also 2 CT Vol. 1 237-260 [declarations regarding defense contacts and attempted contacts with jurors].) In a declaration attached to that motion, one of appellant's defense attorneys, Milton Grimes, stated that on October 16, 1991, he had a telephone conversation with jury foreperson Vicki King. During that conversation, King told him that: the jurors had made a pact not to assist the defense in any manner; she personally knew Orange County Deputy District Attorney Donna Crandell and her husband, Orange County Deputy Marshal Gregory Crandell; she had known the Crandells for several years; and, during appellant's trial, she had met with Donna Crandell and

informed her about the case. (2 CT Vol. 1 193-194.)[3]

Thereafter, the trial court examined the jurors and other witnesses. (2 CT Vol. 1 212, 263, 267-272, 274-275; RT Vol. A 4645-4694, 4697-4824, 4826-4852, 4854-4996; RT Vol. AA 4997-5063, 5065-5226; 1 RT Vol. 20 4454-4504.) The testimony established, among other things, that: during appellant's trial, three jurors (King, Marie Forde and Herlinda Lamon) had lunch with Eileen Baiocchi, who had been a prospective juror in the case; Baiocchi showed the jurors a newspaper article about, and a photograph of, a man whose mouth had been taped shut because of his obstreperous courtroom conduct, and told them that Grimes had been the attorney in that case (People v. John Jordan); Baiocchi also showed them a photograph of a woman and said Grimes had been the attorney in the case in which the lady's baby died (People v. Cheryl Massip); and, this information was, or at least may have been, shared with other jurors. (RT Vol. A 4774-4782, 4794-4795, 4792-4795, 4815-4817, 4820-4824, 4826, 4860-4873, 4880-4910, 4919-4952; RT Vol. AA 5010-5013, 5015, 5096-5097, 5100, 5114, 5127, 5158-5159; 5162-5165.)

In light of this testimony, appellant filed a second motion for new trial on January 24, 1992. (2 CT Vol. 1 278-307.) The prosecution filed briefing in opposition on February 13, 1992. (2 CT Vol. 1 308-325.) On April 30, 1992, the trial court granted appellant's motion for a new trial on the ground that there had been serious juror misconduct constituting a structural defect in his trial. (RT Vol. A 5228-5247; 2 CT Vol. 2 483.)

On August 5, 1992, appellant filed a motion for change of venue. (2

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[3] The prosecution filed an opposition to appellant's motion on December 5, 1991, and a supplemental brief in opposition on December 11, 1991. (2 CT Vol. 1 199-211, 215-236.)

CT Vol. 2 537-682.) The prosecution filed a motion in opposition on August 17, 1992. (2 CT Vol. 2 683-719.) On September 4, 1992, the trial court denied appellant's motion. (2 CT Vol. 2 765.)

Jury selection for appellant's retrial began on January 25, 1993. (2 CT Vol. 3 824.) However, after a challenge by the defense, the trial court struck the entire jury venire on February 10, 1993, because prospective jurors had violated its admonitions not to discuss the case. (Terminated Voir Dire Vol. 7 2011-2023; 2 CT Vol. 3 1128C.)

On February 17, 1993, jury selection for appellant's retrial began anew. (2 CT Vol. 3 1131-1134.) On March 22, 1993, the trial court heard arguments regarding one of appellant's three "*Wheeler/Batson*" motions, which it then denied. (2 CT Vol. 4 1203-1205.) The jury was sworn to try the case on March 24, 1993. (2 CT Vol. 4 1215; see also 2 CT Vol. 4 1227 [alternate jurors sworn].)

The guilt phase began on March 31, 1993. (2 CT Vol. 4 1236.) The jury commenced deliberations on May 5, 1993. (2 CT Vol. 4 1379.) On May 10, 1993, after approximately two-and-a-half days of deliberations, the jury returned verdicts of guilty as to Counts 1, 2, 3, 5 and 6, and found each of the special circumstances to be true. (2 CT Vol. 4 1379-1381, 1384-1387, 1505-1513, 1527-1532.)[4]

On May 12, 1993, the sanity phase of appellant's retrial commenced. (2 CT Vol. 4 1535.) The jury commenced deliberations on May 25, 1993. (2 CT Vol. 4 1570.) On May 27, 1993, after approximately two days of deliberations, the jury found that appellant was sane at the time

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[4] Although appellant was not retried as to Count 4, the remaining counts were not renumbered. (2 RT Vol. 17 3705-3709.)

he committed the crimes. (2 CT Vol. 4 1570; 2 CT Vol. 5 1574-1575, 1619-1622.)

On June 2, 1993, the penalty phase commenced. (2 CT Vol. 5 1641.) The jury began penalty deliberations on June 8, 1993. (2 CT Vol. 5 1656.) On June 14, 1993, after approximately three-and-a-half days of deliberations, the jury returned a verdict of death. (2 CT Vol. 5 1656-1657, 1701-1702, 1707-1708.)

On August 6, 1993, appellant filed a motion for a new trial. (2 CT Vol. 5 1721-1734.) On August 27, 1993, the trial court denied that motion. (2 CT Vol. 5 1782.)

That same day, the trial court also denied appellant's motion for modification of the verdict and sentenced appellant as follows: imprisonment for the upper term of 11 years for Count 2; a consecutive upper term of eight years for Count 3; a concurrent upper term of eight years for Count 5; and a concurrent upper term of eight years for Count 6. Sentence on Counts 2, 3, 5 and 6 were stayed pursuant to section 654 pending the automatic appeal and execution of sentence on Count 1. As to Count 1, appellant was sentenced to death. (2 CT Vol. 5 1782-1796; 2 RT Vol. 35 8812-8814.)

This appeal is automatic.

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Case

On March 20, 1989, nine-year-old Nadia Puente lived with her parents at 2413 West Pomona Avenue in Santa Ana. (2 RT Vol. 18 3964.) She was a student at Diamond Elementary School, located on West Edinger Street in Santa Ana, and attended school that day. (2 RT Vol. 18 3858-

3860.) School was dismissed at 2:16 p.m. (2 RT RT Vol. 18 3861.)

That same day, at around 2:15 p.m., Sandra Cruz left Diamond Elementary School, where she was in the third grade. (2 RT Vol. 18 3865-3866, 3868.) As she was walking, a gray car pulled up. The man in the car called her over. He said he was a teacher and asked her to carry some books to a nearby intermediate school. (2 RT Vol. 18 3868, 3870-3871.) There were schoolbooks inside the car. (2 RT Vol. 18 3873, 3882.) Cruz did not believe him, and said her mother was waiting for her and that she had to go. (2 RT Vol. 18 3871-3872.) He said okay and drove off. (2 RT Vol. 18 3872-3873.)

Cruz reported the incident the following morning and was taken to a police station, where she described the man and drew sketches of him and his car. (2 RT Vol. 18 3876-3886, 3890-3891.) She was shown a number of photographs but could not identify anyone. (2 RT Vol. 18 3886-3888.)

On March 21, 1989, Detective Grover E. Randolph of the Los Angeles Police Department was dispatched to Griffith Park in connection with the investigation. Sometime between 2:00 and 4:00 a.m., he spotted an aluminum trash can, which was unlike the green trash cans belonging to the park. (2 RT Vol. 17 3747-3748.) The trash can was visible from the road. (2 RT Vol. 17 3751-3753.)

Randolph found Nadia's body inside the trash can. (2 RT Vol. 17 3749, 3796-3797.) Randolph placed his fingers on her right carotid artery but there was no heartbeat. The body was then transported to the Los Angeles County Coroner's facility. (2 RT Vol. 17 3749.)

Later that day, Jose O'Campo, another student at Diamond Elementary School, spoke to Officer Ben Rodriguez of the Santa Ana Police Department. O'Campo reported that the previous day he saw Nadia

get into a gray car on West Pomona Street. (2 RT Vol. 18 3893, 3897-3898.)

Christopher Rogers, M.D., a deputy medical examiner for Los Angeles County, conducted an external examination of Nadia's body on March 21, 1989. Her hair and clothing were wet, and the tips of her fingers were wrinkled. (2 RT Vol. 17 3796-3797, 3811, 3823, 3825.) He performed an autopsy on March 22, 1989. (2 RT Vol. 17 3786, 3795.) Dr. Rogers concluded that Nadia died due to asphyxia due to chest compression. There were bruises on her upper chest and left arm, and there were petechial hemorrhages above that level. (2 RT Vol. 17 3802.) There were also abrasions or bruises to her right lower chest, upper back, both legs, the base of the neck and around her right eyebrow. (2 RT Vol. 17 3826-3827, 3832-3833.)

Although some of her injuries were consistent with having been beaten with fists, hands, or some instrument, Dr. Rogers could not testify that she had been beaten. (2 RT Vol. 17 3830-3831.) He testified that the bruises to her chest were consistent with Nadia's chest being forced down against the edge of a bathtub. (2 RT Vol. 17 3831.) Dr. Rogers also opined that the injury to her upper back was consistent with blunt injury caused by some object, but he acknowledged that it was only about 1/8" in diameter. (2 RT Vol. 17 3831-3832.) All of those bruises occurred within three or four days of death, i.e., some time between March 16, 1989, and one-half hour prior to her death on March 20, 1989. The bruises could have been incurred during play. (2 RT Vol. 17 RT 3833-3839.)

At the entry of Nadia's vagina, there was a 3/8" laceration and an area of abrasion and bruising. There was also bruising of the lining of the vagina. In the area of the anus there was bruising and a small abrasion.

There were a few small petechial hemorrhages of the lining of the rectum. The injuries in the area of the vagina were consistent with the insertion of an erect human penis, as were the injuries in the area of the anus. (2 RT Vol. 17 3802-3804, 3806, 3818-3821.) Dr. Rogers could not tell whether any foreign object had been inserted in the rectum. (2 RT Vol. 17 3807-3808.) Although he acknowledged that the injuries to the vaginal and rectal areas could have been inflicted by Nadia having been bent over the edge of a bathtub, he said they could have been caused in some other manner. (2 RT Vol. 17 3811-3813.) He specifically opined that the trauma to the vaginal walls was caused by a foreign object. (2 RT Vol. 17 3818.) Dr. Rogers also concluded that the damaged tissue in the vaginal area was consistent with an intent to forcibly enter the vagina. (2 RT Vol. 17 3826.)

According to Dr. Rogers, it appeared from his initial examination that the lacerations and bruises occurred before death. (2 RT Vol. 17 3805.) Microscopic examination confirmed that the injuries to the vaginal area and anus occurred before death. (2 RT Vol. 17 3804-3807.) However, because Dr. Rogers did not observe any pinpoint hemorrhages in the section of the rectum he examined, he could not determine whether the rectal injury occurred before or after death. (2 RT Vol. 17 3806.)

Dr. Rogers testified that when one's oxygen supply is completely cut off, it takes approximately five or six minutes to die. If one's oxygen supply is only partially cut off, it may take longer to die. (2 RT Vol. 17 3808.) Because a nine-year-old child's bones are more flexible than that of an adult, it requires less force to cause asphyxiation in a child than in an adult. (2 RT Vol. 17 3808.) Dr. Rogers could not offer an opinion as to whether Nadia was conscious when the injuries to her vagina, rectum and anus were inflicted. (2 RT Vol. 17 3814-3815.)

Dr. Rogers agreed that the wet hair, chest compression, and the damage to the vaginal and rectal areas were consistent with Nadia having been held over the edge of a tub during the sexual assault. (2 RT Vol. 17 3826, 3828.) He acknowledged that those factors were also consistent with the possibility that the injuries were inflicted after Nadia was taken out of the water. (2 RT Vol. 17 3829.)

Appellant registered at the Ha' Penny Inn, a motel in Santa Ana, on March 20, 1989. The parties stipulated that he signed a guest registration card and receipt from the Ha' Penny Inn. (2 RT Vol. 17 3756, 3785.) Thomas Nixon, a clerk, recognized appellant as having been a guest on March 20, 1989. According to Nixon, the number "2" entered on the motel records indicated that appellant registered for two guests. (2 RT Vol. 17 3771.)[5]

Peter Veira, a groundsman at the Ha' Penny Inn, testified that the trash can in which Nadia was found came from the motel's laundry room. (2 RT Vol. 18 3853-3856.) Mary DeGuelle, a senior forensic specialist for the Orange County Sheriff's Department, testified that she located 11 fingerprints on the plastic liner of the trash can, one of which matched appellant's right ring finger. (2 RT Vol. 18 3911-3912, 3928-3929, 3934.)

William Ehart, a homicide detective with the Santa Ana Police

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[5] Nixon initially testified that there was no provision for documenting how many people rented a particular room. (2 RT Vol. 17 3757.) However, he then identified a space on the receipt where the number of guests is entered, and also testified that he obtained the number (i.e., 2) from a registration card partially filled out by a fellow employee. (2 RT Vol. 17 3760, 3765-3766, 3770-3771.) Vereen Kennelly, the office manager, also testified regarding the motel's registration procedure. (2 RT Vol. 17 3773-3783.)

Department, went to the Los Angeles International Airport, where he located appellant's automobile, a silver Nissan, in the long-term parking lot. (2 RT Vol. 18 3912-3914.) During a search of the vehicle, Ehart observed several items in the trunk: a piece of what appeared to be laundry lint; pieces of rusty metal; and the Metro section of the Orange County Register, dated March 24, 1989. (2 RT Vol. 18 3916-3919.) He did not recall finding any drugs or alcoholic beverages in the trunk. (2 RT Vol. 18 3919-3920.)

On April 1, 1989, Officer Valentine Lopez and Detective Richard Asher of the San Antonio (Texas) Police Department arrested appellant at a Taco Bell restaurant in San Antonio. The officers had received information that appellant was applying for a job there. Appellant was cooperative during the arrest. The officers transported him to a police substation, where he was advised of his *Miranda* rights. Appellant stated that he understood those rights. They did not question appellant, but left him in a room with Investigators Michael Alvarado and Gary Bruce of the Santa Ana Police Department, who had been dispatched to San Antonio with a warrant for his arrest. (2 RT Vol. 18 3842-3852.)[6]

Investigator Alvarado also advised appellant of his *Miranda* rights. Appellant responded that he understood his rights and wanted to talk to them. (2 RT Vol. 18 3952-3954; 2 CT Vol. 4 1240-1241.) The interview

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[6] The parties stipulated that, before interviewing appellant on April 1, 1989, Investigator Alvarado had information that a match had been made between the fingerprint found on the trash can liner and appellant's fingerprint, which was found in a law enforcement database. (2 RT Vol. 18 3978.)

was tape recorded. (2 RT Vol. 18 3954.)[7]

Appellant initially denied knowing anything about Nadia's murder, and said he thought he had been arrested over something to do with a car. (2 CT Vol. 4 1240-1243.) He admitted checking into the Ha' Penny Inn on March 20, 1989. (2 CT Vol. 4 1242.) His initial account of the events of that day did not involve Nadia. (2 CT Vol. 4 1243-1280.)

At some point, appellant agreed to submit samples of his head hair, pubic hair, blood and saliva. (2 CT Vol. 4 1280-1284.) Shortly thereafter, Bruce and Alvarado told appellant that his fingerprints had been found on a trash can liner. (2 CT Vol. 4 1291.) Nevertheless, appellant maintained that he had not killed anyone. (2 CT Vol. 4 1291-1292.)

Moments later, however, appellant said the killing was an accident. (2 CT Vol. 4 1294.) According to appellant, he picked up Nadia a block from her house around 2:30 p.m. He told her that he was a teacher, that he was being transferred, and that he needed some help with some school books. (2 CT Vol. 4 1295.) He drove her to the motel, passing her house along the way. She carried a couple of his boxes into the room. Appellant told her to sort and put his things away, then he would take her home. She asked to use the phone, but he told her it was not working. Appellant said he did not do anything to her, but she started screaming as if she were afraid. Appellant said he got carried away because she was screaming. He held her under water until she was dead. (2 CT Vol. 4 1295-1297, 1303-1305.)

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[7] The 81-page interview transcript, a copy of which is contained in the clerk's transcript (2 CT Vol. 4 1239-1320), was marked as People's Exhibit 42. The cassette tape itself was marked as People's Exhibit 43. (2 RT Vol. 18 3955.)

Appellant said he had not intended to harm her, but he was mad and disgusted about a confrontation he had had with his supervisor earlier that day, and the fact that he had lost his job. (2 CT Vol. 4 1248, 1260-1262, 1272-1274, 1300.) He said that it was "like . . . the devil made me do it." (2 CT Vol. 4 1300.)

After Nadia was dead, appellant had sex with her anally and inserted his finger into her vagina. (2 CT Vol. 4 1301-1302, 1304.) Appellant subsequently wrapped her in a blanket from the motel. (2 CT Vol. 4 1306.) Then he placed her in a trash can, put the trash can in the trunk of his car, and dropped it off at the Griffith Observatory. (2 CT Vol. 4 1306-1308.)

2. Defense Case

During the guilt phase, the defense presented the testimony of various lay witnesses (including family members, ex-wives and former co-workers) to establish that appellant had displayed bizarre behavior, particularly problems with rage and jealousy, from the time he was a toddler. The defense also presented the testimony of eight expert witnesses in support of its theory that, as a result of longstanding mental impairments (including brain damage and various mental illnesses), and perhaps the use of alcohol and/or drugs, appellant lacked the mental states necessary to sustain convictions for the charged crimes.

a. Testimony of Lay Witnesses

The defense presented the testimony of appellant's parents (Martha and Lucio DeHoyos, Sr.) and two of his six siblings (Alexander and Lucio DeHoyos, Jr.).

Appellant was born and raised in San Antonio, Texas. (2 RT Vol. 20 4585, 4685.)

From the time appellant was about two years old, he was noticeably

different from his siblings. (2 RT Vol. 20 4626, 4642.) He would let himself fall in his crib because he was angry and wanted his parents to take him out right away. (2 RT Vol. 20 4626.) He moved away from his mother whenever she tried to hug him. (2 RT Vol. 20 4642.)

As appellant grew up, he had tantrums and "flare-ups." He was mean, stubborn and nervous. (2 RT Vol. 20 4488, 4500, 4625-4628, 4630, 4645.) He did not understand or pay attention to what he was told. (2 RT Vol. 20 4499, 4630.) Whenever his mother asked him to do anything, he became enraged and talked back to her. (2 RT Vol. 20 4645-4649.)

Appellant fought with his brothers and sisters. (2 RT Vol. 20 4631.) He was not close to them and sometimes wanted to be alone. (2 RT Vol. 20 4643.) However, Lucio, Jr., recalled that appellant was an extremely funny companion and friend. (2 RT Vol. 20 4551.)

Appellant's mother started hitting him when he was about seven or eight years old. (2 RT Vol. 20 4649-4651.) He was the child she disciplined the most. (2 RT Vol. 20 4498, 4503.) She struck appellant with any object near at hand, including a belt, a clothes hanger, and a broomstick, and hit him on his arms, his side, even his head. (2 RT Vol. 20 4586-4587.)

When appellant was about 12 or 13 years old, his behavior grew worse, so his parents began taking him to a curandero, or faith healer, in Mexico. (2 RT Vol. 20 4493-4494, 4521-4523, 4631, 4660-4661, 4668, 4684-4685.)[8] During one such visit, the curandero changed into a white gown with a gold cross on the front. While leading the family in prayers,

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[8] Martha acknowledged that she did not want to talk about the curandero because many people do not believe in or understand such things. (2 RT Vol. 20 4664-4665.)

the curandero's voice changed pitch and he said, "Don't listen to them. They are somebody else." Lucio, Jr., who heard the comment, did not know what the curandero was referring to. (2 RT Vol. 20 4572-4574, 4584-4585.)

At some point, the curandero asked appellant's brothers to leave the room. (2 RT Vol. 20 4555.) Appellant and his parents then knelt in prayer with him. (2 RT Vol. 20 4555.) During the prayer, appellant fell to the floor and appeared to sleep for two or three minutes. (2 RT Vol. 20 4633, 4636.) When appellant arose, the curandero asked him what he saw. Appellant replied that he had seen a very pretty lake, on the other side of which he saw very ugly animals. The curandero asked him on which side of the lake would he rather be, and appellant replied, "On this side, the pretty side." (2 RT Vol. 20 4633.) The curandero described the scene as the other side of hell. (2 RT Vol. 20 4634.)

Within minutes, appellant ran out of the room. He appeared to be "out of his mind" and "busted the door open." (2 RT Vol. 20 4556, 4601.) His eyes were bulging out and he was "all red." (2 RT Vol. 20 4556, 4619.) Appellant ran into a field, where he remained for about 30 minutes. (2 RT Vol. 20 4557, 4603.) Shortly thereafter, the family drove back to Texas, and appellant was quiet during the entire trip. (2 RT Vol. 4603-4606.) About four years later, appellant recalled the incident, saying, "I will never forget that day when we went to the ranch and they made me see the good side and the bad side of hell." (2 RT Vol. 20 4567.)

Appellant had trouble learning and earned poor grades. (2 RT Vol. 20 4491-4493, 4529.) Even though appellant was about two-and-a-half years older than Alexander, Alexander tried to keep him out of trouble, especially at school. (2 RT Vol. 20 4498, 4500, 4530.) When appellant

was in the 10th grade, he told his mother that he was dumb and could not learn. (2 RT Vol. 20 4673, 4687.) A counselor talked to his mother about measures that could be taken to help appellant, and gave her the address of another school. (2 RT Vol. 20 4673-4676.) She accompanied appellant to that school, where the students were retarded, but she decided it was not the right place for him. (2 RT Vol. 20 4530-4532, 4678-4680.)

During high school, appellant's problems continued. (2 RT Vol. 20 4638-4639.) On one occasion, he started throwing books at his mother, enraged because she had asked why he never wore some of his clothes. (2 RT Vol. 20 4653.) When she threatened to call the police, he replied, "Ha, I don't think so. I don't think you will do anything." (2 RT Vol. 20 4653.) She then called the police, and an officer told her that he had to "turn [appellant] in for life." She just wanted appellant to be scared, not punished, so she did not let the police take him. (2 RT Vol. 20 4654-4655.)

Appellant was ordered to leave home when he was 17 years old, following an incident in which he attempted to hit his mother's stomach with a broomstick. She was several months pregnant at the time. (2 RT Vol. 20 4551-4553, 4591-4592, 4598-4599, 4623, 4638-4639, 4642, 4655-4658, 4672.) He had "fire in his eyes," and they were bulging out. He was cursing, tensed, and red in the face, and his chest was sticking out. (2 RT Vol. 20 4553-4554, 4569-4570, 4619, 4656, 4659.) His mother dodged the broom and he did not actually hit her. (2 RT Vol. 20 4553-4554, 4599-4600, 4672.)

Appellant's brother, James, tried to take the broom. (2 RT Vol. 20 4553, 4598.) His brothers Raymond and Alex chased him across the street and wrestled him to the ground. Appellant flailed around and his eyes were "lit up." (2 RT Vol. 20 4489-4490, 4504-4507, 4512-4519, 4570, 4657,

4682.) When their father picked appellant up from the ground, appellant was still furious. (2 RT Vol. 20 4570-4571, 4594-4596.)

Appellant did not return home until about four years later, when he visited for a couple of days. Lucio, Jr., did not see appellant again until about seven or eight years later, shortly before his arrest. (2 RT Vol. 20 4615-4616.)

Gloria Lara testified that she met appellant in San Antonio when she was 14 or 15 years old. He was about one year older. They started dating, and Lara thought he was "real kind and giving" and that it was nice to be around him. (2 RT Vol. 19 4375, 4377, 4395-4396.)

They were married on July 31, 1975, when Lara was 16 years old. (2 RT Vol. 19 4376.) Four days later, appellant stabbed her. (2 RT Vol. 19 4378.) She had been visiting him at the veterinary hospital where he worked. (2 RT Vol. 19 4378.) During the visit, Lara talked on the telephone to one of her friends. (2 RT Vol. 19 4379.) After the conversation ended, appellant became upset and accused her of talking to or about an ex-boyfriend. (2 RT Vol. 19 4380-4381, 4398-4401.) Appellant subsequently attempted to engage in sexual activity with her, and, while doing so, stabbed her in the abdomen. (2 RT Vol. 19 4383-4385, 4394, 4403-4411; 2 RT Vol. 20 4477-4478.) Appellant said, "Oh, my God you are bleeding," and he appeared to be scared or surprised. (2 RT Vol. 19 4386, 4412-4413.) After she begged him to take her to a hospital, appellant flagged down a passing motorist, who drove them to a hospital. (2 RT Vol. 19 4387, 4396, 4412-4418.)

Appellant was later arrested. (2 RT Vol. 20 4480-4481.) He shaved his head while he was in jail. He had never done that before. (2 RT Vol. 20 4480-4481.) After Lara got out of the hospital, she got appellant out of jail.

(2 RT Vol. 20 4481-4483.) She asked why he had shaved his head, and he said he had thought he would never get out of jail and that they had lice there. (2 RT Vol. 20 4483.) She later dropped the charges against him. They lived together for another two years, at which time appellant filed for divorce. (2 RT Vol. 19 4388-4391, 4419-4422.)

Jerry Taylor testified that he met appellant in December, 1979, when they were assigned to the same army unit at Fort Colby in Panama. (2 RT Vol. 26 5664-5665.) Appellant was a good friend and made him feel comfortable. (2 RT Vol. 26 5665, 5677.)

According to Taylor, appellant did not have a problem with taking orders, but sometimes displayed unusual behavior when he was corrected. (2 RT Vol. 26 5665, 5671.) In one incident, appellant yelled at a commander who had messed up his bunk area while conducting an inspection. Although the commander and other officers ordered appellant to stand at attention and be quiet, appellant continued "mouthing off." (2 RT Vol. 26 5665-5666, 5681-5684, 5691-5692, 5696.) During the incident, appellant "went into a distant blank stare" and was not listening to other people. (2 RT Vol. 26 5668.) He paced back and forth and talked to himself for awhile before he calmed down. (2 RT Vol. 26 5696-5697.) On another occasion, a sergeant corrected appellant, who replied that he knew his job and was doing it well. The sergeant ordered him to stand at ease, but other sergeants had to come in to calm appellant down. (2 RT Vol. 26 5667, 5684-5685, 5692-5693.) On yet another occasion, appellant disappeared for at least 30 days, during which military officials searched for him. (2 RT Vol. 26 5672-5673, 5675.)

Taylor recalled that appellant's reactions had scared and shocked him, explaining that, "as a soldier, this action is not normal." (2 RT Vol. 26

5668-5669, 5694.) He had never seen any other soldier engage in such behavior. (2 RT Vol. 26 5669, 5685-5686, 5690.) Other soldiers talked and joked about appellant, and he had a reputation within the unit for not accepting correction well. (2 RT Vol. 26 5688, 5690, 5693.)

Sam Morrison testified that, in 1982, he worked with appellant at a telemarketing firm. Appellant engaged in unusual behavior to amuse his co-workers. For instance, whenever work was slow, appellant jumped on top of his desk, screamed into the telephone, and then ran around his desk. (2 RT Vol. 18 4016-4017, 4021-4022, 4024.) Appellant also boasted that he had women or wives all over the world and that they sent money to him. (2 RT Vol. 18 4019-4021.)

Appellant often attended performances by Morrison's band, then stayed to drink. Afterward, appellant often went to Morrison's house, where he and Morrison's father drank pitchers of margaritas. Appellant would drink about a pitcher and a half of margaritas. (2 RT Vol. 18 4018, 4029.)

Maria Ines Esparza testified that she met appellant in a bar in 1984. After dating for approximately two to four months, they got married. (2 RT Vol. 25 5622-5623.) At their wedding reception, appellant was offended when Maria's brother told him to try to make her happy. Appellant told her brother not to butt in, and they started hitting each other. (2 RT Vol. 25 5627-5628, 5631, 5643-5644.)

Maria believed appellant used cocaine. Although she never saw him do so, he had nose bleeds while he slept. (2 RT Vol. 25 5631-5632.)

At times he came home angry or after he had been drinking. (2 RT Vol. 25 5643.) On one occasion, appellant cut up various photographs and other items. She did not know why he did that. He said nothing during the

episode, which lasted for about 15 minutes. (2 RT Vol. 25 5634-5636, 5645.)

During their marriage, they had problems due to appellant's jealousy. (2 RT Vol. 25 5624.) Appellant physically attacked Maria on one occasion, after he came home to pick up some clothes and she asked him where he was going. Appellant started to curse and push her. He pushed her to the edge of the bathtub and, with his knee on her chest, he hit and choked her. (2 RT Vol. 25 5625, 5627, 5630-5631, 5638-5640, 5642; 2 RT Vol. 26 5652-5654.) His face turned yellow, his eyes were big, and his hands were shaking. (2 RT Vol. 26 5654-5655.) She could tell that he had been drinking. (2 RT Vol. 25 5638, 5646.) At some point, he said, "Die, die." (2 RT Vol. 25 5641.) She was starting to lose consciousness when she grabbed a small teaspoon or fork and hit him in the face. (2 RT Vol. 25 5625-5626, 5641.) He got very angry, calling her a bitch. As appellant tried to leave, she called him and he pushed her and ran away. (2 RT Vol. 25 5626.) The police were contacted but they could not find him. (2 RT Vol. 25 5627.) He never came back home. (2 RT Vol. 25 5645.)

In 1988, Paul Shawhan supervised appellant at USA Aluminum. (2 RT Vol. 18 3989-3990.)[9] Appellant was very courteous towards his supervisors but acted like a "self-appointed police officer" with respect to fellow employees, continually reporting minor infractions. (2 RT Vol. 18 3993.) He was slower to learn new tasks than the other employees and had difficulty following instructions. (2 RT Vol. 18 4010-4012.)

Appellant had a terrible temper and easily became agitated. (2 RT

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[9] Shawhan recalled that appellant worked at USA Aluminum in 1989. However, an employment record indicated that appellant worked there in 1988. (2 RT Vol. 18 3990, 3996, 3998-4001.)

Vol. 18 4007-4008.) He had several confrontations with other employees which Shawhan did not deem serious enough to take disciplinary action. (2 RT Vol. 18 4002, 4012-4015.) On one occasion, however, appellant almost got into a physical altercation with another employee. Shawhan did not know what precipitated the dispute, but he observed that appellant "was in [the man's] face." Appellant was agitated. His face was set, his body was rigid and his fists were clenched, while the other man was calm. Shawhan intervened and appellant walked away. (2 RT Vol. 18 3993-3994, 4004-4006.)

Shawhan terminated appellant as a result of the incident. As appellant was leaving, he told Shawhan it was okay because the Los Angeles Police Department and the Sheriff's Department had been recruiting him. Appellant told Shawhan that those agencies were interested in him because he had an international passport. Appellant also said that maybe someday he would stop by in his police car and take Shawhan out for coffee. (2 RT Vol. 18 3994-3995, 4002-4003.)

In March, 1989, appellant shared an apartment in Westminster with several other people. (2 RT Vol. 19 4216-4217.) According to one of his roommates, Mary Perez, he was a good tenant. He kept up with his rent payments, he was not rowdy, and he never argued with anyone. (2 RT Vol. 19 4217-4218.) She recalled that he stayed in the apartment the nights of March 20, 21, and 22, 1989. (2 RT Vol. 19 4226.) At some point, he told her he was moving out, though he had left her a note to that effect about a week before. (2 RT Vol. 19 4222-4223.)

In February and March, 1989, Dennis Burkhart supervised two Taco Bell restaurants. (2 RT Vol. 19 4259-4260, 4287.) At some point during that period, appellant, who had been working at one of the restaurants for

about three or four weeks, approached Burkhart and asked for an assessment of his performance. Burkhart informed appellant that he had discussed his performance with the restaurant manager, Maryann Scott, and that she believed appellant needed to learn aspects of the business other than working at the register. (2 RT Vol. 19 4260, 4263, 4270-4275.) As far as Burkhart was concerned, it was a minor matter. (2 RT Vol. 19 4267-4268, 4275-4276, 4289-4290.) However, appellant replied that Scott was "picking on [him]." (2 RT Vol. 19 4261, 4278.) Appellant was glaring at him, and his eyes seemed to be bulging out. His face was red and he was perspiring. (2 RT Vol. 19 4264-4267, 4282-4283.) Burkhart just walked away, afraid appellant was going to assault him. (2 RT Vol. 19 4267, 4278-4279, 4284.)

Norma Sandoval, one of appellant's co-workers at the Taco Bell, recalled that he sometimes said and did unusual things. For instance, he joked and talked about sexual matters, such as having sex with two or three women at one time. (2 RT Vol. 18 4032-4037, 4045-4047.) She told him she did not want to talk about that at work. He did not get angry when she said that. (2 RT Vol. 18 4046.)

On two occasions, appellant visited the restaurant after he had been drinking. The first time, which was about two weeks before he was fired, he told Sandoval that she was pretty and that she smelled nice, and touched her on the shoulders. She felt nervous. He waited around and gave her a ride home. (2 RT Vol. 18 4041-4044, 4058-4059.) The second time was the night after he was fired. (2 RT Vol. 18 4037-4038, 4048-4050, 4054-4055, 4060-4061, 4064.) He said he had been fired and was moving to Texas to be with his family. (2 RT Vol. 18 4050.) He seemed nervous. (2 RT Vol. 18 4055.) He had also stopped by that afternoon. (2 RT Vol. 18

4041, 4054.)

According to Sandoval, appellant got along with his fellow employees and was patient with them. (2 RT Vol. 18 4041.) He was always friendly with everyone and never lost his temper with customers. (2 RT Vol. 18 4045.)

Sometime in March, 1989, appellant called Gloria Lara and told her that he was moving to Texas to be near their daughter, Sandra. He said that there was nothing for him in California. (2 RT Vol. 19 4429-4430.) He said he was waiting for a tax refund. (2 RT Vol. 19 4429.) He also told her he had not had sex in a long time. (2 RT Vol. 19 4430-4433.)

Maryann Scott testified that she had been a manager at a Taco Bell in Westminster, and that she had hired appellant as an assistant manager. (2 RT Vol. 19 4228-4229.)[10] According to Scott, she had to work with appellant constantly to make sure he did his job correctly. Appellant was slow to learn how to fill out paperwork and sometimes made a lot of errors. (2 RT Vol. 19 4237, 4429.) She often assigned him to one task, only to find that he had switched to another, easier one. (2 RT Vol. 19 4238.) Often she had to do appellant's work for him. (2 RT Vol. 19 4235.) Appellant became upset whenever he was corrected, and he got upset more easily than other employees did. (2 RT Vol. 19 4241, 4244-4245.) Scott and appellant had arguments when she corrected him, and sometimes he walked away. (2 RT Vol. 19 4243-4245.)

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[10] As the direct examination commenced, Scott started to cry and the court called a recess. Out of the jury's presence, Scott explained that her daughter had just been murdered and that she did not want to be there. She also stated that she believed she was entitled to a reward in connection with this case and that she was trying to find out how to obtain it. (2 RT Vol. 19 4229-4233.) However, she decided to testify. (2 RT Vol. 19 4234.)

On appellant's last day at the Taco Bell, Scott contacted him at 6:00 a.m. and told him to return to the restaurant right away because it was a mess. (2 RT Vol. 19 4239.) The previous evening, he had failed to make sure it had been cleaned properly. (2 RT Vol. 19 4241.) When he arrived, they got into a heated argument, with Scott berating appellant about his failings as an employee. Appellant, in turn, said that she was always complaining. They were both angry. (2 RT Vol. 19 4229, 4234, 4240.) Appellant said, "Well, if I can't do it the way you say then I guess I'm out of here." He threw the keys on the desk and stomped out the door. She followed him to the parking lot and told him that what he was doing was stupid and that if he wanted the job as much as he told her he did, he could at least try harder to make it right. (2 RT Vol. 19 4242, 4249.) Appellant got into his car and drove away. (2 RT Vol. 19 4250.) Appellant never said he quit and she never told him that he was fired. (2 RT Vol. 19 4249.)

According to Scott, she would have given appellant another chance had he returned. She did not want to see appellant lose all that he had been trying to put into the job. (2 RT Vol. 19 4257.)

Appellant returned at some point to pick up his final paycheck. She could not recall the date he picked up the check. (2 RT Vol. 19 4250.) He was dressed very well and told her he was returning to Panama. (2 RT Vol. 19 4251.)

The next day, Santa Ana police officers informed Scott that appellant may have been involved in a murder and asked that she let them know if she heard anything. (2 RT Vol. 19 4254-4255.) A short time later, she received a phone call from a Taco Bell employee in San Antonio, where appellant had applied for a job. (2 RT Vol. 19 4253.) She gathered information as to appellant's whereabouts, intending to pass that

information on to the Santa Ana police. (2 RT Vol. 19 4256.)

Laverne Arnold, a disclosure officer for the Internal Revenue Service ("IRS"), testified that appellant's tax return was processed on April 10, 1989. (2 RT Vol. 19 4295, 4297.) That same day, the IRS mailed a notice advising appellant that his refund had been offset by a liability for child support. (2 RT Vol. 19 4296, 4299, 4301-4303.) Arnold did not know when appellant had filed the return, but said he could have filed it in January or February of 1989. (2 RT Vol. 19 4297-4298.)

Gloria Lara saw appellant in San Antonio around Easter week, 1989. (2 RT Vol. 19 4428.) She and her daughter Sandra picked up appellant at the airport. (2 RT Vol. 19 4434-4435.) From there, they went to a Taco Bell restaurant. Lara did not know why they went there. (2 RT Vol. 19 4434-4435.) She did not know whether he applied for a job, but he did ask about working there. Afterward, they returned to the airport so appellant's mother could pick him up. (2 RT Vol. 19 4445.)

Over the next week or so, Lara saw appellant about once a day. (2 RT Vol. 19 4446.) Sometime during that week, she asked how his brother Raymond was doing. Appellant replied that Raymond was living in Mexico and was in big trouble. He would not tell her what Raymond had done, only that it was "something real bad." (2 RT Vol. 19 4451-4452.) On another occasion, he called her from a club and said he was enjoying himself. He also said California was terrible because there you could kill someone and get away with it. (2 RT Vol. 19 4453-4454, 4471-4473.)

About a week after Lara picked him up, appellant called her from the San Antonio Jail. (2 RT Vol. 19 4445-4446.) He said he had been arrested for killing a nine-year-old girl. When Lara asked why he killed her, he replied, "I don't know. She was getting out of hand." He also said that he

did not mean to kill her. Then he said he had to go. (2 RT Vol. 19 4447-4448; 2 RT Vol. 20 4475-4477.) He called again sometime later, asking her to get him out of jail. She refused to do so. (2 RT Vol. 19 4449-4451.)

Lara testified that she felt sorry for appellant. (2 RT Vol. 19 4460.) She had always believed that appellant was "not totally all there." She also believed he had never gotten the help he needed. (2 RT Vol. 20 4470-4471.)

b. Expert Testimony Regarding Appellant's Brain Damage and Other Impairments

Paul Berg, Ph.D., was a psychologist retained by the defense to determine whether appellant fit the profile of a pedophile, and to provide a general psychological profile of appellant and information about his mental state on March 20, 1989. (2 RT Vol. 19 4310-4321.) In conducting his evaluation, Dr. Berg relied on the following sources of information: his interviews of appellant; police records; the autopsy report and other laboratory records; appellant's military and school records; a memorandum regarding interviews of his family members; psychological tests he administered to appellant; his interviews of appellant's mother, father and younger brother; and the reports prepared by Dr. Jose LaCalle, Dr. Consuelo Edwards and Dr. Seawright Anderson. (2 RT Vol. 19 4319-4324; 2 RT Vol. 21 4715-4717.)

Dr. Berg interviewed appellant on November 20, 1990, and December 10, 1992. (2 RT Vol. 19 4320, 4326-4327.) Each of the interviews lasted about four or five hours. (2 RT Vol. 19 4327.)

During the first interview, appellant was cooperative and engaged, but he exhibited strange thinking. That is, appellant's responses often were only loosely connected to Dr. Berg's questions. He seemed anxious and

sometimes confused, and exhibited suspiciousness and self-centeredness. (2 RT Vol. 19 4325.)

Among other things, appellant discussed the stabbing of Gloria Lara. The attack was part of a pattern in his life, i.e., an act of uncontrolled rage, which came out when he felt most insecure, followed by remorse. (2 RT Vol. 19 4345-4347.)[11]

Appellant also told him that his mother had subjected him to a great deal of abuse when he was growing up. She beat him with whatever was available, such as broomsticks and coat hangers. She was always angry at him and was always trying to hurt him. (2 RT Vol. 19 4333, 4337.)

Dr. Berg also obtained information regarding eight separate head injuries appellant had suffered. First, when he was 19 years old, he was in a car accident in which he was propelled through the windshield. Second, while appellant was serving in the Army at the age of 21, some men hit him over the head a number of times, leaving him dazed. Appellant reported that he was taken to the Army hospital, where he was x-rayed. Third, in another incident, three fellow soldiers covered him with a blanket and threw him out of a second-story window. Appellant said he was taken to the hospital following the incident. Fourth, three weeks later, he was running at night when he fell into a ditch and was knocked unconscious. He was given medication and held out of basic training for about a month, but he continued to suffer constant, bad headaches. Fifth, he was asleep in a military truck when it turned over, causing a cannon to bang against his

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[11] Throughout the trial, Gloria Lara was sometimes referred to by her maiden name, Gloria Villareal. (See, e.g., 2 RT Vol. 19 4345-4347; 2 RT Vol. 22 5023; 2 RT Vol. 34 8542.) However, for the sake of clarity, appellant refers to her as Gloria Lara in this brief.

head. He suffered from headaches as a result and was given painkillers. Sixth, sometime around 1977, he dove into a pool which was too shallow and landed on his forehead, leaving him dazed. Seventh, in 1986 he was involved in a fight in which a man threw a rock at him, hitting the back of his head. The injury required six or seven stitches. Finally, in 1987, he slipped and fell while chasing a chicken. He was knocked unconscious and turned yellow. (2 RT Vol. 19 4345-4349; 2 RT Vol. 21 4887-4893.)

Dr. Berg also obtained information regarding appellant's relationship history. Appellant had lived with at least 10 different women and fathered a number of children. He had a very intense need to be with women and found it intolerable to be between relationships. He needed to prove his masculinity with women. If he could not control them, he often became upset, jealous and enraged. (2 RT Vol. 19 4349-4350.)

Dr. Berg administered various psychological tests. (2 RT Vol. 19 4332.) Among other things, Dr. Berg administered two personality tests, the Minnesota Multiphasic Inventory ("MMPI") and the Millon Clinical Multiaxal Inventory ("Millon"). (2 RT Vol. 19 RT 4321-4323.) Appellant answered those two tests in such a chaotic way that they produced no valid clinical information. (2 RT Vol. 19 4332; 2 RT Vol. 21 4855-4856.) Dr. Berg also administered the Reyes Memory Test, a test commonly used to determine whether a patient is malingering. The results indicated that appellant was not malingering. (2 RT Vol. 19 4333; 2 RT Vol. 21 4903-4905.) Dr. Berg observed that although some of appellant's bizarre conduct may have been calculated, that did not mean he was not mentally ill. (2 RT Vol. 22 4942.)

Dr. Berg's second interview of appellant took place two years after his first interview. (2 RT Vol. 19 4327; 2 RT Vol. 21 4695.) Dr. Berg

found that appellant was obviously more disturbed than he had been two years earlier. That is, his suspiciousness, confusion and paranoia were more pronounced, and he was more boastful about his sexual exploits and general competence. (2 RT Vol. 19 4328-4329; 2 RT Vol. 21 4696.)

Dr. Berg concluded that appellant was not malingering because the changes he observed in appellant were consistent with other cases in which he had seen people decompensate, or fall apart, under stress. (2 RT Vol. 19 4331.) Although appellant's experiences in jail exacerbated his mental condition, he had been mentally ill when he went to jail. (2 RT Vol. 21 4696.)

Dr. Berg considered the investigative records to be important in his clinical examination. They documented, among other things: appellant's inability to hold a job for any length of time; and the fact that he got involved in violent altercations, which generally related either to his inability to get along with other people or to his intense jealousy in his relationships with women. (2 RT Vol. 19 4340-4341.)

Dr. Berg interviewed appellant's mother, father and youngest brother, in part to evaluate appellant's claim that his mother had abused him. (2 RT Vol. 19 4323, 4333; 2 RT Vol. 21 4893.) Appellant's mother denied that she had ever hit him, which Dr. Berg found somewhat surprising. She also dominated the interview in a way he had rarely seen in his 29-year career. She tried to control the entire interview and prevented her husband from speaking. On a number of occasions, appellant's father tried to speak, and she either looked at him or placed her hand on him so that he would be quiet. (2 RT Vol. 19 4337.) Dr. Berg explained that such behavior may indicate that the individual is domineering, if not physically aggressive. (2 RT Vol. 19 4338.)

Both parents told Dr. Berg that, of their seven children, appellant was the most different and odd. He seemed unable to make social relationships with other kids and was a loner. His mother saw a kind of violence in him and reported that he had a "flash temper." From the time he was about seven years old, he would explode in ways that frightened people around him. She could not communicate with him or predict how he would behave. Appellant's father reported that, from the time appellant was two years old he would not allow anyone to come close to him. He was averse to physical contact and seemed withdrawn and isolated. (2 RT Vol. 19 4338-4339.)

From appellant's account of the crimes, Dr. Berg concluded that he struggled for some part of that day with the idea of killing Maryann Scott, including when he approached Sandra Cruz and while he was in the motel room with Nadia. (2 RT Vol. 21 4779-4780; 2 RT Vol. 22 4972.) Appellant's account suggested that he may have believed he was killing Scott. (2 RT Vol. 21 4862-4863, 4869, 4875-4879; 2 RT Vol. 22 4932-4934, 4946.) Dr. Berg also concluded that Nadia's age was irrelevant to appellant; at most, he may have been unable to approach an adult female at that time because he had had a toxic interaction with an adult. (2 RT Vol. 21 4711-4712, 4771.) Appellant also reported that he had ingested one Quaalude, seven or eight lines of cocaine, marijuana and between three and six "tall boys" (i.e., 16-ounce cans of beer) before killing Nadia. (2 RT Vol. 21 4783-4785, 4858.)

Dr. Berg found that he had no basis to completely disbelieve any aspect of appellant's account. He believed that appellant's various accounts of the incident had had different slants, depending on who he was talking to, because he was struggling to recreate it and he was giving the best

recollection he could. (2 RT Vol. 21 4703-4704.)

Dr. Berg opined that appellant was mentally ill on March 20, 1989. Specifically, on that day appellant was affected by severe personality disorders which had developed early in his life, and by a variety of stressors related to his confrontation with Scott. (2 RT Vol. 21 4699-4700.) His thought processes may have been further impaired by drug and alcohol use. (2 RT Vol. 21 4783; 2 RT Vol. 22 4929, 4946-4948.)

Dr. Berg explained that, due to his personality disorders, appellant was a narcissistic, egotistical man who needed constant affirmation and reassurance. The intensity of his desire to be accepted and to succeed was self-defeating. (2 RT Vol. 21 4698-4699.) Appellant's personality disorders had caused difficulties for him long before March 20, 1989. (2 RT Vol. 21 4696-4697, 4880; 2 RT Vol. 22 4967.) Among other things, he had had short-lived relationships with many women in a frantic effort to restore his self-esteem. Appellant was similarly unable to sustain a job. (2 RT Vol. 21 4967-4968.) Dr. Berg testified, "There was nothing this man touched that didn't turn to dirt." (2 RT Vol. 21 4698.)

Dr. Berg further explained that although appellant's personality disorders were always present, on the day of the crimes they were exacerbated by stressors that were not present at other times and which precipitated his actions that day. (2 RT Vol. 21 4777-4779; see also 2 RT Vol. 22 4934-4935.) Specifically, those stressors included his perception that he had been fired; his rage and desire to kill Scott; his fear that he could not sustain his living arrangements; his inability to obtain money; and his attempt to obtain drugs to remedy how he was feeling. All of those stressors would have been very upsetting but manageable for a normal person, but, given the severity of his personality disorders, they were

unmanageable for appellant. As a result, appellant could not control himself. (2 RT Vol. 21 4696-4697, 4699-4700.)

Appellant's mental illness manifested itself in various ways with respect to the crimes. First, soliciting Nadia Puente to enter his car was pathological. He sought her company because he was desperate and depressed, and he was reaching out in an obviously inappropriate way for anything that might help him feel better. Second, appellant's poor judgment in taking her to the motel room was a sign of his pathology. Third, his rage reaction in the bathroom, which led to the killing, was a sign of his inability to control himself. Fourth, appellant's explanation for his sexual activity with Nadia was so extraordinarily bizarre that it could only have been the idea of a mentally ill person. (2 RT Vol. 21 4700-4701.)

Dr. Berg further concluded that appellant did not fit the common profile of a pedophile. (2 RT Vol. 19 4353.) Many pedophiles are seldom interested in interacting with adult women. Appellant, however, was hypersexualized with respect to adult women. (2 RT Vol. 19 4344-4345; 2 RT Vol. 21 4894-4895.) Moreover, nothing in appellant's history showed an interest in or fantasies about gratifying himself with young children. (2 RT Vol. 19 4354-4355; 2 RT Vol. 21 4899-4902.)

Dr. Berg explained that the technical definition of pedophilia requires that an individual be over the age of 16 and harbor persistent sexual interest in children under the age of 13. (2 RT Vol. 19 4354, 4358; 2 RT Vol. 21 4732-4733.) In light of this definition, appellant did not engage in pedophilic conduct when, as an 11-year-old, he fondled his younger sister. (2 RT Vol. 19 4357-4358.) Similarly, an incident in which he made advances towards a 15-year-old, Dalila Flores, was insignificant. That is, the incident shed no light on appellant's state of mind on March 20, 1989,

when he was upset because he had been, or believed he had been, fired from his job. (2 RT Vol. 21 4762-4770; 2 RT Vol. 22 4924-4926, 4957.)

Dr. Jose J. LaCalle, Ph.D., a clinical psychologist, was appointed to determine whether appellant was mentally ill on March 20, 1989. (2 RT Vol. 22 5003-5015, 5018; 2 RT Vol. 23 5097-5099.) In conducting his evaluation, Dr. LaCalle reviewed criminal and medical records; conducted multiple clinical interviews with appellant; administered psychological testing; interviewed family members, spouses and others; and consulted with other defense experts. (2 RT Vol. 22 5017-5019; 2 RT Vol. 24 5331-5363, 5368-5372.)

Dr. LaCalle concluded that appellant suffered from the following mental disorders on March 20, 1989: Organic Personality Syndrome, Explosive Type; Borderline Personality Disorder, Severe; and organic impairment, a medical condition. (2 RT Vol. 22 5065-5067; 2 RT Vol. 23 5163-5164, 5243, 5256; 2 RT Vol. 24 5328, 5376-5377.) Dr. LaCalle explained that both of appellant's mental disorders were chronic and had developed early in his life, and he probably had developed the Organic Personality Syndrome by age 10. (2 RT Vol. 22 5067-5068; 2 RT Vol. 24 5330.)

Dr. LaCalle testified about various aspects of appellant's history which related to his mental illness. (2 RT Vol. 22 5018-5019, 5021.) First, he concluded that appellant had a very traumatic childhood. His mother had emotionally rejected him almost from the time he was born. (2 RT Vol. 22 5019.) She also physically abused him. (2 RT Vol. 22 5019-5022.) Dr. LaCalle spent five hours interviewing appellant's mother, whom he found to be extremely defensive. She reluctantly confirmed her rough treatment of appellant, but blamed appellant by saying he was totally unruly and

needed the discipline. (2 RT Vol. 22 5027.) Appellant's sister and aunt also related incidents of abuse he suffered at his mother's hands. (2 RT Vol. 22 5028-5031.)

Second, over the years, appellant suffered multiple concussions, some of them followed by loss of consciousness. (2 RT Vol. 22 5020.) In support of this conclusion, Dr. LaCalle recited essentially the same history of head injuries as that recounted by Dr. Berg.[12] Moreover, appellant's aunt reported that, when he was a child, he had run to her house, bleeding from the skull. Finally, appellant's sister reported that, on several occasions, his mother beat him on his head and shoulders with "whatever she could get her hands on," such as a broom and a piece of lumber. (2 RT Vol. 22 5028-5039.) All of these injuries either knocked him out or made him dizzy. (2 RT Vol. 22 5039.) Dr. LaCalle testified that appellant's concussions resulted in permanent, irreversible brain damage. (2 RT Vol. 22 5025; 2 RT Vol. 23 5219-5228, 5247-5250; 2 RT Vol. 24 5330, 5398.)

Third, appellant had a history of alcohol and drug use. (2 RT Vol. 22 5020.)

Fourth, appellant had a history of unstable emotional and sexual relationships. For instance, he had been married nine or ten times, with both legal and common-law marriages. (2 RT Vol. 22 5020, 5024.)

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[12] Dr. LaCalle testified that an Army medical record indicated that appellant was treated for knee and head injuries after either the incident in which he was thrown from a window or the one in which he was hit with a rifle. (2 RT Vol. 22 5033; 2 RT Vol. 23 5302-5306.) In addition, Dr. LaCalle testified that appellant's ex-wife, Marisa Baules, confirmed that appellant hit a wall and passed out while chasing chickens. She told Dr. LaCalle that she thought appellant had died because he was motionless and did not appear to be breathing. (2 RT Vol. 22 5036-5037.)

Fifth, appellant's history demonstrated his inability to remain in a particular situation or locale, such as a job or relationship, for any significant length of time. He had made a number of impulsive decisions such as suddenly getting married, suddenly leaving his wife and children, and leaving the army without authorization. (2 RT Vol. 22 5021-5022.) Appellant's work history showed a pattern of dedicating himself totally to a new job, getting into conflicts with a manager or co-worker, and then leaving the job for another one. (2 RT Vol. 22 5046-5047.) He was unable to handle job-related stress or conflict, and tended to feel persecuted and singled out. (2 RT Vol. 22 5044-5045, 5048.)

Sixth, appellant's history revealed multiple incidences of rage and uncontrollable violence, which sometimes occurred when he was contradicted or challenged. He would lose rational control and strike back like an animal. (2 RT Vol. 22 5021-5022.) Such incidents included his jealous attack on Lara; an incident at a hamburger stand he owned in Panama, in which he brandished a knife at a customer who had been talking to appellant's wife; and an attack on a customer who had underpaid by 10 cents. (2 RT Vol. 22 5023-5024.)

Seventh, Dr. LaCalle had yet other information suggesting a lifelong history of mental illness. Appellant may have suffered from Attention Deficit Disorder of Childhood and was placed in special education classes as a result. (2 RT Vol. 22 5040.) When appellant was about 11 years old, he took his 16-year-old cousin's bra and panties, manifesting some of the criteria required for Organic Personality Syndrome. (2 RT Vol. 24 5409-5410.) He was taken to a curandero on a number of occasions during his childhood and adolescence. (2 RT Vol. 22 5041, 5043.) An Army medical record indicated that appellant was referred to a psychiatrist three

weeks before he was discharged, and appellant reported that he was seen by an Army psychiatrist at least three times. (2 RT Vol. 22 5043-5044.)

With regard to testing, Dr. La Calle concluded as follows:

The results of both the MMPI and the Millon were invalid. (2 RT Vol. 22 5048-5049.) The results of a third personality test were so unusual that he had some questions as to their validity. (2 RT Vol. 22 5050-5052; 2 RT Vol. 23 5279-5284; 2 RT Vol. 23 5279-5284.) According to Dr. LaCalle, appellant was affected by the fact he was in custody. (2 RT Vol. 22 5087-5088.)

Appellant scored 10 out of a maximum of 10 on two separate tests – one designed to test for depression, the other to test for anxiety. However, because the two scores were inconsistent both with Dr. LaCalle's clinical observations and with one another (i.e., it is unusual to obtain maximum scores on both tests), he concluded appellant was malingering. (2 RT Vol. 22 5053-5054, 5088-5089; 2 RT Vol. 23 5321-5322.)

Dr. LaCalle explained that appellant's mental illness, and the Organic Personality Syndrome in particular, interfered with appellant's cognitive processes, that is, the functioning of his mind in perceiving reality and processing information, passing judgment, seeking acceptable alternatives, and executing decisions. (2 RT Vol. 22 5068-5069; 2 RT Vol. 24 5438-5443, 5446-5451.) The loss of his job, which appellant saw as his "ticket to respectability," triggered an extreme emotional reaction as he felt he had amounted to nothing. (2 RT Vol. 24 5397-5398.) That is, under the influence of uncontrollable rage associated with his mental illness, appellant's thinking processes were impaired at the time he committed the crime. In the absence of that rage, appellant would not have committed the crimes against Nadia Puente. (2 RT Vol. 22 5070-5071; 2 RT Vol. 23

5129-5130, 5269-5270, 5290-5292; 2 RT Vol. 24 5290-5292, 5331, 5422.)

Dr. LaCalle also explained that he had spoken with appellant a number of times during the previous four years, enabling him to compare the various statements appellant had made regarding the crime and to observe his demeanor when he made those statements. (2 RT Vol. 22 5074-5078; 2 RT 23 5190-5191, 5294-5301; 2 RT Vol. 24 5387-5388.) Dr. LaCalle opined that appellant did not know what happened or why it happened, had only limited recollection of the events, and tried to fill the gaps by creating information, processing information he had heard during the last four years, and, more recently, manipulating information on his own behalf. (2 RT Vol. 22 5076-5081.)

Despite his conclusion that appellant had malingered and lied to him in the past, Dr. LaCalle expressed confidence in his opinion that appellant was mentally ill on March 20, 1989. He explained that appellant's lies and malingering represented an after-the-fact attempt to explain to himself why he did what he did. (2 RT Vol. 22 5073.) He further explained that appellant's condition was involuntary and therefore beyond his control. (2 RT Vol. 22 5073-5074.)

Finally, Dr. LaCalle did not find anything in appellant's background indicating that, as an adult, he had engaged in inappropriate sexual behavior with any minors other than Nadia Puente. (2 RT Vol. 22 5081; 2 RT Vol. 23 5175-5181; 2 RT Vol. 24 5362-5363, 5390-5395.) Although appellant's sister reported that he had molested her when they were both minors, the American Psychiatric Association's definition of molestation, as set forth in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), required that the sexual activity involve either an adult and child or a sufficient age differential between two children, neither of which applied.

(2 RT Vol. 22 5082-5083; 2 RT Vol. 23 5165-5170.) Lastly, although appellant took Dalila Flores to a motel to have sex with her, and made sexual advances towards her, that conduct did not indicate pedophilia because she was not a prepubescent child, as required by the DSM. (2 RT Vol. 22 5084-5086; 2 RT Vol. 23 5132-5162.) On the other hand, while appellant may have behaved inappropriately when he offered to give an 11-year-old girl English lessons at his apartment, that conduct was not sexual in nature. (2 RT Vol. 23 5170-5175, 5178.)

Dr. Seawright Anderson, M.D., a psychiatrist, was appointed to determine whether appellant understood the nature and quality of his act and whether he knew or understood what he was doing was right or wrong, pursuant to Penal Code section 1026. (2 RT Vol. 25 5472-5474, 5488-5491.)

Dr. Anderson reached the following diagnoses: Schizo-Affective Disorder; a history of poly-substance abuse involving alcohol, marijuana, cocaine and Quaaludes; a history of head injuries; and Organic Personality Disorder. (2 RT Vol. 25 5484, 5487, 5558, 5563, 5566-5576, 5584-5585, 5612-5615.) Appellant's impairments resulted in defects in his testing of reality, including his perceptions of what was happening with Nadia. (2 RT Vol. 25 5541-5545, 5548-5549.)

Dr. Anderson explained that appellant, already impaired by these disorders, was frustrated and depressed because he had lost his job and felt he had lost everything. (2 RT Vol. 25 5509, 5606-5607.) His disorder made him more frustrated, suicidal, and depressed, decreasing his judgment, insight, and ability to control his inner impulses and frustrations. (2 RT Vol. 25 5593.) When a tax refund check he was expecting did not arrive, appellant's anger was exacerbated. (2 RT Vol. 25 5535-5541, 5596-5597.)

That extreme anger distorted appellant's visual perception at the time he killed Nadia, so that he believed he was killing Maryann Scott, not Nadia. (2 RT Vol. 25 5596-5597.)

Dr. Susan Fossum, Ph.D., a licensed clinical psychologist, testified that she had been appointed to assist the defense in this case. (2 RT Vol. 26 5698-5701.) In conducting her evaluation, she prepared a biopsychosocial history of appellant based on various sources of information, including the following: approximately 15½ hours of interviews with appellant; psychological testing of appellant;[13] reports by other experts; a diary written by appellant; police reports; medical, army, employment, and jail records; and interviews of two of appellant's supervisors. (2 RT Vol. 26 5752-5761, 5767-5768, 5770-5775, 5777-5779, 5785-5787, 5808.) She concluded that each of these aspects of his history influenced his behavior on March 20, 1989. (2 RT Vol. 26 5767-5768.)

Dr. Fossum reached the following diagnoses: Organic Personality Syndrome, Explosive Type; Chronic Schizophrenia of the Paranoid Type; Narcissistic Personality Disorder with features of Borderline Personality Disorder; and Sociopathic Personality Disorder. (2 RT Vol. 26 5762; 2 RT Vol. 27A 6048-6049, 6113, 6137.) She also concluded that appellant's right frontal lobe, right and left temporal lobe, and right parietal lobe were marked by extensive dysfunction, as was, probably, his limbic system. (2 RT Vol. 26 5765, 5842; 2 RT Vol. 27A 6127-6128.) Appellant was

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[13] Dr. Fossum concluded that, had she administered the Rorshach test to appellant on March 20, 1989, the results would have been the same or worse than the results of the test she administered in 1993. (2 RT Vol. 27A 6133.)

afflicted with all of these conditions on March 20, 1989. (2 RT Vol. 27A 6078, 6127.)

Dr. Fossum explained that an individual afflicted with Organic Personality Syndrome, Explosive Type, has frontal lobe damage, resulting in an inability to read social cues, exercise judgment and reason, and solve abstract problems. The syndrome also involves great emotional lability, resulting in rage reactions in which an unwanted response begins and the brain is unable to exercise normal controls to stop the response. (2 RT Vol. 26 5763; 2 RT Vol. 27A 6137-6138.) According to Dr. Fossum, appellant developed the condition prior to 1989. (2 RT Vol. 26 5766.)

Dr. Fossum explained that a primary characteristic of Schizophrenia, Paranoid Type, is a distortion of reality and the inability to assess reality correctly. A schizophrenic may suffer hallucinations and delusions, has difficulty with thought, judgment and reasoning, and is often socially isolated and withdrawn. (2 RT Vol. 26 5763-5764.) She also explained that an individual with Narcissistic Personality Disorder has failed to evolve a solid sense of self and is to varying degrees – and in severe cases, entirely – dependent on external manifestations or reassurances of one's worth. (2 RT Vol. 26 5754.) Dr. Fossum testified that appellant's brain damage was permanent and irreversible, and that it was evident in his behavior. For instance, appellant tended to perseverate, he had difficulty with abstract concepts, he was socially inappropriate and naive, and he lacked self-critical ability. All of those matters are functions of the frontal lobe. (2 RT Vol. 26 5842-5844.)[14]

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[14] Dr. Fossum testified that her conclusion that appellant had brain damage was based partly upon the results of a Positron Emission

(continued...)

Dr. Fossum testified that, even under the best of circumstances, appellant's schizophrenia rendered his ability to perceive reality at least as poor as that of most hospitalized schizophrenics. (2 RT Vol. 27A 6129-6130, 6132, 6160-6162.) He was continually bombarded by intense flows of bad feelings and intrusive thoughts, which stemmed from inner stimuli. (2 RT Vol. 27A 6134.) He had very little control, but rather had a propensity for "acting out" non-volitionally. (2 RT Vol. 27A 6135.) His schizophrenia was exacerbated significantly by stress, and he was under a great deal of stress on the day of the crime. (2 RT Vol. 27A 6133.)

Moreover, as a result of his Organic Personality Syndrome, he was extremely emotionally labile, so that his emotions went out of control very readily. He had exceedingly poor impulse control, poor judgment and reasoning, and was in a highly emotional state on that date, which was precipitative of the frontal lobe rage reaction. (2 RT Vol. 27A 6128-6129.)

Dr. Fossum opined that Maryann Scott's castigation of appellant triggered a decompensation of his narcissistic personality structure on the morning of March 20, 1989. Dr. Fossum explained that decompensation involves a rapid disintegration of cognitive processes, leaving one unable to distinguish reality from fantasy and internal stimulations that do not relate to reality; a disintegration of faculties such as judgment and reasoning; and the inability to control one's impulses. (2 RT Vol. 27A 6130-6131, 6149-

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[14](...continued)
Tomography ("PET") scan administered by Dr. Monte Buchsbaum and Dr. Stephen Lottenberg (see pp. 47-49, *infra*), but she acknowledged that she had no training in interpreting PET scans and that she did not talk to either of those doctors. (2 RT Vol. 26 5763, 5843.) Dr. Fossum also acknowledged that she was unable to determine what caused the brain damage or when it occurred. (2 RT Vol. 26 5844-5845.)

6150.) She concluded that, as a result of his mental disorders, appellant was confused and consumed by rage at the time of the crimes. (2 RT Vol. 27A 6114-6122, 6136-6137, 6150-6153.) He was confused about what he was doing physically at the time he raped Nadia. (2 RT Vol. 27A 6114-6122, 6136-6137.) Dr. Fossum further concluded that appellant's confusion and rage probably began to ebb around the time he placed Nadia's body in the trash can and took it to Griffith Park. (2 RT Vol. 27A 6122, 6154.)

Dr. Fossum distinguished appellant's mental state on March 20, 1989, from his mental state on the day he took Dalila Flores to a motel room. Specifically, Dr. Fossum observed that appellant had been castigated by Scott and thought he had been fired on the day of the crime, which triggered a decompensation involving rage which left him unable to control his behavior. No such circumstance was present on the day he took Flores to the motel. (2 RT Vol. 27A 6139, 6145-6146.)

Dr. Arnold Purisch, Ph.D., a clinical psychologist specializing in clinical neuropsychology, was appointed at the defense's request to evaluate appellant. (2 RT Vol. 27A 6180.) His primary task was to determine whether appellant had any brain problems and what role, if any, those problems may have played with respect to the charged offenses. (2 RT Vol. 27A 6182.)

In conducting his evaluation, Dr. Purisch considered the following sources of information: several hundred pages of records and reports; approximately nine hours of interviews with appellant regarding his recollection of the crime, his behavior and acts in the time period leading up to it, and what had happened since; a battery of 21 neuropsychological tests, which had not been administered to appellant previously; and an interview of Jerry Taylor, who had served in the Army with appellant. (2 RT Vol.

27A 6182, 6184-6185, 6192; 2 RT Vol. 28 6221, 6270, 6426-6427, 6431-6432.)

Dr. Purisch reviewed information regarding appellant's family history, including reports that appellant's mother was abusive to him. (2 RT Vol. 28 6251-6252.) Appellant's academic records showed that he was a below-average student. His marriage and birth records showed that he had a large number of confirmed spouses and children, and that his relationships were generally short-lived. (2 RT Vol. 27A 6187-6188; 2 RT Vol. 28 6244-6245.) During his marriages, he displayed bizarre behavior including suicide threats, the destruction of belongings, and assaults. (2 RT Vol. 28 6244, 6265-6269.)

Police and other investigative reports relating to interviews of former employers and co-workers established that appellant's jobs were similarly short-lived. Morever, appellant's co-workers and roommates described him as odd and suggested that he had personality difficulties. (2 RT Vol. 28 6244, 6250-6251, 6260-6265, 6270.) For instance, he tended to brag and could not bear constructive criticism. (2 RT Vol. 28 6264-6265.)

Appellant's military records indicated that he received a head injury when he was pushed out of a building. When he was seen by a doctor afterward, he had cognitive problems and slight confusion. (2 RT 27A 6188; 2 RT Vol. 28 6431-6438.) The military records also documented that appellant was referred for a psychiatric examination in 1980 and that a mental status exam was conducted in November of 1981. (2 RT Vol. 28 6206, 6208.)

Dr. Purisch reviewed the reports prepared by other defense experts in the case and was impressed by the fact that the reports were largely in agreement as to the types of mental conditions appellant suffered. (2 RT

Vol. 28 6215-6216.) Records relating to a PET scan and a Brain Electrical Activity Mapping ("BEAM") study revealed problems in appellant's brain, particularly on the right side.[15] Specifically, the BEAM study revealed evidence of problems in the parietal lobe, the left posterior temporal region, and the right temporal region. The metabolism of glucose in appellant's brain, as measured by the PET scan, suggested that his brain impairments were chronic. Moreover, the impairments were typical of individuals with histories of head injuries. (2 RT Vol. 28 6218-6220.)

The results of the neurological battery indicated that appellant had cognitive and other neuropsychological problems, and were consistent with brain impairment. (2 RT Vol. 28 6223-6230, 6240-6241, 6272-6287, 6293.) There was no evidence that appellant attempted to malinger during the neuropsychological testing. To the contrary, appellant was highly engaged with, and motivated during, the testing. He frequently appeared to be satisfied when he knew he did well and became frustrated when he did poorly. (2 RT Vol. 28 6233, 6414-6415.) Moreover, the consistency and reliability of the test results showed a pattern indicative of genuine brain damage. (2 RT Vol. 28 6225-6226, 6230, 6303.)

Dr. Purisch also gave appellant copies of the M.M.P.I. and Millon personality tests to fill out on his own. Because the results were invalid, Dr. Purisch assigned his assistant to observe appellant as he repeated the tests. The results of those tests were also invalid. Dr. Purisch concluded that, although appellant purposefully malingered on the personality tests, he was truly troubled and exaggerated his responses as a cry for help. (2 RT Vol. 28 6235-6240.)

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[15] See pages 47-50, *infra*.

During his interviews of appellant, Dr. Purisch obtained a lengthy background account regarding appellant's personal and family history. (2 RT Vol. 27A 6183.) Among other things, appellant reported to Dr. Purisch that he was twice hospitalized for psychiatric reasons while in the army. Just prior to going absent without leave, he was referred for psychological evaluation because he had been in verbal and possibly physical conflicts with superior officers, and he may have been wrongly suspected of setting fires. After returning from his unauthorized absence, he was placed in a psychiatric ward for two months. During that time, he was given medication, including Sinequan, Cogentin and Navane. Appellant received a formal diagnosis but did not recall what it was. Appellant maintained that the psychiatric treatment he received had been designed to weaken him. (2 RT Vol. 28 6211-6212.)

Appellant also provided a number of examples of his longstanding problem with aggression and temper. Among other things: his mother said he had a flash temper; he stabbed one of his ex-wives; he stabbed another person in Panama; he frequently got into fights, becoming like a "pit bull" and losing control; he destroyed property; and he set fires from early in his life. (2 RT Vol. 28 6297.)

During Dr. Purisch's interviews, appellant could not give a straightforward response, but would instead "go on and on and on." Appellant's co-workers also noted this characteristic, which Dr. Purisch referred to as circumstantiality. Dr. Purisch explained that circumstantiality is frequently observed among individuals with brain damage. (2 RT Vol. 28 6250-6251.)

Dr. Purisch concluded that appellant suffered from an Organic Personality Syndrome of the Explosive Type. He explained that if

something is wrong with an individual's brain, his or her personality becomes disordered. If the individual displays abnormal behavior over the long term, and that behavior has a neurological component, he or she is said to have Organic Personality Disorder. (2 RT Vol. 28 6294-6295, 6501-37-6501-40.)

According to Dr. Purisch, the deficiencies in appellant's brain could account for the long-term behavioral problems he demonstrated, such as aggressive, odd and erratic behavior and a deficient ability to interpret how other people reacted to him in social situations. (2 RT Vol. 28 6281, 6295-6296.) Dr. Purisch concluded that appellant was not an antisocial, psychopathic individual. Although appellant had a sense of right and wrong, he lacked the skills necessary to live the type of life he desired. (2 RT Vol. 28 6254-6255.) Appellant's termination from his job was a significant stress to him, and contributed to the state of mind that resulted in his explosive behavior. (2 RT Vol. 28 6438, 6501-49-6501-50.) In his highly agitated state, given his mental impairments, which may have been exacerbated by drugs and alcohol, his crimes against Nadia were part of an explosive outburst that he could not control. (2 RT Vol. 28 6501-19-6501-22, 6501-43, 6501-46.)

Dr. Purisch believed that his conclusion that appellant had suffered Organic Brain Disorder over a long period of time was supported by the following: appellant's longstanding history of aggressive and violent behavior, which tended to be short-lived; physical abuse by his mother; the fact that he had sustained a number of head injuries; his below-average performance in school; the cognitive difficulties he displayed in his various jobs; his lack of coordination and poor athletic skills; his hyper-sensitivity, that is, he could not bear to be touched for very long; and his longstanding

history of alcohol, cocaine and marijuana abuse. (2 RT Vol. 28 6299-6301.) Moreover, Doctor Purisch was confident in his diagnosis that appellant had Organic Brain Disorder and that he was afflicted with this disorder on March 20, 1989. (2 RT Vol. 28 6418.)

Dr. Monte Buchsbaum, M.D., testified that he was a professor of psychiatry and the director of the Positron Emission Tomography laboratory at Mt. Sinai School of Medicine in New York, New York. (2 RT Vol. 28 6306.) He previously had been the director of the Brain Imaging Center at the University of California at Irvine, where appellant underwent a PET scan in June, 1991. (2 RT Vol. 28 6308-6309, 6330.) He explained that a PET scan measures the rate at which the subject's brain metabolizes glucose, which is a means of assessing brain activity. For instance, the technique enables the psychiatrist to determine what parts of the subject's brain were damaged by psychiatric illness or head injury. (2 RT Vol. 28 6309, 6314-6315, 6323.)

The PET scan administered in this case showed several areas of abnormality or damage in the parietal, frontal and temporal lobes, as well as in the cingulate gyrus, of appellant's brain, particularly on the right side. (2 RT Vol. 28 6314-6322.) According to Dr. Buchsbaum, it was uncommon to find so many areas with deficient metabolism, and, indeed, it lay outside the range of normal physiology. (2 RT Vol. 28 6327.) Dr. Buchsbaum concluded that the most likely medical explanation for the pattern of abnormal metabolism was permanent brain damage, probably associated with head trauma. (2 RT Vol. 28 6363-6365, 6372.) Assuming appellant had suffered no head injuries, his abnormal metabolism could have been caused by a developmental disorder or asymmetric brain damage at birth. (2 RT Vol. 28 6376-6377.)

Dr. Buchsbaum explained that the frontal lobe is the area of one's brain involved in planning and organization of behavior, and it inhibits impulses and other kinds of behavior. (2 RT Vol. 28 6328.) The cingulate gyrus is that part of the brain involved in carrying emotions and other information from the frontal lobe to the temporal lobes, where memory and other kinds of processing occur. (2 RT Vol. 28 6322, 6328.) Impairment of the cingulate gyrus frequently produces abnormal sexual behavior. (2 RT Vol. 28 6328.) A person with the sort of damage seen in appellant's brain would have problems controlling his or her impulsivity and rage and inhibiting violence. (2 RT Vol. 28 6329.)

Based on his experience with PET scan abnormalities among patients with schizophrenia and head injuries, as well as his review of the medical history from the other physicians who had examined appellant, Dr. Buchsbaum opined that this damage probably had existed over the previous decade, and may have been present as early as childhood. He specifically opined that the damage had been there on March 20, 1989. (2 RT Vol. 28 6326.) Moreover, he expected that the results would have been the same had the PET scan been administered on that date. (2 RT Vol. 28 6399.)

Arthur Kowell, M.D., Ph.D., a clinical neurophysiologist, testified regarding a BEAM scan administered to appellant on September 17, 1992. (2 RT Vol. 18 4067-4069, 4089, 4091, 4148, 4169; 2 RT Vol. 19 4195-4197.) Dr. Kowell explained that the procedure is comprised of four sub-tests, the results of which are recorded and compared to those of a control group. (2 RT Vol. 18 4073-4075, 4085-4086, 4091-4093, 4098-4103, 4106-4118, 4123-4133; 2 RT Vol. 19 4176-4195.) A technician administered the test and Dr. Kowell interpreted the results. (2 RT Vol. 18 4087-4089, 4103-4106.)

One of the sub-tests, the Visual Evoked Response, revealed abnormality in the following regions of appellant's brain: the central regions of the brain; the posterior frontal lobe on both sides of appellant's brain; the parietal lobe, which involves integration of sensory processes and spatial relationships; and the right temporal lobe, which deals with language, speech, memory and emotion. (2 RT Vol. 18 4076-4085, 4097-4098, 4130-4152.) Although the results might not have been the same had the test been administered in 1989, the results of such tests are generally consistent absent some intervening pathological process. (2 RT Vol. 18 4148-4150.) Moreover, the results of a PET scan conducted on June 5, 1991, at the University of California, Irvine, showed some of the same areas of abnormality. (2 RT Vol. 18 4138, 4152; 2 RT Vol. 19 4165-4168, 4171-4175, 4203-4204.)

Dr. Kowell explained that a patient with abnormalities in his frontal lobe might have rage attacks or difficulty controlling his temper, though he could not say whether this was true in appellant's case. (2 RT Vol. 18 4134-4137.) Based on the BEAM scan alone, he would not make predictions as to how a specific abnormality would affect appellant's ability to control his temper, his ability to lie, or his tendency to be violent. (2 RT Vol. 19 4200-4202.)

3. Prosecution Rebuttal Testimony

Dalila Flores testified that she met appellant when she was 15 years old. Appellant, who was the assistant manager of a Taco Bell, asked her if she wanted a job. (2 RT Vol. 28 6501-68, 6501-95, 6501-106-6501-107.) She said she did, and she gave him her name and number. (2 RT Vol. 28 6501-68-6501-69.) During that conversation, he asked if she had a boyfriend. (2 RT Vol. 28 6501-95-6501-96.)

About a week later, he called her and said he had a job application for her and that she could meet him the following day at a different Taco Bell. After they met, appellant told her to accompany him to his "apartment" to get the application, and she agreed. (2 RT Vol. 28 6501-68-6501-71.)

They stopped at a store and appellant bought some wine coolers. Appellant then took her to a motel. When they arrived at his motel room, Flores sat down on the bed and appellant started talking about times he had taken other girls there, saying that he had undressed and they took pictures of him. He also said they would go to bed and "do a blow job." Appellant asked if she wanted to do the same thing, but she said no. At some point, appellant asked again whether she had a boyfriend. Appellant also asked Flores if she wanted him to take out a *Playboy* or *Hustler* magazine, and she said no. (2 RT Vol. 28 6501-71-6501-72, 6501-95-6501-96, 6501-99-6501-101.) Appellant pushed her on the bed and tried to kiss her. At that point, she became frightened. (2 RT Vol. 28 6501-72-6501-73, 6501-75.)

At the time appellant pushed Flores, he was drinking one of the wine coolers. She pushed him off, took the bottle and threatened to hit him with it. She said, "Hey, mother fucker, if you touch me you are dead." She also told appellant that she had cousins in gangs, and that they knew where she was, and that if appellant messed with her, her cousins, brothers and boyfriend would mess with him. (2 RT Vol. 28 6501-72-6501-74, 6501-78, 6501-98, 6501-102-6501-103.)

She then walked out of the room. Appellant followed her, but she told him she was going home. Because the motel was "kind of far" from her house and because he apologized, she let him drive her halfway home. She did not ask appellant to drive her all the way home because she did not

want him to know where she lived. Flores never saw appellant again. (2 RT Vol. 28 6501-76-6501-78, 6501-103.)

During the time Flores was in the motel room, they never discussed a job application, and she never saw one. (2 RT Vol. 28 6501-71.)

B. Sanity Phase

1. Defense Case

a. Appellant's Testimony

Appellant testified at the sanity phase of his trial, giving the following account of the events of March 20, 1989:

On March 19, 1989, appellant got off work at 2:00 a.m., having worked a 12-hour shift. He went to bed at 3:00 a.m. but was awakened at 6:00 a.m., when he received a telephone call from Maryann Scott. (2 RT Vol. 30 6982-6983.) She was very angry and told him to "get [his] ass over there real quick because her ass was on the line," and that if anyone was going to lose their job, it would be him, not her. (2 RT Vol. 30 6983.)

When appellant arrived at the Taco Bell, Scott showed him those parts of the restaurant which had not been cleaned properly. She told him that she had put a lot of time into training him, that he was hard-headed and would not listen, and that she was going to replace him. Appellant, thinking he had been fired, threw his keys on the table, "barged out" of the restaurant, and jumped in his car. Scott ran after him and tried to stop him, but he drove away. (2 RT Vol. 30 6983-6985.)

Appellant grabbed some clothes from his apartment, then bought a 6-pack of beer. Angry that he had lost his job, he sped around on some freeways at more than 80 miles per hour, drinking the beer as he drove. He wanted to hit the center divider and kill himself, thinking he had lost the best and final opportunity of his life. (2 RT Vol. 30 6985-6988.) At around

10:00 a.m., appellant bought between $100 and $125 worth of cocaine, speed and Quaaludes. He bought the drugs because he wanted to forget about everything and because he did not want to do anything he was not supposed to. (2 RT Vol. 30 6989-6990.)

Appellant did a few lines of cocaine and drank more beer in a parking lot. At about 11:00 a.m., he checked into the Ha' Penny Inn to get away from everything. In his motel room, appellant thought about how to get back at Scott. He also did three lines of cocaine, drank beer, and smoked. (2 RT Vol. 30 6990-6993.)

After about an hour, appellant drove back to the Taco Bell. He was very upset and saw Scott through the window of the Taco Bell. He wanted to get her but the Taco Bell was crowded, so he returned to the motel. (2 RT Vol. 30 6993-6994.)

Appellant remembered that he had filed his income tax in January. Around 2:00 p.m., he went to the post office, where he discovered that the refund check had not arrived. (2 RT Vol. 30 6990-6995.) As appellant walked back to his car, he had a conversation with Nadia Puente. He could not remember what the conversation was about, but she may have asked what time it was. He told her he did not have a watch. (2 RT Vol. 30 6997-6998.)

Nadia got into appellant's car, but he did not know how that happened. He probably told her he was the President of the United States or something to that effect. He believed he told her to buckle her seatbelt, because he always told his passengers to do that, but he did not remember any other conversation in the car. Nadia pointed to her house when they passed it, and appellant said he would bring her back there. (2 RT Vol. 30 6998-7001.)

Appellant drove Nadia to the motel, but he testified that he did not know why he did so. (2 RT Vol. 30 6999, 7002.) When they arrived at the motel, appellant grabbed clothes and other items from the trunk of his car. Nadia reached into the car and grabbed a box. She followed him into his motel room and closed the door. She said the place was a mess, and started cleaning the room. (2 RT Vol. 30 7001.)

Appellant told her he was tired and needed to take a bath, and that he would take her home after she finished "fixing all of this stuff." He closed the bathroom door and filled the bathtub, then sat in the tub for 20 minutes. During that time, he snorted cocaine. (2 RT Vol. 30 7002.)

As appellant stood up to reach for a towel, the door suddenly opened and Nadia entered the bathroom. He was angry that she had seen him naked, and he told her to hand the towel to him. He then grabbed her and jumped out of the bathtub. Nadia kicked him, which made him angrier. He stood behind her, holding her in a bear hug. He told her he was going to punish her for doing that, but he testified that he did not know how he intended to punish her. (2 RT Vol. 30 7003-7004.)

They had a scuffle and ended up falling over the edge into the bathtub. Appellant stayed on top of her and she drowned. He did not have the power to get off of her. He testified that he did not know what he was trying to do to her, he just did it. (2 RT Vol. 30 7005.)

Nadia did not move. Finally, he rolled onto the floor and got up. Nadia was hanging over the edge of the bathtub. He slipped her entire body into the water, where she lay face down. He turned out the lights and sat in the living room for five or ten minutes. He returned to the bathroom and turned on the light. At that point, he knew something was wrong. He walked out, grabbed the mattress off the bed, and threw it on the carpet. (2

RT Vol. 30 7006.)

Appellant took Nadia's body to the living room and laid her on the mattress because he wanted to get her out of the water. He sat in a chair and saw that her face had turned different colors, including blue and purple. He smelled a terrible odor because she had defecated. He raised up her skirt and pulled her underwear down so he could clean her. (2 RT Vol. 30 7007.)

Although Nadia did not move, appellant did not think he had killed her. Rather, he thought she was playing dead, and he wanted to know if she was alive. He first placed her underneath a chair, grabbed a picture from the wall and put it over the chair to hide her. He was going to leave her there. (2 RT Vol. 30 7008.)

Appellant then placed the picture back up on the wall and again laid Nadia on the mattress. Her face was blue and purple, as if she had been badly beaten, though he never beat her. He walked around the motel room, not knowing what to do. He thought about "doing something," but she looked too young. (2 RT Vol. 30 7009.)

Appellant went in the bathroom and started to "play with [him]self" to get an erection. Appellant testified that he did so "because I couldn't do nothing in the condition I was. When I drink and I am on drugs I am no good in sex. I am weak. I can't do nothing." (2 RT Vol. 30 7009.) Appellant then sodomized her to determine whether she was alive. He thought that was the only way to find out whether she was alive. He did not ejaculate because "it was in and out real quick, wobbly." (2 RT Vol. 30 7010.)

Nadia's face was stiff, and at that point, appellant knew she was dead. (2 RT Vol. 30 7011.) Nervous and scared, he walked outside for 20

minutes. He took a trash can from the laundry area to his room. He placed a bedspread inside the trash can because he did not want to get her skin dirty. He then put her in the trash can and put the lid over it. (2 RT Vol. 30 7010-7012.)

Appellant put his belongings in his car and placed the trash can containing Nadia's body inside the trunk. Appellant then drove around aimlessly, finally ending up in Griffith Park. He wanted to leave the trash can in a place where Nadia would be found before vultures or ants could get to her. He did not know why he did not leave her body in Orange County. (2 RT Vol. 30 7012-7015.)

After placing the trash can on the ground, appellant removed the lid and looked inside. He looked at her face, thinking she might be alive by now and that perhaps he could take her home, but she did not move. Appellant told her he was sorry he had to leave her there, and that she would be found soon. He covered the can with the lid so the ants would not get her. (2 RT Vol. 30 7015-7016.)

Appellant drove to Beverly Hills, where he sat in a parking lot. He then drove to his apartment, arriving around midnight. One of his roommates accompanied him to the motel. After appellant returned the motel key, he took his roommate back to the apartment. He then went to the Taco Bell. (2 RT Vol. 30 7016-7018.)

Appellant denied that he took Nadia to the motel intending to have sex with her. He wanted to kill Maryann Scott, not Nadia Puente. He was mad and Nadia just happened to get in the way, and he killed her. He explained that he was angry when Nadia walked into the bathroom as he was reaching for a towel. He had been thinking about Scott, and he was thinking that he had failed and lost. He remained angry even after

drowning Nadia. (2 RT Vol. 30 7018-7020.)

On cross-examination, appellant reiterated that he did not recall what he told Nadia when he approached her. (2 RT Vol. 30 7022-7023.)

At first, he did not tell the police he had killed Nadia because he was afraid of them. He could see their revolvers. (2 RT Vol. 30 7024, 7028.) The officers were whispering, and at some point he heard Officer Alvarado say, "I feel like shooting the bastard." (2 RT Vol. 30 7028.) After they said his fingerprint was on the trash can liner containing Nadia's body, he gave in and said he had killed her. (2 RT Vol. 30 7024.) Appellant acknowledged that he told the police that he told Nadia that he was a teacher and that he knew the principal of the school. However, he testified, he did so because the police officers told him he had said that and because he was afraid they would shoot him. (2 RT Vol. 30 7022-7023, 7066-7067, 7132-7133, 7137.) Appellant testified that he lied when he told the police officers that he was not under the influence of drugs the day he killed Nadia. (2 RT Vol. 30 7026.) Appellant denied approaching anyone other than Nadia. (2 RT Vol. 30 7023, 7067, 7138.)

Appellant further testified that he may have told Nadia he was suicidal. (2 RT Vol. 30 7067.) When he walked to the motel room with Nadia, she looked older than she had when he picked her up. She looked like a 19-year-old, and by the time they reached the motel room, she looked about 25 years old. (2 RT Vol. 30 7079.)

While they were in the motel room, appellant told her he was going to take a bath and that he would take her home after he was done. He meant it. (2 RT Vol. 30 7080-7081.) He then took a bath to "cool out," so that he would not do anything he should not do. (2 RT Vol. 30 7131.)

Appellant also testified that she screamed while he was holding her,

so he believed he had to silence her screams. But it was Maryann Scott he saw screaming, not Nadia. (2 RT Vol. 30 7083.) He was not afraid he would be caught with a child. It was the high tone of her voice which "freaked [him] out." (2 RT Vol. 30 7087-7090, 7139-7141.)

Although he held her head under water until she stopped struggling, he did not know if he did so purposefully. He was on top of her and could not get up. (2 RT Vol. 30 7109, 7142.) He admitted that he probably told Dr. Edwards that he was going to punish her. (2 RT Vol. 30 7079-7080.)

After killing Nadia, appellant sat in the other room for a while, thinking she was playing dead. (2 RT Vol. 30 7090.) He acknowledged that he probably told Dr. Edwards he watched television. (2 RT Vol. 30 7083.) At some point, appellant decided the best way to find out what was happening was to sodomize her. (2 RT Vol. 30 7090, 7098, 7104, 7139, 7151, 7153.) He thought that was the right thing to do. (2 RT Vol. 30 7153.)

Appellant had a feeling Nadia was dead when he pulled her out of the water, but he also thought she might be alive because she was blue and purple. As he stared at her after placing her on a mattress, she appeared to turn young again. He thought he had killed Maryann. (2 RT Vol. 30 7103-7104, 7108-7109, 7151-7152.)

He proceeded to sodomize her. (2 RT Vol. 30 7090, 7098, 7104, 7139, 7142-7143, 7150.) He put his fingers in her vagina, but only to clean her. He did not penetrate her vagina with his penis. (2 RT Vol. 30 7098-7099, 7102-7103, 7151.) He could not actually "do anything because [he] was so wasted." (2 RT Vol. 30 7095.)

Appellant testified that he had been trying to figure out exactly what happened that day. Appellant explained that he was testifying to what he

believed had happened, but he did not know what really happened. (2 RT Vol. 30 7100.) The only thing he actually remembered was that Nadia was floating in the water and he took her out of the bathtub. (2 RT Vol. 30 7100.)

Appellant said he removed Nadia from the motel room because he did not want to scare the maid and he wanted Nadia to be found somewhere else. He also testified that he kept thinking she might wake up. (2 RT Vol. 30 7107.) Although appellant testified that he wanted her to be found, he acknowledged that he took no steps to notify anyone as to the location of her body, and that he placed the trash can lid on tightly. (2 RT Vol. 30 7064, 7155-7156.)

Two days later he went to Griffith Park with Lorena Manuel and her two nieces. (2 RT Vol. 30 7091-7093, 7157-7158.) He had forgotten what happened with Nadia. (2 RT Vol. 30 7157.)

Appellant denied making up stories when he spoke to the doctors. He told them everything. (2 RT Vol. 30 7024.) He never told members of the Orange County Jail psychiatric team that he shaved his eyebrows and engaged in bizarre behavior because it made him look crazy. (2 RT Vol. 30 7058-7059.) However, he told Dr. Ronald Siegal that he had not used any drugs on the day of the crimes so that Dr. Siegal would leave him alone. (2 RT Vol. 30 7049-7050.) He probably told Dr. Jose LaCalle on some occasions that he had not used drugs that day because he was mad at Dr. LaCalle. (2 RT Vol. 30 7051-7053.)

Appellant also testified that Dalila Flores had lied during her testimony. (2 RT Vol. 30 7032.) According to appellant, he showed her a job application and wanted to help her fill it out. (2 RT Vol. 30 7031-7032.) He had her pick up the application at his motel because the

encounter took place the day before he left California, when he was no longer working at the Taco Bell. (2 RT Vol. 30 7037-7040.)

Appellant testified that he never was disrespectful to Flores. He never asked if she wanted to take her clothes off and take pictures of him, and never said he needed a blow job. (2 RT Vol. 30 7033, 7035.) He did not talk to her about sex or *Playboy* and *Hustler* magazines, nor did he expose himself. He never intended to have sex with her, but only to help her get a job, drink a little, and talk. (2 RT Vol. 30 7035-7036.)

Flores did not fill out the application because she was drinking wine coolers and said she was sleepy. She lay on the bed and wanted to "party" with appellant, and he sat on the side of the bed with her. (2 RT Vol. 30 7033-7034.)

At the end, Flores said her boyfriend was in a gang, and that a lot of gangbangers would come and get appellant if he said something to her. (2 RT Vol. 30 7034.) Flores had appellant drop her off five doors down from her house because she did not want her family or friends to know she was with a guy. (2 RT Vol. 30 7036-7037.)

b. Testimony of Dr. Consuelo Edwards

Dr. Consuelo Edwards, M.D., a physician with a specialization in psychiatry, had been appointed to evaluate appellant's mental status at the time of the charged offenses. (2 RT Vol. 30 7161-7165.)

Dr. Edwards opined that appellant was legally insane at the time of the crimes. (2 RT Vol. 30 7232.) Appellant committed those acts while in a rage arising from a conflict with Nadia. This mental state was consistent with prior episodes in which he had suddenly attacked others over trivial provocations. (2 RT Vol. 30 7233.) His mental impairments affected him on the day of the crimes in that he was very angry and paranoid regarding

his argument with Maryann Scott; his anger mounted and he fled, afraid he was going to attack her; he continued to believe she treated him unfairly because she envied him; his anger was exacerbated because he did not receive the money he believed he needed to sustain the precarious life he had built during the previous several months; and he exercised poor judgment in approaching, and later attacking, Nadia Puente. (2 RT Vol. 30 7226, 7232-7233, 7250.)

Although appellant might not have been legally insane at the beginning of the day, his anger increased as he thought about all the things that were happening to him as a consequence of the perceived firing. At some point, his control weakened and he wanted to do something to his employer or otherwise lash out. (2 RT Vol. 30 7234-7235.) By the time he had a conflict with Nadia, his impulsivity and anger flared up and he attacked her, with no foresight or control over his actions. (2 RT Vol. 30 7235-7236.)

Dr. Edwards further testified that appellant's mental illness enables him to distinguish between right and wrong after the fact, but inhibits him from making the proper judgment before he acts. Therefore, the fact that he may have told police officers that he did not mean to kill Nadia and that he did not want to be caught in the room with her did not mean he actually considered those matters prior to acting. (2 RT Vol. 31 7426-7428, 7430-7431.)

In forming her opinions, Dr. Edwards considered the following sources of information: police records; data obtained from interviews with family members, employers, neighbors, friends and former wives; the autopsy report; medical records; approximately eight hours of interviews of appellant; a PET examination and an electroencephalogram examination,

performed at her request; a consultation with Dr. LaCalle; a review of reports prepared by other experts involved in the case; and several examinations (including a mental status examination and a neurological examination) intended to pinpoint the nature of the brain damage she came to suspect appellant suffered. (2 RT Vol. 30 7167-7173, 7231-7232.)

During her interviews of appellant, Dr. Edwards observed the following: appellant's speech was grossly over-productive; his affect was inappropriate, i.e., it was very shallow and bland, and did not correspond to the subject at hand; his affectivity (that is, emotional expression) was almost meaningless; his thought processes were abnormal, in that they were circumstantial and rambling; and he tended to give the same attention to irrelevant details as he did to things that would be important to any person with common sense. (2 RT Vol. 30 7173-7174.)

Dr. Edwards also concluded that appellant had a history of olfactory and gustatory hallucinations. She also found that he had an abnormal sense of the passage of time. In some instances, it seemed to appellant that time was flying by, so that hours or even days could seem like a very short time; at other times it seemed exactly the opposite. (2 RT Vol. 30 7174-7177.)

The PET scan confirmed the existence of damage in various areas of appellant's brain. (2 RT Vol. 30 7206-7207, 7209-7218.) Specifically, the scan demonstrated that appellant has scattered lesions (i.e., areas of malfunction) in his brain. (2 RT Vol. 30 7214-7217.) As a result, neurotransmitters may not follow the normal pathways, and may be interrupted, delayed or otherwise distorted. (2 RT Vol. 30 7217-7218.)

Dr. Edwards explained that the lesions may have been caused by a congenital condition, toxin exposure after birth, head trauma, or some other, unknown process. (2 RT Vol. 30 7218-7220.) Moreover, Dr. Edwards,

who had extensive experience working in emergency rooms, observed scars on appellant's temple, the back of his head, and the upper left side of his head. She concluded that all three wounds had been caused by blunt force trauma. (2 RT Vol. 30 7182, 7220-7224.)

Dr. Edwards concluded that appellant suffered from the following: Organic Personality Syndrome, Explosive Type; Impulse Control Disorder; Anti-Social Personality Disorder; and frontal and temporal lobe dysfunction. He had had those disorders throughout most of his life. (2 RT Vol. 30 7175, 7181, 7207, 7225, 7232.) She explained that any one of appellant's symptoms, viewed in isolation, was relatively unimportant. However, when symptoms are predictably found together, then one can be sure of the diagnosis. Appellant's manner of presentation simply could not be faked. (2 RT Vol. 30 7178.)

Dr. Edwards acknowledged that she did not explicitly state in her report that appellant was legally insane at the time of the offenses, but explained that she had simply phrased that same conclusion in a different manner. (2 RT Vol. 30 7276; 2 RT Vol. 31 7328-7329.) She believed appellant did not know the difference between right and wrong when he killed Nadia because he acted in an impulsive act of rage, without consideration of what he was doing. (2 RT Vol. 30 7277-7279; 2 RT Vol. 31 7322, 7347.)

c. Testimony of Dr. Jose LaCalle

Dr. Jose LaCalle concluded that appellant was legally insane at the time of the crimes. (2 RT Vol. 31 7504-7506.) As a result of his Organic Personality Disorder, Explosive Type, whenever appellant is in a rage, his ability to process information, make decisions and execute them is severely impaired. (2 RT Vol. 31 7508.) Appellant entered such a rage as a result of

the confrontation with Scott. At some point, his judgment became so impaired by rage that he could not distinguish right from wrong, and he fell within the parameters of legal insanity. (2 RT Vol. 31 7507-7508.)

Dr. LaCalle opined that appellant's insanity was not continuous. Given his mental defect, appellant's judgment may be affected by rage at any given time. He will then calm down for a while until his rage is reignited either by some new provocation or the recollection of a past provocation. (2 RT Vol. 31 7511-7512.) Moreover, the fact that he may have been aware he was performing a physical act did not mean he was able to know and understand the nature and quality of that act, or that he knew whether the act was right or wrong. Dr. LaCalle observed that one cannot evaluate right and wrong if one's cognitive processes are impaired. (2 RT Vol. 31 7511-7513.)

Dr. LaCalle did not know precisely at what point that day appellant became legally insane, but he concluded that appellant operated under some degree of impairment throughout the day after he thought he had been fired from his job. (2 RT Vol. 31 7509.) However, appellant was legally insane at least at the time of Nadia's death. The insanity was triggered when Nadia walked into the bathroom and saw appellant naked. Appellant went into a rage, and at that moment he grabbed and killed her. (2 RT Vol. 31 7515-7516.) Although he knew what he was doing when he grabbed, assaulted and killed her, he did not know those actions were wrong and he could not understand their nature and consequences – i.e., death. (2 RT Vol. 31 7508, 7545-7546.)

d. Testimony of Dr. Paul Berg

Dr. Paul Berg testified that, on the day of the crimes, appellant was under extraordinary stress, as he struggled with the impulse to kill Maryann

Scott. His thinking, reasoning, judgment and control deteriorated over the course of the day, and the elements of legal insanity were present even before Nadia entered the bathroom. In addition, appellant may have used drugs, which would have further impaired his mental abilities. Believing that Scott was coming after him, he felt a mix of shame and rage, and he lashed out. By the time he committed the acts against Nadia, appellant was legally insane. (2 RT Vol. 31 7549-7550, 7552, 7555.)

Dr. Berg testified that appellant met both prongs of the California test for legal insanity. Appellant did not understand he was killing Nadia at that time. Instead, he believed he was committing those acts against Maryann Scott, and his rage at Scott was such that he could not know, at least in the moral sense, that what he was doing was wrong. (2 RT Vol. 31 7550-7551.) The act flowed directly from his mental state, not from a state of cognition in which he thought about whether an action was right or wrong before making a determination or choice. (2 RT Vol. 31 7551-7552.)

The state of insanity ended when appellant completed a sexual act with her, realized she was dead and that he had done something very horrible to a child, and began to think about what to do. Everything appellant did to evade detection occurred when he was no longer insane. (2 RT Vol. 31 7552-7553.)

In forming his opinion, Dr. Berg considered the following: appellant's long history of difficulty in his relationships with women, beginning with apparent physical abuse by his mother all the way up to his confrontation with Scott; his history of rage reactions (e.g., his attacks on Lara and Esparza), particularly with respect to women, went well beyond mere anger; he had a history of very poor ego formation, and lacked a clear

sense of who he was; and he never developed any sense of stability or personal identity that would give him the capacity to think things out, or to feel good enough about himself to seek other solutions to terrible stressors. (2 RT Vol. 31 7554.)

e. Testimony of Dr. John Reid Meloy

John Reid Meloy, Ph.D., testified that he was a psychologist specializing in forensic psychology. (2 RT Vol. 32 7614-7615.)

Dr. Meloy opined that appellant understood the nature of his act when he took Nadia with him. However, appellant did not appreciate the quality of the act (which Dr. Meloy understood to mean the *consequence* of the act) because he did not intend to sexually assault Nadia or to commit a lewd and lascivious act. (2 RT Vol. 32 7629, 7697.) Dr. Meloy reached this opinion after concluding that: appellant had no history of pedophilia or sexual interest in children; appellant sought Nadia's company to compensate for the humiliation he had experienced at the Taco Bell, and to restore his "narcissistic equilibrium"; appellant's behavior and development stopped in latency age – i.e., the period from ages six through nine – and he identified with Nadia. Appellant was not capable of distinguishing between right and wrong during this event. (2 RT Vol. 32 7629-7633.)

Dr. Meloy further opined that appellant was capable of knowing and understanding the nature and quality of his act when he drowned Nadia. However, appellant was not capable of distinguishing right from wrong at that time. (2 RT Vol. 32 7632-7634.) As a consequence of his frontal lobe abnormalities, there is nothing to inhibit his impulses when he is enraged. On the day of the crimes, appellant experienced a "transference of this experience," rapidly shifting from the original experience of humiliation by his mother, to the experience of humiliation by Maryann Scott, and, finally,

to Nadia Puente when she saw him in the bathroom. The result was an instance of affective violence, an immediate reaction to strike back and make the humiliation go away. (2 RT Vol. 32 7635-7638.)

Dr. Meloy also opined that appellant knew and understood the nature and quality of the sexual assault because he knew he was performing the acts upon a human being. However, appellant was incapable of distinguishing right from wrong at the time of the sexual assault. Appellant reasonably believed Nadia was dead at the time of the sexual assault, and he harbored the grandiose belief that he could bring her back to life by having sex with her. (2 RT Vol. 32 7638-7642.)

In evaluating appellant, Dr. Meloy relied upon the following sources of information: approximately 2,000 pages of documents that included family history, personal history, crime scene investigation and analysis, medical reports, psychological reports, psychiatric reports, social history, developmental history, jail custody reports, and other crime scene investigation data generated by the police and District Attorney's office; reports from other doctors who examined appellant; the results of the Hare Psychopathy Checklist, Revised, a psychological test; and a seven-hour interview of appellant. (2 RT Vol. 32 7620-7622.)

In the course of that evaluation, Dr. Meloy diagnosed appellant as having several mental disorders. First, Dr. Meloy concluded that appellant suffered from Organic Personality Syndrome, Explosive Type, based on the following: appellant is at times markedly suspicious and paranoid; he has repeated episodes of aggression and grossly impaired social judgment; a PET scan and the Visual Evoked Potential reading yielded abnormal results; neuropsychological data generated by Dr. Purisch supported the organic basis for this diagnosis; appellant's history of head trauma; Dr. Edwards'

diagnosis and neurological examination indicated frontal lobe pathology; and the Rorschach examination, which Dr. Purisch administered and Dr. Meloy re-scored, was consistent with explosive lability, loss of controls and poor stress tolerance. (2 RT Vol. 32 7623-7624.) Second, Dr. Meloy concluded that appellant suffered from Narcissistic Personality Disorder, as indicated by his grandiosity; constant need for attention, especially from females; lack of empathy in his relationships; preoccupation with fantasies of success and beauty; and use of other people for his own means. (2 RT Vol. 32 7623, 7627-7628.) Third, Dr. Meloy concluded that appellant suffered from Anti-Social Personality Disorder. (2 RT Vol. 32 7623, 7625-7628.) Each of these disorders contributed to appellant's inability to distinguish right from wrong at the time of the offenses. (2 RT Vol. 32 7728-7729.)[16]

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[16] During the cross-examination of Dr. Meloy, the prosecutor asked, "Why didn't you put this information in your typewritten report that you had independent information indicating that the defendant wanted a minor female to take pictures of him?" At that point, appellant started shouting:

> I don't even own a camera you stupid punk. Is it in evidence? Is it? Is it in evidence? I will fuck you up, punk. I don't even have a fucking camera. I never had. I never have. He is accusing me of something I never did. I never did nothing like that. What?

(2 RT Vol. 32 7893-7894.) As he shouted, appellant advanced several steps toward the prosecutor, getting within five feet of him. He was restrained and removed from the courtroom. The court then admonished the jurors to return to the jury room and not to discuss the outburst. (2 RT Vol. 32 7893-7897.) Dr. Meloy subsequently testified that appellant's outburst was consistent with his diagnoses, each of which has a criterion relating to anger and aggressiveness. (2 RT Vol. 33 7985-7986.) The jury was permitted to consider appellant's outburst as evidence both at the sanity phase (2 RT

(continued...)

2. Prosecution Case

The sole witness presented by the prosecution at the sanity phase was Sergeant Gary Bruce of the Santa Ana Police Department. The purpose of Bruce's testimony was to rebut appellant's testimony that he felt threatened and afraid during the interrogation. Specifically, Bruce testified that on April 1, 1989, he and Investigator Mike Alvarado traveled to San Antonio, Texas, to serve an arrest warrant on appellant. They were both wearing plain clothes and neither had a weapon. (2 RT Vol. 33 8028-8031.) After the interview of appellant, Bruce heard Alvarado say, "I feel like shooting the bastard." (2 RT Vol. 33 8031.) At that moment, appellant was about 25 feet away, engaged in a telephone conversation. (2 RT Vol. 33 8034-8035, 8040.)

C. Penalty Phase

1. The Prosecution's Evidence in Aggravation

The sole witness presented by the prosecutor at the penalty phase was Sara Puente, Nadia's mother, who presented victim impact evidence.

Mrs. Puente testified that on March 20, 1989, she lived in Santa Ana with various family members, including her only daughter, Nadia. Nadia was a fourth-grader at Diamond Elementary School, and she wanted to be a teacher when she grew up. (2 RT Vol. 34 8291-8293, 8297.)

On that day, Mrs. Puente was working as a substitute teacher at an elementary school. Around 2:45 p.m., her mother called to report that Nadia was missing. Mrs. Puente found out Nadia had been killed when she

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[16](...continued)
Vol. 33 8088-8097; 2 CT Vol. 5 1584 [CALJIC No. 2.00]) and at the penalty phase (2 RT Vol. 34 8602-8608; 2 CT Vol. 5 1664 [CALJIC No. 8.85]).

overheard a man saying her body had been found. (2 RT Vol. 34 8294.)

Since Nadia's death, Mrs. Puente no longer worked at elementary schools. She switched to intermediate schools because Nadia would have been an 8th-grader, and she liked to see 8th-grade girls. Whenever people asked about the size of her family, she said she had four boys and a girl in heaven. (2 RT Vol. 34 8295-8296.)

Mrs. Puente testified that she was reminded of her daughter every day when she looked in the mirror as she got ready for work. Nadia used to tell Mrs. Puente that Mrs. Puente was beautiful and that when she grew up, Mrs. Puente would teach her how to put on her makeup. (2 RT Vol. 34 8297.)

2. The Defense Case in Mitigation

a. Testimony of Teodora Munoz DeHoyos

Teodora Munoz DeHoyos testified that she met appellant in January, 1979, in Panama. They dated for about six months before getting married. She went by the name DeHoyos because she was not divorced from him. (2 RT Vol. 34 8305-8306.) They had two children together. (2 RT Vol. 34 8308.)

She and appellant lived together for three years. During that time, appellant was nice and understanding. He always behaved well towards her and her family. They never had any physical fights. He worked and provided for her and the children, financially and otherwise. (2 RT Vol. 34 8307-8310.)

One day, however, he left the house and never came back. She still did not understand why he left. There had been no argument. (2 RT Vol. 34 8307.) Appellant had a relationship with their two children through his letters. He wrote to them and urged them to keep studying and to behave.

She always talked to the children about their father, and they hoped to see him, talk to him and get to know him. (2 RT Vol. 34 8311-8313.)

She was aware of his crimes, but believed he should not be put to death because he was a not a bad person. She also believed that he was not well when he committed the crimes. (2 RT Vol. 34 8310.)

b. Testimony of Erundina Itzel Martinez

Erundina Martinez testified that she was in her first year at the University of Panama, where she studied English. (2 RT Vol. 34 8329.) She met appellant in 1985 or 1986, when she was 10 years old. He rented a house from her father. The house was situated behind her house. During the two years or so that he lived there, she saw him nearly every day. (2 RT Vol. 34 8323-8325, 8330-8331.)

Appellant was a very friendly person who had conversations with everyone and helped whoever needed it. Appellant offered to teach her English at a school he had set up, but she was able to attend for only one week because of her regular school schedule. He often helped her with her English schoolwork. She never observed him act sexually toward her or any other young children in the area. She was never concerned that appellant would act inappropriately with her. (2 RT Vol. 34 8326-8329.)

Martinez was aware of appellant's crimes. She believed he should be left in prison for life, rather than be put to death. She explained that she was opposed to the death penalty, she had no bad memories of him, and she believed he was sick when he committed the crimes. (2 RT Vol. 34 8328, 8331-8334.)

c. Testimony of Edna Maritza Carrera

Edna Maritza Carrera testified that she met appellant in 1987, in Chiriqui, Panama. (2 RT Vol. 34 8338.) She knew him for around one to

two years. He taught at a school, and she took English lessons from him for one year. (2 RT Vol. 34 8339-8340.)

Appellant was also a good friend of her family. He was a very good person. He was a gentleman, very loving toward children, and very friendly in his behavior. People who knew him loved him a lot. Although she knew what crimes appellant had been convicted of, the facts surprised her. He was not that way "with us, with the people." (2 RT Vol. 34 8338-8342.) He was always sincere with her and never engaged in any behavior indicating he was sexually interested in little girls. (2 RT Vol. 34 8350.)

Carrera acknowledged that she once saw appellant in a physical altercation. During one of appellant's English classes, the facility owner wanted him to pay a higher rent, and appellant said that was not right. A discussion or argument ensued, and the man threw a stone at appellant's head. The stone hit his head, causing a lot of blood to ooze out. (2 RT Vol.34 8342.)

She believed appellant should live because she was convinced he did not commit the crimes consciously or while in his right mind. When he lived in Panama, his conduct had been marvelous. (2 RT Vol. 34 8343.)

d. Testimony of Rubin Dario Martinez

Rubin Dario Martinez met appellant about five years earlier, in Chiriqui. Appellant rented a house from Martinez for more than a year, and lived with Martinez' sister-in-law and her child. Martinez saw appellant daily because their houses were on the same property. (2 RT Vol. 34 8351-8354.)

Appellant interacted constantly with his family, including his daughters, who were between 12 and 14 years old at the time. Martinez never felt uncomfortable or concerned about appellant being around his

girls. He never noticed anything suggesting appellant had an inappropriate interest in them. (2 RT Vol. 34 8352-8353.)

Appellant was well liked by people in their town. He was highly communicative and left a good impression. (2 RT Vol. 34 8354.)

Martinez was aware that appellant's crimes involved sexual acts with, and the killing of, a nine-year-old girl. Nevertheless, Martinez believed appellant should be sentenced to life imprisonment because the crime would be punished, he could not harm anyone else, and taking his life would not bring back the first one (i.e., Nadia). (2 RT Vol. 34 8355.)

On cross-examination, the prosecutor asked whether Martinez would feel the same way about the death penalty if someone kidnaped, raped and murdered his daughter. Martinez replied that his younger sister and his aunt had been kidnaped by five men, who raped them throughout the night and then cut them to pieces. Martinez acknowledged that he had had a thirst for vengeance, and that the police were lucky they found the murderers first. (2 RT Vol. 34 8358-8359.)

Martinez further testified that, in Panama, the maximum punishment was 20 years, and the killers were paroled after 16 years. Afterward, each one was able to continue in his profession. He met them and he said, "What am I going to do? May God protect them." He admitted that he did not know how he would feel if this had happened to one of his daughters. (2 RT Vol. 34 8359-8360.)

e. Testimony of Norman Morein

Norman Morein testified that he was a sentencing consultant. Prior to working as a consultant, he had been employed for five years as a probation officer and for 25 years as a prison counselor. As a prison counselor, he had been promoted to the position of chief counselor. (2 RT

Vol. 34 8361-8362.)

Morein testified that one of the primary jobs of a counselor in a reception center is to determine whether an inmate can adjust to a prison setting. To make such a determination, the counselor read all material regarding the case, examined the inmate's conduct at the reception center, and then prepared a report indicating where the inmate should be housed and in what type of program he should be placed. The report was then sent to the chief counselor, who made the final decision as to the inmate's placement and program. (2 RT Vol. 34 8362-8364.)

Morein opined that appellant could adjust to the prison setting if sentenced to life imprisonment without possibility of parole, based on his interviews of appellant; the material he read, including appellant's probation report and various psychological and psychiatric reports; and his experience dealing with people like appellant over a period of many years. (2 RT Vol. 34 8364-8367, 8399.) Where appellant would be confined depended primarily upon the length of his sentence, his mental state, and his escape potential. Length of sentence was by far the overriding consideration as to where he would be placed; the greater the sentence, the more secure the facility. (2 RT Vol. 34 8410-8411.)

On cross-examination, Morein testified that he held that opinion notwithstanding incidents of misbehavior by appellant in the county jail. Morein explained that conditions in a prison may be radically different – i.e., very repressive – from conditions in the county jail. Appellant necessarily would have to adjust to the prison conditions. (2 RT Vol. 34 8391-8396.)

f. Testimony of Dr. William Logan

Dr. William Logan testified that he was a medical doctor

specializing in psychiatry, with a sub-specialty in forensic psychiatry. As such, he focused on the intersection between psychiatry and law in cases where an opinion about a person's mental state was needed as relevant to a particular legal issue. He was also the director of the Law and Psychiatry department at the Menninger Clinic in Topeka, Kansas. (2 RT Vol. 34 8420-8421.) His experience included work with and regarding the prison system, including maximum security and death row. (2 RT Vol. 34 8422-8427.)

Dr. Logan had been requested to conduct a diagnostic assessment to determine what information the jury could consider in sentencing appellant. (2 RT Vol. 34 8427-8428.) Accordingly, Dr. Logan identified nine items as having had an impact on appellant's behavior and life adjustment:

First, appellant suffered from physical abuse when he was a child, had a very disturbed relationship with his mother, and witnessed violence at home. This traumatized appellant and had a significant impact on his later relationships with women. He was exposed to violence at an early age, which predisposed him to use violence, and sometimes sexual means, to work out problems. (2 RT Vol. 34 8433.)

Second, appellant was exposed to sexuality prematurely when he was sexually abused as a young boy. As a result, he later developed very deviant sexual ideas. This had an impact on his behavior, and on what occurred in this particular case, because appellant had a long pattern of reacting violently to perceived slights, especially in situations in which he felt humiliated by a woman. This factor related both to the reason appellant took Nadia to his motel room and the reason he later killed her. (2 RT Vol. 34 8433-8434.)

Third, appellant was exposed to odd religious beliefs. For instance,

the curandero had appellant perform a number of bizarre rituals, some of which involved the slaughter of animals. When appellant was around 11 years old, the curandero introduced him to very odd, superstitious beliefs that later influenced his perceptions of reality. Appellant had a history of hearing voices talk to him, and he believed that the curandero and other supernaturals could influence his behavior, and he reported such phenomena on the day he killed Nadia. (2 RT Vol. 34 8434.)

Fourth, appellant had a physical deformity as a child. Specifically, his eyes were deviated outward. Other children ridiculed him, which significantly affected his self-esteem. Appellant often reacted violently when he felt others were making fun of or humiliating him. This characteristic was involved indirectly in the events of March 20, 1989, because he believed his boss had humiliated him unjustly. (2 RT Vol. 34 8435.)

Fifth, appellant had suffered a number of head injuries. Dr. Logan believed these head injuries may have been related to the brain abnormalities revealed by the BEAM scan and the PET scan. Further, the head injuries had a direct impact on his behavior, ability to control his impulses, regulate his emotions, and exercise appropriate judgment while under stress. Because his brain function was abnormal, it is possible he had more difficulty restraining himself with respect to Nadia, and it could have caused his behavior and emotions to fluctuate very dramatically after the confrontation with his boss earlier that morning. (2 RT Vol. 34 8435-8436.)

Sixth, appellant's abuse of sedatives and stimulants, which dated back to his childhood, affected his ability to adjust successfully to life. He began by sniffing glue. Later in adolescence, he began using marijuana.

In junior high school, he was measured as having a low-normal IQ, which is not unusual for young people who abuse inhalants, which can cause brain damage. Appellant's family members confirmed that his behavior worsened after he began using marijuana at age 16. Later, he progressed to the use of cocaine, amphetamines and other drugs. On the day of the crimes, he abused a number of substances, including alcohol, marijuana, cocaine, amphetamines, and Quaaludes. Some of those substances predispose people to increased aggression and "increased sexual acting out inappropriately," and can cause hallucinations. Appellant reported experiencing all of those effects. (2 RT Vol. 34 8436-8437.)

Seventh, Dr. Logan diagnosed appellant as suffering from paraphilia, or abnormal sexual development. Appellant had a pattern of short-lived relationships with women, often using sex as a tool to hurt or dominate others when he felt he had been slighted or wronged in some way. Dr. Logan opined that on March 20, 1989, appellant had been humiliated by a woman and, as a result, picked a weaker, younger female to dominate as a means to repair his self-esteem. (2 RT Vol. 34 8437-8438.)

Eighth, appellant reported a history of experiencing psychotic phenomena during periods of stress. For instance, he experienced odd sensations of feeling or taste, and heard voices which gave him instructions. On one such occasion, he felt the urge to flee the country and considered jumping off a building. Dr. Logan did not know whether to directly associate this factor with appellant's behavior on March 20, 1989, but appellant reported hearing voices at various times during his contact with Nadia. (2 RT Vol. 34 8438- 8439.)

Ninth, beginning early in 1988 and progressing through the time of the offense, appellant's functioning had become much worse. While living

in Panama, his business failed. He became afraid that the government of Panama would do something to him because he was American, so he fled to Costa Rica, where he engaged in brief affairs with several different women, including one that produced a child. He briefly became suicidal, and eventually prevailed on someone to give him a ticket back to the United States. He then went through a succession of jobs, encountering difficulties in each one; for instance, he was often very suspicious of co-workers or left the job impulsively. He was upset when he learned certain sex-related information about his grandfather. During this very unstable period, appellant saw the job at Taco Bell as a way of putting his life back together and achieving something of importance, and so he took it very hard when he found out he was going to be let go. (2 RT Vol. 34 8439-8440.)

g. Testimony of Lucio DeHoyos, Sr.

Appellant's father, Lucio DeHoyos, Sr., believed his son was not well in his head from the time he was born. By taking appellant to the curandero, the family was trying to get help for him. The curandero's advice did not work because appellant remained the same, stubborn person. (2 RT Vol. 34 8495-8496.)

DeHoyos, Sr., believed that appellant should be punished but not put to death. He believed appellant was sick and needed help. (2 RT Vol. 34 8497.)

h. Testimony of Lucio DeHoyos, Jr.

Lucio DeHoyos, Jr., testified that he was 10 years younger than appellant. During the time appellant lived at home, he was very funny and made him laugh a lot. That was the only side of appellant Lucio, Jr., remembered. (2 RT Vol. 34 8498-8499.)

If appellant were to be put to death, he would be missed, there would

be a lot of pain, and Lucio, Jr., would miss the laughter appellant brought. Lucio, Jr., believed appellant's death would not balance Nadia's death. He also believed appellant was not in a right state of mind, and that he should be in the hospital because of his mental problem. (2 RT Vol. 34 8498-8501.)

i. Testimony of Alexander DeHoyos

Appellant's brother, Alexander DeHoyos, believed that appellant should not be sentenced to death. Appellant had done a lot of good things during the time he lived at home. Alexander and appellant used to play outside as boys, sharing a lot of good times. (2 RT Vol. 34 8503-8504, 8510.)

Alexander believed appellant "[was] not all there." (2 RT Vol. 34 8503-8504.) Alexander testified that, although their mother did her best, appellant could never understand. She was "always at him, always at him" but "[i]t would just never sink in." Something was wrong, and the things appellant did were not normal. (2 RT Vol. 34 8504.) Appellant had trouble in school, and, although Alexander was two years younger than appellant, he was always helping appellant. (2 RT Vol. 34 8510.)

Alexander testified that appellant's situation had affected their parents tremendously. For a time, they were in a state of shock and denial, and they would not acknowledge what had happened. He believed that his parents initially did not want to cooperate with the defense. Now they were always sad. His mother was always breaking down crying. Alexander had never seen his father cry until he saw him cry in court. They felt ashamed and that their name had been sullied. Appellant's situation was extremely stressful for Alexander. It would affect his family a great deal if appellant were executed. (2 RT Vol. 34 8505-8510.)

Alexander did not believe appellant meant to do what he did, and he believed that appellant should not die. (2 RT Vol. 34 8510-8511.)

j. Testimony of Martha DeHoyos

Appellant's mother, Martha DeHoyos, first learned what appellant had done when her mother called from California in April, 1989. It was a great shock and she could not believe it. She was in denial. (2 RT Vol. 34 8512-8513.)

She testified that the previous four years had created a lot of depression for her family. They thought about the case all the time and it had hurt them terribly. They felt very bad for Nadia's relatives. (2 RT Vol. 34 8514.)

Appellant had a hot temper and got "hyper" at her for no reason. He needed to be disciplined more than her other children. (2 RT Vol. 34 8514, 8516.)

She did not know he had a mental disorder until the doctors checked him. She started thinking that he may have developed the disorder because she had an accident when she was about three months pregnant. She now attributed his problems to his disorder. If she had known there was something so terribly wrong with him, she would have done something about it. (2 RT Vol. 34 8515.)

Martha testified that she thought her son should be put in a hospital where he could get medical treatment. She said she knew the jurors probably wanted the death penalty for him, but she wanted them to understand he had to have been sick to do what he did. She did not believe that a person who is ill should be put to death. (2 RT Vol. 34 8517-8518.)

k. Testimony of Gloria Lara

Gloria Lara has known appellant since she was 14 or 15 years old.

They lived together for two years and were divorced in April, 1977. They had a 16-year-old daughter, Sandra. (2 RT Vol. 34 8542-8543.)

Following their divorce, Lara did not see appellant until about two years later. The next time she saw him after that was around 1982, when Sandra was four or five years old. Lara did not see appellant again until 1989. (2 RT Vol. 34 8544-8545.)

During that time, appellant's only contacts with Sandra occurred when she was five years old, when she was in the 6th grade, and in January, 1989, when he sent Sandra some cards, money, and a letter, and also telephoned her. (2 RT Vol. 34 8545-8546.)

According to Lara, appellant's situation had affected Sandra. Sandra always thought about things that would never come to pass. For example, during a party celebrating Sandra's 16th birthday, Sandra started crying when Lara played the song "16 Candles." Sandra explained, "Well, I am never going to get to dance with my daddy." Lara was sad for her daughter. (2 RT Vol. 34 8548-8549.)

Lara was aware of appellant's convictions. She thought that appellant needed help, but he did not get it. She said appellant could be kind and that he had good qualities, but "he is not all there." (2 RT Vol. 34 8549-8551.)

l. Testimony of Sandra DeHoyos

Appellant's daughter, Sandra DeHoyos, testified that her first memory of her father was when he came to see her when she was in 7th grade. She had no memories of him before that time, but she had wanted to meet him and to know who he was because he was her father. (2 RT Vol. 34 8555-8556.)

When she met him in March, 1989, he was nice to her. They

attended a basketball game, went sightseeing, and then just talked to get to know one another. Since then, they had written to each other and she had spoken with him on the phone. (2 RT Vol. 34 8557.) She talked with appellant about everyday things, mainly school, her friends and how he was doing. He was her best friend because she could tell him everything. She could talk to other people, but not as well as she could talk to him. He made it easier to talk, she loved him very much, and she felt free to say things to him, even more so than with her mother or stepfather. (2 RT Vol. 34 8558-8560.)

It hurt her to know why he was where he was. She did not want him to be there. She felt sorry for everyone involved. She believed appellant should go to prison "for a little bit," but she hoped he would get out. She hoped to communicate with him in person because she loved him very much. (2 RT Vol. 34 8557-8558.)

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ARGUMENT

I

THE PROSECUTION'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES TO STRIKE MINORITY PROSPECTIVE JURORS FROM THE PETIT JURY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND TO A JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY

A. Introduction

Appellant is Hispanic. (2 RT Vol. 13 2734.) During jury selection, and over defense objection, the prosecutor used race-based peremptory challenges to exclude Hispanics and Blacks from appellant's jury. Specifically, three of the prosecutor's twenty peremptory challenges were to Hispanic prospective jurors E.V., A.M-F. and M.L.; one peremptory challenge was to Black prospective juror L.M.; and another peremptory challenge was to prospective juror R.M., who described his ethnic origin as "Mex-Blk" (that is, Mexican and Black). (2 RT Vol. 6 1369, 1370; 2 RT Vol. 7 1747; 2 RT Vol. 9 2112; 2 RT Vol. 12 2658; Aug./Corr. CT Vol. 11 3552, 3594, 3603, 3651; Aug./Corr. CT Vol. 12 4049.)[17] Appellant challenged the prosecutor's use of his peremptory challenges against these five prospective jurors under *Batson v. Kentucky* (1986) 476 U.S. 79 and

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[17] A protective order imposed by the trial court, which restricted in certain respects the disclosure of information regarding the jurors, expressly provided that it "[did] not restrict disclosure in any legal pleading or factual information from the voir dire report, questionnaires . . . relating to prospective jurors that is deemed by counsel . . . to be necessary and appropriate to legal issues raised on appeal . . . or public reference to such information thereafter." (8/15/02 Supp. CT, p. 30.) Cognizant of that order, appellant has deemed the juror-related information set forth in this argument to be necessary and appropriate.

People v. Wheeler (1978) 22 Cal.3d 258, overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 170, arguing that they had been excused in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution. (2 RT Vol. 12 2659-2661.) After finding a prima facie case and hearing the prosecutor's various reasons for excluding these five prospective jurors (2 RT Vol. 13 2684-2696, 2699-2702, 2705-2708, 2715), the trial court denied appellant's "*Wheeler/Batson*" motion (2 RT Vol. 13 2736).

Because the prosecutor's reasons for exercising his peremptory challenges against these five prospective jurors are not supported by the record, and because the trial court failed to make a serious attempt to evaluate the bona fides of the prosecutor's explanations for excusing each of these five prospective jurors, appellant's right to trial by a representative jury and right to equal protection were violated and reversal is required. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 16.)

B. Applicable Legal Principles

In *Batson v. Kentucky*, *supra*, 476 U.S. at pages 86-89, the United States Supreme Court held that the Equal Protection clause of the United States Constitution guarantees a defendant that the state will not exclude members of his race from the jury venire on account of race.[18] *Batson* recognized that denying a person participation in jury service on account of his or her race not only harms the accused but also undermines public confidence in the fairness of our system of justice by unconstitutionally

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[18] In *Powers v. Ohio* (1991) 499 U.S. 400, 402, the United States Supreme Court eliminated the requirement that the defendant and the stricken juror be of the same race.

discriminating against the excluded juror. (*Id.* at p. 87.)[19]

Batson set forth a three-step process to determine whether a peremptory challenge is race-based in violation of the Constitution. The defendant must first make a prima facie showing that the prosecution has exercised a peremptory challenge on the basis of race. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97.) That is, the defendant must demonstrate that the facts and circumstances of the case "raise an inference" that the prosecution has excluded venire members from the petit jury on account of their race. (*Id.* at p. 96.) If a defendant makes this showing, the burden shifts to the prosecution to provide a race-neutral explanation for its challenge. (*Id.* at p. 97.) The trial court then has the duty to determine whether the defendant has established purposeful racial discrimination by the prosecution. (*Id.* at p. 98.)[20]

In *People v. Wheeler*, *supra*, 22 Cal.3d at pages 276-277, decided eight years before *Batson,* this Court presaged *Batson* by holding that a defendant's right to a jury drawn from a representative cross-section of the community under Article I, section 16 of the California Constitution was violated by the use of peremptory challenges to remove prospective jurors on the sole ground of group bias. Group bias was defined as a presumption "that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar

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[19] Hispanics and Blacks are cognizable groups under both *Batson* and *Wheeler*. (See *Batson v. Kentucky*, *supra*, 476 U.S. at p. 89; *People v. Alvarez* (1996) 14 Cal.4th 155, 193; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-279.)

[20] The trial court's obligations in conducting the third step of the *Batson* procedure is set forth in greater detail in Section D, *infra*.

grounds." (*Id.* at p. 276; see also *People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1191, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

Wheeler set forth procedures similar to those later adopted in *Batson.* Thus, one who believes his opponent is using peremptory challenges for improper discrimination must object in a timely fashion and make a prima facie showing that prospective jurors are being excluded because of race or group association. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280; see also *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200, abrogated on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; *People v. Crittenden* (1994) 9 Cal.4th 83, 115.)[21] If the trial court finds a prima facie case, the burden shifts, and the party whose peremptory exclusions are under attack must then provide a race- or group-neutral explanation, related to the particular case, for each suspect excusal. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 281-282; see also *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Fuentes* (II) (1991) 54 Cal.3d 707,

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[21] In *People v. Wheeler*, *supra*, this Court held that, to make a prima facie case, a party "must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (22 Cal.3d at p. 280.) Later, in *People v. Johnson* (2003) 30 Cal.4th 1302, 1317-1318, this Court, discussing the term "strong likelihood" (as well as the term "reasonable inference") as used in *Wheeler*, held that "to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." (*Id.* at p. 1318.) However, the United States Supreme Court rejected this conclusion in *Johnson v. California*, *supra.* In so doing, the high court clarified the first prong of the *Batson* test, explaining that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (545 U.S. at p. 170.)

714.) Once the burden has shifted and the prosecution has stated its reasons for the excusal, the trial court has an obligation to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' [citation] and to clearly express its findings [citation]" in light of all the circumstances. (*People v. Silva* (2001) 25 Cal.4th 345, 385-386; accord *Batson v. Kentucky*, *supra*, 476 U.S. at p. 98; see also *People v. Wheeler*, *supra*, 22 Cal.3d at p. 282.)

If the trial court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted and the trial court must dismiss the venire and begin jury selection anew unless the complaining party waives its right to such remedy or consents to an alternative remedy. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282; *People v. Willis* (2002) 27 Cal.4th 811, 823-824.) Moreover, the exclusion by peremptory challenge of a single juror on the basis of race or ethnicity violates both the state and federal Constitutions and requires reversal. (*People v. Silva*, *supra*, 25 Cal.4th at p. 386, citing *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Fuentes*, *supra*, 54 Cal.3d at pp. 715 and 716, fn. 4; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1158; *United States v. Vasquez- Lopez* (9th Cir. 1994) 22 F.3d 900, 902 ["the Constitution forbids striking even a single prospective juror for a discriminatory purpose"].)

The unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 629-630; *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, citing *Vasquez v. Hillery* (1986) 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].)

C. The Prosecutor's Stated Reasons for Exercising Peremptory Challenges As To the Five Prospective Jurors

1. The Prosecutor's Stated Reasons and Defense Counsel's Responses

Because the trial court expressly found that appellant made a prima facie case that the five prospective jurors had been excluded on account of race, the prosecutor was obligated to justify the challenges in accordance with *Batson v. Kentucky*, *supra*, 476 U.S. at page 97, and *People v. Wheeler*, *supra*, 22 Cal.3d at page 282. (2 RT Vol. 12 2663-2673.) The prosecutor's stated reasons, and defense counsel's responses to those reasons, are set forth below:

a. Prospective Juror L.M.

L.M. was a 42-year-old office associate at the time of voir dire. (Aug./Corr. CT Vol. 11 3596.) One of her two children had attended three-and-a-half years of college and was now self-employed; the other was currently a college student. (Aug./Corr. CT Vol. 11 3598.) Her brother was a probation officer. (Aug./Corr. CT Vol. 11 3599.) Neither she nor any of her relatives or friends had ever been charged, arrested, indicted or convicted of any criminal offense. (Aug./Corr. CT Vol. 11 3602.) During voir dire, L.M. affirmed that: she would not be biased by the charges in the case (2 RT Vol. 2 518); she would be impartial and consider all of the evidence before reaching a decision (2 RT Vol. 5 1030, 1120); she could vote for either life without possibility of parole or the death penalty, depending on what the evidence showed (2 RT Vol. 3 705-708, 713, 720, 726); and, she looked forward to fulfilling her civic duty by serving as a juror (2 RT Vol. 3 721).

The prosecutor said he excused L.M. for the following reasons: (1) her statement that she was looking forward to sitting on a capital case raised a question as to whether she had a specific reason or agenda; (2) her comment that she was not apprehensive about the case raised a question as to whether she fully understood the gravity of the responsibility; (3) he was skeptical about her claim that she and her daughter had not discussed her daughter's classwork; (4) she recalled an instance when she had expressed her opinion that a death penalty verdict was the wrong decision, but said she never read anything about the death penalty; and, (5) in light of her opinion that the death penalty was wrongly imposed in one instance, he was concerned about her statement that she had no opinion as to whether the death penalty was used too seldom or too often. (2 RT Vol. 13 2684-2688.)

Defense counsel countered that L.M.'s statement that she looked forward to serving as a juror meant only that she accepted the responsibility of jury service, a view that had been shared by other prospective jurors. (2 RT Vol. 13 2712-2713.) Defense counsel further argued that L.M.'s statement that she did not discuss her daughter's classwork did not indicate a lack of credibility. For instance, L.M. and her daughter may have discussed other aspects of her daughter's academic life instead (e.g., her tuition or her schedule), or she might have led too busy a life to discuss her children's coursework. (2 RT Vol. 13 2713-2714.) Finally, defense counsel argued that none of L.M.'s responses indicated that she could not follow the court's instructions or that she had a hidden agenda; according to defense counsel, L.M. had not been apprehensive or nervous, her responses were intelligent and proper, and she had been passed for cause. (2 RT Vol.

13 2714-2715.)[22]

b. Prospective Juror E.V.

E.V. was a 27-year-old meat cutter. (Aug./Corr. CT Vol. 12 4042.) He had attended one year of college, where his major area of study was art. (Aug./Corr. CT Vol. 12 4043.) He was married and the father of a first-grader. (Aug./Corr. CT Vol. 12 4043-4044.) Neither he nor any of his relatives or friends had ever been charged, arrested, indicted or convicted of any criminal offense. (Aug./Corr. CT Vol. 12 4048.) During voir dire, E.V. stated that: he would follow the court's instructions on the law (2 RT Vol. 4 885); he would be impartial (2 RT Vol. 4 886; 2 RT Vol. 5 1032, 1120); and, he could vote for either life without possibility of parole or the death penalty based upon the evidence presented (2 RT Vol. 4 921, 923-933).

The prosecutor claimed that he excused prospective juror E.V. because: (1) he lacked sufficiently broad life experience, work history and/or education to make a suitable juror, e.g., to critically analyze the mental health testimony to be presented by the defense; (2) he appeared to be somewhat deferential and very easily could be overwhelmed by the mental health evidence; and (3) he stated that he did not believe that some crimes are so serious that the offender has forfeited his right to live in society. (2 RT Vol. 13 2689-2692.) In response, defense counsel expressed her surprise that the prosecutor referred to the need for jurors who could critically analyze mental health testimony, pointing out that the prosecutor had used a number of peremptory challenges to excuse prospective jurors

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[22] Neither the prosecutor nor the trial court contested defense counsel's description of L.M.'s demeanor, suggesting that it was accurate. (See *People v. Adanandus* (2008) 157 Cal.App.4th 496, 510.)

with any expertise in, knowledge about, or training in the mental health field. Defense counsel also argued out that E.V. had demonstrated sufficient intelligence to make an adequate juror, in that he had attended one year of college and had responded intelligently during the voir dire. (2 RT Vol. 13 2692-2693.)

c. Prospective Juror A.M.-F.

A.M.-F. was a 28-year-old sales associate. (Aug./Corr. CT Vol. 11 3587.) He had a bachelor's degree in psychology, and since graduation had taken classes or seminars on developmental psychology. (Aug./Corr. CT Vol. 11 3588; 2 RT Vol. 7 1732-1737.) Among his favorite books were *I, Claudius* and *Claudius the God* by Robert Graves and a treatise by Jurgen Habermas. (Aug./Corr. CT Vol. 11 3592.) On voir dire, A.M.-F. stated that he would be a fair juror (2 RT Vol. 7 1572, 1718-1719) and that he could handle the responsibility of reaching a penalty verdict (2 RT Vol. 7 1619, 1624-1625).

According to the prosecutor, he excused prospective juror A.M.-F. because: (1) as a psychology major, he had taken approximately 25 psychology courses; (2) he had taken a post-graduate course in psychology and was considering getting a master's degree in psychology; (3) he had taken classes regarding, and also had administered, the M.M.P.I., a test administered by a number of the psychologists in this case;[23] (4) his sister had been in and out of jail; (5) he had driven with a suspended license in violation of a court order or directive from the Department of Motor Vehicles; and, (6) the last book he had read was Adolph Hitler's *Mein*

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[23] The prosecutor was referring to the Minnesota Multiphasic Personality Inventory, a psychological test. (See Kaplan and Sadock, Comprehensive Textbook of Psychiatry (8th ed. 205) Vol. 1, pp. 379, 788.)

Kampf. With respect to A.M.-F.'s experience with psychology, the prosecutor raised a concern that he would be predisposed to accept mental health evidence presented by the defense and that he would become a source of information for the other jurors. (2 RT Vol. 13 2693-2696.)

In response, defense counsel suggested that the notion of reading for pleasure is subject to interpretation; for example, one might derive pleasure from reading to increase one's knowledge. Defense counsel further suggested that the fact A.M.-F. had read something the prosecutor did not think was pleasurable did not make him an unworthy juror. Defense counsel also noted that the First Amendment protected A.M.-F.'s right to read *Mein Kampf.* (2 RT Vol. 13 2696-2697.)

Defense counsel further argued that A.M.-F. was the type of juror the prosecutor presumably would want in light of his comments regarding the need for jurors who could understand technical mental health testimony. (2 RT Vol. 13 2697.) Defense counsel also pointed out that A.M.-F. had said he would not use his knowledge to advocate one way or another. (2 RT Vol. 13 2697.) Defense counsel then argued that A.M.-F. had explained satisfactorily his sister's situation. As defense counsel noted, A.M.-F. explained that his sister "got into her own situations" and that he tended not to get involved in them. (2 RT Vol. 13 2698.)

Finally, defense counsel argued that A.M.-F.'s responses did not indicate that "he was the type of person who just went out and violated the law or court order to such a major degree." (2 RT Vol. 13 2699.) As defense counsel pointed out, A.M.-F. had been aware that he had a suspended license and took care of the matter. (2 RT Vol. 13 2698-2699.)

d. Prospective Juror R.M.

R.M. was a 37-year-old retail manager. (Aug./Corr. CT Vol. 11 3644.) Some years earlier he had worked with disabled children, teaching them self-help skills. (2 RT Vol. 9 2103-2105, 2109-2111.) He had attended one year of technical college and two and a half years of college, where he had studied business finance. (Aug./Corr. CT Vol. 11 4043; 2 RT Vol. 9 2105-2107.) Notwithstanding his initial concern that his feelings about the charges would be so strong as to impair his ability to be a fair juror in this case, he consistently affirmed that he could set aside his feelings and judge the case fairly. (2 RT Vol. 9 2074-2087, 2090-2091, 2100-2102, 2112.) He could vote for either life without possibility of parole or the death penalty, depending on the evidence. (2 RT Vol. 9 2092, 2096-2098.)

According to the prosecutor, he excused prospective juror R.M. because: (1) in light of the charged offenses it was doubtful whether R.M., who had been the victim of a crime, could be fair; (2) he was not a strong advocate of the death penalty; (3) the degree to which he had vacillated over the course of voir dire raised a concern as to whether he would be able to make definite decisions with respect to mental health testimony and at the penalty phase; (4) he described himself as emotional; (5) he had concerns about viewing photographs; (6) he had never before disclosed his victimization, which raised a concern as to whether it would interfere with the decision-making process; (7) he stated that human life was the most precious thing regardless of what the person had done; and, (8) he said that he had never had to make any calls regarding a medical emergency during the six years he worked with disabled children. (2 RT Vol. 13 2699-2702.) The prosecutor later added that R.M. said he doubted he could be fair. (2

RT Vol. 13 2715, citing 2 RT Vol. 9 2079, 2082, 2085.)

Defense counsel countered that there was no evidence R.M. had taught any activities that would require emergency medical services, and, in any event, the fact he had never summoned emergency personnel during the time he worked with children provided no basis for his excusal. (2 RT Vol. 13 2702-2703.) Defense counsel further argued that R.M. should not have been disqualified by his statement that human life is most precious no matter what a person has done, asserting that many people share that belief. According to defense counsel, many of the prospective jurors had pained expressions during jury selection, many of the prospective jurors did not express strong support for the death penalty, and probably 75% of the prospective jurors changed their position over the course of voir dire. (2 RT Vol. 13 2703-2705.) Defense counsel also pointed out that R.M. said he would follow the law, that he believed the death penalty was a deterrent, and that he could vote for the death penalty despite his views regarding the death penalty. Moreover, defense counsel observed, the prosecutor had not challenged R.M. for cause based on his views regarding the death penalty. (2 RT Vol. 13 2704-2705.) Finally, defense counsel noted that R.M. ultimately said he could set aside the fact that he had been a victim. (2 RT Vol. 13 2705.)

e. Prospective Juror M.L.

M.L. was a 22-year-old office assistant for the Orange County Health Care Agency. (Aug./Corr. CT Vol. 11 3545.) In high school, she had worked as a preschool assistant. (Aug./Corr. CT Vol. 11 3547.) She was married and the mother of a two-month-old baby. (Aug./Corr. CT Vol. 11 3546-3547.) During voir dire, she stated that she could be fair (2 RT Vol. 11 2606-2608, 2610; 2 RT Vol. 12 2614, 2625-2626, 2653) and listen

to all of the evidence, then vote for either life without possibility of parole or the death penalty (2 RT Vol. 12 2621, 2634-2636).

The prosecutor stated that he excused prospective juror M.L. because: (1) in her questionnaire she indicated that no one close to her had been the victim of a crime, but on voir dire she revealed that her cousin had been murdered; and, (2) during voir dire, she stated she had forgotten to include in her questionnaire the fact that her brother had been arrested a number of times. The prosecutor suggested that these facts raised a question as to whether M.L. was paying enough attention to the process and to her responsibilities in the case. The prosecutor added that, at one point, M.L. said she did not think it is right to give the death penalty to a defendant. (2 RT Vol. 13 2705-2708.)

Defense counsel countered that the prosecutor's argument supported the need for cultural diversity in jury selection. According to defense counsel, matters such as squabbles and visits by the police are not a major issue in M.L.'s culture. Moreover, whether M.L. was close to her murdered cousin was a matter of interpretation. (2 RT Vol. 13 2709-2710.)

Defense counsel also observed that, although M.L. said she did not think the death penalty was right, she affirmed that she could follow the law and that she could return a death verdict. (2 RT Vol. 13 2711.) Finally, defense counsel argued that the prosecutor may have discriminatorily excused M.L. because she knew what a curandero is. (2 RT Vol. 13 2716-2718.)

2. The Trial Court's Rulings

In considering appellant's motion, the trial court said that it had read *People v. Johnson*, *supra*, 47 Cal.3d 1194, *People v. Fuentes*, *supra*, 54 Cal.3d 707, *People v. Howard*, *supra,* 1 Cal.4th 1132, and *People v. Pride*

(1992) 3 Cal.4th 195. (2 RT Vol. 13 2722-2723.) The trial court added that it was familiar with its duties with respect to such motions because it had been on the bench throughout the 15 years since *Wheeler* was decided. (2 RT Vol. 13 2723-2724.) The trial court then proceeded to address the prosecutor's stated reasons.

First, the trial court ruled that the prosecutor was justified in doubting prospective juror L.M.'s ability to seriously consider the death penalty in this case. In so ruling, the court relied upon the following: L.M.'s statement that she had never had to make any decision dealing with life or death; her statement that she had no opinion as to whether the death penalty was used too often or not enough; and, the fact that she did not remember the execution of Robert Alton Harris, which had occurred the previous year. (2 RT Vol. 13 2724.) The court was skeptical that she did not remember anything about the Harris case. (2 RT Vol. 13 2725-2726.) The court acknowledged that L.M. had not said anything that disqualified her for cause, but found her answers to be "a little bit unconcerned . . . with respect to this particular responsibility." (2 RT Vol. 13 2725.) According to the court, the prosecutor's reservations about juror L.M. with respect to the death penalty were justified "in light of her seeming lack of involvement in having given any thought about this issue in the past, which I find very hard to believe, especially after she had been called to the jury box and heard some of the earlier voir dire of other prospective jurors." (2 RT Vol. 13 2726.)

Second, the trial court ruled that prospective juror E.V.'s responses supported the prosecutor's position that he did not have many life experiences and that he did not appear to be someone who could grapple properly with sanity phase issues. In so ruling, the court stated that in his

questionnaire, E.V. had misspelled several words in his questionnaire, including the word "Spanish;" he appeared to respond to leading questions; he was initially confused by the court's reading of the penalty phase instructions, even though they had been read the prior afternoon; in a section of the questionnaire asking for the occupations of any children who were working, he listed his own occupation. (2 RT Vol. 13 2726-2728.) Although the court acknowledged that these might be perceived as minor matters, it found that the prosecutor had a reasonable basis for concluding that E.V. was not a strong person and that he might be overwhelmed by mental health testimony. (2 RT Vol. 13 2728.)

Third, the trial court found that prospective juror A.M.-F.'s exposure to the field of psychology – that is, that he was a psychology major, had taken 25 courses in psychology, and had administered an M.M.P.I. test – justified the prosecutor's fear that he might be predisposed to accept the testimony of psychologists and therefore constituted a proper basis for the peremptory challenge. (2 RT Vol. 13 2728-2729.) The trial court also stated that it had not realized A.M.-F. was Latin-American until after the challenge was made. The court then commented that, although the questionnaire asked the prospective jurors to state his or her "racial or ethnic origin," experience indicates that sometimes people confuse that. (2 RT Vol. 13 2729.)

Fourth, the trial court ruled that, because prospective juror R.M. vacillated as to whether he could be a fair juror, the prosecutor was justified in exercising a peremptory challenge against him. (2 RT Vol. 13 2729-2730.) The court also noted that R.M. had said that human life is the most precious thing, "no matter what this person has done." (2 RT Vol. 13 2730, quoting 2 RT Vol. 9 2097.) According to the trial court, R.M.'s use of the

phrase "this person" improperly referred to appellant. Under those circumstances, the prosecutor rightfully could be concerned about R.M.'s answer. (2 RT Vol. 13 2730.)

Fifth, the trial court found that the prosecutor properly exercised a peremptory challenge as to prospective juror M.L. because she may have purposefully concealed information. (2 RT Vol. 13 2731-2732.) The court concluded that she had failed to include the information about her brother and cousin in her questionnaire even though it related to events that were relatively recent and that she was unlikely to have forgotten. (2 RT Vol. 13 2731-2732.) Finally, the court found not only that she had vacillated as to whether she could give the death penalty, but that she had done so in response to leading questions. (2 RT Vol. 13 2731.)

The trial court then denied appellant's "*Wheeler/Batson*" motion, finding that the totality of the circumstances established that none of the prosecutor's peremptory challenges had been used to exclude members of a racial group. (2 RT Vol. 13 2732-2736.)[24] The trial court explained that it had also considered the following factors in concluding that the reasons the prosecutor gave to explain his peremptory challenges were in fact the reasons why the prospective jurors were excused: (1) it was not aware of any instance in which the prosecutor had deliberately misled the court about

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[24] According to the court, it had found a prima facie case because (1) the prosecutor had used almost a third of his peremptory challenges for persons identified as Hispanic or Black, and (2) it had not been in a position to recall all of the reasons the prosecutor had given for excusing the prospective jurors. (2 RT Vol. 13 2732-2733.) In fact, the prosecutor did not proffer any explanations for these peremptory challenges at the time he made them. (2 RT Vol. 6 1369, 1370; 2 RT Vol. 7 1747; 2 RT Vol. 9 2112; 2 RT Vol. 12 2658.)

a matter of importance; (2) during appellant's 1991 trial, one of the sitting jurors was a Mexican-American, and the prosecutor had not used a peremptory challenge to prevent her from sitting on the jury; (3) the victim was also Hispanic; (4) the prosecutor had questioned all of the challenged jurors in depth; and (5) the prosecutor passed on his peremptory challenges several times when minorities were in the jury box. (2 RT Vol. 13 2732-2736.)

D. The Prosecutor's Reasons for Exercising the Peremptory Challenges Do Not Withstand Scrutiny, Requiring Reversal of Appellant's Convictions and Judgment of Death

1. Legal Principles

In determining whether the defendant has established purposeful racial discrimination within the meaning of *Batson*, the trial court "must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' [Citation.]" (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93; see also *Purkett v. Elem* (1995) 514 U.S. 765, 767.) Although the courts have not prescribed a specific procedure to be followed in conducting such an inquiry, "[a]t a minimum, this procedure must include a clear record that the trial court made a deliberate decision on the ultimate question of purposeful discrimination." (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 968, fn. 2.) Similarly, this Court has held that in the third step of a *Wheeler/Batson* challenge, the trial court is obligated to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168) and to clearly express its findings (*People v. Fuentes, supra*, 54 Cal.3d at pp. 716-720; *People v. Silva*, *supra*, 25 Cal.4th at p. 386).

The United States Supreme Court has also noted that "under some

circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.' [Citation.]" (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93.) Indeed, the United States Supreme Court recently found a prosecutor's proffered reasons for striking a prospective juror to be pretextual and vacated the judgment. As that Court explained:

> The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent. See [*Miller-El v. Dretke* (2005) 545 U.S. 231, 252] (noting the "pretextual significance" of a "stated reason [that] does not hold up"); *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (*per curiam*) ("At [the third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"); *Hernandez* [*v. New York* (1991) 500 U.S. 352], 365, 111 S.Ct. 1859 (plurality opinion) ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed"). Cf. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("[R]ejection of the defendant's proffered [nondiscriminatory] reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination").

(*Snyder v. Louisiana* (2008) ___ U.S. ___, 128 S.Ct. 1203, 1212; emphasis in original.)

Justifications for a particular peremptory challenge remain a question of law and thus are properly subject to appellate review. (*People v. Turner* (1986) 42 Cal.3d 711, 720, fn. 6; *People v. Granillo* (1987) 197 Cal.App.3d 110, 120.) "[A]n appellate court independently reviews a trial court's conclusion on whether the prosecutor stated adequate neutral reasons for the peremptory challenges in question: It amounts to the resolution of a

pure question of law [citation]. . . ." (*People v. Alvarez, supra,* 14 Cal.4th at p. 198, fn. 9.) "At the same time, [the appellate court] review[s] for substantial evidence a finding that the prosecutor's stated reasons were genuine: 'It is plainly the resolution of a pure question of fact.'" (*Id.* at p. 198; see also *People v. Lewis* (2006) 39 Cal.4th 970, 1009.) If the trial court makes a sincere and reasoned effort to evaluate the justifications offered, its conclusions are entitled to deference on appeal. (*People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Arias* (1996) 13 Cal.4th 92, 136.) A trial court's failure to engage in such a careful assessment of the prosecution's stated reasons is itself reversible error. (*People v. Silva, supra*, 25 Cal.4th at p. 386; *People v. Fuentes, supra*, 54 Cal.3d at p. 721;[25] see *Purkett v. Elem, supra*, 514 U.S. at p. 768 [third step in *Batson* process requires trial court to determine whether facially non-discriminatory reasons are implausible or pretextual]; *United States v. Alcantar* (9th Cir. 1996) 897 F.2d 436, 438.)

As the United States Supreme Court has pointed out, the credibility of a prosecutor's stated reasons "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in

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[25] This Court has carved out an exception to the requirement that a trial court make explicit and detailed findings regarding the prosecution's use of peremptory challenges. Specifically, in *People v. Reynoso* (2003) 31 Cal.4th 903, 929, this Court held that a trial court is not required to make specific findings in instances where it decides to credit the prosecution's demeanor-based reasons for exercising a peremptory challenge. Appellant submits that the prosecutor's stated reasons in this case were not demeanor-based. To the extent it could be argued they were demeanor-based, appellant further submits that the *Reynoso* exception is contrary to *Batson* and its progeny and should be reconsidered.

accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) In *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 830-831, the Court of Appeals explained:

> As with any credibility finding, the court's own observations are of paramount importance. [Citation.] Other factors come into play in a court's evaluation of a prosecutor's reasons . . . For example, if a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination. Similarly, a comparative analysis of the struck juror with empaneled jurors "is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination." [Citation.] . . . A court may enlist the help of counsel in order to evaluate "the totality of the relevant facts" thoroughly. [Citation.]

The Ninth Circuit also suggested that "[a]fter analyzing each of the prosecutor's proffered reasons, . . . the court should then step back and evaluate all of the reasons together." (*Lewis v. Lewis*, *supra*, 321 F.3d at pp. 830-835.)

2. A Review of the Record Demonstrates That the Prosecutor's Reasons for Striking the Minority Prospective Jurors Were Pretextual

In *Miller-El v. Cockrell*, *supra*, 537 U.S. 322, the United States Supreme Court established that comparative juror analysis is a constitutionally-required technique to be employed by courts in evaluating whether the prosecution's stated reasons for use of the peremptory violated *Batson*'s proscription against race-based peremptory challenges. The issue before the Court was whether Miller-El had made "a substantial showing of the denial of a constitutional right," thus warranting the issuance of a certificate of appealability ("COA") relating to the third prong of his *Batson* claim: that is, whether he had carried his burden of proving purposeful

racial discrimination. (*Id.* at pp. 326-327.) The Court explained that while a COA ruling was not the occasion for ruling on the merits of Miller-El's claim, the COA determination required an overview of the claims and a general assessment of their merits. (*Id.* at p. 331.) Miller-El contended that the prosecution's stated race-neutral reasons for use of peremptories were pretextual.[26]

The Court in *Miller-El* reaffirmed its holding in *Purkett v. Elem*, *supra*, 514 U.S. at page 768, that the critical question in determining whether a defendant has proven purposeful discrimination at step three is the persuasiveness of the prosecution's justification for the peremptory strike. (*Id.* at pp. 338-339.) The Court held that, while such a finding is an issue of fact normally accorded deference, such deference does not amount to abandonment of judicial review. (*Id.* at pp. 339-340.)

In analyzing Miller-El's claim that peremptory strikes were race-based, the United States Supreme Court considered the facts and circumstances that were adduced in support of a prima facie case, including statistical evidence supporting the claim that the strikes were more than happenstance. It also conducted a tentative comparative analysis of whether the state's proffered race-neutral rationales for striking Black jurors pertained just as well to some White jurors who were not challenged and who did serve on the jury. (*Id.* at pp. 342-343.)[27] Even the lone dissenter

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[26] The state conceded the existence of a prima facie case, and Miller-El conceded that the prosecution had offered facially race-neutral reasons for the three strikes subject to defense objection. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 338.)

[27] After remanding Miller-El's case and later granting certiorari, the United States Supreme Court conducted a comparative juror analysis in

(continued...)

endorsed a comparative analysis, although he disagreed with the majority's conclusion. (*Id.* at pp. 361-363 (dis. opn. of Thomas, J.).) The Court thus left no doubt that comparative analysis was a factor to be considered on review of a claim of purposeful discrimination under *Batson*.

An examination of decisions by other federal and state courts demonstrates that use of comparative analysis is a necessary analytical tool in determining whether a party is engaging in discrimination. (See, e.g., *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, 1030-1031; *Lewis v. Lewis*, *supra*, 321 F.3d at pp. 830-831; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220-1221, citing *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251 (overruled on other grounds in *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (en banc)) ["A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination."].)[28]

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[27](...continued)
Miller-El, *supra*, 545 U.S. 231.

[28] The use of comparative analysis is certainly the rule rather than the exception. (See, e.g., *Jordan v. Lefevre* (2nd Cir. 2000) 206 F.3d 196, 201 ["Support for the notion that there was purposeful discrimination in the peremptory challenge may lie in the similarity between the characteristics of jurors struck and accepted."]; *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 653 ["[A]s a general matter, comparisons between challenged jurors and similarly situated, unchallenged jurors of a different race or gender can be probative of whether a peremptory challenge is racially motivated"]; *Devose v. Norris* (8th Cir. 1995) 53 F.3d 201, 204, quoting *Doss v. Frontenac* (8th Cir. 1994) 14 F.3d 1313, 1316-1317 ["It is well-established that peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged."]; *Hollingsworth v. Burton* (11th Cir. 1994) 30 F.3d 109, 112 ["While a comparison of stricken Whites with
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As these courts have recognized, the inconsistent use of peremptory challenges to excuse some jurors but retain others who share the same ostensibly objectionable characteristic can raise an inference of purposeful discrimination. In the *Batson* context, reviewing courts from many jurisdictions have employed comparative analysis to determine whether a prima facie case of discrimination has been established[29] as well as to assess

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[28](...continued)
stricken Blacks is relevant to a *Batson* claim, a comparison of stricken Blacks to seated Whites also is appropriate."]; *Splunge v. Clark* (7th Cir. 1992) 960 F.2d 705, 709 ["non-Black potential jurors who answered the question identically were deemed fit for jury service"]; *People v. Randall* (Ill.App. 1996) 671 N.E.2d 60 [prosecution's peremptory challenge of Black prospective juror was racially discriminatory because prosecution did not strike similarly-situated White juror]; *Mattison v. State* (Ga. 1994) 451 S.E.2d 807 [prosecution's use of peremptory challenges to excuse Black jurors was discriminatory where prosecution did not excuse White jurors with same characteristics as excused Black jurors]; *Holmes v. Great Atl. & Pac. Tea Co.* (La.App. 1993) 622 So.2d 748 [peremptory challenges were racially based where five White members of panel were challenged for reasons that Black members could have been, but were not, challenged]; *State v. Reliford* (Mo.App. 1988) 753 S.W.2d 9 [prosecution misused peremptory strikes where Black prospective juror who knew defendant from church was excused while White prospective juror who knew defendant from work was not].)

[29] See, e.g., *Mahaffey v. Page* (7th Cir. 1998) 162 F.3d 481, 486 ["If an excused African-American juror had characteristics and opinions that were similar to those of a juror who sat, for example, then an obvious inference, at least prior to the articulation of a race-neutral explanation for the strike, would be that the strike was racially-motivated. As far as the voir dire record would reveal, the stricken juror's race would be the only characteristic distinguishing the African-American from the juror who was retained."]; *Bennett v. Collins* (E.D. Tex. 1994) 852 F.Supp. 570 [finding prima facie case where, inter alia, several Black jurors were peremptorily challenged even though they responded to questions similarly to Whites
(continued...)

whether a party's proffered race-neutral reasons for a challenged strike are in fact pretextual.[30] Moreover, comparative analysis is employed by state and federal appellate courts to review, for the first time on appeal, the grounds upon which a trial court has based a ruling pursuant to *Batson*.[31]

Very recently, this Court held that evidence of comparative juror

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[29](...continued)
who were eventually seated on the jury].

[30] See, e.g., *McClain v. Prunty*, *supra*, 217 F.3d at p. 1220 ["A prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge"]; *Coulter v. Gilmore* (7th Cir. 1998) 155 F.3d 912, 921 ["A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate Black prospective jurors and not others who also have that characteristic"]; *Jones v. Ryan* (3rd Cir. 1993) 987 F.2d 960, 972-975 [rejecting the prosecution's race-neutral explanation for striking Black jurors where the prosecution did not apply the same rationale to similarly-situated White jurors]; *State v. Belnavis* (Kan. 1990) 787 P.2d 1172, 1174-1175 [prosecution's reasons for challenging Black jurors were not racially neutral where characteristics he identified in those jurors were present in White panel members who were not struck]; *Gamble v. State* (Ga. 1987) 357 S.E.2d 792, 795-796 [prosecutor who used peremptory challenges to strike all Blacks from venire failed to rebut prima facie case of discrimination where similarly situated White jurors were not challenged].

[31] See, e.g., *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 273-294 [conducting comparative analysis of struck Black jurors with unstruck White jurors for first time on appeal]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698-699 [appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were struck and those who were not fatally undermines the prosecution's credibility]; *Young v. State* (Tex.Crim.App. 1992) 826 S.W.2d 141, 146 ["this type [of] analysis is significant, maybe even more so, on appeal when the appellate court is reviewing the trial judge's findings as to purposeful discrimination"].

analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons. (*People v. Lenix* (2008) 44 Cal.4th 602, 622.)[32] According to this Court, "*Miller-El* [*v. Dretke*] and *Snyder* [] demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Ibid.*)[33] This Court went on to state that "[t]he law has long recognized that particular care must be taken when relying on

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[32] Prior to its decision in *Lenix*, this Court had for some time engaged in comparative analysis, but in so doing it had assumed without explicitly deciding that it was obligated to do so. (See *People v. Lenix*, *supra*, 44 Cal.4th at p. 612; *People v. Lewis* (2008) 44 Cal.4th 415, 472; *People v. Watson* (2008) 43 Cal.4th 652, 674, fn. 5; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1109-1118; *People v. Stevens* (2007) 41 Cal.4th 182, 196-198; *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1016-1024.)

[33] Appellant submits that this Court has interpreted *Miller-El v. Cockrell* and its progeny too narrowly. For instance, those cases do not accord comparative juror analysis so little weight, or, put another way, require so much evidence beyond comparative juror analysis. Although the defense in *Miller-El* presented evidence of the prosecutor's discriminatory intent other than comparative analysis – e.g., evidence that the prosecutor used peremptory challenges to strike 91% of eligible Black jurors but only 13% of eligible non-Black jurors; the prosecutor used a "jury shuffling" procedure to increase the likelihood that preferable venire members would be empaneled; and the District Attorney's office had a systematic policy to exclude minority jurors (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 531-535) – the high court has not suggested that such a showing is necessary to establish a *Batson* violation. Indeed, in *Snyder v. Louisiana*, *supra*, the high court found a *Batson* violation based on (1) a comparison of the prosecutor's stated reasons with what the challenged juror actually said, and (2) comparative juror analysis. (128 S.Ct. at pp. 1208-1212.)

circumstantial evidence." (*Ibid.*)[34]

In an ideal setting, a court evaluating a *Batson* motion would use most, if not all, of the tools identified in *Lewis v. Lewis*, *supra*, 321 F.3d at pages 830-831: consideration of its own observations; a review of the record; and comparative analysis. As appellant demonstrates below, however, the trial court in this case failed to do so. In particular, the trial court: (1) failed to engage in a comparative analysis of the prosecutor's respective treatment of the minority prospective jurors and similarly-situated White prospective jurors; and, (2) failed to adequately test the prosecutor's reasons by referring to the actual record, allowing the prosecutor to repeatedly mischaracterize statements made by the prospective jurors. Moreover, a proper review of the record, including application of comparative juror analysis, reveals that the prosecutor's reasons for striking Hispanic and Black jurors were race-based.

a. Prospective Juror L.M.

Each of the reasons offered by the prosecutor in support of his peremptory challenge of prospective juror L.M. is either implausible or contradicted by the record.

First, there is nothing in the record to support the prosecutor's claim that L.M.'s statement that she looked forward to sitting on a capital case suggested that she might have a specific reason or agenda. (2 RT Vol. 3 721; 2 RT Vol. 13 2684-2685.) A fair reading of the record demonstrates that the prosecutor all but put words in her mouth:

[Prosecutor:] You have not heard that much about this case,

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[34] It is also true that circumstantial evidence may suffice to prove a fact. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 930; CALCRIM Nos. 223 and 224; CALJIC Nos. 2.00, 2.01 and 2.02.)

but just with respect to the fact that it is a potential capital case; that is, it may come down to the penalty phase, and you may be in a group of people deciding whether or not the defendant is going to live or whether or not he is going to be executed. Knowing that, how do you feel about serving as a juror on this kind of case?

[L.M.:] I feel that I would, you know, do the best, you know, to my ability for it, for the right verdict, however you want to say it.

[Prosecutor:] I understand that. But how do you feel about –

[L.M.:] It doesn't bother me, if that is – is that what you are asking me? Do I feel nervous –

[Prosecutor:] Just, how do you feel?

[L.M.:] – or scared or –

[Prosecutor:] Yes. Apprehensive about it?

[L.M.:] No.

[Prosecutor:] *Are you eager about it?*

[L.M.:] *I would not say eager about it, but to do my civil duty.*

[Prosecutor:] *Okay. Are you looking forward to it?*

[L.M.:] *In one respect, I guess, you could say yes.*

[Prosecutor:] Why would that be?

[L.M.:] Well, I don't know. It is just that – I have been one other time as a juror, but I had to go to L.A. as I had stated on the – on that form. But I was never – I was not picked. I was on a panel, but I never got picked for a case.

(2 RT Vol. 3 720-721, emphasis added.) Her responses evince not a

questionable eagerness, but a laudable sense of civic duty.

As defense counsel argued, L.M.'s comment meant only that she accepted the responsibility of jury service. (2 RT Vol. 13 2712-2713.) Indeed, during voir dire, L.M. affirmed that: she would not be biased by the charges in the case (2 RT Vol. 2 518); she would be impartial and would consider all of the evidence before reaching a decision (2 RT Vol. 5 1030, 1120); and, she could vote for either life without possibility of parole or the death penalty, depending on what the evidence showed (2 RT Vol. 3 705-708, 713, 720, 726).

Moreover, a White prospective juror, E.C., was at least as willing, even eager, to serve as a juror. Specifically, E.C. stated that she believed jury service is an experience everyone should have. (2 RT Vol. 10 1898-1899.) The prosecutor, however, did not suggest that some agenda or reason motivated her desire to serve as a juror, nor did he exercise a peremptory challenge to excuse her.

Second, the prosecutor's skepticism that L.M. did not discuss her daughter's classwork was absurd. (2 RT Vol. 13 2686-2687.) It is entirely conceivable that a parent and her adult child would not discuss the specific details of the child's studies. Indeed, as defense counsel pointed out, L.M. may well have talked to her daughter about other aspects of her college life, such as her tuition or her schedule. (2 RT Vol. 13 2713-2714.)[35]

Moreover, a number of White prospective jurors, including seven who were later seated as jurors or alternate jurors, acknowledged that they had friends or loved ones with whom they did not discuss their work. C.S.

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[35] Tellingly, the trial court did not directly address either of these stated reasons, probably recognizing their weakness.

stated that she had been good friends with a judge for at least 40 years, but had never spoken to him about his work. (2 RT Vol. 13 2818-2819.) R.D. stated that his sister-in-law had been a court clerk but she never talked to him about her work. (2 RT Vol. 13 2977.) G.J. stated that his brother had been a prison guard in Washington, but they had had no discussions "whatsoever" about his brother's work inside the prison. (2 RT Vol. 9 2116-2117.) G.P. stated that he was acquainted with two attorneys who practiced criminal law, but he had never talked about their cases with them. (2 RT Vol. 13 2739-2741.) A.S. stated that, about six years earlier, he had social relationships with a Santa Ana Police Department investigator and an attorney, but never discussed their work with them. (2 RT Vol. 6 1454-1455.) M.H. stated that one of her best friends was an attorney but they never talked about her friend's work. (2 RT Vol. 14 3173-3174; 2 RT Vol. 15 3213.) M.W. stated that his friend was a police officer, but M.W. had never talked with him about his work. (2 RT Vol. 16 3351-3352.) M.B. stated that he was acquainted with a judge but never spoke with him about his cases. Moreover, M.B.'s nephew worked in a juvenile facility but he never discussed that with his nephew. (2 RT Vol. 17 3606-3608.) Nevertheless, the prosecutor did not suggest that any of these prospective jurors was untrustworthy.

Third, the record completely undermines the prosecutor's suggestion that L.M.'s comment that she was not apprehensive about the case raised a question as to whether she fully understood the gravity of the responsibility. (2 RT Vol. 13 2685.) Not only did she acknowledge that this was a "severe" case (2 RT Vol. 3 711), but, as appellant notes above, the prosecutor mischaracterized her willingness to serve as somehow questionable.

In addition, the prosecutor's argument that L.M. may have failed to recognize the gravity of the responsibility, and the factors cited by the trial court in accepting that argument (2 RT Vol. 13 2724-2726), must be rejected when compared to responses given by similarly situated White prospective jurors who were not excused by the prosecutor. For instance, in finding that the prosecutor justifiably doubted L.M.'s ability to seriously consider the death penalty, the trial court pointed to her statement that she had never had to make any decision dealing with life or death. (2 RT Vol. 13 2724.) However, three White prospective jurors, including seated jurors T.B. and J.R., acknowledged that they had never had to make any decisions concerning the welfare, health or life of another. (2 RT Vol. 4 965; 2 RT Vol. 6 1264; 2 RT Vol. 14 3098.) Yet neither the prosecutor nor the trial court suggested that they somehow failed to recognize the magnitude of the task before them.

The trial court also relied upon L.M.'s statement that she had no opinion as to whether the death penalty was used too often or not enough, as well as the fact that she did not remember Harris's execution. (2 RT Vol. 13 2724-2726.) According to the court, the fact that she had not given much thought to the death penalty in the past suggested that she was not sufficiently concerned with the responsibility she would face as a juror. (2 RT Vol. 13 2724-2726.) At the same time, the court did not believe her statements that she had not previously considered the death penalty issue and that she had not heard about the Harris execution. (2 RT Vol. 13 2725-2726.) However, the trial court's conclusions were inconsistent; that is, the court implicitly accepted her statement that she had not given much thought to the death penalty, yet it did not believe her when she said she had not considered it or heard about the *Harris* case. Moreover, there was nothing

in the record to suggest that she had heard about the *Harris* case or that she had any reason to be untruthful.

Moreover, the prosecutor failed to excuse a number of White prospective jurors – including four who ultimately sat on appellant's jury and one of the alternate jurors – who, like L.M., were unfamiliar with the execution of Robert Alton Harris and/or had not previously considered the issue of capital punishment in any depth. The jury foreman, G.P., stated that he might have discussed his feelings about the death penalty in the past, but he did not recall doing so during the past several years. (2 RT Vol. 13 2751.) Asked whether he could think of any recent cases regarding the death penalty, he responded as follows:

> Not really. You know, to be quite frank, I am so busy on day-to-day things that – maybe it sounds bad, but it is difficult for me to pay too much attention to things like that. The other day, though, I heard something on the radio about somebody that was executed, and they briefly mentioned the circumstances behind that. I can't even remember which state it was in, but that's about it.

(2 RT Vol. 13 2751.) G.P. did not even recall whether he had formed an opinion as to whether the person deserved it, recalling only that he had a sense that it was a very serious situation. (2 RT Vol. 13 2751-2752.)

Another seated juror, J.R., acknowledged that she had never had any discussions regarding the death penalty, and that it was a topic she avoided. (2 RT Vol. 4 964.) Seated juror S.M. had never discussed the death penalty with anyone and could not think of any recent cases involving the death penalty, though she believed she had seen news coverage of people

picketing in connection with a Florida case. (2 RT Vol. 9 2172-2173.)[36] The fourth seated juror, R.D., stated that he had not taken an interest in or followed any court trials. (2 RT Vol. 14 3020.)

Alternate juror M.B. had been on a jury panel in a capital case about two years earlier, but had not given any thought to the death penalty issue since then. (2 RT Vol. 17 3611-3612, 3614-3615.) Prospective juror E.C. stated that she had never expressed an opinion either for or against the death penalty. (2 RT Vol. 10 1858.) Although she claimed that she must have read about specific cases involving the death penalty, she did not recall any such cases. In fact, she admitted that she did not follow court cases in the newspaper because "if you do you get oversaturated." (2 RT Vol. 10 1858-1859.) Prospective juror K.T. could not recall any recent cases in which the death penalty had been imposed. (2 RT Vol. 8 1775.) Prospective juror T.S. stated that he was not familiar with the recent Harris execution. (2 RT Vol. 8 1933.) Moreover, T.S. only vaguely recalled one case in which the death penalty was actually imposed, a case which took place somewhere back East. (2 RT Vol. 8 1938-1939.) Finally, prospective juror C.F. recalled that there had been an execution the previous year, but recalled nothing about the case. (2 RT Vol. 8 1789.)

Fourth, the record undermines the prosecutor's reliance upon L.M.'s comment that she had never read anything about the death penalty coupled with her recollection of an instance where she had opined that the death penalty had been imposed wrongly in a particular case. (2 RT Vol. 13 2687.) Apparently, the prosecutor's point was that she had contradicted

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[36] S.M., however, said she had read a lot of books containing opinions both for and against the death penalty. (2 RT Vol. 9 2172-2173.)

herself, and that the contradiction showed that she lacked credibility. Yet there was no contradiction at all: L.M. had expressed that opinion in the course of a discussion (2 RT Vol. 3 716-718), and she did not claim to have read anything regarding the death penalty.

Similarly feeble is the prosecutor's suggestion that L.M.'s lack of an opinion as to whether the death penalty was imposed too often or too seldomly somehow contradicted her statement that she once took the position that a death penalty had been imposed wrongly. (2 RT Vol. 13 2688.)[37] Her lack of an opinion with respect to the frequency of executions is consistent with, even expected in light of, her having never read anything about the death penalty.

The fact that the prosecution failed to excuse a number of White prospective jurors, who, like L.M., had never had to make a life or death decision or who were unfamiliar with capital cases in California fatally undermines the prosecutor's credibility. (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427, citing *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695; accord, e.g., *Davidson v. Harris* (8th Cir. 1994) 30 F.3d 963, 965; *Bennett v. Collins* (E.D. Tex 1994) 852 F.Supp. 570, 577.) Although defense counsel did not prod the trial court to engage in comparative analysis with respect to L.M., the shared similarities between L.M. and the White prospective jurors discussed in this section were explored in sufficient depth to compel a finding that the peremptory challenge was improperly race-based. (See *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.)

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[37] L.M. never suggested that the death penalty was wrong in general, just that it had been wrongly imposed in a specific case. (See 2 RT Vol. 3 716-718.)

In addition, there is simply nothing in L.M.'s voir dire or questionnaire that suggests that she would not impose the death penalty where appropriate. Although she acknowledged that she was not a strong supporter of the death penalty, she stated that: the law provided a reasonable method for reaching a penalty verdict; she would be able to vote for either death or life imprisonment without possibility of parole; and, if the death penalty law were at issue in an election, she would vote to renew it, not to abolish it. (2 RT Vol. 3 705-707, 709, 712-713, 715, 720-721.) During voir dire, L.M. affirmed that: she would not be biased by the charges in the case (2 RT Vol. 2 518); she would be impartial and consider all of the evidence before reaching a decision (2 RT Vol. 5 1030, 1120); she could vote for either life without possibility of parole or the death penalty, depending on what the evidence showed (2 RT Vol. 3 705-708, 713, 720, 726); and, she looked forward to fulfilling her civic duty by serving as a juror (2 RT Vol. 3 721).

Under these circumstances, the trial court's conclusion that L.M.'s answers "were a little bit unconcerned"[38] and that the prosecutor therefore had reason to doubt her ability to seriously consider the death penalty was groundless. (2 RT Vol. 13 2725-2726.)[39] Indeed, one of the prosecutor's

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[38] Significantly, it does not appear that the trial court was referring to L.M.'s demeanor in finding that her answers were "a little bit unconcerned."

[39] The trial court's reliance upon *People v. Johnson*, *supra*, 47 Cal.3d at pages 1218-1222, in upholding the peremptory challenge to L.M. is puzzling. (2 RT Vol. 13 2725-2726.) Although the section of *Johnson* cited by the court generally addresses a trial court's obligations in analyzing a prosecutor's explanations, it does not involve the sort of speculation in which the trial court here engaged. In addition, a significant portion of that

(continued...)

reasons for excusing her was that she said she was *looking forward* to sitting on a jury. (2 RT Vol. 13 2684-2685.)

In short, the prosecutor's stated reasons for excusing prospective juror L.M. were "inherently implausible in light of the whole record." (*People v. Turner, supra*, 42 Cal.3d at p. 720, fn. 6; see also *Snyder v. Louisiana, supra*, 128 S.Ct. at pp. 1208-1212; *People v. Gonzalez, supra,* 211 Cal. App.3d at p. 1193; *People v. Granillo, supra*, 197 Cal.App.3d at p. 120.)

b. Prospective Juror E.V.

The prosecutor's stated reasons as to why he excused prospective juror E.V. were also contradicted by the record. The record makes clear that, contrary to the prosecutor's position, his life experience was broad enough that he would have been a suitable juror. E.V. was a father, a husband, and had a job; he had attended one year of college, where he had majored in art; his hobbies were art and cars. (Aug./Corr. CT Vol. 12 40424-4044.) Indeed, as defense counsel pointed out, the prosecutor's purported concern that E.V. would be unable to properly consider mental health testimony was belied by his peremptory challenges to several prospective jurors with experience in the area of psychology, psychiatry and/or medicine. (2 RT Vol. 10 2353-2363; 2 RT Vol. 11 2499-2502, 2543-2544; 2 RT Vol. 13 2928-2930; 2 RT Vol. 14 3033-3034, 3079-3080.)

Additionally, E.V.'s profile was comparable to that of White prospective jurors who were not challenged by the prosecutor. For instance,

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[39](...continued)
section reflected this Court's disapproval of comparative juror analysis (47 Cal.3d at pp. 1220-1222), a stance which must be reversed in light of *Miller-El v. Cockrell, supra*, 537 U.S. 322.

one of the seated jurors, R.D., was a retired produce manager who had attended two years of high school and had studied real estate at a college. (Aug./Corr. Vol. 10 3192-3193.) He did not belong to any clubs or organizations or do any volunteer work. (Aug./Corr. Vol. 10 3194.) He watched television almost every evening, and did not read books for pleasure. (Aug./Corr. Vol. 10 3197.) He had never studied psychology or psychiatry. (Aug./Corr. Vol. 10 3198.)

Prospective juror T.S., a factory worker, did no volunteer work, was not a church member, and belonged to no clubs or organizations. (Aug./Corr. CT Vol. 12 3872, 3874.) He had not attended college and had never studied psychology or psychiatry. (Aug./Corr. CT Vol. 12 3873, 3878.) His hobbies were weightlifting, bike riding, and handgun shooting, and his favorite "books" were the magazines *Guns and Ammo*, *Bikes*, and *Hot Rod*. (Aug./Corr. CT Vol. 12 3874, 3877.)[40]

Prospective juror C.B. was a retired department store manager and buyer. (Aug./Corr. Vol. 10 3062.) He had earlier worked as a grocery clerk and a drug store clerk. (Aug./Corr. Vol. 10 3063.) He did not read books for pleasure. (Aug./Corr. Vol. 10 3067.) Like E.V., he misspelled several words in his questionnaire; in his questionnaire, C.B. wrote "Pharmisist, "challange," and "Improvment." (Aug./Corr. CT Vol. 10 3062, 3063, 3066.) He had never studied psychology or psychiatry. (Aug./Corr. Vol. 10 3068.)

Prospective juror N.W. had finished high school but had not attended

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[40] Significantly, the prosecutor did not remark on T.S.'s list of favorite "books." In contrast, the prosecutor noted that E.V. read *Hot VW* in support of his argument that E.V. would be unable to properly consider mental health testimony. (2 RT Vol. 13 2689-2692.)

college or vocational school. (Aug./Corr. CT Vol. 12 4060.) She did not belong to any organizations or do volunteer work. (Aug./Corr. Vol. 12 4061.) She did not read books for pleasure. (Aug./Corr. Vol. 12 4064.) She had never studied psychology or psychiatry. (Aug./Corr. Vol. 12 4065.)

Prospective juror C.A. was a homemaker who had last worked 17 years earlier as a dental assistant. (Aug./Corr. Vol. 10 2966-2967.) She was a member of a church, but belonged to no clubs or other organizations. (Aug./Corr. Vol. 10 2968.) While her hobbies included reading (as well as "bikeing" (*sic*) and walking), her favorite books were the potboilers *Hunt for Red October*, *The Firm* and *The Rising Sun*. (Aug./Corr. Vol. 10 2968, 2971.) She had never studied psychology or psychiatry. (Aug./Corr. Vol. 10 2972.)

Finally, prospective juror S.S., an electrical technician, apparently was not a church member, belonged to no clubs or organizations, had no hobbies, and did no volunteer work.[41] He watched television almost every evening. (Aug./Corr. CT Vol. 12 3904, 3906, 3908.) He had never studied psychology or psychiatry. (Aug./Corr. CT Vol. 12 3910.)

E.V. was "excused after giving routine, acceptable responses" to questions during voir dire, an indication of discriminatory use of peremptory challenges by the prosecution. (*People v. Snow* (1987) 44 Cal.3d 216, 223.) Moreover, the prosecutor's discriminatory use of peremptory challenges is once again disclosed by his failure to excuse similarly-situated White prospective jurors. (*Burks v. Borg*, *supra*, 27 F.3d

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[41] S.S. did not fill out the portions of the questionnaire relating to these matters.

1424, 1427; accord, e.g., *Davidson v. Harris*, *supra*, 30 F.3d at p. 965; *Bennett v. Collins*, *supra*, 852 F.Supp. at p. 577; *People v. Turner*, *supra*, 42 Cal.3d at p. 719.) "The proffer of various faulty reasons and only one or two otherwise adequate reasons may undermine the prosecution's credibility to such an extent that a court should sustain a *Batson* challenge." (*Lewis v. Lewis, supra*, 321 F.3d at p. 831; see also *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1212.) Furthermore, the shared similarities between E.V. and the White prospective jurors discussed in this section were explored in sufficient depth to compel a finding that the peremptory challenge was improperly race-based. (See *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.)

In short, E.V. was another minority prospective juror, one of five in this case, for whose excusal the prosecution's stated reasons were "inherently implausible in light of the whole record." (*People v. Turner, supra*, 42 Cal.3d at p. 720, fn. 6; *People v. Gonzalez*, *supra,* 211 Cal. App.3d at p. 1193; *People v. Granillo, supra*, 197 Cal.App.3d at p. 120.)

c. Prospective Juror A.M.-F.

The record also contradicts the prosecutor's stated concern that prospective juror A.M.-F.'s exposure to the field of psychology suggested that he might have a predisposition to accept mental health evidence presented by the defense or act as a source of information for the other jurors. (2 RT Vol. 13 2693-2696.) As defense counsel observed, A.M.-F. presumably was the type of juror the prosecutor would have wanted to keep in light of his stated concern that jurors be able to understand technical mental health testimony. (2 RT Vol. 13 2690-2692, 2697.) Contrary to the prosecutor's assertion (2 RT Vol. 13 2695), A.M.-F. expressly stated that he did not, and by law was not permitted to, administer the M.M.P.I. (2 RT

Vol. 7 1734). Moreover, as noted above, A.M.-F. stated that he would be a fair juror and that he could handle the responsibility of reaching a penalty verdict. (2 RT Vol. 7 1572, 1619, 1624-1625, 1572, 1718-1719.)

It should also be noted that the trial court's suggestion that A.M.-F. might have incorrectly listed his ethnicity (2 RT Vol. 13 2729) defies belief, particularly in light of his impressive academic history. In any event, the prosecutor himself acknowledged that he was aware A.M.-F. was Latin-American (2 RT Vol. 13 2693-2694). (Cf. *People v. Bonilla* (2007) 41 Cal.4th 313, 344 ["Where a prosecutor is unaware of a prospective juror's group status, it logically follows he cannot have discriminated on the basis of that status."].)

Finally, at least five White prospective jurors, including four seated jurors, had studied psychology or psychiatry but were not excused by the prosecutor by way of peremptory challenges. Juror T.B. had taken a mandatory psychiatry course his first or second year of college. (2 RT Vol. 14 3089.) Juror D.H. majored in psychology in college, which entailed a year-long psychology course. (Aug./Corr. CT Vol. 11 3376; 2 RT Vol. 7 1738.) Juror G.P. took a basic psychology course in college. (2 RT Vol. 13 2758.) Juror C.S. took basic psychology in college. (2 RT Vol. 13 2820.) And prospective juror D.B. had taken a required psychology course in college. (2 RT Vol. 10 2289.) Appellant acknowledges that none of these prospective jurors had studied psychology as intensively as A.M.-F., but their familiarity with basic psychology (and, in the case of D.H., the fact that she had elected to major in psychology) should have raised the prosecutor's concern that they too would be predisposed to accept the defense evidence or serve as a conduit of information to other jurors, at least if he had genuinely held such concern.

Moreover, the prosecutor's claim that he had excused A.M-F. in part because his sister had been in and out of jail (2 RT Vol. 13 2694) was undercut by the fact that he did not exercise a peremptory challenge as to juror C.S., whose children had extensive histories of legal and mental health problems. Her son had been arrested for forging a parking permit. About two years later, he was arrested again; according to C.S., he was arrested for being in a house where marijuana was being used. Her daughter had been convicted of embezzling money from her employer. She was later arrested for stealing Vicodin from a clinic where she worked. (2 RT Vol. 13 2785-2792, 2809-2810.) Both of C.S.'s children had had ongoing mental health issues, including nervous breakdowns. (2 RT Vol. 13 2789-2791; Aug./Corr. CT Vol. 12 3918.)

Although the prosecutor claimed that he had excused A.M.-F. because he had driven with a suspended license (2 RT Vol. 13 2694), he did not challenge prospective juror, D.T., who had been arrested "for drugs" (presumably, possession of drugs) and for driving under the influence (Veh. Code, § 502). (Aug./Corr. CT Vol. 13 4203-4204; 2 RT Vol. 17 3564-3565.) Nor did he challenge W.H., who had been arrested and apparently convicted for drunk driving. (2 RT Vol. 7 1768-1769.) Although D.T. and W.H. may not have disregarded a directive of the court or the Department of Motor Vehicles, they did disobey the law in the first place; in addition, driving under the influence is much more serious an offense than driving with a suspended license. The prosecutor, however, did not express any concern as to whether D.T. or W.H. would make suitable jurors. In fact, D.T. was selected as an alternate juror and W.H. was seated as an actual juror. (2 CT Vol. 4 1227.)

The prosecutor's discriminatory use of peremptory challenges is

once again disclosed by his failure to excuse similarly-situated White prospective jurors. (*Burks v. Borg, supra,* 27 F.3d at p. 1427; see also *Davidson v. Harris, supra,* 30 F.3d at p. 965; *Bennett v. Collins, supra,* 852 F.Supp. at p. 577; *People v. Turner, supra*, 42 Cal.3d at p. 719.) Again, the shared similarities between prospective juror, A.M.-F., and the White prospective jurors discussed in this section were explored in sufficient depth to compel a finding that the peremptory challenge was improperly race-based. (See *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.)

d. Prospective Juror R.M.

The prosecutor's stated reasons for excusing prospective juror R.M. amounted to an argument that he might not be fair and/or that he would not vote for the death penalty. (2 RT Vol. 13 2699-2702.) However, despite R.M.'s initial concern that his feelings about the charges would be so strong as to impair his ability to be a fair juror in this case, he consistently affirmed that he could set aside his feelings and judge the case fairly. (2 RT Vol. 9 2074-2087, 2090-2091, 2100-2102, 2112.) He also affirmed that he could vote for either life without possibility of parole or the death penalty, depending on the evidence. (2 RT Vol. 9 2092, 2096-2098.)

Indeed, R.M.'s voir dire responses suggest that the prosecutor presumably would have wanted him as a juror, but for his race. R.M. explained that there "would have to be a lot of evidence to prove there is no way that this person did it because of the charges." (2 RT Vol. 9 2081.) Moreover, a careful reading of the record indicates that he was referring to the victim, not appellant, when he first expressed his belief that human life is the most precious thing. Explaining the lengths that appellant would have to go to convince R.M. that he was innocent, R.M. stated:

[R.M.:] . . . maybe just because of the charges I don't know if

> I could be able to put them aside or deal with them and be open minded about them.
>
> [Defense counsel:] Q Is it because the charges are involving a young girl as opposed to an adult?
>
> [R.M.:] Sort of – mainly the charges I guess. My philosophy [is that] human life is the most precious thing whether it is a child or adult.
>
> When somebody does take another person's live [*sic*] away I think it is a pretty horrendous crime, just murder in itself and for that person to be proven innocent as far as I am concerned it has to be a lot presented to me to be able to change my mind or for me to have an open mind about it.

(2 RT Vol. 9 2081.)

The prosecutor did not challenge several White prospective jurors who had expressed reservations about the death penalty. T.B., one of the seated jurors, stated that he would vote to keep the death penalty, but would be reluctant to do so for fear that someone innocent or not entirely guilty was executed. (2 RT Vol. 14 3104.) Seated juror J.R. said that she was not strongly in support of the death penalty. (2 RT Vol. 4 961.) Seated juror W.S. commented that "Death is a very serious penalty and I would have to be positive beyond a reasonable doubt before I would even look at death as being a penalty." (2 RT Vol. 9 2014.) Prospective juror R.S. would vote for the death penalty to be legal, were that the subject of an election, but added that the penalty decision was not to be taken lightly. (2 RT Vol. 4 823, 827.) She said she could consider both life without possibility of parole and death, but the decision would be extremely difficult. (2 RT Vol. 4 826.) She characterized herself as not a strong supporter of the death penalty, but somewhere in between. (2 RT Vol. 4 827.)

The prosecutor's discriminatory use of peremptory challenges is once again demonstrated by his failure to excuse similarly-situated White prospective jurors. (*Burks v. Borg, supra,* 27 F.3d at p. 1427; see also *Davidson v. Harris, supra,* 30 F.3d at p. 965; *Bennett v. Collins, supra,* 852 F.Supp. at p. 577; *People v. Turner, supra,* 42 Cal.3d at p. 719.) Moreover, the shared similarities between R.M. and the White prospective jurors discussed in this section were explored in sufficient depth to compel a finding that the peremptory challenge was improperly race-based. (See *Snyder v. Louisiana, supra,* 128 S.Ct. at p. 1211.) Finally, the pretextual nature of the prosecutor's challenge to R.M. is further revealed by his reliance upon the fact that R.M. had never called for emergency medical services during the time he worked with disabled children, a matter of no relevance whatsoever. (See *Miller-El v. Dretke, supra,* 545 U.S. at pp. 251-252 [court may consider plausibility of prosecutor's reasons in determining whether peremptory challenges were race-based].)

e. Prospective Juror M.L.

The record undercuts the prosecutor's argument that prospective juror M.L.'s responses suggested she was not paying enough attention to the process or to her responsibilities in the case. (2 RT Vol. 13 2705-2707.) M.L.'s statements regarding her cousin and half-brother satisfactorily explained why she had forgotten to mention them in her questionnaire. It had been approximately eight years since her cousin had been murdered, he had been five years older than her, and he had lived in another city. (2 RT Vol. 12 2645-2646; Aug./Corr. CT Vol. 11 3545.) Her half-brother's arrests involved minor, alcohol-related matters, such as drinking in public or public intoxication, he was older than M.L., and she had not seen him since their father's death in 1989. (2 RT Vol. 12 2626, 2646–2647.)

Moreover, the fact that M.L. actually disclosed the information belies the prosecutor's argument that she had failed to do so because she was either too inattentive to be a suitable juror or because she wanted to serve on the jury. (2 RT Vol. 13 2705-2708.)

The prosecutor's other stated reason for excusing M.L. – i.e., that at one point she said she did not think it was right to give the death penalty to a defendant (2 RT Vol. 13 2708) – is contradicted by the record. First, a fair reading of the record plainly shows that she supported the death penalty and could vote for the death penalty if she believed it was appropriate. (2 RT Vol. 12 2621, 2630-2642.) Moreover, as noted in the previous section, a number of White prospective jurors expressed some resistance to the death penalty but were not excused by the prosecutor by way of peremptory challenges. (*Burks v. Borg, supra,* 27 F.3d at p. 1427; see also *Davidson v. Harris, supra,* 30 F.3d at p. 965; *Bennett v. Collins, supra,* 852 F.Supp. at p. 577; *People v. Turner, supra*, 42 Cal.3d at p. 719.) The shared similarities between M.L. and the White prospective jurors discussed in this section were explored in sufficient depth to compel a finding that the peremptory challenge was improperly race-based. (See *Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1211.)

E. The Prosecutor's Improper Peremptory Challenges In This Case Requires That the Entire Judgment Be Reversed

The exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal. (*People v. Silva, supra*, 25 Cal.4th at p. 386, citing *People v. Montiel, supra,* 5 Cal.4th at p. 909; *People v. Fuentes*, supra, 54 Cal.3d at pp. 715 and 716, fn. 4; see *People v. Howard, supra,* 1 Cal.4th at p. 1158; *Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1255, fn. 4; *United*

States v. David (11th Cir. 1986) 803 F.2d 1567, 1571.) In this case, not one but five prospective jurors were excluded for race-based reasons.

"As to all [five] of the challenges the inadequacy of the prosecutor's reasons was compounded by the court's apparent acceptance of those reasons at face value." (*People v. Turner, supra*, 42 Cal.3d at p. 727; see also *Garrett v. Morris* (8th Cir. 1987) 815 F.2d 509, 514 ["The trial court's immediate acceptance of [the prosecutor's] explanation at face value compounds our concern about the adequacy and genuineness of the proffered explanation."].) As in *Turner*, not only did the prosecution fail "to sustain its burden of showing that the challenged prospective jurors were not excluded because of group bias," but also "the court failed to discharge its duty to inquire into and carefully evaluate the explanations offered by the prosecutor." (*People v. Turner, supra*, 42 Cal.3d at p. 728; see also *People v. Silva, supra*, 25 Cal.4th at pp. 385-386.) The error is prejudicial per se and requires reversal of appellant's convictions and death judgment. (*Batson v. Kentucky, supra*, 476 U.S. at p. 100; *People v. Turner, supra*, 42 Cal.3d at p. 728; *People v. Silva, supra*, 25 Cal.4th at p. 386; *People v. Fuentes, supra*, 54 Cal.3d at p. 721; *People v. Gonzalez, supra*, 211 Cal.App. 3d at p. 1193; *People v. Granillo, supra*, 197 Cal.App.3d at p. 116.) The trial court's failure to engage in comparative juror analysis and other critical measures virtually guaranteed that it would accept the prosecutor's reasons as proper and race-neutral. (See *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 358 ["We hold that the California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine."].)

Further, the unlawful exclusion of members of a particular race from jury selection constitutes structural error resulting in automatic reversal because the error infects the entire trial process. (See *Arizona v. Fulminante, supra,* 499 U.S. at p. 310, citing *Vasquez v. Hillery*, *supra*, 474 U.S. 254 [unlawful exclusion of members of the defendant's race from a grand jury constitutes structural error].)

Under any analysis, however, reversal of the entire judgment is required because the record clearly reveals that the prosecution's purported race-neutral explanations were pretexts for purposeful discrimination.

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II

THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING STATUTORILY INADMISSIBLE TESTIMONY DURING THE PROSECUTOR'S CROSS-EXAMINATION OF DR. SEAWRIGHT ANDERSON AT THE GUILT PHASE

A. Factual Background

On direct examination, the scope of Dr. Seawright Anderson's testimony was essentially limited to the following: that, after evaluating appellant, he concluded that appellant suffered from Schizo-Affective Disorder, a history of polysubstance abuse, a history of head injuries, and Organic Personality Disorder; and an explanation of the information upon which he relied in forming that opinion. (2 RT Vol. 25 5474-5488, 5563.)

Nevertheless, the prosecutor asked Dr. Anderson on cross-examination whether he concluded that appellant knew the difference between right and wrong when he killed Nadia Puente. (2 RT Vol. 25 5597.) The trial court overruled defense counsel's objection that the question was irrelevant, immaterial and exceeded the scope of direct examination. (2 RT Vol. 25 5597-5598.) Dr. Anderson then replied, "Yes, sir, I feel – I feel at the time that – the fact that he did know the difference between right and wrong." At that point, the prosecutor advised the court that he had no further questions for Dr. Anderson. (2 RT Vol. 25 5598.)

As appellant demonstrates below, the trial court erred by allowing the prosecutor to elicit Dr. Anderson's testimony that appellant knew the difference between right and wrong. His testimony on that point was not only irrelevant and misleading as to the question of appellant's guilt or innocence, but was also statutorily impermissible.

B. Legal Analysis

Penal Code section 1026, subdivision (a), provides in pertinent part that "[w]hen a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed." Penal Code section 28, subdivision (a), provides in pertinent part that "[e]vidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." In contrast, whether a defendant "was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense" is an issue to be determined by the trier of fact at the sanity phase. (§ 25, subd. (b).)

In addition, Penal Code section 29 provides that an expert testifying about a defendant's mental illness "shall not testify as to whether the defendant *had or did not have* the required mental states. . . ." (§ 29, italics added; see also *People v. Smithey* (1999) 20 Cal.4th 936, 961.) Thus, neither party may elicit from an expert that a criminal defendant acted with, or lacked, a particular intent. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 960.)

Here, the trial court erred in allowing the prosecutor to elicit Dr. Anderson's opinion as to whether appellant knew the difference between right and wrong. First, whether appellant knew the difference between right and wrong was irrelevant to the only issue raised at the guilt phase by appellant's mental health evidence: "whether or not [he] actually formed a

required specific intent, premeditated, deliberated, or harbored malice aforethought." (§ 28.) Consideration of whether appellant knew the difference between right and wrong could only have confused the jury's determinations with respect to this question, striking at the heart of the defense case. For the same reason, section 28 precluded Dr. Anderson from explaining or giving context to his response. That is, testimony expanding upon his opinion as to whether appellant could distinguish between right and wrong could only be presented at the sanity phase.

Second, Dr. Anderson was precluded by section 28 from giving an opinion on that issue. Again, whether appellant knew the difference between right and wrong lay outside the scope of section 28. Moreover, it is likely that, just as the prosecutor intended, the jury understood Dr. Anderson's testimony that appellant knew the difference between right and wrong as, in effect, an opinion that appellant harbored the mental states necessary to sustain convictions for the charged offenses. It is well-established that section 29 prohibits an expert witness from using terms that are synonymous with the mental states involved. For instance, in *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364, the Court of Appeal concluded that

> section 29 does not simply forbid the use of certain words, it prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted. An expert may not evade the restrictions of section 29 by couching an opinion in words which are or would be taken as synonyms for the mental states involved.

In *People v. Czahara* (1988) 203 Cal.App.3d 1468, 1477, the Court of Appeal found that the trial court properly ruled that a defense mental health

expert could not opine that the defendant acted in the heat of passion, although the expert had not proposed to state directly that the defendant acted without malice aforethought. The Court reasoned that "[h]eat of passion upon sufficient provocation is not merely evidence that malice was absent, it is by legal definition the absence of malice." (*Ibid.*)

A criminal defendant is permitted to use expert testimony in an effort to show that he did not actually form the required mental states of the charged crimes. (*People v. Coddington* (2000) 23 Cal.4th 582, 529, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) This is true regardless of what opinion the expert may have on the ultimate legal question presented. (*Id.* at pp. 582-583.) Appellant's proper effort to convince the jury that he acted without the mental states necessary for the charged crimes did not invite the prosecutor to ignore the boundaries of section 29 and elicit inadmissible testimony.

Moreover, the prosecutor's improper question was not permissible to impeach Dr. Anderson. He did not testify on direct examination that appellant acted without the requisite mental states. Accordingly, there was nothing for the prosecutor to impeach by means of such improper questioning.

People v. Smithey (1999) 20 Cal.4th 936 is instructive. There, the prosecutor asked the defendant's psychiatric expert whether he had an opinion as to whether the defendant could form the intent to commit the charged crimes, despite the fact that he was barred by Penal Code sections 28 and 29 from giving such an opinion. (*Id.* at pp. 958-960.) The defense objected to the improper question, and the expert did not answer it. (*Id.* at p. 960.) In finding the misconduct to be harmless, this Court noted that the trial court quickly admonished the jury to disregard any questions put to the

expert about the defendant's intent to commit the crime, explained that the defense objections to such questions were proper, and read the text of section 29 to the jury. (*Id.* at p. 961.) In light of these circumstances, this Court found "no reasonable likelihood that the jury was misled by the prosecutor's improper question." (*Ibid.*)

In this case, on the other hand, the trial court allowed the prosecutor to elicit Dr. Anderson's inadmissible opinion that appellant knew the difference between right and wrong. Neither did the court admonish the jury, read the text of section 29, or otherwise advise the jury that Dr. Anderson's opinion on that point was irrelevant.

C. The Trial Court's Error Was Prejudicial

During the guilt phase of appellant's trial, there was only one seriously contested issue: appellant's mental state at the time of the killing. This one issue, however, involved a number of complex questions: Was the killing committed with malice aforethought, and premeditation and deliberation, as required to sustain a conviction of deliberate and premeditated first degree murder? Did appellant harbor the specific intent to commit the underlying offenses necessary to sustain a conviction for felony-murder? Did appellant harbor the specific intent required to sustain a conviction for kidnaping for the purpose of child molestation or for a lewd and lascivious act with a child under the age of 14? Did appellant have the mental state required for the felony-murder special circumstances? Even if appellant committed the physical acts necessary for rape and sodomy, did appellant intend to commit those crimes?

However, as noted above, the jury likely understood Dr. Anderson's opinion that appellant knew the difference between right and wrong as tantamount to evidence that appellant had the mental states necessary to

sustain convictions of the charged crimes. Further, to the extent that the jury interpreted Dr. Anderson's opinion in this manner, they would have found it inconsistent with his testimony on direct examination. That is, the jury would have believed that Dr. Anderson's opinion that appellant knew the difference between right and wrong undermined his testimony that appellant suffered from various mental impairments, evidence upon which appellant relied in support of his theory that he lacked the requisite mental states. At the very least, his testimony would have confused the jury's determination as to whether appellant had the requisite mental states.

Although the jury was instructed regarding the elements of the charged crimes and that they could consider evidence of mental impairment and voluntary intoxication in determining whether appellant harbored the requisite mental states (2 CT Vol. 4 1430-1437, 1460-1462, 1465-1467, 1469-1478, 1480-1486), those instructions would not have cured the error. Instead, the jurors would have believed that they properly could consider appellant's ability to distinguish right from wrong in determining whether he had the requisite mental states. None of the jury instructions alerted the jurors that appellant's ability to determine right from wrong had no relevance with respect to his guilt or innocence. Moreover, the trial court did not admonish the jury to disregard the prosecutor's questions and Dr. Anderson's response. (Cf. *People v. Smithey*, *supra*, 20 Cal.4th at pp. 960-961 [the prosecutor's misconduct deemed harmless in light of the jury instructions and the court's admonition].) Thus, there was no way for the defense to counter the improper testimony other than attacking Dr. Anderson, its own expert. In short, nothing occurred which would have neutralized the prejudice created by Dr. Anderson's improper opinion testimony. (See, e.g., *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732,

739 [no adequate means to counter expert's erroneously admitted opinion evidence].)

As such, Dr. Anderson's improperly admitted testimony severely undercut the defense case and invaded the province of the jury. It also improperly lightened the prosecutor's burden to prove every element beyond a reasonable doubt, since the prosecution was unfairly permitted to bolster his case with testimony from the defense's own expert to establish that appellant had acted with the requisite mental states. In light of the foregoing, appellant's guilt phase convictions must be reversed.

In addition to violating state law, the error violated appellant's federal constitutional rights in a number of ways.

State law errors that render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment to the federal Constitution. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Estelle v. McGuire* (1991) 502 U.S. 62, 67-68; *Snowden v. Singletary*, *supra*, 135 F.3d at p. 737.) A denial of fundamental fairness occurs when improperly admitted evidence "is material in the sense of a crucial, critical, highly significant factor. []" (*Snowden v. Singletary*, *supra*, 135 F.3d at p. 737.) In *Snowden*, admission of testimony by an expert witness that 99 percent of children tell the truth about sexual abuse denied the defendant a fair trial. The improper testimony usurped the jury's fact-finding role and went to the heart of the case. Moreover, there was no adequate means to counter the testimony since it truly was the expert's opinion on the subject. (*Id.* at pp. 737-739.)

The trial court's error also deprived appellant of a state law entitlement, thereby denying him due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt v. Helms* (1983) 459 U.S. 460, 469; *People v.*

Webster (1991) 54 Cal.3d 411, 439 [due process concerns may arise when the state arbitrarily withholds a nonconstitutional right provided by its laws].) State statutes with "language of an unmistakable mandatory character" may create an expectation protected by the Due Process Clause of the Fourteenth Amendment. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 428 (conc. opn. of O'Connor, J.).) Here, section 29 mandated that any expert testifying about a defendant's mental illness *shall not testify* as to whether he did or did not have the required mental states of the charged crimes, and that that question *shall be decided* by the trier of fact. (§ 29.) This mandatory language created an expectation by appellant that the prosecutor would not be permitted to elicit testimony on the ultimate issue of his mental state at the time of the crimes, and that the jury would be the sole arbiter of this crucial question.

Moreover, by unforeseeably changing the rules after trial had begun, the trial court deprived appellant of his due process right to fair notice of the rules that would govern the trial and made it impossible for his counsel to anticipate the consequences of the steps he was taking or to intelligently prepare for trial, in violation of the Sixth and Fourteenth Amendments to the federal Constitution. (See *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1236-1238 [where counsel had no notice of prosecutor's intended reliance on felony-murder theory until after evidentiary phase of trial, the error was held to be fundamental error and not subject to harmless-error analysis]; *Coleman v. McCormick* (9th Cir. 1989) 874 F.2d 1280, 1285-1289 [defendant was denied due process where, prior to and during trial, he had no notice that his trial decisions would become relevant as aggravating and mitigating circumstances under a sentencing law enacted after his trial was over].)

In addition, appellant was deprived of a meaningful opportunity to present a complete defense in violation of the Sixth and Fourteenth Amendments to the federal Constitution. (*Rock v. Arkansas* (1987) 483 U.S. 44; *Crane v. Kentucky* (1986) 476 U.S. 683.) His right to present the testimony of Dr. Anderson in his defense was nullified by the trial court's arbitrary application of sections 28 and 29, since Dr. Anderson's opinion that appellant knew the difference between right and wrong unfairly undermined the rest of his testimony.

Finally, the error undermined the reliability of the guilt phase verdict as a proper basis for the imposition of the death penalty, in violation of the Eighth and Fourteenth Amendments to the federal Constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

As appellant has explained above, the errors were not harmless when measured under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. Thus, they could not have been harmless under the more stringent standard of *Chapman v. California* (1967) 386 U.S. 18, 24.

Because appellant was deprived of a fair trial, the entire judgment must be reversed.

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III

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE REGARDING AN EXPERT WITNESS'S DISPOSITION OF DISCOVERY MATERIAL IN A PREVIOUS CASE

A. Factual Background

On direct examination, Dr. Fossum testified that, during her interview of appellant, she wrote some of her notes on a laptop computer and the rest she wrote by hand. (2 RT Vol. 26 5775-5777.) On cross-examination, she explained that she did not print out the notes she had typed on her computer. Rather, she stored the information on a computer disk, transferred the notes from the computer disk to her computer, then incorporated those portions of the notes she deemed psychologically significant into her report.[42] She placed the computer disk in a drawer so that it would be available for re-use, but she did not know whether in fact she had re-used it.[43] She did not think about the computer disk when she responded to a subpoena sent to her by the prosecution. (2 RT Vol. 27 5848-5850.)

The prosecutor then asked, "In a previous criminal case [i.e., People v. Sturm], Dr. Fossum, wherein you were appointed to work as a defense expert, is it correct that you interviewed the defendant, tape-recorded the interviews and then destroyed the tapes?" Defense counsel objected that

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[42] Presumably, she meant that she transferred the notes from the computer disk to a second computer.

[43] Although Dr. Fossum sometimes referred to computer *disks* (2 RT Vol. 27 5849-5850), this apparently reflected her general practice of storing used disks for later use, not a statement that she had used more than one disk in this case. In any event, whether she used one or more disks is immaterial to the merits of this argument.

the question called for irrelevant and immaterial testimony. (2 RT Vol. 27 5850.) The prosecutor asserted that her testimony was relevant to the issue of bias, then the trial court asked both counsel to approach the bench. (2 RT Vol. 27 5850.)

At bench, the prosecutor made the following offer of proof: he had spoken to the prosecutor who had handled the Sturm trial; Dr. Fossum had interviewed Sturm within the previous 18 months; and during her testimony in the Sturm trial, she admitted that she destroyed the tapes. The prosecutor argued that "to the extent that those notes are not preserved. . . it is relevant if, in fact, they have been deliberately destroyed." (2 RT Vol. 27 5851-5852.) The trial court advised the prosecutor that "it would only tend to show bias if you think that she was made aware that that was depriving the prosecution of something they needed and then deliberately did it again that way." (2 RT Vol. 27 5852.)

The prosecutor conceded that Dr. Fossum might have an explanation for why she may have destroyed the tapes in the Sturm case – for example, she may have done it inadvertently. (2 RT Vol. 27 5852-5853.) He also acknowledged that he did not know whether she still had the disks containing her notes regarding her interview with appellant. (2 RT Vol. 27 5853.)

Defense counsel argued that the prosecutor did not know whether Dr. Fossum had ever been told to preserve the disks, and that it was unfair to make her look biased. (2 RT Vol. 27 5853-5854.) Defense counsel also explained that in Sturm she had handled discovery materials in the same manner as she did in this case; that is, she supplied the "gross amount" of the material and advised the prosecutor that it would be inconvenient and impractical to supply everything requested in the subpoena, and she had

been told that this procedure was fine. (2 RT Vol. 27 5855.)[44]

The trial court overruled the defense objection on the ground that Dr. Fossum's conduct tended to show bias and affected her credibility. The trial court further ruled that the defense would have an opportunity to rehabilitate her on redirect examination. (2 RT Vol. 27 5855-5856.)

After cross-examination resumed, Dr. Fossum testified that: during the Sturm trial, she was asked to provide all of the tape recordings of the Sturm interview that were still in her possession (2 RT Vol. 27 5857, 5860-5861); she sent all of the tapes still in her possession to Sturm's attorney (2 RT Vol. 27 5857-5858, 5860); she believed Sturm's attorney released them to the prosecutor's office (2 RT Vol. 27 5857-5858); she did not know whether she had all of the tapes when she turned them over to the attorney or whether any had been re-used (2 RT Vol. 27 5858-5859, 5861); and she testified at the Sturm trial that it was possible some of the tapes had been re-used but she did not know whether in fact any had been re-used (2 RT Vol. 27 5859-5860). She further testified in the instant case that she did not know whether any of the tapes of the Sturm interview had been re-used. (2

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[44] Dr. Fossum testified that she did not turn over certain materials after receiving the prosecutor's subpoena in this case: test equipment (e.g., blocks and puzzle parts); manuals regarding the administration and scoring of various psychological tests; and the seven "case books" she received from the defense investigators. She explained that she found the language of the subpoena to be somewhat vague as to what was being requested, and she sent a declaration advising the prosecution that she was not sending test equipment she needed on a daily basis and that she could arrange for identical equipment to be viewed in a clinical psychology office near the court, or else bring it to the court. Otherwise, she would have had to photocopy and deliver hundreds of pages of material. Other materials, such as the puzzles and blocks, could not be photocopied. (2 RT Vol. 26 5787-5807, 5840.)

RT Vol. 27 5856.)

On redirect examination, defense counsel did not inquire further into Dr. Fossum's handling of the computer disk or tape recordings. However, Dr. Fossum reiterated that she did not send certain materials because she used them everyday. She also explained that she had used the procedure she used in this case (i.e., she wrote a letter requesting that the prosecutor allow her to retain those materials and stating that she would either arrange for an inspection of the materials or would bring them to court) in a prior case. Finally, she testified that the prosecutor in this case did not give any instructions in response to her letter. (2 RT Vol. 27A 6146-6147.)

As appellant demonstrates below, the trial court erred in admitting testimony regarding Dr. Fossum's conduct in the Sturm case.

B. The Trial Court Abused Its Discretion In Admitting Evidence Regarding Her Handling of Discovery Material in a Prior Case

As this Court has explained, "it is well settled that the scope of cross-examination of an expert witness is especially broad; a prosecutor may bring in facts beyond those introduced on direct examination in order to explore the grounds and reliability of the expert's opinion. [Citations.]" (*People v. Lancaster* (2007) 41 Cal.4th 50, 105; see also *People v. Tallman* (1945) 27 Cal.2d 209, 214-215 ["A wide latitude is permitted in the cross-examination of an expert witness in all matters tending to test his credibility so that the jury may determine the weight to be given the testimony. . . ."]; Evid. Code, § 721, subd. (a).) However, it is also well settled that "[n]o evidence is admissible except relevant evidence." (Evid. Code, § 350.) "Relevant evidence" is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of

consequence to the determination of the action." (Evid. Code, § 350.) Therefore, "[t]he trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence." (*People v. Benavides* (2005) 35 Cal.4th 69, 90.)

As noted above, the trial court recognized that evidence of Dr. Fossum's conduct in the Sturm case "would only tend to show bias if [the prosecutor thought] that she was made aware that that was depriving the prosecution of something they needed and then deliberately did it again that way." (2 RT Vol. 27 5852.) However, a review of the prosecutor's offer of proof demonstrates that he lacked a good faith belief that Dr. Fossum actually destroyed any of the tape recordings of her interview with Sturm.[45] He lacked a good faith belief that Dr. Fossum was aware that she was depriving the prosecution in the Sturm case of material to which it was entitled; in fact, he conceded that she may have destroyed the tapes inadvertently. He conceded that he did not know whether Dr. Fossum had actually destroyed the computer disk in this case. Finally, he lacked a good faith belief that she was aware that she had a duty to turn over the computer disk, yet chose to disobey that duty. (2 RT Vol. 27 5850-5856.)[46]

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[45] Again, the prosecutor represented to the court that Dr. Fossum testified in the Sturm trial that she had destroyed the tapes. Yet, he went on to argue that "to the extent that those notes are not preserved. . ." (2 RT Vol. 27 5851-5852), suggesting that in fact he did not know whether any of the tape recordings had been destroyed.

[46] The prosecutor's offer of proof certainly failed to establish that evidence of Dr. Fossum's conduct in Sturm constituted *past misconduct* admissible to impeach her credibility. As this Court has explained, to be relevant, i.e., to have "any tendency in reason to prove or disprove" (Evid. Code, § 210) a witness's character for truthfulness, the misconduct must

(continued...)

Therefore, the trial court should have excluded testimony regarding her conduct in Sturm as irrelevant.

C. The Trial Court's Error Was Prejudicial

Dr. Fossum's testimony was critical to the defense case. Her conclusions were largely consistent with those reached by the other expert witnesses – e.g., that on the day of the crimes, appellant suffered from Organic Personality Syndrome, Explosive Type, and extensive brain dysfunction. However, Dr. Fossum also reached conclusions not reached by other expert witnesses – e.g., that appellant suffered from chronic Schizophrenia of the Paranoid Type and Narcissistic Personality Disorder with features of Borderline Personality Disorder. (2 RT Vol. 26 5752-5762, 5765, 5767-5768, 5770-5775, 5777-5779, 5785-5787, 5808, 5842; 2 RT Vol. 27A 6048-6049, 6113, 6127-6128, 6137.) She also explained at length how appellant's schizophrenia and Narcissistic Personality Disorder contributed to the rapid disintegration of appellant's cognitive processes, to the point that he was confused and consumed by rage at the time of the crimes. (2 RT Vol. 26 5754, 5763-5764, 5842-5844; 2 RT Vol. 27A 6114-6122, 6128-6137, 6149-6155, 6160-6162.)

However, as a result of the trial court's ruling, the prosecutor was able to impeach Dr. Fossum with extremely prejudicial yet wholly irrelevant information. Because the prosecutor's cross-examination on this subject implied that Dr. Fossum intentionally and unethically failed to comply with

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[46](...continued)
directly implicate dishonesty, or otherwise must involve moral turpitude, a "readiness to do evil." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295; *People v. Castro* (1985) 38 Cal.3d 301, 314-315.) There was no showing of dishonesty, let alone a "readiness to do evil," in this case.

its subpoena, the jury likely would have disregarded her testimony altogether. (See 2 CT Vol. 4 1438-1439 [CALJIC No. 2.20 (Believability of Witness)]; 2 CT Vol. 4 1442 [CALJIC No. 2.21.2 (Witness Willfully False)].) Indeed, the evidence would have reinforced the prosecutor's repeated suggestions during closing argument that the defense experts, including Dr. Fossum, were biased and that their opinions had been colored by their interest in making money and their commitment to assist and please the defense attorneys. (2 RT Vol. 29 6707-6717, 6723, 6804-6813.) Therefore, the trial court's error was devastating.

In addition to violating state law, the error violated appellant's federal constitutional rights in a number of ways.

The admission of the evidence denied appellant due process of law under the Sixth and Fourteenth Amendments by rendering his trial fundamentally unfair. Moreover, appellant had a Fourteenth Amendment due process liberty interest to have California's evidentiary standards applied to his case. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Lisenba v. California* (1941) 314 U.S. 219, 236; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920 [recognizing "fundamental fairness" standard]; *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1466, *cert. den.*, 479 U.S. 1068 (1987) [same].)

The trial court's admission of evidence regarding Dr. Fossum's conduct in People v. Sturm also ran afoul of appellant's due process right not to be convicted of crimes committed while he was insane.[47] (U.S.

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[47] Although states have considerable leeway to define an insanity defense, the United States Supreme Court has not foreclosed the possibility (continued...)

Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 17; see also *Ballard v. Estelle* (9th Cir. 1991) 937 F2d 453, 456; §§ 25, subd. (b), and 1026.)

Finally, the court's error precluded the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304).

For the reasons set forth above, the errors were not harmless when measured under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. Thus, they could not have been harmless under the more stringent standard of *Chapman v. California* (1967) 386 U.S. 18, 24.

Accordingly, the entire judgment must be reversed.

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[47](...continued)
that a state's law pertaining to the insanity defense could violate the due process clause. (See *Clark v. Arizona* (2006) __ U.S. __, 126 S. Ct. 2709, 2721, fn. 20.)

IV

THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT REFUSED TO ALLOW AN EXPERT WITNESS TO GIVE HER OPINION REGARDING THE EXTENT TO WHICH EVENTS IN APPELLANT'S WORKPLACE CONTRIBUTED TO THE COMMISSION OF THE CHARGED OFFENSES

A. Introduction

The trial court refused to allow one of the defense experts, Dr. Susan Fossum, to testify regarding the extent to which events in appellant's workplace might have triggered or led to the instant offenses. The exclusion of her testimony in that regard denied appellant his constitutional rights to present a defense, to due process and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law.

B. Factual Background

Dr. Susan Fossum, a clinical psychologist, testified that she was asked to analyze the extent to which events in appellant's workplace might have triggered or led to the instant offenses. (2 RT Vol. 26 5698, 5701-5702.) After defense counsel asked Dr. Fossum to describe the first step she took in conducting her evaluation, the prosecutor objected that the question lacked a proper foundation and called for speculation as to her qualifications to make such an assessment. The prosecutor also requested that he be permitted to conduct a voir dire examination with respect to her qualifications. (2 RT Vol. 26 5702-5703.)

During the voir dire examination, Dr. Fossum testified that she obtained her doctorate in January, 1989, from the Fielding Institute, a

graduate school. (2 RT Vol. 26 5703-5704.) She testified that the training and expertise enabling her to make such an assessment included the following: she had taken doctoral level examinations relating to psychological assessments (2 RT Vol. 26 5703-5705); she had obtained extensive training and clinical experience with respect to identifying and assessing the various stressors, including getting fired, that affected the behavior of her patients (2 RT Vol. 26 5707-5710); she had conducted a psychological and clinical evaluation of appellant (2 RT Vol. 26 5711); she had qualified as an expert in approximately 50 to 75 cases (2 RT Vol. 26 5715-5716); and she had testified in a previous death penalty trial in which she considered the defendant's job loss in connection with his psycho-social history (2 RT Vol. 26 5715-5716, 5718-5721).

Dr. Fossum acknowledged that she had not conducted any research or published any papers regarding the effect of an individual's firing on a subsequent homicide, and that she had never interviewed an individual other than appellant who had been fired or quit his job and then committed a homicide on the same day. (2 RT Vol. 26 5703, 5713.) However, she explained that "[p]ractically no one has seen, on a regular basis, people who had been fired or quit and committed homicides." (2 RT Vol. 26 5714.) There had been approximately 72 or 73 workplace homicides since about 1989, so very few psychologists had come into contact with a patient who was fired and then killed somebody on the same day. Nevertheless, she explained, a psychologist is capable of assessing the subject's psychological history and commenting on his state of mind at the time he commits (any of) a wide range of behaviors. (2 RT Vol. 26 5722.)

The trial court ruled that whether appellant's loss of a job caused or triggered the homicidal act was not a proper subject of expert testimony

under Evidence Code section 801; that the jurors would already understand the importance of a job in a person's life and that job loss would be a significant factor; and that there had not been a sufficient showing that Dr. Fossum was qualified to answer that question. (2 RT Vol. 26 5725-5732; see also RT Vol. 26 5723-5725 [trial court's tentative ruling].)

The trial court subsequently granted the defense's request to make a further showing on the ground that Dr. Fossum's testimony would assist the jury because instances in which a person commits a homicide after being fired are rare, and she could explain the effect of appellant's firing in light of his mental illness. (2 RT Vol. 26 5733-5736.)

On further voir dire, Dr. Fossum testified that her research with respect to the subject was comprised of: (1) her extensive clinical work with individuals who had experienced job loss and other job-related trauma; and (2) because she believed she was insufficiently aware of the research connecting being fired to an immediate homicide, she requested that the National Institute of Occupational Safety and Health (NIOSH) conduct a search on this subject. According to Dr. Fossum, NIOSH provided her with five articles, none sufficiently pertinent to the subject. (2 RT Vol. 26 5636-5637.) She added, "There's virtually a dearth of formal empirical research in this area." (2 RT Vol. 26 5637.)

The prosecutor objected that this testimony lacked foundation and called for speculation as to what research existed in this area. Defense counsel argued that Dr. Fossum should be allowed to explain how she went about getting the information. The trial court responded that the prosecutor was objecting to her statement that there was no research in the field, and ruled that the objection was meritorious because the statement was nonresponsive. (2 RT Vol. 26 5737-5738.)

Dr. Fossum then described the studies and articles she had received from NIOSH: *Occupational Violent Crime, Research on an Emerging Issue*; *Occupational Incidents Due to Violent –*;[48] *Disgruntled Workers Intent on Revenge*; *Female Homicides in the United States Workplace Since 1980 to 1985*; and, *Sexual Assault of Women At Work.* (2 RT Vol. 26 5639-5640.) Defense counsel then asked whether, to her knowledge, this was the only research done in this area. The trial court sustained the prosecutor's objection that the question lacked foundation and called for speculation. (2 RT Vol. 26 5740.)

Dr. Fossum then explained that there are many database services to which one can subscribe or apply for information, but NIOSH seemed to be the most relevant and cooperative with respect to this subject. (2 RT Vol. 26 5740-5741.) She further testified that she found no articles relating to situations in which a person is fired, then harms strangers at another location. (2 RT Vol. 26 5641-5643.)

Defense counsel maintained that Dr. Fossum's research was relevant to provide insight into the anger experienced by employees towards supervisors and co-workers in workplace homicide cases, and that appellant's anger toward his co-worker (i.e., Maryann Scott) could be "extrapolate[d]" to the victim. (2 RT Vol. 26 5744-5745.) The trial court, however, ruled the testimony inadmissible, reasoning that the defense already had presented its position that appellant's anger toward Scott had something to do with the crime. The court added that, absent studies

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[48] The complete title of the article is not contained in the record. Defense counsel asked, "Did you review an article named 'Occupational Incidents Due to Violent' –" Dr. Fossum answered, "Yes," before defense counsel completed the question. (2 RT Vol. 26 5739.)

showing a relationship between a person's workplace problems and violent acts against people at remote locations and at another time, Dr. Fossum would not say anything the jurors could not figure out for themselves. (2 RT Vol. 26 5745-5746.)

As appellant demonstrates below, the trial court prejudicially erred in excluding Dr. Fossum's testimony regarding the extent to which events in appellant's workplace might have triggered or led to the charged offenses. Contrary to the trial court's ruling, the matter was a proper subject of expert testimony, and Dr. Fossum was qualified to testify as an expert witness on the subject.

C. Argument

1. General Legal Principles

A criminal defendant's right to present a defense by calling and examining witnesses on his or her behalf is a fundamental right guaranteed both by the Sixth Amendment and by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Taylor v. Illinois* (1988) 484 U.S. 400, 407-409; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19; *In re Eichorn* (1998) 69 Cal.App.4th 383, 391.) A criminal defendant's right to present a defense by calling and examining witnesses is also guaranteed by the California Constitution. (Cal. Const., art. I, § 15; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787.)

A criminal defendant's Due Process and Sixth Amendment right to present a defense under the United States Constitution includes the right to present all relevant and material evidence favorable to his or her defense theory. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas*, *supra*, 388 U.S. at p. 23; *People v. Jennings* (1991) 53 Cal.3d 334,

372; *People v. Babbitt* (1988) 45 Cal.3d 660, 684.) Further, where, as here, the excluded evidence is crucial to the defense and bears directly on the defendant's legal and moral culpability, the erroneous exclusion of the evidence not only undermines the defendant's Sixth and Fourteenth Amendment right to present a defense, but also precludes the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and deprives the defendant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

Evidence Code section 801 provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education

must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).) "A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony." (Evid. Code, § 720, subd. (b).) "'The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement.'" (*People v. Kelly* (1976) 17 Cal.3d 24, 39; see also *People v. Watson* (2008) 43 Cal.4th 652, 692.)

A mental health expert cannot give an opinion that the defendant lacked the capacity to form a required mental state. (§§ 25 & 28.) A mental health expert also cannot give an opinion that the defendant did not form a requisite mental state. (§ 29.) However, a mental health expert may testify concerning the nature of a mental illness, and may give his or her opinion as to whether the defendant has that mental illness. (*People v. Smithey* (1999) 20 Cal.4th 936, 964-968; *People v. Stoll* (1989) 49 Cal.3d 1136, 1146-1162.) Further, a psychologist expert may give an opinion about how the defendant's mental illness may have affected him at or near the time of the charged offenses. (*People v. Stoll, supra*, 49 Cal.3d at pp. 1146-1162; *People v. Cegars* (1992) 7 Cal.App.4th 988, 994-1001.)

2. The Trial Court Prejudicially Erred in Excluding the Testimony of Dr. Fossum Regarding the Link Between Appellant's Job Loss and the Charged Crimes

Several defense experts testified that appellant's confrontation with his supervisor, and the subsequent loss of his job, constituted psychological stressors influencing his mental state at the time of the crimes. According to Dr. Paul Berg, on the day of the crimes appellant was affected by both his lifelong mental impairments and the psychologically unmanageable

stressors related to the confrontation, including his perception that he was fired, his feeling that he had to do something about it, and his rage and desire to kill her. (2 RT Vol. 21 4700; 2 RT Vol. 22 4949.) Dr. Fossum opined that Scott's castigation of appellant on the morning of the crimes, and appellant's belief that he had been fired, triggered a psychological decompensation, rendering him unable to control his behavior. (2 RT Vol. 27A 6139, 6145-6146.) According to Dr. Jose LaCalle, when appellant lost his job, which he saw as his "ticket to respectability," it triggered an uncontrollable rage associated with his mental illness, as he felt he had amounted to nothing. (2 RT Vol. 22 5070-5071; 2 RT Vol. 23 5129-5130, 5269-5270, 5290-5292; 2 RT Vol. 24 5290-5292, 5331, 5397-5398, 5422.) Dr. Anderson similarly testified that appellant, already impaired by his mental disorders, was frustrated and depressed because he had lost his job and felt he had lost everything. (2 RT Vol. 25 5509, 5606-5607.) Under those circumstances, his disorder made him more frustrated, suicidal, and depressed, decreasing his judgment, insight, and ability to control his inner impulses and frustrations. (2 RT Vol. 25 5593.) Finally, Dr. Purisch opined that appellant's termination from his job was a significant stress to him, contributing to the state of mind that resulted in his explosive behavior. (2 RT Vol. 28 6438, 6501-49-6501-50.) In appellant's highly agitated state, and given his mental impairments, his crimes against Nadia were part of an explosive outburst he could not control. (2 RT Vol. 28 6501-19 - 6501-22, 6501-43, 6501-46.)

However, none of this testimony would have given the jury insight into the specific, even profound, significance of one's job in shaping his self-esteem and sense of identity, and as to the devastating psychic effect of a job loss. This is especially so for someone who, like appellant, had a

history of failure in virtually every aspect of his life. Moreover, the expert testimony presented to the jury did not explain the psychological process through which appellant re-directed his rage from Maryann Scott to Nadia Puente.

Furthermore, contrary to the trial court's position (2 RT Vol. 26 5745-5746), Dr. Fossum's training and clinical experience would have permitted her to provide insight lying "sufficiently beyond common experience" as to be of assistance to the jury (Evid. Code, § 801, subd. (a)). On voir dire, Dr. Fossum identified a number of factors which qualified her as an expert witness, including the following: extensive training and clinical experience with respect to identifying and assessing the stressors, such as getting fired, that affected the behavior of her patients (2 RT Vol. 26 5707-5710); her psychological and clinical evaluation of appellant (2 RT Vol. 26 5711); and the fact that she had testified in a previous death penalty trial in which she considered the defendant's job loss in connection with his psycho-social history (2 RT Vol. 26 5715-5716, 5718-5721). Her training and experience as a clinical psychologist, including her work in this case, would have produced an analysis of the psychological consequences of appellant's far broader and more informed than could be reached by the jurors alone. (See *People v. Hernandez* (1977) 70 Cal.App.3d 271, 280 ["'The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of the inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citations.]"]; *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 478 ["The definitive criteria in guidance of the trial

court's determination of the qualifications of an expert witness. . . rest primarily on 'occupational experience,. . . ."]; Evid. Code, § 720.)

Under these circumstances, the trial court abused its discretion in excluding Dr. Fossum's testimony. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299 ["the decision of a trial court to admit expert testimony 'will not be disturbed on appeal unless a manifest abuse of discretion is shown.' [Citations.]"].)

Moreover, the trial court's error was prejudicial. Denial of a criminal defendant's right to present witnesses or evidence in support of his defense violates his rights under the Sixth and Fourteenth Amendments to the United States Constitution. (*Webb v. Texas*, *supra*, 409 U.S. at p. 98; *People v. Babbitt*, *supra*, 45 Cal.3d at p. 684; *People v. Schroeder*, *supra*, 227 Cal.App.3d at p. 787.) Further, where the excluded evidence is crucial to the defense and bears directly on the defendant's legal and moral culpability, the erroneous exclusion of the evidence also precludes the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638), and deprives the defendant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Thus, upon such error, the conviction must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Where the exclusion of evidence only violates state law, reversal of the conviction is required if it is reasonably probable that a result more favorable to the defendant would have been reached had the excluded

evidence been admitted. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1146-1162.)

In this case, the core of appellant's defense was the contention that the confrontation with Scott and the subsequent loss of his job hurled appellant into a rage he could not control. Thus, the excluded testimony was not only relevant, but critical to appellant's defense. Without Dr. Fossum's testimony elaborating the link between the loss of appellant's job and the charged crimes, the jury likely would have accepted the prosecution's argument that appellant had planned beforehand to commit the offenses, that he acted with the requisite mental states, and that he later lied to the police and defense experts. (2 RT Vol. 29 6687-6723, 6798-6827.) Thus, appellant's convictions must be reversed because the state cannot establish that the error was harmless beyond a reasonable doubt. Indeed, the error requires reversal under either of the prejudice standards set forth above.

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V

THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT EXCLUDED CRITICAL LAY WITNESS OPINIONS SUPPORTING APPELLANT'S MENTAL HEALTH DEFENSE

A. Introduction

At several points during the guilt phase, the trial court refused to allow defense witnesses to provide opinion testimony as to matters relevant to appellant's defense theory that he suffered from longstanding mental impairments, and that, because of those impairments, he did not form the mental states necessary to sustain convictions of the charged offenses. The trial court's refusal to allow such testimony denied appellant his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to present a defense, to due process and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination.

B. Factual Background

1. The Trial Court's Restriction of the Testimony of Paul Shawhan

During the direct examination of Paul Shawhan, who was appellant's supervisor in 1988 (2 RT Vol. 18 3989-3990, 3996, 3998-4001), the following exchange took place:

[Defense counsel:] During the period of Mr. DeHoyos' employment, did you observe anything about Mr. DeHoyos that you considered to be strange or abnormal or different?

[Prosecutor:] Objection, that is vague and ambiguous.

[Court:] Sustained.

[Defense counsel:] During his employment there did you ever have any conversations with Mr. DeHoyos that struck you as being a little abnormal?

[Prosecutor:] Objection, that is vague and ambiguous.

[Court:] Sustained.

[Defense counsel:] During your employment and Mr. DeHoyos' employment at the company, did you ever have any conversations with Mr. DeHoyos wherein he said things that appeared to be abnormal to you?

[Prosecutor:] Same objection.

(2 RT Vol. 18 3990-3991.)

At bench, defense counsel argued that Shawhan's testimony was relevant as evidence of appellant's grandiosity (i.e., his tendency to boast, exaggerate and tell untruths about matters of common knowledge), which was a symptom of his mental illness. Defense counsel observed, "He is a lay person but lay people can form certain opinions about things of common knowledge." (2 RT Vol. 18 3991.) The trial court responded,

> Well, I don't think you can ask a lay witness if somebody is abnormal. That is the question. But I think you can ask if something unusual was said and have him relate what it was and let the jury decide whether it has any significance, provided it was something that was later related to the doctor, which they are going to be relying on.

(2 RT Vol. 18 3991-3992.) In compliance with the trial court's ruling, defense counsel subsequently asked Shawhan whether he ever observed appellant say or do anything unusual. (2 RT Vol. 18 3993.)

Shawhan then testified about appellant's unusual conduct and statements – e.g., appellant continually reported minor infractions of his fellow employees (2 RT Vol. 18 3993), he was slower to learn new tasks than his fellow employees and had difficulty following instructions (2 RT Vol. 18 4010-4012), he had a terrible temper (2 RT Vol. 18 4007-4008), and he had several confrontations with other employees (2 RT Vol. 18 3993-3994, 4002, 4004-4006, 4012-4015). Following appellant's termination, he claimed it was okay he was being terminated because the Los Angeles Police Department and the Sheriff's Department had been trying to recruit him. (2 RT Vol. 18 3994-3995, 4002-4003.)

2. The Trial Court's Restriction of the Testimony of Sam Morrison

Sam Morrison, who worked with appellant for about a year around 1982, testified that he had observed unusual things about him. For instance, when work was slow, appellant would jump on top of his desk, scream into the telephone, then run around the desk. Appellant "would just do weird things like that" and was "[k]ind of a class clown in the office." (2 RT Vol. 18 4107.) Morrison also testified that appellant often went to see Morrison's band play, then stayed to drink. Appellant often went to Morrison's house after the performances, where he and Morrison's father drank pitchers of margaritas. Appellant used a vase as his margarita glass. The vase contained about one and a half pitchers, and appellant drank it all. (2 RT Vol. 18 4018.)

At that point, the following exchange took place:

[Defense counsel:] You know what impulsiveness is, impulsivity, being impulsive?

[Morrison:] Uh-huh.

[Defense counsel:] You ever observe Mr. DeHoyos behave in that

manner, impulsively?

[Prosecutor:] Objection, calls for speculation and no foundation.

[Court:] Sustained.

(2 RT Vol. 18 4018-4019.)

3. The Trial Court's Restriction of the Testimony of Maria Esparza

Appellant's ex-wife, Maria Esparza, testified that she and appellant had had problems caused by his jealousy. On one occasion, appellant came home and attacked her while in a rage. (2 RT Vol. 25 5621, 5624-5627.) She also recalled that something unusual happened during their wedding. Specifically, appellant became angry when her brother told him to try and make her happy. Appellant told Esparza's brother not to butt in, and then they hit each other. (2 RT Vol. 25 5267-5628.)

At that point, the following exchange took place:

[Defense counsel:] Was [appellant] out of control? Was he in control? Was he wild? Was he savage-acting?

[Prosecutor:] Objection. Calls for speculation and out of control [*sic*].

[Court:] Sustained.

[Defense counsel:] In her description, Your Honor.

[Court:] Sustained.

[Defense counsel:] What did you observe about his behavior, ma'am, as far as control? In control or out of control?

[Prosecutor:] Calls for speculation. No foundation as to his control of his own behavior.

[Court:] Sustained.

[Defense counsel:] Did you observe [appellant] fight anyone else at any time during the time that you knew him?

[Esparza:] No.

[Defense counsel:] Do you know what the reason for [appellant's] attack on you was when you ended up in the bathroom?

[Prosecutor:] Objection. That calls for speculation as to the actual reason.

[Defense counsel:] I am asking if she knows, Your Honor.

[Prosecutor:] Same objection.

[Court:] All she can do is testify to something that he told her. Is that what you are asking?

[Defense counsel:] It wouldn't be offered for the truth, then. It would be offered for his state of mind at the time, Your Honor.

[Prosecutor:] I have no objection to statements that were made, but as to her opinion as to the real reason, I object to that.

[Court:] Sustained.

(2 RT Vol. 25 5628-5629.) Shortly thereafter, the trial court again disallowed Esparza from offering an opinion:

[Defense counsel:] Did Mr. DeHoyos ever attempt to commit suicide during your marriage?

[Prosecutor:] Objection. Speculation. No foundation.

[Defense counsel:] If she knows.

[Prosecutor:] Same objection. Speculation. No foundation.

[Court:] I think you need to ask about acts, Mr. Grimes, first. And then I might permit her to express an opinion depending on what combination appears. I will also sustain the objection at this time.

[Defense counsel:] All right.

[Defense counsel:] Did Mr. DeHoyos ever threaten to commit suicide during your marriage?

[Prosecutor:] Objection. It is irrelevant.

[Court:] Sustained.

(2 RT Vol. 25 5633-5634.)

C. Argument

1. General Legal Principles

A criminal defendant's right to present a defense by calling and examining witnesses on his or her behalf is a fundamental right guaranteed both by the Sixth Amendment and by the Due Process clause of the Fourteenth Amendment to the United States Constitution. (*Taylor v. Illinois* (1988) 484 U.S. 400, 407-409; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19; *In re Eichorn* (1998) 69 Cal.App.4th 383, 391.) A criminal defendant's right to present a defense by calling and examining witnesses is also guaranteed by the California Constitution. (Cal. Const., art. I, § 15; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787.)

A criminal defendant's Due Process and Sixth Amendment right to

present a defense under the United States Constitution includes the right to present all relevant and material evidence favorable to his or her defense theory. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas*, *supra*, 388 U.S. at p. 23; *People v. Jennings* (1991) 53 Cal.3d 334, 372; *People v. Babbitt* (1988) 45 Cal.3d 660, 684.) Further, where, as here, the excluded evidence is crucial to the defense and bears directly on the defendant's legal and moral culpability, the erroneous exclusion of the evidence not only undermines the defendant's Sixth and Fourteenth Amendment right to present a defense, but also precludes the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and deprives the defendant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

This Court has explained that "[a] lay witness may express an opinion based on his or her perception, but only where helpful to a clear understanding of the witness's testimony (Evid. Code, § 800, subd. (b)), 'i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed.' [Citation.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 889.) For instance, "[l]ay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" (*People v. Williams* (1988) 44 Cal.3d 883, 915.)

Thus, reviewing courts have upheld the admission of a wide variety of lay opinion testimony. (See, e.g., *People v. Hinton*, *supra*, 37 Cal.4th at

p. 889 [lay opinion admissible where witness's "impression rested on subtle or complex interactions between [victim] and defendant that were difficult to put into words, which would render [witness's] opinion proper"]; *People v. Farnam* (2002) 28 Cal.4th 106, 153 [trial court properly admitted testimony of correctional officer that the defendant stood "in a posture like he was going to start fighting" where that opinion was based on his personal observations and his perceptions were "sufficiently within common experience"]; *People v. Medina* (1990) 51 Cal.3d 870, 887 [in proceedings to determine the defendant's competency to stand trial in a capital murder prosecution, the trial court did not err in permitting a deputy sheriff to testify regarding defendant's mental state and degree of awareness while in jail]; *People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1608-1609 [trial court properly allowed a non-expert police officer to testify that shoe prints found at the crime scene were "similar" to the pattern on the soles of the defendant's shoes]; see also *People v. Williams*, *supra*, 44 Cal.3d at p. 914-916 [upholding admission of the testimony of a detective and a correctional officer, neither of whom was an expert, that in their opinion the defendant was not "strung out" when they observed him]; *People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 33 [in a prosecution for spousal abuse, the trial court did not err in allowing testimony by police officers that they believed defendant's wife was credible when they interviewed her following her 911 call, where the testimony was not received to prove she was telling the truth, but to show the reasonableness of the officers' conduct].)

2. The Trial Court's Exclusion of Lay Opinion Testimony In This Case Was Prejudicial Error

In each of the instances set forth in Section B, *supra*, the trial court prejudicially erred in disallowing the lay opinion testimony.

First, appellant was seeking to elicit testimony as to a matter in which "'the concrete observations on which the opinion is based [could not] otherwise be conveyed' [Citation.]" (*People v. Hinton*, *supra*, 37 Cal.4th at p. 889.) Each of the witnesses was asked for an opinion based on his or her personal observations and related to matters "sufficiently within common experience" that such an opinion would have been both proper and helpful to the jury. (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 153.) Indeed, although a lay witness generally may not give an opinion about another's state of mind, "a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397 [holding that a percipient witness was competent to testify that the defendant's behavior and demeanor in kicking a high school custodian were consistent with enjoyment].)

Here, Shawhan testified about appellant's unusual conduct and statements – e.g., he had numerous conflicts with co-workers (2 RT Vol. 18 3993-3994, 4002, 4004-4006, 4012-4015), had difficulty following instructions (2 RT Vol. 18 4010-4012), and had a terrible temper (2 RT Vol. 18 4007-4008). However, he was barred from actually expressing an opinion that appellant not only said and did unusual things, but that he *was* abnormal, testimony defense counsel clearly intended to elicit. (2 RT Vol. 18 3991.) Shawhan did not need medical, psychiatric or other training to form and express an opinion as to whether any of this conduct seemed abnormal. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 397.) The word

"abnormal" is one of common usage, not a term of art.[49]

Similarly, Morrison did not need such training to form and express an opinion as to whether he ever observed appellant behave impulsively. (2 RT Vol. 18 4018-4019.)[50] The jurors likely were familiar with the notion of impulsivity, at least insofar as it is used by laymen.[51] (*People v. Chatman*, *supra*, 38 Cal.4th at p. 397.)

Finally, Esparza testified about, among other things, appellant's fight with her brother (2 RT Vol. 25 5627-5628, 5631, 5643-5644); an occasion in which appellant spent about 15 minutes cutting up photographs and other items (2 RT Vol. 25 5634-5636, 5645); and the incident in which he attacked her (2 RT Vol. 25 5625, 5627, 5630-5631, 5638-5642; 2 RT Vol. 26 5652-5654). During that attack, appellant's face turned yellow, his eyes were big, and his hands were shaking (2 RT Vol. 26 5654-5655). Esparza was qualified to express her opinions as to whether appellant was "out of control" during the fight with her brother, whether she knew why appellant attacked her, and whether appellant ever threatened to commit suicide during the time they were married, all of which were matters both

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[49] "Abnormal" has been defined as "not normal; not average; not typical; not usual; irregular, esp. to a considerable degree." (*Webster's New World Dictionary* (2nd College ed. 1976) p. 3.)

[50] In addition to the testimony summarized in Section B.2, *supra*, Morrison testified that appellant boasted about all the women he had. Appellant claimed that he had women or wives all over the world and that they sent him money. (2 RT Vol. 18 4019-4021.)

[51] "Impulsive" has been defined in pertinent part as "1. impelling; driving forward 2. a) acting or likely to act on impulse . . . b) produced by or resulting from a sudden impulse . . . 3. *Mech.* acting briefly and as a result of impulse." (*Webster's New World Dictionary* (2nd College ed. 1976) p. 707.)

"sufficiently within common experience" and based on her perceptions, so that such opinions would have been proper and helpful to the jury. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 397; *People v. Farnam*, *supra*, 28 Cal.4th at p. 153.)[52]

Each of these opinions, alone or in combination, would have reinforced the defense argument that appellant had suffered from a mental illness throughout his life, and, in light of that mental illness, he did not premeditate the murder or intend to have sex with Nadia Puente for the purpose of sexual gratification. (2 RT Vol. 29 6738-6740, 6742-6750, 6752, 6761-6762.) For instance, the opinion testimony would have bolstered the defense argument that, as a result of his mental illness, appellant went into a trance-like state in which he could not control his rage. (2 RT Vol. 29 6745-6747, 6749-6750.) The opinion evidence also would have helped rebut the prosecutor's cross-examination of the expert witnesses as to whether appellant was malingering (2 RT Vol. 22 4970; 2 RT Vol. 23 5206-5209, 5255-5258, 5264; 2 RT Vol. 25 5555, 5584-5585, 5595; 2 RT Vol. 27A 6042, 6080-6081, 6086, 6099-6100, 6157; 2 RT Vol. 28 6469, 6479-6480, 6483, 6488-6491) and his argument that he was a malingerer (2 RT Vol. 29 6798-6799), as it would have demonstrated that appellant's impairments were genuine and that they pre-dated the crimes.

It is immaterial that the witnesses were allowed to testify as to the facts that would have supported their opinions. First, Shawhan, Morrison and Esparza had close personal interactions with appellant over extended

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[52] Significantly, the defense attempted to elicit her testimony as to whether appellant had ever *threatened* to commit suicide during their marriage, not her opinion as to appellant's state of mind (e.g., whether such threat was genuine).

periods of time. Therefore, their opinion testimony not only would have explained the significance of appellant's conduct, but it would have had force and effect that could not be conveyed by a simple recitation of their observations. In the absence of their opinions regarding the nature of appellant's behavior, the jury may have been left with the impression that appellant was a mere "class clown" (2 RT Vol. 18 4107) or that he was simply a jealous man (2 RT Vol. 25 5621, 5624-5627). Second, the jury may have been more likely to credit these lay witnesses than the expert witnesses, particularly in light of the prosecution's repeated attacks on the integrity of the expert witnesses. (See, e.g., 2 RT Vol. 29 6707-6717, 6723, 6804-6813.)

The trial court's errors were prejudicial at every phase of appellant's trial. First, the excluded lay witness opinions were relevant to appellant's defense at the guilt phase: that, as a result of longstanding mental impairments (including brain damage and various mental illnesses), appellant lacked the mental states necessary to sustain convictions for the charged crimes. In particular, the testimony was critical to show that appellant's mental illness was genuine and longstanding. Without this opinion testimony, however, the prosecution's case, including its suggestion that appellant was a predator and a malingerer, was unfairly strengthened.

Second, in the absence of the opinion testimony, the jury was more likely to reject defense evidence that appellant was legally insane. On the other hand, the jury would have been more likely to accept the prosecutor's argument that appellant was legally sane at the time of the offenses, including his suggestion that appellant was a malingerer and that he had manipulated the defense experts. (2 RT Vol. 33 8155-8164.)

Third, the exclusion of the lay opinion testimony was also prejudicial

at the penalty phase, where the prosecutor argued at length that appellant was not mentally ill. (2 RT Vol. 34 8632-8637.) In the absence of the opinion testimony, the jury was more likely to reject appellant's mental health evidence – which constituted the core of his mitigation – and to accept the prosecutor's argument that appellant acted deliberately, consciously, and for his own sexual gratification. (2 RT Vol. 34 8637.)

As such, the trial court's ruling violated the state and federal Constitution in several respects. First, exclusion of the opinion violated appellant's right to present witnesses or evidence in support of his defense under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. (*Webb v. Texas*, *supra*, 409 U.S. at p. 98; *People v. Babbitt*, *supra*, 45 Cal.3d at p. 684; *People v. Schroeder*, *supra*, 227 Cal.App.3d at p. 787.) Second, the trial court's exclusion of the lay opinion testimony ran afoul of appellant's due process right not to be convicted of crimes committed while he was insane.[53] (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 17; see also *Ballard v. Estelle* (9th Cir. 1991) 937 F2d 453, 456; §§ 25, subd. (b), & 1026.) Finally, the court's error precluded the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment (*Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304).

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[53] As appellant has pointed out, the United States Supreme Court has not foreclosed the possibility that a state's law pertaining to the insanity defense could violate the due process clause. (See fn. 47, *supra*.)

Appellant's convictions and the special circumstance findings must be reversed because the state cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the trial court's rulings only violated state law, reversal of the entire judgment is required because it is reasonably probable that a result more favorable to appellant would have been reached had the excluded evidence been admitted. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1146-1162.)

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VI

THE TRIAL COURT ERRED IN GIVING A PREJUDICIAL JURY INSTRUCTION REGARDING THE APPOINTMENT OF EXPERT WITNESSES

A. Introduction

During the guilt phase, both parties requested that the trial court give an instruction regarding applications for ancillary services (i.e., investigators and expert witnesses), the review of such applications by the court, and how the jury was to consider the fact of the court's decision to appoint an expert witness. (2 RT Vol. 29 6658.) The defense argued that an instruction advising the jury that the court was involved in the appointment of expert witnesses was necessary because "the prosecution was making it appear that there was just a well or a bucket of money . . . that the defense was just dipping into. . . . And made it appear as though the experts were influenced and testimony was influenced by this unending source of revenue." (2 RT Vol. 29 6675-6676.)

The prosecutor, on the other hand, argued that the jury should be instructed that the court approves applications for expert witnesses based on information provided by the defense. According to the prosecutor, such an instruction was necessary because the defense, in an attempt to lend credibility and legitimacy to the testimony of the expert witnesses, repeatedly had elicited testimony that they had been appointed by the court. (2 RT Vol. 29 6659-6666; see also 2 CT Vol. 4 1413 [prosecutor's proposed instruction].)[54]

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[54] The prosecutor's proposed version was identical to the version given by the trial court except that the paragraph describing the role of the court read as follows:

(continued...)

The trial court accepted the prosecutor's argument, explaining, ". . . I think Mr. Gannon has fairly requested that the instruction be modified in some way to make it clear that the names are being submitted by defense counsel and that the court is monitoring it only for the reasons indicated, and not appointing those doctors itself off of some kind of list." (2 RT Vol. 29 6674.)[55] Moreover, the trial court said of the defense, "[i]n each case, almost each case, you took pains to ask if they had been appointed by the court. The only reason why I could see that you would do that – and I am not being critical, but the reason you do that is to take advantage of the fact that the court was involved in the process, for whatever you can gain from that regarding the witness' credibility." (2 RT Vol. 29 6674; see also 2 RT Vol. 29 6675-6678.)

Accordingly, the trial court modified the instruction to read as follows:

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[54](...continued)
In these circumstances, the Court is involved in reviewing and processing the application submitted by the defense attorneys, and in appointing the investigators, experts, and others who have been asked by the defense attorneys to assist with the defense, only for the purposes of ensuring that, based upon the declarations submitted by the defense attorneys, the persons appointed are reasonably necessary for the preparation or presentation of the defense. The Court is also involved to monitor the fees to be paid to such investigators and experts to ensure that such fees are within the guidelines established by the Court for that purpose.

(2 CT Vol. 4 1413.)

[55] As the trial court observed, applications submitted pursuant to Penal Code section 987.9 were reviewed by another judge. (2 RT Vol. 29 6660.)

> Under the law an indigent defendant (or his attorney) may apply to the Court for public funds to employ investigators, experts and others reasonably necessary for the preparation or presentation of the defense. For this purpose a defendant is "indigent" if he does not have the financial means to secure those services himself. The application is confidential until disclosed by the defense before or during the trial. *The purpose of this law is to ensure that an indigent defendant is not deprived of an effective defense because of his financial condition, since the investigation and presentation of the prosecution is paid for with public funds.*
>
> The Court is involved in the reviewing and processing the application submitted by the defense attorneys, and in appointing the investigators, experts, and others requested in the application, *only for the purpose of ensuring that the persons appointed are reasonably necessary for the preparation or presentation of the defense, and to monitor the fees to be paid to such investigators and experts to ensure that such fees are within the guidelines established by the Court for that purpose.*
>
> Neither the approval of such a request, nor the appointment of such an investigator, expert, or other person by the Court to assist with the defense, should be taken by the jury as an indication that the Court has taken any position with respect to the credibility of such person when that person later testifies as a witness. It is for you, the jury, to determine the credibility if [*sic*] any such witness and the weight to be given to the testimony of such a witness.

(2 CT Vol. 4 1450, italics added.)

Although the jury instruction was legally accurate to the extent it was based upon the language of Penal Code section 987.9, subdivision (a),[56] the

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[56] Penal Code section 987.9, subdivision (a), provides in pertinent part:

> (a) In the trial of a capital case . . . the indigent defendant, through

(continued...)

reasonably likely effect of the instruction was to unfairly highlight the cost to the public of both prosecuting and defending appellant.[57]

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[56](...continued)
the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

[57] Appellant acknowledges that defense counsel requested that the court give the version given at the first trial (2 RT Vol. 29 6658), and that the versions given at the two trials were virtually identical (1 CT Vol. 3 771; 2 CT Vol. 4 1450). Nevertheless, this argument is cognizable on appeal. (§§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Defense counsel's objection to the prosecutor's proposed language regarding the submission of applications by the defense (2 RT Vol. 29 6658, 6661-6663, 6667-6668) applies equally well to the instruction as modified by the court. In any event, this Court has explained that "'if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find "invited error"; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause.' [Citation.]" (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201.) Here, defense counsel expressed no tactical purpose for suggesting or acceding to an instruction concerning the payment of funds for ancillary services rendered on the defendant's behalf, or, at least, one

(continued...)

B. The Jury Instruction Unfairly Highlighted the Cost to the Public of Both Prosecuting and Defending Appellant

Information regarding costs associated with the trial is not only irrelevant to the issue of a defendant's guilt or innocence, but "[c]onsideration of expense 'may have an incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government.' [Citation.]" (*People v. Barraza* (1979) 23 Cal.3d 675, 685; see also *People v. Gainer* (1977) 19 Cal.3d 835, 852, fn. 16 [language regarding the expense of a retrial is irrelevant to the issue of the defendant's guilt or innocence, and is therefore impermissible]; *People v. Hinton* (2004) 121 Cal.App.4th 655, 660 [judge's references to the time and resources devoted to the trial injected extraneous and improper considerations into the jury's deliberations].)

The trial court in this case erred in giving the jury instruction. First, the instruction highlighted the costs associated with appellant's trial, injecting an irrelevant, impermissible consideration into the jury deliberations. (*People v. Barraza*, *supra*, 23 Cal.3d at p. 685; *People v. Gainer*, *supra*, 19 Cal.3d at p. 852, fn. 16; *People v. Hinton*, *supra*, 121 Cal.App.4th at p. 660.) It expressly told the jury that public funds were being expended to pay for the defense experts and perhaps other members of the defense team ("an indigent defendant (or his attorney) may apply to the Court for public funds to employ investigators, experts and others") as well as the investigation and presentation of the prosecution. (2 CT Vol. 4

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[57](...continued)
which discussed the role of the defense in that process. Indeed, defense counsel could have had no tactical reason for requesting an instruction which injected improper considerations into the jury's deliberations.

1450.) In fact, two of the three paragraphs in the instruction related to the process by which a defendant applies for public funds. (*Ibid.*)

Information concerning the costs of appellant's trial was irrelevant to any issue at the guilt phase. For instance, information that public funds paid for the investigation and prosecution of appellant had no conceivable bearing on any aspect of the issue of appellant's guilt or innocence, including the credibility of the expert witnesses.

Second, the court modified the instruction because it accepted as true the prosecutor's mistaken assertion that defense counsel had repeatedly elicited testimony that the expert witnesses had been appointed by the court, thereby insinuating that the court had validated their testimony. (2 RT Vol. 29 6662, 6665, 6674-6678.) In fact, a review of the record shows that, in almost every instance, the defense made clear the nature of the expert's appointment. In its direct examination of Dr. Paul Berg, defense counsel elicited his testimony that the defense had contacted him and requested that he evaluate appellant. (2 RT Vol. 19 4317.) Dr. Berg did not testify that he had been appointed by the court. Yet, on cross-examination, the prosecutor asked, "Now, you have testified that you were appointed by the court to conduct an examination with respect to Mr. DeHoyos; is that correct?" (2 RT Vol. 21 4712-4713.)[58]

Dr. Seawright Anderson testified on direct examination that the Orange County Superior Court had appointed him, and that the appointment was not made at the request of the defense. (2 RT Vol. 25 5472-74, 5599.) The prosecutor did not impeach or otherwise challenge this testimony.

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[58] Dr. Berg replied, "I don't recall if I testified to that." (2 RT Vol. 21 4713.)

Dr. Susan Fossum testified on direct examination that the defense had requested that she assist in the preparation of its case, and that she was subsequently appointed by the superior court to do so. (2 RT Vol. 26 5701.) Similarly, Dr. Arnold Purisch testified on direct examination that he had been appointed by the court at the defense's request. (2 RT Vol. 27A 6180.)

Finally, although Dr. Jose LaCalle testified on direct examination that it was his understanding that he had been appointed by the Orange County Municipal Court (2 RT Vol. 22 5015), the prosecutor subsequently clarified that he had been appointed as a psychological expert for the defense (2 RT Vol. 23 5097-5099, 5192).

Third, and lastly, the court erred in giving the instruction because it was misleading. The jury would have understood it to mean that the court must determine whether the ancillary personnel were reasonably necessary, but not that the court was also required to determine whether the *funds* requested were reasonably necessary. (§ 987.9, subd. (a); see also *Lucero v. Superior Court* (1981) 122 Cal.App.3d 484, 489 ["Penal Code section 987.9 under which the request for funds was made provides that the application shall be made by affidavit specifying that the funds are reasonably necessary for the preparation or presentation of the defense and that the court shall rule on the reasonableness of the request"].) Although the instruction stated that the court "monitor[ed] the fees to be paid to such investigators and experts to ensure that such fees are within the guidelines established by the Court for that purpose," it failed to explain the nature or purpose of those guidelines. It is reasonably likely, then, that the jury understood this portion of the instruction to mean only that an expert (or other ancillary personnel) could not receive any fees unless the court had

determined that his or her services were reasonably necessary.

Under these circumstances, the jurors may have felt pressured to reach a verdict, and to find appellant guilty of the charged offenses even if they were not convinced beyond a reasonable doubt of his guilt, simply to avoid the costs of a retrial. (See *People v. Barraza*, *supra*, 23 Cal.3d at p. 685.) This is especially so because the jury was well aware that this trial was itself a retrial. (See, e.g., 2 RT Vol. 21 4712, 4786; 2 RT Vol. 23 5196, 5202; 2 RT Vol. 27A 6149; 2 RT Vol. 28 6332.)

It is immaterial that the instruction made clear that public funds were paying for both the prosecution and the defense of appellant. It is reasonably likely that the instruction provoked or exacerbated the jurors' anger over the cost of the trial where (1) they were aware that this was a retrial and (2) the prosecutor had gone to great lengths to highlight the fees paid to defense counsel and the defense experts. (2 RT Vol. 18 4067-4069, 4089, 4091, 4116-4117, 4148, 4169; 2 RT Vol. 19 4195-4197; 2 RT Vol. 21 4713-4718; 2 RT Vol. 23 5099-5100, 5114-5116; 2 RT Vol. 25 5493-5494, 5496-5497; 2 RT Vol. 26 5771-5775; 2 RT Vol. 27 5898-5899, 5994; 2 RT Vol. 28 6335-6337; 2 RT Vol. 28 6420-6422.)[59]

People v. Barraza, *supra*, is instructive. In that case, after the jury announced that it was deadlocked, the trial court committed reversible error

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[59] As early as jury selection, the prosecutor began insinuating that defense counsel was dipping into the public coffers. Specifically, the prosecutor asked a prospective juror, "The fact that Mr. Grimes represents Mr. [Rodney] King in his civil suit for money against the city of L.A., as far as you as are concerned, that will have nothing to with this case, right?" (2 RT Vol. 5 1121.) As defense counsel objected shortly thereafter, the phrase "for money" might have led the prospective jurors to view him unfavorably. (2 RT Vol. 5 1124.)

by giving an instruction which stated, in part, that "[i]f you fail to agree upon a verdict, the case will have to be tried before another jury selected in the same manner and from the same source as you were chosen. There is no reason to believe that the case will ever be submitted to a jury more competent to decide it." (*Id.* at pp. 681-682, 685.) This Court explained that the instruction was not only misleading (i.e., it erroneously suggested that "some jury, sooner or later, must decide [the] case one way or the other"), but it referred to the expense involved in trying a case. As this Court pointed out:

> We observed in [*People v. Gainer* (1977) 19 Cal.3d 835] that reference to the expense and inconvenience of a retrial is irrelevant to the issue of a defendant's guilt or innocence and is thus impermissible. (*Gainer*, at p. 852, fn. 16.) That the reference here did not link the notion of expense to a prospective retrial is immaterial, for the link is obvious and will naturally be inferred by the jurors once the subject is introduced. It is not so much the irrelevance of such a reference that is troubling, however, as the additional pressure to decide thus created. Consideration of expense "may have an incalculably coercive effect on jurors reasonably concerned about the spiraling costs of government." (Note, *The Allen Charge: Recurring Problems and Recent Developments* (1972) 47 N.Y.U. L.Rev. 296, 304.) The improper reference to expense herein thus augments the substantial, if subtle, pressure created by the improper instructions concerning the need for retrial. Although these erroneous instructions may not constitute a direct admonition to the minority, they have for all practical purposes much the same effect, particularly when given in tandem.

(*People v. Barraza*, *supra*, 23 Cal.3d at p. 685.)

If the consideration of public expense creates "additional pressure" upon a jury at a defendant's first trial, how much greater is the pressure to reach a verdict felt by a jury at his retrial?

C. The Error Was Prejudicial

The trial court's error in giving the instruction allowed the jury to consider irrelevant, unduly prejudicial information, denying appellant his rights to a fair trial and due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15.) Moreover, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, it violated his right to a fair and reliable capital trial (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17).

Under federal constitutional law, the state has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-681; *People v. Brown* (2003) 31 Cal.4th 518, 538.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Under California law, this Court must reverse if it is reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.)

For the reasons set forth above, there can be no question that the error requires reversal under either the state or federal standard. Even if this Court concludes that the instruction was merely ambiguous, the entire judgment must be reversed because it is reasonably likely that the instruction led the jury to consider the costs expended in bringing appellant to trial, and to find him guilty simply to avoid the costs of a retrial. (*Boyde v. California* (1990) 494 U.S. 370, 380; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

Accordingly, the entire judgment must be reversed.

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VII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S REQUEST FOR A JURY INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF EVIDENCE OF HIS PRIOR ACTS OF MISCONDUCT

During the guilt phase, both the prosecution and the defense presented evidence that appellant had committed several prior acts of misconduct. Two of the prior acts (i.e., appellant's assaults against Gloria Lara and Maria Esparza) were introduced by the defense. (See Section A, *infra*.) The prosecutor requested that the trial court give CALJIC Nos. 2.50,[60] 2.50.1[61] and 2.50.2,[62] arguing that they were necessary to ensure that

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[60] CALJIC No. 2.50 (5th ed.), as given in this case, read as follows:

> Evidence has been introduced which may show that the defendant committed crimes or acts other than that for which he is on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [¶] The existence of the intent which is a necessary element of the crime charged; [¶] The identity of the person who committed the crime, if any, of which the defendant is accused; [¶] The defendant had knowledge or the means that might have been useful or necessary for the commission of the crime charged. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider this evidence for any other purpose.
>
> (2 CT Vol. 4 1426-1427.)

[61] CALJIC No. 2.50.1, as given in this case, read as follows:

(continued...)

the jury did not view the testimony as propensity/character evidence in violation of Evidence Code section 1101, subdivision (b). (2 RT Vol. 29 6568-6569, 6571.)

However, the defense withdrew its request for, and objected to, those instructions on the following grounds: (1) it would be inappropriate to describe appellant's prior acts as "crimes" when he had not been convicted of them; and, (2) the instructions addressed the prosecutor's concern that the jury improperly would use the prior misconduct evidence as propensity evidence, but did not address the purpose for which the defense had introduced it. Accordingly, the defense objected to the instructions in their entirety; in the alternative, the defense requested that the court give a limiting instruction advising the jury that it could consider the evidence of prior misconduct only to the extent that the expert witnesses relied upon such evidence in support of their opinions. (2 RT Vol. 29 6572-6574, 6577-6581, 6583, 6585-6587.)

The trial court agreed that the instructions requested by the prosecutor were appropriate. (2 RT Vol. 29 6569-6571, 6578-6580, 6584.)

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[61](...continued)

> Within the meaning of the preceding instruction, such other crime or act purportedly committed by a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that the defendant committed such other crime or act. [¶] The prosecution has the burden of proving these facts by a preponderance of the evidence.

(2 CT Vol. 4 1428.)

[62] CALJIC No. 2.50.2 defines the term "preponderance of the evidence." (2 CT Vol. 4 1429.)

Although the trial court addressed the defense's first concern by modifying CALJIC No. 2.50 to include "acts" in addition to "crimes," its failure to give the defense-requested limiting instruction with respect to the Lara and Esparza incidents was error.

A. Evidence of Prior Misconduct

The prosecution presented the testimony of Sandra Cruz, who testified that, on March 20, 1989, she was a third-grader at Diamond Elementary School. Shortly after 2:15 p.m. that afternoon, she was approached by a man in a gray car. The man told her he was a teacher and asked her to carry some books to a nearby intermediate school. When she replied that her mother was waiting for her and that she had to go, the man said okay and drove away. (2 RT Vol. 18 3865-3892.)

The defense presented the testimony of Gloria Lara, appellant's first wife, who testified that in 1975, four days after marrying her, appellant stabbed her. While visiting appellant at the veterinary hospital where he worked, Lara spoke on the telephone to one of her friends. Appellant thought she was talking to or about an ex-boyfriend. About a minute after the phone conversation was over, she had a conversation with appellant about the ex-boyfriend. Appellant subsequently attempted to engage in sexual activity with her, and, while kissing and fondling her, he stabbed her in the upper stomach. His facial expression suggested that he did not believe she was bleeding, as if he were asking, "God, what did I do?" (2 RT Vol. 19 4374-4460.)

The defense also presented the testimony of Maria Ines Esparza, another ex-wife, who testified that appellant attacked her in January, 1985. During the attack, he pushed her to the bathtub and kept hitting her while his knee was pressed against her chest. He choked her while pressing her

over the edge of the bathtub, and told her "I am going to kill you" and "Die, die." His face was yellow and his eyes were large. As she was losing consciousness, she grabbed a small teaspoon or fork and jabbed him in the face. He got very angry, calling her a bitch. As appellant tried to leave, she called him and he pushed her and ran away. (2 RT Vol. 25 5621-5646; 2 RT Vol. 26 5652-5662.)

To rebut the testimony of defense experts that appellant had not exhibited a history of pedophilia or sexual interest in young children, the prosecution presented the testimony of Dalila Flores. Flores testified that when she was 15 years old, she accompanied appellant to his motel room, where he said he had a job application for her. Shortly after they arrived at the motel, appellant started talking about times he had taken other girls there, saying he would get naked and they would take pictures of him, or they would go to bed and "do a blow job." Appellant asked if she wanted to do the same thing, and she said no. Appellant also asked if she wanted him to take out a Playboy or Playgirl magazine, and she said no. He pushed her on the bed and tried to kiss her. She threatened to hit him with a bottle and said that her cousins, brothers and boyfriend knew where she was and would mess with him if he messed with her, then walked out of the room. She ultimately let appellant drive her halfway home. (2 RT Vol. 28 6501-67 - 6501-107.)[63]

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[63] The prosecutor had already introduced this incident in his cross-examination of expert witnesses. (2 RT Vol. 21 4762-4770; 2 RT Vol. 22 4924-4926, 4957, 5084-5086; 2 RT Vol. 23 5132-5162, 2 RT Vol. 27A 6139, 6145-6146.)

B. The Trial Court Erred in Failing to Give a Limiting Instruction as Requested by the Defense

It is well established that a trial court must restrict evidence to its proper scope and so instruct the jury if a party requests a limiting instruction. (Evid. Code, § 355 ["When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"]; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924; *People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3.) Even where there are defects in a proposed instruction regarding other crimes evidence, the trial court must tailor the instruction to guide the jury regarding the use of the other crimes evidence, rather than denying the instruction outright. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 924; *People v. Grant* (2006) 113 Cal.App.4th 579, 591.)

Although defense counsel did not submit a proposed jury instruction after the trial court stated it would consider any modification requested by the defense (2 RT Vol. 29 6571, 6587-6588), the trial court erred in failing to give a limiting instruction with respect to the Lara and Esparza incidents. The nature and scope of the requested limitation was clear: the jury could consider the evidence regarding those incidents only to the extent it was relied upon by the expert witnesses as evidence of appellant's mental defect. (2 RT Vol. 29 6578-6581, 6583.) Therefore, the trial court should have tailored CALJIC No. 2.50 or otherwise instructed the jury to that effect, and its failure to do so constituted error.[64]

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[64] Appellant does not contend that the trial court erred in giving CALJIC Nos. 2.50, 2.50.1. and 2.50.2. Appellant agrees the instructions (continued...)

The court's error allowed the jury to consider evidence regarding appellant's prior acts of misconduct against Lara and Esparza as substantive evidence – that is, as evidence in its own right. Both Lara and Espinoza testified at length to brutal acts committed by appellant. This simply cannot have been defense counsel's intention; that is, defense counsel could have had no tactical reason for introducing the evidence in the absence of an instruction limiting its use.[65] In any event, had the jury been given a limiting instruction, the jury necessarily would have viewed those acts strictly within the context of expert opinions that they were products of appellant's mental illness.

In the absence of a limiting instruction, the jury was more likely to consider evidence regarding the assaults against Lara and Esparza as propensity evidence or for some other improper purpose. Because the prior acts were introduced as substantive evidence, the jury was free to simply ignore the experts' opinions as to why those acts occurred, and simply find that appellant was an evil man. The danger that a jury will consider evidence of prior misconduct evidence as propensity evidence has long been recognized. As Witkin has explained:

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[64](...continued)
were necessary to ensure that the jury did not view the evidence as propensity/character evidence in violation of Evidence Code section 1101, subdivision (b). However, appellant argues that the instructions were incomplete because they did not include the limitation requested by the defense.

[65] Any claim that defense counsel rendered ineffective assistance in presenting the testimony of Lara and Espinoza, and/or presenting their testimony in the absence of a limiting instruction, is more appropriately raised in habeas corpus proceedings and is not raised in the instant brief. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

> The reasons for exclusion are: '*First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.' [Citations.]

(1 Witkin Evid. (4th ed. 2000) Circumstantial Evidence, § 42, p. 375, italics original.) Indeed, the rule excluding evidence of criminal propensity is over three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647, cited in *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913, and *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.)

This error was not cured by any other instructions given by the trial court. CALJIC No. 2.50.1 told the jury that "[t]he *prosecution* has the burden of proving these facts [referred to in CALJIC No. 2.50] by a preponderance of the evidence." (2 CT Vol. 4 1428, italics added.) Therefore, it is reasonably likely the jury believed CALJIC No. 2.50 applied only to the testimony of Flores, who was called by the prosecutor, not to the testimony of Lara and Esparza, who were called by the defense. Similarly, in the absence of the requested limiting instruction, it is reasonably likely the jury did not understand that the testimony of Lara and Esparza constituted evidence of mental illness within the meaning of CALJIC No. 3.32 [evidence of mental disease – received for limited purpose]. (2 CT Vol. 4 1434.)

The trial court's failure to give the requested limiting instruction allowed the jury to consider evidence which was both unduly inflammatory and likely to be used as propensity evidence, denying appellant his rights to

a fair trial and due process of law. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15.) It also violated appellant's right to have a properly instructed jury find that the elements of all the charged crimes had been proven beyond a reasonable doubt. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16.) Finally, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, it violated his right to a fair and reliable capital trial. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17.)

Under federal constitutional law, the state has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-681; *People v. Brown* (2003) 31 Cal.4th 518, 538.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Under California law, this Court must reverse if it is reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.)

For the reasons set forth above, there can be no question that the error requires reversal under either the state or federal standard. Accordingly, the entire judgment must be reversed.

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VIII

THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING HEARSAY TESTIMONY THAT APPELLANT REGISTERED FOR TWO GUESTS AT THE HA' PENNY INN

The trial court erroneously ruled that a motel receipt from the Ha' Penny Inn constituted an admission, and admitted testimony, based on the receipt and another motel record, that appellant registered for two people on the day of the crime. The testimony was also inadmissible under the business records exception to the hearsay rule because the motel records failed to satisfy the requisite criteria under that hearsay exception. As appellant demonstrates below, the trial court's error requires reversal of the entire judgment.

A. Factual Background

Thomas Nixon, who was the assistant manager of the Ha' Penny Inn on the date of the charged offenses, testified that the procedure for registering motel guests included filling out a registration card and a receipt. (2 RT Vol. 17 3756-3758; People's Exhibits 6 (receipt) and 7 (registration card).) According to Nixon, the motel employee filled out the registration card and receipt, which were then signed by the guest. (2 RT Vol. 17 3756-3760, 3766-3771.)

Nixon also testified that there was no provision for documenting how many people rented a particular room. (2 RT Vol. 17 3757.) The prosecutor subsequently asked, "Is there any provision on the document for [the] number of people?" The trial court sustained defense counsel's objection that the question called for hearsay. (2 RT Vol. 17 3759.)

Nixon then testified that the writing on the receipt, including an entry regarding the number of persons registered to the room, was his. Again

defense counsel objected that testimony as to what the document said constituted hearsay. The court ruled, "Just answer the question, Mr. Nixon, if you recall it." (2 RT Vol. 17 3759.) Nixon reiterated that his handwriting was on the document, including an entry for "Number of persons." When the prosecutor asked for the number, defense counsel again objected on hearsay grounds. (2 RT Vol. 17 3759.)

At bench, the court advised counsel that it would sustain the hearsay objection as to the document itself. (2 RT Vol. 17 3761.) Defense counsel argued that the witness might not have an independent recollection as to the source of the information that appellant had registered for two guests, or as to whether appellant said he was registering for two guests, recalling Nixon's testimony that there was no provision for documenting the number of guests registered to a room. (2 RT Vol. 27 3762-3763.) The prosecutor argued that the document had been authenticated in light of Nixon's testimony that he had written the number "2." (2 RT Vol. 17 3763.)

The trial court responded as follows:

> Well, I agree, if that's the stipulation. Because it is an admission on the part of the defendant that there was more than one person going into the room he was renting. Unless, of course, the man had him sign it before it was all filled out.
> . . .
>
> Assuming that the last thing that happened was that Mr. DeHoyos signed it and he had an opportunity to read what was on it, it constitutes an admission.

(2 RT Vol. 17 3763-3764.) After both counsel stipulated that appellant had signed the document, the court overruled the objection. (2 RT Vol. 17 3765.)

Following the bench conference, Nixon testified that he had written

the number "2" on the receipt (i.e., People's Exhibit 6). He explained that he copied that information from the registration card (i.e., People's Exhibit 7), on which the number "2" had been written by a fellow employee, Parley Kennelly. Nixon did not obtain the information from appellant. (2 RT Vol. 17 3770-3771.) Nixon further testified that he did not know whether Kennelly took that information from appellant or just wrote the "2" on his own accord. (2 RT Vol. 17 3771.)[66]

Vereen Kennelly, who was the motel's office manager on the date of the crimes, subsequently testified that the guest, not the motel employee, filled out the registration card. (2 RT Vol. 17 3773-3778, 3781.)[67] Moreover, according to Kennelly, the motel employee generally requested that the guest state how many people were going to be in the room, and accepted the guest's response as true unless he or she saw additional people with the guest. (2 RT Vol. 17 3777.) In addition, she acknowledged that she could not testify with certainty as to whether Parley had been told or simply guessed that there would be two guests in appellant's room. (2 RT Vol. 17 3780.)

B. Applicable Legal Principles

Evidence Code section 1200 provides in pertinent part that:

> (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

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[66] Parley Kennelly did not testify at trial.

[67] Vereen Kennelly testified that Parley Kennelly was her son. (2 RT Vol. 17 3774, 3778.) She also testified that Parley was 16 years old in March, 1989, and that she was unaware of any mistakes he may have made during the time he worked for the motel. (2 RT Vol. 17 3782-3783.)

(b) Except as provided by law, hearsay evidence is inadmissible.

"The chief reasons for the general rule of inadmissibility [of hearsay] are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements. [Citations.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 610; see also *Williamson v. United States* (1994) 512 U.S. 594, 598-599 [discussing similar rationale underlying federal hearsay rule].) The "lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported is today accepted as the main justification for the exclusion of hearsay." (2 McCormick, Evidence (5th ed. 1999) Hearsay, § 245, p. 94.)

C. The Trial Court Erred in Admitting Hearsay Testimony That Appellant Registered for Two Persons

The prosecution offered Nixon's testimony, which was based entirely upon the motel records rather than independent recollection, to prove the truth of the facts asserted therein – specifically, that appellant registered for two guests. As such, Nixon's testimony was hearsay (Evid. Code, § 1200, subd. (a)), admissible only if it fell within a recognized exception to the hearsay rule (Evid. Code, § 1200, subd. (b)), *and* was relevant to the charges or issues involved in the case (Evid. Code, § 350). As the proponent of Nixon's testimony, the prosecution had the burden to establish that it came within an exception to the hearsay rule. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.)

As appellant demonstrates below, the trial court prejudicially erred in admitting Nixon's testimony that appellant had registered for two guests, because the motel records upon which his testimony was based did not fall

within any exception to the hearsay rule.

1. The Motel Records Did Not Constitute Admissions

Evidence Code section 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." Evidence Code section 1221 provides, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

As the trial court recognized, the information in the documents would constitute an admission *so long as* there was evidence that appellant had read the documents before signing them. (2 RT Vol. 17 3763-3764.) However, the trial court ruled that the record constituted an admission in the absence of evidence that appellant had reviewed the record before signing it, or even that he had told any motel employee that he was renting the room for two people. Nixon's testimony was inconsistent as to whether the motel's registration procedure required that the motel clerk document the number of guests registered to a room. That is, he testified that there was no provision for documenting how many people rented a particular room, yet he subsequently testified that he had entered the number of people registered to appellant's room on the receipt. (2 RT Vol. 17 3757, 3759.) Moreover, there was no evidence as to the source of the information that appellant had registered for two guests, or that appellant had reviewed either the receipt or registration card before signing them.

Even the testimony which followed the trial court's ruling did not

establish that the document constituted an admission. Nixon documented that appellant had registered for two guests based on the registration card filled out by his co-worker, Parley Kennelly, but there was no evidence as to how or where Kennelly obtained that information. (2 RT Vol. 17 3770-3771, 3780.) In addition, neither Nixon nor Vereen Kennelly testified that appellant did in fact review the records before signing them.

Thus, it cannot be said that appellant either made or adopted an admission that he had registered for two guests.

This Court's analysis in *People v. Maki* (1985) 39 Cal.3d 707 is applicable in this case. There, this Court concluded that the trial court erred in admitting a car rental invoice and a hotel receipt as adoptive admissions where there was no testimony regarding the preparation of the documents or their purpose. (*Id.* at p. 711.) In so holding, the Court explained:

> [T]o prove "adoption" of a hearsay statement sufficient to make it admissible under section 1221, not merely as corroboration, it must be shown "that the party to an action against whom a declarant's hearsay statement is offered as an adoptive admission, (1) had knowledge of the contents of declarant's statement, and (2) having such knowledge, has, by words or other conduct, manifested his adoption or his belief in its truth." [Citation.] Defendant's signature thus would constitute an adoptive admission if it were shown that he had read over the document and signed it after doing so. [Citations.] This prerequisite for introduction of such evidence may be provided by testimony of a person describing the circumstances surrounding the signing of the document. [Citations.]"

(*Id.* at p. 712.)[68] Because there was no evidence regarding the

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[68] Although this Court held that the documents were otherwise admissible, its holding clearly depended on the fact that the case arose from (continued...)

circumstances surrounding the defendant's signing of the documents, they did not constitute adoptive admissions. (*Id.* at p. 713.)

Similarly, the trial court erred in finding that the receipt constituted an admission, and in admitting Nixon's testimony that appellant had registered for two guests.

2. The Motel Records Did Not Fall Within the Business Records Exception

Evidence Code section 1271 provides:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Under limited circumstances, a record that does not qualify as an admission nevertheless may be admissible under the business records exception to the hearsay rule. (See *People v. Maki*, *supra*, 39 Cal.3d at p. 709 [documents (i.e., car rental invoice and hotel receipt) were admissible to show defendant violated probation by traveling to Chicago even though no testimony had been presented to show that the documents actually were from Chicago or

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[68](...continued)
a probation revocation proceeding, which permits greater flexibility and informality than a criminal trial. (*People v. Maki*, *supra*, 39 Cal.3d at p. 715.)

as to where they were seized]; *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 43, fn. 10 [invoice of a third party might come in under the business record exception if supported by testimony as to identity and mode of preparation].)

Here, aside from the fact that neither the prosecutor nor the trial court suggested that the motel records constituted business records, the prosecutor failed to make a sufficient showing that they fell within the business records exception to the hearsay rule. Nixon and Kennelly presented conflicting testimony concerning the method of preparation of motel records. As noted above, Nixon testified that the motel employee filled out the registration card and receipt, which were then signed by the guest. (2 RT Vol. 17 3756-3760, 3766-3771.) Kennelly, on the other hand, testified that the guest, not the motel employee, filled out the registration card. (2 RT Vol. 17 3773-3778, 3781.)

In addition, the testimony of both Nixon and Kennelly makes clear that the motel had no procedure for reliably documenting how many guests checked into a particular motel room. Again, Nixon testified that there was no provision for documenting how many people rented a room. (2 RT Vol. 17 3757.) Kennelly testified that the motel employee generally requested that the guest state how many people were going to be in the room, and accepted the guest's response as true unless he or she saw additional people with the guest. (2 RT Vol. 17 3777.) Moreover, Kennelly could not testify as to whether Parley Kennelly had been told or simply guessed that there would be two guests in appellant's room. (2 RT Vol. 17 3780.)

This testimony was inconsistent with the basic principle underlying the business records exception, that "[t]he guarantee of *trustworthiness* lies in the habit or practice of accurate and systematic bookkeeping by trained

persons." (1 Witkin Evid. (4th ed. 2000) Hearsay, § 226, p. 943.) Because the motel records lacked sufficient indicia of reliability, Nixon's testimony was inadmissible under the business records exception.

D. The Admission of Testimony Based Upon Inadmissible Hearsay Violated Appellant's Constitutional Rights to Due Process, a Fair Trial, and Reliable Guilt and Penalty Determinations

The trial court's admission of Nixon's testimony, which was based entirely upon unreliable and inadmissible hearsay, operated to violate not only the state hearsay rule, but a number of appellant's constitutional rights. First, admission of the testimony denied appellant due process of law under the Sixth and Fourteenth Amendments by rendering his trial fundamentally unfair. Second, admission of the testimony violated appellant's Fourteenth Amendment due process liberty interest to have California's evidentiary standards applied to his case. (U.S. Const., Amends. 6th, 8th, 14th; Cal. Const., art. I, §§ 7, 15, 16, 17; *Lisenba v. California* (1941) 314 U.S. 219, 236; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920 [recognizing "fundamental fairness" standard]; *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1466, *cert. den.*, 479 U.S. 1068 (1987) [same].) Finally, admission of the testimony violated appellant's right to reliable guilt and penalty determinations under the Eighth and Fourteenth Amendments. Therefore, this Court must reverse the judgment in this case unless the state can establish that the errors are harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)[69]

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[69] Defense counsel's hearsay objection sufficed to preserve the instant argument for appeal, notwithstanding his failure to cite

(continued...)

There can be no question that appellant was prejudiced by the admission of Nixon's unreliable testimony. During his closing argument, the prosecutor referred to the motel records in support of his contention that the charged offenses were planned (2 RT Vol. 29 6817-6820) and that,

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[69](...continued)
constitutional provisions, because the objection sufficiently alerted the trial court to the nature of the claim. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 [a defendant's new constitutional arguments are not forfeited on appeal where "(1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution."]; see also *People v. Partida* (2005) 37 Cal.4th 428, 433-439.) Appellant's hearsay objections fully apprised the trial court of the federal due process and Eighth Amendment reliability grounds of his claim. (*People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6.) Although defense counsel did not explicitly cite the Sixth or Eighth Amendments, the admission of a record prepared by a non-testifying witness almost necessarily implicates fairness and reliability concerns. (See, e.g., *Ohio v. Roberts* (1980) 448 U.S. 56, 66, overruled by *Crawford v. Washington* (2004) 541 U.S. 36, 68 [holding that the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant *if* the statement bears "adequate 'indicia of reliability.'"].) To the extent defense counsel's objection was inadequate to preserve the argument for appeal, defense counsel rendered ineffective assistance of counsel. That defense counsel objected to Nixon's testimony demonstrates that he had no tactical reason for acceding to its admission, and therefore he was ineffective in failing to object on constitutional grounds. Of course, any claim that defense counsel rendered ineffective assistance is more appropriately raised in habeas corpus proceedings and is not raised in the instant brief. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

"[l]ike a predator, he goes out to find a target" (2 RT Vol. 19 6819).[70] This argument improperly undermined the defense evidence that appellant acted while in the throes of mental illness.

Under such circumstances, the court should have exercised its discretion to exclude the hearsay testimony. Its failure to do so denied appellant his rights to due process, a fair trial, and reliable guilt and penalty determinations.

E. Reversal of the Entire Judgment Is Required

Under federal constitutional law, the state has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman v. California, supra*, 386 U.S. at p. 24; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-681; *People v. Brown* (2003) 31 Cal.4th 518, 538.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Under California law, this Court must reverse if it is reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.)

Under either the state or federal standard, there can be no question that appellant was prejudiced by the admission of Nixon's unreliable testimony. During his closing argument at the guilt phase, the prosecutor referred to the motel records in support of his contention that the charged

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[70] The prosecutor erroneously told the jury that they would have the documents in the jury room. (2 RT Vol. 29 6817.) As noted above, the trial court ruled that the records themselves would not be admitted. (2 RT Vol. 17 3761.)

offenses were planned. (2 RT Vol. 29 6817-6820.) Among other things, the prosecutor relied upon the evidence that appellant registered for two guests to argue the following:

> Like a predator, he goes out to find a target. So to argue to you that there is no evidence that the defendant – no evidence whatsoever that the defendant kidnapped Nadia Puente for the purposes of sexual assault or child molestation and there is no evidence that the murder took place during the course of the rape, I suggest to you is not – is not borne out by what you have heard in this courtroom.

(2 RT Vol. 29 6819-6820).[71] This argument improperly undermined the defense evidence that, in light of appellant's mental illness, his actions were a product of sudden rage, not planning or intent.

Nixon's testimony was also prejudicial at the penalty phase, where the prosecutor argued that the fact appellant registered for two guests showed that he was not mentally ill. (2 RT Vol. 34 8634.) The jurors surely would have viewed the offenses as particularly heinous if they believed appellant had planned to commit them. Similarly, if the jury believed Nixon's testimony showed planning, it would have been more likely to reject, or even disregard altogether, the evidence in mitigation.

Thus, the constitutional error was not harmless beyond a reasonable doubt because it supplied highly prejudicial evidence underlying appellant's conviction and profoundly undermined the basic fairness of appellant's trial. The entire judgment must be reversed.

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[71] The prosecutor erroneously told the jury that they would have the documents in the jury room. (2 RT Vol. 29 6817.) As noted above, the trial court ruled that the records themselves would not be admitted. (2 RT Vol. 17 3761.)

IX

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH ONE COUNT OF SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

The trial court instructed the jury that appellant could be convicted of murder if he unlawfully killed a human being either with malice aforethought or during the commission or attempted commission of rape or lewd act upon a child under the age of 14 years. (2 CT Vol. 4 1460-1461 [CALJIC No. 8.10].) The trial court also gave instructions defining malice aforethought (2 CT Vol. 4 1462 [CALJIC No. 8.11]), first degree felony murder (2 CT Vol. 4 1467 [CALJIC No. 8.21]), unpremeditated second degree murder (2 CT Vol. 4 1469 [CALJIC No. 8.30]), second degree murder resulting from an unlawful act dangerous to life (2 CT Vol. 4 1470 [CALJIC No. 8.31]), voluntary manslaughter (2 CT Vol. 4 1473 [CALJIC No. 8.40]), and involuntary manslaughter (2 CT Vol. 4 1474 [CALJIC No. 8.45]). The jury found appellant guilty of one count of murder in the first degree. (2 CT Vol. 4 1505.) The instructions on first degree murder were erroneous,[72] and the resulting conviction of first degree murder must be

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[72] The errors discussed in this argument are cognizable on appeal even though defense counsel, along with the prosecution, requested the instructions relating to first degree murder. (2 RT Vol. 29 6616, 6629.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here,

(continued...)

reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[73]

Count 1 of the Information alleged that "On or about March 20, 1989, RICHARD LUCIO DeHOYOS aka: RICHARD LUCIO DEHOYOS, in violation of Section 187(a) of the Penal Code (MURDER), a FELONY, did willfully and unlawfully and with malice aforethought kill Nadia Puente, a human being." (1 CT Vol. 1 4; 2 CT Vol. 1 171.) Both the statutory reference ("Section 187(a) of the Penal Code") and the description of the crime ("did willfully and unlawfully and with malice aforethought kill") establish that appellant was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.

Under Penal Code section 187, the statute cited in the information, second degree murder is "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder.

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[72](...continued)
neither condition for invited error has been met. On the other hand, instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

[73] Appellant is not arguing here that the information was defective. On the contrary, as explained hereafter, count 1 of the information was an entirely correct charge of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crime of first degree felony murder in violation of Penal Code section 189.

[Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[74] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[75] This authority makes clear that malice murder is not murder of the first degree.

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try appellant for first degree murder. A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information charging that specific offense. (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7; *People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not

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[74] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[75] In 1995, when the murder at issue allegedly occurred, Penal Code section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 282, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[76] It has many times been

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[76] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. (continued...)

> decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

(*People v. Witt*, *supra*, 170 Cal. at pp. 107-108.)

However, the rationale of *People v. Witt*, *supra*, and all similar cases has been completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that Penal Code section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] section 189 as a statutory enactment of the first degree felony murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, fn. omitted.)

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[76](...continued)
On the contrary, "[s]econd degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another and be included within it.

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664, subd. (a), referring to "willful, deliberate, and premeditated murder, as defined by Section 189") or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d at page 472, expressly held that the first degree felony-murder rule was codified in Penal Code section 189. Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara* (2003) 30 Cal.4th 705, 712). First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford*, *supra* 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser

offense included within first degree murder].)[77]

The greatest difference is the one between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that, under the

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[77] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction.* This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original italics.)

notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment*, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.)[78]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in Penal Code section 189, together with the specific intent to commit that crime) are facts which increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (§ 190, subd. (a).) Therefore, those facts should have been charged in the information.

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *DeJonge* v. *State of Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th and 14th Amends.; Cal.

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[78] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

Const., art. I, §§ 7, 15, 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder and would not have been death-eligible. (§ 190.2; see *People v. Cooper* (1988) 53 Cal.3d 771, 828.) Therefore, appellant's conviction for first degree murder must be reversed.

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THE TRIAL COURT'S FAILURE TO MODIFY CALJIC NO. 4.01 AS REQUESTED BY APPELLANT DENIED HIM A FAIR SANITY PHASE

A. Introduction

During the sanity phase of appellant's trial, both parties requested that the trial court give CALJIC No. 4.01, a jury instruction intended to explain the consequences of a verdict of not guilty by reason of insanity. (2 RT Vol. 33 8066-8067, 8082, 8087; 2 CT Vol. 5 1601.) In contrast to the version given at appellant's first trial, the prosecutor's proposed version of the instruction included language stating that, in the event the jury found appellant legally insane, he could be placed in an outpatient facility. (2 RT Vol. 33 8066-8067; see also 1 CT Vol. 3 894-895.) Defense counsel objected that the proposed instruction was misleading because the Penal Code mandated in-patient treatment for a minimum of six months in cases involving crimes of violence, and therefore outpatient treatment would be unavailable in this case. (2 RT Vol. 33 8069-8070, 8072, 8086-8087, 8095.)[79]

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[79] As the trial court recognized (2 RT Vol. 33 8074-8075, 8091), defense counsel was referring to Penal Code section 1601, subdivision (a), which provided in pertinent part:

> In the case of any person . . . found not guilty by reason of insanity of *murder . . . a violation of Section 207* or 209 in which the victim suffers intentionally inflicted great bodily injury . . . *a violation of Section 288* . . . or any felony involving death, great bodily injury, or an act which poses a serious threat of bodily harm to another person, outpatient status under this title shall not be available until that person has actually been confined in a state hospital or other facility

(continued...)

The trial court subsequently modified the instruction to explain that, if appellant were found legally insane, where he was placed depended on both the seriousness of the crimes for which he had been convicted and the seriousness of his mental illness. (2 RT Vol. 33 8080-8082; 2 CT Vol. 5 1601-1602.)[80] According to the trial court, the instruction as modified addressed both: (1) the prosecutor's concern that, in the absence of language regarding outpatient treatment, the instruction inaccurately suggested that appellant could never be removed from hospital placement until either he recovered his sanity or served the maximum period of

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[79](...continued)
for 180 days or more. . . .

(Italics added.)

[80] CALJIC No. 4.01 (5th ed.) as given in this case read, in pertinent part, as follows:

> A verdict of "not guilty by reason of insanity" does not mean the defendant will be released from custody. Instead, he will remain in confinement while the courts determine whether he has fully recovered his sanity. If he has not, he will be placed in a hospital for the mentally disordered or other facility, or in outpatient treatment, depending upon the seriousness of his present mental illness *and the seriousness of the crimes for which he has been convicted in the guilt phase of this trial.*
>
> Moreover, he cannot be removed from that placement unless and until the court determines and finds the defendant's sanity has been fully restored, in accordance with the law of California, or until the defendant has been confined for a period equal to the maximum period of imprisonment which could have been imposed had he been found sane.

(2 CT Vol. 5 1601, italics added.)

confinement; and (2) the defense's concern that jurors might think appellant would be released immediately. (2 RT Vol. 33 8080-8084.)

Appellant argued that the modified instruction was misleading and would deny appellant a fair sanity trial because it failed to explain that, given the crimes for which he had been convicted, there would be a mandatory period of in-patient treatment. (2 RT Vol. 33 8084, 8086.) Appellant subsequently reiterated his request that CALJIC No. 4.01 be given, but objected to the inclusion of language regarding outpatient treatment. However, the trial court overruled the objection. (2 RT Vol. 33 8095-8096.)

The trial court's ruling was error.

B. The Trial Court Erred in Refusing Appellant's Request That It Modify CALJIC No. 4.01 by Deleting Language Regarding Outpatient Treatment

In *People v. Moore* (1985) 166 Cal.App.3d 540, 556-557, the Court of Appeal concluded that the trial court erred in refusing to give an instruction regarding the consequences of a verdict of not guilty by reason of insanity, requiring reversal of the sanity phase verdict. Discussing the state's argument that such an instruction conflicts with the general rule that a jury ordinarily is not concerned with a defendant's post-verdict punishment, the Court of Appeal reasoned as follows:

> The Michigan Supreme Court considered this problem to be a judicial choice between "1) the possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to so advise the jury; and 2) the possible 'invitation to the jury' to forget their oath to render a true verdict according to the evidence by advising them of the consequence of a verdict of not guilty by reason of insanity." [Citation.] We conclude, as did the Michigan Supreme Court, the reasons supporting the first proposition far outweigh the dangers expressed in the second proposition.

(*Id.* at pp. 556-557.) Accordingly, the court held that, upon request by the defendant or jury, the trial court should give an appropriate instruction to ensure that the jury does not erroneously believe an insanity verdict will result in the defendant's immediate release. (*Ibid.*)

The *Moore* court's analysis was adopted by reviewing courts in subsequent appellate decisions. Thus, the Court of Appeal in *People v. Dennis* (1985) 169 Cal.App.3d 1135, 1139-1140, reversed a sanity phase judgment, holding that the trial court erred in refusing to give such a jury instruction even though the defendant's proposed instruction did not accurately describe the commitment procedures established for defendants found to be legally insane. In *People v. Kelly* (1992) 1 Cal.4th 495, 536-537, this Court discussed *Moore* and *Dennis* with apparent approval in rejecting the defendant's contention that it was error to give both CALJIC No. 17.41, which instructed the jury not to consider penalty or punishment, and CALJIC No. 4.01.

Here, appellant requested CALJIC No. 4.01 (2 RT Vol. 33 8082, 8087; 2 CT Vol. 5 1601), and therefore the trial court was required to give it. (*People v. Dennis*, *supra*, 169 Cal.App.3d at pp. 1139-1140; *People v. Moore*, *supra*, 166 Cal.App.3d at pp. 556-557; cf. *People v. Jones* (1997) 15 Cal.4th 119, 178-179, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 832, fn. 1 [holding that the trial court had no sua sponte duty to give CALJIC No. 4.01 where defense counsel withdrew his request for that instruction].) However, appellant also requested that the trial court delete the language regarding outpatient treatment. (2 RT Vol. 33 8070, 8072, 8084-8086.) Each of the trial court's reasons for denying appellant's request was flawed, and its failure to modify the instruction was error. (See, e.g., *People v. Saille* (1991) 54 Cal.3d 1103, 1117 [a trial court

must give a "pinpoint" instruction requested by defense counsel].)

First, contrary to the trial court's position (2 RT Vol. 33 8083-8084), modification of the instruction to state that the seriousness of the crime is a factor to be considered did not operate to properly instruct the jury as to the consequences of a verdict of legal insanity. The modified CALJIC No. 4.01 did not advise the jury that the law (specifically, Penal Code section 1601, subdivision (a)) mandated in-patient treatment "for 180 days *or more*" as to defendants found not guilty by reason of insanity of certain offenses. Moreover, although appellant had been convicted of murder and lewd and lascivious acts with a child under the age of 14, the jury could not have known that those offenses were among those enumerated in section 1601. It is not enough to speculate that the jury may have surmised that the seriousness of appellant's crimes made it unlikely he would be released immediately; there is nothing in the record to justify such speculation, and neither CALJIC No. 4.01 nor any other instruction explicitly told them so. Had the jury been given that information, as appellant requested (2 RT Vol. 33 8069-8070, 8072, 8084, 8086-8087, 8095), it would have been reassured that he would be ineligible for outpatient treatment for at least 180 days.

Second, the trial court incorrectly dismissed appellant's concern that, in the absence of language explaining that the law prohibited immediate outpatient treatment under the circumstances of this case, the jury would fear he could be released immediately. (2 RT Vol. 33 8084-8085.) Specifically, the trial court suggested that the jurors would find the prospect that appellant could be released after six months to be equally frightening. (2 RT Vol. 33 8085.) However, the jurors likely would have recognized that there is a profound difference between immediate release and release after six months or more of in-patient treatment in light of the evidence

presented in the case. For instance, at least two of the defense expert witnesses, Dr. Consuelo Edwards and Dr. Monte Buchsbaum, believed that appellant's brain damage was treatable. (2 RT Vol. 24 5398-5399.) Dr. Buchsbaum testified that drugs or other kinds of rehabilitation might have some impact in addressing appellant's brain damage. (2 RT Vol. 28 6366.)

Finally, the trial court incorrectly refused to modify the instruction on the ground that it did not want the jury to speculate as to whether the courts or Department of Mental Health would properly carry out their duties. (2 RT Vol. 33 8085.) However, the court's failure to modify the instruction by either incorporating section 1601, subdivision (a), or deleting the reference to outpatient treatment, could only have *encouraged* uninformed speculation as to where appellant would be placed if he were to be found legally insane. As the Court of Appeal observed in *People v. Moore*:

> Empirical data indicates that regardless of whether an instruction is given jurors *do* concern themselves with the consequence of the insanity verdict; indeed, such speculation has been shown to be "one of the most important factors" in jury deliberations. (Weihofen, Procedure For Determining Defendant's Mental Condition Under The American Law Institute's Model Penal Code (1956) 29 Temp. L.Q. 235, 247.) Such discussion among jurors without the benefit of a correct instruction may very well cause them to proceed on an erroneous basis.

(*People v. Moore*, *supra*, 166 Cal.App.3d at p. 554, italics original.) In fact, the trial court itself recognized that no appellate court had yet addressed the fact that the standard version of CALJIC No. 4.01 did not incorporate the provisions of Penal Code section 1601, and that a potential appellate issue

lay therein. (2 RT Vol. 33 8074-8076.)[81]

Assuming, arguendo, that the trial court was correct that simply deleting the reference to outpatient treatment would leave the jury with the impression that appellant could never be removed from hospital placement until he either recovered his sanity or served the maximum term of confinement (2 RT Vol. 33 8082-8083), it should have clarified the instruction to accurately state the law. (See *People v. Dennis*, *supra*, 169 Cal.App.3d at p. 1140.) As this Court has explained, even when written in the language of statutes, or reflective of an accurate principle of law, instructions are proper "only if the jury would have no difficulty in understanding [them] without guidance from the court. [Citation.]" (*People v. Howard* (1988) 44 Cal.3d 375, 408, internal quotation marks omitted; *People v. Cornett* (1948) 33 Cal.2d 33, 40.) Under such circumstances, a court must give additional guidance and clarification on its own motion. (*People v. Graham* (1969) 71 Cal.2d 303, 329, overruled on another ground in *People v. Ray* (1975) 14 Cal.3d 20, 29, fn. 7.)[82]

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[81] For this reason, the prosecutor's argument that the language of CALJIC No. 4.01 was approved in *People v. Kelly* (1992) 1 Cal.4th 495, 537-538, and cases cited therein, must be rejected. (2 RT Vol. 33 8068-8071.)

[82] Although the appellate courts in both *Moore* and *Dennis* identified the appropriate premise – i.e., that the defendant was entitled to an accurate instruction on the consequences of a verdict of legal insanity even though his proposed instruction did not properly reflect California law – the instructions they recommended were incomplete, and therefore inaccurate, to the extent they failed to incorporate the provisions of Penal Code section 1601. (See *People v. Moore*, *supra*, 166 Cal.App.3d at pp. 556-557; *People v. Dennis*, *supra*, 169 Cal.App.3d at pp. 1140-1141 [adopting the instruction recommended by the *Moore* court].) Indeed, the *Moore* court

(continued...)

Here, the trial court failed to correct the flawed instruction by either deleting the reference to outpatient treatment or incorporating the provisions of section 1601, subdivision (a). As a result, the instruction completely failed to serve the purpose for which it had been developed: to aid the defense by telling the jury not to find appellant sane out of a concern that otherwise he would be improperly released from custody. (See *People v. Kelly*, *supra*, 1 Cal.4th at p. 538.) Under these circumstances, the trial court abdicated its duty to instruct the jury properly regarding the consequences of a verdict of legal insanity. (*People v. Dennis*, *supra*, 169 Cal.App.3d at pp. 1139-1140; *People v. Moore*, *supra*, 166 Cal.App.3d at pp. 556-557; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1013.)

C. The Defective Instruction Violated Appellant's Rights to Due Process and a Jury Trial

CALJIC No. 4.01 as given in this case infringed appellant's federal and state constitutional rights. In two respects, the trial court violated appellant's due process rights, which are guaranteed by the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 17 of the California Constitution. First, the instruction ran afoul of appellant's due process right not to be convicted of crimes committed while

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[82](...continued)
itself recognized that its recommended instruction was flawed, stating that it "welcome[d] and encourage[d] the appropriate committees and organizations to improve upon the substance and language of our initial version for use in other cases." (*People v. Moore*, *supra*, 166 Cal.App.3d at p. 557.)

he was insane.[83] By failing to advise the jurors that the law would prohibit appellant's immediate release were he to be found legally insane, CALJIC No. 4.01 likely led them to disregard the evidence of his insanity, and therefore fell short of what the federal and California Constitutions' due process clauses require. Second, the trial court's failure to follow state law regarding the insanity defense deprived appellant of a state-created liberty interest and thus constituted a separate due process violation. (See *Ballard v. Estelle* (9th Cir. 1991) 937 F2d 453, 456; see also §§ 25, subd. (b), & 1026.)

The erroneous instruction also deprived appellant of his rights to a jury trial under the Sixth and Fourteenth Amendments and article I, section 16 of the California Constitution. By permitting the jury to reject an insanity defense more readily than the law allows, the court improperly raised appellant's burden of persuasion, thereby violating appellant's jury trial rights. (See *Rose v. Clark* (1986) 478 U.S. 570, 582, fn. 11 [explaining that errors altering terms under which jury considers defendant's guilt or innocence impair defendant's jury trial right].) Lastly, the erroneous instruction infringed appellant's right to a jury trial before a properly instructed jury. (See *United States v. Miller* (9th Cir. 1976) 546 F.2d 320, 324 [recognizing constitutional right to properly instructed jury].)

D. The Trial Court's Error Was Prejudicial

The trial court's error in failing to modify CALJIC No. 4.01 requires that the sanity verdicts be vacated. The error was not harmless beyond a

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[83] Again, as appellant has noted (fn. 47, *supra*), the United States Supreme Court has not foreclosed the possibility that a state's law pertaining to the insanity defense could violate the due process clause. (See *Clark v. Arizona* (2006) 548 U.S. 735, 752, fn. 20.)

reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)[84] Further, had the trial court properly instructed the jury regarding the *actual* consequences of a verdict of legal insanity, it is reasonably probable that the jury would not have found appellant sane with respect to all counts. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Respondent cannot demonstrate beyond a reasonable doubt that the trial court's error did not contribute to the verdict. The evidence that appellant was legally insane at the time of the crimes was overwhelming. At the guilt phase, appellant had presented extensive evidence regarding his lifelong history of mental impairments.[85] Among other things:

Family members testified that appellant had displayed noticeably odd behavior from the age of two through his teens. For instance, they testified that: when appellant was about two years old, he moved away from his mother whenever she tried to hug him, and he sometimes let himself fall in his crib because he was angry and wanted his parents to take him out of the crib right away (2 RT Vol. 20 4626, 4642); as he grew up, he was nervous, emotionally distant from his siblings, and became enraged whenever his mother asked him to do anything (2 RT Vol. 20 4643, 4645-4649); appellant had trouble learning, so much so that a counselor approached his mother about the possibility of placing him in a special school (2 RT Vol. 20 4491-4493, 4529-4532, 4673-4680); appellant's parents repeatedly took him to a *curandero*, or faith healer, and during one such visit he became

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[84] Of course, this Court must apply the *Chapman* standard in evaluating the federal constitutional errors.

[85] Pursuant to CALJIC No. 1.00, the jury was instructed during the sanity phase that it could consider evidence that had been presented at the guilt phase. (2 CT Vol. 5 1577.)

terrified because he saw a vision of "the bad side of hell" (2 RT Vol. 20 4493-4495, 4521-4523, 4536-4538, 4555-4557, 4600-4601, 4619, 4668, 4684-4685); and during an incident in which appellant tried to poke his pregnant mother with a broomstick, he was cursing, tensed, red in the face, and his eyes were bulging and "lit up" (2 RT Vol. 20 4489-4490, 4504-4507, 4512-4519; 2 RT Vol. 20 4553-4554, 4569-4571, 4619, 4642, 4655-4659, 4672). Family members also testified about abuse suffered by appellant at the hands of his mother. (2 RT Vol. 20 4498, 4503, 4535, 4586-4587, 4649-4651.)

One of his ex-wives, Maria Ines Esparza, testified about several incidents in which appellant displayed sudden rage: on their wedding day, appellant got into a fight with her brother, who had told appellant to make her happy (2 RT Vol. 25 5622-5623, 5627-5628, 5631, 5643-5644); on one occasion, appellant cut up photographs and other items for about 15 minutes, saying nothing during the episode (2 RT Vol. 25 5634-5636, 5645); during an incident in which appellant attacked her during a jealous rage, his face turned yellow, his eyes were big, and his hands shook (2 RT Vol. 26 5654-5655); and he never came back home following that incident (2 RT Vol. 25 5645). Another ex-wife, Gloria Lara, testified that appellant stabbed her in a jealous rage four days after their wedding. (2 RT Vol. 19 4378-4381, 4383-4385, 4394, 4398-4411; 2 RT Vol. 20 4477-4478.) Following the stabbing, his facial expression led her to think he could not believe she was bleeding. (2 RT Vol. 19 4386, 4412-4413.)

Dennis Burkhart, the supervisor of the Taco Bell where appellant had been working at the time of the crimes, testified about an incident in which appellant became enraged in response to minor criticism. (2 RT Vol. 19 4259-4261, 4263, 4267-4268, 4270-4276, 4278, 4287, 4289-4290.)

Appellant glared at him, his eyes seemed to bulge out, his face was red and he was perspiring. (2 RT Vol. 19 4264-4267, 4282-4283.) Burkhart walked away, afraid appellant was going to assault him. (2 RT Vol. 19 4267, 4278-4279, 4284.) Norma Sandoval, one of appellant's co-workers at that time, recalled that he sometimes said and did unusual things. (2 RT Vol. 18 4032-4037, 4045-4047.) Maryann Scott, his manager, testified about appellant's poor work performance, his difficulties in learning his tasks, and the fact that he became unusually upset when given constructive criticism. (2 RT Vol. 19 4235, 4237-4238, 4241, 4244-4245.) She also testified about her confrontation with appellant on the day of the murder. (2 RT Vol. 19 4229, 4234, 4239, 4240-4242, 4249-4250, 4257.)

Finally, various expert witnesses, each of whom had conducted a comprehensive evaluation of appellant's personal and family history, testified at the guilt phase regarding his lifelong history of mental impairments and the effect of those impairments on his mental state at the time of the crimes. Dr. Arthur Kowell, a clinical neurophysiologist, testified that a Brain Electrical Activity Mapping ("BEAM") scan administered to appellant revealed abnormality in various areas of his brain, including the frontal lobe, and observed that a patient with abnormalities in his frontal lobe might have rage attacks or difficulty controlling his temper. (2 RT Vol. 18 4066-4069, 4077-4089, 4091, 4103-4106, 4130-4152, 4169; 2 RT Vol. 19 4195-4197.)

Dr. Paul Berg, a psychologist, opined that appellant suffered from severe personality disorders which, by definition, are virtually lifelong. (2 RT Vol. 19 4310; 2 RT Vol. 21 4696-4697, 4880; 2 RT Vol. 22 4967.) On March 20, 1989, appellant was affected by his mental disorders as well as stressors related to the confrontation with Maryann Scott, so that he

struggled with the idea of killing her and could not control himself. (2 RT Vol. 21 4699-4700, 4779-4780; 2 RT Vol. 22 4972.) According to Dr. Berg, appellant's account suggested he may have believed he was killing Scott. (2 RT Vol. 21 4862-4863, 4869, 4875-4879; 2 RT Vol. 22 4932-4934, 4946.)

Dr. Jose LaCalle, a clinical psychologist, concluded that on March 20, 1989, appellant suffered from Organic Personality Syndrome, Explosive Type; Borderline Personality Disorder, Severe; and, organic impairment. (2 RT Vol. 22 5003, 5065-5067; 2 RT Vol. 23 5163-5164, 5243, 5256; 2 RT Vol. 24 5328, 5376-5377.) Appellant's job loss triggered an extreme, uncontrollable rage associated with his illness, impairing his thinking processes at the time of the crimes against Nadia Puente. (2 RT Vol. 22 5070-5071; 2 RT Vol. 23 5129-5130, 5269-5270, 5290-5292; 2 RT Vol. 24 5290-5292, 5331, 5397-5398, 5422.)

Dr. Seawright Anderson, a psychiatrist, diagnosed appellant as having Schizo-Affective Disorder, based partly on his belief that appellant had experienced auditory and visual hallucinations (2 RT Vol. 25 5484, 5558, 5563, 5566-5576, 5584-5585, 5612-5615); and Organic Personality Disorder (2 RT Vol. 25 5487, 5563). Dr. Anderson explained that appellant's disorder made him more frustrated, suicidal, and depressed by the loss of his job, decreasing his judgment, insight, and ability to control his impulses and frustrations. (2 RT Vol. 25 5509, 5593, 5606-5607.) His extreme anger distorted his visual perception, so that he believed he was killing Maryann Scott, not a little girl. (2 RT Vol. 25 5535-5541, 5596-5597.)

Dr. Susan Fossum, a clinical psychologist, concluded that on March 20, 1989, appellant was suffering from: (1) Organic Personality Syndrome,

Explosive Type; (2) Chronic Schizophrenia of the Paranoid Type; (3) Narcissistic Personality Disorder with features of Borderline Personality Disorder; (4) Sociopathic Personality Disorder; and (5) extensive brain impairment, including right frontal lobe dysfunction. (2 RT Vol. 26 5698, 5762, 5765, 5842; 2 RT Vol. 27A 6048-6049, 6078, 6113, 6127-6128, 6137.) According to Dr. Fossum, Scott's castigation of appellant triggered his decompensation on the morning of March 20, 1989. (2 RT Vol. 27A 6130-6131, 6149-6150.) As a result of his mental disorders, appellant was confused and consumed by rage at the time of the crimes. (2 RT Vol. 27A 6114-6122, 6136-6137, 6150-6153.)

Dr. Arnold Purisch, a clinical psychologist, concluded that appellant suffered from Organic Personality Syndrome of the Explosive Type. (2 RT Vol. 27A 6170; 2 RT Vol. 28 6294-6295, 6501-37-6501-40.) Appellant's termination from his job was a significant stressor and contributed to the state of mind that resulted in his explosive behavior. (2 RT Vol. 28 6438, 6501-49-6501-50.) In his highly agitated state, given his mental impairments, he had no ability to control his actions with respect to Nadia. (2 RT Vol. 28 6501-19-6501-22, 6501-43, 6501-46.)

Finally, Dr. Monte Buchsbaum testified that a PET scan administered to appellant showed several areas of abnormality or damage in his brain, and that a person with such damage would have problems controlling his or her impulsivity and rage and inhibiting violence. (2 RT Vol. 28 6306, 6314-6322, 6329.)

At the sanity phase, appellant presented similarly extensive evidence in an attempt to establish that he was legally insane at the time of the offenses. In addition to his own testimony (2 RT Vol. 30 6976-7158), appellant presented the testimony of several expert witnesses, each of whom

opined that he was in fact insane at the time of the offenses. (2 RT Vol. 30 7232; 2 RT Vol. 31 7459, 7504-7506, 7549-7550, 7591-7592; 2 RT Vol. 32 7640, 7664, 7696-7697, 7704.)

Dr. Consuelo Edwards, a psychiatrist, testified that, on the day of Nadia's death, appellant had suffered from a number of impairments, including: Organic Personality Syndrome, Explosive Type; Impulse Control Disorder; a history of Attention Deficit Disorder with hyperactivity; Anti-Social Personality Disorder; and frontal and temporal lobe dysfunction. According to Dr. Edwards, he had suffered from those impairments for most of his life. (2 RT Vol. 30 7161, 7190, 7198-7205, 7225; 2 RT Vol. 31 7301-7305, 7497-7498.) In light of these impairments, Dr. Edwards concluded that appellant was legally insane at the time of the crimes. (2 RT Vol. 30 7232; 2 RT Vol. 31 7347.) While appellant was still in a rage over his perceived firing and other stressors, a conflict arose with Nadia, leading him to flare up and attack her. (2 RT Vol. 30 7232-7236; 2 RT Vol. 31 7335-7336, 7407-7408.) At some point, his agitation had become so great that his awareness of the distinction between right and wrong disappeared. (2 RT Vol. 31 7347, 7353-7355, 7372-7373, 7441.)

Dr. LaCalle testified that appellant was legally insane at the time of the crimes. (2 RT Vol. 31 7504-7506.) According to Dr. LaCalle, on the day of the crimes appellant was in a rage caused by the confrontation with Scott, but his mental impairment escalated to the level of legal insanity when Nadia walked into the bathroom and saw him naked. (2 RT Vol. 31 7507, 7513-7515.) Because appellant suffers from Organic Personality Disorder, Explosive Type, his ability to process information, make decisions and execute them is severely impaired whenever he gets into a rage. (2 RT Vol. 31 7508, 7543-7544.) Given appellant's mental disorder,

moreover, he was legally insane in that he was aware of the nature of his actions, but did not know whether those actions were right or wrong. (2 RT Vol. 31 7511-7515, 7546.)

Dr. Berg testified that appellant was legally insane when he killed Nadia Puente. (2 RT Vol. 31 7549.) He concluded that, on the day of the killing, appellant was under extraordinary stress and that his thinking, reasoning, judgment and control deteriorated over the course of the day. (2 RT Vol. 31 7550.) Dr. Berg opined that appellant met both prongs of the California test for legal insanity: first, appellant did not understand he was killing Nadia at that time, but rather believed he was committing the acts against Maryann Scott; second, appellant's rage at Scott was such that, by the time of his act, he could not know, at least in a moral sense, that what he was doing was wrong. (2 RT Vol. 31 7551, 7556-7759.) Appellant had been struggling all day long with the impulse, desire and plan to kill Scott. While in this very deteriorated position, he was shocked and enraged by Nadia's entry into the bathroom and he "lost it mentally." Appellant believed that Maryann Scott was coming after him, and, feeling ashamed and enraged, he struck out at Nadia. (2 RT Vol. 31 7555, 7580-7581.) He even may have believed he was seeing the Devil. (2 RT Vol. 31 7556.)

Finally, Dr. John Reid Meloy, a psychologist, testified that on March 20, 1989, appellant suffered from Organic Personality Syndrome, Explosive Type, Narcissistic Personality Disorder, and Anti-Social Personality Disorder. (2 RT Vol. 32 7614, 7623, 7654-7663, 7802, 7816-7824; 2 RT Vol. 33 7986.) Dr. Meloy further testified that, because of those mental disorders, appellant was legally insane at the time of the crimes. (2 RT Vol. 32 7664.) Although appellant understood the nature of his act when he kidnaped Nadia, he did not understand the quality (that is, consequences) of

that act because he did not intend to sexually assault her or commit a lewd and lascivious act on her body. Appellant, whose behavior and development had stopped in latency age (i.e., around the age of six through nine years old), identified with Nadia and sought her company to compensate for the feelings of rage and humiliation evoked by the loss of his job; on the other hand, he did not have a history of pedophilia, and his past acts of sexual violence involved "age related females." (2 RT Vol. 32 7629-7632, 7696-7699, 7704.) Moreover, given his mental impairments, he was not capable of distinguishing between right and wrong at the time of the kidnaping. (2 RT Vol. 32 7632-7634.) Dr. Meloy further opined that appellant understood the nature and quality of his acts when he sexually assaulted Nadia and when he drowned her, but, because of his mental disorders, he was not capable of distinguishing right from wrong when he committed those acts. (2 RT Vol. 32 7634-7641.) Appellant had been angry following the confrontation with Maryann Scott, but that anger escalated to a homicidal rage when Nadia walked into the bathroom and saw him nude. Although he may have recognized that it was Nadia, not Maryann Scott, the feelings of rage he felt towards his mother and Scott were now directed at Nadia, a female figure. (2 RT Vol. 32 7749-7764.)

Significantly, a number of the expert witnesses testified that appellant either did not malinger during an evaluation (2 RT Vol. 19 4331, 4333; 2 RT Vol. 21 4903-4904; 2 RT Vol. 26 5782; 2 RT Vol. 28 6303, 6414, 6447, 6469, 6488, 6501-13) or that his mental disorders were genuine despite instances in which he had, or possibly had, malingered or otherwise engaged in manipulative behavior (2 RT Vol. 22 4940, 4970, 5054, 5073; 2 RT Vol. 23 5206-5209, 5255-5258, 5264; 2 RT Vol. 25 5555, 5584-5585, 5595; 2 RT Vol. 27A 6042, 6080-6081, 6086, 6099-6100, 6124, 6126,

6157; 2 RT Vol. 28 6469, 6479-6480, 6483, 6488-6491, 6501-12-6501-13; 2 RT Vol. 30 7191-7193, 7195-7197, 7256-7259, 7271-7272; 2 RT Vol. 33 7999-8000).[86]

In light of the defective instruction, however, it is reasonably likely that the jury found appellant sane – either rendering a verdict that he was sane despite its belief that he was legally insane, or disregarding the defense evidence altogether – simply out of fear that he could be released immediately. For instance, the jury may have agreed with the defense theory that appellant was *temporarily* insane (2 RT Vol. 30 7234-7236; 2 RT Vol. 31 7511-7512, 7550-7553; 2 RT Vol. 33 8167-8171), but feared that hospital officials would find that he had been restored to sanity and release him immediately.[87] Similarly, the jurors may have accepted the prosecutor's argument that appellant had successfully manipulated expert

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[86] The prosecutor presented no expert witnesses at the guilt phase. Moreover, in contrast to the substantial body of defense evidence presented at the sanity phase, the prosecutor called only one witness, Officer Gary Bruce of the Santa Ana Police Department. The sole purpose of Officer Bruce's testimony was to rebut appellant's testimony that he was intimidated when he heard Bruce's partner say "I feel like shooting the bastard" during their interrogation of him. (2 RT Vol. 30 7028-7029; 2 RT Vol. 33 8028-8054.)

[87] The jurors were likely to find the prospect of immediate release especially frightening in light of the extensive evidence that appellant's mental impairments tended to result in sudden, violent rages. (2 RT Vol. 18 4066-4069, 4077-4089, 4091, 4103-4106, 4130-4152, 4169; 2 RT Vol. 19 4195-4197; 2 RT Vol. 22 5070-5071; 2 RT Vol. 23 5129-5130, 5269-5270, 5290-5292; 2 RT Vol. 24 5290-5292, 5331, 5397-5398, 5422; 2 RT Vol. 27A 6114-6122, 6136-6137, 6150-6153; 2 RT Vol. 28 6306, 6314-6322, 6329; 2 RT Vol. 30 7232-7236; 2 RT Vol. 31 7335-7336, 7407-7408, 7507-7508, 7513-7515, 7543-7544, 7555, 7580-7581; 2 RT Vol. 32 7629-7632, 7696-7699, 7704.)

witnesses and others (2 RT Vol. 33 8129, 8137-8138, 8142-8164), leading them to fear that appellant would manipulate hospital officials to gain an immediate release. In either event, the defective jury instruction erroneously left the jury with the impression that appellant could obtain an early release if found legally insane.

Therefore, the sanity verdicts must be vacated, whether they are reviewed under the *Chapman* test or the *Watson* test. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 17; *People v. Kelly*, *supra*, 1 Cal.4th at pp. 537-538; *People v. Dennis*, *supra*, 169 Cal.App.3d at pp. 1139-1140; *People v. Moore*, *supra*, 166 Cal.App.3d at pp. 556-557).

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XI

THE PROSECUTOR'S ARGUMENT REGARDING A SOCIAL CONTRACT MINIMIZED THE JURORS' SENSE OF RESPONSIBILITY REGARDING THE CAPITAL SENTENCING DECISION IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

During his closing argument, the prosecutor referred to John Locke's theory of social contract. In particular, he argued:

> In the old days it used to be if someone stole my horse, I would go steal his horse. Or if someone assaulted my son, I might go assault his son. And what happened, a long time ago, individuals basically handed over their rights, certain rights, to the government. And among those rights were the rights to seek redress for wrongs. And they said, "We as individuals are going to let, in effect, society speak through our laws. We are going to have a set of laws."
>
> And just as if you had your car stolen and someone stole a car, you have an expectation, number one, that there is a law that would correct that wrong; number two, the person if they were caught, would somehow be punished commensurate with that type of wrong. You have that expectation because you are part of that compact or that agreement. We all are. That's what it is, and we have the expectation that the laws in California will be carried out.
>
> So, in effect – in effect, that agreement transfers these rights to the government. And the government has decided in this one case – in this one case in the State of California, we are going to take that right back and we are going to give it back to the people. And that's what you have, the right of punishment and sentencing in a capital-type case.
>
> And it is because of that that your decision, whether it is life without the possibility of parole or the death penalty, is an expression – is an expression of society's attitudes towards

> crimes. Because, if you think about it for a minute, the only way society can say anything about a crime, how they feel about it – good, bad, or otherwise – is how? By punishment.

(2 RT Vol. 34 8660-8661.) The prosecutor went on to argue that this case featured a "combination of the worst" categories of offenses, that is, crimes against children and sexual offenses involving violence. (2 RT Vol. 34 8662.)

As discussed below, the prosecutor's comments lessened the jurors' sense of responsibility regarding their role in assessing a death sentence. These statements violated appellant's rights under the Eighth and Fourteenth Amendments to the federal Constitution.[88]

B. Appellant Was Sentenced by a Jury That Was Operating with a Diminished Sense of Responsibility for Its Penalty Determination

Eighth Amendment jurisprudence demands that a jury making a capital sentencing decision fully appreciate the gravity of its task, i.e., that it is the body responsible for determining whether an individual lives or dies. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329.) The United States Supreme Court has identified several reasons why prosecutorial argument which misleads the jury with respect to this responsibility is constitutionally impermissible. Among other things,

> [e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the

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[88] Although appellant did not object to the prosecutor's comments, this argument is cognizable on appeal. Because appellant's trial took place prior to *People v. Cleveland* (2004) 32 Cal.4th 704, 762, no objection was required to preserve the argument. (*People v. Moon* (2005) 37 Cal.4th 1, 17-18.)

> prosecutor's assurance that [the responsibility for the sentencing decision rests elsewhere]. [Citations.] A defendant might thus be executed, although no sentencer had ever made a determination that death was the appropriate sentence.

(*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 331-332.) In addition, the Court recognized that

> we must also recognize that [such] argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. [Citations.] Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

(*Id.* at pp. 332-333.) This Court has echoed the holding in *Caldwell*, stating that "[a] death judgment is invalid under the Eighth Amendment if imposed by a sentencer that believed it lacked the ultimate moral responsibility to determine the appropriate penalty under all the individual circumstances." (*People v. Melton* (1988) 44 Cal.3d 713, 761.)

Here, the principle addressed in *Caldwell* was undermined by the prosecutor's penalty phase argument. Although the prosecutor in this case did not explicitly tell the jurors that the responsibility for the sentencing decision lay elsewhere, his implication to that effect was clear. Rather than being led to appreciate the true nature of its task, the jurors were led to believe that their duty was to carry out their roles as a proxy for "society,"

and in that capacity to formally reach the verdict (i.e., death) that "society" had already mandated. That is, the prosecutor suggested that, although the social contract had transferred the right to impose punishment from individuals to society, the traditional expectation that a criminal must be punished in kind survives. (2 RT Vol. 34 8660-8661.)

The prosecutor's comments misled the jury as to its discretion and its responsibility in reaching its sentencing verdict by suggesting that they were to act as mere enforcers of the social contract. His argument suggested that the jury's role was to "correct" the wrong in a manner "commensurate with that type of wrong" (2 RT Vol. 34 8661) by reaching a pre-existing decision or mandate to sentence killers to death.

Under these circumstances, the jurors in this case believed that they did not bear the responsibility for determining whether appellant lived or died, but rather that they had a political and moral duty to sentence appellant to death. (See *People v. Farmer* (1989) 47 Cal.3d 888, 924-929, overruled on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6 [prosecutor committed reversible *Caldwell* error by telling the jury that, among other things, "You do not decide life or death. The law does that."]; *People v. Milner* (1988) 45 Cal.3d 227, 253-258 [death sentence reversed because, among other things, the prosecutor committed *Caldwell* error by repeatedly assuring the jurors that they did not have to "shoulder the burden of personal responsibility," that the law "protect[ed]" them from deciding what is "just and right," and encouraged them to "hide" behind the law in determining the sentence after weighing aggravating and mitigating circumstances].)

The error was not cured by the prosecutor's reference to the choice between a sentence of death and one of life imprisonment without the

possibility of parole ("LWOP"). As he characterized the jurors' sentencing decision, they were to choose between death and LWOP to express how they felt about appellant's crime (i.e., "good, bad, or otherwise"). (2 RT Vol. 34 8661.) The jurors necessarily understood this argument to mean that a sentence of LWOP amounted to saying they felt *good* about the crimes, whereas a sentence of death was the commensurate punishment required by the social contract.

Nor was the error cured by any of the jury instructions. In particular, the jury likely read the instructions relating to the weighing of aggravating and mitigating evidence in light of the prosecutor's argument. (See 2 CT Vol. 5 1664-1665 [CALJIC No. 8.85], 1695-1696 [CALJIC No. 8.88 (1989 rev.)].) For instance, they may have weighed the evidence in the manner described in those instructions while operating under the notion that "society" demanded that they reach a verdict of death, or that a vote for LWOP meant they felt "good" about the crimes. This is especially so in light of the great weight the jury would have accorded to the prosecutor's argument. As the Court of Appeal pointed out in *People v. Pitts* (1990) 223 Cal.App.3d 606, 694,

> [a] prosecutor's closing argument is an especially critical period of trial. [Citation.] Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. [Citation.] An argument by the prosecution that appeals to the passion or prejudice of the jury is improper. [Citations.]

Under these circumstances, the prosecutor's comments violated appellant's Eighth and Fourteenth Amendment rights to a fair and reliable penalty trial. Because the state cannot demonstrate that these errors were

harmless, appellant's death sentence must be reversed. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

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XII

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently-phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this mandate requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 19 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See 2 CT Vol. 5 1664-1665 [CALJIC No. 8.85].) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. Here, the prosecutor argued that the death penalty was warranted because, among other things, appellant

planned to kill Nadia because he feared being caught with her; he sought his own sexual gratification; Nadia was nine years old and "had her entire life in front of her"; she was kidnaped close to home; she trusted appellant, who told her that he was a teacher; and, after committing the crimes, appellant placed her body in a trash can, as if she were a piece of trash. (2 RT Vol. 34 8633-8640.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges this Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence, except as to proof of prior criminal acts. (2 CT Vol. 5 1666 [CALJIC No. 8.87 (1989 rev.)].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 536 U.S. 584, 604, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 871, 166 L.Ed.2d 856], now require that any fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make factual findings: (1) that aggravating factors were present; and (2) that the aggravating factors were so substantial as to make death an appropriate punishment. (2 CT Vol. 5 1695-1696 [CALJIC No. 8.88 (1989 rev.)].) Because these additional findings were required before the jury could impose the death sentence,

Apprendi, *Ring*, *Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Ring*, and *Blakely* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Appellant further contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra*, 36 Cal.4th 686, 753.) Appellant requests that this Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (2 CT Vol. 4 1664-1665, 1695-1696), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutionally minimal standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this Court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury.

(See 24 RT 3984; cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance that the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) This Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal

Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause of the federal Constitution and by its irrationality violate both the Due Process Clause and Cruel and Unusual Punishment Clause of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks this Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (2 CT Vol. 5 1666 [CALJIC No. 8.87].) Consequently, any use of unadjudicated criminal activity by a

member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson, supra*, 25 Cal.4th 543, 584-585.) Here, the prosecution argued that the stabbing of Gloria Lara, the choking of Maria Esparza, and appellant's courtroom outburst constituted aggravating evidence the jury was to consider. (2 RT Vol. 34 8622-8625.)

The United States Supreme Court's recent decisions in *Cunningham v. California, supra*, 549 U.S. 270, *Blakely v. Washington, supra*, 542 U.S. 296, *Ring v. Arizona, supra*, 536 U.S. 584, and *Apprendi v. New Jersey, supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks this Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on An Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (2 CT

Vol. 5 1696.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather, it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court has previously rejected this claim. (*People v. Arias*,

supra, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of

forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See (*Brewer v. Quarterman* 2007) 550 U.S. 286, __ [127 S.Ct. 1706, 1712-1724, 167 L.Ed.2d 622]; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question

that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

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

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an

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

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges this Court to reconsider its decisions on the necessity of written findings.

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E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see 2 CT Vol. 5 1664-1665 [CALJIC No. 8.85]; Pen. Code, § 190.3, factors (d) and (g)) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Mills v. Maryland, supra*, 486 U.S. 367, 384; *Lockett v. Ohio, supra*, 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case, including factors (e) [victim a participant in or consented to homicide], (f) [offense committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct], (g) [defendant acted under duress or domination of another person], and (j) [defendant an accomplice and minor participant]. The trial court failed to omit those factors from the jury instructions (2 CT Vol. 5 1664-1665), likely confusing the jury and preventing the jurors from making any reliable determination of the

appropriate penalty, in violation of defendant's constitutional rights.[89] Appellant asks this Court to reconsider its decision in *People v. Cook, supra*, 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (2 CT Vol. 4 1664-1665.) This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's jury, though, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks this Court to reconsider its holding that the trial court

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[89] In denying appellant's automatic motion for modification of the sentence (§ 190.4), the trial court itself commented that these factors were inapplicable. (2 RT Vol. 35 8790-8792.)

need not instruct the jury that certain sentencing factors are relevant only as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require intercase proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules

of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks this Court to reconsider.

H. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms

This Court has repeatedly rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, and "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook, supra*, 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions.

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XIII

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO AGGRAVATED AND/OR CONSECUTIVE TERMS ON COUNTS 2, 3, 5 AND 6 BECAUSE IT RELIED UPON (1) INAPPLICABLE FACTORS AND (2) FACTORS NOT FOUND TRUE BEYOND A REASONABLE DOUBT BY THE JURY

A. Introduction

Appellant was sentenced to death for his conviction of first degree murder with special circumstances. As to the non-homicide offenses for which he was also found guilty, the trial court imposed a determinate sentence as follows: the upper term of 11 years as to the kidnaping (Count 2); a consecutive upper term of 8 years as to the rape (Count 3); the upper term of 8 years as to the sodomy (Count 5), to be served concurrently to the term imposed for Count 2; and, the upper term of 8 years as to the lewd and lascivious act with a child under the age of 14 (Count 6), to be served concurrently to the term imposed for Count 2.[90] (2 RT Vol. 35 8812-8814; 2 CT Vol. 5 1793-1795; 2 CT Vol. 7 2290.)

The court's imposition of the upper terms and/or consecutive sentences as to the non-homicide offenses violated appellant's federal constitutional rights to due process and a jury trial because (1) they were imposed in violation of the sentencing procedures set forth in Penal Code section 1170, subdivision (b), and former rule 420 of the California Rules of Court; and (2) they were based on factual determinations made by the judge, did not meet the required standard of proof, and appellant did not

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[90] As appellant noted in his Statement of the Case, *supra*, the jury at his first trial found him not guilty of attempted rape (Count 4). (1 CT Vol. 2 678-681; 1 CT Vol. 3 827-832.) However, the remaining counts were not renumbered at appellant's retrial. (See 2 RT Vol. 17 3705-3709.)

waive his right to have a jury determine the existence of those facts beyond a reasonable doubt.[91] (U.S. Const., 6th and 14th Amends; Cal. Const., art. 1, § 16; *Cunningham v. California* (2007) 549 U.S. 270, 274-275; *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Ernst* (1994) 8 Cal.4th 441, 448 [waiver of jury trial must be expressly made on the record].) Because these federal constitutional errors were not harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), this Court should vacate appellant's sentences as to Counts 2, 3, 5 and 6, and impose instead the midterm sentence for each offense. Additionally, the order that Counts 2 and 3 run consecutively should be vacated and concurrent terms imposed instead. In the alternative, this Court should remand the matter for re-sentencing in compliance with the Sixth and Fourteenth Amendments.

B. The Sentencing Hearing

Following its denial of appellant's motion for new trial and his application to modify the verdict pursuant to Penal Code section 190.4, subdivision (e), the trial court heard a statement by the victim's mother. (2 RT Vol. 35 8802-8802.) Following a recess, the court heard a statement by appellant, who expressed remorse for the crimes and maintained that they had occurred in the manner he described in his testimony, specifically, that he did not know what he was doing. (2 RT Vol. 35 8803-8804.) The court then stated that it had read both of the probation reports prepared in the case. (2 RT Vol. 35 8804; see also 2 CT Vol. 2 484-523 [pre-sentence

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[91] Former rules 420, 421 and 423 of the California Rules of Court, which were in effect at the time of appellant's trial, have since been revised and renumbered as rules 4.420, 4.421 and 4.423. The revisions were relatively inconsequential and do not affect the analysis set forth herein.

report filed on April 30, 1992]; 2 CT Vol. 6 1797-1843 [supplemental pre-sentence report filed on August 27, 1993].)[92] Finally, the court heard arguments by both counsel. (2 RT Vol. 35 8805-8811.) No further evidence was presented at the time of sentencing.

The trial court sentenced appellant to death for the murder of Nadia Puente, as charged in Count 1. (2 RT Vol. 35 8814.) As to the non-homicide counts, the trial court imposed an aggregate determinate sentence of 19 years. The trial court selected Count 2 (kidnaping for the purpose of child molestation (§ 207, subd. (b)) as the principal term, and explained that it was imposing the upper term of 11 years because it found that aggravating circumstances outweighed mitigating circumstances.

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[92] The supplemental pre-sentence report set forth the following "Circumstances in Aggravation," pursuant to former rule 421: "[t]he crimes involved a high degree of cruelty, viscousness [sic], and callousness in that the defendant raped and sodomized the victim before killing her" [rule 421, subd. (a)(1)]; "[t]he victim was particularly vulnerable as she was only nine years of age and the defendant told her that he was a teacher and asked for her help, thus gaining her confidence" [rule 421, subd. (a)(3)]; "[t]he fact that the defendant appears to have attempted to entice another girl into his car by telling her that he was a teacher shortly before kidnapping the victim, indicates planning, sophistication, and professionalism" [rule 421, subd. (a)(8)]; and, "[t]he defendant has engaged in violent conduct which indicates that he is a serious danger to society" [rule 421, subd. (b)(1)]. The report also set forth the following "Circumstances in Mitigation," pursuant to former rule 423: "[t]he defendant claims the crime is mitigated because the victim initiated the contact with him and willingly went to the motel room" [rule 423, subd. (a)(2)]; "[t]he defendant has an insignificant prior criminal record" [rule 423, subd. (b)(1)]; and, "[t]he defendant claims to be suffering from a mental condition that significantly reduced his culpability for the crime" [rule 423, subd. (b)(2)]. (2 CT Vol. 6 1840-1841.) The aggravating and mitigating circumstances set forth in the original pre-sentencing report were essentially identical to those set forth in the supplemental report. (2 CT Vol. 2 520-521.)

Specifically, the court identified appellant's lack of a criminal record, the fact that he had "mental problems to a certain extent," and his early acknowledgment of guilt as mitigating circumstances, and the following circumstances as aggravating: the vulnerability of the victim; appellant planned and premeditated the crime; and appellant took advantage of a position of trust in order to perpetrate the crime. (2 RT Vol. 35 8812-8813.) As to Count 3 (forcible rape (§ 261, subd. (2)), the trial court sentenced appellant to a consecutive upper term of 8 years. According to the court, a consecutive term for Count 3 was permissible under section 667.6, subdivision (c). In addition, the trial court found that a consecutive term was permissible because the rape and the kidnaping occurred at different times and places, and appellant had numerous opportunities to think about what he was doing after picking up Nadia. (2 RT Vol. 35 8813-8814.) As to Counts 5 (sodomy (§ 286, subd. (c)) and 6 (lewd and lascivious acts with a child under the age of 14 (§ 288, subd. (a)), the trial court imposed concurrent upper terms of 8 years. (2 RT Vol. 35 8814.)

C. The Case Should be Remanded for Resentencing Because At Least Two of the Factors Used by the Court to Impose the Upper Term on Count 2 Were Inapplicable and the Trial Court Gave No Reason As to Why It Imposed the Upper Terms on Counts 3, 5 and 6

California's Determinate Sentencing Law ("DSL") permits three related sentencing choices. (§ 1170, subd.(a)(3).) Section 1170, subdivision (b), requires that the court select the middle term unless there are mitigating or aggravating circumstances (see *People v. Leung* (1992) 5 Cal.App.4th 482, 508; Cal. Rules of Court, former rule 420, subd. (a)), and provides in relevant part:

> When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order

> imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.

Former rule 420 stated in relevant part:

> (a) . . . The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation. [¶] (b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. . . . [¶] (d) A fact that is an element of the crime may not be used to impose the upper term. [¶] (e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

As noted in footnote 92, *supra*, circumstances in aggravation were set forth in former rule 421 and circumstances in mitigation were set forth in former rule 423.

Here, at least two of the aggravating factors arguably relied upon by the court in imposing the upper term as to Count 2 were inapplicable. First, the trial court erred in relying upon Nadia's vulnerability to impose the upper term as to the conviction for kidnaping for the purpose of child molestation. (2 RT Vol. 35 8813; see also 2 CT Vol. 2 520; 2 CT Vol. 6 1840.) This is so whether the court viewed Nadia as vulnerable based upon her age, the fact that she trusted appellant because of his representation that he was a teacher, or both.[93]

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[93] Although defense counsel failed to object to the sentencing error discussed in this section, no objection was then required to preserve issues (continued...)

It is well established that a fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term. (See, e.g., *People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 [noting that vulnerability based on age is generally not a proper sentencing factor where age range is an element of the offense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1159 [court erred in relying on victim's age as a factor in aggravation in imposing the upper term as to section 288 charges]; *People v. Ginese* (1981) 121 Cal.App.3d 468, 477 [the trial court erred in using the fact of the victims' minority to impose the upper term on two child molestation counts]; Cal. Rules of Court, rule 4.420, subd. (d) [formerly rule 441, subd. (d)].) Because the elements of section 207, subdivision (b), include the kidnaping of a child under the age of 14, rule 441, subdivision (d), operated to preclude the imposition of the upper term based on Nadia's age.

People v. Flores (1981) 115 Cal.App.3d 924 is illustrative. There, the Court of Appeal held that the trial court erred in considering the factors that the victim was particularly vulnerable and was a minor in sentencing the defendant, who had been convicted on his guilty plea of violating Penal Code section 288a, subdivision (b)(2) (oral copulation by person over age of 21 with person under age of 16), to the upper term. (*Id.* at p. 927.) In so holding, the Court of Appeal observed that section 288a makes it clear that the Legislature already has determined that all persons of specified ages are particularly vulnerable by reason of their age alone and consequently has provided increased punishment for offenses committed against them.

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[93](...continued)
relating to defects in the trial court's statement of reasons. (*People v. Scott* (1994) 9 Cal.4th 331, 357-358.)

(*Ibid.*)[94]

It is equally clear that, by specifically proscribing the kidnaping of children under the age of 14 for the purpose of child molestation, the Legislature has determined that such children are particularly vulnerable. (§ 207, subd. (b).)[95] Moreover, as it did with section 288a, the Legislature has provided for increased punishment in cases involving the kidnaping of children under the age of 14. (Compare § 207, subd. (a) [kidnapping punishable by imprisonment for three, five, or eight years] and § 207, subd. (b) [except under specified circumstances not present here, kidnapping of a child under the age of 14 punishable by imprisonment for 5, 8, or 11 years].)

To the extent that the trial court's finding of vulnerability was based upon evidence that appellant gained Nadia's trust by telling her he was a teacher, imposition of the upper term was similarly improper. According to the pre-sentence reports, upon which the trial court presumably relied (Cal. Rules of Court, rule 409 [now rule 4.409]), Nadia was particularly vulnerable because, in addition to her age,"the defendant told her that he

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[94] Significantly, Penal Code section 288a does not expressly state this legislative determination. Instead, the Court of Appeal in *Flores* appears to have reached this conclusion based upon (1) the criminalization of the conduct proscribed, as codified in section 288, subdivision (b)(2), and (2) the fact that the Legislature had provided for an increased sentence for such conduct. (*People v. Flores*, *supra*, 115 Cal.App.3d at p. 927.)

[95] Penal Code section 207, subdivision (b), provides that "[e]very person who, for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping."

was a teacher and asked for her help, thus gaining her confidence." (2 CT Vol. 2 520; 2 CT Vol. 6 1840.) However, this rationale relates directly to the elements of section 207, subdivision (b), which proscribes the kidnaping of a child by means of "false promises, misrepresentations, or the like." Moreover, although the imposition of an upper term based on vulnerability may be permissible where the trial court makes a finding as to the victim's *specific* fear or dependency, no such findings were made by the trial court in this case. (Cf. *People v. Estrada* (1986) 176 Cal.App.3d 410, 418 [the trial court properly imposed the upper term as to sex charges where it expressly found that the victim was very young, shy, withdrawn and resistant to testifying]; *People v. Hetherington* (1984) 154 Cal.App.3d 1132, 1141-1142 [the trial court properly relied on the victims' vulnerability in imposing the upper term where the defendant ran a day-care center and molested children in his care].) Therefore, rule 441, subdivision (b), operated to preclude the imposition of the upper term. (See *People v. Quinones*, *supra*, 202 Cal.App.3d at pp. 1159-1160 [because the trial court did not state that the victim's fear or dependency was the basis for aggravation of the sentence for section 288 charges, imposition of the upper term was error]; *People v. Ginese*, *supra*, 121 Cal.App.3d at pp. 476-477 [same].)

Second, the trial court erred in relying upon the "fact" that appellant took advantage of a position of trust to impose the upper term as to Count 2. (2 RT Vol. 35 8813.) Appellant had no "special status" vis-a-vis Nadia within the meaning of rule 421, subdivision (a)(11). (Cf. *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1694-1695, overruled on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123 [rejecting defendant's argument that he had no "special status" vis-a-vis the victim where he had

cultivated a relationship with the four-year-old victim over a long period of time]; *People v. Franklin* (1994) 25 Cal.App.4th 328, 338 [defendant was victim's stepfather]; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1577 [defendant was victim's biological father].)

Finally, the trial court failed to state its reasons for imposing concurrent upper terms as to Counts 3, 5 and 6, in violation of Penal Code section 1170, subdivisions (b) and (c). (See also Cal. Rules of Court, rule 4.406, subd. (b)(5).) In the absence of a statement of reasons, it cannot be assumed that the trial court's reasons, if any, for elevating the sentences on those counts were appropriate.[96]

It is reasonably probable that the trial court would have chosen lesser sentences had it known that some of its reasons were improper. (See *People v. Price* (1991) 1 Cal.4th 324, 492.) Accordingly, this case should be remanded for reweighing of the factors in aggravation against the factors in mitigation, and for resentencing based upon that reweighing. (*People v. Ginese*, *supra*, 121 Cal.App.3d at p. 479; *People v. Flores*, *supra*, 115 Cal.App.3d at p. 927.) Indeed, as the Court of Appeal noted in *Flores*, "Where two of three articulated factors are erroneous, remand for resentencing is appropriate, particularly when, as here, the mitigating factor of 'no prior record' is present." (*Ibid.*)

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[96] The trial court's reference to Penal Code section 667.6, subdivision (c), related to its decision that appellant be sentenced to a consecutive sentence on Count 3, not to its decision that he be sentenced to the upper term on that count.

D. The Upper Terms and/or Consecutive Sentences Imposed by the Trial Court Violated the Federal Constitution Because the Court Relied on Factors Not Found True Beyond a Reasonable Doubt by a Jury

In *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, the United States Supreme Court held that "[a]ny fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Four years later, in *Blakely v. Washington*, *supra*, 542 U.S. at pp. 303-304, the United States Supreme Court held that the trial court's use of an aggravating factor not found to be true by the jury to increase the defendant's sentence above the statutory maximum, other than the fact of a prior conviction, violated the rule articulated in *Apprendi*.[97]

In January, 2007, the United States Supreme Court held that California's Determinate Sentencing Law ("DSL") violates a defendant's federal constitutional right to a jury trial and proof beyond a reasonable doubt by allowing the judge to impose an aggravated sentence based on facts found by a judge by a preponderance of the evidence. (*Cunningham v. California*, *supra*, 549 U.S. at pp. 288-289.) As the Supreme Court in *Cunningham* stated, "[b]ecause circumstances in aggravation are found by the judge not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt . . . the [California] DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact

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[97] Because appellant's trial and sentencing occurred prior to *Blakely v. Washington*, *supra*, 542 U.S. 296, the instant argument is cognizable on appeal even though appellant raised no objection in the trial court. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4; *People v. Black* (2007) 41 Cal.4th 799, 810-812.)

that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*Ibid.*)[98] The *Cunningham* Court reemphasized that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" (*Id.* at p. 288, quoting *Blakely v. Washington, supra*, 542 U.S. at p. 303.)

The Supreme Court's decision in *Cunningham v. California* logically applies to the imposition of both the aggravated terms and the consecutive terms. *Cunningham* was based on a criminal defendant's constitutional right under the Sixth Amendment to have a jury determine beyond a reasonable doubt any fact "that exposes a defendant to a greater potential sentence." (*Cunningham v. California, supra*, 549 U.S. at p. 281, citing *Jones v. United States* (1999) 526 U.S. 227 and *Apprendi v. New Jersey, supra*, 530 U.S. 466; cf. *People v. Black* (2007) 41 Cal.4th 799, 823 [concluding that *Cunningham* does not apply to the imposition of consecutive sentences].) Because a criminal defendant is not exposed to

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[98] The *Cunningham* Court disapproved of this Court's opinion in *People v. Black* (2005) 35 Cal.4th 1238, and held that neither (1) a trial court's broad discretion to determine what facts may support an enhanced sentence, (2) the benefits that criminal defendants may have received under California's DSL, nor (3) a defendant's right to a jury trial on statutory enhancements shielded the DSL from constitutional scrutiny. (*Cunningham v. California, supra*, 549 U.S. at p. 290.) Moreover, the Supreme Court in *Cunningham* found that California's DSL was unconstitutional and infringed on a criminal defendant's Sixth and Fourteenth Amendment rights to a trial by a jury because it permitted a judge to impose a sentence in excess of the statutory maximum based on a fact, other than a prior conviction, that was not found by a jury beyond a reasonable doubt nor admitted by the defendant. (*Id.* at pp. 274, 293.)

aggravated or consecutive sentencing absent a finding of extrinsic facts, the principles set forth in *Cunningham* regarding aggravated terms and the requirement that the fact-finding be by a jury beyond a reasonable doubt apply as well to consecutive sentencing. Just as *Cunningham* made clear that the midterm is the presumptive choice when sentencing a defendant pursuant to California's DSL, concurrent sentences are the default absent reasons to impose a consecutive term and fall within *Cunningham/Blakely/Apprendi* restrictions as well.

Because California expressly forbids the dual use of facts included in the element of the offense to impose the aggravated term (Cal. Rules of Court, former rule 420, subd. (d) [current rule 4.420, subd.(d)]), the DSL necessarily requires facts beyond those determined by the jury and contained in the judicial record.

1. The Imposition of the Upper Term Sentences for Counts 2, 3, 5 and 6 Violates the Federal Constitution under *Cunningham*, *Blakely* and *Apprendi*

In this case, as noted above, the trial court elevated the sentence on Count 2 (§ 207, subd. (b)) from the midterm of 8 years to the upper term of 11 years (§ 208, subd. (b)) because it found that aggravating circumstances outweighed mitigating circumstances. The trial court elevated the sentence on Count 3 (§ 261, subd. (2)) from the midterm of 6 years to a consecutive upper term of 8 years (§ 264, subd. (a)) pursuant to section 667.6, subdivision (c), and because appellant had had numerous opportunities to think about what he was doing after picking up Nadia. Finally, the trial court elevated the sentences on Counts 5 (§ 286, subd. (c)) and 6 (§ 288, subd. (a)), each of which had a midterm of 6 years, to the upper terms of 8 years. The trial court failed to state any reasons as to why it was imposing

the upper terms on those counts. (2 RT Vol. 35 8812-8814.)

In *People v. Sandoval* (2007) 41 Cal.4th 825, 837-838, this Court found that the trial court had erred in imposing an upper term sentence because

> [n]one of the aggravating circumstances cited by the trial court come within the exceptions set forth in *Blakely* [*v. Washington* (2004) 542 U.S. 296]. Defendant had no prior criminal convictions. All of the aggravating circumstances cited by the trial court were based upon the facts underlying the crime; none were admitted by defendant or established by the jury's verdict.

The same analysis applies here. As appellant established in the previous section, the trial court's use of the "vulnerability" and "position of trust" factors with respect to Count 2 was improper. Moreover, none of the aggravating factors set forth in the pre-sentence reports or the trial court's statement of reasons was admitted by appellant or necessarily reflected in the jury verdict. (Cf. *People v. Black*, *supra*, 41 Cal.4th 799, 820 [holding that the defendant's criminal history and the jury's finding that the offense involved the use of force or violence established two aggravating circumstances that independently satisfied Sixth Amendment requirements, rendering him eligible for the upper term]; *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1516 [the defendant's rights under *Cunningham* were not violated where valid aggravating factors, i.e., prior convictions and a prior prison term, were present].)

Notably, two of the factors listed in the pre-sentence reports and/or expressly relied upon by the trial court (2 CT Vol. 2 520; 2 CT Vol. 6 1840; 2 RT Vol. 35 8812-8813) – i.e., the particular vulnerability of the victim (rule 421, subd. (a)(3)) and "violent conduct which indicates that [appellant] is a serious danger to society" (rule 421, subd. (b)(1)) – were

the two facts specifically found in *Cunningham* to require submission to a jury and proof beyond a reasonable doubt. (*Cunningham v. California*, *supra*, 127 S.Ct. at p. 860 & fn. 1.) These factors were likewise invalid here because they had not been found by the jury beyond a reasonable doubt.

As set forth above, *Apprendi* and *Blakely* established the bright-line rule that any fact which elevates the sentence for a criminal offense above the proscribed statutory maximum term must be submitted to and found true by the jury beyond a reasonable doubt. Because *Cunningham* holds that the bright-line rule applies to findings of aggravating factors under California's DSL, the upper terms imposed as to Counts 2, 3, 5 and 6 cannot stand. (*Cunningham v. California*, *supra*, 127 S.Ct. at pp. 873-877.) Accordingly, the aggravated terms on those counts should be vacated and the respective midterms imposed instead.

2. The Full Maximum Consecutive Term Imposed As to Count 3 Pursuant to Section 667.6, Subdivision (c), Violated the Federal Constitution and Should Be Vacated

Not only did the trial court impose the upper term of 8 years for the rape conviction (Count 3), but the court set the term to run fully and consecutively to the upper term imposed as to the kidnaping conviction (Count 2), pursuant to section 667.6, subdivision (c), reasoning that appellant had numerous opportunities between the two crimes to think about what he was doing. (2 RT Vol. 35 8813.) However, as noted above, none of the circumstances set forth in the pre-sentence reports or in the trial court's statement of reasons, including the notion that appellant had many opportunities to consider what he was doing, had been found true beyond a reasonable doubt by a jury.

Section 1170.1 provides that where a criminal defendant is convicted of two or more felonies, and consecutive terms are to be imposed, the sentence shall generally consist of a principal term, one or more subordinate terms, and any applicable enhancement terms. Section 1170.1 further provides:

> The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed.

(§ 1170.1, subd. (a).) Clearly, the plain language of section 1170.1 (i.e., use of the word "shall") creates a mandatory sentencing presumption in favor of imposing only one-third of the middle term for all consecutive/subordinate terms imposed.

Section 667.6, on the other hand, provides for the imposition of full, separate and consecutive terms for each subordinate term for certain enumerated sex offenses, "in lieu of the term provided in section 1170.1." (§ 667.6, subds. (c) and (d).)[99] Thus, section 667.6 allows for an upward departure from the general and more lenient consecutive sentencing provisions of section 1170.1, under certain specified circumstances.

Imposition of full, separate and consecutive sentences under section 667.6, subdivision (c), rests within the court's discretion, but the court is nonetheless required to first make specific factual findings justifying the

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[99] Section 667.6, subdivision (c) provides, in relevant part:

> In lieu of the term provided in Section 1170.1, a full separate and consecutive term may be imposed for each violation of . . . subdivision (a) of Section 261 . . . [or] Section 286 . . . whether or not the crimes were committed during a single transaction.

"much harsher sentencing measure" than the presumptive consecutive sentencing scheme prescribed by section 1170.1. (*People v. Belmontes* (1983) 34 Cal.3d 335, 344-348; *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1489; *People v. Smith* (1984) 155 Cal.App.3d 359; see California Rules of Court, former rules 425 and 426 [current rules 4.425 and 4.426].)[100] This Court has recognized that a

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[100] Former rule 425 stated in relevant part that:

> Criteria affecting the decision to impose consecutive rather concurrent sentences include:
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> (a) [Criteria relating to crimes] Facts relating to crimes, including whether or not:
>
> (1) The crimes and their objectives were predominantly independent of each other;
>
> (2) The crimes involved separate acts of violence or threats of violence.
>
> (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.
>
> (b) [Other criteria and limitations] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences.

Former rule 426, subdivision (b) provided, in relevant part:

> [T]he sentencing judge shall . . . determine whether to impose a full, separate and consecutive sentence under 667.6(c) for the violent sex crime or crimes in lieu of including the violent

(continued...)

decision to sentence under section 667.6, subdivision (c), requires the trial court to make a series of sentencing choices, the basis of which must be stated for the record:

> In deciding whether to sentence consecutively or concurrently, and if consecutively, whether to do so under section 1170.1 or under the harsher full term provisions of subdivision (c) of section 667.6, the court is obviously making separate and distinct decisions. [Footnote omitted.] A decision to sentence under section 667.6, subdivision (c) is an additional sentence choice which requires a statement of reasons separate from those justifying the decision merely to sentence consecutively.

(*People v. Belmontes*, *supra*, 34 Cal.3d at pp. 347 & 348.) The decision to impose full, consecutive and separate terms "must be made thoughtfully because the Legislature obviously intended by the alternative language in section 667.6, subdivision (c), that the more punitive statute be utilized for the more serious sex offenders." (*People v. Wilson* (1982) 135 Cal.App.3d 343, 353.)

The imposition of "full strength consecutive sentencing" for sex offenses under section 667.6, subdivision (c), requires judicial fact-finding beyond what is implicit in an underlying jury verdict. Thus, like the DSL sentencing scheme for aggravated offenses, this particular sentencing

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[100](...continued)
sex crime or crimes in the computation of the principal and subordinate terms under section 1170.1(a). A decision to impose a fully consecutive sentence under section 667.6(c) is an additional sentence choice which requires a statement of reasons separate from those given for consecutive sentences, but which may repeat the same reasons. The sentencing judge is to be guided by the criteria listed in rule 425, which incorporates rules 421 and 423, as well as any other reasonably related criteria as provided in rule 408.

procedure violates a criminal defendant's constitutional rights to a jury trial and due process of law according to the bright-line rule of *Apprendi v. New Jersey*, *supra*, and *Blakely v. Washington*, *supra,* which has been recently reaffirmed by *Cunningham v. California*, *supra.*

The reasoning of *Cunningham v. California*, *supra*, regarding upper term sentencing of California's DSL applies to the imposition of a consecutive term. There is no qualitative difference between the manner in which California's sentencing scheme allows for the imposition of an upper term following a determination of aggravating circumstances and the manner in which California allows for the imposition of maximum, full and consecutive terms for sex offenses under section 667.6, subdivision (c). Just as section 1170 provides a statutory presumption in favor of the midterm sentence (*Cunningham v. California*, *supra*, 127 S.Ct. at pp. 861-862), section 1170.1, which is the general operative statute for aggregate and consecutive sentencing, provides for a statutory presumption in favor of one-third the midterm for all subordinate terms (*People v. Miller* (2006) 145 Cal.4th 206, 214). Under section 1170.1, the sentencing judge may only depart from the presumptive term, thus proceeding to aggravate a sex offense via section 667.6, subdivision (c) (imposing full, separate and consecutive terms), after specific additional facts justifying the departure from the norm are stated on the record. (See *People v. Fernandez*, *supra*, 226 Cal.App.3d at p. 682.) This procedure is identical to the California DSL procedure for upper term sentencing that *Cunningham* invalidated because there was no finding by the jury beyond a reasonable doubt with regard to the justification for the departure upward.

The sentencing structure for aggravated sex offenders in California presents the same concerns that were addressed in *Apprendi.* As the

Supreme Court aptly observed:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not -- at the moment the State is put to proof of those circumstances -- be deprived of protections that have, until that point, unquestionably attached.

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 484.) The sentencing scheme under section 667.6, subdivision (c), unconstitutionally deprives defendants of due process and jury trial protections because it gives the sentencing judge discretion to impose full, aggravated and consecutive terms by a preponderance of the evidence. As the Supreme Court recognized in *Cunningham*:

> [B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment is not satisfied.

(*Cunningham v. California*, *supra*, 549 U.S. at p. 290.)

In the present case, the full, consecutive upper term of 8 years for the rape conviction imposed by the trial court pursuant to section 667.6, subdivision (c), violated appellant's rights to due process and a jury trial under *Apprendi/Blakeley/Cunningham*. The sentence imposed for that count should therefore be vacated, and the mid-term as well as concurrent sentencing imposed.

E. The Lack of Jury Fact-finding and/or Proof Beyond a Reasonable Doubt Was Not Harmless in This Case

The denial of the right to a jury trial as to the aggravating circumstances relied upon by the trial court to aggravate the determinate sentence was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *Washington v. Recuenco* (2006) 548 U.S. 212, 222 [pursuant to *Blakely*, failure to submit sentencing factor to jury may be reviewed for harmlessness under *Chapman v. California*]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Apprendi* error subject to harmless error review under *Chapman*].)

In appellant's case, the prosecution cannot establish that the error was harmless beyond a reasonable doubt. It is speculative whether the jury would have found a sufficient number of the aggravating factors to be true. Each of the aggravating circumstances in this case rested upon an at least "somewhat vague or subjective standard," and therefore there can be no "confidence that, had the issue been submitted to the jury, the jury would have assessed the facts in the same manner as did the trial court." (*People v. Sandoval, supra*, 41 Cal.4th at p. 840.)

A number of the circumstances listed in the probation report and/or the trial court's statement of reasons – such as the "high degree of cruelty, viscousness [*sic*], and callousness" of the crimes, vulnerability of the victim, and violence, were inherent in the crimes themselves and could not be used as an aggravating circumstance for sentencing. (*Cunningham v. California, supra*, 549 U.S. at p. 288 [fact that is an element of crime or essential to jury's guilt determination may not be used to impose upper term]; Cal. Rules of Court, former rule 420, subd. (d).) Moreover, without elaboration as to why the manner in which the kidnaping was carried out

made that crime any worse than it ordinarily would have been, it is not likely that the jury would have found this factor applicable beyond a reasonable doubt. (*People v. Fernandez*, *supra*, 226 Cal.App.3d at p. 680, citing *People v. Young* (1983) 146 Cal.App.3d 729, 734 [aggravating factor must make offense distinctively worse than it would have been].) Finally, as in *Sandoval*, the level of appellant's personal culpability was "hotly contested" (based upon, in appellant's case, extensive testimony regarding his mental impairments). (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 843.)

Under these circumstances, the state cannot demonstrate that the denial of appellant's right to a jury trial and proof beyond a reasonable doubt was harmless.

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XIV

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even if this Court should find that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of both guilt and penalty phase proceedings and warrants reversal of the judgment of conviction, sanity verdict and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 ["The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; *People v. Criscione* (1981) 125 Cal.App.3d 275, 293 [cumulative prejudice from repeated acts of prosecutorial misconduct required reversal of sanity verdict]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [addressing claim that cumulative errors so infected "the trial with unfairness as to make the resulting conviction a denial of due process"].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386

U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The Ninth Circuit Court of Appeals has pointed out that, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) The court's observation is uniquely applicable to this case, given not only the sheer number of substantial errors, but the way in which those errors operated *synergistically* to deny appellant his state and federal constitutional rights. (See Arguments I through XIII, each of which is hereby incorporated by reference as if fully set forth herein.)

Appellant's trial was tainted from the start because the prosecutor exercised his peremptory challenges in a discriminatory manner, denying appellant his state and federal constitutional rights to equal protection and to a jury drawn from a representative cross-section of the community. (Argument I, *supra.*)

At the guilt phase, the defense conceded that appellant did the acts surrounding the death of the victim. They sought only to raise a reasonable doubt about whether appellant had the required mental states for the charged crimes and special circumstances. The defense did so by presenting lay witnesses who showed that appellant had a lifelong history of bizarre behavior, including acts of violence committed during episodes of sudden rage evoked by trivial if any provocations. Moreover, the defense presented an array of expert witnesses to show that, as a result of brain damage, mental disorders, and the influence of drugs and alcohol, appellant

exploded into a sudden, intense rage and could not control his actions, and therefore did not have the requisite mental states at the time of the crimes.

This evidence should have sufficed to raise a reasonable doubt about appellant's mental state. However, due to a combination of judicial errors the jury never weighed and considered this evidence, and never fully understood their obligations with regard to determining appellant's mental state. The errors in this case prevented appellant from getting a fair trial on the issue of mental state in at least two related ways.

First, some of the errors caused the jury to reject, even ignore, appellant's mental health testimony. Among other things, the trial court permitted the prosecutor to elicit testimony bearing upon the issue of sanity, rather than appellant's guilt or innocence, thereby confusing the jury's guilt phase determination of his mental states (Argument II, *supra*); the trial court admitted evidence regarding a defense expert's disposition of discovery material in a prior case, permitting the prosecutor to unfairly impeach her credibility (Argument III, *supra*); the trial court precluded that expert witness from giving her opinion regarding the extent to which events in appellant's workplace might have triggered the offenses (Argument IV, *supra*); the trial court precluded lay witnesses from testifying to opinions which would have lent credence to the defense position that appellant's mental disorders were genuine and longstanding (Argument V, *supra*); the trial court erred in giving a prejudicial jury instruction regarding the appointment of expert witnesses (Argument VI, *supra*); the trial court denied appellant's request for a limiting instruction to guide the jury's consideration of his prior acts of misconduct (Argument VII, *supra*); and

the trial court erred in admitting hearsay testimony that appellant registered for two guests at a motel prior to the crimes, thereby introducing spurious "evidence" of planning and intent (Argument VIII, *supra*).

Second, some of the errors allowed the jury to consider irrelevant, inflammatory information which have led the jury to convict appellant even if they had a reasonable doubt as to his guilt. (Arguments VII and VIII, *supra*.)

Any of the guilt phase errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be found harmless beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282, *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Taken separately or in combination, the errors and violations of appellant's constitutional rights deprived appellant of a fair trial, due process and a reliable determination of guilt. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The cumulative effect of the errors in this case so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's convictions, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding that cumulative effect of the

deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

Those errors create not only a reasonable possibility, but also a reasonable probability that errors influenced the verdict. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, these errors considered cumulatively establish violation of appellant's right to a fair trial and the convictions and special circumstance findings must be reversed.

The possibility that the jury did not weigh and consider the defense mental state evidence also affected the sanity phase. The prosecutor's improper attacks on defense counsel and the expert witnesses would have led the jury to disregard their testimony at the sanity phase, which would have been fatal to appellant's case. Not only did expert testimony represent the bulk of his sanity phase evidence, but it was critical to a proper consideration of appellant's sanity phase testimony. Moreover, appellant was denied a fair sanity trial because the trial court refused his request that the jurors be instructed that the law would preclude his immediate release if they were to find him legally insane. (Argument X, *supra*.)

Finally, the possibility that the jury did not weigh and consider the mental health evidence offered in mitigation also affected the penalty phase. In a case involving the kidnaping, sexual assault and murder of a 9-year-old girl, it was critical that the jury meaningfully consider the mental health evidence in order to determine the appropriate sentence. The errors by the prosecutor and the court, however, prevented the jury from doing so,

undermining the reliability of the death verdict. The reliability of the penalty verdict must be called further into question in light of the prosecutor's suggestion during closing argument that the jury was bound by a social contract, an argument which the jurors would have understood to mean that they were to act as society's agents and that the responsibility for the sentencing decision lay elsewhere. (Argument XI, *supra.*)

Thus, the fundamentally flawed guilt verdicts contributed to an unreliable determination of sanity and penalty by the jury. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Stringer v. Black* (1992) 503 U.S. 222, 230-232; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown*, *supra*, 46 Cal.3d at p. 448; *People v. Criscione*, *supra*, 125 Cal.App.3d at p. 293 .)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing penalty phase].) In this context, this Court has expressly recognized that evidence that may not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life

> imprisonment or death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in the absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137, overruled on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2, and disapproved of on another ground in *People v. Daniels* (1991) 52 Cal.3d 815, 866; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The case in aggravation presented at the penalty phase was not so substantial compared to the evidence in mitigation that the death penalty was a foregone conclusion. In particular, the evidence of appellant's culpable mental state was not overwhelming, as the trial court itself conceded.[101] However, there is at least a reasonable possibility that the foregoing errors, singly and in combination, had a continued prejudicial effect upon the jury's consideration of the evidence presented at penalty, as

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[101] In granting appellant's motion for a new trial following his first trial, the trial court commented that although the evidence was overwhelming that appellant committed the acts which caused the victim's death, it was not overwhelming on the mental state issues. (RT Vol. AA 5238.)

well as upon the jury's ultimate decision to return a sentence of death. Thus, aside from the unreliability of the guilt verdicts and special circumstance finding due to the errors at the guilt phase, those errors introduced further unreliability into the penalty phase and the penalty decision. Reversal of the death judgment is mandated here because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown*, *supra*, 46 Cal.3d at p. 466.)

The errors at appellant's trial resulted in a process distorted beyond constitutional limits. In particular, the trial judge erroneously admitted evidence and instructed the jury in ways that denied appellant proper consideration of his mental health evidence.

Respondent cannot show beyond a reasonable doubt that errors improperly gutting appellant's mental health evidence, coupled with penalty phase errors including the prosecutor's appeal to a so-called social contract, did not contribute to the death verdict. The constitutional errors could not have been harmless. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258.) Therefore, the judgment of death must be vacated.

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

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CONCLUSION

For all the reasons stated above, the entire judgment in this case must be reversed.

DATED: December15, 2008

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1)(A))

I, GARY D. GARCIA, am the Deputy State Public Defender assigned to represent appellant RICHARD LUCIO DeHOYOS in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 81,648 words in length.

DATED: December 15, 2008

GARY D. GARCIA
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. DeHOYOS* No. S034800

I, VICTORIA MORGAN, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S OPENING BRIEF

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

DOUGLAS P. DANZIG
Deputy Attorney General
P. O. Box 85266
San Diego, CA 92186

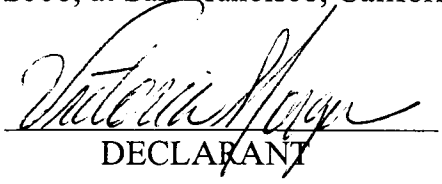
MICHAEL LAURENCE
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

RICHARD L. DeHOYOS
San Quentin State Prison
Box H-91600
San Quentin, CA 94974

Each said envelope was then, on December 15, 2008, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on December 15, 2008, at San Francisco, California.



DECLARANT