COPY SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

BRIAN DAVID JOHNSEN,
Defendant and Appellant.

DEATH PENALTY CASE

No. S040704

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment and Death Sentence
of the Superior Court of the State of California
County of Stanislaus, No. R239682

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. BRIAN DAVID JOHNSEN, Defendant and Appellant.	**DEATH PENALTY CASE** No. S040704 (Stanislaus County Superior Court No. R239682)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a death sentence, and is automatically taken to this Honorable Court pursuant to Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

A complaint filed in the Stanislaus County Municipal Court on March 30, 1992, charged appellant Brian David Johnsen with one count of murder, one count of attempted murder, one count of robbery, four counts of burglary, and two special circumstance allegations, that: (1) the murder occurred during the commission of a burglary and robbery; and (2) the murder involved the infliction of torture. (2 CT 374-375.) On that same date, the Public Defender was appointed to represent appellant. (1 CT 40.)

On June 25, 1992, the Public Defender withdrew, citing a conflict of interest due to his joint representation of a potential witness, jailhouse

informant Eric Holland. (1 CT 67.) Between June 25 and September 25, there ensued a search for a new attorney. In the course of that process, five private attorneys were appointed in succession to represent appellant for various purposes.[1]

On September 25, 1992, attorney Fred Canant was appointed to represent appellant in municipal court proceedings and represented him throughout the preliminary examination (January 11-14, 1993), at the conclusion of which appellant was held to answer as charged. (2 CT 305, 307-310, 377, 379, 489, 491; 3 CT 606, 608, 729, 731.)

On January 28, 1993, an information was filed in Stanislaus Superior Court, charging appellant with the following crimes:

Count I: murder of Juanita Bragg (Pen. Code, § 187[2]) on March 1, 1992, with special circumstances — during the commission of burglary (§ 190.2, subd. (a)(17)(vii)) and robbery (§ 190.2, subd. (a)(17)(i));

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[1] On June 25, 1992, the firm of Grisez, Ornstein, and Hertle was appointed, but it immediately declared a conflict due to representation of potential witnesses. (1 CT 67-68.) The court then appointed the next conflict firm, Perry and Wildman. (1 CT 68.) On July 29, attorney Perry declared a conflict, and on July 31, attorney Kirk McAllister was appointed for the limited purposes of advising appellant regarding that conflict. (1 CT 91, 93, 108, 115.) On August 19, attorney Alexander Wolfe was appointed for the limited purpose of representing appellant regarding a discovery motion filed in propria persona on August 15. (1 CT 123, 125-126, 157, 166-169.) On September 22, Wolfe's appointment was expanded to include representing appellant regarding a prosecution motion for handwriting exemplars. (1 CT 257, 284.) On September 25, Mr. Perry was formally relieved, and attorney Fred Canant was appointed in his place. (2 CT 305, 307-310.)

[2] All statutory references hereafter are to the California Penal Code unless otherwise indicated.

Count II: attempted murder (§§ 664/187) of Leo Bragg on March 1, 1992;

Count III: robbery (§ 212.5) of Juanita Bragg on March 1, 1992;

Count IV: robbery (§ 212.5) of Leo Bragg on March 1, 1992;

Count V: burglary (§ 459) of 121 Robin Hood Drive, Modesto, on March 1, 1992;

Count VI: burglary (§ 459) (121 Robin Hood Drive) on February 15, 1992;

Count VII: burglary (§ 459) (121 Robin Hood Drive) on September 3, 1991;

Count VIII: solicitation (§ 653f) of Chester Thorne to murder Mickey Landrum between March 26 and March 28, 1992;

Count IX: solicitation (§ 653f) of Chester Thorne to commit murder between March 26 and March 28, 1992;

Count X: solicitation (§ 653f) of Eric Holland to murder Ella Pokorney between May 12 and June 26, 1992;

Count XI: solicitation (§ 653f) of Eric Holland to murder Fred Vaughn between May 12 and June 26, 1992;

Count XII: solicitation (§ 653f) of Eric Holland to murder Bill Grogan between May 12 and June 26, 1992;

Count XIII: solicitation (§ 653f) of Eric Holland to murder Mickey Landrum between May 12 and June 26, 1992; and

Count XIV: solicitation (§ 653f) of Eric Holland to commit murder between May 12 and June 26, 1992.

(3 CT 835-841.)

Appellant was further charged, in Counts I and II, with personal weapon use (a knife and a blunt instrument) pursuant to section 12022,

subdivision (b), and in Count II alone, with infliction of great bodily injury pursuant to section 12022.7. (3 CT 837-838.) On that same day, appellant was arraigned. He entered a not guilty plea to all charges and denied all special circumstance and enhancement allegations. (3 CT 843.)

On June 14, 1993, appellant filed a *Marsden*[3] motion against attorney Canant, and on June 18, Mr. Canant was relieved. (4 CT 1122-1160, 1168.) On June 30, attorney Kent Faulkner was appointed to represent appellant; his representation continued throughout the remainder of the proceedings. (4 CT 1170.)

Thereafter, appellant filed several pre-trial motions, including motions (1) to suppress his statements to jailhouse informant Eric Holland pursuant to *Massiah v. United States* (1964) 377 U.S. 201 (5 CT 1200-1373; 6 CT 1374-1510); (2) to dismiss for prosecutorial misconduct in obtaining those statements, to recuse the Stanislaus County District Attorney, and to suppress appellant's statements (6 CT 1514, 1533-1535, 1557-1607, 1633-1635); and (3) for change of venue. (7 CT 1760-1841.) The motions were denied[4] (6 CT 1516; 7 CT 1682; 7 CT 1960), and on February 1, 1994, trial began before Judge David G. Vander Wall. (7 CT

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

[4] Appellant sought review of the denial of his motion to suppress his statements by filing a petition for writ of prohibition/mandate in the Court of Appeal, Fifth Appellate District. That petition was denied on November 5, 1993. (*Johnsen v. Superior Court of Stanislaus County*, Fifth Appellate District, Case No. F020431; 7 CT 1728.) Appellant also sought review of the denial of his request for change of venue in the Fifth District. His petition for mandate was denied on January 28, 1994. (*Johnsen v. Superior Court of Stanislaus County*, Fifth Appellate District, Case No. F020985; 7 CT 1971.)

1972.) The jury was sworn on February 15, and guilt phase ran from February 15 to March 7. (8 CT 2021, 2050.)

On March 8, the jury began guilt phase deliberations. (8 CT 2051.) On March 10, the jury announced its inability to agree on two of the seven counts of solicitation to commit murder, and those counts (Counts IX and XIV) were dismissed. On that same date, the jury returned verdicts finding appellant guilty of all the remaining charges and found the special circumstances and the charged enhancements to be true. (8 CT 2222-2236.)

The evidentiary portion of appellant's penalty trial began on March 29 and continued to April 11. (9 CT 2330, 2366.) On April 14, the jury returned its verdict sentencing appellant to death. (9 CT 2552.) On June 2, the court denied appellant's motion for new trial and section 190.4, subdivision (e), motion to modify the penalty of death. (10 CT 2638.)

On June 9, the court sentenced appellant to death. The court also sentenced appellant to an indeterminate term of life with the possibility of parole for Count II (attempted murder) and imposed the following determinative consecutive terms totaling 43 years and 4 months:

- Count I (§ 12022, subd. (b) enhancement): 1 year;
- Count II (§ 12022, subd. (b) enhancement): 1 year; and (§ 12022.7 enhancement): 3 years;
- Count III (§ 212.5): 1 year, 4 months (1/3 the midterm of 4 years);
- Count IV (§ 212.5): 1 year, 4 months (1/3 the midterm of 4 years);
- Count V (§ 459): 1 year, 4 months (1/3 the midterm of 4 years) — § 654 stay;

- Count VI (§ 459): 1 year, 4 months (1/3 the midterm of 4 years);
- Count VII (§ 459): 1 year, 4 months (1/3 the midterm of 4 years);
- Count VIII (§ 653f): aggravated term of 9 years;
- Count X (§ 653f): midterm of 6 years;
- Count XI (§ 653f): midterm of 6 years;
- Count XII (§ 653f): midterm of 6 years; and
- Count XIII (§ 653f): midterm of 6 years.

(10 CT 2776-2777.)

The commitment (judgment of death) was entered on June 22, 1994. (10 CT 2807-2817.) This appeal is automatic pursuant to section 1239, subdivision (b).

* * * * * *

STATEMENT OF FACTS

I.

GUILT PHASE

A. Prosecution Case.

1. The Crimes-March 1, 1992.

At some point on Sunday morning, March 1, 1992, Juanita Bragg and her husband Leo Bragg Sr. were attacked in the spare bedroom of their daughter's home at 121 Robin Hood Drive, Modesto. (15 RT 3159-3160.) Mr. Bragg survived the attack, his wife did not.

Sylvia Rudy, the Braggs' daughter, was not home at the time of the attack. Ms. Rudy had vacationed that weekend in Pebble Beach with friends and had arranged for her parents to stay in her home during her absence. (15 RT 3173-3174, 3180.) The Braggs arrived at their daughter's home sometime before 7:00 p.m. on Saturday, when Ms. Rudy's daughter Kimberly Maynard spoke with them there by telephone. (15 RT 3135.)

When Ms. Rudy returned to her home around 3:00 p.m. on Sunday, she noticed her parents' car in the carport; the house was quiet and the drapes drawn. (15 RT 3174.) Upon entering, she peeked in the spare bedroom, and it appeared that her parents were sleeping, so Ms. Rudy closed the bedroom door. (*Ibid.*) After observing her parents' laundry hanging in the kitchen, which Ms. Rudy thought was odd, she looked into the spare bedroom again and saw that her father was moving and moaning. (15 RT 3174-3175.) Upon further investigation, Ms. Rudy found that her mother was very cold and damp and had some blood in her hair and that the left side of her father's head was bashed in. (15 RT 3176-3177.)

Ms. Rudy went looking for a telephone to call 911 but the phones in her den and bedroom were missing, and the cord of the kitchen wall

telephone had been cut. (15 RT 3176.) She ran next door to a neighbor's home and he called 911. (15 RT 3177.)

Police and medical services arrived soon afterward. Mrs. Bragg was dead. Leo Bragg Sr. was severely injured, having suffered multiple trauma to his head, neck and abdomen. (15 RT 3156.) He was immediately transported to the emergency room, where he was operated on by both a neurosurgeon and a general surgeon. (15 RT 3155-3158; 17 RT 3452-3453.) Mr. Bragg would likely have died had the surgeries not been performed. (15 RT 3158; 17 RT 3453-3454.) He suffered six lacerations over his scalp, multiple skull fractures, and two stab wounds to his abdomen which perforated his small intestine, colon and a large blood vessel.[5] (15 RT 3156-3158; 17 RT 3452-3453.)

Dr. William Ernoehazy, a forensic pathologist who performed autopsies on a contractual basis for the county, arrived at the Rudy residence to perform a quick examination of Mrs. Bragg's body. (15 RT 3230-31.) Her body was lying face-down on one side of the double bed. (15 RT 3232.) Post-mortem rigidity was present in the neck and upper extremities and was beginning in the knees. (*Ibid.*)

2. **Autopsy and Time of Death.**

Upon performing an autopsy the next day (Monday, March 2), Dr. Ernoehazy found that Mrs. Bragg suffered (1) extensive blunt force injuries to the head, including over 15 lacerations extending from the forehead to

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[5] It was stipulated that Mr. Bragg's injuries constituted great bodily injury. (21 RT 4550.) It was also stipulated that the People did not present Mr. Bragg as a witness "because he's unable to communicate verbally or in writing." The jurors were instructed that they could not use this stipulation to infer anything about the cause of Mr. Bragg's inability to communicate. (19 RT 4147.)

the back of the head and several depressed skull and other bone fractures; (2) three superficial stab wounds to the neck; (3) three superficial stab wounds to her abdomen; (4) a fairly long and deep cut on her right wrist; and (5) several defensive wounds on her hands and fingers. (15 RT 3234-3237.) Dr. Ernoehazy opined that all of the head injuries were caused by the same weapon and the most likely instrumentality was the round head of a hammer. (15 RT 3237, 3251.)

Ernoehazy concluded that Mrs. Bragg died of loss of blood caused by blunt force trauma to the head. (15 RT 3233, 3253-3255.) Mrs. Bragg did not lose so much blood as to completely "bleed out"[6] but lost enough such that her vital organs were not getting sufficient oxygen. (15 RT 3254-3255.) Additionally, Mrs. Bragg had fairly severe arteriosclerosis and emphysema, which could have contributed to her death. (15 RT 3254-3255.) Dr. Ernoehazy testified that people who don't suffer such conditions sometimes recover from blunt force trauma to the head. (15 RT 3254.)

At trial, Dr. Ernoehazy affixed the time of death at "around noon or so" on the Sunday her body was found. (15 RT 3252.) Judging from the amount of rigidity and lividity which he had observed when he first saw the body at the scene at 6:00 p.m., he opined that she would have died six to eight hours earlier. Thus, she would have expired "somewhere around noon or maybe a little before that," perhaps as early as 10:00 a.m. (*Ibid.*) Based on the severity and number of wounds, Dr. Ernoehazy opined that Mrs.

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[6] Dr. Ernoehazy testified that if a person loses five of his six quarts of blood, he will die, whereas if he loses only three quarts, "we can probably put you back together." (15 RT 3255.) Based on Mrs. Bragg's minimal lividity, Dr. Ernoehazy opined that she probably lost close to half of her blood at the rate of approximately one quart an hour between the time of the attack and time of death. (15 RT 3256.)

Bragg died probably several hours after receiving her injuries. (15 RT 3253.) Ernoehazy explained, however, that due to so many factors, all he could say with certainty was that the length of time she lived following the infliction of injuries was "less than 24 hours but it's older than five minutes." (*Ibid.*)

Dr. Ernoehazy's testimony at the preliminary examination was markedly different. There he testified that Mrs. Bragg had been dead for no more than six hours when he examined her at the scene at 6:00 p.m. The time of death, he had testified, was not before noon, and probably in the early afternoon. Dr. Ernoehazy had also testified that Mrs. Bragg's injuries were inflicted not over an hour before death — that is, between 10 a.m. and 2 p.m. (which, as will be seen, would have ruled out appellant as being her assailant) (2 CT 401-402.) Following that testimony, the court recessed for lunch, in the course of which Dr. Ernoehazy spoke with the chief investigator for the prosecution, Detective William Grogan. (2 CT 415.) When the preliminary hearing resumed after lunch, Dr. Ernoehazy was asked by the prosecutor whether his observations at the scene and at the autopsy were "consistent with the injuries . . . having been inflicted as early as 5:00 or 6:00 in the morning." Dr. Ernoehazy responded: "That could have been, yes." (*Ibid.*)

3. <u>Crime Scene</u>.

Upon arriving at the Rudy residence on March 1, police officers checked the exterior and interior of all windows and doors and found no evidence of forced entry. (15 RT 3128.) They did find evidence of a possible prior forced entry through a back bedroom window. (15 RT 3121, 3128.) All windows and sliding glass doors were in closed and locked positions and secured by either wooden dowels in tracks or dry wall screws. (16 RT 3392-3393.) The only possible way to exit the residence would be

through the front door. (16 RT 3393.) A locksmith later determined that the deadbolt lock, as well as the knob lock, on Ms. Rudy's front door had not been picked. (18 RT 3883-3884.) When Sylvia Rudy returned home on March 1 from Pebble Beach, the front door was locked and she had to use her key to open it. (15 RT 3178.) She recalled only having to open the dead bolt lock.[7] (16 RT 3400.)

The house was very clean and organized; there was no indication of ransacking or search. (15 RT 3124.) Officers discovered a pair of pantyhose lying on the back of an armchair in the living room, which appeared out of place in a house which otherwise was "exceptionally neat and clean and tidy."[8] (15 RT 3125; 16 RT 3375.) A knife containing blood stains on its blade was found in a knife block in the kitchen. (15 RT 3125; 16 RT 3376.) Ten days later, while Ms. Rudy was in the process of moving out of the Robin Hood apartment, moving personnel discovered a second knife, a kitchen utility knife with a five-inch blade, in a vase in the sitting room (the center bedroom). (16 RT 3379-3381, 3432-3433.) Its blade, which was bent to one side, contained blood stains. (16 RT 3381; 18 RT 3841-3842.)

Juanita Bragg's purse and wallet and Leo Bragg's wallet were found in the northeast bedroom of 121 Robin Hood. (21 RT 4550.) Juanita's wallet contained some loose change and three folded 100 dollar bills in a side compartment, not in the bill compartment which was empty. (18 RT

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[7] That dead bolt could be activated from the inside but not from the outside without a key. (16 RT 3393-3394.)

[8] Ms. Rudy identified those pantyhose as of the same brand that she wore fairly exclusively and which she kept in her bedroom dresser. (16 RT 3401.) When she left her home on Friday, February 28, Ms. Rudy had not left any pantyhose in the living room or out anywhere else in her home. (16 RT 3402.)

3811.) Leo's wallet contained three folded 100 dollar bills and two folded dollar bills, again in a side compartment, rather than in the bill compartment which was empty. (18 RT 3812.) The folded bills in both wallets were not visible upon opening the wallets. (*Ibid.*)

Ms. Rudy's residence was one unit of a four-unit complex. Ms. Rudy collected the rent and dealt with any tenant problems for her employer, the owner of the four-plex. (15 RT 3180.) Appellant's mother, Faye Johnsen, lived in that four-plex, in the unit at 103 Greenwich Lane, directly behind Ms. Rudy's unit at 121 Robin Hood Drive. (15 RT 3180-3182; 16 RT 3307-3308.) Although Mrs. Johnsen's rear patio area was enclosed by a six-foot fence, it contained openings on each side which permitted unimpeded travel to and from Ms. Rudy's unit. (15 RT 3182-3183.) Ms. Rudy had been told that Mrs. Johnsen's son also lived at 103 Greenwich Lane, although she never saw him. (15 RT 3182.)

4. <u>**Investigation and Events Leading to Appellant's Arrest**</u>.

a. <u>**Prior Burglaries**</u>.

On two occasions prior to Sunday, March 1, 1992, Ms. Rudy's home had been broken into: on September 3, 1991 and February 15, 1992. On September 3, Ms. Rudy had left some cash on her dining room table for her daughter, Kimberly Maynard, to pick up. (15 RT 3130-3131; 3160.) When Ms. Maynard arrived around 3:00 p.m., the front door was wide open and there was no money on the table. (15 RT 3131.) Ms. Maynard called her mother who came home and discovered that also missing were a VCR and all of her jewelry which had been inside a dresser in her bedroom. (15 RT 3160, 3162-3163, 3131-3132.) Ms. Rudy observed that a window in the back (northeast) bedroom had been broken. (15 RT 3162.)

On February 15, 1992, Ms. Rudy's home was broken into again. (15 RT 3166-3167.) Once again, the northeast window had been broken. (15 RT 3167-3168.) Her kitchen telephone had been disabled, with its "insides" removed, and her bedroom clock radio telephone was missing, so Ms. Rudy went to a neighbor's home to call police. (15 RT 3168.) Also missing were: a microwave, china, and liquor from a liquor cabinet in the kitchen, a "boom box," answering machine, and a portable bar. (15 RT 3166-3172.) On a later date, Ms. Rudy discovered that a camera and a key ring containing spare car keys were missing from her bedroom dresser. (15 RT 3178.) A few days after the attack on her parents, Ms. Rudy noticed that a spare front door key was also missing; Ms. Rudy could not recall whether that key had been left on a kitchen window sill or on the key ring with the other keys. (15 RT 3178-3179.) That key was never found. (16 RT 3401.)

b. **The Move and the Evening Before at Appellant's Home.**

All day on Sunday, the day of the assault on the Braggs, appellant's mother, Faye Johnsen, was in the process of moving from her apartment at 103 Greenwich Lane, Modesto, to San Jose, where her parents lived and her employer (Ray's Sewing Machine Center) had a branch office. (16 RT 3317.) Appellant, who had lived with his mother at 103 Greenwich Lane since the end of July or first part of September, 1991, was not moving to San Jose but was moving with his friend, Mickey Landrum, to 2427 Strivens, in Modesto. (16 RT 3298, 3308, 3316-3317.) Appellant and several others, including Landrum, Ray Gresham (Faye Johnsen's employer), Roger Gomez (a mutual friend who was moving into 103 Greenwich), David Johnson (an employee of Ray's Sewing Machine Center) and David's father Vince Johnson, helped Ms. Johnsen move her belongings out of the Greenwich apartment. (16 RT 3317.)

The evening before the move, Mickey Landrum had been at the Johnsen home, which he left about 9:00 p.m. (16 RT 3317-3318.) Landrum could not recall much about that evening, other than that he traded a camera at the home of Linda Lee and Chester Thorne for a half gram of "crank," approximately half of which he and appellant ingested. (16 RT 3290-3294.) They may also have been smoking pot. (16 RT 3294.) Landrum did recall that he went home that night, spending the night at his mother's home. (16 RT 3192.) Landrum believed that he consumed most of the remaining "crank" the next day. (16 RT 3295.)

Ray Gresham and his daughter Julie spent Saturday night, February 29, at 103 Greenwich. (16 RT 3317.) The next morning (Sunday), Faye, Ray, Julie, and appellant had breakfast at McDonald's at 7:00 a.m., and then started moving at about 8:30 a.m. (*Ibid.*) Mickey Landrum had been expected early, but did not arrive until 10:00 a.m. (16 RT 3318.) Landrum drove his uncle's pickup truck, which he and appellant used to transport their belongings to their new home. (*Ibid.*) Appellant helped his mother all day and then, at about 5:00 p.m., he and Landrum took the pickup truck to their new home to deliver their furniture. (16 RT 3317, 3319.)

c. <u>Mickey Landrum and Other Characters.</u>

Mickey Landrum

On or about March 26 (almost four weeks after the assault on the Braggs), Mickey Landrum, who was living with appellant, contacted Detective Grogan, the investigating officer in this case, and told him that he wanted to give him some property. (16 RT 3281, 3299.) Landrum did so

because his mother, Ella Pokorney,[9] did not want the property in her house anymore and asked her son to turn the property over to the police. (16 RT 3299-3300.) Landrum was then interviewed by Detective Grogan. (16 RT 3303-3304.) The property turned out to be items taken from Sylvia Rudy's home at the time the Braggs were assaulted and on September 3. Landrum was promised by the Stanislaus County District Attorney's office that he would not be prosecuted for his "handling" of that property, nor would he be prosecuted "for holding dope at the time, or having dope, been doing dope at the time of moving the merchandise." (16 RT 3287.)

At trial, Landrum testified that he had met appellant in February or March of 1991[10] in Modesto and they soon became close friends. (16 RT 3288.) Appellant was pretty much Landrum's closest friend. (*Ibid.*) Landrum and appellant spent much time together, playing pool, drinking beer, and doing drugs. (16 RT 3288-3289.) Landrum admitted smoking pot and ingesting crystal methamphetamine ("crank"). (16 RT 3289-3290.) Landrum, who regularly obtained his crystal meth from another friend, Chester Thorne, was "into crank;" appellant "was more into pot." (16 RT 3290, 3295.) Although "doing crank" was "kind of a regular thing" for Landrum during the time period surrounding the events in this case, he denied that it affected his memory, at least "[n]ot a whole lot." (16 RT 3295-3296.) Landrum did acknowledge, however, that he had only a vague memory of the night prior to the assault on the Braggs, because of his substance use that night and because it was two years ago. (16 RT 3290-

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[9] Ms. Pokorney died prior to trial, on September 3, 1992. (16 RT 3279.) It was stipulated that she died of natural causes unrelated to this case. (21 RT 4550.)

[10] According to appellant's mother, appellant did not arrive in Modesto until the summer of 1991 at the earliest. (16 RT 3308.)

3291.) Landrum denied committing any burglaries or other crimes with appellant. (16 RT 3288-3289.)

According to Landrum, appellant had called him around 10:00 a.m. on Saturday, February 15 (the date of the second burglary of Ms. Rudy's unit and two weeks before the assault) and asked him to come over to the Greenwich apartment where appellant lived with his mother to help him move a television set. (15 RT 3259.) When Landrum arrived around 2:30 p.m., appellant pointed out the TV to be moved. (15 RT 3259-3261.) It was inside 121 Robin Hood Drive, and appellant pointed to it through the sliding glass window of his home. (15 RT 3260-3261.) Landrum purportedly told appellant that he did not wish to help him. (15 RT 3260.) Appellant showed Landrum some things he said he had taken from 121 Robin Hood earlier that morning: a microwave, a boom box, a portable bar, a box of china dishes, and some jewelry (charms) in a little case.[11] (15 RT 3261-3262, 3269-3270.) Appellant told Landrum that he had been inside 121 Robin Hood Drive once prior to that morning. (15 RT 3262.)

Appellant also showed Landrum a key ring holding around 10 keys.[12] (15 RT 3270.) Appellant said that one of the keys, which looked

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[11] Landrum identified People's Exhibits 10 (boom box), 4 (piece of china), 6 (jewelry box containing gold chain and charms), and 7 (jewelry) as looking familiar to, or the same as, the property he observed on February 15. He also identified People's Exhibit 12 (a photo of Sylvia Rudy identifying a microwave, boom box, china, and portable bar) as depicting that property. (15 RT 3268-3269; 16 RT 3281-3282.) Notably, Sylvia Rudy testified that all of her jewelry was taken during the September 3 burglary. She identified Exhibits 6 and 7 as that missing jewelry. (15 RT 3163-3146.)

[12] Landrum's testimony was inconsistent regarding the date upon which he claimed appellant showed him the keys. During direct examination, Landrum testified this occurred on February 15, when appellant showed him the property taken from 121 Robin Hood. (15 RT 3259-3261, 3270.)
(footnote continued on next page)

like a house key, might be for the house[13] and another might be for a car in the carport which he described as an Oldsmobile or Buick. (15 RT 3270-3271.) Landrum assumed appellant was referring to the car in the carport at 121 Robin Hood, because Landrum had seen such a car parked there and appellant said he had been at that unit earlier that day. (15 RT 3271.) After showing Landrum the keys, appellant placed them with the rest of the property. (15 RT 3270-3271; 16 RT 3278.) On cross-examination, Landrum admitted that he had been using "crank'" on the day appellant displayed the keys. (16 RT 3295-3296.)

Landrum further testified that he was again at appellant's home on the morning of February 19 (four days after the second Rudy burglary), when a detective from the Modesto Police Department arrived. Landrum and appellant had been "partying" there the preceding night, drinking, smoking pot, and "snorting crank," and Landrum had spent the night. (15 RT 3262, 3265; 16 RT 3289-3290.) Landrum and appellant had a discussion with the detective and then appellant left with the officer.[14] (15 RT 3265.) Landrum remained at 103 Greenwich. (*Ibid.*) Early that same afternoon, while still at 103 Greenwich, Landrum received a telephone call from appellant, who asked Landrum to remove the property appellant had

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On redirect examination, he testified that appellant showed him the keys on a later date, February 18 or 19, the day that the police spoke to them. (16 RT 3305.)

[13] At one point in his testimony, Landrum testified that appellant told him the house key might go to 121 Robin Hood. (15 RT 3271.) At another point, Landrum testified that appellant merely said that the key might have gone to the house; appellant did not identify which house it went to. (16 RT 3278-3279.)

[14] Although the jury was not so informed, appellant was apparently arrested on a traffic warrant. (15 RT 3263-3264.)

shown him on February 15. (15 RT 3265-3266; 16 RT 3300.) Appellant said that he was afraid the police might obtain a search warrant and search his home. (15 RT 3266.) Landrum removed that property (microwave, boom box, china, portable bar, and jewelry) from a back bedroom and took it to a friend's house. (15 RT 3266-3269.) The friend would not take the property and so Landrum contacted appellant's mother, Faye Johnsen, and told her of appellant's request to move the stolen property from her home. (15 RT 3266-3267, 3272.) Mrs. Johnsen agreed to meet Landrum and the property was transferred to her car. (15 RT 3267-3268.)

Mrs. Johnsen testified that Landrum told her he had a truck filled with things that belonged to her son and she was to take them and store them or give them away. (16 RT 3309.) He did not tell her that the items had been stolen. (16 RT 3319-3320.) Mrs. Johnsen assumed that the things belonged to her son. (16 RT 3312.) When she subsequently asked appellant about the property, he said: "As far as you know, I got it either at a garage sale or it was given to me." (16 RT 3314.) Mrs. Johnsen identified the property she received from Landrum on February 19 as: a small stereo unit, box of dishes, microwave and portable bar, all of which were subsequently identified by Sylvia Rudy as her property. (16 RT 3310-3311.) Because the property was too heavy to cart around in her car, Mrs. Johnsen eventually transferred it to her parents' home in San Jose. (16 RT 3312.) Some of it was also stored at the home of Mrs. Johnsen's uncle and aunt, Ken and Carol Beucus. (16 RT 3315.)

As noted above, on March 1, Landrum and appellant moved into an apartment on Strivens Street. According to Landrum, sometime in the two-week period following that move, he and appellant drove to San Jose to visit appellant's mother and grandparents. (16 RT 3276.) While they were driving on highway 880, appellant pulled out the keys he had shown

Landrum on February 15 and threw them out the window. (16 RT 3276, 3278.) Appellant also threw out a folded blue sweatshirt which appeared to contain something—"[b]ecause it looked bulky." (*Ibid.*) Landrum did not see what, if anything, was inside the sweatshirt.[15] (*Ibid.*)

Landrum further testified that at some time after February 19 but before March 25, he and appellant were walking along Strivens Street when they ran into an acquaintance, George Romo. (16 RT 3282-3283.) According to Landrum, as he and appellant were walking, each was holding a yellow rubber glove retrieved from the toolbox of his uncle's truck. (16 RT 3283.) Appellant, for reasons which Landrum claimed he did not know, wanted to get rid of those gloves. (16 RT 3283-3284.) Landrum told appellant that Romo could sell the gloves for 50 cents and they gave the gloves to Romo. (16 RT 3282-3283.)

George Romo, however, remembered the event somewhat differently. Romo, who lived across the street from appellant and Landrum on Strivens Street, knew Landrum but knew appellant only by name. (16 RT 3420.) According to Romo, it was Landrum who had both gloves, asked Romo if he wanted them, and gave them to him. (16 RT 3421.) Romo put the gloves in his room and later gave them to one of the detectives in this case. (*Ibid.*)

Linda Lee and Johanna Oliver

Other associates of Landrum and appellant had contact with the various items of property taken from 121 Robin Hood Drive. Linda Lee, the

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[15] On April 28 (four weeks after the assault on the Braggs), Landrum accompanied several officers to an area of highways 880 and 237, where he said appellant had thrown those items. Although six people searched a two-mile area, nothing was ever found. (18 RT 3877-3878.)

girlfriend of Chester Thorne, lived at 2419 Strivens Street in the same complex as Landrum's mother, Ella Pokorney. (16 RT 3403, 3349.) On March 1 (the day of the crimes against the Braggs), appellant came to her house, carrying a brown paper sack. (*Ibid.*) He asked her to "get rid of it where no one would ever see it again." (16 RT 3404.) Appellant was shaking and acting scared, nervous. (*Ibid.*) He gave Lee the bag and left. Lee looked inside the bag and saw a telephone. (*Ibid.*) Lee's friend, Johanna Oliver, who was also present, saw two telephones and a calculator inside the bag. (16 RT 3365-3366. 3368.) Lee thought something was wrong and sent Oliver to find appellant. (16 RT 3405.) When Oliver could not find him, Lee asked Oliver to get Ella Pokorney (Landrum's mother) and see if she would take the bag. (*Ibid.*) Pokorney arrived at Lee's home and took the bag to her place. (16 RT 3369, 3406.)

Two or three weeks later, Lee received other property from appellant, namely, a telephone clock radio subsequently identified by Sylvia Rudy as the one taken from her home on February 15, 1992. (16 RT 3406; 18 RT 3840.) It was not a gift; Lee was supposed to pay for it. (16 RT 3407.) She subsequently turned it over to Detective Grogan. (*Ibid.*)

On the day of appellant's arrest (March 26, four weeks after the Braggs were assaulted), appellant called Lee from jail. (16 RT 3408; 18 RT 3848.) When she told appellant that she had given the telephone clock radio to Detective Grogan, he responded: "I'm done for now." (16 RT 3408-3409.) Appellant told her to say that she did not remember anything and said that they could not do anything to her. (16 RT 3409.) Thereafter, Lee received many telephone calls from appellant in jail. Appellant mentioned Robin Hood Drive and asked if she knew anybody who would go over there and burglarize it, indicating that if someone else did that while he was in jail, it would draw suspicion away from him. (16 RT 3410.) Appellant

also told Lee that he had a key because "his mom used to rent the place." (16 RT 3411.)

Lee admitted that she had been convicted in Stanislaus County in 1990 of receiving stolen property. (16 RT 3413-3414.) Lee testified that she never purchased any stolen property from appellant. (16 RT 3414.) She did buy a stolen camera from Mickey Landrum around Valentine's Day of 1992, but was never arrested for that. (*Ibid.*)

Chester Thorne

Chester Thorne met appellant approximately a week after Valentine's Day of 1992. (16 RT 3332.) They were not friends, but mere acquaintances. (16 RT 3333.)

On March 26, the day of appellant's arrest, appellant called Thorne and then called again on the next day. (*Ibid.*) They discussed appellant's arrest and appellant asked Thorne if he knew anybody who might "whack" (which Thorne understood to mean "kill") Mickey Landrum and a woman. (16 RT 3334.) Thorne told appellant that he did not know but would look around. (16 RT 3334, 3342.) On cross-examination, Thorne admitted that he might have told appellant that he "knew the people. They would do it for a favor for me because . . . we went way back in drugs and all that." (16 RT 3342-3343.) Thorne claimed, however, that he really did not know anybody. He was just saying that to see what he could learn about appellant's crime. (16 RT 3334, 3343.)

According to Thorne, appellant instructed him how the people were to be killed: they were to be beaten with a hammer and stabbed. (*Ibid.*) Thorne was also to take a telephone and some other items and place them in a dumpster outside the house. (16 RT 3334-3335.) Appellant wanted this done so that the police would think the killer was still "out there killing

people." (16 RT 3335.) Appellant asked both if Thorne could arrange to have the killings done and if Thorne would do them himself. (*Ibid.*) Appellant promised to repay the "favor." (*Ibid.*) Thorne said that he would find somebody. (*Ibid.*) Thorne testified that he did not try to find anyone and had no intention of doing so. (16 RT 3336.)

Thorne did not go to the police with this information because he was wanted on a warrant for receiving stolen property. (*Ibid.*) He told no one about this other than his girlfriend, Linda Lee. (16 RT 3336, 3349.)

Thorne eventually went to jail on that warrant and while in jail, he had some contact with appellant. (16 RT 3336-3337.) When appellant would walk by Thorne's cell, they would converse sometimes; other times, appellant would pass him a note. (*Ibid.*) Thorne kept one of appellant's notes and copied another one before returning it to him, because (Thorne claimed) he could not read the note very well and wanted someone to read to him exactly what appellant wrote. (16 RT 3350.) Thorne identified People's Exhibit 73[16] as a sanitized version of the copy he made of

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[16] Exhibit 73 read:

> This is what the facts are:
>
> 1. Mouse told you that he did it alone after his mom went to work that morning.
> 2. he was on dope or drunk when he told you this.
> 3. He told you on his birthday, 3-23.
> 4. you do not know why he told you.
> 5. He said he would kill you & Linda if you ever tell. you are scared!!
> 6. You want protection for your family.
> 7. Try to get time off of your sentence for your testimony.

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appellant's note and People's Exhibit 75[17] as a sanitized version of the note which he retained.

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> 8. Don't make any guesses when you are asked questions. You only know what is written here.
> 9. Never change your story! Stick to it!
> 10. Linda knows nothing! She was not home when he told you.
> 11. Mouse killed them by mistake.

Because appellant told Thorne to return his original note, Thorne copied appellant's note and identified People's Exhibit 72 as that copy. Except for excised portions (found inadmissible), Thorne stated that Exhibit 73, which was admitted into evidence, was an accurate copy of Exhibit 72, which was identified but not admitted. (16 RT 3339-3340.)

[17] Exhibit 75 read:

> Chester, [¶] I want you to tell Linda not to be afraid of the police. She is not guilty of receiving stolen property. The law states that you are only guilty if you knew the property was hot before or when you accepted it! She was told it was clean. She is not guilty. When Linda is asked (on the stand) what it was that I said to her when I handed her the bag of property, she must not remember what I said to her. Then they will remind her of what she said to the police. Even when they remind her, she still must have no memory of the words I said! No matter what! I will protect you and Linda till the day I die. I expect the same from both of you. Joanne also must lose her memory. She never heard me anyway! Remember, if you or Linda is asked a question, and you know the truth will hurt me, lose your memory! [¶] Write me back.

Exhibit 74, which was identified but not admitted, was the actual note which appellant passed to Thorne. People's Exhibit 75, which was admitted into evidence, was an accurate copy of Exhibit 74 except for excised (inadmissible) portions. (16 RT 3340-3341.)

Thorne was charged with both grand theft and receiving stolen property (unrelated to the thefts from Ms. Rudy's apartment), and then later charged with possession of methamphetamine. (16 RT 3344.) Prior to testifying at appellant's trial, Thorne pled guilty to possession of methamphetamine and either receiving stolen property or grand theft and in exchange for his testimony against appellant, received two consecutive one-year sentences (eight months for each offense after credits for work time/good time), which he served in the county jail. (16 RT 3336-3337, 3344-3345.) His plea bargain was based on conditions set by the District Attorney's office that he do his time, go to Court and tell the truth. (*Ibid.*)

Thorne denied ever selling drugs to Landrum or appellant and denied using amphetamines at the time of appellant's trial. (16 RT 3343.) When asked whether he suffered any prior offenses (other than the ones mentioned above), Thorne responded "not down here," "just growing up as a kid" — "shoplifting and stuff like that." (16 RT 3345.) When asked whether he committed a theft in Idaho in 1990 at the age of 30, Thorne said that he might have but could not remember (four years earlier). (16 RT 3347.) Thorne did acknowledge going to jail in Idaho, which he thought was for a stolen car. (*Ibid.*) Thorne could have gone to jail in 1991 or 1992, but he did not remember for sure; he had been pulled over and had gone to jail for "all kinds of things," but was unable to remember for sure what he went to jail for at any particular time. (*Ibid.*) Thorne acknowledged that he might have given false information to a police officer in Stanislaus County in 1990 and might have gone to jail for that. (16 RT 3348.) After some obfuscation, Thorne also admitted leaving Stanislaus County to avoid jail. (16 RT 3348-3349.)

d. **Recovery of Property Stolen From Sylvia Rudy's Home.**

On March 26 (almost four weeks after the charged crimes), Mickey Landrum went with an officer to his mother's house at 2415 Strivens Street to retrieve some property. (16 RT 3279-3280, 3441-3442.) A few days prior, Landrum's mother, Ella Pokorney, had shown the property to Landrum and told him to get rid of it. (16 RT 3280-3281.) Pokorney was not home when Landrum arrived with the police, so Landrum turned over the following property to the officer: a small maroon velvet jewelry box containing a gold chain and some charms, three telephones and an adding machine/calculator (People's Exhibits 6, 13, 14, 15, and 16). (16 RT 3279-3280, 3442-3444; 18 RT 3842-3843.) Sylvia Rudy subsequently identified two of the phones as those taken from her den and bedroom in the March 1 burglary and assault and the third telephone as looking like the same kind of telephone her parents took with them when they traveled. (15 RT 3187-3188.) Rudy also identified the calculator as her father's and the jewelry as her jewelry taken on September 3, 1991. (15 RT 3164, 3188-3189.) Landrum, when asked how the property ended up at his mother's house, said that he and appellant took a bag of "stuff" to Pokorney's house two to five days after their March 1 move. (16 RT 3297.) Landrum did not see what was in the bag and thus did not know whether it contained the property he gave to the police, but did recall hearing a bell ring inside the bag. (*Ibid.*)

On the same day as Landrum was turning property over to the police, Linda Lee gave to Detective Grogan the clock radio telephone which she got from appellant. (16 RT 3407; 18 RT 3841.) Sylvia Rudy subsequently identified that telephone (People's Exhibit 79) as the one taken from her home on February 15, 1992. (18 RT 3840.)

Also on this same date, two detectives contacted appellant's mother about the property she had received from Mickey Landrum. (16 RT 3381; 19 RT 4110.) When officers described the property they were seeking, Mrs. Johnsen initially said that she did not know anything about it.[18] (19 RT 4111.) After the detectives told her that they had spoken to Landrum and knew the property had passed through her possession, Mrs. Johnsen took them to her parents' home and the home of her aunt and uncle. (16 RT 3314-3316, 3382-3383; 19 RT 4111.) They retrieved a bag of jewelry (People's Exhibit 7) from her mother's home and a box of china (Exhibits 4, 65, 66, 67, 68), a boom box (Exhibit 10), a video recorder (VCR) (People's Exhibit 8), portable bar, and microwave oven from the aunt and uncle's home. (16 RT 3382, 3384-3385.) At trial, Sylvia Rudy identified that jewelry and other items as her property taken from her home on September 3, 1991 and February 15, 1992. (15 RT 3164-3165, 3170-3173.)

5. Hair Comparison and DNA Evidence-The Hair From the Pantyhose.

The pantyhose found in the living room at Sylvia Rudy's home remained on the back of the chair for two to three hours during the processing of the scene until a detective opened the hose to look inside, then folded it and placed it inside an evidence envelope. (16 RT 3391, 3394.) The pantyhose was delivered, inside out, to Dr. Richard Lynd, a Department of Justice criminalist in Modesto. (17 RT 3455, 3458.) Dr.

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[18] According to one of the detectives, Mrs. Johnsen told them that she did not initially acknowledge knowing of the property, because she "didn't want to hang her own son." (19 RT 4112.) Mrs. Johnsen testified that when the officers contacted her at work, informed her of her son's arrest for murder and asked if she had any property, she said no because she was nervous and fearful of being involved with property that might be stolen. (16 RT 3315.)

Lynd found one nearly colorless hair inside the pantyhose, which he concluded was a head hair due to its four-inch length and clipped end. (17 RT 3458-3459, 3463, 3465.) Upon visual comparison of the hair to sample hairs from Sylvia Rudy, Juanita Bragg, Mickey Landrum and appellant, Dr. Lynd eliminated all but appellant as possible donors. (17 RT 3458, 3463-3464, 3466, 3468.) Dr. Lynd concluded that the pantyhose hair could have originated from appellant because it showed similar color, length, and texture. (17 RT 3464-3465.) He could not say, however, that the hair was from appellant to the exclusion of others and had no idea how many people had similar hair. (17 RT 3468-3469.)

When he completed his visual examination, Dr. Lynd sent the pantyhose hair to John Yoshida, a Department of Justice Senior Criminalist in French Camp, who performed PGM-1 (phosphoglucomutase) testing upon it with no result.[19] (16 RT 3434; 17 RT 3469; 18 RT 3757-3758.) The Petri dish holding the pantyhose hair (People's Exhibit 151) was then returned to the Modesto lab, where it was opened by Dr. Lynd on June 3, 1992. (18 RT 3760, 3763.) Dr. Lynd removed the hair in order to photograph it because he understood the hair was to be sent off for testing that might consume it.[20] (18 RT 3764, 3803.) In lifting the hair from the

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[19] A PGM-1 analysis attempts to distinguish between various individuals in a case through examination of their enzymes. (16 RT 3435-3436.) At trial, Mr. Yoshida testified that every individual has various enzymes, some of which are polymorphic, meaning they are in different forms in different people. (*Ibid.*) The PGM enzyme is polymorphic. Each individual inherits half of his PGM enzyme from his father and half from his mother. (*Ibid.*) The resulting combination is not absolutely unique in that only one person would have a particular enzyme combination but in a population, there is a certain distribution of these polymorphic enzymes. (*Ibid.*)

[20] Subsequent PCR testing did, in fact, destroy the pantyhose hair. Although the jury was not explicitly informed of this, the deputy district
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container, Dr. Lynd broke it into two pieces. (18 RT 3764.) Dr. Lynd compared one of those hair segments to five samples hairs from appellant by placing a slide containing one of the pantyhose hair segments and a slide containing appellant's hair under both sides of a microscope for viewing (similar to looking through binoculars). (18 RT 3767-3768, 3801-02.) He then took photographs of the comparisons but they did not turn out and so Dr. Lynd took 3 Polaroid photographs two weeks later, on June 18. (18 RT 3769.)

Dr. Lynd did not photograph the second segment of the pantyhose hair and at trial, was unable to tell, by looking at the photographs, whether he photographed the root end or the other end. (18 RT 3770.) All he had was a photograph of a piece of the pantyhose hair, with the shaft going from one border to the other border of the photograph. (18 RT 3770-3771.)

After completing his photography on June 18, Dr. Lynd packaged the hairs in a sealed container which was delivered to Julie Cooper, a senior molecular biologist, at Cellmark in Germantown, Maryland. (18 RT 3766, 3773-3774, 3803.) When Ms. Cooper opened the container on June 22, she observed two very fine blond hairs. (18 RT 3776.)

Ms. Cooper began PCR (polymerase chain reaction)[21] testing of the hairs on September 28. (18 RT 3777.) When she removed the hairs from

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attorney so informed the Court. (18 RT 3864.) This was confirmed during Dr. Lynd's testimony when he was asked if there was anything in the container (People's Exhibit 151). (18 RT 3768.) At counsel's request, Dr. Lynd broke the seal on the exhibit, opened it and looked inside. (18 RT 3769.) The container was empty, except for a piece of masking tape. (*Ibid.*)

[21] PCR analysis can be used to type a single hair if the hair has a root containing sufficient cellular material. (18 RT 3692.) For a concise
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their container, Ms. Cooper observed that both of the hairs had what appeared to be root ends, but she did not examine them under a microscope to confirm the two root ends.[22] (18 RT 3777-3778.) Cooper tested both hairs together, putting them in the same solution in one test tube. (18 RT 3778-3779.) She did not know, and did not inquire, whether the hairs were from one or two individuals. (18 RT 3779-80.) If there had been two root ends, the extraction process of her PCR testing would have extracted from both root ends and mixed them together. (18 RT 3780.)

The PCR testing done by Ms. Cooper enabled her to identify the type of the DQ-Alpha alleles in the DNA of the pantyhose hairs, which she determined to be the 2,4 type. (*Ibid.*) According to Ms. Cooper, if the two hairs had come from two different persons, then in order to yield a 2,4 DQ-Alpha type when the two hairs were tested together, the DQ-Alpha type of the two donors would have had to be either (1) both 2,4 or (2) one a 2,2 and one a 4,4. (18 RT 3793.)

Appellant's DQ-Alpha type is 2,4 — which means that he could not be excluded from the class of possible donors of the tested pantyhose hair fragment. (18 RT 3743-3744.) About 9 percent of the general population

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explanation of the PCR method of DNA testing, see this Court's discussion in *People v. Venegas* (1998) 18 Cal.4th 47, 58, fn. 6.

[22] Cooper testified that she clipped "the root and/or roots off and [sic] an adjacent hair shaft from that root and placed those two root ends" in a small plastic tube, where she did her PCR analysis. (18 RT 3777.) When asked about saying that she put two root ends in the tube, Cooper said: "The two pieces of hair, they both looked like they had an end that breathed out a bit which, from my experience, I know that hairs usually with a root, that's the fatter end." (*Ibid.*)

has the 2,4 DQ-Alpha type.[23] (18 RT 3683-3684.) When asked if the 2, 4 type was a fairly common allelic combination, Dr. Word of Cellmark responded that it was "sort of in the middle." (18 RT 3697.) Of the 21 possible combinations of alleles, the frequency of rarest combination is a little less than 2 percent and the frequency rates of the most common combinations are at 21 percent, 23 percent and 28 percent. (*Ibid.*) For the Caucasian population, one lab reported that approximately 4.6 percent of that population has the 2,4 allelic combination; another lab reported a frequency of 8.6 percent, and a third lab reported a frequency of 8.7 percent. (18 RT 3685.) Given these disparate results, Dr. Word acknowledged that "[t]hese are not precise specific accurate numbers. These are approximations. . . ." (18 RT 3698.)

6. <u>PGM -1 Analysis of Blood Samples From the Two Knives Found at Sylvia Rudy's Home</u>.

DOJ criminalist John Yoshida performed PGM-1 (phosphoglucomutase) testing of blood swabs from the two knives found inside Sylvia Rudy's home: the knife found in the vase in the bedroom and the knife obtained from the kitchen. (16 RT 3436.) Yoshida concluded that

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[23] As explained by this Court in *People v. Wilson* (2006) 38 Cal.4th 1237, 1242, once PCR analysis and comparison result in a "match" of alleles — in this case the DQ-Alpha type — "the DNA profile of the matched samples is compared to the DNA profiles of other available DNA samples in a relevant population database or databases in order to determine the statistical probability of finding the matched DNA profile in a person selected at random from the population or populations to which the perpetrator of the crime might have belonged." Dr. Charlotte Word, a Cellmark supervisor, explained that different laboratories throughout the world have examined the DNA of individuals in various populations and recorded that data in tables, which allow for the calculation of the frequency of different types present in the various studied populations. (18 RT 3682-3683.)

the knife found in the bedroom contained a mixture of blood from at least two different individuals and that blood was consistent with having come from both Juanita and Leo Bragg. (16 RT 3437-3438.) Yoshida further concluded that Juanita Bragg could be the donor of the blood on the knife found in the kitchen. (16 RT 3439.)

Yoshida also typed blood samples from appellant and Mickey Landrum: appellant's PGM type is 1+1- and Landrum's PGM type is 2+1+ (the same as Juanita Bragg). (16 RT 3439-3440.) Appellant thus could not be the donor of blood on either knife. (16 RT 3440.) Landrum could be a possible co-donor with Leo Bragg on the knife found in the vase in the bedroom. (16 RT 3439.)

7. DNA Analysis of Blood Samples From Two Knives Found at Sylvia Rudy's Home and Yellow Rubber Gloves Obtained From George Romo.

Cellmark performed DNA testing of blood samples from the yellow rubber gloves obtained from George Romo and the two knives found inside Sylvia Rudy's home. (16 RT 3374, 3379-3381; 18 RT 3744, 3746, 3752-3754, 3781-3782.)

Cellmark employee Julie Cooper determined the DQ-Alpha type for the following individuals: Leo Bragg Sr. — DQ-Alpha type of 1.1, 1.1; Juanita Bragg — DQ-Alpha type of 1.3, 2; Sylvia Rudy — DQ-Alpha type of 1.1, 2; Mickey Landrum — DQ-Alpha type of 1.1, 1.2; George Romo — DQ-Alpha type of 1.2, 4; and appellant — DQ-Alpha type of 2, 4. (18 RT 3743-3744.)

Ms. Cooper performed RFLP (restriction fragment length polymorphism) analysis[24] of a swab of blood taken from the knife found in the vase (Exhibit 76), comparing that blood to the samples obtained from Leo and Juanita Bragg, Sylvia Rudy, Mickey Landrum, George Romo, and appellant. (18 RT 3744, 3746-3747.) The banding patterns in Exhibit 76's blood swab matched the banding patterns in Juanita Bragg's blood sample and two additional bands in that swab were similar to two bands found in Leo Bragg's blood sample. (18 RT 3737.) Exhibit 76's banding patterns did not match that of appellant, Mickey Landrum or George Romo. (18 RT 3747, 3749-3750.) Cooper concluded that the blood on the knife in the vase matched Juanita Bragg and was similar to Leo Bragg so that she could not identify or exclude him as a donor of DNA to that blood. (18 RT 3747, 3751.) She was able to positively exclude appellant, Landrum and Romo as possible donors of the blood on that knife. (18 RT 3749-3751, 3781.)

Ms. Cooper performed PCR analyses of blood samples taken from the knife found in the kitchen block (Exhibit 77) and the yellow rubber gloves retrieved from George Romo. (18 RT 3752-3754.) The PCR DQ-Alpha type for both blood samples was 1.3, 2. (18 RT 3752-3753.) Cooper thus concluded that Juanita Bragg, who had the same DQ-Alpha type (1.3, 2), could not be excluded as a possible donor of DNA to either the blood on the knife from the kitchen block or the blood on the yellow gloves. (18 RT

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[24] As explained by Dr. Word, RFLP is the preferred method of DNA analysis because it yields more information. (18 RT 3692.) However, there are many situations where they cannot use RFLP testing, such as when there is not enough DNA material to test with the RFLP method or the DNA is damaged and/or broken into smaller pieces. In those situations, they must use the PCR method to analyze samples. (18 RT 3680-3681, 3693-3694.) The RFLP method of DNA testing has been described in detail in several of this Court's opinions, including *People v. Venegas*, *supra*, 18 Cal.4th at pp. 57-63 and *People v. Soto* (1999) 21 Cal.4th 512, 519-526.

3753.) Neither appellant, Mickey Landrum, or George Romo had blood of that type. (18 RT 3753-3754.)

8. Eric Holland.

The star witness for the prosecution was Eric Allen Holland, an admitted forger by occupation, who had suffered numerous counterfeiting and forgery convictions.[25] (17 RT 3550.) In 1991, Holland had been convicted of counterfeit security charges in federal court and sent to federal prison to serve a 37-month sentence. (1 RT 179.) At the time of his federal sentencing in March 1991, Holland was also facing pending felony charges for forgery and auto theft in various California counties, including Stanislaus, Santa Clara, Kern, Fresno, Modesto, and Madera. (1 RT 178-180.) Holland sought, through his attorney, to work some kind of deal with these counties whereby all of his county charges would be run concurrent to his federal sentence and claimed that the counties did, in fact, enter into such an agreement with him. (1 RT 180; 17 RT 3556-3558.) However, he

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[25] In addition to his federal counterfeit security convictions and pending county charges discussed below, Holland admitted a 1987 forgery conviction for forging payroll checks in Stanislaus County, which resulted in a 32-month state prison sentence. (1 RT 182; 17 RT 3561, 3562.) In 1987, he was also arrested and convicted in Alameda County for forging payroll checks. (17 RT 3559-60.) He forged payroll checks in other counties in 1987, including Fresno, Kern, and Los Angeles Counties. (17 RT 3561.)

Additionally, Holland admitted manufacturing cashier's checks which he used to purchase various cars (17 RT 3552-3555) and forging payroll checks (17 RT 3559), driver's licenses (17 RT 3560), and many birth certificates. (*Ibid.*)

Holland also admitted running an escort service, although he denied that it was a front for a prostitution ring. He insisted that his girls were just strippers who danced at burlesque parties. (17 RT 3565-3567.)

subsequently learned that the various counties, including Stanislaus, were not going to honor such a deal.[26] (*Ibid.*)

Thus, in 1992, Holland was transferred from federal prison to the Stanislaus County Jail to face his pending Stanislaus County felony charge, arriving on May 12. (1 RT 180-81; 17 RT 3540-3541, 3550, 3558; 18 RT 3822.) Holland was initially placed on "X" tier, as a heightened security risk due to his escape conviction. (1 RT 183.) However, within two weeks, Holland was moved to "PS" tier where, beginning June 8, he was housed in a cell next to appellant's cell. (1 RT 183-184; 19 RT 4147.) Holland had not met appellant prior to that date, but was aware of appellant's pending murder charge. (17 RT 3484, 3495, 3537.)

Holland testified that he overheard appellant's conversations with various trustees in the jail. (17 RT 3486.) Appellant was offering them his motorcycle and commissary credit if they would kill Mickey Landrum and possibly Landrum's girlfriend. (*Ibid.*) Holland advised appellant to shut up, and appellant then asked Holland if he knew anybody to "do the job." (17

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[26] It appears that, despite Holland's insistence at appellant's trial that the various counties "reneged" on this deal for concurrent state time, the counties did not want to honor or make that deal due to Holland's subsequent 1991 federal conviction for aiding others in an unlawful attempt to escape custody. Holland received a consecutive 36-month term for that conviction. (1 RT 181; 17 RT 3556.) At trial, Holland maintained that he never tried to escape from federal prison; he was only convicted of aiding and abetting, "which was not escape or me trying to escape." (17 RT 3556.) Holland also contended that he really was not facing between five and ten additional years in state prison if he had not negotiated the plea to testify against appellant, because "any judge that saw the deal that [he] took and the time that [he] got would give [him] the deal that [he] was supposed to have got in the first place" — to run his state time concurrent with his federal sentence. (17 RT 3557.) Holland claimed that he was in Modesto at the time of his conversations with appellant to try to convince a judge to enforce this deal. (17 RT 3556.)

RT 3486-3487.) Holland told appellant that he knew a marine colonel who could take care of it, but it would cost a lot of money.[27] (17 RT 3487, 3543.) Holland testified that he told this to appellant, because he wanted him to be quiet. (17 RT 3487-3488.) Holland figured that appellant would not be asking the trustees anymore if he thought Holland could do it. This strategy, Holland said, was to get appellant to stop talking about it. (*Ibid.*)

But, of course, this "strategy" did not work. Appellant appeared to believe Holland's story and only became more interested. (17 RT 3487, 3544.) And appellant's list of individuals to be killed grew longer. It now included not only Mickey Landrum and Landrum's girlfriend, but also Landrum's uncle (Virgil Pokorney) and mother (Ella Pokorney); Chester Thorne; Linda Lee; possibly Virgil's girlfriend; and the two investigating officers, Detectives Grogan and Vaughn. (17 RT 3494-3495.)

Appellant told Holland that he did not have any money, but had a motorcycle and could purchase commissary for Holland. (17 RT 3488.) Appellant also promised to do a favor for Holland when appellant and Holland got out of jail. He would do whatever Holland wanted, including killing somebody for him. (*Ibid.*) Holland responded that he would have to pay the colonel out of his own pocket and appellant could later reimburse him by doing the favor. (*Ibid.*)

Holland, however, wanted some insurance that appellant would, in fact, reimburse him and it was decided that appellant would give Holland a signed confession to the crimes charged in this case. (17 RT 3489, 3494.) Appellant was to address the confession to the deputy district attorney, so

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[27] At trial, Holland first insisted that there was, in fact, such a marine colonel. But finally, after continued questioning, he admitted that he made him up. (17 RT 3545.)

that if appellant failed to reimburse Holland in full, Holland could and would give that confession to the District Attorney's office. (17 RT 3494, 3511-3512.)

Holland testified that appellant told him several different versions of the crimes. First, appellant told him that Mickey Landrum, alone, did the murder. (17 RT 3502, 3510.) Appellant's second account was that he and Mickey both committed the crimes. (17 RT 3503, 3510.) Holland doubted that Landrum was involved, so asked appellant questions about the crimes. (17 RT 3510.) Appellant then admitted that he, alone, committed the crimes. (17 RT 3503, 3510.) Appellant described how he committed the murder, said that he had burglarized the same place on two previous occasions, and drew a diagram of the home. (17 RT 3503, 3507.)

According to Holland, the following is the account appellant told him. Appellant twice burglarized a woman's house. He first burglarized the home in September 1991. He had been outside dumping the trash when he looked through the window of a neighbor's home and saw $80 sitting on the counter. Appellant needed money, so he broke in and took the money, along with several other items, including dishes, glasses and telephones. (17 RT 3503, 3507, 3508.)

Appellant next burglarized the home around Valentine's Day of 1992. Appellant could not recall what he took from the home on that occasion. He said that he tried to get a television set but needed help to move it due to his bad back. He called Mickey Landrum to see if he would help, but Landrum could not make it. (17 RT 3508.)

Then, on the night/morning before he and his mother moved from their home, appellant broke into the same house and committed a murder. Landrum and appellant spent the evening before the homicide at appellant's home, getting stoned and playing games. (17 RT 3503.) Landrum went

home and after appellant's mother, her roommate and the roommate's daughter went to bed, appellant continued to watch TV. (17 RT 3504.)

About 4:30 or 5:00 am, appellant awoke and "got dressed to kill." He knew it was the last night that he could kill, and he wanted to see whether he could commit a murder. (17 RT 3504.) Appellant's intent was to rape and kill Sylvia Rudy. (17 RT 3509.) Appellant got a pair of his mother's yellow dishwashing gloves, a knife, and a ball-peen hammer, and left his house through its sliding glass door. (17 RT 3504.) Appellant opened the neighbor's front door with keys he had taken previously, went to Sylvia Rudy's bedroom, which was empty, and then went to the other room where he saw two elderly people sleeping. (*Ibid.*) Appellant did not realize that they, and not Ms. Rudy, would be in the house, because their car was similar to Ms. Rudy's car. (17 RT 3509.)

Appellant stood above the two sleeping people for about three minutes, trying to figure out whether "he was crazy enough to do it." He then began stabbing and beating both of them. His knife bent when he tried to stab them through the blanket, so he went to the kitchen and got a couple more knives. Returning to the bedroom, appellant began stabbing back and forth — one and then the other. Appellant hit the man's head with his ball-peen hammer, and it went into his skull about an inch. Appellant thought that the man was dead, so he did not attack him anymore. But the woman was still alive, so he slit her throat and wrists and continued stabbing her. (17 RT 3505.)

Appellant then went through the house to see if there was anything to steal. He took telephones, $4 from the man's wallet, $7 from the woman's purse, and a binder and calculator from the closet. (17 RT 3505.) Appellant set a camera on the counter, and then returned to the bedroom where he saw that the woman was still alive. He continued to strike her but saw that it

was getting light out. He wanted to ensure that she could not identify him, so appellant went to Sylvia Rudy's bedroom and grabbed a stocking from a drawer, which he placed over his face. Appellant then returned to the other bedroom and continued to stab the woman. At that point it was getting real light, so appellant grabbed his sack and left. Appellant left something behind, on the counter, which Holland thought was a camera, but was not sure. (17 RT 3506.)

Appellant placed his bag by the trash dumpster and entered his home. His mother saw him, and appellant told her that he had been out jogging. The others in his home awoke and they went to McDonald's for breakfast. They then started moving and about 2:30 or 3:00 p.m., the ambulances started coming and "they started asking questions." (17 RT 3506.)

Holland testified that he and appellant also passed notes back and forth about the crimes.[28] (17 RT 3509-3510.) Holland would write a question on a note and pass it to appellant; appellant would then write a response on the note and return it to Holland, and sometimes, vice versa. (17 RT 3509.) Holland identified People's Exhibits 96 through 98 and 100 through 118 as those notes. (17 RT 3512-3519.) They contained (1) Holland's questions to appellant about the crime and appellant's answers; and (2) appellant's questions to Holland regarding the murder of various

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[28] Holland testified that the notes were written over a period of a couple of weeks, starting around June 20. (17 RT 3538-3539.) With the exception of one note, none of the notes were dated in any way that would establish a chronology, but Holland claimed that he could approximate, based on content, when most of the notes were written. (17 RT 3539.) Holland also claimed that he possessed the majority of the notes at the time of his first meeting with a District Attorney Investigator on June 26, even though the notes "were still coming in." (17 RT 3539-3540.)

witnesses and the two investigating officers, as well as information about the individuals to be killed.[29] Holland distinguished between his handwriting and appellant's handwriting by placing his initials "E.H." next to his own handwriting. (17 RT 3514-3515.) David Moore, a questioned document examiner employed by the Department of Justice, opined that appellant wrote Exhibits 96, 98, 105, 107, 109, 112, 113, 116, and 117; Holland wrote Exhibit 118; and that for Exhibits 97, 99, 100, 101, 102, 103, 104, 106, 108, 110, 111, 114, and 115, Holland wrote the entries accompanied by the initials "EH" and appellant wrote the remaining entries. (17 RT 3637-3647; 18 RT 3652-3656.) Donna Mambretti, a latent print analyst at the Department of Justice, identified appellant's prints on Exhibits 98 through 100, 102 through 104, 106 through 116 and 118 and Holland's prints on Exhibits 97 through 100, 102, 104, 112, and 115. She found no identifiable prints on Exhibits 96, 101, 105, and 117. (17 RT 3568, 3592-3599.)

After all of the note passing, in which Holland questioned appellant and elicited details about the crimes, it was time for appellant to write his "confession." (17 RT 3511, 3519.) In the last note passed between the two, People's Exhibit 118, Holland gave appellant specific instructions how to write the confession.[30] (17 RT 3519.)

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[29] Because it is difficult to summarize these Modesto case notes without distorting their meaning, they are reproduced verbatim in Appendix A contained in the separately bound volume of appendices filed concurrently with this brief.

[30] Exhibit 118 stated:

> 1st you need to put this in order. Take your time. Write neatly. Only write on one side of paper. Start with night of FEB 29th, then go through the night to early morning of March 1st. Write it just like you told me. With full

(footnote continued on next page)

According to Holland, appellant wrote three or four different accounts of the crime. (17 RT 3509-3510, 3547.) Holland did not keep all of them. The version, in which Mickey Landrum committed the murder, was thrown away. (17 RT 3510.) Appellant flushed other versions down his toilet. (17 RT 3546.) Appellant's third version was a two-to-three page account which, Holland apparently thought, lacked sufficient detail. (17 RT 3510, 3548.) After reading that version, Holland wrote a five-page version, which he showed to appellant, and said: "This is how I want it if you're going to do this collateral." (17 RT 3549.)

So appellant ripped up the three-page version and wrote the final version, a 14-page confession with two one-page supplements. (17 RT 3511, 3519-20, 3549.) Holland kept this account, which he identified as People's Exhibits 80 through 95.[31] (*Ibid.*) Questioned document examiner David Moore opined that appellant wrote these exhibits and DOJ Latent Print Analyst Donna Mambretti identified both appellant's and Holland's prints on them. (17 RT 3575-3577, 3583-3592.) Holland eventually admitted possessing a copy of this confession in his own handwriting —

(footnote from previous page)

> detail. the thoughts you had at the time. What you wore, specifically. What you took specifically with you. how you left without anyone knowing. What you were thinking when you woke up. How you saw her car (thought it was her car) How you went into house. How much money you took from wallet, how much from purse, total. how you went back to your house. What you said to your Mom, etc.etc. Full Detail Start To Finish!

[31] Each page of the alleged confession was given a separate exhibit number. It is reproduced verbatim in Appendix B contained in the separately bound volume of appendices filed concurrently with this opening brief.

identical in all respects except for the omission of appellant's signature. (17 RT 3549-3550.) Holland claimed to have written that version months after appellant wrote Exhibits 80 through 95. Holland wrote it "exactly so the District Attorney could look at it without having Brian's confession in hand, but that way they could see exactly what it contained but that it wasn't the real confession." (17 RT 3550.)

Holland admitted that his intent in obtaining the written confession was to give it to the district attorney. (17 RT 3520.) He claimed his motivation in doing so was because he thought "this person was sick and that he might get off." (*Ibid.*) Upon receiving the notes from appellant, Holland gave them to his attorney to give to the authorities.[32] (17 RT 3520-3522.) Holland claimed that he did not want to get involved, because he was already incarcerated and did not want to be labeled as an informant. All he wanted to do was give the information to the authorities. (*Ibid.*) Holland hoped or believed that he would not have to testify because he had a signed confession in appellant's handwriting, specifically stating that it was written "without stress or duress."[33] (17 RT 3522.) Holland "figured that's all it took." (*Ibid.*)

After Holland gave the notes to his attorney, his attorney contacted the district attorney's office and arranged an interview which occurred one

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[32] However, on September 4, 1992, the police seized notes, as well as the alleged confession, from Holland's jail cell after serving a search warrant. (17 RT 3531; 18 RT 3825-3827.) Holland was not asked and did not explain whether the notes seized from his cell were the same notes that had been delivered to his attorney and if so, how they ended up in his cell.

[33] Actually, however, Holland did not have the signed confession at that time. He did not obtain the signed confession until after his second meeting with the authorities, which occurred on July 3. (17 RT 3528.)

or two days later. (1 RT 190-91; 17 RT 3522.) Several interviews ensued between Holland and the authorities.[34]

The first interview occurred on June 26, between Holland, his attorney and District Attorney Investigator Fred Antone. (17 RT 3524.) At the very beginning of the interview, Antone stated to Holland: "I understand that you may want to work a deal." (18 RT 3836-3837.) Holland told Antone that he had notes from appellant and "was in the process of getting a confession" from him. (17 RT 3546.) Holland claimed that he met with Mr. Antone in order to give him appellant's confession because he was worried about appellant getting out of jail. (17 RT 3520, 3546.) Holland denied that he did so, because he had a number of years hanging over his head for his various pending charges. Holland insisted that he already had a deal. (17 RT 3546.) Holland initially testified that at the end of that meeting, he reached an agreement with the district attorney's office that his state charges would run concurrent with his federal charges. (*Ibid.*) He then testified that no, nothing was said about any deal at the first meeting. Holland just signed a paper stating that nothing he told the authorities would be held against him.[35] (*Ibid.*)

At the second interview held on July 3, Holland and Antone discussed a possible deal and Holland expressed concerns about not wanting to testify. (17 RT 3525; 18 RT 3837.) Mr. Antone testified that the

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[34] Four interviews between Holland and the authorities were tape-recorded and transcribed: on June 26, July 3, September 4, and September 17. All four transcripts were attached as exhibits to appellant's motion to suppress his statements to Holland. (See 5 CT 1218-1373.) A detailed summary of these interviews is presented, *post*, in Argument II.

[35] It was stipulated that the paper contained a promise that the district attorney's office would not use any statement Holland might make during the interview against him. (19 RT 4147-4148.)

main subject of the July 3 interview was the deal; Holland was facing a substantial number of years in prison on his pending charges in the various counties. (18 RT 3838-3839.) At trial, Holland claimed he "tried to give the confessions free and clear." He "didn't want anything for it." (17 RT 3525.) Holland was told, however, that what he had given the authorities would be of no use unless he testified. (*Ibid.*) It was (supposedly) only then that Holland decided he wanted something in return. Holland explained that if he had to testify, there was "no way" he would consider doing so unless he got his "original deal" to run all of his state charges concurrent with his federal sentence. (17 RT 3525-3526.)

Holland testified that he wanted the deal for two reasons: first, because it was owed to him, and second, because he was not going to do anything else in this case unless he got it. (17 RT 3526.) He testified that if he was placed in the California prison system, he would be labeled an informant and his life would be in danger. Holland thus wanted his state sentences to expire when his federal sentences concluded. (*Ibid.*) When asked what that would accomplish, Holland answered: "It would accomplish what I thought would accomplish all along from the very beginning, that I wouldn't have to do any time in the California prison system." (*Ibid.*) Holland and the district attorney's office, however, did not reach any agreement during the second interview. (17 RT 3526-3527.) Because Mr. Antone did not know for sure whether they could convince the other counties to run their sentences concurrent with Holland's federal time, Holland refused to testify and kept all of his written material concerning the case. (17 RT 3527.)

Sometime after the July 3 inteview, Holland received the written confession,[36] but he did not give it to the district attorney's office. (17 RT 3528.) Holland held on to it because Mr. Antone would not take it. (*Ibid.*) Holland denied that he attached any condition to giving the written confession to the authorities. He only attached a condition to testifying against appellant — that he receive his original deal of running all of his state charges concurrent with his federal time.[37] (17 RT 3529.) Holland was told that the Stanislaus County District Attorney's office was working on meeting that condition. (*Ibid.*)

Holland was moved from the Stanislaus County jail on August 11 and on September 4, he received a visit at his new jail location from Mr. Antone and Detective Grogan. (17 RT 3530; 18 RT 3822.) Holland still possessed the confession and notes. (*Ibid.*) Holland told them that he was not going to do anything for them, they were "screwing" him, and he did not want anything to do with them. (17 RT 3531; 18 RT 3830-3831.) They then served a search warrant and took possession of the confession (People's Exhibits 80 through 95) and all of the notes in Holland's cell (People's Exhibits 96 through 116).[38] (17 RT 3531; 18 RT 3826-3827.)

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[36] According to the transcript, during the July 3 interview, Holland told Antone that he was "on the brink" of getting access to appellant's confession, but wanted to know if "it would be pertinent to a case" to have a detailed confession, including the motivation for giving it, in appellant's handwriting. (5 CT 1297-1298.)

[37] Investigator Antone confirmed that on several occasions, Holland offered to give the documents on assurance that he would not be called as a witness and did not condition that offer on receiving a deal. (18 RT 3833-3834.)

[38] On August 4, Investigator Antone had retrieved a note (People's Exhibit 117) from the toilet in appellant's cell and another note (People's Exhibit 118) from a paper bag in his cell. (18 RT 3824-25.) Exhibit 117 stated:
(footnote continued on next page)

Thereafter, Holland agreed to cooperate and signed an agreement with the District Attorney's office to testify against appellant. (17 RT 3531-3532; 18 RT 3830-3831.) The agreement provided that in exchange for his testimony against appellant, all of his state charges[39] would be run together and in the aggregate, they would run concurrent with his federal sentence so that upon expiration of his federal sentence, he would not go to state prison. (17 RT 3536.) The only condition attached by the State was that he testify truthfully and to the best of his knowledge. (17 RT 3535; 18 RT 3832.) At the time of appellant's trial, Holland had entered guilty pleas in all of his outstanding state cases but was awaiting sentencing. (17 RT 3536.)

Holland admitted that while he was in custody in Stanislaus County, he had seen the police reports in this case, which described all the details of the case. (17 RT 3562-3563.) However, he maintained that he saw them after he had received appellant's confession. (17 RT 3563.) Holland claimed that appellant gave them to him, asking him to review them and tell him what he thought. (*Ibid.*)

(footnote from previous page)
"Must make it look like he's running from the law. He <u>has</u> to disappear and his car has to be driven to the airport and left there to be found." (People's Exhibit 17.) Exhibit 18, quoted in footnote 30, *ante*, at pp. 39-40, was Holland's note instructing appellant how to write his confession.

[39] The state charges folded into this plea agreement included: Stanislaus County — forgery (one check); Madera County — destructive device in a vehicle; Fresno County — forgery (one check, maybe more); Kern County — forgery (created a cashier's check which he used to buy a car); Los Angeles County — forgery and auto theft (used a forged check to buy a Cadillac convertible); and Santa Clara County — forgery (forged a cashier's check in the amount of $28,000, which he used to buy a Mercedes-Benz). (17 RT 3550-3551, 3553-3555.) Under the plea agreement, Holland would not serve any time for these charges, other than the time he was already serving for his federal convictions. (17 RT 3555.)

B. The Defense.

1. Evidence Implicating Mickey Landrum.

Mickey Landrum, who had testified in the prosecution's case in chief, was recalled as a defense witness. Initially Landrum claimed that he did not recall what he did or where he was on Saturday night, February 29, just before the charged capital offense. (19 RT 3959-3960.) On cross-examination, however, he recalled that he was at appellant's house during the evening and went home between 10:00 and 10:30 p.m. (19 RT 3963.) He was 99 percent sure that he spent the night at his mother's house. (19 RT 3960.) The only person there that night was his mother, who left the next morning at 6:00 for work. (19 RT 3961.) Landrum awoke about 8:00 a.m. on Sunday, ate breakfast, watched TV, and then went to appellant's house to help with the move at 10:00 a.m. (19 RT 3960-3961.) Landrum denied that he had a cut on his hand that morning or was wearing a bandage on his hand when he arrived at 103 Greenwich. (19 RT 3961.) Landrum also denied having received a key to 103 Greenwich from Mrs. Johnsen in order to care for her animals. (19 RT 3959.)

David Johnson, an employee at Ray's Sewing, moved into the Johnsens' home at 103 Greenwich Lane on Sunday, March 1. (19 RT 3986-3987.) He arrived there to help with the move around 10:00 a.m. (*Ibid.*) Mickey Landrum was also there, helping with the move. (19 RT 3988.) David Johnson did not know either Landrum or appellant. (19 RT 3988, 3990.) Johnson observed a gauze bandage wrapped around Landrum's left hand. (19 RT 3988.) Johnson recalled thinking that Landrum might have cut his hand washing dishes or something, because they were still cleaning up at the Johnsen home. (19 RT 3994.) Johnson also recalled Landrum playing around with the bandage. (19 RT 3998.)

Faye Johnsen also recalled seeing a bandage on Landrum's left hand when he arrived around 10:00 a.m. (19 RT 4014.) Mrs. Johnsen thought that the bandage was wrapped around Landrum's hand but was not sure, since it had been two years ago. (*Ibid.*) She did recall that the bandage was bigger than a Band-Aid. (*Ibid.*) Mrs. Johnsen also testified that Landrum had a key to 103 Greenwich, which she had given him during the last week in February 1992, in order to care for her cats. (19 RT 4015-4016.)

District Attorney Investigator Fred Antone testified that the day before, he examined Mickey Landrum's left hand and observed a quarter-inch scar between his thumb and forefinger, "near the webbing." (19 RT 4105.) Landrum told him that eight years ago, he was playing a game called "Mumbly Peg," and cut himself with a knife. (19 RT 4105-4106.)

2. **The Move and the Evening Before at Appellant's Home.**

Faye Johnsen testified that appellant was home during the evening before the March 1 move. (19 RT 4010.) She did not see him leave their home that night after 7:30 p.m. (19 RT 4010-4011.) Mickey Landrum was there for about an hour that evening. (19 RT 4010.) When Mrs. Johnsen went to bed around 10:30 p.m., appellant was lying on the sofa, watching TV and starting to doze off. (19 RT 4011.) Mrs. Johnsen arose once during the night, maybe about 3:00 a.m., to stop a running toilet. (*Ibid.*) Appellant was asleep on the couch but the TV was still on, so she turned it off. (*Ibid.*) Mrs. Johnsen returned to bed and did not get up again until around 6:40 or 6:45 a.m. (19 RT 4011-4012.) Appellant was there, on the couch, just starting to get up. (19 RT 4012.) She, appellant, and the Greshams left her home about 7:00 a.m. to have breakfast at McDonald's, and returned home between 7:30 a.m. and 7:45 a.m. (19 RT 4012-4013.) They spent the day moving and then all left 103 Greenwich about 5:00 p.m. (19 RT 4015.)

Appellant was with them the entire day, except for ten minutes when he and Landrum went to the store at lunchtime (around noon) to get soda and beer. (*Ibid.*)

Ray Gresham, who owned the Modesto sewing machine shop where Faye Johnsen worked before moving to San Jose, testified that he also had a store in San Jose. (19 RT 4000- 4001.) Gresham was the person who actually rented the premises at 103 Greenwich and when he was in Modesto, he stayed in the third bedroom. (19 RT 4002.) On the night before the March 1 move, Gresham and his daughter slept at 103 Greenwich. (19 RT 4003-4004.) When they rose at 6:30 or 7:00 a.m., Faye Johnsen and appellant were already up. (19 RT 4004.) About 7:00 a.m., they all went to breakfast at McDonald's. (*Ibid.*) Approximately 30 minutes later, they returned to 103 Greenwich, where they spent the day packing and moving. (19 RT 4006.) Gresham did not leave the home at any time that day. (*Ibid.*) Appellant was also there all day, except when he left at 10:00 a.m. to get some sodas. (*Ibid.*) He was gone for 30 minutes. (*Ibid.*)

3. Time of Death and Infliction of Injuries.

Dr. Ernoehazy testified that one of his duties as a forensic pathologist is to estimate time of death. (19 RT 3970.) In every case, he either has to estimate the time of death or determine whether the reported time of death fits, in light of his examination. (19 RT 3971.) He has testified several hundred times to time of death in court. (*Ibid.*)

Dr. Ernoehazy recalled his preliminary hearing testimony that when he saw Mrs. Bragg's body at the scene at 6:00 p.m. on Sunday, March 1, he did not think she had been dead for a very long period of time. (19 RT 3972.) When asked at trial what he had meant by "very long period of time," the doctor responded that six hours is not a very long period of time. He explained: "In other words, she is not dead long enough to start

decomposing yet." (*Ibid.*) Based on that factor, as well as some of the other findings, Dr. Ernoehazy estimated the period of time she had been dead as being six, maybe eight hours. (*Ibid.*)

Dr. Ernoehazy also recalled testifying at the preliminary hearing that Mrs. Bragg's injuries were inflicted not more than an hour or two before she died. (19 RT 3973.) When asked if that was still his opinion, the doctor responded: "yes and no." (*Ibid.*) He could no longer say whether the injuries occurred an hour or two before she died. He could only say that they occurred at least an hour or so before her death. (*Ibid.*) When reminded that according to his preliminary testimony, two hours would be the outside limit in his opinion, Dr. Ernoehazy responded that he could not recall exactly what he had said because he did not know what questions led to that response. (19 RT 3975.) Basically, the doctor could say that the injuries happened before death and happened long enough before death that there was some vital reaction on the microscopic slides, but how long before was an educated guess. (*Ibid.*) Considering the amount of hemorrhage and amount of reaction, Dr. Ernoehazy opined that the injuries were inflicted at least several hours before Mrs. Bragg died. But whether they occurred two, three or four hours before death, the doctor could not say. (*Ibid.*)

At the time of trial, Dr. Ernoehazy had not learned any more information about Mrs. Bragg's body than he knew at the time of his preliminary testimony in 1993. (19 RT 3976) He believed that his current conclusions were pretty much the same as the conclusions he held at the preliminary hearing. (*Ibid.*)

On cross-examination by the deputy district attorney, Dr. Ernoehazy recalled testifying at the preliminary hearing that Mrs. Bragg's injuries could have been inflicted as early as 5:00 or 6:00 a.m. (19 RT 3977.) When asked if that was still his opinion, the doctor responded that he really could

not tell exactly what time she was hit. She was hit at least two hours or so before death but it could be more than that. (*Ibid.*) Dr. Ernoehazy also agreed with his opinion, stated during the prosecution's case in chief, that Mrs. Bragg probably lived several hours after the injuries were inflicted, but all he could really say is that she survived less than 24 hours but more than 5 minutes. (19 RT 3977-3979.)

When asked whether he recalled taking a break or recess during his preliminary hearing testimony and conferring with Detective Grogan and the deputy district attorney, Dr. Ernoehazy responded that he could not recall conferring with anyone. (19 RT 3983.) When asked if he had any conversation with them during the break, Dr. Ernoehazy said he did not recall any. (*Ibid.*)

Detective Grogan testified that he recalled taking a lunch break during Dr. Ernoehazy's testimony at the preliminary hearing, and that during the break, he and the deputy district attorney had a discussion with the doctor about the facts of the case. The detective conceded that they discussed the issue of when the injuries were inflicted, but he could not recall exactly what was said. (19 RT 3984-3985.) When asked whether it concerned the possibility of having Dr. Ernoehazy testify that the injuries were inflicted as early as 5:00 or 6:00 in the morning, Detective Grogan responded that he did not believe it was put to Dr. Ernoehazy that way, but the detective was not sure "how it was put" to the doctor. (19 RT 3984.) The detective claimed, however, that the deputy district attorney did not say anything to the doctor that would change his testimony. (19 RT 3984-3985.)

4. <u>Impeachment of Eric Holland</u>.

Simon Ellis, a manager of a software engineering group at Intel. Corp., testified that in 1990, he sold a 1987 Porsche to Eric Holland. (19

RT 3964-3966.) Holland gave him a cashier's check in the amount of $20,600. (19 RT 3966.) It looked like a regular cashier's check from Wells Fargo and the bank initially accepted the check, but it was subsequently dishonored. (*Ibid.*) Holland was pretty convincing. (19 RT 3967.)

The defense also called District Attorney Investigator Fred Antone, who read a multitude of passages from the transcripts of his June 26 and July 3, 1992 meetings with Holland. As noted above, a detailed summary of these meetings is presented, *post*, in Argument II.

C. **Prosecution Rebuttal.**

Detective Grogan testified that on March 1, around 7:00 p.m., he observed Mickey Landrum at 103 Greenwich for probably five minutes. (19 RT 4107.) The detective did not observe any bandages on Landrum, who was standing five feet away. (*Ibid.*)

Detective Grogan further testified that when he interviewed Ray Gresham on April 14, Gresham told him that he had gotten up on March 1, at 7:30 a.m. (19 RT 4108.) Detective Ray Taylor testified that Faye Johnsen told him that she arose at 7:00 a.m., ate breakfast and started moving. (19 RT 4112-4113.) According to both detectives, neither Ray Gresham nor Mrs. Johnsen equivocated about the time. (19 RT 4109, 4112-4113.)

* * * * * *

II.

PENALTY PHASE

A. Prosecution.

1. Other Crimes Evidence.

a. May 15, 1991, Homicide of Theresa Holloway.[40]

On the morning of May 17, 1991, the body of Theresa Holloway was found lying in a drainage ditch along Highway 163 in San Diego. (22 RT 4771-4773.) Holloway, who was 16 to 17 weeks pregnant, had suffered (1) multiple abrasions and lacerations on her face and scalp; (2) multiple fractures of her facial bones, skull and jaw; (3) several defensive wounds on her hands; and (4) horizontal abrasions and contusions on her neck which may have been ligature marks. (22 RT 4778-4780, 4782-4784.) The cause of death was blunt force head injuries and strangulation. (22 RT 4784.) Due to the peculiar pattern of the lacerations and abrasions, the San Diego medical examiner opined that they might have been inflicted with a scissors jack. (22 RT 4778-4781.)

At the time of Holloway's death, appellant was incarcerated in the San Diego County jail. (25 RT 5695; People's Exhibits 161-164.) Mark Schmidt, an acquaintance of appellant, testified to events which had occurred at his San Diego home on the evening of May 15, two days before the discovery of Holloway's body. On that evening, appellant called Schmidt from jail and said that he wanted to talk to another friend, Robert Jurado. (22 RT 4786.) Schmidt went to Jurado's apartment, where he found Jurado, Denise Shigemura, and Theresa Holloway, and delivered

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[40] It was stipulated that Theresa Ann Holloway, also known as Terry or Teri, had been appellant's girlfriend at the time of her death. (22 RT 4945.)

appellant's message. (22 RT 4786-4787.) Schmidt, Jurado, Shigemura, Holloway, and Anna Humiston, who had just arrived, went to Schmidt's apartment, where appellant called again. (22 RT 4787-4788.) Jurado and Shigemura talked to appellant behind closed doors, and then handed the phone to Holloway, who also spoke to appellant behind closed doors. (22 RT 4788-4789.) After about ten minutes, Jurado asked Schmidt to tell Holloway to hurry and that she had to leave his apartment with Jurado. (22 RT 4789, 4791-92, 4794-4795, 4798.) Schmidt did so and Holloway left with Jurado, Humiston, and Shigemura at about 8:45 p.m. (22 RT 4791-4792, 4792-4794.) Before leaving, Jurado asked Schmidt for some chain, and Schmidt gave him some Weed Eater wire (thin hard plastic wire). (22 RT 4790.) Jurado looped the wire around his neck, tightened it, and said, "That will do." (22 RT 4791.) Schmidt believed that appellant called later that evening, around 10:00 p.m. (22 RT 4797.)

Melissa Andre, a friend of Anna Humiston, testified that on May 16, Humiston called her and said that she had done something very bad on the night before with Robert Jurado and Denise Shigemura. (22 RT 4848-4849.) Humiston told Andre that they had murdered Terry Holloway. Denise was driving on Highway 163, with Holloway sitting in the front passenger seat and Jurado and Denise in the back seats. (22 RT 4849-4850.) Jurado tried to strangle Holloway with a wire and Humiston punched her. (22 RT 4850.) Holloway said: "Why are you killing me and my baby?" "Please stop," and "What did I do?" (22 RT 4850-4851.) Holloway would not die and so they pulled to the side of the road, whereupon Jurado threw Holloway into a ditch and beat her head with a tire jack. (22 RT 4850.)

Mia Rodigues, another friend of Humiston, testified to conversations with Humiston about Holloway's death. At high school on May 16, Humiston told Rodigues that on the previous night, she helped kill

somebody named Terry. (22 RT 4852-4853.) Humiston said that she had pinned Terry's arms while Humiston's boyfriend, Robert Jurado, tried to strangle her with a rope. (*Ibid.*) Terry did not die and so Jurado hit her with a car jack. (*Ibid.*) In another conversation the next day, Humiston, whose eyes were tearing, told Rodigues that Terry kept asking, "Why?" "Why are you doing this?" and Humiston kept hearing Terry's voice in her head, over and over again. (22 RT 4854-4855.)

San Diego Police Detective Ronald Larmour testified to his custodial interview of Denise Shigemura, wherein she described her participation in Holloway's homicide. (22 RT 4856-4858.) Shigemura said that she, Holloway, Jurado and Humiston were in Mark Schmidt's apartment, talking on the telephone to Holloway's boyfriend, appellant, who was in jail. (22 RT 4858-4859, 4861.) Jurado told Shigemura, "We have to take her [Holloway] out." (22 RT 4861.) The killing was committed while Shigemura was driving. (22 RT 4859.) Holloway was sitting in the front passenger seat, Jurado was sitting in the back directly behind her, and Humiston was sitting next to Jurado. (*Ibid.*) While Shigemura was driving, Jurado began to choke Holloway with a cloth-like material. (*Ibid.*) Shigemura had engine trouble and pulled off to the side of the road in a culvert area. (*Ibid.*) Jurado, with Humiston's help, pulled Holloway out of the car. Jurado then hit Holloway several times in the head with a car jack. (*Ibid.*) Holloway kept saying, "Why me?" "Tell me why." (22 RT 4860.) They left Holloway in a ditch and were able to drive away in the car. (*Ibid.*)

Eric Holland, the jail inmate who had testified for the prosecution at the guilt phase, testified at the penalty phase regarding an alleged "confession" appellant wrote regarding his involvement in Theresa

Holloway's death. Holland identified People's Exhibits 161 through 168[41] as that handwritten confession which he claimed he received from appellant on July 4, 1992.[42] (22 RT 4868.) Those exhibits were seized from Holland's

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[41] Similar to the Modesto case confession, each page of the San Diego case confession was given a separate exhibit number.

[42] The confession was allegedly signed and dated by appellant on "7-4-92," the same date that appeared on the signature page of the Modesto case confession. (People's Exhibit 167; People's Exhibit 93.) Holland testified initially that he assumed, based on the date, that he received the confession on July 4. (22 RT 4869.) His testimony thereafter, though, was notably inconsistent.

When asked if he had received the San Diego case confession before he received the Modesto case confession, Holland said yes, "probably between one and seven days" prior. (22 RT 4881.) When reminded of his testimony that he had received the San Diego case confession on July 4 and therefore, he would have received the Modesto case confession one to seven days after July 4, Holland replied: "No. You asked me about the notes. I believe I got the notes between one and seven days prior to the writing of the confession." (*Ibid.*) When asked again if he had received the Modesto case confession after the San Diego case confession, Holland responded:

> Well, I got the Modesto confession as the dates were on there as both 7/4 of '92. So they weren't done exactly at the same time because obviously he couldn't write them at the same time, but it's the same date. They were – he signed them.

(22 RT 4882.)

Holland testified that Johnsen gave him the San Diego case confession first and that he told appellant on July 4 that the San Diego confession was not sufficient, so appellant then wrote the Modesto case confession. (22 RT 4882-4883.) Holland claimed, however, that July 4 was not the first time he had seen the San Diego case confession:

> I saw prior writings just like I did the Modesto confession that were done in two or three pages and then those were destroyed and then he did another and it finally came to that right there [Exhibits 161 through 168].

(footnote continued on next page)

cell on September 4, 1994, when police served a search warrant. (22 RT 4870.)

Holland testified that initially, appellant was going to give him the Modesto case "confession" as collateral to secure Holland's services to arrange for the killing of witnesses, but then appellant said he did not "want to mess" with the Modesto case and would instead give Holland the San Diego case confession, which "was just as good, if not more damaging." (22 RT 4869-4870.) Holland responded that he was not sure whether the San Diego case confession would constitute sufficient collateral, but agreed to take and consider it. (22 RT 4871.)

The confession was addressed to "D.D.A. Mark Pettine," the San Diego County Deputy District Attorney who prosecuted the Holloway homicide case, and began:

> I Brian Johnsen do hereby write you this full confession of my actions. The only people forcing me to write this, is Teri, and God. You may do what you wish with this.

(People's Exhibit 161.)

(footnote from previous page)

(*Ibid.*)

When asked when he received the Modesto case confession, Holland testified: "Well, he dated it 7/4. I believe it was 7/5. But I think he dated it back to the same day." (22 RT 4883.) Holland was clear that he did not receive both confessions on the same day:

> Like I said, I believe that he dated that one back to 7/4 so they coincided because he was giving me two confessions. He was basically trying to say, "Well, I'll go ahead and give you this one; and if you'll do this for me I'll give you this one also," so like putting more money in the pot. Basically saying this is better for you.

(*Ibid.*)

The confession stated that on the evening of May 15, appellant called Mark Schmidt and asked him to get Robert Jurado and Denise Shigemura because appellant needed to speak with them. Appellant, Jurado, and Shigemura were involved in a plot to kill a person named Doug Mynatt. Shortly thereafter, Jurado, Shigemura, Anna Humiston, and Terry Holloway arrived at Schmidt's home and when appellant called back, he first spoke to Jurado. Jurado told appellant that Holloway was threatening to tell Mynatt about their plans. Appellant responded that he doubted Holloway would say anything to Mynatt, but Jurado was very worried that she would follow through. After appellant spoke to Jurado, Shigemura told appellant that Holloway was "getting very stupid" and that he should talk her out of it. (People's Exhibit 161.)

Appellant then asked to speak to Holloway. She asked him about the plot to kill Mynatt and he asked her why she was threatening to "snitch [them] off." (People's Exhibit 161.) Holloway told appellant that she could not stand by and watch Mynatt get killed without knowing why and threatened to tell Mynatt if appellant did not tell her everything. (People's Exhibit 162.) Appellant replied that would "get a lot of people killed, including me." Her response was that appellant had better tell her what she wanted to know. Appellant told Holloway that he first needed to discuss it with Jurado, so Holloway put Jurado on the phone. (*Ibid.*)

Jurado told appellant that something had to be done about Holloway because even if they told her everything, she would probably tell Mynatt, and then they would all die. (People's Exhibit 162.) Jurado said that Holloway would have to die unless appellant wanted to test his luck. Appellant asked Jurado how he thought the situation should be handled and Jurado told appellant not to worry, that he would take care of her, appellant just needed to get Holloway to leave Schmidt's home with them and that

Jurado would "do the rest." Appellant told Jurado to get Schmidt "out of the house by telling him that he had a previous engagement,"[43] and appellant would take care of Holloway. (*Ibid.*)

Holloway then came on the phone and appellant told her that he would tell her what she wanted to know but it would require more time than they presently had, because Shigemura had to get home. (People's Exhibit 162.) Holloway responded that she could stay with Schmidt, and appellant told her to ask Schmidt if that was okay. (People's Exhibit 163.) Schmidt told her no, because he had to go somewhere but would return home in an hour. Appellant suggested to Holloway that she leave with Jurado, Humiston and Shigemura to drive Shigemura home and by the time she returned to Schmidt's home, Schmidt should also have returned. Appellant told Holloway that he would call her at Schmidt's home later that evening, at 10:15, 10:30, and 10:45 (in case either she or Schmidt was late returning). Holloway said okay and then left with Jurado, Humiston, and Shigemura. (*Ibid.*)

When appellant called Schmidt's home later that evening at the three designated times, Holloway was not there and Schmidt had not heard from her or the others. (People's Exhibit 163.) Appellant knew then that something was wrong. When appellant called Schmidt on the next day and learned that Schmidt had still not heard from Holloway, appellant was pretty sure that Holloway was dead. (*Ibid.*)

The next day, the police visited appellant at jail and told him that Holloway had been murdered. (People's Exhibit 164.) Appellant, hoping to

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[43] The confession may have meant to say: appellant told Jurado to tell Schmidt to claim that he had to leave the house because he (Schmidt) had a prior engagement.

steer them away from investigating his friends, told them that he thought Brian Dick, a dope dealer, had done it, because Holloway owed him money. (People's Exhibits 163, 164.)

After appellant was released from jail on May 20, he received a call from Shigemura, who had been arrested and was crying. (People's Exhibit 165.) Shigemura, who was unaware of appellant's May 15 conversation with Jurado, told appellant how sorry she was for her participation in Holloway's death and offered to tell him anything he asked. She felt that she owed appellant an explanation for betraying his friendship. Appellant asked about Holloway's murder and Shigemura told him that Jurado had strangled her while Humiston beat her with a lug wrench. (*Ibid.*)

When appellant saw Deputy District Attorney Pettine in September and told him about the real motive for Holloway's death, he kept "a few facts" from him. (People's Exhibit 166.) Everything appellant told Pettine was true "except for those few sentences that had been exchanged between Robert and I on the phone that night." Appellant was very surprised that he had not been questioned in the courtroom about what he and Jurado had said to each other that night. Appellant did not know what he would have said had he been questioned. (*Ibid.*)

The confession continued:

> I know that you already know most of the things I have stated here. But I felt that I should relive the events to the best of my recollection so I wouldn't leave anything important out. [¶] With this confession, you now have enough evidence against me for accessory & Conspiracy charges. (People's Exhibit 166.)

The confession ended:

> This confession was written of my own free will, and to the best of my recollection. In no way, shape, or form, has anyone forced me to write this confession. I

> have written this of sound mind and body, and am on no drugs or medication. [¶] Brian Johnsen 7-4-92.

(People's Exhibit 167.)

The confession also contained an addendum, dated July 4, 1992, that stated:

> This agreement is part of a 7 page confession that I have written. [¶] I Brian Johnsen am giving this signed confession to a certain person for the purpose of having this person exterminate the people I will list below. I realize that I am giving this admission of my guilt to this person for callateral [sic], and further realize that I'll be in debt to this person until I am asked to repay my debt, no matter who, what, where, when, or how it is asked of me. I further realize that when my debt is paid, my callateral [sic] will be returned to me. [¶] 1. Mickey Landrum 2. Linda Lee. 3. Chester 4. Bill Grogan 5. Fred Vaughn 6. Ella Pokorney [¶] Brian Johnsen 7-4-92.

(People's Exhibit 168.)

Holland identified People's Exhibits 169 through 180 as notes concerning Holloway's death which he and appellant wrote to each other from their jail cells. (22 RT 4871-4880.) Holland claimed that these "San Diego case" notes were written before he received the San Diego case confession. (22 RT 4880.) As he had done with the Modesto case notes, Holland distinguished between his handwriting and appellant's handwriting by placing his initials "E.H." next to his own handwriting. (22 RT 4872.) These notes largely reflected the information provided in the San Diego case confession but contained additional details.[44]

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[44] Because it is difficult to summarize these notes without distorting their meaning, they are reproduced verbatim in Appendix C contained in the separately bound volume of appendices filed concurrently with this opening brief.

Questioned document examiner David Moore opined that appellant wrote the handwritten San Diego case confession, Eric Holland wrote the handwritten entries accompanied by the initials "EH" in the San Diego case notes, and appellant wrote the remaining handwritten entries in those notes. (22 RT 4799-4801.) DOJ latent print analyst Donna Mambretti examined the San Diego case confession (People's Exhibits 161 through 168) and notes (People's Exhibits 169 through 180) and identified appellant's latent prints on all of them except Exhibit 164 and Holland's latent prints on ten of them. (22 RT 4802-4810.)

San Diego County District Attorney Investigator Anthony Bento testified that he had interviewed appellant on September 6, 1991, as a witness in the prosecution of Theresa Holloway's murder. (22 RT 4885-4886.) Appellant told Bento that Holloway had been pregnant with his child at the time of her death. (22 RT 4886.) Appellant said he had been concerned with her use of methamphetamine during the pregnancy and had been attempting to get her to stop using. (*Ibid.*) Appellant said that in early May, he threatened to throw Holloway out of their home if she did not stop. (*Ibid.*)

Appellant also told Bento about a plot to kill Doug Mynatt, a drug dealer who had sold drugs to appellant and Robert Jurado. (22 RT 4887.) Appellant, Jurado, Denise Shigemura, and Anna Humiston had been upset by Mynatt's behavior for several weeks prior to Holloway's death.[45] (*Ibid.*) Appellant suggested that they take Mynatt out (kill him) and discussed that plan during telephone calls he made from jail. (*Ibid.*) Appellant told Bento that on May 15, he called Mark Schmidt, and spoke to Jurado and

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[45] Mynatt had kidnapped Jurado, had taken Shigemura's purse and had been holding parties at appellant's home while he was in jail. (22 RT 4887.)

Shigemura. (22 RT 4887-4888.) Jurado told appellant that things had changed and they needed to immediately kill Mynatt. Appellant agreed. (22 RT 4888.)

Bento testified that during the interview, appellant was sad. (22 RT 4921.) He broke down when talking about the deaths of Holloway and her baby. (*Ibid.*) Bento opined that appellant was sincere and saw no indication otherwise. (22 RT 4921-4922.)

b. Edward Nieto—Brandishing A Weapon And Slapping Theresa Holloway.[46]

Edward Nieto, Holloway's former co-worker at Pizza Hut in San Diego, testified that in June of 1990, appellant threatened to hit Nieto's new car with a baseball bat. (22 RT 4889-4890.) Nieto also testified that later that day at the Pizza Hut restaurant, appellant pointed a gun at him and threatened to shoot him. (22 RT 4893-4995.)

Nieto further testified that he once observed appellant slap Holloway's face with an open hand. (22 RT 4900-4901.) Nieto did nothing; he just left. (22 RT 4901.)

Nieto admitted using methamphetamine with Holloway. (22 RT 4904.) Appellant told Nieto that he did not want him to give Holloway any drugs. (22 RT 4905.) Nieto observed several arguments between appellant

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[46] Based on Mr. Nieto's testimony at the penalty phase and discrepancies between that testimony and Nieto's statements to District Attorney Investigator Fred Antone regarding the brandishing incidents, the prosecutor told the jurors during his penalty phase argument "that Mr. Nieto is not to be believed as to those matters" and urged them not to base their penalty determination on those purported incidents. (25 RT 5708.) Accordingly, these incidents are mentioned here only very briefly.

and Holloway over her drug use. (22 RT 4902.) Appellant wanted her to stop using drugs. (*Ibid.*)

District Attorney Investigator Fred Antone testified to significant discrepancies between Nieto's testimony and statements made by Nieto during an interview in July of 1993. (22 RT 4898, 4905-4908.)

2. **Prior Felony Conviction.**

On July 27, 1988, appellant was convicted of possession of a controlled substance (methamphetamine) in violation of Health and Safety Code section 11377, subdivision (a). (22 RT 4944; People's Exhibit 188.)

3. **Victim Impact Evidence.**

Dr. Lloyd Brown, medical director of a rehabilitation facility in Tennessee, testified regarding Leo Bragg's out-patient rehabilitation at that facility from June 1 through December 4, 1992. (22 RT 4909, 4914, 4916-4917.) Testing upon Mr. Bragg's arrival at the facility demonstrated that his ability to receive, process, and understand information was severely impaired and his ability to express was much more impaired. (22 RT 4915.) Mr. Bragg was unable to talk other than to say an occasional word. (*Ibid.*) His reading and writing were also severely impaired. (22 RT 4918.) Mr. Bragg could not be left alone at any time, because he would wander off. (22 RT 4917.) One of his cognitive deficits was impulsivity, a common result of head injuries, and thus he had to be constantly watched. (22 RT 4917-4918.)

During his rehabilitation, Mr. Bragg made slow, steady progress but upon discharge, he was still very severely impaired. (22 RT 4919.) He remained impulsive with poor judgment. (22 RT 4920.) Mr. Bragg still could not converse, either verbally or in writing. (22 RT 4919.) He could only respond with head nods and say rote-like responses, such as good

morning. (*Ibid.*) His prognosis for a full recovery was very poor. (22 RT 4920.) At best, Mr. Bragg would have to live in a supervised living environment under constant observation for his safety. (*Ibid.*)

Mr. Bragg's children, Sylvia Rudy and Leo Bragg, Jr., and Leo's wife, Merriam Bragg, testified regarding Mr. Bragg's rehabilitation and the effect of the crimes on them. Both Ms. Rudy and Leo Bragg, Jr., testified how difficult it had been for them to cope with the loss of their mother. (22 RT 4924, 4929.) Before her death at the age of 74, Juanita Bragg had been very active. (22 RT 4929.) She enjoyed golf and gardening. (*Ibid.*) Mrs. Bragg's death had been particularly devastating to Ms. Rudy, who every day relived the vision of discovering her parents after the attack. (22 RT 4924.) Ms. Rudy continued to suffer guilt over her mother's death, thinking that it would not have happened had she not gone away for the weekend or had she realized that her key was missing. (22 RT 4925.) Ms. Rudy's personality changed after the attack. (*Ibid.*) She became fearful and avoided people. (*Ibid.*)

The Braggs' children also testified to their difficulties in coping with the effects of their father's assault. Mr. Bragg had been very healthy, active, learned and sharp. (22 RT 4927, 4932, 4936.) He participated in civic organizations, gardened, played golf and worked part-time out of his home, selling and installing draperies and repairing sewing machines and vacuum cleaners. (22 RT 4926-4927, 4932-4933, 4936.) After the attack, Mr. Bragg was a different person and could no longer engage in his previous activities. (22 RT 4927.)

Upon his discharge from the hospital, Mr. Bragg stayed with Sylvia Rudy for a few days until Leo Bragg, Jr., took him to Tennessee to live in his home. (*Ibid.*) Ms. Rudy described how Mr. Bragg had no control over his bodily functions, was confused, and could not respond. (22 RT 4927-

4928.) She had to constantly watch him, because his behavior was so unpredictable. (22 RT 4927.)

Leo Bragg, Jr., testified that his father's assault completely changed his own life. (22 RT 4930.) Mr. Bragg lived with his son and daughter-in-law for about 15 months before moving to a retirement facility. (22 RT 4931-4932.) Merriam Bragg, who was his primary caretaker, had to retrain him, like a child, to use a toothbrush, comb and brush, razor, and silverware. Merriam's work and other activities outside the home had been limited because of her responsibilities as Mr. Bragg's primary caretaker. (22 RT 4931.) It had been difficult for both Leo, Jr., and his wife, because Mr. Bragg could not communicate and they could never leave him alone. (22 RT 4930-4931.)

Merriam Bragg described the changes in her father-in-law. During the first few months of living in their home, Mr. Bragg was very restless and insecure. (22 RT 4939.) He sometimes became agitated and frightened and was very emotional if his wife's name was mentioned. (22 RT 4938-4939.) When attempting to communicate, he became easily frustrated because he could not speak the words. (22 RT 4939.) Mr. Bragg was no longer active, and spent his time watching television and volunteering a few days a week at the rehabilitation center, where he picked up papers and assisted patients. (22 RT 4934, 4941-4942.)

B. Defense.

1. Psychosocial History and Testimony By Family Members and Friends.[47]

Clinical psychologist Gretchen White was retained to prepare a psychosocial history of appellant. (23 RT 5014.) To do so, she reviewed police reports, appellant's alleged confessions to Eric Holland and various records, including school and prior mental health treatment records. (23 RT 5015.) She also interviewed appellant, his mother, his father, his stepmother, his grandmother, his brother, and two mental health experts who had treated appellant and his family, and read an investigator's reports of interviews with other people who knew appellant and/or his family. (*Ibid.*) Dr. White's testimony was supplemented with the penalty phase testimony of appellant's mother, Faye Johnsen; his father, Bruce Johnsen; his brother, Kevin Johnsen; his paternal aunt, Ann Johnsen McMasters; Jack Minteer, who became romantically involved with Mrs. Johnsen following her divorce and, for a very short period, acted as a father substitute for appellant; Robert Remmer, a friend of Mrs. Johnsen who lived in her home for 9 or 10 years following her divorce and acted as a caretaker for appellant and his brother; and Sue Corbett, a friend and business partner of Mrs. Johnsen.

Dr. White found that appellant had a long history of warning signs, beginning in infancy, which should have alerted people to the very serious

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[47] This subsection summarizes Dr. White's testimony concerning the psychosocial history she prepared of appellant's life and historical details provided by the family members and friends who testified at the penalty hearing. Dr. White's opinions, conclusions, observations and explanations are identified as such. Historical facts are followed by citations to testimony by the various defense penalty phase witnesses and when relevant, identities of witnesses are noted.

problems that he was developing. (23 RT 5015.) Dr. White testified to three general areas of difficulty which she observed in appellant's life: (1) innate temperament; (2) problem behaviors; and (3) family discord. (23 RT 5016.) Dr. White observed that appellant was born with an exceptionally difficult temperament. (23 RT 5017-5018.) As an infant, appellant suffered colic and gastrointestinal infections; he frequently cried and vomited and was difficult to soothe. (23 RT 5017; 24 RT 5396-5397.) As a toddler, he continued to have difficulty sleeping and to cry at night. (23 RT 5115-5116.) Dr. White explained that such children tend to be at risk for developing problems throughout most of their childhood. (23 RT 5017-5018.) They are also at a higher risk for parental rejection or child abuse.[48] (23 RT 5017.)

Dr. White testified that in addition to his innate temperament, appellant was subjected to other risk factors, including family stressors and his father's long absences during his childhood. (23 RT 5018.) Mrs. Johnsen testified that when appellant was five days old, her husband, a Navy officer, left for a 10-month tour. (23 RT 5396.) Throughout appellant's childhood, his father was often away on extended tours of duty, six to nine months at a time, followed by six months at home. (23 RT 5018,

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[48] Mrs. Johnsen testified that her husband favored appellant's younger brother Kevin, who did not get sick and did not cry as much. (24 RT 5400.) According to Mrs. Johnsen, her husband liked his second child and remained at home for the first two years of his life. (24 RT 5400-5401.) Mr. Johnsen agreed that unlike appellant, Kevin was virtually no trouble and required little supervision. (23 RT 5127-5128.) Mr. Johnsen testified that although he was stationed at home during Kevin's younger years, during appellant's younger years, he was stationed at home half the time, maybe less. (23 RT 5128.)

5109-5110 5114; 24 RT 5398.) Mrs. Johnsen also traveled when appellant was young, leaving him with friends or her parents.[49] (24 RT 5398-5400.)

Dr. White observed that when Mr. Johnsen was home, his training as a naval flight officer left him unable to cope with a difficult infant. (23 RT 5018; see also 32 RT 5113.) Mr. Johnsen testified that appellant's crying was stressful, because he needed his sleep in order to be capable of flying. (23 RT 5115-5116.) Mrs. Johnsen testified that Mr. Johnsen could not take appellant's crying and so she would try to keep the two apart. (24 RT 5397-5398.) Both parents testified that Mr. Johnsen would respond to the crying by picking appellant up and dropping him a foot onto his bed in order to disorient him and make him catch his breath. (23 RT 5116; 24 RT 5397.)

Dr. White testified that during his preschool years, appellant behaved erratically; he was also defiant and difficult to control. (23 RT 5020.) In kindergarten, appellant developed behavioral problems: he was fidgety, disruptive, and often unable to stay in the classroom. (23 RT 5020, 5118; 24 RT 5402.) Upon teacher recommendation, appellant was evaluated and diagnosed as suffering attention deficit hyperactivity disorder (ADHD) and at age five, was placed on Ritalin, which improved his symptoms.[50] (23 RT 5020, 5094-5095, 5118-5119; 24 RT 5402-5404.)

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[49] Mrs. Johnsen traveled to Greece for an "R and R" with her husband when appellant was 18 months old and to the Orient for another "R and R" when appellant was two and a half years of age. (24 RT 5399-5300.)

[50] Mr. Johnsen testified that the medication calmed appellant and helped him focus. (23 RT 5118.) According to his testimony, appellant became one of the best students and learned to play the piano. (23 RT 5118-5199, 5126.) Mrs. Johnsen testified that although appellant's school performance was erratic, he did do better while taking Ritalin and made satisfactory progress. (24 RT 5405-5406.)

Dr. White testified that children who suffer ADHD are very impulsive, immature, and unable to plan. They become very easily frustrated and have special needs: they require structure, consistency, and very quick feedback. (23 RT 5023.) According to Dr. White, appellant's home environment did not meet those needs. Due to his father's long absences, appellant was subject to constantly changing systems of discipline. (*Ibid.*) Appellant's father was a strict disciplinarian who could have provided the necessary structure had he been present, whereas appellant's mother provided an unstructured home environment where appellant did not receive sufficient discipline.[51] (*Ibid.*) Additionally, both parents were insufficiently concerned with appellant's developing problem behaviors.[52] (23 RT 5029.)

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[51] Mr. Johnsen acknowledged that he was a strict disciplinarian and testified that Mrs. Johnsen coddled their children. (23 RT 5117-5118.) He further testified that after he and his wife separated, appellant was in definite need of discipline, but it was not his place to provide it. (23 RT 5130-5131.) Mr. Johnsen complained that appellant received little or no discipline from his mother. (23 RT 5132.)

Mrs. Johnsen testified that her husband was rough on the boys. (24 RT 5415.) He yelled at them and hit them and if they cried, he would hit them more. (24 RT 5417.) She observed him pick up the boys by their pants and drop them to the floor simply to see a response. (24 RT 5416, 5454-5455.)

Kevin Johnsen testified that his father was "really hard" on both him and appellant, but was particularly "fierce" with appellant. (24 RT 5281-5282.)

[52] Sue Corbett testified to the indifference of both parents. After the divorce, appellant's father did the bare minimum in terms of fathering his children. (23 RT 5262.) If he had to visit his sons, he would make the visit as short as possible. (*Ibid.*) Mrs. Johnsen avoided reality when it came to her children and put her energies into other areas, such as work. (23 RT 5263-5264.) Often, Ms. Corbett would tell Mrs. Johnsen that it was time for her to leave work and get home to her children. (23 RT 5264.) Mrs. Johnsen would respond, however, that "it's just such a pain" and would
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When appellant was eight or nine years old, his parents discontinued the Ritalin without medical consultation. (23 RT 5119-5120; 24 RT 5407, 5453.) Mr. Johnsen testified that they did so because of a concern that the medication was stunting appellant's growth. (23 RT 5119-5120.) Mrs. Johnsen testified that appellant was doing so well in school and with his music that she concluded he no longer needed to take the Ritalin. (24 RT 5407, 5453.) She also wanted his appetite to increase and that he become "more normal." (24 RT 5407.) Both parents testified that when the medication was discontinued, appellant's symptoms worsened and his old behavioral problems returned. (23 RT 5120-5121, 5125-5227; 24 RT 5409-5410, 5412.) They did not take him to a doctor to be placed back on medication or seek any other treatment. (24 RT 5409.)

In her review, Dr. White saw the ongoing effects of ADHD on appellant's behavior throughout his adolescence: appellant continued to exhibit impulsivity, very poor planning and judgment, defiance, oppositional behavior, and difficulty getting along with people. (23 RT 5087-5088.) Appellant began using marijuana when he was in the 6th or 8th grades and methamphetamine at the age of 14 or 15, and may also have tried LSD and cocaine. (23 RT 5088-5089, 5091.) Although Dr. White did not believe that appellant's drug use caused his behavioral problems, she opined that it could easily have exacerbated his ADHD-caused behaviors.[53] (23 RT 5088-5090, 5092.)

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continue working. (*Ibid.*) Mrs. Johnsen depended on other people to help with the care of her sons. (*Ibid.*)

[53] Dr. White agreed that methamphetamine use could cause many of appellant's ADHD symptoms, but noted that his symptoms occurred long before his drug use. (23 RT 5088, 5090-5091.) She also observed that appellant's ADHD symptoms were consistent throughout his early years up
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Dr. White testified that adolescence was a critical period in appellant's life. (23 RT 5030; 24 RT 5417.) His parents separated when he was 12 years old and divorced when he was 14. (23 RT 5129-5130.) Prior to the separation, appellant's father had been involved in his sons' lives as a disciplinarian but did not do many activities with them. (23 RT 5031; see also 24 RT 5281.) After Mr. Johnsen moved out of the family home, he made an effort for a period of time to engage in activities, such as sports and camping, with appellant and his brother. (24 RT 5283-5284, 5428.) Appellant thrived from his father's attention and was very responsive. (23 RT 5031-5032, 5084.) Dr. White opined that he was still then very amenable to treatment for his problem behaviors. (23 RT 5032.)

However, appellant's father remarried and his reconciliation with his sons disintegrated. (23 RT 5032, 5083-5084.) Mr. Johnsen stopped engaging in activities with them, and his interaction with his sons did not last long after his remarriage.[54] (23 RT 5032, 5082.) Appellant was deeply

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until his adult years. (23 RT 5088.) Given appellant's long history of ADHD symptoms and his improvement while medicated, Dr. White opined that his adolescent symptoms were attributable to ADHD, rather than to drug use. (23 RT 5094-5095.)

[54] Mrs. Johnsen testified that after Mr. Johnsen started dating Gloria (his second wife), he had little time for his children. (24 RT 5428-5429.) He and Gloria took appellant and his brother out a few times and then stopped. (24 RT 5429.)

Kevin testified that his father insisted that Gloria be included in their activities and they stopped doing fun activities that he and appellant liked. (24 RT 5284.) He and appellant did not like Gloria because she always told them what to do. (24 RT 5300.) According to Kevin, both he and appellant wanted to spend some time alone with their dad, but Gloria would not allow that. (*Ibid.*)

Mr. Johnsen testified that appellant wanted to spend more time alone with him but he and Gloria preferred "more of a family approach." (23 RT
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hurt by his father's abandonment. (23 RT 5032; 24 RT 5288.) Both his mother and brother recalled occasions where appellant, in tears, would call his father and ask him to visit, but his father said no, he had a new life. (24 RT 5289, 5430, 5463.)

Mrs. Johnsen testified that around the time of the separation, she started a sewing machine business which required her to travel two weeks at a time. (24 RT 5417, 5419, 5471-5472.) She arranged for a friend, Robert Remmer, to provide child care after school and during her absences, in exchange for free room and board. (23 RT 5243, 5246-5247; 24 RT 5418-5419.) Appellant was then 13 years old. (23 RT 5243.) Mr. Remmer moved into appellant's home a few weeks after Mr. Johnsen left and lived there for nine or ten years. (23 RT 5243; 24 RT 5422.) Although Mr. Remmer was supposed to provide discipline for the boys, he did not exert much authority or supervision over them.[55] Moreover, because Mr. Remmer worked many nights as a dealer in a card hall, appellant and his brother were often not supervised in the evening and were expected to cook for themselves and take care of their own laundry. (23 RT 5096, 5242, 5244-5245, 5247-5248; 24 RT 5422-5424.)

Mr. Remmer testified that he regularly smoked marijuana in the Johnsens' backyard or in his room and kept his "stash" under his bed. (23

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5137.) They believed that Gloria and her children should be involved in group outings with Mr. Johnsen and his sons. (23 RT 5138, 5152.) Appellant, however, never got along with Gloria; she was critical of appellant and appellant did not like her. (23 RT 5141, 5152-5153.)

[55] Mrs. Johnsen testified that Mr. Remmer could not control her sons. (24 RT 5420.) Mr. Remmer testified that he did not discipline the boys because as an outsider, it was not his responsibility. (23 RT 5267.) Kevin Johnsen testified that Remmer did not provide any supervision; he was basically a friend with whom Kevin occasionally smoked marijuana. (23 RT 5294.)

RT 5248-5250.) Mrs. Johnsen testified that she was aware of Remmer's marijuana smoking, but he was supposed to smoke outside, not around her sons. (24 RT 5420-5421.) She did not consider the possible effect of Mr. Remmer's drug use on her sons.[56] (24 RT 5422.) She was working six days a week and was "in another world" at that time. (*Ibid.*)

Mr. Remmer testified that appellant and Kevin were "probably" aware of his drug use. (23 RT 5251.) Sometimes, he noticed that some of his marijuana was missing. (23 RT 5250.) Kevin testified that he knew of Mr. Remmer's drug use. (23 RT 5290.) According to Kevin, Mr. Remmer liked to smoke dope, play cards and shoot pool and occasionally, he shared his marijuana with Kevin. (23 RT 5291-5292, 5294.) Kevin also occasionally smoked marijuana and used methamphetamine with appellant.[57] (23 RT 5302-5307.)

During her sons' high school years, Mrs. Johnsen continued to travel for work and also took vacations, without her children, to Arizona, Hawaii, and Switzerland. (24 RT 5423, 5431-5432, 5433-5334, 5446-5447.) Mr. Remmer continued to be their caretaker during those longer trips. (23 RT 5253-5254.) Mrs. Johnsen felt that when she traveled, appellant used those opportunities to misbehave more. (24 RT 5432.) She testified that every

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[56] Mrs. Johnsen testified that she did not know that appellant was smoking marijuana until he overdosed and had to be admitted to a drug treatment program at age 17. (24 RT 5458.) Thereafter, she spoke to Mr. Remmer about appellant's drug use and asked Remmer to stop smoking marijuana, but did not believe that he ever did so. (24 RT 5425-5426.) Mr. Remmer testified that he did not alter his own practice of drug use after learning of appellant's drug problems. (23 RT 5257.)

[57] One of appellant's friends introduced Kevin to marijuana. (24 RT 5302-5304.) Kevin discovered appellant and the friend smoking and asked the friend to let him try it. (23 RT 5203-5204.)

time she traveled, "something would happen." (24 RT 5433.) For example, when she was in Switzerland, appellant and his girlfriend broke up and appellant threatened suicide and drank every alcoholic beverage in the house. (*Ibid.*) Both Mr. Remmer and appellant's teachers reported to her that appellant was very depressed. However, Mrs. Johnsen testified, he "seemed to be back to normal" within about a week.[58] (*Ibid.*) Mrs. Johnsen testified that she never had any concern that appellant might have had serious emotional or mental problems. (24 RT 5435.)

When appellant was 17 years old, his mother became romantically involved with Jack Minteer. (23 RT 5231.) Mr. Minteer liked appellant and became quite involved with him, working on electronics with him and watching him play in the school marching band. (23 RT 5234-5235.) Mr. Minteer discussed the idea of marrying his mother and becoming his stepfather with appellant, who was enthusiastic about that prospect. (23 RT 5237-5238, 5240; 24 RT 5295, 5312-5313.) But Robert Remmer was still living at the house, which Minteer found awkward, and eventually his relationship with Mrs. Johnsen fizzled out. (23 RT 5237-5238.) Dr. White observed that while Mr. Minteer was involved in appellant's life, he was a positive influence, but after he left, his prior involvement was another source of disappointment and loss for appellant.[59] (23 RT 5099.)

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[58] Mrs. Johnsen testified to another example when she was vacationing in Arizona and received a call from Mr. Johnsen (her former husband), reporting that appellant had suffered a concussion in a motorcycle accident and requesting her to immediately return home. (24 RT 5431.) Mr. Johnsen had picked up appellant from the hospital and delivered him to the care of Robert Remmer at Mrs. Johnsen's home. (24 RT 5432.) Mrs. Johnsen, however, did not cut short her vacation, because Remmer assured her that appellant was okay. (*Ibid.*)

[59] Kevin Johnsen testified that appellant loved Mr. Minteer and saw him as a father substitute, but then he disappeared from their lives. (24 RT 5312.)

At the age of 17, appellant was admitted to a six-week residential drug treatment program at Harbor View in San Diego after he overdosed on an unidentified drug at home and had to be rushed to the hospital where his stomach was pumped.[60] (24 RT 5435, 5437.) Dr. White testified that a major focus of Harbor View's treatment concerned appellant's relationship with his father. (23 RT 5036.) Appellant was depressed and very distraught over his father's abandonment, telling staff: "He's not seeing me anymore." "He won't see me without his new wife." (*Ibid.*) When asked five projective wishes, appellant said, "Number one, to get out of here; number two, to have my dad back. That's all I need." (23 RT 5037.) Appellant's mother and the Red Cross attempted to contact appellant's father to have him participate in appellant's treatment but Mr. Johnsen, who was on a cruise at that time, did not ever participate or see appellant at Harbor View. (23 RT 5037, 5143.)

While at Harbor View, appellant wrote his father, informing him that he was in the hospital for drug rehabilitation and asking him to come back into his life, to be more involved, and to participate in his counseling. (23 RT 5037; 24 RT 5294.) Dr. White testified that Mr. Johnsen's wife Gloria and his attorney responded and shortly thereafter, Mr. Johnsen sent appellant a very formal response, which appellant perceived as a rebuff. (23 RT 5037.) Kevin Johnsen testified that appellant was very hurt by his father's refusal to attend his counseling. (24 RT 5294.) Mr. Johnsen testified that he saw appellant's letter as a demand that he choose between his new wife and appellant and responded with a letter informing appellant that such correspondence was not the appropriate place to resolve their

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[60] Kevin Johnsen was admitted two weeks later, after Harbor View staff informed Mrs. Johnsen that he, too, was using drugs. (24 RT 5437.)

problems. (23 RT 5138-5140, 5155.) But when Mr. Johnsen returned to San Diego, he made no attempt to visit appellant. (23 RT 5140-5141.) Mr. Johnsen never resolved that issue with appellant and thought that appellant likely assumed that he chose his wife over him. (23 RT 5141, 5156.)

Dr. White testified that Harbor View's records noted (1) that appellant was quite depressed and had serious problems with reality testing and peer relationships, (2) the effects of an acrimonious divorce on appellant, and (3) the staff's doubts regarding his mother's ability to provide the necessary structure and consistent limit-setting upon his discharge. (23 RT 5033.) Dr. White observed, however, that Harbor View's records contained notable omissions. There was no mention of (1) appellant's ADHD or his medication with Ritalin, and (2) some very serious behavior which appellant's mother should have brought to the staff's attention.[61] (23 RT 5033-5034.) Dr. White found these omissions significant, because (1) the omitted behaviors would have raised a red flag for any professional, and (2) some of appellant's behavior could have been related to his ADHD and prior medication. (23 RT 5034.)

Dr. White testified that despite Harbor View's recommendation that appellant be placed in a residential treatment program upon discharge, he was returned to his mother's home. (23 RT 5035-5036; see also 24 RT 5447.) Mrs. Johnsen testified that she considered the residential treatment option when appellant gave her problems and "held it over his head." (24 RT 5447.) However, time passed and then appellant became too old for that particular program. (*Ibid.*) Appellant, Kevin, and their mother attended

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[61] Dr. White mentioned, as an example, an occasion where appellant, then a young teenager, slit a bathroom screen and reached his hand into a bathroom where a young female neighbor was taking a shower. (23 RT 5034.)

counseling and other aftercare programs after the boys' discharge from Harbor View. Kevin Johnsen testified that they both maintained a period of sobriety — eight months for himself and six months for appellant. (24 RT 5314-5315.) Mrs. Johnsen testified that initially, appellant did quite well, both at school and at home. (24 RT 5441-5442, 5445.) However, after her ex-husband wrote to her sons' therapist and directed that their counseling sessions terminate because they did not need any more help, appellant refused to continue with the sessions and he quickly spiraled downhill. (24 RT 5445, 5468, 5470-5471.)

Both Dr. White and the Harbor View records she reviewed emphasized appellant's extreme attachment to his father and the harmful effect of his father's abandonment. (23 RT 5033.) Kevin Johnsen testified that after his father remarried, Mr. Johnsen initially gave his unlisted telephone number to his sons. (23 RT 5144-5145; 24 RT 5289.) At some point, however, Mr. Johnsen stopped communicating with his sons, changed that telephone number and never gave them the new number. (23 RT 5145; 24 RT 5289.) Kevin testified that when he was 13 or 14, he stopped trying to contact his father. (24 RT 5289-5290.)

Kevin further testified that although he spoke to his father two days before his testimony at appellant's trial, they did not re-establish contact. (24 RT 5296.) Kevin had last seen his father six or seven years earlier. (24 RT 5287.) Mr. Johnsen did not write to his sons other than to send cards twice a year (on birthdays and Christmas), which contained a dollar or two and were signed "Love Dad," but never included any messages. (23 RT 5148-5149; 24 RT 5287-5288.)

Mr. Johnsen admitted that after his marriage to Gloria, he had little contact with any members of his family. (23 RT 5145.) Mr. Johnsen did not visit appellant in jail on the evening before his testimony at the trial. (23 RT

5146.) Gloria said it was not okay for him to do so and he was concerned about any possible negative impact on her. (23 RT 5149, 5160-5161.)

Dr. White concluded that appellant's case was unusual and different from cases of other troubled youth due to the combination of red flags (warning signs of serious problems), his ADHD symptoms, and the fact that he was still reaching out to connect with people at the age of 17. (23 RT 5043-5044.) She explained that usually, an individual who suffers the type of difficulties experienced by appellant becomes unreachable by early adolescence. Appellant, however, remained open, quite vulnerable, and reachable up to the age of 17 or 18, perhaps even later. (23 RT 5016.) Dr. White testified that although appellant had some protective factors in his life, such as being the eldest child, possessing high average intelligence and musical talent, and enjoyed the attention and interest of his grandparents, they were outweighed by the many difficulties he experienced from an early age. (23 RT 5019-5020, 5070, 5081-5082, 5099-5100.)

2. **Mental Health Treatment.**

Robert John Bauer, a marriage, family and child therapist, testified that he counseled appellant and his family in 1987 when appellant was 16 years old.[62] (23 RT 5166-5167.) Appellant, his younger brother and his mother were referred to Mr. Bauer for outpatient counseling following the boys' hospitalization at Harbor View. (23 RT 5167.) Mr. Bauer was to monitor the boys' abstinence from substance abuse. (23 RT 5168.) Harbor

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[62] Appellant's was, in fact, 17 years old in 1987 when his counseling with Mr. Bauer began following his discharge from Harbor View. (See 23 RT 5167; 24 RT 5318, 5320-5321.) Mr. Bauer had not seen appellant since 1987. (23 RT 5218.)

View staff was also concerned that appellant and his brother had limited family support.[63] (23 RT 5168-5169.)

Mr. Bauer testified that Harbor View staff had encouraged appellant to write to his father in an attempt to mend fences and re-establish their broken relationship. (23 RT 5170.) According to Mr. Bauer, Mr. Johnsen's response was not warm, but very matter of fact and "militaristic." (23 RT 5170, 5219.) It set forth a list of things that appellant would have to do in order to re-establish a relationship.[64] (23 RT 5170.) Both appellant and his brother found that response offensive and did not want to have anything to do with their father, because he had cut them off. (*Ibid.*) Mr. Bauer opined that appellant was hopeful that his letter would be a step toward rebuilding his relationship, but was then hurt by his father's response. (23 RT 5175.) Appellant's mother built on appellant's hurt and disappointment ("one more time he's turned his back on you") and rubbed it in. (23 RT 5175, 5181.)

Mr. Bauer conducted 20 to 25 sessions with appellant and his family and then the family discontinued the sessions. (23 RT 5172.) The primary goal of appellant's mother was to turn the boys over to him and have him fix their problems. (23 RT 5172-5173, 5191.) Her primary interest was

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[63] Mr. Bauer understood that Mr. Johnsen had no contact with his sons and that Mrs. Johnsen was overwhelmed, had great difficulty in setting limits, and had little time for her sons due to the demands of her sewing machine business. (23 RT 5169.)

[64] Mr. Bauer opined that Mr. Johnsen's response to appellant's letter was appropriate in setting limits and rules for how he would interact with his children. (23 RT 5219, 5225.) He also agreed that appellant had to accept responsibility for his part in maintaining the relationship with his father, but noted that appellant's mother emotionally manipulated appellant and strongly promoted her agenda of breaking the relationship between him and his father. (23 RT 5221-5222.)

herself; she was too busy and overwhelmed to provide effective parenting. (23 RT 5173-5174, 5191.) Mrs. Johnsen also wanted to blame her ex-husband and encouraged appellant's animosity toward his father, thereby impeding the therapeutic process. (23 RT 5173-5174.)

Appellant did not want to attend counseling. (23 RT 5176.) He was very angry, depressed, negative, pessimistic and miserable. (*Ibid.*) He had low energy and failed to gain pleasure from anything.[65] (*Ibid.*) Normally, Mr. Bauer would refer such a patient to a doctor for medication. (23 RT 5177.) However, he did not do so in appellant's case because Harbor View staff had considered antidepressant medication and decided against it in light of appellant's history of drug use. (23 RT 5176-5177.)

Mr. Bauer opined that appellant suffered dysthymic disorder, an Axis I mood disorder; borderline personality disorder, an Axis II personality disorder; and a major depressive episode. (23 RT 5195-5196, 5199, 5215-5217.) Mr. Bauer saw no evidence that appellant fit a diagnosis of anti-social personality disorder. (23 RT 5214-5215.) Mr. Bauer was not aware of any records that appellant might have or had had ADHD, nor was he ever informed that appellant took Ritalin from ages five to nine. (23 RT 5171.)

Mr. Bauer testified that dysthymic disorder is a condition characterized by a constant base of depression, which episodically intensifies to the point of physiologic or endogenous depression where the

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[65] Mr. Bauer testified that appellant was not merely depressed, but suffered physiologic or endogenous depression which resulted from his brain chemistry. (23 RT 5191-5192, 5194.) He received no pleasure from anything and nothing mattered to him or touched him emotionally. (23 RT 5192-5193.) Mr. Bauer opined that appellant suffered a long-standing depressive syndrome. (23 RT 5192.)

individual shuts down. (23 RT 5195-5196.) Borderline personality disorder is characterized by difficulty in trusting others and emotional distancing; the trust relationship, for those suffering this condition, is significantly impaired — usually by the age of two.[66] (23 RT 5198-5199.) Appellant suffered both an inability to trust and emotional distancing. (23 RT 5199.)

Mrs. Johnsen never voiced any concerns that appellant suffered serious psychological problems and did not inform Mr. Bauer of appellant's prior medication or of the episode where he slit a screen in a neighbor's bathroom. (23 RT 5178.) Had Mr. Bauer been provided such information, he would have changed appellant's course of treatment. (23 RT 5178-5179.) Such information would have mandated individual counseling and treatment, apart from the family counseling. (23 RT 5180.)

Dr. Mitchell Luftig, a psychologist, testified that in 1987, he evaluated appellant, who was then 17 years old, prior to appellant's discharge from Harbor View. (24 RT 5317-5318, 5320-5321, 5373.) Harbor View staff had requested an assessment of appellant's psychological state, impulse control, and ability to think rationally and behave appropriately. (24 RT 5320.)

Dr. Luftig administered the Wechsler Intelligence Scale for Adults Revised, the Rorshach Inkblot test, the Thematic Apperception test, the Minnesota Multiphasic Personality Inventory (MMPI), the Draw-a-Person test, the Forer Structured Sentence Completion test, and the Bender Motor-

[66] Mr. Bauer testified that there are several different paths of disrupted growth development which can result in borderline personality disorder. Many "borderlines" have been sexually abused. (23 RT 5206-5207.) Other traumas, such as the disruption in parent-child bonding suffered by the colicky baby, can also account for the development of the disorder. (23 RT 5207.)

Gestalt test. (24 RT 5323.) Appellant appeared oriented[67] and eager to cooperate and please the examiner. (24 RT 5322.) But as the testing wore on, he lost energy and became more anxious and less able to perform well. (24 RT 5322-5323.) Appellant's test-taking behavior reflected a fear of failing and anticipation of criticism and Dr. Luftig opined that behavior was typical of how appellant approached most tasks in his life: he anticipated failure and criticism despite investing significant energy into trying to succeed. (24 RT 5323.) Testing demonstrated that (1) appellant's sense of identity was confused and unstable, (2) he longed for affection and nurturance, and (3) he used emotional constriction and aggression to protect himself from being hurt. (24 RT 5324-5235.)

Dr. Luftig diagnosed appellant as suffering several Axis I conditions: (1) a conduct disorder (undersocialized, nonaggressive[68]) and (2) cannabis and amphetamine dependence. (24 RT 5373.) He did not diagnose any Axis II disorders, such as borderline personality disorder or dysthymic disorder,[69] or ADHD, although he found behaviors consistent with all three diagnoses. (24 RT 5352-5353, 5357-5358, 5373-5374, 5382-5383.) Dr. Luftig explained that he was hesitant to label teenagers, who

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[67] Dr. Luftig observed no obvious signs of hallucinations, delusions, or suicidal thoughts. (24 RT 5322.)

[68] Dr. Luftig testified that much of appellant's inappropriate behavior (using drugs, cutting classes, and stealing a motorcycle when no one was present) occurred in solitary form and did not directly threaten others. (24 RT 5375-5376.)

[69] Although Dr. Luftig did not see any indications of a major depressive episode or psychosis, he observed momentary lapses in appellant's reasoning process — instances where appellant's level of anxiety impeded his ability to think clearly. (24 RT 5374, 5377-5378.) Dr. Luftig did not find evidence of organic brain damage, but did not conduct a comprehensive neurological test battery. (24 RT 5378.)

were still evolving in their personality, with personality disorders. (24 RT 5383.) Dr. Luftig also testified that non-medicated ADHD behaviors may mirror borderline behaviors.[70] (24 RT 5357.)

Dr. Luftig testified that the pivotal event in appellant's life had been his father's leaving the family home. (24 RT 5326.) Appellant experienced that as an ultimate rejection, and the event resulted in damage to his self-esteem and self-concept. (*Ibid.*) Appellant blamed himself for the loss of his father. (24 RT 5327.)

Dr. Luftig had not been informed in 1987 that appellant had been diagnosed with ADHD and medicated when he was a child. (24 RT 5357.) If Dr. Luftig had been informed of that prior diagnosis, he would have considered it to be significant information, consistent with the behavior he observed during his 1987 evaluation, as well as his test results.[71] (24 RT 5357-5358.) If Dr. Luftig had known that information in 1987, he would have made a different recommendation to Harbor View. He would have recommended restarting the ADHD medication. (24 RT 5358, 5365.) Dr. Luftig had recommended residential treatment, continuation of family

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[70] Dr. Luftig testified that when the "borderline" is exposed to too much emotional stimulation, he becomes very anxious and discharges that anxiety through impulsive behavior which may look like ADHD behavior. (24 RT 5357.) Such behavior might be aggressive or drug abusing. (*Ibid.*)

[71] Dr. Luftig testified that individuals who suffer ADHD are neurologically impaired and often function on an emotional and social level significantly less than their chronological age. (24 RT 5368, 5380.) Symptoms include impulsivity, knee-jerk reactions which the child has no ability to control or modulate, and difficulty staying on task and completing assignments. (24 RT 5354-5357.) Dr. Luftig explained that medication and treatment are essential for ADHD children. (24 RT 5369-5370.) Medication such as Ritalin slows their reaction time so as to provide them with an opportunity to consider an appropriate response. (24 RT 5356.)

treatment, drug aftercare, and individual therapy with a male therapist. (24 RT 5359-5361.) When he evaluated appellant, Dr. Luftig opined that he was redeemable. (24 RT 5358.)

3. **Correctional Testimony.**

Jerry Enomoto, a former Director of the California Department of Corrections, testified that he reviewed appellant's jail file and determined that appellant received only three disciplinary reports during his two-year pretrial incarceration, for (1) not being dressed in time for a court appearance; (2) not being out of jail clothes in a timely manner; and (3) possession of Motrin. (24 RT 5333-5335.) Mr. Enomoto opined that if sentenced to life without possibility of parole (LWOP), appellant would not be a danger to other inmates or guards.[72] (24 RT 5342, 5347.)

Mr. Enomoto also testified that anyone sentenced to LWOP is housed in a level four maximum security facility, where the inmates are under constant supervision and their daily routine is highly controlled. (24 RT 5336-5337, 5347.) Such facilities provide the highest degree of security in the system, other than the isolated secured housing units. (24 RT 5336.)

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[72] Although aware of appellant's conviction for soliciting the murder of several individuals while in jail awaiting trial and his alleged role in Ms. Holloway's death while incarcerated in the San Diego County Jail, Mr. Enomoto opined that these acts would not necessarily indicate that appellant would pose a danger at a level four institution. (24 RT 5335, 5343, 5350, 5351.) The inmates who pose a danger to others in maximum security institutions are those who make weapons which they use to attack other inmates or guards, victimize other inmates, deal drugs, and are active gang members. (24 RT 5344.)

ARGUMENT

ERRORS IMPACTING BOTH GUILT AND PENALTY DETERMINATIONS

I.

THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S MOTION FOR A CHANGE OF VENUE DEPRIVED HIM OF A FAIR TRIAL BY AN IMPARTIAL JURY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT.

A. Introduction.

An elderly couple, Juanita and Leo Bragg, were discovered by their daughter in the guest bedroom of her home in the city of Modesto in Stanislaus County. The media reported that the Braggs had been brutally attacked in their sleep for no apparent reason. Both had been repeatedly stabbed and beaten with a hammer; Leo Bragg survived, but unfortunately, his wife did not. The local newspaper, The Modesto Bee, described the crime in sensational language and emphasized that it was a baffling attack. The residents of the Modesto area understandably experienced a reaction of fear after this terrifying crime.

Even after appellant's arrest, the community's fear did not abate. And the inflammatory coverage continued. Now, however, the media turned its attention upon appellant. It erroneously reported that appellant was dismissing counsel after counsel in an attempt to manipulate the system and delay the trial, thereby costing the county thousands of dollars. It described both actual and non-existent evidence, statements and circumstances strongly pointing to his guilt — that appellant had confessed, that incriminating evidence had been found in his possession, and that he

had attempted to destroy evidence. And it reported inadmissible evidence, including but not limited to erroneous reporting that appellant was sought by another jurisdiction due to his involvement in another homicide and his invocation of his Fifth Amendment right to refuse to speak to the police.

As demonstrated below, the trial court erred in denying appellant's motion for a change of venue. Most of the governing factors — the nature and gravity of the offense, the inflammatory slant of the news coverage, the status of the victims and the accused, and the degree to which voir dire revealed the jury pool to be prejudiced — weighed heavily in favor of the conclusion that appellant could not and did not receive a fair trial in Stanislaus County, and the remaining factor — size of Stanislaus County — is neutral. Given the evidence presented at the time of the motion, as well as the voir dire of the jury pool and the actual jury panel selected, it is reasonably likely that appellant received a constitutionally unfair jury trial. The erroneous denial of his motion for a change of venue violated the Sixth Amendment and the Due Process Clause and requires reversal of the entire judgment.

B. Factual and Procedural Background.

1. Defendant's Motion for Change of Venue.

On November 24, 1994, appellant filed a motion for change of venue, supported by two exhibits: Exhibit A contained copies of newspaper and magazine reports about the crime and a summary of dates and extent of coverage by local radio and television stations; and Exhibit B contained a report by Stephen J. Schoenthaler, Ph.D., a Professor of Sociology and Criminal Justice at California State University, Stanislaus,[73] summarizing

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[73] Dr. Schoenthaler is an eminent expert in the field of venue who had been retained by both the Stanislaus County District Attorney's office and
(footnote continued on next page)

the results of a public opinion poll that he conducted in this case at appellant's request. (7 CT 1760-1841.) In the motion, appellant argued that (1) the crimes were especially grave and reported by the media to be brutal and revolting; (2) Stanislaus County, with a population of 370,000, was relatively small and provincial; (3) although the victims were not prominent members of the community, their elderly age, their visit to their daughter, and the fact that they were allegedly killed in their sleep would engender community sympathy; (4) appellant was a relative stranger to Stanislaus County, who had "dropped out" of any type of community life and had few, if any, close friends; (5) the publicity was extensive; (6) the community reacted to the crimes with fear and hostility; and (7) the publicity had described potential evidence incriminating appellant in not only the capital crime but "the drug-related execution of his former girlfriend" and reported that he may have confessed to the capital crime. (7 CT 1760-1776.)

2. State's Opposition To The Motion.

The prosecution filed an opposition to the motion, in which it argued that (1) the size of Stanislaus County's population, which the prosecution reported to be 383,300, did not compel a change of venue; (2) appellant's status (relatively unknown) militated against a change of venue; (3) the victims' status (anonymous visitors) did not favor a change of venue; and (4) the amount and extent of publicity did not favor a change. (7 CT 1844-1853.) The opposition, which reported 19 news articles in the Modesto Bee over a span of 21 months and 35 newscasts aired on six days within the month of March 1992, asserted that a great majority of the articles were factual and brief. (7 CT 1850-1852.) The State further argued that the defense survey was deficient in that those interviewed were not exposed to

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defense counsel in venue matters. (3 CT 712-714.)

the actual voir dire process, in which the court asks probing questions and instructs venirepersons in the law regarding the burden of proof, the presumption of innocence, the assessment of evidence, and a juror's duty to disregard bias. (7 CT 1849.)

3. Hearing On Change Of Venue.

A hearing on appellant's motion was held on January 7, 14, 24, and 26, 1994. (7 CT 1907, 1927, 1946, 1960.) At the hearing, Dr. Schoenthaler and investigator Michael Dulaney testified for the defense, and Dr. Ebbe Ebbesen, a professor of psychology at the University of California, San Diego, testified for the prosecution. (7 CT 1907, 1927, 1946.) The defense presented eight exhibits (Defendant's Exhibits 1 through 7 and 24), and the State presented 16 (People's Exhibits 8 through 23), all of which were received into evidence. (7 CT 1907, 1946, 1960; 3 RT 769-770; 5 RT 1027; 5 RT 1197-1198.) The admitted exhibits included:

- the experts' curricula vitae (Defendant's Exhibit 1 and People's Exhibit 8);
- Dr. Schoenthaler's report summarizing his survey and its findings (Defendant's Exhibit 2);
- his survey results sheet (Defendant's Exhibit 6);
- a diagram (Defendant's Exhibit 7) and chart regarding "probabilities of ending up with a fair trial" (Defendant's Exhibit 24) prepared by Dr. Schoenthaler;
- a compilation of newspaper articles concerning the case (Defendant's Exhibit 3);
- a videotape of media coverage (35 newscasts) from March 1, 1992 through March 30, 1992 (Sacramento Television

Channels KCRA-3, KXTV-10, KOVR-13, KRBK-31, KTXL-40, and KCSO-19) (Defendant's Exhibit 4[74]) and an index to that videotape (Defendant's Exhibit 5);

- various charts, tables, and graphs prepared by Dr. Ebbesen containing his opinions concerning Dr. Schoenthaler's testimony and the defense survey (People's Exhibits 9, 13, 14, 16, 17, 19, 20, 21, 22, 23[75]);
- defense survey lists (People's Exhibits 10, 11, 12);
- Dr. Ebbesen's report on the defense survey (People's Exhibit 15); and
- an official state estimate of Stanislaus County's population as of January 1, 1993 (People's Exhibit 18).

Defense Exhibit 4 (the videotape of newscasts) was played for the trial court. (5 RT 1196.)

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[74] As noted by the trial court, Modesto did not have a local television station (other than cable), and its population received its major television news from Sacramento and Stockton. (5 RT 1267.) Defense counsel, Kent Faulkner, stated that the broadcasts contained in Defendant's Exhibit 4 were the only ones that he could obtain, because the television stations normally track the broadcasts only upon request. (5 RT 1197.) None of the previously appointed defense counsel had made such a request. The media had, on its own, tracked the Bragg homicide stories for 30 days and then stopped. (*Ibid.*) By the time that Faulkner was appointed (on June 30, 1993), that 30-day compilation of broadcasts was all that was available. (4 CT 1170; 5 RT 1197.) Defense counsel thus advised the court that the fact that the videotapes ended with broadcasts on March 30, 1992, did not mean that there were no additional broadcasts. (5 RT 1197.)

[75] People's Exhibits 13, 14, 16, 17, 20, 21, and 22 were duplicates of charts and Tables 1-3 and 5-6 in Dr. Ebbesen's report (People's Exhibit 15).

a. Dr. Schoenthaler's Survey Report and Testimony.

i. Background.

Dr. Schoenthaler conducted two surveys in this case, using the same questions each time.[76] (3 RT 729, 738.) He first conducted an exploratory, preliminary survey, because his initial impression of the case was that there might not be sufficient evidence to support a full-scale venue survey. (3 RT 729.) The results of both surveys were similar, just a couple of percentage points apart, thereby indicating reliability. (4 RT 920.) The second, full-scale survey[77] and its findings were summarized in Dr. Schoenthaler's report (Defendant's Exhibit 2).

ii. Methodology.

Dr. Schoenthaler conducted a telephone survey, using randomly-selected listed Stanislaus County telephone numbers. (7 CT 1831.) Investigators Steve Blanusa and Michael Dulaney, working under Dr. Schoenthaler's instructions and supervision, made the calls at various times during the morning, afternoon, and evening, including on Sundays, to ensure that people who worked during the day would have an equal chance of being surveyed. (7 CT 1831; 3 RT 760.) According to Dr. Schoenthaler's report, that practice produced a high likelihood that the sample contacted would be similar in makeup to those called for jury duty.

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[76] On his own and as a matter of scientific interest, Dr. Schoenthaler conducted a post-survey qualitative analysis, in which he interviewed students at the university, to study the relationship between knowledge of the case and prejudgment. (3 RT 729, 731, 750-751.)

[77] Although not explicitly stated in his testimony, the difference between the preliminary survey and the second full-scale survey was obviously in the sample size of their participants, given that both surveys contained the same questions.

(7 CT 1831.) Anyone contacted who was not a resident of the county, or at least 18 years old, was excluded. (*Ibid.*) In all, 240 people were contacted, and all but one agreed to answer the survey, so there were 239 responders. (*Ibid.*)

Dr. Schoenthaler explained that the purpose of his survey was to identify the percentage of the jury-eligible population who had knowledge of appellant's case through exposure to publicity and then to determine whether that knowledge had produced prejudgment of guilt or penalty. (3 RT 843-847.) He specifically designed his survey questions to identify those subjects with formed, rather than non-formed, opinions — a design feature missing from traditional change-of-venue surveys.[78] (7 CT 1829-

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[78] Dr. Schoenthaler's report explained:

> Traditional venue research involves asking potential jurors questions using such words as "Have you formed the opinion that . . . ." The problem with such wording is that most potential jurors have no idea what a "formed" opinion is. They simply answer based on whether or not they currently have an opinion. In law, the difference is critical. A formed opinion is one which has existed for a substantial period of time; it has become hardened, firm, and is resistant to change. In contrast, "non-formed" opinions are new, malleable, and readily changed through instruction or education. When dealing with juror impartiality, the Courts are primarily concerned with "formed opinion," since that is the type that cannot be readily altered through instruction from the bench. Yet, most venue surveys err by assuming that the potential juror knows what is meant by a formed opinion. It follows that the true rate of prejudgment (based on formed opinion) is lower than total prejudgment rate which includes jurors with developing opinions.

(7 CT 1829.)

1830; 3 RT 743-748, 775-779.) Dr. Schoenthaler added another control to his survey which did not exist in traditional venue surveys: a control to eliminate those who prejudged guilt or penalty on the basis of preconceived attitudes toward the criminal justice system, rather than due to their exposure to publicity. (7 CT 1829-1830, 1836-1837; 3 RT 781-783; 4 RT 855, 857-863.) Instead of using questions to eliminate those who prejudged on the basis of preconceived attitudes about the system in general,[79] Dr. Schoenthaler ascertained the number of subjects with no knowledge but possessing formed opinions and subtracted that total from the number of those with knowledge who possessed formed opinions. (3 RT 781-783; 4 RT 855-863.) He was thus able to compute the true rate of those who prejudged guilt or penalty as a result of their exposure to pretrial publicity. (3 RT 783.) As discussed below, the survey demonstrated that 55 percent of the sample had formed fixed opinions as to guilt, penalty, or both on the basis of their exposure to publicity and were thus not amenable to rehabilitation during voir dire.[80] Or, stated conversely, the survey showed

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[79] In his post-survey qualitative analysis of university students, Dr. Schoenthaler interviewed 25-30 students with formed opinions about the case to determine the degree to which exposure to pretrial publicity had caused those prejudgments. (4 RT 863-865, 871.) As discussed in the argument below, the results of this assessment showed that a very high degree of fear was a significant factor causing penalty prejudgment in this case. (4 RT 875.)

[80] Dr. Schoenthaler testified that whereas those with fluid opinions can be rehabilitated during voir dire, it is very difficult to rehabilitate those with fixed opinions. (3 RT 746.) Although they state that they can set aside their opinions, empirical evidence shows otherwise. (3 RT 747-748.) There is a considerable body of scientific literature which demonstrates that a juror's declaration regarding his ability to act impartially is not valid. (4 RT 921-922.)

that only 45 percent of the subjects did not prejudge either guilt or penalty and could be impartial jurors. (7 CT 1838; 3 RT 785.)

iii. Survey Results.

- 70 percent (168 out of 239 subjects who responded to the survey) had knowledge of the case. (7 CT 1834, 1836.)
- 41 percent believed that appellant killed the victim, and 30 percent had formed this opinion prior to the survey. Therefore, 30 percent had a formed opinion of guilt that was not subject to rehabilitation during voir dire. (7 CT 1835.)
- 60 percent believed that if convicted, appellant deserved the death penalty, and 54 percent had formed this opinion prior to the survey. Therefore, 54 percent had a formed opinion of sentence that was not subject to rehabilitation during voir dire. (*Ibid.*)

After performing the statistical analysis required to calculate the percentage who had prejudged either guilt or sentence based on pretrial publicity, Schoenthaler reported the following results:

- With an added control to eliminate those subjects whose opinions were amenable to change through instruction or education from the judge (i.e., a control to differentiate between those with formed opinions versus those with non-formed opinions,[81] the percentage of impartial subjects rose to 32 percent. (*Ibid.*)

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[81] Dr. Schoenthaler's report explained his methodology as follows:

> It is clear that all people who prejudge a case due to pretrial publicity must have knowledge of the case.

(footnote continued on next page)

- With an added control to eliminate those subjects whose bias resulted from some factor other than publicity, the percentage of impartial subjects rose to 45 percent. (7 CT 1838.)

iv. Conclusions.

Based on his survey data, Dr. Schoenthaler concluded that there was not a reasonable likelihood that appellant could receive a fair and impartial trial in Stanislaus County. (7 CT 1839; 3 RT 730, 793-794.) In spite of fairly "moderate" pretrial publicity, there was substantial public awareness of appellant's case: 70 percent of the survey sample had prior knowledge of the crimes. (7 CT 1838.) Among those potential jurors who had knowledge of the case, there clearly existed a significantly high amount of prejudgment of appellant being guilty and deserving the death penalty, with a disproportionate number of people prejudging penalty in favor of imposing a death sentence. (7 CT 1838; 3 RT 794.)

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> Conversely, those potential jurors with no knowledge of the case who claim to have formed opinions are biased, but not due to pre-trial publicity. Separation is simple mathematically. One may measure knowledge and then formed and non-formed prejudgment. One could then subtract "A" (the proportion of subjects who claimed to have formed opinions, but no knowledge) from "B" (the proportion of subjects who claimed to have formed opinions and knowledge). The result is the best estimate of those who have prejudged due to pretrial publicity, while "A" is the best estimate of those who are biased in general towards defendants charged with the type of crime in question.

(7 CT 1830.)

b. <u>Dr. Ebbesen's Report And Testimony.</u>

The prosecution's expert, Dr. Ebbe Ebbesen, a professor of psychology at the University of California, San Diego,[82] questioned the basic premise underlying change-of-venue surveys — that the attitudes measured by such surveys can predict what jurors do in real cases. (5 RT 1049.) Dr. Ebbesen opined that, in general, measures of exposure to pretrial publicity and formation of opinions regarding guilt or penalty prior to trial, such as done in Dr. Schoenthaler's survey, do not predict how people will decide the case after hearing the evidence. (5 RT 1109.) Dr. Ebbesen also declared that it is impossible to design a survey that will accurately measure people's attitudes, because people simply do not answer the question asked. (5 RT 1086.)

In addition to these general criticisms, Dr. Ebbesen found fault with several aspects of Dr. Schoenthaler's methodology. Although Dr. Ebbesen acknowledged that the survey was reliable due to its large sample size (4 RT 993; People's Exhibit 15, pages 9-10), he asserted that it was neither representative of the people who might be called for jury duty, nor representative of those who might actually serve on a jury in this case. (4 RT 978-979; People's Exhibit 15, pages 8-10.) Dr. Ebbesen further opined that the survey was not a valid tool to identify those individuals

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[82] Although Dr. Ebbesen's area of specialty included statistics, he did not himself conduct surveys, but instead researched, conducted change-of-venue-survey experiments and taught others how to conduct surveys. (4 RT 960-961, 965-966.) Dr. Ebbesen had never conducted a change-of-venue survey or testified for the defense. (4 RT 964-965.) He was always called as a rebuttal witness by the State to criticize the methods used in change-of-venue surveys. (4 RT 964.) He had testified at 25 previous change-of-venue hearings, always providing similar testimony critical of defense surveys. (5 RT 1055-1056.) In every case in which he testified, Dr. Ebbesen concluded that the survey had validity problems. (5 RT 1056-1057.)

who, on the basis of pretrial publicity, had formed firm opinions incapable of rehabilitation regarding appellant's guilt. (4 RT 993; People's Exhibit 15, pages 10-21.) Based on his criticisms of Dr. Schoenthaler's survey, Dr. Ebbesen asserted that the court could not accept its numbers at face value. (5 RT 1054.) In order to produce a valid survey, Dr. Schoenthaler would have needed to ask an additional 30 questions, possibly more, although Ebbesen acknowledged that at some point, the length of the questionnaire would reach the point where respondents would refuse to continue, which would interfere with the survey's validity. (5 RT 1073.)

Accepting at face value, however, the results of Dr. Schoenthaler's survey, Dr. Ebbesen prepared several charts and tables in which he isolated and then compared the subjects' responses in order to render his own conclusions. (See People's Exhibit 15, pages 11-19; People's Exhibits 14, 16, 17, 20-23.) Dr. Ebbesen acknowledged that in his report, tables, and charts, he made assumptions and inferences, sometimes incorrect, in describing the questions to which the subjects responded, thereby mischaracterizing the subjects' responses, and that such mischaracterizations underlay his conclusions. (5 RT 1076-1086, 1088-1095, 1098-1101.) He maintained, however, that his conclusions were sound. (5 RT 1078-1079, 1081-1082, 1099, 1100-1101.)

Dr. Ebbesen concluded that 44.1 percent of the Schoenthaler survey sample population had not been exposed to publicity and did not hold fixed opinions regarding guilt or penalty; and thus could be impartial jurors. (5 RT 1135; People's Exhibit 23, top row/left column of second chart.) He also concluded that only 23 percent (55 of the 239 subjects) (employing a less restrictive definition of exposure to publicity) or 11 percent (27 of the 239 subjects) (employing a more restrictive definition of exposure to publicity) of the survey sample posed any problem to the selection of an

impartial jury free from the taint of publicity.[83] (5 RT 1135-1137; People's Exhibit 23 (sum of both numbers in bottom row of each chart).)

4. Court's Ruling.

The trial court denied appellant's motion, ruling that appellant did not meet his burden of demonstrating a reasonable likelihood that he could not receive a fair and impartial trial in Stanislaus County. (5 RT 1276,

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[83] To reach this conclusion, Dr. Ebbesen first identified a large group of subjects who held fixed opinions that appellant should be sentenced to death and **either** had not been exposed to publicity **or** did not hold any fixed opinion regarding guilt. (People's Exhibit 23, top row/right column of each chart.) Using his more restrictive definition for exposure to publicity, Dr. Ebbesen identified 105 of such individuals (44.2 percent of the sample) (People's Exhibit 23, second chart) and using his less restrictive definition, he identified 86 such individuals (36.4 percent of the sample) (People's Exhibit 23, first chart). (5 RT 1138.) Dr. Ebbesen assumed that these jurors' death penalty attitudes did not result from their exposure to publicity, and so he classified them as "A.D.P.'s" (automatic death penalty proponents). (5 RT 1138-1139.) Because such "A.D.P." subjects would not pose any problem to the selection of an impartial jury free from the taint of publicity, Dr. Ebbesen excluded them from that group of subjects whom he opined were problematic. (5 RT 1139.)

In rebuttal, Dr. Schoenthaler disagreed with Dr. Ebbesen's opinion that these "A.D.P." subjects posed no problem for purposes of venue. (5 RT 1162-1163.) Ebbeson's opinion would be valid only if the subjects' fixed opinions regarding penalty were based on personal bias, rather than exposure to publicity. In his analysis, however, Dr. Ebbesen had simply lumped together those subjects who had suffered no exposure to publicity **with those who had** formed no guilt opinion. As Dr. Schoenthaler explained, "the key word in that table (People's Exhibit 23) is 'or.'" (5 RT 1162.) Thus, it could not be determined from Dr. Ebbesen's analysis which of those subjects who had formed a fixed opinion regarding death as the appropriate punishment did so as a result of exposure to pretrial publicity. (*Ibid.*) Dr. Schoenthaler testified that this gap in Ebbeson's analysis was "definitely reason for concern since many of those [who] have pre-existing knowledge of the case, hadn't formed an opinion of guilt but are ready to sentence the defendant to death if he is found to be guilty." (5 RT 1163.)

1278.) The court stated that although the nature and gravity of the crime supported a change of venue, none of the other controlling factors (size of community, status of defendant, status of victims, and nature and extent of publicity) weighed in favor of granting the motion. (5 RT 1260-1278.) The court rejected the results of Dr. Schoenthaler's survey and instead adopted the conclusions in Dr. Ebbesen's report (see People's Exhibit 15, page 21). (5 RT 1272-1275.) The court stated that, based on questions raised by Dr. Ebbesen, it had serious doubts about the validity of the Schoenthaler survey.[84] The court further cited Dr. Ebbesen's conclusion that the survey results "did not show the high numbers of persons that were so affected that they could not be fair and impartial." (*Ibid.*) Based on its own review of the articles and media coverage, the court could not conclude "that pretrial publicity [wa]s such that it would preclude a fair trial." (5 RT 1275-1276.)

Appellant sought review of the denial of his motion by filing a petition for writ of mandate in the Court of Appeal, Fifth Appellate District. His petition was denied on January 28, 1994. (*Johnsen v. Superior Court of Stanislaus County*, Case No. F020985; 7 CT 1971.)

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[84] Specifically, the court had concerns about (1) the number of people surveyed; (2) the questions asked; (3) the manner of asking questions; (4) the use of a telephone survey rather than a face-to-face survey; and (5) the validity of the statistical information gleaned from the survey. (5 RT 1272.)

5. The Questionnaires and Voir Dire of Prospective Jurors.

a. Jury Questionnaires.[85]

Each juror who did not raise hardship concerns was given a 24-page questionnaire, containing 150 questions, to complete. (See, e.g., I CT-JQ 1-25.) On pages 10-11, the questionnaire asked the following questions about the nature of the crimes charged and pre-trial publicity:

> 96. Have you read, seen or heard anything about this case? If yes, please describe what you have read, seen or heard.
>
> 97. From what sources have you heard about the case? (For example: newspaper, television or radio news, friends, etc.)
>
> 98. If you have answered yes, what if anything, do you recall about the person charged with the crime or [sic] from what you have seen, read or heard?
>
> 99. If you answered yes, what if anything do you recall about the victim from what you have seen, read or heard?
>
> 100. Regarding radio and/or television broadcasts, were there incidents relating to the criminal justice systems that have been presented during the past five years which have attracted your attention? Yes __ No___. Please comment:
>
> 101. What are the most serious criminal cases you have followed in the media during the past five years?

(*Id.* at pp. 11-12.)

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[85] The questionnaires of the 294 individuals called to the venire in this case are contained in 14 separate volumes of Clerk's Transcript, labeled "Clerk's Transcript Juror Questionnaires." Appellant refers to these questionnaires as "CT-JQ," preceded by the volume number.

b. Voir Dire.[86]

The court called four different panels of prospective jurors; the total venire consisted of 294 people.[87] (See Appendix F.) When each panel was called, the court told the jurors the name of the case, introduced the parties, and defined hardship. (6 RT 1448-1451, 1473-1475, 1494-1496; 7 RT 1620-1623.) It stated nothing else about the case other than its estimated length. (6 RT 1449, 1473-1474, 1494-1495; 7 RT 1621.) The court then took a roll call, and those individuals claiming hardships were sent to the jury assembly area to complete hardship disqualification forms. (6 RT 1451-1459, 1476-1482, 1496-1500; 7 RT 1623-1629.) To the remaining venirepersons, the court read the information and a brief description of the case,[88] described certain legal principles, told them to avoid exposure to any

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[86] Contained in the separately bound volume of appendices filed concurrently with this brief are two charts — Appendices F and G — summarizing: (1) the voir dire of all 294 venirepersons in the four panels (Appendix F); and (2) the responses of the 59 venirepersons who admitted to being exposed to pretrial publicity. (Appendix G.) In both charts, the sworn regular jurors and alternates are noted in bold.

[87] Group I called on February 1, 1994, consisted of 82 people. (1 Supp CT 8-10; 6 RT 1452-1458.) Of those 82, 48 claimed hardships and were sent to the jury assembly room to complete hardship applications. (*Ibid.*) Group 2 called on February 1, 1994, consisted of 82 people. (1 Supp CT 15-17; 6 RT 1476-1482.) In Group 2, 52 claimed hardships and were excused to complete hardship applications. (*Ibid.*; 7 RT 1540.) Group 3 called on February 1, 1994, consisted of 48 people. (1 Supp CT 18-19; 6 RT 1496-1500.) Of those 48, 28 claimed hardships. (*Ibid.*) Group 4 called on February 2, 1994, consisted of 82 people. (1 Supp CT 20-22; 7 RT 1623-1628.) In Group 4, 50 claimed hardships. (1 Supp CT 20-22; 7 RT 1623-1628, 1724-1728.)

[88] The court read the following statement:

> This case involves the alleged murder of an elderly woman and the attempted murder of her elderly husband. They were both bludgeoned and stabbed while

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possible media coverage of the case, and sent them to the jury assembly room to complete their questionnaires. (6 RT 1460-1471, 1482-1492, 1500-1510; 7 RT 1629-1640.)

The court held hardship voir dire for those persons who had filled out hardship applications. (7 RT 1567-1619, 1642-1698, 1699-1721, 1739-1753; 8 RT 1755-1788.) Those whose hardship requests were not granted were provided jury questionnaires to complete following their hardship voir dire. The court initially excused 154 venirepersons for hardships (1 Supp CT 8-10, 15-22; see also Appendix F), and the remaining 140 potential jurors were questioned in nine groups — groups A through I. (1 Supp CT 7-14.) With each group, the court first conducted sequestered voir dire regarding exposure to pretrial publicity, questioning only those whose questionnaires indicated they had been exposed to publicity. (8 RT 1807-1830 (sequestered pretrial publicity voir dire of Panel A); 9 RT 1984-2008 (Panel B); 10 RT 2116-2140 (Panel C); 10 RT 2235-2254 (Panel D); 11 RT 2365-2371 (Panel E); 12 RT 2470-2490 (Panel F); 12 RT 2579-2622 (Panel G); 13 RT 2716-2737 (Panel H); and 14 RT 2841-2875 (Panel I).)

Following that questioning, the court conducted both general and death qualification voir dire with the entire group present.[89] (8 RT 1832-

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> sleeping in their daughter's home. These offenses allegedly occurred in a private residence located at 121 Robin Hood Drive in the City of Modesto on March 1, 1992. [¶] The victims Juanita and Leo Bragg had traveled from Missouri to visit their daughter Sylvia Rudy at her home. During the crime the perpetrator allegedly took phones, money and a calculator.

(6 RT 1465-1466, 1487, 1506; 7 RT 1635.)

[89] The court had denied a defense motion for sequestered *Hovey* voir dire. (6 RT 1395-1396, 1398.)

1880; 9 RT 1894-1980 (general and death qualification voir dire of Panel A); 9 RT 2010-2106 (Panel B); 10 RT 2140-2234 (Panel C); 10 RT 2255-2325; 11 RT 2328-2361 (Panel D); 11 RT 2375-2462 (Panel E); 12 RT 2494-2575 (Panel F); 12 RT 2635-2708 (Panel G); 13 RT 2738-2820 (Panel H); and 14 RT 2875-1965 (Panel I).)

During pretrial publicity voir dire of Group G (the 7th panel), the court realized that those venirepersons who had sought hardship excusals but who had NOT been excused ("hardship-retained" jurors) did not know about the case when they completed their 24-page questionnaires related to this case. (12 RT 2619-2623.) David Owens, one of the hardship-retained jurors in Group G, wrote in his questionnaire that he was unsure whether he had heard anything about the case because he did not know what the case was about. (11 CT-JQ 3134.) Because he, like all the other venirepersons seeking hardship, had been excused to the jury assembly room to complete a hardship application before the court read the information and case summary, the only information he had about the case was the defendant's name — which he did not recognize. (12 RT 2619-2621.) Mr. Owens was called for publicity voir dire, however, due to his questionnaire response that he was unsure about possible exposure to publicity. (12 RT 2619.) During this part of Owens' voir dire, the court provided a brief description of the crime and Owens recalled that he had read about the case in the newspaper. (12 RT 2620-2621.) The court had already dismissed some of the hardship-retained jurors, but decided to call the remaining hardship-retained jurors into the courtroom to read the information and summary of the case and ask whether they recalled any publicity. (12 RT 2622-2626.) Thereafter, the court did call 16 hardship-retained jurors and asked 13 of them, after reading the information and case summary, whether they

remembered reading or hearing anything about the case.[90] (14 RT 2833-2869.) The court did not question one of those hardship-retained jurors, Janice Pollard, about possible exposure to publicity; instead, the court questioned her about a hardship, and she was excused upon stipulation. (14 RT 2862.) As for the other two (Mary Davis and Blanca Del Mercado), the court merely asked whether they could be fair, not whether they had previously heard about the case. (14 RT 2839-2840.)

c. **Summary Of Numbers and Percentages.**

a. Total venire = 294. (Appendix F.) After initial hardship excusals, 140 remained who completed questionnaires and thus provided information regarding their exposure to pretrial publicity (24 of whom were hardship-retained and thus did not know what the case was about when they completed their questionnaires). (*Ibid.*)

b. Number of venirepersons who had heard about case: 59.[91]

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[90] These 13 jurors were Barbara Alfonso, Judy Andrino, Mark Corbeil, Genoveva Garcia, Jennifer Gianopoulos, Melanie Harden, Kenneth Jelacich, Kim Krug, Richard Mueller, Guy Ranson, Lynn Posluch, Susan Thomas, and Eliseo Rangel. (14 RT 2841-2869.) Nine of the 13 had, in fact, heard of the case. (14 RT 2844-2846 (Corbeil), 2846-2847 (Garcia), 2848-2849 (Gianopoulos), 2850 (Harden), 2852-2853 (Jelacich), 2854-2855 (Krug), 2856-2857 (Mueller), 2858-2861 (Ransom), and 2864-2865 (Thomas).)

[91] Those venirepersons who had heard about the case were Jeanne Adams, James Barker, Robert Baucher, Eugene Boesch, Juror No. 4, Gordon Brown, Maxine Bryson, Mark Burden, Mary Caviale, Alternate Juror No. 1, Mark Corbeil, Velma Cox, Alternate Juror No. 2, Sandra Dias, Genoveva Garcia, Jennifer Gianopoulos, Alternate Juror No. 4, Melanie Harden, Vivian Heddon, Doris Hedrick, Marcella Hibbs, Rita Himes, Jennifer Hobbs, Geraldine Howard, Juror No. 10, Kenneth Jelacich, David Johnston, Charles Jones, Juror No. 8, Charles Journey, Carol Knapp, Kirk Krug,
(footnote continued on next page)

c. Hardship-retained: 24. Of these, 17 were queried about exposure to publicity; 7 were never questioned[92] and thus it is unknown whether those 7 were exposed to publicity. (Appendix F.)

d. Percentage of venire exposed to publicity: The record is insufficient to identify the percentage of the entire venire that had been exposed to publicity, because none of the 154 venirepersons initially excused for hardships completed questionnaires or were questioned regarding possible exposure to pretrial publicity. It is thus unknown how many of those 154 hardship excusals had been exposed to publicity. The record shows that at least 59 of the remaining 140 jurors[93] had heard about the case, for a percentage of 42

(footnote from previous page)
Celeste Marlow, Kenneth McCluskey, John McGee, Barbara McIntosh, Harry Moitozo, Sharon Moore, Richard Mueller, Jillian Mullinix, Juror No. 1. Kevin Murphy, David Owen, Guy Ransom, Alice Rodriguez, Alternate Juror No. 5, Jim Sifford, Arlene Sohn, Sandra Stephenson-Tobin, Vernon Stevenson, Rae Strickland, Susan Thomas, Eric Thompson, Leroy Thompson, Russell Wade, Juror No. 6, Eva Wilson-Kroeze, Carol Wright and Michael Wright. (Appendix F; see also Appendix G.)

[92] Those seven hardship-retained jurors who completed their questionnaires without being informed of the charges or the case summary and who were never questioned about possible exposure to pretrial publicity were Marlene Carpenter (12 CT-JQ 3284; 11 RT 2363-2364), Mary Davis (7 CT-JQ 1961; 12 RT 2499-2512; 14 RT 2834-2840), Blanca Del Mercado (7 CT-JQ 1987; 12 RT 2512-2519; 14 RT 2834-2840), Timothy Dickmeyer (10 CT-JQ 2695; 12 RT 2519-2528), Jesse Franco (12 CT-JQ 3336; 14 RT 2965-2967), Janice Pollard (13 CT-JQ 3189; 14 RT 2833-2839, 2862), and Carl Smith (10 CT-JQ 2851; 12 RT 2564-2566). (See Appendix F.)

[93] These 140 jurors include three jurors who initially did not claim hardships but were subsequently excused on hardship grounds during regular voir dire — Chester Hammond, Dori Hastings, and Dena Hill. (6
(footnote continued on next page)

percent. However, as noted, 7 of those 140 jurors were hardship-retained venirepersons who answered the questionnaire questions regarding publicity without being informed of the charges and case summary and who were never questioned regarding possible exposure to publicity. Thus, it is unknown whether they, too, had been exposed to publicity. After subtracting those 7 venirepersons from the pool of 140 jurors who completed questionnaires, that pool drops to 133. Thus, the corrected percentage of the venire that had been exposed to publicity is 59 of 133 — a percentage of 44 percent.

e. Number of the 17 sworn jurors exposed to publicity: 9 (5 of the 12 seated jurors and 4 of the 5 alternate jurors).[94] (Appendix G.)

(footnote from previous page)
RT 1455, 1478; 9 RT 1950-1952, 1971-1972; 10 RT 2214-2217.) Because they initially did not claim hardships, they heard the charges and the case summary and completed questionnaires. (1 CT-JQ 271-272; 2 CT-JQ 349-350; 3 CT-JQ 842; 6 RT 1460-1466, 1482-1487.) Because they provided information regarding their possible exposure to publicity, they are considered with the remaining venirepersons (who were not excused for hardship) for purposes of computing that percentage of the venire who had been exposed to pretrial publicity.

[94] These jurors and alternates were Juror No. 1 (9 CT-JQ 2315-2316; 13 RT 2732-2733), Juror No. 4 (6 CT-JQ 1701-1702; 11 RT 2365-2367), Juror No. 6 (5 CT-JQ 1285-1286; 10 RT 2137-2138), Juror No. 8 (8 CT-JQ 2241-2242; 13 RT 2716-2723), Juror No. 10 (2 CT-JQ 375-376; 8 RT 1828-1830), Alternate Juror No. 1 (4 CT-JQ 1129-1130; 10 RT 2133-2134), Alternate Juror No. 2 (8 CT-JQ 2143-2144; 12 RT 2588-2596), Alternate Juror No. 4 (5 CT-JQ 1207-1208; 10 RT 2134-2135), and Alternate Juror No. 5 (9 CT-JQ 2493; 13 RT 2733-2737).

f. Percentage of seated and alternate jurors exposed to publicity: 41.6 percent of the seated jurors, 80 percent of the alternate jurors, or 53 percent of all sworn jurors.

6. **Trial Counsel's Request For Additional Peremptories Followed By Selection Of Jury.**

After voir dire but before the exercise of peremptory challenges, defense counsel requested that the court grant additional peremptory challenges on the basis that it had denied six of his challenges — to Eugene Boesch, Maxine Bryson, Teresa Countz,[95] Doris Hedrick, Theda Jones, and Mary Credille — made on grounds that these jurors had formed biased opinions as a result of their exposure to pretrial publicity. (15 RT 3021.) Counsel argued that he needed to use all 20 peremptory challenges, and that the presence of jurors biased as a result of publicity would deny appellant a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments. (*Ibid.*) The court agreed that there was authority for granting additional peremptory challenges in order to remedy venue problems, but denied counsel's request, stating that it had already denied the change of venue motion and saw nothing during voir dire that changed its opinion. (15 RT 3022-3024.)

Thereafter, counsel exercised their peremptory challenges, after which a jury of 12 plus 5 alternates was sworn. (15 RT 3043-3047.) Defense counsel used one peremptory challenge to excuse Eugene Boesch — one of the venirepersons whom he had challenged on the basis of bias due to exposure to pretrial publicity (15 RT 3047) — and three challenges

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[95] Defense counsel was incorrect in including Countz in that list; he challenged her on the basis of her death penalty views, rather than her exposure to publicity. (9 RT 1937.)

during selection of the alternate jurors.[96] (15 RT 3055, 3068-3069.) He subsequently explained, "Just for the record, I did not exercise all my peremptory challenges because of tactical reasons and I am not waiving my objection to the composition of the voir dire on the basis of pretrial publicity." (15 RT 3082.)

C. The Trial Court Erroneously Denied Appellant's Motion for Change of Venue.

1. Governing Legal Principles.

The right to be tried by an impartial jury, including a capital-sentencing jury, is the cornerstone of our criminal justice system and is protected by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Morgan v. Illinois* (1992) 504 U.S. 719, 728; *Duncan v. Louisiana* (1968) 391 U.S. 145, 147-158; *Irvin v. Dowd* (1961) 366 U.S. 717, 722, 727-728 ["the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors"; "'[a] fair trial in a fair tribunal is a basic requirement of due process.'"].) Changes of venue are designed to protect that fundamental right. (*Groppi v. Wisconsin* (1971) 400 U.S. 505, 510-511; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363; *Rideau v. Louisiana* (1963) 373 U.S. 723, 726-727; *People v. Bonin* (1988) 46 Cal.3d 659, 672, overruled on another ground by *People v. Hill* (1988) 17 Cal.4th 800, 823, fn. 1.)

Derived from *Sheppard* and *Maine v. Superior Court* (1968) 68 Cal.2d 375, the California standard governing a change of venue is codified

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[96] Immediately after selection of the jurors and alternates, counsel stipulated to the excusal of one of the jurors for hardship reasons, and she was replaced by the first alternate. (15 RT 3075, 3080, 3085.)

in Penal Code section 1033, which provides that "the court shall order a change of venue . . . to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (Pen. Code, § 1033.) Whether the issue is raised by a pretrial writ or on appeal from a judgment of conviction, a reviewing court must independently examine the record and determine de novo whether a venue change should have been granted. (*People v. Williams* (1989) 48 Cal.3d 1112, 1125; *Maine v. Superior Court, supra*, 68 Cal.2d at pp. 382-383.) "The phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.'" (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578, citation omitted.)

Because no single factor is controlling, each case must be approached on an individual basis. (See, e.g., *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 585; *Maine v. Superior Court, supra*, 68 Cal.2d at pp. 384-388.) The trial court's initial venue determination, as well as this Court's independent evaluation, must consider five factors: (1) the nature and gravity of the offense; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the community status of the defendant; and (5) the prominence of the victim. (*People v. Famalaro* (2011) 52 Cal.4th 1, 21.)

When the denial of a change of venue is challenged on appeal, the review is retrospective. (*People v. Harris* (1981) 28 Cal.3d 935, 949.) "[A] successful challenge to a trial court's denial of the motion must show both error and prejudice, that is, that 'at the time of the motion it was reasonably likely that a fair trial could not be had in the county, and that it was reasonably likely that a fair trial was not had.' [Citations.]" (*People v. Famalaro, supra,* 52 Cal.4th at p. 21, citation omitted.) Reviewing courts look to what actually transpired during voir dire to determine whether the

"reasonable likelihood" standard warranting a change of venue was met. (*People v. Harris*, *supra*, 28 Cal.3d at p. 949.) Resolution of that question requires examination of "the voir dire of prospective and actual jurors to determine whether pretrial publicity did in fact have a prejudicial effect." (*People v. Jennings* (1991) 53 Cal.3d 334, 360, internal quotation marks omitted.)

Upon application of these legal principles to the instant case, it is apparent that prior to jury-selection proceedings, there was far more than a reasonable likelihood that appellant could not obtain a fair trial in Stanislaus County. This finding was confirmed during jury selection; the effect of the pretrial publicity was shown to have prejudicially permeated the jury venire, thus depriving appellant of a fair trial.

2. At The Time Of The Motion, It Was Reasonably Likely That A Fair Trial Could Not Be Had In Stanislaus County.

a. The Nature And Gravity Of The Offense.

The "nature" of the offense refers to the "peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1159.) Its "gravity" refers to "its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict." (*Ibid.*)

When a change of venue is requested in a capital case, the gravity of the offense and the severity of potential penalty are factors that militate strongly in favor of granting the defendant's motion. (*Williams v. Superior Court* (1983) 34 Cal.3d 584, 593 [a charge of murder with special circumstances is the gravest offense carrying the gravest penalty — a factor weighing heavily in favor of the defendant]; *accord*, *People v. Jennings*,

supra, 53 Cal.3d at p. 360 ["capital murder is the most serious crime and 'that fact weighs strongly in favor of a change of venue'"].)

Here, in addition to the fact that appellant was facing the death penalty, the facts and circumstances of the case were both sensational and unfathomable. The Modesto Bee reported that the victims, an elderly couple, were brutally attacked in their sleep for no apparent reason. The 74-year-old woman was beaten to death in her bed, and her husband lay next to her for hours, critically injured with massive head injuries. They were stabbed and beaten with either a crowbar or hammer, and the crime scene in their daughter's guest bedroom was described as "very violent." (Defendant's Exhibit 3 [The Modesto Bee (Mar. 2, 1992)]; 7 CT 1777-1780.[97]) The articles also reported that "[m]oney and valuables were sitting neatly on the dresser," "the home appeared otherwise untouched," and investigators found no sign of forced entry. (7 CT 1780.) The Bee quoted one officer as saying, "This makes no sense at all," and reported that another officer told reporters, "We are still baffled." (The Modesto Bee (Mar. 2 & 3, 1992); 7 CT 1780, 1784.) An article also quoted one of the victims' relatives, who arrived at the crime scene just as the victims' daughter discovered her parents, as saying, "On my God . . . [t]hey beat them. Why?" (The Modesto Bee (Mar. 2, 1992); 7 CT 1780.)

The nature and gravity of the offense were graphically illustrated by the sensational publicity. Newspaper articles described the crime as the

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[97] As noted above, all of the newspaper articles concerning the case are contained in Defendant's Exhibit 3. Copies of all of the defense exhibits introduced at the venue hearing, including Exhibit 3, are contained in the Clerk's Transcript. For ease of the court and opposing counsel, appellant provides Clerk's Transcript citations for these newspaper articles, rather than their exhibit number.

"baffling, violent crime," the "Bloody March 1 beating," and "vicious," and said that Mr. Bragg's head resembled a "broken eggshell." (The Modesto Bee (Mar. 3, 4, 11, 27, 28, 1992); 7 CT 1784, 1786, 1789-1790, 1810.) Articles also reported that the victims' injuries indicated that they "tried to protect themselves against their attacker's repeated blows," and Mr. Bragg "may have lay bleeding near death and next to his dying wife for 15 hours before he was found." (The Modesto Bee (Mar. 3, 1992); 7 CT 1784.) (See e.g., *Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 593 [media characterizations of killing as "cold-blooded" or "execution-style" created a high degree of sensationalism]; *People v. Williams*, *supra*, 48 Cal.3d at p. 1127 [nature of newspaper reports was frequently sensational, with references to the victim's "bullet-riddled" body, description of the slaying as "execution style," and reporting that the victim had been raped and that authorities believed she had been "executed' so that she could not identify her assailant]; *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 582 [sensational media coverage referring to "cold-blooded killing" and emphasizing that victim was shot in the back, while lying on the floor, weighed in favor of a venue change].)

The more "spectacular" the facts of a case, the more likely it is that jurors will notice, remember, and be prejudiced by the publicity. (*Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 877 [when a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt].) This "baffling" and "vicious" attack on the sleeping elderly victims — a brutal crime which made no sense at all — was such a spectacular crime, and as discussed below, the publicity repeatedly

described purported facts, statements and circumstances strongly pointing to appellant's guilt.

The questionnaires and voir dire of the prospective jurors reflected their recognition of and reaction to the nature and gravity of the crimes. (See, e.g., 9 RT 1990-1991 ["the bludgeoning and the stabbing, repeated stabbing"; "[p]retty well in my mind the newspaper made him guilty"]; 12 RT 2589 [victims from Missouri visiting daughter, there was a burglary, and the man murdered the wife, whoever committed crime should probably be put to death]; 10 CT-JQ 2669-2670 ["he broke into the Rudy duplex and murdered her father or mother . . . it seemed like a senseless killing"]; 12 RT 2475 ["I really am, quite honestly, prejudiced against it"]; 1 CT-JQ 142 [the victims had traveled from Missouri to visit their daughter — "I recall thinking the victims were so innocent and why would anyone want to hurt them"]; 8 RT 1816-1818 [young woman was away on vacation and her parents were visiting; she returned the next day and found them killed with a hammer; neighbors suspected that crime was committed by a young man who lived at the four-plex and also suspected that he had previously burglarized the young woman's apartment; juror associated the crime with her own parents from Kansas and did not believe that she could be fair and impartial]; 11 CT-JQ 2983 [recalled "feeling of horror & outrage"]; 12 RT 2606 [mother and father were visiting their daughter who was not home; when daughter returned home, she found them dead; "I just think that it's terrible and that whoever did it should get hung"]; 8 RT 1824 ["it was pretty gory"]; 27 CT-JQ 402-403 ["[t]he violent way in which the elderly couple was beaten and left to Die!"]; 11 RT 2723 ["this elderly couple were from Missouri visiting their daughter and someone killed the female and brutally beat up the male"; "it was pretty bloody and gory"]; 6 CT-JQ 1545-1546; 10 RT 2251-2252 ["[v]isiting older couple beaten and the death

of the lady"; "shocked by it"]; 3 CT-JQ 712-713 ["[b]rutality shown on two old people"; "[t]hey never had a chance to even run or defend themselves"].)

Accordingly, the nature and gravity of the offense are factors militating strongly in favor of a change of venue in this case.

b. <u>The Nature and Extent of News Coverage</u>.

The "extent" of news coverage is quantitatively measured by items like the number of articles (and electronic coverage), their pattern and their prominence. The "nature" of publicity is qualitatively measured.

A venue change should be, and is more likely to be, granted where coverage has been inflammatory or produces outright hostility towards the suspect. (See *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 877.) But California does not require that publicity be particularly inflammatory or hostile to justify a change of venue. (*Ibid.*; see also *People v. Tidwell* (1970) 3 Cal.3d 62, 69; *People v. Williams, supra*, 48 Cal.3d at p. 1128.) Where such circumstances are not present, if "a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." (*Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 877 [venue change ordered although pretrial publicity surrounding the serial killer had not been inflammatory and had "portrayed Corona as a quiet, respectable family man and as a religious, hard-working man"]; *accord*, e.g., *People v. Jennings, supra*, 53 Cal.3d at p. 362; *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 580.) As noted above, coverage that contains detailed descriptions of the crime using graphic language about the circumstances and the defendant weighs in favor of a change of venue. (See

Martinez v. Superior Court, supra, 29 Cal.3d at p. 582; *Williams v. Superior Court, supra*, 34 Cal.3d at p. 593.) Coverage that contains inaccurate reporting of facts, or reporting of facts that would be inadmissible at trial, also weighs in favor of a change of venue. (See *Marshall v. United States* (1959) 360 U.S. 310, 312-313; *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 878, fn. 4; *People v. Williams, supra*, 48 Cal.3d at p. 1127.)

Although the extent of the media coverage in this case was not extreme,[98] the nature of the coverage weighed heavily in favor of a venue change in that (1) the coverage was inflammatory with respect to both the crime and appellant; (2) the publicity described purported (and often inaccurate) facts, statements and circumstances strongly pointing to appellant's guilt; and (3) the newspaper coverage recounted very prejudicial inadmissible evidence. Moreover, there were several factors which made this case unique. Now to explain these points.

First, the coverage was, indeed, inflammatory. As discussed above, the media portrayed the crime in graphic, sensational terms. The fact that a particular homicide offense, as portrayed in the media, possesses "sensational" overtones setting it apart from the usual homicide favors the necessity of a change of venue. (See, e.g., *People v. Williams, supra*, 48 Cal.3d at p. 1127; *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 582.) That was certainly the case here.

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[98] The prosecution reported that the Modesto Bee published 19 news articles over a span of 21 months, and 35 newscasts regarding the case were aired on a six-day period during the month of March 1992. (7 CT 1850-1851.) Dr. Schoenthaler described the publicity as "fairly moderate." (7 CT 1838.)

The coverage was not only inflammatory about the crime but with regard to appellant as well, characterizing him as rejecting counsel after counsel, that such serial rejection of counsel was costing the county thousands of dollars, and that he was attempting to manipulate the system and delay the trial:

- On June 19, 1993, the Modesto Bee published an article headlined, "*Murder Case Defendant Fire* [sic] *Lawyer*." (The Modesto Bee (June 19, 1993); 7 CT 1800.) This article characterized appellant's successful *Marsden* motion to dismiss counsel as nothing more than an attempt to delay his trial. It stated in pertinent part:

  > The man charged with killing an elderly woman in Modesto and beating her husband fired his lawyer Friday. [¶] Brian David Johnsen . . . succeeded in dumping Fred Canant as defense counsel. This was the second time Johnsen tried to dismiss Canant. . . . [¶] Deputy District Attorney Doug Fontan objected to the switch in lawyers. "It's the people's desire to have a speedy trial, and this will only cause a delay in the case." [¶] "I agree," [Judge] Vander Wall said. "Let's see if I can get a lawyer by 1:30 this afternoon, so there won't be a delay." [¶] Johnsen objected. Fontan is "always interfering with the defense. It's none of his business how long it takes to have a new trial." [¶] "Yes it is," shot back Vander Wall. . . . [¶] During the afternoon hearing, Johnsen said . . . "I haven't seen any discovery. At this point in time, I'm not ready to accept a lawyer. But if the court could send some lawyers to the jail, I would be willing to interview them." [¶] He also asked Vander Wall to appoint a lawyer from out of county. "I can't trust any lawyers in this county," he said. [¶] "I'm not going out of county to appoint an attorney to represent you," Vander Wall said. [¶] Fontan again said he wanted the matter to go to trial as expeditiously as possible. "This case has dragged

> on and on and on. I want the record to reflect that the people have a right to a speedy trial."

(*Ibid.*)

- On July 1, 1993, the Bee published two articles, one headlined "*Defendant Rejects No. 5*; *Sixth Lawyer appointed*," and the other headlined "*$1 Million Suit Claims Conflict By Attorneys.*" (The Modesto Bee (Jul. 1, 1993); 7 CT 1818-1819.) The latter article reported appellant's filing of a one-million-dollar lawsuit against his former lawyer and a Stanislaus County district attorney and his allegation that they conspired to violate his civil rights. (7 CT 1819.) The other article reported that a sixth attorney was appointed because appellant rejected lawyer number five, and then summarized the succession of five attorneys who had represented appellant, stating that appellant had succeeded in claiming conflicts of interest and "dumping Fred Canant as defense counsel." (7 CT 1818.) That article stated: "In addition to the time lost, the county has paid thousands of dollars to pay for Johnsen's defense. According to court records, the county has paid about $35,000 so far in legal fees for Perry's, Canant's, and Wolfe's work on the case." (*Ibid.*) It also reported, once again, the prosecutor's concern regarding the People's right to a speedy trial and his statement that the change in attorneys would only cause more delay. (*Ibid.*)

- On July 2, 1993, the Bee published another article regarding appellant's civil lawsuit against his former attorney. (The Modesto Bee (Jul. 2, 1993); 7 CT 1821.) This article was headlined, "*Defendant's Attorney Quits Case Over Lawsuit* [;]

Canant Refutes Client's Claims Of Conspiracy With DA." (*Ibid.*)

According to this article:

> Although the lawsuit prepared by Brian David Johnsen against his former attorney Fred Canant has not been officially filed, it did the job – it made Canant quit as Johnsen's lawyer. . . . [¶] The lawsuit so upset Canant that he told . . . Judge . . . Vander Wall that he didn't think he could adequately defend Johnsen in his murder trial. . . . "He called me a surrogate district attorney. That really upset me. Anybody who knows me knows that I wouldn't conspire with the district attorney's office on anything." . . . [¶] Canant said Johnsen's efforts are a way of manipulating the system. . . . [¶] "I have defended a client who physically attacked me," Canant said, "But I can't defend someone who would bring a lawsuit against me."

(*Ibid.*)

- On July 9, 1993, the Bee published an article headlined, "*More Time Given To Prepare Murder Defense*," stating: "The murder trial of Brian David Johnsen got kicked into the next year." (The Modesto Bee (Jul. 9, 1993); 7 CT 1823.) This article reported that Kent Faulkner, who was appellant's sixth attorney, asked for more time to prepare for trial because he had just been appointed. The article quoted Faulkner as stating his understanding that there had "been five or six previous counsel in the case already" and that he hoped "to be the last one, so we have to accommodate Mr. Johnsen as well." (*Ibid.*) This article repeated the previous reporting that lawyer Fred Canant withdrew as appellant's counsel because appellant prepared a lawsuit against him in which he alleged that Canant conspired with the district attorney's office to deprive appellant of his rights; "Canant

denie[d] the claim but withdrew, saying he could not work with Johnsen." (*Ibid.*)

This publicity — suggesting that appellant (1) was responsible for the large turn-over in counsel which was costing the county thousands of dollars, and (2) was dismissing counsel right and left in order to delay his trial — inevitably infected the community with hostility toward appellant. This media coverage was particularly unfair and prejudicial, because appellant was not at fault for the large turn-over in counsel. This turn-over began when appellant's counsel, the Public Defender, withdrew, citing a conflict of interest due to his joint representation of jailhouse informant Eric Holland, who was seeking a deal to testify against appellant. (1 CT 67.) During the next three months, there ensued a search for a new attorney. In the course of that process, five private attorneys were appointed in succession to represent appellant and all but the last, Fred Canant, either declared conflicts due to representation of potential witnesses or had been appointed merely as interim counsel to advise regarding such potential conflicts or to represent appellant on limited matters.[99] Thus, it was not appellant who was "dumping" his attorneys, but the attorneys who were

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[99] On June 25, 1992, the firm of Grisez, Ornstein, and Hertle was appointed, but it immediately declared a conflict due to representation of potential witnesses. (1 CT 67-68.) The court then appointed Perry and Wildman. (1 CT 68.) On July 29, attorney Perry declared a conflict, and on July 31, attorney Kirk McAllister was appointed for the limited purposes of advising appellant regarding that conflict. (1 CT 91, 93, 108, 115.) On August 19, attorney Alexander Wolfe was appointed for the limited purpose of representing appellant regarding a discovery motion filed in propria persona on August 15. (1 CT 123, 125-126, 157, 166-169.) On September 22, Wolfe's appointment was expanded to include representing appellant regarding a prosecution motion for handwriting exemplars. (1 CT 257, 284.) On September 25, Mr. Perry was formally relieved, and attorney Fred Canant was appointed in his place. (2 CT 305, 307-310.)

declaring conflicts. The only attorney whom appellant sought to dismiss was Fred Canant, and as set forth in his *Marsden*[100] motion, appellant had valid reasons to doubt Canant's ability to provide vigorous representation in this capital prosecution.[101] (4 CT 1122-1160.) Yet, the media coverage painted appellant as responsible for legal maneuvers which were costing the citizens thousands of dollars. This creation of public opinion hostile to appellant on the basis of inaccurate representations, as well as the sensational coverage of the crime, thus favored a change of venue in this case. (See, e.g., *Corona v. Superior Court*, *supra*, 24 Cal.App.3d at p. 877 [change of venue favored where pretrial publicity infects the community with hostility toward the suspect].)

Second, the publicity described both actual and non-existent evidence, statements and circumstances strongly pointing to appellant's guilt. Several articles reported on appellant's confession to a fellow inmate and his counsel's motion to suppress that confession. (The Modesto Bee, (Sept. 17 & Nov. 19, 1993); 7 CT 1824-1826.) Although the articles described the confession as "alleged" and reported that defense counsel was seeking to suppress any confession or statements appellant "may have

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

[101] Among the reasons stated in the motion were that (1) during his representation of appellant, Canant "took on" another capital case and then informed the judge in that case that he could not meet the trial schedule because he was overworked; (2) Canant did not present any defense witnesses or any defense whatsoever in that other capital matter; (3) Canant rejected appellant's request that he seek appointment of second (*Keenan*) counsel; and (4) Canant had not "distributed appropriate and necessary funds to appointed investigators, thereby alienating competent investigation [sic]." (4 CT 1124-1126, 1128-1129.) To an individual facing a prosecution seeking to deprive him of his life, these would all appear to be very valid concerns about the ability of his attorney to vigorously represent him.

made," the reporting made it clear that appellant had, in fact, confessed. (*Ibid.*) The articles informed that the judge had closed the hearing "at which the inmate's testimony was heard regarding the statements," because defense counsel stated that "if a potential jury pool reads the testimony, that pool may be prejudiced against Johnsen." (*Ibid.*) One of the articles also reported that the judge denied appellant's "motion to suppress the confession, but he said he could not reveal why he denied it because it would mean revealing some of the evidence produced during the closed hearing." (7 CT 1826.)

Several articles also reported that detectives found a bloody hammer, bloody tennis shoes and several of Sylvia Rudy's possessions in appellant's apartment and noted that he refused to talk to detectives after his arrest. (The Modesto Bee (Jan. 29, Jun. 19 & Jul. 1, 1993); 7 CT 1797, 1801; see also The Modesto Bee (Mar. 27, 1992); 7 CT 1802 [detectives serving a search warrant at appellant's apartment "reportedly found evidence linking Johnsen to the attack but declined to say what they turned up"; "Johnsen refused to talk to detectives"].) Most of this reporting, however, was not true. The record contains no evidence that the police ever found a bloody hammer, bloody tennis shoes, or Sylvia Rudy's possessions in appellant's apartment. In fact, the prosecution's evidence contradicted these allegations. According to the Modesto case confession, appellant threw the hammer out of the car, along with Sylvia Rudy's keys and his shirt, while driving along I-880. (People's Exhibit 91.) And there was no testimony that police ever discovered any bloody shoes belonging to appellant. To be sure, had the authorities ever discovered such evidence, the prosecution would certainly have presented it at trial. As for Sylvia Rudy's possessions, none were found at appellant's home. Some of Ms. Rudy's property was found at the home of Mickey Landrum's mother and some was found in the homes

of appellant's grandparents and his mother's uncle and aunt. (16 RT 3279-3280, 3314-3316, 3383-3385, 3442-3444; 18 RT 3842-3843; 19 RT 4111.) As discussed *post* in Argument III, the property stored at the homes of appellant's relatives was attributable to Mickey Landrum, not appellant, for it was Landrum who gave it to appellant's mother; this and other evidence presented substantial reason to prosecute Landrum for the three burglaries, two robberies, attempted murder and murder charged against appellant. Another article reported that police found some of Rudy's belongings in appellant's home, and that police were checking on fingerprints and blood on items found in his home. (The Modesto Bee (Mar. 28, 1992); 7 CT 1810.) Again, the claim that Rudy's belongings were found in appellant's home was inaccurate, and there was never any evidence obtained from appellant's home that was, or could have been, checked for fingerprints or blood stains.[102] Newspaper coverage also reported that while driving on the interstate, appellant threw the keys to Sylvia Rudy's apartment out the window, and detectives believed that he had obtained those keys during an earlier burglary. (The Modesto Bee (Mar. 26, 1992); 7 CT 1793.)

Indeed, one article quoted officers as declaring appellant's guilt (The Modesto Bee (Mar. 27, 1992); 7 CT 1802 ["Investigators said it appears Johnsen entered the apartment to commit a burglary and while there he encountered the Braggs, who were asleep."]), another quoted Sylvia Rudy as telling police that she believed appellant committed the earlier burglaries of her home and had been watching her apartment (The Modesto Bee (May 26, 1992); 7 CT 1792), and a third article quoted neighbors as stating that

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[102] As summarized *ante* in the statement of facts, the DNA evidence presented in this case was extracted from (1) a hair found inside a pantyhose obtained from Rudy's residence; and (2) blood samples taken from two knives also recovered from Rudy's home.

they were not surprised to hear that the police arrested appellant, and describing him as "weird" and a "'skinny stoner' type." (The Modesto Bee (Mar. 28, 1992); 7 CT 1810.)

The net effect of all this coverage was to communicate to the community of potential jurors — largely on the basis of non-existent evidence — that appellant was guilty — the bloody implement of the murder as well as the property stolen during the crime had been found in his possession, he had attempted to destroy evidence linking him to the crime, and he had confessed. In fact, during voir dire, one of the jurors candidly stated that although he would try to be fair and impartial, "pretty well in my mind the newspaper made him guilty." (9 RT 1989.) This was thus another factor strongly weighing in favor of a change of venue. (See *Martinez v. Superior Court*, *supra*, 29 Cal.3d at pp. 579-581, 583 [coverage of the codefendant's trial, reporting that the codefendant presented an alibi and contended that Martinez had committed the robbery during which an individual was killed; that the prosecution stated its belief that Martinez was the gunman and dismissed the special circumstance against the codefendant because he did not fire the gun; and that a prosecution witness had admitted being Martinez's crime partner in other robberies and had invoked the Fifth Amendment at the codefendant's trial, suggested that Martinez was the actual killer, posed a danger to a fair trial and compelled a change of venue]; *People v. Williams*, *supra*, 48 Cal.3d at pp. 1127-1128 [press reports (1) that sheriff indicated that defendant was the actual "triggerman" and rapist, and (2) that defendant had made statements which were inadmissible due to a "*Miranda* violation," but which nevertheless exonerated his co-defendant brother, suggested the probability that defendant was the actual killer and were a significant factor in requiring reversal for failure to grant a venue change].) "The goal of a fair trial in the

locality of the crime is practically unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news media." (*Corona v. Superior Court, supra,* 24 Cal.App.3d at p. 878.)

Third, the press informed the public of highly prejudicial inadmissible evidence: appellant's involvement in another homicide[103] (The Modesto Bee (May 26, 1992); 7 CT 1792-1793) and appellant's invocation of his Fifth Amendment right to refuse to speak to the police. (The Modesto Bee (Jan. 29, 1993); 7 CT 1797 ["Detective Sgt. Ron Chandler said Johnsen refused to talk to detectives after his arrest"].) The reporting regarding the other homicide was particularly prejudicial, because it provided erroneous information suggesting that appellant was implicated in the murder of his former girlfriend, Theresa Holloway. The May 26 article, headlined "*Trail Of Accused Murderer Suspect In Beatings Has Sordid History,*" provided a detailed account of appellant's involvement in Ms. Holloway's murder, as well as his involvement in drug dealing and his conspiring to kill another drug dealer. The article began: "Brian Johnsen's legal entanglements didn't begin with his arrest following a savage attack on an elderly couple that left a 74-year-old woman dead in her daughter's north Modesto apartment." (7 CT 1792.) It reported that at the time of his arrest for the attack on the Braggs, appellant was being sought by the San Diego County District Attorney's office as a possible witness to the planning of the "drug-related execution of his former girlfriend." (*Ibid.*) This was, in fact, false. Appellant had already been interviewed by the San Diego County District Attorney's office and was not being sought by that office. At appellant's penalty phase, San Diego County District Attorney

[103] Evidence of appellant's involvement in this homicide was not admissible at the guilt phase but was introduced as aggravating evidence at the penalty phase under Penal Code section 190.3, subdivision (b).

Investigator Anthony Bento testified that in preparation for the trial in the Holloway matter, he interviewed appellant on September 16, 1991, as a witness. (22 RT 4885-4886.) Appellant, who was not in custody, freely participated in the interview. (22 RT 4886.) The article, however, implied that appellant was not a mere witness but that, although never arrested, he had been involved in Holloway's murder. According to the article, appellant had been dealing drugs, became involved in a conflict with another drug dealer and conspired with Robert Jurado and others to kill that drug dealer. But after appellant "was busted for outstanding traffic violations and booked in county jail," he told Jurado that he was worried that Holloway was going to warn the other dealer of the plot. (*Ibid.*) Jurado, with others, killed Holloway; appellant, who was in jail at the time of the murder, was never arrested. (*Ibid.*)

This aspect of the publicity was not only obviously prejudicial but likely to cause members of the community to remember the case. As Dr. Schoenthaler explained, when he questioned subjects who recognized the case during his qualitative survey, one of the factors that caused them to remember and prejudge the case was the media's reporting that appellant was under suspicion for another homicide in San Diego and had not been brought to trial for that. (3 RT 795-796; 4 RT 873.) The subjects' responses indicated that this aspect of the publicity created both concern and hostility toward appellant. (*Ibid.*) The reporting of such highly prejudicial matter, which was not admissible at the guilt phase, was thus another element of the publicity which weighed heavily in favor of changing venue. (See, e.g., *Sheppard v. Maxwell, supra*, 384 at pp. 360-361["the exclusion of [inadmissible] evidence in court is rendered meaningless when news media make it available to the public"]; *Ainsworth v. Calderon* (9th Cir. 1998) 138 F.3d 787, 795 [media accounts containing prejudicial information that was

not admissible at trial create presumptive prejudice favoring a change of venue]; *People v. Williams*, *supra*, 48 Cal.3d at p. 1127 [press report of inadmissible incriminating statement of defendant was a significant factor in requiring reversal of venue issue].)

In sum, all of these factors — the inflammatory coverage portraying the crime in graphic details, the inflammatory coverage erroneously implying that appellant was manipulating the system and was costing the taxpayers thousands of dollars, the reporting that appellant had confessed and invoked his Fifth Amendment right to refuse to speak to police, the erroneous reporting that incriminating evidence had been found in his home, and the reporting of highly prejudicial and inadmissible evidence that appellant was involved in another homicide but had not been charged — pointed to the necessity of a change of venue in this case. In *People v. Jennings*, *supra*, 53 Cal.3d 334, 361-362, where publicity reported that the defendant admitted one of four charged murders, the defendant was suspected in a fifth, uncharged murder, and various incriminating evidence had been discovered in his residence, this Court stated: "The reporting of these facts is troublesome. Although the reports were largely factual, they nevertheless could have led to a jury pool disposed to convict." (*Id.* at p. 362.) Accordingly, the nature of the news coverage is a factor militating strongly in favor of a change of venue in this case.

c. <u>The Size of the Community</u>.

The third factor is the size of the community. "The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness." (*People v. Balderas* (1985) 41 Cal.3d 144, 178.) This Court has also recognized, however, that "population size alone is not determinative." (*Fain v. Superior Court* (1970) 2 Cal.3d 46, 52, fn. 1; *accord*, *Odle v. Superior Court* (1982) 32

Cal.3d 932, 938.) As it admonished in *Maine:* "We do not intend to suggest, however, that a large city may not also become so hostile to a defendant as to make a fair trial unlikely." (*Maine v. Superior Court, supra,* 68 Cal.2d at p. 387, fn. 13.)

Appellant's trial took place in Stanislaus County in 1994. According to the prosecution's opposition, Stanislaus County had a population of 383,300 in 1991. (7 CT 1857.) It was stipulated at the venue hearing that (1) the total number of eligible potential jurors in Stanislaus County in 1994 was 244,941; and (2) of that pool of 244,941 eligible venirepersons, 40,941 were qualified to be called for jury duty. (5 RT 1177-1178.)

In *Fain, supra,* 2 Cal.3d at page 52, this Court determined that Stanislaus County, with a population then of 184,600, was too small to dissipate the effects of extensive pretrial publicity and ordered a change of venue. *Fain* noted that Stanislaus County ranked only 21st of California's 58 counties, and that a trial of that nature (capital case involving murder, kidnapping, rape) was a significant event in the community. (*Id.* at p. 52, fn. 1.) In 2005, however, in the case of *People v. Viera,* this Court affirmed the denial of change of venue in a capital case in Stanislaus County, whose population had then grown to approximately 370,000. (*People v. Viera* (2005) 35 Cal.4th 264, 280.) Notably, though, venue changes have been granted from larger counties. (*Smith v. Superior Court* (1969) 276 Cal.App.2d 145 [Los Angeles County, with a population over seven million]; *Steffen v. Municipal Court* (1978) 80 Cal.App.3d 623 [San Mateo County, with a population of 575,000].) Thus, the size of community must be viewed as a neutral factor in the present case; it is a factor which neither favors nor disfavors a change of venue here.

d. <u>The Status of the Victim and the Accused.</u>

The fourth and fifth factors to be considered are the status of the victim and the accused. If the victim is a prominent or popular member of the community, such status favors a venue change. (*Martinez v. Superior Court, supra*, 29 Cal.3d at p. 584.) And "[p]ertinent to [the status of the accused] is whether [the defendant] was viewed by the press as an outsider, unknown in the community or associated with a group to which the community is likely to be hostile." (*Odle v. Superior Court, supra*, 32 Cal.3d at p. 941.) Aside from the brutality of the crime, its apparent senselessness, and the incriminating details of the investigation pointing to appellant's guilt, the pretrial publicity in this case focused heavily on the facts that (1) the victims were a sympathetic elderly couple who were attacked in their sleep while visiting their daughter; and (2) appellant was an unsavory outsider. (See 7 CT 1780, 1784, 1786, 1792-1793, 1795, 1797, 1800, 1802, 1810, 1817-1818.)

In *Maine v. Superior Court*, one of the circumstances that this Court relied upon to order a venue change was that the defendants were strangers in the small community in which they were charged with committing brutal crimes against prominent and popular victims. (*Maine v. Superior Court, supra*, 68 Cal.2d at p. 385; see also *People v. Tidwell, supra*, 3 Cal.3d at p. 70 ["[d]efendant and his brother Robert were strangers to the locale of the three murders of which they were accused"]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293 [victims were prominent local citizens and although defendant was a resident of the area, "he had chosen to 'drop out' of the ongoing life of the community and retained few if any close friends"]; *Williams v. Superior Court, supra*, 34 Cal.3d at p. 594 ["defendant is a young black man, a stranger to and friendless in the community, twice accused of additional violent crimes, charged with raping

and murdering an untarnished young white woman whose family is upstanding in the community"]; *Fain v. Superior Court, supra*, 2 Cal.3d at pp. 51-52 [victims were popular local teenagers, whose fate drew expressions of public sympathy and aroused hostility toward defendant, and defendant had been a resident of the Modesto area for only a few months prior to the crime and had not been integrated into the community].) As explained by this Court in *Martinez v. Superior Court, supra*, the defendant in that case, "a member of a minority group and an alleged heroin addict, 'friendless in the community,' represents exactly the type of defendant whom pretrial publicity can most effectively prejudice." (29 Cal.3d at p. 584.)

Here, like in *Maine*, *Tidwell*, *Frazier*, *Williams*, and *Martinez*, appellant, too, was the type of defendant whom pretrial publicity could most effectively prejudice. He was a relative stranger to Stanislaus County, who had "dropped out" of any type of community life and had few, if any, close friends. He was reported to have been dealing drugs in San Diego and then to have moved to Modesto less than a year before the crime because of "his link to the drug-related execution of his former girlfriend." (The Modesto Bee (May 26, 1992); 7 CT 1792.) One article quoted neighbors describing appellant as "weird" and a "skinny stoner type who was not inclined to leave the house much during the day." (The Modesto Bee (Mar. 28, 1992); 7 CT 1810.) According to the article, neighbors were not surprised to hear that the police had arrested him and hoped that he would be convicted. (*Ibid.*)

The victims themselves were not prominent or popular in the Modesto community; however, their daughter, Sylvia Rudy, was an upstanding member of the community, and worked for a prominent financial institution. (See *People v. Williams, supra*, 48 Cal.3d at pp. 1129-

1130 [although the victim was herself not especially prominent, she came from an extended family with long and extensive ties to the community]; *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 584 [although victim, the brakeman for the railroad, was "no public figure," his "prominence in the public eye . . . derive[d] from the status of his employer, and that factor undoubtedly engendered community sympathy"].) In fact, one article noted that Ms. Rudy's employer, Pacific Valley National Bank, was offering a reward of $10,000 for information leading to an arrest (The Modesto Bee (Mar. 4, 1992); 7 CT 1786), and several venirepersons knew either Rudy or people at the bank where she worked. (12 RT 2473-2475 [venireperson knew Sylvia Rudy because he did business at the bank, the bank employees talked a lot about the case, and he was prejudiced as a result of what he had heard and read]; 11 RT 2348-2849 [heard about case from Rudy's daughter — knew "a lot" and had formed opinions]; 14 RT 2852-2853 [was a friend of Rudy's employer, knew Rudy and had "prejudge[d] this guy"].)

Moreover, although the victims were not prominent or popular, the media created enormous community sympathy for them. In effect, they "became . . . posthumous celebrit[ies]" as a result of the publicity. (See *Odle v. Superior Court, supra*, 32 Cal.3d at pp. 940-941 [while trial court's characterization of the victims as private persons who could not be classified as prominent was correct, it failed to take into consideration that the slain officer, by virtue of media coverage after the crime, had become a posthumous celebrity]; *accord*, *People v. Daniels* (1991) 52 Cal.3d 815, 852.) The press focused on three aspects of the crime to engender sympathy for the victims — that they were innocent elderly people, that they had traveled from Missouri to visit their daughter, and that they were killed in their sleep. (See 7 CT 1780, 1784, 1786, 1792-1793, 1795, 1797, 1800,

1802, 1810, 1817-1818.) There was also reporting of the family's discovery of and reaction to the crime:

> Santiago Lopez and his wife, Cynthia, arrived at the home just as Rudy discovered her parents. Cynthia Lopez is Rudy's daughter. She had stopped by to see her grandparents, whom she knew would be in town. [¶] Rudy and her daughter cried and hugged while trying to answer police questions. Santiago Lopez remained behind the police barricades, out in the car with their children who had been brought to see their great-grandparents.

(The Modesto Bee (Mar. 2, 1992); 7 CT 1780.) Indeed, nearly every article paid particular attention to the fact that the victims' daughter, Sylvia Rudy, was the one who discovered her brutally beaten parents in bed in her home. (*Ibid.* ["A Modesto woman returned home from a business trip Sunday afternoon to find her 74-year-old mother beaten to death and her father critically injured in the guest bedroom where they had been sleeping"]; see also The Modesto Bee (Mar. 3, 1992); 7 CT 1784 ["Sylvia Rudy found her parents beaten, stabbed, and lying in bed still clad in their nightclothes . . . when she returned home from a business trip"]; *accord*, 7 CT 1786, 1793, 1795, 1797, 1800, 1802, 1817-1818.)

Furthermore, as discussed below in subsection (e), the particular circumstances of this crime likely resulted in high victim identification, thereby drawing more community sympathy and support.

In conclusion, the fate of the victims here "drew expressions of public sympathy and generosity" (*Frazier v. Superior Court*, *supra*, 5 Cal.3d at p. 287), whereas appellant was cast as a weird, drug-dealing stranger who had been involved in another homicide. Here, as in *Martinez*, the victims, although not themselves prominent local citizens, engendered post-offense community sympathy and support, while appellant's strangeness, prior criminal acts, and outsider status had resulted in public

hostility. (*Martinez*, *supra*, 29 Cal.3d at pp. 584-585.) The status of the victims and the accused were thus factors favoring a change in venue. (*Ibid.*)

e. **Consideration Of The Five Factors Thus Demonstrates A Reasonable Likelihood That A Fair Trial Could Not Be Had in Stanislaus County.**

In sum, the sensational nature of the crimes, the gravity of the charges, the inflammatory coverage of both the crime and appellant, and the status of the victims and the accused, in combination, compelled a change of venue in this case.

It is instructive to compare this case with *Maine v. Superior Court.* Both involved capital charges arising out of a brutal and senseless murder. As explained by this Court in *Tidwell*:

> The circumstances we relied upon in *Maine* to order a venue change included the fact that defendants were strangers in the small community in which they were charged with committing brutal crimes against prominent and popular victims. Local law enforcement officials' commendable attempts to keep details from the press were frustrated by an out-of-state report of one defendant's confession. Press coverage was not inflammatory, although it included support for a successful fund drive to defray the surviving victim's medical expenses. The final factor we noted was that the defense attorney and the prosecutor were opponents in an upcoming judgeship election.

(*People v. Tidwell*, *supra*, 3 Cal.3d at p. 70.)

Here, as in *Maine*, appellant was an outsider to the community where the crime occurred. In both cases, the publicity engendered sympathy toward the victims. In *Maine*, the victims were popular local teenagers from respected families; here, they were the elderly parents of an upstanding

community member employed by a prominent financial institution. Although the victims in this case had not themselves been prominent or popular, the media's extremely sympathetic portrayal of them turned them into posthumous celebrities. In *Maine*, a codefendant's confession was disclosed prior to trial; here, the press reported that appellant made a confession, and unlike the commendable restraint exercised by local law enforcement officials in *Maine*, the press and public were apprised of virtually every detail of the investigation of the crime, including information that appellant attempted to destroy evidence as well as *inaccurate* reporting that the authorities had discovered incriminating evidence at appellant's home. As a result, not only was a good deal of the prosecution's case presented out of court before the trial, but the public was provided an erroneous picture of appellant's guilt. Although trial participants here were not competing election candidates as in *Maine*, there were considerable allegations in this case that appellant was attempting to manipulate the system and by doing so, was costing the community thousands of dollars. Moreover, as observed by this Court in *Fain v. Superior Court*: "That [defense attorney and prosecutor opposing each other in election] was a somewhat unusual circumstance . . . , and certainly was not intended to constitute a prerequisite for granting a change of venue." (*Fain v. Superior Court, supra*, 2 Cal.3d at p. 52.)

In addition to the factors paralleling those in *Maine*, this case presented additional persuasive evidence that a fair trial could not be had in Stanislaus County. Unlike the publicity in *Maine*, the publicity here was quite inflammatory about both the crime and appellant, describing the crime in sensational language and reporting allegations that appellant was a drug dealer. It also reported inadmissible evidence that appellant invoked his Fifth Amendment right to refuse to speak to the police and was involved

in another homicide. It is true that the crime in *Maine* occurred in a smaller community (Mendocino County with a population then of 51,200). (*Maine v. Superior Court, supra*, 68 Cal.2d at p. 385, fn. 10.) However, as found by *Fain*, when comparing the 1970 population of Stanislaus County (184,600) with that of Mendocino County in *Maine*, "the difference is merely relative" and "[i]n any event, population size alone is not determinative." (*Fain v. Superior Court, supra*, 2 Cal.3d at p. 52, fn. 1.) The important point here, as in *Maine* and *Fain*, is that the crime was a significant event in the community, as confirmed by the responses of potential jurors during voir dire. (See subsection (3), *post.*)

Moreover, as noted by Dr. Schoenthaler, there were several unique factors in the media coverage of this case which created a significantly high level of prejudgment in favor of the death penalty. (3 RT 794.) First, there was a very high fear factor caused by the initial reporting of the crime; the media portrayed the crime in a sensational manner, describing it as a brutal beating and horrific crime and reporting that there were no suspects, no motive, and no evidence of forced entry. (3 RT 795.) The second factor that particularly upset people was the media's later reporting, upon appellant's arrest, that appellant had entered the home and found the elderly people sleeping but instead of retreating, he killed them while they lay sleeping and defenseless in their bed. (3 RT 796.) The third factor was reporting that appellant had been involved in another homicide in San Diego, but had not been brought to trial for that charge. (*Ibid.*)

As for the fear factor, Dr. Schoenthaler's report explained that the coverage of the attack on the Braggs created tension and fear in the community, and public fear of being similarly victimized produced prejudgment as to guilt and particularly, the death penalty. (7 CT 1830-1831.) As noted in that report, a homicide which occurs during a burglary

in somebody's home instills the greatest magnitude of fear due to identification with the victim. (7 CT 1830.) The public sees the victim as an average, good citizen who did nothing wrong, but nonetheless became a victim. (7 CT 1830-1831.)

According to news articles, the community did, in fact, react to the crimes with fear and hostility. (See The Modesto Bee article headlined, *Neighborhood is Still Fearful Despite Arrest* (Mar. 28, 1992); 7 CT 1774 ["Even if Johnsen is the killer, neighbors fear that he will get off on a technicality. They are afraid he'll be back."].) And the results of Dr. Schoenthaler's post-survey qualitative analysis showed that a very high fear factor was a significant factor leading to penalty prejudgment in this case. (4 RT 875.) University students, interviewed during that assessment, experienced a high level of fear due to the following facts revealed in the initial reporting by the media: (1) there was no evidence of forcible entry; (2) there was no known motive; (3) there was no known suspect; and (4) the victims were attacked while sleeping. (4 RT 872.) Individuals reported that the crime made no sense and was horrible and vicious and that this case was worse than other homicide cases, because the victims were entirely innocent individuals who were attacked in their sleep. (4 RT 872-873.)

In conclusion, therefore, considering the nature and gravity of the offenses with which appellant was charged, the nature and extent of the media coverage, appellant's status as an outsider, the sympathy generated by the media coverage for the victims, and the high fear factor created by initial reporting and resulting from victim identification, there is a reasonable likelihood that a fair trial could not be held in Stanislaus County. Consequently, the trial court erred in denying appellant's motion for a change of venue. As demonstrated below, this error was prejudicial in that it is reasonably likely that appellant did not, in fact, receive a fair trial.

3. It Is Reasonably Likely That Appellant Did Not, In Fact, Receive A Fair Trial.

As noted above, appellate review of the denial of a motion to change venue is "retrospective . . . for the matter may then be analyzed in light of the voir dire of the actual, available jury pool and the actual jury panel selected. The question then is whether in light of the failure to change venue, it is reasonably likely that a fair trial was not had." (*People v. Douglas* (1990) 50 Cal.3d 468, internal quotations and citations omitted, abrogated on another ground by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

Here, such retrospective review shows that the trial court's denial of appellant's venue motion was erroneous. The superior court's confidence that, despite the publicity, the venire would consist primarily of persons who had not been exposed to publicity and had not formed an opinion as to defendant's guilt was not borne out by subsequent proceedings. As evidenced by the completed jury questionnaires and voir dire, (1) numerous prospective jurors had heard about and were familiar with details of the case through newspaper articles and television coverage; and (2) many were impacted by their exposure to publicity.

Of the 133 prospective jurors who completed questionnaires after being informed of the charges and case summary, 59, or approximately 44 percent, had read or heard of the case.[104] Of these, only one was excused for cause on the ground that she could not disregard her opinion, formed on the basis of news reports, that appellant was either guilty or deserved the death

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[104] These venirepersons are listed, and their responses are summarized, in Appendix G.

penalty.[105] (8 RT 1819 [Mary Caviale].) Five of the twelve seated jurors ultimately seated had read or heard of the case, as had four of the five alternate jurors .[106]

Examination of some of the potential jurors' responses reveals the extent of their knowledge of the case and the negative impact of the publicity:

- Mary Caviale heard that the crime had been committed in a four-plex, the neighbors suspected that it had been committed by a young man who lived in the complex, and they also suspected that he had previously burglarized the young woman's apartment. (8 RT 1817.) The young woman was away on vacation and the victims, her parents, were visiting from Missouri. The daughter returned the next day and found them. They had been killed with a hammer. (*Ibid.*) Caviale related the crime to her own parents, who were from Kansas, and she did not believe that she could be fair or impartial. (8 RT 1817-1818.)

- Vivian Hedden, who discussed the case with her sister, read in the newspaper that "the mother and father came from some place to visit their daughter and she wasn't at home. So they

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[105] Six other venirepersons were excused upon stipulation on the basis of their knowledge of, and formed opinions about, the case. (9 RT 1991 [David Johnston], 1999 [Harry Moitozo]; 12 RT 2475 [Mark Burden], 2489-2490 [Vernon Stevenson]; 14 RT 2849 [Jennifer Gianapoulous], 2853 [Kenneth Jelacich].)

[106] As noted in footnote 94, *ante*, these were jurors nos. 1, 4, 6, 8, 10 and alternate jurors nos. 1, 2, 4, and 5. Their questionnaire and voir dire responses are summarized in Appendix G.

went in and when she came home then she found them dead." (12 RT 2606.) When asked if she had formed any opinions, Hedden answered: "Well, I just think that it's terrible and that whoever did it should get hung." (*Ibid.*) Based on what she had read in the paper or heard about the case, Hedden would automatically impose the death penalty. (12 RT 2608.)

- David Ray Johnston stated: "It was quite in bit [sic] of the newspaper and TV at the time." (9 RT 1984.) He recalled that the girl who lived there went on an overnight trip; her parents were visiting from Missouri; they had a key; and when the girl returned, she found her parents. (9 RT 1988-1990.) He also recalled that the crime was perpetrated during a burglary and remembered "the bludgeoning and the stabbing, repeated stabbing." (9 RT 1990.) When asked if he had formed any opinions, Johnston replied: "You can't help but form an opinion. . . . You're reading so much, it has to influence you." (9 RT 1985.) Johnston told the court that he "would try to be [fair and impartial] but, . . . needless to say, you're influenced by things like that . . . pretty well in my mind the newspaper made him guilty. . . ." (9 RT 1988-1989.)

- Doris Hedrick recalled that the victims were from Missouri and that "it was pretty gory." (8 RT 1822, 1824.) She did not know whether she could set aside the impressions resulting from her review of the publicity: "If somebody beats an elder person to death, you know, that's going to stick in your mind." (8 RT 1825.)

- Jim Sifford (whose own father had been killed at age 67) read about the case "[a]ll through the paper" and recalled that it

was "[a] murder and attempted murder in the commission of a burglary." (9 RT 2002.) Sifford stated,"[t]he thing that sticks out most in my mind was the elderly couple." (*Ibid.*) Although the publicity alone would not affect his decision, Sifford "[a]bsolutely" connected what he had read with his own personal tragedy and as a result, had formed negative opinions: "If someone is minding their own business in a private residence and someone else comes in, no matter the reason, and they don't belong there, and a crime such as this is committed, I think everything is pretty black and white myself." (9 RT 2003-2004.) As he further explained, "it's too late for them as far as me having any leniency." (9 RT 2005.) When asked if he could keep an open mind, Sifford responded, "[p]robably not." (9 RT 2006.)

- Eugene Boesch stated that he was "really interested in the case," because he lived in the neighborhood where the crime occurred. (10 RT 2118.) He read all the articles in the Modesto Bee and recalled: "While the owner of the unit was away, her mother and father stopped and stayed at her complex. During the night, someone entered the house and finding occupants killed the woman and seriously injured her husband." (4 CT-JQ 1078.) What he had read "affected [Boesch] quite seriously." (10 RT 2119.) Based on what he had read, Boesch had formed an opinion on how he would decide the case — he "would lean heavily towards the death penalty." (10 RT 2121.)

- Harry Moitozo recalled that "the people were beaten to death or one was beaten to death and the other survived." (9 RT

1996.) When asked if he had formed any opinions, Moitozo responded: "Well, somebody did a real bad thing, I know that." (9 RT 1997.) He told the court that it would be difficult for him to judge the case based on the evidence and not from any other source and admitted that the publicity could cause him to be unfair. (9 RT 1997-1998.) Moitozo did not feel that he could perform his duties as a juror because of his opinions. (9 RT 1998.)

- Maxine Bryson recalled that the couple from Missouri were visiting their daughter, they were staying at her apartment, the daughter was not home, and the suspect broke in. (10 RT 2127.) When asked if she had formed any opinions on the basis of what she had read, Bryson answered: "Well, yes. I did at the time that I read it. I was glad that they had apprehended the ones that did it because I thought it was terrible." (10 RT 2128.) She did not know whether she could be fair and impartial and listen to the evidence. (10 RT 2129.)

- Kirk Krug, who read about the case in the Modesto Bee, recalled that the crime occurred in the daughter's home when she was absent. (14 RT 2854.) Krug had formed an opinion that the defendant was guilty ("I don't feel they would have brought it this far if they didn't think that they had sufficient evidence") and did not believe that he could exclude from his mind what he had read about the case. (14 RT 2854-2855.)

Contrary to the trial court's assessment, the voir dire of the venire confirmed that the passage of time had not erased the knowledge and impact of the case on the prospective jurors. Numerous prospective jurors recited chapter and verse regarding the attack on the Braggs, recalling

specifically those aspects of the crime which the media emphasized in their coverage — that they were an elderly couple who had been visiting their daughter and who were attacked in her home. (2 CT-JQ 323-324, 375-376; 3 CT-JQ 635-636; 4 CT-JQ 1078; 5 CT-JQ 1233-1234, 1311-1312, 1415-1416; 6 CT-JQ 1701-1702; 9 CT-JQ 2493-2494; 10 CT-JQ 2669-2770; 11 CT-JQ 2930-2931, 3109-3110; 8 RT 1811, 1816-1817, 1827; 9 RT 1988-1990, 1992; 10 RT 2118, 2127, 2133, 2137, 2139, 2241, 2248, 2873-2874; 12 RT 2589, 2606, 2621, 2482; 13 RT 2717, 2723; 14 RT 2845-2847.) Many recalled the terrifying details that the couple had been asleep in bed at the time of the attack (9 CT-JQ 2493-2494; 10 CT-JQ 2747-2748; 11 CT-JQ 2930-2931; 8 RT 1811) and that their daughter Sylvia Rudy had returned from out-of-town to find them there. (11 CT-JQ 2930-2931; 8 RT 1811, 1817; 9 RT 1988-1990; 10 RT 2139; 12 RT 2606; 13 RT 2734.) Furthermore, several venirepersons personally knew Rudy or her daughter and as a result, had very strong feelings about the case. (12 RT 2473-2475 [prospective juror Mark Burden knew Rudy and was "really . . . quite honestly, prejudiced" because he saw "what Sylvia went through"]; 14 RT 2848-2848 [prospective juror Jennifer Gianopoulos had heard about the case from Rudy's daughter, who was an employee; Gianopoulos knew "a lot" and was impacted]; 14 RT 2852-2853 [prospective juror Kenneth Jelacich knew Rudy; when asked if he had formed an opinion, he responded: "You're darn straight . . . I prejudge this guy."].)

Others had paid particular attention to the case and were impacted, because either they or their friends lived in the vicinity of Sylvia Rudy's home. (10 RT 2118-2119, 2121 [prospective juror Eugene Boesch was "really interested in the case," because he lived in the area; reading about the case "affected [him] quite seriously being in [his] area," and as a result of the publicity he had read, he had formed an opinion favoring the death

penalty]; 8 RT 1815-1818 [a very close friend (who lived a few houses away from Rudy) told prospective juror Mary Caviale "lots of details" about the crime, as well as the opinions of her neighbors and the landlady; as a result, Caviale did not think that she could be fair or impartial]; 10 RT 2235-2236 [prospective juror Rita Himes read about the case in the newspaper and was very apprehensive, because the crime had occurred approximately a mile from her home].) And some prospective jurors experienced an empathetic reaction as a result of the circumstances under which the Braggs were attacked, identifying with the elderly couple because they thought of their own parents. (8 RT 1818 [prospective juror Mary Caviale, who associated the crime with her own parents from Kansas, did not believe that she could be fair and impartial]; 14 RT 2864 [prospective juror Susan Thomas, who read about the case and then discussed it with her parents who — like the Braggs — were from Missouri, opined that "it was a very terrible thing"].)

Prejudice is also manifested by the composition of jurors and alternate jurors chosen to serve in this case. As noted above, five of the twelve seated jurors ultimately seated had read or heard of the case and four of the five alternate jurors had read or heard of the case. Two in particular, juror no. 8 and alternate juror no. 2, were impacted by their exposure to the publicity and each had formed prejudicial opinions as a result of their exposure. Juror no. 8 reported that she had read about the case in the newspaper and also saw televised reports about the case. (8 CT-JQ 2241-2242.) She recalled that the victims had come from Missouri to visit their daughter, the daughter was not home when the crime occurred, and the parents were subsequently found. (13 RT 2717.) Juror no. 8 stated that she was inclined to believe the defendant was guilty based both on what she had read and on the number of charges brought against him. (13 RT 2717-

2818.) The juror told the court that she could keep an open mind, but that she did favor death. (13 RT 2719-2720.)

Similarly, alternate juror no. 2 had read about the case in the newspaper, and she recalled "that these people came to visit their daughter, from Missouri . . . and there was a burglary. And I think that the man murdered the wife. . . ." (12 RT 2588-2589.) She also stated that the defendant's name "r[ang] a bell." (12 RT 2589.) When asked if what she had read had caused her to form any opinion regarding penalty, alternate juror no. 2 responded that whoever committed the crime "probably should be put to death." (12 RT 2590.) Although she stated that she was willing to keep an open mind, the alternate juror admitted that she probably had pretrial bias toward the death penalty as a result of her exposure to the publicity. (12 RT 2592-2593.)

In sum, examination of the responses of the prospective jurors and the selected jurors and alternate jurors demonstrates a reasonable likelihood that appellant did not, in fact, receive a fair trial.

It is true that, as in every case, the jurors ultimately selected to try the case assured the court, in one way or another, that they could give both sides a fair trial. Such assurances, both generally and in this particular case, do not legally support a trial court's decision to deny a motion to change venue. Nor can they *logically* be deemed supportive of a denial of such a motion; since any prospective juror acknowledging an inability to be fair would of course be excused, no venue motion could ever be successful if mere assurances of fairness were deemed sufficient to deny such a motion. (See *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1211 [venue motion held improperly denied despite defendant's concession "that the record contains no findings that any jurors demonstrated partiality or prejudice that could not be laid aside"].)

Cases are legion, from virtually every jurisdiction, that juror assurances of impartiality are entitled to little weight, and certainly are not dispositive. (See, e.g., *Irvin v. Dowd, supra*, 366 U.S. at p. 728 ["[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father . . . such a statement of impartiality can be given little weight"]; *Smith v. Phillips* (1982) 455 U.S. 209, 221-222 (conc. opn. of O'Connor, J.) ["[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it"]; *People v. Vieira, supra,* 35 Cal.4th at p. 283, fn. 5 ["'[a] juror's declaration of impartiality . . . is not conclusive,'" quoting *People v. Williams, supra*, 48 Cal.3d at p. 1129]; *People v. Howard* (1992) 1 Cal.4th 1132, 1168 ["To be sure, the jurors' assertions of impartiality do not automatically establish that defendant received a fair trial"]; *People v. Daniels, supra*, 52 Cal.3d at p. 853 ["the fact that the jurors declared they could decide the case impartially on the evidence does not preclude the necessity of a change of venue"]; *People v. Williams* (1981) 29 Cal.3d 392, 410 ["problem of subtle or unconscious bias . . . makes a general proclamation of fairmindedness untrustworthy"]; *People v. Tidwell, supra*, 3 Cal.3d at p. 73 [juror's claim of ability to sit impartially "is of course not conclusive"]; *People v. McKay* (1951) 37 Cal.2d 792, 798 ["In view of the prevailing atmosphere in the community, the fact that from 251 persons it was possible to select 14 who thought they could try the case fairly does not sustain the conclusion that a fair trial could be had"]; *Powell v. Superior Court* (1991) 232 Cal.App.3d 785, 801-802, internal quotation marks and citations omitted ["Many will sincerely try to set aside their preconceptions and give assurance of impartiality, yet unconsciously bend to the influence of initial impressions gained from the news media"]; *United States v.*

Williams (5th Cir. 1978) 568 F.2d 464, 471, fn. 16 ["continual protestations of impartiality from prospective jurors are best met with a healthy skepticism from the bench"]; *Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 639 ["whether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness without something more"].)

Not only is this the clear state of the law, but it is also confirmed by the undisputed evidence in this case. As Dr. Schoenthaler testified, it is very difficult to rehabilitate those with fixed opinions. (3 RT 746.) Although they state that they can set aside their opinions, empirical evidence shows otherwise.[107] (3 RT 747-748.) There is a considerable body of research which demonstrates that a juror's declaration regarding his ability to act impartially is not trustworthy. (4 RT 921-922.) Dr. Schoenthaler explained the difficulty is that venirepersons try very hard to please the Court and may say that they can set aside their prejudgment and follow the court's instructions when they cannot. (4 RT 878.) The questioning of prospective Juror Eugene Boesch provides a prime example. After Mr. Boesch stated that he had formed an opinion regarding penalty (leaning towards death) as a result of the publicity, the court asked if he

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[107] Examination of the responses of several of the prospective jurors illustrates the impossibility of setting aside information already received about a crime. Charles Jones, upon recalling the case, stated: "I mean, how do you ignore something that you already – that you – that you . . . ." (10 RT 2240.) The court interrupted Mr. Jones and told him that the law required him to put it out of his mind and decide the case solely on the basis of the evidence presented in court. (*Ibid.*) When asked if he could do so, the juror replied: "I can't say honestly that I could completely ignore anything that I heard before but I can try, I guess." (*Ibid.*) And venireperson David Johnston stated: "You can't help but form an opinion. . . . You're reading so much, it has to influence you. . . . I would certainly try to be open about it. But still you are influenced." (9 RT 1985-1986.)

could exclude what he had read and decide the case on the facts. (10 RT 2121.) The juror replied: "Well, I think that I'm a reasonable-type person and I can follow direction. The only thing is, I think you know, I think I have formulated some opinion in my own mind as to, you know, the penalty that I feel should be associated with this. But I think that if I am given specific direction, I can follow that." (10 RT 2122.) The court told him that the law required him to exclude his prior opinions and asked if he could do that. Boesch responded that he would "give it [his] best shot." (*Ibid.*) But he agreed with defense counsel that he would be entering the trial with an opinion regarding the appropriate penalty which could "operate on [his] evaluation of the case." (10 RT 2123.)

In the present case, given the inflammatory coverage, with its sympathetic portraits of the Braggs and their daughter, Sylvia Rudy, and the extremely adverse — and often inaccurate — depiction of both appellant and the crime, an exposed juror's mere assurance of impartiality and fairness — however sincere and well-intentioned — is not credible in the least, much less conclusive or dispositive.

It is true that, as this Court has recognized, "perfection is not required" and "some knowledge of the case on the part of the jurors is often unavoidable." (*People v. Williams, supra*, 48 Cal.3d at p. 1129.) However, because in this case "a brutal murder had obviously become deeply embedded in the public consciousness," there is "more than a reasonable possibility that the case could not be viewed with the requisite impartiality." (*Ibid.*) Accordingly, retrospective review demonstrates a reasonable likelihood that appellant did not, in fact, receive a fair trial.

D. Conclusion.

In conclusion, considering all of the pertinent factors — the nature and gravity of the offense, the inflammatory slant of the news coverage, the

neutral size of Stanislaus County, the status of the victims and the accused, and the degree to which voir dire revealed the jury pool to be prejudiced — the balance weighs heavily in favor of the conclusion that appellant could not and did not receive a fair trial in Stanislaus County. Given this one-sided balance, case law dictates that the change of venue motion was wrongfully denied in violation of the Sixth Amendment and the Due Process Clause. (*Irvin v. Dowd*, *supra*, 366 U.S. at pp. 722, 727-728; *People v. Williams*, *supra*, 48 Cal.3d at pp. 1124-1132; *Martinez v. Superior Court*, *supra*, 29 Cal.3d. 574.)

E. **The Erroneous Denial Of Appellant's Motion For A Change Of Venue Requires Reversal Of The Entire Judgment.**

The erroneous denial of a motion for a change of venue requires reversal of the entire judgment. (*Irvin v. Dowd, supra,* 366 U.S. at p. 728; *People v. Williams, supra,* 48 Cal.3d at pp. 1131-1132.)

> Whether raised on petition for writ of mandate or on appeal from a judgment of conviction, however, the standard of review is the same. *A showing of actual prejudice shall not be required.* . . . On appeal after judgment, the defendant must show a reasonable likelihood that a fair trial was not had. In either case, the phrase "reasonable likelihood" denotes a lesser standard of proof than "more probable than not."

(*People v. Vieira, supra,* 35 Cal.4th at p. 278, quoting *People v. Williams, supra,* 48 Cal.3d at pp. 1125-1126, emphasis added.)

Here, when the entire record on the venue issue is thoroughly reviewed, it is impossible to fairly conclude that "it is reasonably likely that the defendant in fact received a fair trial." (*Williams, supra,* at p. 1126.) To the contrary, appellant has demonstrated a "reasonable likelihood" that he received a constitutionally-unfair jury trial. The entire judgment must be reversed.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AT BOTH THE GUILT AND PENALTY PHASES BY ADMITTING INCRIMINATING STATEMENTS ELICITED FROM APPELLANT BY JAILHOUSE INFORMANT ERIC HOLLAND IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.[108]

A. Introduction.

After appellant was arraigned and counsel was appointed to represent him in this case, a jailhouse informant, Eric Holland, elicited from appellant incriminating admissions and confessions to the capital case crimes ("Modesto case"), the two previous burglaries of the Rudy residence, and a previous homicide committed in San Diego ("San Diego case"). Holland also elicited incriminating statements which formed the basis for the solicitation charges. Appellant moved pretrial to suppress his statements to Holland on constitutional grounds. The trial court denied the motion and admitted at the guilt phase a written confession which Holland obtained from appellant and a number of handwritten notes which the two exchanged about the Modesto case and the previous burglaries, as well as Holland's testimony relating his conversations with appellant about those charged offenses. The court also admitted exchanged handwritten notes and testimony regarding conversations which underlay the solicitation charges.

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[108] As argued below, in addition to depriving appellant of his right to counsel under the Sixth Amendment and Article I, section 15 of the California Constitution, this error violated appellant's rights to a fair trial and to a reliable penalty verdict in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Throughout this argument, we use the term Sixth Amendment to stand for all of these federal and state constitutional provisions.

At the penalty phase, the court admitted appellant's written confession to aiding the San Diego homicide, notes that Holland and appellant exchanged concerning that case, and Holland's testimony relating his conversations with appellant about the case.

The trial court committed prejudicial error at both phases of this capital case in denying appellant's motion to exclude this evidence, because the tactics used to obtain it violated appellant's rights to assistance of counsel, a fair trial, and a reliable penalty verdict under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, section 15 of the California Constitution. (*Massiah v. United States, supra,* 377 U.S. 201.) As demonstrated below, the Stanislaus County District Attorney violated appellant's Sixth Amendment right to counsel by using Holland as an agent to elicit appellant's incriminating statements.[109]

B. Factual And Procedural Summary.

1. Introduction.

Eric Holland, an admitted forger and thief, had a case in (inter alia) Stanislaus County and was housed next to appellant in the Stanislaus County Jail in June, July, and most of August 1992. Using a ruse of pretending to help appellant find someone to kill witnesses and facilitate appellant's escape from the jail, Holland extracted incriminating information from him about the Modesto case and the San Diego case. Near

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[109] In presenting the current claim, we will assume for the sake of argument that the writings and oral statements attributed to appellant Johnsen were written or uttered by him, and thus we will not continually qualify references to those matters by using the term "alleged." Use of this convention is not intended to be an acknowledgment that Johnsen was in fact the author of any of those writings or that Holland's rendition of appellant's oral statements is accurate.

the end of June 1992, after he had elicited only a small portion of the information, Holland, through his counsel, contacted the Stanislaus District Attorney's Office and offered to inform against appellant in exchange for leniency in his many other pending cases. Holland was facing numerous fraud and theft charges in several counties and wanted a deal to consolidate all of those cases in Stanislaus County and receive either suspended sentences or sentences to be run concurrent with a six-year federal prison term he was serving.

Holland met with Stanislaus County District Attorney Investigator Fred Antone on June 26 and July 3 to discuss the deal that Holland wanted and the information that he could provide. Both interviews were tape-recorded. (See 5 CT 1218-1301.) At the June 26 interview, Investigator Antone stated that his office was "definitely" interested, indicated that a deal was possible and arranged for another interview. At the second interview, held on July 3, Antone told Holland that the deal was feasible and promised to try to put it together, but stated that no offer would be made until Holland turned over all of his information. Antone informed Holland that his office had started working on putting the deal together and promised to move Holland out of the jail as soon as he gave him everything that he thought he could, including all documents that he could access. In the ten weeks between June 27 and September 4, Holland made repeated telephone calls to Antone to discuss the status of the deal. According to Holland, he was told that the deal was going to happen.

At both the June 26 and July 3 interviews, in order to "sweeten the deal," Holland told Investigator Antone that he could obtain more incriminating evidence — information about the San Diego case and handwritten, signed confessions to both crimes — and asked if such information would be pertinent to the prosecution's case. Antone did not

tell him to refrain from initiating conversations with, or questioning, appellant. Although Antone told Holland that he (Holland) was not an agent and that he acted on his own, Antone gave Holland permission to continue his ruse to obtain the information, stating that his office would not prosecute him and that there was nothing wrong with his actions. Even more significant, Antone emphasized the difficulty of putting the deal together and stated that whether the deal could be made depended on whether Holland's information was "worth it." Holland informed Antone that he would be obtaining that additional evidence and he did, in fact, do so.

Following the June 26 interview, the Stanislaus County District Attorney's Office worked toward putting the deal together. It investigated Holland's various outstanding charges, contacted the district attorneys in the other counties, and eventually persuaded each to agree to the deal. By the end of the July 3 interview, however, Holland and the Stanislaus County District Attorney had not reached an agreement. The authorities wanted Holland to provide his information before they would make an offer, and Holland did not want to turn over his information until the offer was made or he received assurance that his information would not be used if the deal did not go through. Still, the District Attorney's Office moved forward with pursuing the deal, and Holland continued to call Investigator Antone to inquire regarding the office's progress. The District Attorney's Office eventually arranged the deals with the other counties that Holland sought. In late August, it had Holland moved to another jail after he called Antone and stated that appellant had accused him of being a snitch. On September 3, Stanislaus County Deputy District Attorney Douglas Fontan (appellant's capital case prosecutor) and Holland's attorney presented the proposed deal to Judge Vander Wall (the judge presiding over appellant's

capital case), who agreed to it. And on September 4, after the authorities served a search warrant and seized Holland's notes and the written confessions from his jail cell, Holland signed the agreement. Holland was re-interviewed by the investigating detectives on September 4 and September 17. These two interviews were also tape-recorded. (See 5 CT 1302-1373.)

2. Appellant's Motion To Suppress.

Appellant filed a motion to suppress his oral and written statements to Holland (5 CT 1200-1217) on Fifth and Sixth Amendment grounds.[110] A hearing on the motion was conducted on September 16 and 17, 1993. (1 RT 160-299; 2 RT 300-356.) At that hearing, Eric Holland, Investigating Detective Bill Grogan, District Attorney Investigator Antone, and Stanislaus County Sheriff Classification Officer Randall Grose testified. (1 RT 177-227, 238-297; 2 RT 301-315.) The following exhibits were admitted:

Exhibit 1: transcript of Holland's interview by Stanislaus County District Attorney Investigator Fred Antone on June 26, 1992, with Holland's legal representative —Stanislaus County Public Defender Joe Rozelle — present (same as

[110] Although counsel did not argue, as asserted here on appeal, that the erroneous admission of appellant's statements violated his rights to a fair trial and reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments, his objection under Fifth and Sixth Amendment grounds was sufficient to preserve appellant's claims on appeal, because "the claim invokes no facts or legal standards different from those before the trial court, but merely asserts that an error . . . [also] violat[ed] the Constitution." (*People v. Leon* (June 29, 2015, S056766) __ Cal.4th __ [2015 WL 3937629] [slip opn., pp. 11-12].)

Motion Exhibit A[111] attached to appellant's motion to suppress at 5 CT 1218-1243);

Exhibit 2: transcript of Holland's interview by Investigator Antone on July 3, 1992 (same as Motion Exhibit B at 5 CT 1244-1301);

Exhibit 3: transcript of Holland's interview by Detectives Grogan and Vaughn and Investigator Antone on September 4, 1992 (same as Motion Exhibit C at 5 CT 1302-1359);

Exhibit 4: transcript of Holland's interview by Detectives Grogan and Vaughn on September 17, 1992 (same as Motion Exhibit D at 5 CT 1360-1373);

Exhibit 5: 8 pages of Holland's "Modesto Case Notes"[112] — notes exchanged between appellant and Holland concerning the Modesto crime (same as Motion Exhibit E at 6 CT 1374-1381);

Exhibit 6: five sets of documents:

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[111] Exhibits attached to appellant's motion to suppress are identified as Motion Exhibits, exhibits admitted at the hearing on the motion to suppress are simply referenced as Exhibits, and exhibits admitted at trial are referenced as People's or Defendant's Exhibits.

[112] Exhibit 5, like Motion Exhibit E, does not contain the complete copy of the "Modesto Case Notes." It contains eight pages of those notes and the remaining 14 pages of those notes have been mistakenly mixed into Exhibit 6 (see Motion Exhibit E-1 at 5 CT 1397-1410). It is not clear whether the error was made in the assembly of the Clerk's Transcript or by trial counsel in assembling the exhibits in support of appellant's motion.

(a) a 13-page unsigned draft of a confession (Modesto case) and two pages of an unsigned addendum, all of which were written by Holland for appellant to sign (same as Motion Exhibit E-I at 6 CT 1382-1396);

(b) 14 pages of "Modesto Case Notes" (same as Motion Exhibit E-1 at 6 CT 1397-1410);

(c) pages 9-14[113] of a 14-page confession (Modesto case), with two pages of addendum, all signed by appellant on July 4, 1992, which is a nearly identical copy of the 13-page unsigned draft listed above under (a) (same as Motion Exhibit E-2 at 6 CT 1419-1425, 1427);

(d) a 7-page confession (San Diego case), with a one-page addendum, signed by appellant on July 4, 1992, which is a nearly identical copy of a 7-page unsigned draft contained in Exhibit 7 and described below (same as Motion Exhibit E-2 at 6 CT 1426, 1428-1433);

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[113] Pages 1-8 of this document are contained in Exhibit 7, as described below. The complete document is contained in Motion Exhibit E-2 at 6 CT 1411-1425, 1427.

(e) Holland's handwritten reproduction of the "Modesto Case Notes," but this time labeled "Notes on Modesto Case," notes #1-20 (same as Motion Exhibit E-2 at 6 CT 1434-1444);

Exhibit 7: six additional sets of documents:

(a) pages 1-8 of the 14-page signed Modesto case confession (same as Motion Exhibit E-2 at 6 CT 1411-1418);

(b) Holland's reproduced Modesto case notes ("Notes on Modesto Case"), notes #21-34 (same as Motion Exhibit E-2 at 6 CT 1445-1451);

(c) Holland's handwritten reproduction of the "Teri! Notes!" (described below), but this time labeled "Notes on San Diego Case" (same as Motion Exhibit E-2 at 6 CT 1452-1465);

(d) documents entitled "Teri! Notes!" — notes exchanged between appellant and Holland concerning the San Diego Homicide (same as Motion Exhibit E-2 at 6 CT 1466-1478[114]);

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[114] Both in the Clerk's Transcript and in Exhibit 7 itself, the first page of these notes is not at the beginning; in the Clerk's Transcript, that page is at 6 CT 1474. We are unable to determine whether any other pages in these notes are out of sequence or whether, in fact, there is a "correct order."

(e) a 7-page draft of San Diego case confession that Holland wrote for appellant to sign (same as Motion Exhibit E-2 at 6 CT 1492-1498); and

(f) miscellaneous notes (same as those contained in Motion Exhibit E-2 at 6 CT 1479-1491, 1499-1510);

Exhibit 7A: pages 9-14 of the 14-page signed Modesto case confession, with two pages of addendum;

Exhibit 8: Holland's notes re Modesto case;

Exhibit 9: deal-agreement signed by Eric Holland on September 4, 1992;

Exhibit 10: signed June 26, 1992 agreement with Eric Holland that he would not be prosecuted for any misrepresentations made to appellant.

3. <u>Trial Court's Ruling</u>.

On September 27, 1993, the Court denied appellant's motion to suppress, making the following statements to explain its ruling:

(1) The Modesto case confession dated July 4 did not exist prior to Holland's June 26 and July 3 interviews with Investigator Antone (2 RT 352);

(2) Prior to the June 26 interview, Holland "basically had the information against Mr. Johnsen. He had notes, he had been talking with Mr. Johnsen, it wasn't anything the police had set up." (*ibid.*);

(3) Holland acted on his own when he obtained the information and confessions. Although Antone had "indicated that he was interested" at the initial June 26 interview, he "did not make Holland an agent," and Holland "was still not an agent" as of the July 3rd interview. And while the written confession [Modesto] was created after these interviews, Holland "was acting on his own" when he obtained it. (*ibid.*);[115]

(4) "[T]he People did not deliberately elicit defendant's statements to Mr. Holland." (2 RT 354);

(5) Detective Grogan testified that he never directed anyone at the jail regarding Holland's housing, and the jailer testified to the independence of the jail with regard to that subject (*ibid.*);

(6) Moving Holland did not "constitute making him an agent," because "[h]e had the information" (2 RT 353);

(7) Holland had two motives in acting on his own: (a) moral, ethical motives; and (b) an interest in working a deal for himself (2 RT 352-353); and

(8) There were "no inducements made to [Holland] to do this. And . . . the deal was struck after the information was obtained." (2 RT 353.)

4. Holland's Testimony At Trial.

Holland testified against appellant during both the guilt and penalty phases. At the guilt phase, Holland described conversations with appellant

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[115] The trial court made no statement as to when Holland received particular documents, other than stating that the Modesto case confession came into existence after the July 3 interview. (2 RT 352-356.)

about the solicitations, the Modesto case crimes, and the prior burglaries. (See 17 RT 3484-3489, 3494-3496, 3502-3567.) Additionally, 23 of the 35 notes concerning those conversations and the Modesto case confession were admitted into evidence. At the penalty phase, Holland testified to conversations with appellant about the San Diego homicide of his girlfriend, Theresa Holloway (see 22 RT 4868-4884) and the corresponding confession and 12 of the 20 notes ("Teri! Notes!") concerning that crime were admitted.[116] As summarized in the statement of facts, at pages 39, 61, *ante*, a fingerprint expert testified to finding appellant's and Holland's prints on the confessions and notes, and a handwriting expert testified that the signed confessions and much of the material in the notes was written by appellant and the rest by Holland.

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[116] Holland's guilt and penalty phase testimonies are summarized in the statement of facts at pages 33-45, 54-60, *ante*. The 23 admitted Modesto Case Notes (People's Exhibits 96 through 118) are reproduced verbatim in Appendix A, and the Modesto case confession (People's Exhibits 80 through 95) is reproduced verbatim in Appendix B. The confession to the San Diego case homicide is summarized in the penalty phase statement of facts, at pages 56-60, *ante*, and the 12 notes ("Teri! Notes") concerning that homicide (People's Exhibits 169-180) are reproduced verbatim in Appendix C.

5. **Factual Summary.**[117]

a. **Appellant's And Holland's Arrival At The Stanislaus County Jail And Holland's Placement In The Cell Next To Appellant.**

Appellant was arrested on the current charges on March 26, 1992 and was appointed counsel (the Stanislaus County Public Defender) on March 30. (1 CT 40; 18 RT 3848.) While awaiting trial, appellant was incarcerated at the Stanislaus County Jail.

In mid-May 1992, Eric Holland, a convicted forger,[118] arrived at that jail to face felony charges of forgery and grand theft. (5 CT 1309 [9/4/92 Interview], 1360 [9/17/92 Interview]; 1 RT 178, 181.) He also had charges of forgery and auto theft pending in several other California counties, including Kern, Fresno, Madera and Los Angeles. (1 RT 179, 181.) Holland had been convicted in federal court in March 1991 of possession of counterfeit documents and in October 1991 of aiding others in an attempt to escape, and was already serving a federal sentence of 37 months for the

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[117] This summary is based on testimony and other evidence presented at the hearing on the motion to suppress, including statements made by Holland and Investigator Antone during the June 26 and July 3 interviews, and statements made by Holland during his September 4 and 17 interviews. In order to provide context for an understanding of the statements made by Holland during his four taped interviews with the authorities, we first provide, in sections (a) and (b), a summary of Holland's interaction with appellant during the summer of 1992. In those sections, references to statements made during the tape-recorded interviews are so identified. Thereafter, in sections (c), (d), (f) and (g), we provide summaries of the four interviews.

[118] In 1987, Holland had been convicted of forgery in Stanislaus County and had served 32 months in state prison. (1 RT 182.) During his career as a forger and counterfeiter, Holland had been accused of forging cashier checks, payroll checks, and birth certificates. (1 RT 187.)

counterfeit securities conviction and a consecutive 36 months for the attempted escape. (1 RT 179, 181; 3 CT 770.)

At the hearing on the motion to suppress, Holland claimed that at one point in time, he had put together a deal with Stanislaus County and the other counties to run all of his state charges concurrent with his federal sentences. (1 RT 272-273, 180.) It was stipulated that as of October 22, 1990 (one and one-half years before arriving at the Stanislaus jail), Holland had had a commitment from the Stanislaus County District Attorney's Office to recommend that prison time in its case run concurrent with Holland's federal sentence if he received a federal sentence of at least five years, but the stipulation also stated that that offer was withdrawn when Holland was subsequently convicted of attempted escape. (2 RT 322-323.) No evidence was produced that any of the other counties had ever agreed to similar dispositions. In any event, while serving his federal sentence, Holland learned that his state detainers had not been dropped and that the various California counties, including Stanislaus, did not "do" or "honor the deal" for concurrent sentences. (1 RT 180, 274.) When he arrived at the Stanislaus County Jail, Holland knew that he was facing considerable state prison time on his pending state cases. (1 RT 270-271, 274.)

Approximately five weeks after Holland arrived at the jail, he and appellant were placed in adjoining cells. (5 CT 1360 [9/17/92 Interview].) Holland estimated that this occurred sometime around early to mid-June.[119]

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[119] At trial, it was stipulated that Holland and appellant were housed in adjoining cells, beginning on June 8. (19 CT 4147.) The evidence produced at the hearing was not consistent. Holland testified that three days after he had been placed next to appellant's cell, they began talking about appellant's case and that had occurred at the end of May or beginning of June. (1 RT 185, 186.) At his June 26 interview with Investigator Antone, Holland said that he had been housed next to appellant for about a week
(footnote continued on next page)

Despite various cell movements, Holland always ended up in a cell next to appellant until the latter part of August, when Holland was removed from the jail altogether, after his informing activities had been discovered. (1 RT 184, 276-277; 2 RT 304-305.) Holland thought it odd that he and appellant always remained next to each other. He had no idea why they kept returning him to a cell next to appellant. (1 RT 277.) A jail classification officer testified that he examined the classification files for both Holland and appellant and saw no indication that an outside agency ever requested that they be housed together. (2 RT 314.) He further testified that had such a request been made, the jail would not have honored it. (2 RT 313.)

Holland testified at the hearing that he asked jail personnel to move him from his housing next to the murderers, but they would not do so. (1 RT 191-192, 207.) After contacting the authorities with information about appellant, Holland became very worried about his safety. (1 RT 207, 261.) Holland further testified that during his June and July interviews with Investigator Antone, he expressed concern about his safety and asked to be moved, but instead of being moved into protective custody, he was returned to the cell next to appellant. (1 RT 207, 276-277.) Antone told Holland during their July 3 interview that as soon as Holland gave him everything that he thought he could and provided all the written documents that he said he could access, the district attorney's office would move him out of the

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and a half, which would place him there beginning on June 15. (5 CT 1220, 1232 [6/26/92 Interview].) During his taped interview on September 4, Holland told authorities that he and appellant had been placed next to each other sometime between June 5 and June 15. (5 CT 1309 [9/4/92 Interview].) During his taped interview on September 17, Holland said that he had been moved next to appellant four-and-a-half to five weeks after May 12, which would have been sometime between June 12 and June 16. (5 CT 1360 [9/17/92 Interview].)

jail.[120] (5 CT 1254, 1257-1258 [7/3/92 Interview].) As noted earlier, the District Attorney's Office did, in fact, have Holland moved in the latter part of August after Holland called Antone and told him that appellant had accused him of being a snitch. (2 RT 304-305.)

Antone acknowledged at the hearing that during his interviews with Holland, he was aware of Holland's fear and desire to be moved out of the jail. (1 RT 292.) Antone testified that he did not have Holland transferred immediately, however, because (1) he did not feel that Holland's safety was in jeopardy; and (2) logistically it was better to leave Holland where he was, as Holland had not yet given them any information and they were going to have to meet again. (1 RT 292-93.) Antone acknowledged that he could have had Holland moved to another tier and still pursued those interviews; he did not think that jail personnel would move Holland to another tier because of his maximum security tag, but Antone never asked because "[t]here was no reason." (1 RT 295-296.)

b. Holland's Solicitation Of Incriminating Information From Appellant.

Holland had never before met appellant but became aware of the charges he faced. (5 CT 1291 [7/3/92 Interview]; 1 RT 184.) Five or six days after Holland and appellant were first housed next to each other, their conversations regarding killing witnesses began. (5 CT 1361-1362 [9/17/92 Interview].) During the first of these conversations, which occurred in mid-

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[120] In his hearing testimony, Antone acknowledged that he told Holland that he would be moved out of the jail "when we received the papers, the notes and stuff that he said he had." (2 RT 301.) Antone denied that this promise was conditioned on Holland obtaining additional information from appellant. (*Ibid.*)

to-late June, appellant told Holland that he needed to have a person killed, because he was framing appellant for the Modesto crime. (5 CT 1361, 1363 [9/17/92 Interview].)

Before these conversations began, Holland had overheard appellant attempt to solicit various jail trustees to kill witnesses. (5 CT 1310 [9/4/92 Interview], 1361-1362 [9/17/92 Interview]; 1 RT 185.) These solicitations went on for several days, and Holland became tired of hearing them. (5 CT 1310 [9/4/92 Interview], 1362 [9/17/92 Interview].) So when appellant asked Holland if he knew anyone who could take care of the witnesses, Holland said yes "to put an end to it."[121] (5 CT 1311 [9/4/92 Interview].) Holland then called his lawyer and told him about appellant. (5 CT 1291-1292 [7/3/92 Interview].)

Holland lied to appellant, telling him that he knew a colonel who could kill the witnesses and also fly a helicopter into the jail to help appellant escape. (5 CT 1292 [7/3/92 Interview], 1324 [9/4/92 Interview].) At first, appellant wanted only Mickey Landrum killed. (5 CT 1311 [9/4/92 Interview], 1363 [9/17/92 Interview].) Appellant told Holland that Landrum had set up appellant to take the fall, and appellant believed that he could

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[121] When asked during his September 4 interview how he became involved in the solicitations, Holland stated that he "was going through a lot of problems . . . of hearing all of the murders and then getting newspapers and seeing that they were real," and he tried to get moved from the tier where all the accused murderers were housed. (5 CT 1311 [9/4/92 Interview].) Holland was so distressed as a result of his environment that when appellant approached him, Holland said yes, he knew somebody who could take care of the witnesses, just to shut appellant up. (5 CT 1311 [9/4/92 Interview], 1367 [9/17/92 Interview].) Holland stated that he did so, figuring that he could just keep stalling and putting appellant off. (5 CT 1367 [9/17/92 Interview].) But when Holland saw how involved appellant became in the solicitation, Holland went to his attorney, who took the information to the district attorney. (*Ibid.*)

beat his case if Landrum did not testify. (5 CT 1312 [9/4/92 Interview].) Subsequently, however, appellant wanted Holland's colonel to kill both detectives and every witness who could give evidence against him. (5 CT 1364-1365 [9/17/92 Interview].)

Holland and appellant exchanged notes regarding the solicitations. Appellant wrote down the names of people whom he wanted killed, details such as descriptions, addresses and telephone numbers, and instructions for how they were to be killed. (5 CT 1291-1292 [7/3/92 Interview].) Holland went along with appellant's plan and continued his ruse because, as he explained to Investigator Antone on July 3, "now I'm playing you know with you guys. I mean . . . you know so sure you know. I mean I'm going along always the way." (5 CT 1292 [7/3/92 Interview].) Holland told appellant that the colonel owed him a favor worth $50,000. Hence, by arranging for the colonel to kill the witnesses and help appellant escape, Holland would be giving a $50,000 favor to appellant, which appellant had to repay in some manner. (5 CT1370 [9/17/92 Interview].) Appellant promised to do "anything" for Holland – to owe him a favor. (5 CT 1292 [7/3/92 Interview], 1370 [9/17/92 Interview].) At his July 3rd interview, Holland said he told appellant that he had to have something to hold over him to ensure that appellant would, in fact, repay the favor, so he demanded that appellant confess to his pending charges.[122] (5 CT 1292-1293 [7/3/92 Interview].) That is how Holland learned the details of appellant's crimes – both the Modesto and San Diego cases. (*Ibid.*)

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[122] At the hearing on the motion to suppress, however, Holland changed his story. He then claimed that "the whole confession thing" was appellant's idea. Holland did not want it. (1 RT 266.)

Initially, appellant did not want to confess to the capital crime, and so he asked if Holland would accept instead appellant's confession to having participated in a prior murder (of appellant's pregnant girlfriend). (5 CT 1293-1294 [7/3/92 Interview], 1317 [9/4/92 Interview].) Holland did not think that confession would be sufficient because he did not have any newspapers or anything else to check its veracity,[123] but told appellant to go ahead and write it out. (1 RT 216.) So appellant wrote a summary of his involvement in the San Diego homicide. Holland then "drilled him" about that offense and took notes, and had appellant write a confession to it. (5 CT 1294-1295 [7/3/92 Interview], 1317, 1323 [9/4/92 Interview].) Holland, however, had already been in contact with Investigator Antone and wanted a confession to the Modesto crime for the prosecution. (5 CT 1294 [7/3/92 Interview].) Holland thus told appellant that his San Diego case confession was not sufficient; he needed a confession to the Modesto crime as well. (5 CT 1317, 1323 [9/4/92 Interview].) Appellant tried to give Holland "commissary" and a motorcycle instead of a second confession. (5 CT 1324 [9/4/92 Interview].) Holland responded that was ridiculous and that he wanted the Modesto confession. (*Ibid.*) Appellant then agreed to give Holland a confession to the Modesto case. (*Ibid.*)

Appellant gave him substantially different versions of the Modesto crime. (1 RT 221.) Initially, appellant denied involvement in that crime. (5 CT 1362 [9/17/92 Interview].) Appellant told Holland that Mickey Landrum had committed it and had framed appellant. (1 RT 221; 5 CT 1312-1314 [9/4/92 Interview], 1362 [9/17/92 Interview].) Appellant later admitted that he also had been involved with Landrum and thereafter in a

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[123] Holland stated during his September 4 interview that he knew about the Modesto case from his review of newspaper articles, but did not know anything about the San Diego case. (5 CT 1317 [9/4/92 Interview].)

third version, appellant told Holland that Landrum had not been involved — it was appellant alone who had committed the crime. (1 RT 221-222.) Holland explained to the detectives on September 4 and 17 that before appellant admitted his involvement, Holland wrote him a note, saying that he thought appellant had committed the crime. (5 CT 1313 [9/4/92 Interview], 1362 [9/17/92 Interview].) By that time, Holland had cross-examined appellant so much that he saw the "flaws" in his story. (5 CT 1313 [9/4/92 Interview].) Appellant then responded in a note that Holland was right, he was involved in the commission of the Modesto crime. (5 CT 1315-1316 [9/4/92 Interview], 1362 [9/17/92 Interview].) Holland replied that if appellant wanted him to arrange for the killing of witnesses, appellant would have to be truthful and tell Holland everything that had happened. (5 CT 1316 [9/4/92 Interview].)

Before the Modesto and San Diego confessions were written, Holland cross-examined appellant about the details of both crimes via notes which he and appellant exchanged.[124] (5 CT 1256, 1294-1295 [7/3/92

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[124] See, e.g., 6 CT 1379 [Holland's question "So where did you throw the stocking & the knife?"], 1397 [Holland's questions "Then what's this about the knife they found in planter? And what about the blunt instrument? What did you admit to him? . . . Why didn't you take it with you? Also, what about blunt instrument?"], 1398 [Holland's questions "So this is what he & his mom & Linda have said to cops? So he never did say he found bag by dumpster? . . . So they can make a match on the knife & the knife set at your house?"], 1400 [Holland's questions "What do you think he would say? . . . When did you & Mickey drive to San Jose & throw keys & hammer?"], 1454 [Holland's questions "So when she told you what happened you acted like it was totally a shock? . . . Then when did you talk to Denise. When did she tell you what happened & why? . . . Did you tell D.A. that you talked to Teri & got her to go with Robert?"], 1455 [Holland's questions "Did you talk to any of Teri's family after her death? What did they ask & what did you tell them? . . . How did you know? . . . How did you know that Teri was pregnant with your son? . . . How did you
(footnote continued on next page)

Interview].) Holland "kept re-drilling" appellant until he finally learned "the truth." (5 CT 1292-1293 [7/3/92 Interview].) Instead of talking to each other, they communicated through notes so that others could not hear their conversations. (1 RT 193, 201-202.) Holland asked appellant written questions, and appellant wrote the answers on the notes, which he sent back. (5 CT 1294-1295 [7/3/92 Interview]; 1 RT 201-202.) In addition to questions and answers about both the Modesto and San Diego crimes, the notes contained questions (mostly from appellant) and answers from Holland about the plan to have the colonel kill witnesses and the two investigating detectives. (5 CT 1265 [7/3/92 Interview]; see, e.g., notes at 6 CT 1401, 1402-1408.)

At the hearing, Holland identified Exhibit 5 as a copy of the 35 notes which he and appellant had exchanged concerning the Modesto crime — the "Modesto Case Notes."[125] (1 RT 192-193.) Originally, these notes were not dated or numbered. (5 CT 1318 [9/4/92 Interview].) After his removal from the Stanislaus County Jail, Holland assembled, labeled the notes ("M" for the Modesto case and "SD" for the San Diego case) and numbered them (1 through 34, with one unnumbered note), but his numbering was not in chronological order. (5 CT 1339, 1354 [9/4/92 Interview]; 1 RT 193, 195.) Holland also inserted lines in the notes to separate his writing from appellant's and inserted his initials next to his own writing and appellant's initials next to his writing so that they could be identified. (5 CT 1336

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know it was a boy or a girl?"], 1456 [Holland's questions "(1) Who is Mark? (2) Why were you trying to kill Doug? (3) Who all was involved in killing Doug? (4) Who all was involved in killing Teri?"].)

[125] Exhibit 5 actually contains only 13 of those notes; the remaining notes have been mistakenly mixed into Exhibit 6. These notes are contained in the Clerk's Transcript at 6 CT 1374-1381, 1397-1410.

[9/4/92 Interview]; 1 RT 193-195.) Moreover, Holland copied verbatim the Modesto Case Notes; his reproduced copy can be found at 6 CT 1434-1444, 1445-1451.

Holland initially claimed at the hearing that all of the Modesto Case Notes were written before his first interview with the authorities on June 26, but subsequently admitted that was not so. (1 RT 278-279.) He then claimed that "probably 85%" were written before that date. (*Ibid.*) When asked to identify which notes were written before June 26, Holland responded that he did not know. (1 RT 279.) Holland did not give those notes to the officers. (1 RT 195.) They were taken from his jail cell on September 4, 1992, when they served him with a search warrant. (1 RT 195, 218-219.)

After the notes regarding the capital crime were exchanged, Holland instructed appellant how to write his confession to that crime.[126] (See People's Exhibit 18.) Holland testified that appellant wrote several confessions. (1 RT 243.) After reading the first version, Holland told appellant that it was not good enough for collateral and told him what information to insert. (*Ibid.*) So, appellant wrote a second version, and again Holland returned it because it did not contain information that Holland wanted. (*Ibid.*) While this process went back and forth, Holland was talking to the authorities. (*Ibid.*) Eventually, Holland received a 14-

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[126] At trial, Holland explained that he felt it necessary to direct appellant how to write his confession, because it was to be given to him as collateral. (17 RT 3519.) Given the unique similarities in the format and style of both the Modesto and San Diego case confessions, Holland's instructions plainly applied to both confessions.

page confession, which contained two one-page addendums,[127] from appellant. (Defendant's Exhibit 6 and 7; see 6 CT 1411-1425, 1427; 1 RT 241-244.) Holland claimed that all earlier versions of that confession were destroyed. (1 RT 212.)

Almost exact copies of appellant's confessions to the Modesto and San Diego crimes, unsigned and in Holland's handwriting, were found in Holland's cell. (5 CT 1318 [9/4/92 Interview].) Holland claimed that after he was removed from the Stanislaus County Jail in August, he took all the writings that appellant had given him and copied appellant's confessions "word for word." (1 RT 197.) Holland did so, because he wanted to show the district attorney what he had obtained but did not want to give him the actual confessions until the deal was consummated. (1 RT 197-198.)

In June, Holland contacted his lawyer, Stanislaus County Deputy Public Defender Joe Rozelle, and when they met on June 24 or 25, Holland told Rozelle that appellant had confessed. (1 RT 190-191.) At the motion hearing, Holland claimed variously that he gave or showed his lawyer notes which he and appellant had exchanged.[128] (1 RT 190.) Holland also claimed

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[127] The first one-page addendum began "This agreement is part of a 14 page confession that I've written," and stated that appellant was giving the confession as collateral for the killing of Mickey Landrum, Linda Lee, Chester, Bill Grogan, Fred Vaughn, and Ella Pokorney. (6 CT 1425.) The second one-page addendum contained a list of directions for how those people were to be killed. (6 CT 1427.)

[128] Holland's testimony regarding the notes was inconsistent. Holland initially testified that when he showed the notes to his attorney during their meeting, his lawyer did not take the information, he just looked at it. (1 RT 190, 248.) Holland later testified that he gave all of the notes to his attorney, who showed them to the district attorney. (1 RT 278.) The notes, however, were seized from Holland's cell on September 4, 1992. (1 RT 195, 219, 274.) This discrepancy was never explained.

that Rozelle asked him what he wanted to do, and Holland said that he felt appellant was sick; Holland just wanted to give the information to the authorities, but did not want to get involved. (*Ibid.*) Holland did not believe that he spoke to his attorney about trading the information for assistance in obtaining the deal he had previously sought.[129] (1 RT 191.) Holland next heard from his attorney on June 26, when he met with him and a representative from the district attorney's office (Investigator Antone); Holland "imagine[d] he [Holland's attorney] went to the district attorney's office" with his information. (1 RT 190.) According to Antone's testimony, Rozelle had asked if the district attorney was interested in Holland's information in exchange for some consideration. (1 RT 289.) Antone understood that there was a possibility of gaining some information from Holland in exchange for consideration. (*Ibid.*)

c. **Holland's 6/26/92 Interview By Stanislaus County District Attorney Investigator Fred Antone With Holland's Attorney Present.**

As we have just pointed out, on June 26, 1992, Holland and his attorney, Stanislaus County Public Defender Joe Rozelle, met with Stanislaus County District Attorney Investigator Fred Antone. Their interview was tape-recorded. (See RT 6/26/92 Interview at 5 CT 1218-

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[129] At the hearing, Holland testified that he did not want to give appellant's confessions to the authorities until his deal was done. (1 RT 197-199.) Originally, he "just wanted to give everything to the district attorney" and "didn't ask for anything." (1 RT 198-199.) But, Holland testified, he was told by Investigator Antone that he could not do that and that they could not guarantee they would not use his information without his testimony. (1 RT 199.) Holland claimed that only then did he tell the authorities that if he was going to testify, they would have to give him the deal to consolidate all of his state charges and run his time concurrently with his federal sentence. (*Ibid.*)

1243.) Investigator Antone opened the interview by asking: "I understand that you may want to work a deal or something along those lines." (5 CT 1218.) Holland responded that his main purpose was not to make a deal, but almost immediately went on to say that he wanted to run all of his pending state charges concurrent with the time he was serving in federal prison. (5 CT 1218-1219.) Holland claimed that he had "enough information" and stated that he had to avoid going to state prison on any of his pending state cases. (5 CT 1219.) Rozelle told Holland to provide enough information to Antone so that the authorities could evaluate it. (5 CT 1219-1220.)

Holland told Antone that there were some conditions which he wanted to get straight before turning over any information: (1) if he was going to have to testify, he wanted to be transferred to another jail; and (2) he wanted assurance that if he gave information to the authorities, they would not use it unless they gave him a deal. (5 CT 1223, 1225-1226.) Antone explained that this initial interview was for everyone to feel the situation out and that they would talk further about what would be offered, but that Holland had to "lay out the cards" before they offered a deal. (5 CT 1224.)

Holland told Antone that he had some information regarding appellant's capital crime, but admitted that he did not have all the information. (1 RT 293.) Holland claimed that he knew why and how the victims had been killed and things that nobody, including the police, knew. (5 CT 1222.) Holland said that he knew the names of people involved in the case and that appellant had been soliciting other inmates to kill witnesses. (5 CT 1221-1222.) Holland stated that he falsely told appellant that he might know someone who could kill the witnesses and that is why appellant trusted him. (5 CT 1222-1223.)

Antone asked for more information to take back to the district attorney. (5 CT 1230.) Rozelle asked Antone if there was any interest on his side, and Antone responded that there was "definately"[130] [sic] interest. (*Ibid.*) Holland told Antone, "you pretty well know what, what you think I should tell." (*Ibid.*) Holland said that the attack had been premeditated and that Mickey Landrum had attacked one victim and appellant had attacked the other. (5 CT 1233.) Holland stated that the woman's wrists had been cut, and the man had been stabbed and beaten in his head with a claw hammer. (*Ibid.*) Holland claimed that he had in writing appellant's plans for how he intended to defend himself and details concerning the witnesses to be killed, such as their addresses, telephone numbers, and cars. (5 CT 1231-1232.) Holland also inquired as to whether Landrum would be prosecuted. (5 CT 1237-1238.) Antone responded that "at this point" Landrum was not being charged and that whether he would be charged later would be independent of "anything that you have told me today or will tell me." (5 CT 1238.)

Holland asked Antone if he thought that they could "get this done." (5 CT 1236.) Antone replied that he thought something would be resolved "one way or the other" and that Holland would be dealing with him from that point on. (5 CT 1236-1237.) Holland expressed concern that he could be charged as a result of leading appellant on about helping him kill witnesses. (5 CT 1238; 1 RT 293-294.) Antone assured Holland that he would not be prosecuted,[131] but stated, "I want you to understand that I'm

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[130] Although "definitely" is misspelled in the transcript, we will use the proper spelling when quoting it hereafter.

[131] During the interview, Holland signed an "agreement regarding the initial meeting between potential informant and prosecution" form, which provided that the only agreement at that time was that the District (footnote continued on next page)

not asking you to be a police agent and do these things for me." (5 CT 1238.) Holland replied: "Oh, I do this on my own." (*Ibid.*)

Holland also mentioned that appellant had admitted involvement in a murder case in San Diego. (5 CT 1239.) Holland said that he did not yet know about that case, but that appellant was going to tell him about it that night. (*Ibid.*) Holland continued: "cause I'm not an agent for you but . . . would that have any pertinence on anything should I, I mean, I know you can't, I'm not an agent." (*Ibid.*) Antone responded that was up to Holland, "I don't want get anything construed . . . where at some point in time you come back and says, well I only did it for, cause Antone, you know . . . said it would be okay." (*Ibid.*) Holland said that so long as he was not going to be prosecuted for misleading appellant, and Investigator Antone finished his sentence, stating: "I don't see any . . . [¶] There's anything wrong with that." (5 CT 1240.)

Earlier in the interview, Holland had inquired as to when the authorities would reveal his information to appellant's attorney. (5 CT 1228.) Antone responded that they were pursuing an "ongoing investigation" and so would not provide any information to appellant's counsel until 30 days prior to trial. (5 CT 1228-1229.) Antone inquired about the status of Holland's Stanislaus County case, obtained Holland's personal information and concluded the interview with a promise to contact Rozelle or his boss the next week to schedule another interview. (5 CT 1223, 1241-1242.)

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Attorney's Office would not use information provided by Holland against Holland. (5 CT 1240,1243; 2 RT 303; People's Exhibit 10.) Antone testified at the hearing that he also assured Holland that his office would not prosecute him for what he was going to tell appellant regarding the solicitations. (1 RT 294.)

d. <u>Holland's 7/3/92 Interview By District Attorney Investigator Antone</u>.

On July 3, Holland and Antone had another interview, also tape-recorded. (See RT 7/3/92 Interview at 5 CT 1244-1301.) No one else was present. Holland signed, at Antone's request, an authorization/agreement permitting the investigator to speak to Holland without counsel present, promising not to prosecute Holland for anything he told him, and stating that if the district attorney chose to use his information, a written deal would be presented at an interview between the attorneys. (5 CT 1245-1246.) Holland wanted assurance that the authorities would not use his information until "a deal is done." (5 CT 1246.) Antone responded that Deputy District Attorney Fontan had advised that Holland's information was hearsay, which the prosecution could not introduce without Holland's testimony. (*Ibid.*)

Holland asked if the deal for "pulling all the charges together" was possible, and Antone responded that it was feasible, but that it was complicated due to the number of counties involved. (5 CT 1246, 1248 1252, 1274.) Antone said that he had done some preliminary investigation and was in the process of contacting the other counties to determine the status of Holland's pending cases. Deputy District Attorney Fontan would then have to contact the district attorneys in each of those counties to determine if they would agree to the deal; he would have to explain "what it is you have to offer us and if it's worth it." (5 CT 1248, 1287.) Thus, the investigator explained, putting the deal together would require much effort and time. (*Ibid.*)

Holland asked if California had a death penalty and if premeditated murder was a death penalty crime. (5 CT 1252.) When Antone answered yes to both questions, Holland asked what if appellant wrote and signed a

paper detailing "exactly what happened" and stating that he was giving the confession to Holland because he wanted Holland to kill witnesses. (5 CT 1253.) Holland continued: "That's what I can do. I could put it, I can get in writing. . . . [¶] Right now, exactly what's going on. In Brian's hand and that it's not just my heresay [sic], it's him . . . and down to the last detail. . . ." (*Ibid.*) Holland also asked what it took to prove solicitation to murder, "because that's gonna have a big bearing on this." (5 CT 1291.)

Antone said that Holland had to disclose what he knew before they would make any offer, because they would have to invest much effort to corroborate his information. (5 CT 1248, 1253, 1255, 1287.) "We have to be able to corroborate to independent evidence anything you tell me." (5 CT 1253.) They did not want to expend that effort until Holland laid his cards on the table. (5 CT 1253, 1255.) Holland argued that the authorities would not have to corroborate his information, because appellant was "gonna give you a signed confession." (5 CT 1253.) Antone responded that as soon as Holland told him everything that he knew, turned over all the written documents which he said he could access, and "given us everything you think you can," they would move him out of the jail. (5 CT 1254, 1257.) Antone told Holland that they were at a place where Holland had to give up his information. (5 CT 1255-1257.) Holland said that he was willing to talk but first wanted a promise that if they could not put together the deal, they would not use his information. (5 CT 1256-1257, 1260-1261.) Antone left the interview room and upon his return, stated that he had spoken to Deputy District Attorney Fontan, who said that they could not make that guarantee. (5 CT 1261.)

Holland asked, "why can't it be like this? . . . If I, he, signs a complete thing, it's all done. Boom, boom, boom, I show it to you, have my lawyer, however it's done . . .. The deal's done and it's over with." (5 CT

1263.) When Antone responded that "by nature," Holland, a jail inmate, would be considered unreliable, Holland argued that his reliability would not matter if he was able to provide them with a signed confession in appellant's handwriting. (5 CT 1263-1264.) Holland complained that he would be taking a risk when it was not even clear if the district attorney would be able to put together the deal, to which Antone responded that he had done enough checking to know that the deal was "feasible" — that similar deals had "been done before." (5 CT 1265-1266.) The investigator also guaranteed Holland that his office would try to do the deal. (5 CT 1266.)

Holland said that they were talking about whether appellant would die or get life in prison without possibility of parole. (5 CT 1269-1270.) Holland continued: "I mean, it's gonna be in a signed confession." (5 CT 1270.) Holland claimed that he also knew everything about the San Diego homicide and had "it" all in writing and signed by appellant. (*Ibid.*) Referring to the Modesto crime, Holland said that he had seen the paperwork and from his review of the evidence, appellant had a "damn good chance of getting off." (*Ibid.*) Holland asked: "What more iron clad testimony is there than a signed statement?" (5 CT 1273.)

Holland then proposed another alternative: he would tell Antone what he knew if the authorities would guarantee that should the deal not be consummated, they would not tell appellant's attorney about Holland. (5 CT 1274-1275, 1279-1280.) Antone responded that his office could not make such promises but would pursue its contact of the other counties to "see what they have to say." (5 CT 1280-1281.) Antone, who had already run a warrant check on Holland, then discussed with Holland which counties had pending charges, the various aliases that Holland had used, and his prior criminal record. (5 CT 1281-1286.)

Holland told Antone that appellant had approached him and that Holland had "kept re-drilling him and . . . kept re-drilling him" for details about the capital crime. (5 CT 1291-1293.) Holland also explained how he had obtained appellant's confession to his participation in the San Diego homicide and had "drilled' appellant about that crime. (5 CT 1293-1294.) Holland said that he had looked at the San Diego case confession, but "wanted the one in Modesto for you people [referring to the prosecution]" because he figured it would be "a lot easier for you guys." (5 CT 1294.) In discussing that San Diego confession, Holland told Antone: "But I got you know or I should say I have access to a signed statement . . . confession of what happened." (5 CT 1296.)

Holland told Antone that he knew that he was not supposed to be working for the prosecution[132] (5 CT 1296-1297), but:

> I'm on the, on the brink to where um I've got access to both the confessions. Ok. Um got access to all the notes. Of all the murders that want to be done. How they want to be done. In his handwriting. Everything in his handwriting. . . . But . . . theoretically would it be pertinent to a case. . . . If the people that . . . he wanted this done to was in his hand also. To the point to where the agreement was. And also what Brian I want you to go ahead and write an agreement um of why you are doing this. . . . So would it be, I mean I have notes which I'm sure is well enough to you know do that. But I have to build the notes to show . . . how it happened. But would it be pertinent to where he wrote in there exactly I want these people done. . . . Would

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[132] Antone interrupted and said: "Yeah. Basically . . . . [¶] . . . you are not working for us. [¶] We're not, I'm not asking you in any way, shape, or form, or insinuating, intimating . . . . [¶] . . . If you have any idea that you even think you're working for us, stop." (5 CT 1297.) Holland agreed that he was doing "this all on [his] own." (*Ibid.*)

> that be more pertinent than the notes and having to
> build the case?

(5 CT 1297-1298.)

Antone responded: "It's six of one, half a dozen to the another. . . . Don't go out of your way to put yourself in jeopardy. I mean you know you act on your own conscience." (5 CT 1298.) Holland replied that he had already acted, that's why he was there, and the investigator said: "I don't want you to do anything to try and make my case better." (*Ibid.*) Antone told Holland that he thought he was trying to "wet [his] appetite" and "sweeten the deal" to get Antone to persuade the district attorney. (*Ibid.*) At the end of the interview, Antone and Holland discussed the mechanics of meeting again. (5 CT 1299-1300.)

e. <u>Events In July And August 1992</u>.

During the period between July 3 and September 4, Holland continued to call Investigator Antone and Detective Grogan in pursuit of his deal, and the Stanislaus County District Attorney's Office continued to pursue making the deal for Holland. Antone testified at the hearing that between June 26 and September 4, he and Holland talked roughly a dozen times on telephone. (1 RT 291.) Holland called the investigator to learn what Antone had done towards contacting the other counties. (1 RT 290-291.) Antone testified that because they wanted to fold the other county cases into one Stanislaus County case and then run the time on all charges concurrent with Holland's federal sentence, Antone had to contact each county's assigned deputy district attorney, seek his or her cooperation, and then arrange for a transfer of jurisdiction. (1 RT 291-92.) It was "absolutely" a time-consuming process, but eventually the other counties did agree to the deal. (1 RT 292.)

In the latter part of August, Holland was moved from the Stanislaus County Jail to the San Joaquin County Jail after calling Antone and informing him that appellant had accused him of being a snitch. (2 RT 304-305.)

f. **9/4/92 — Service Of Search Warrant, Confiscation Of Confessions And Notes From Holland's Cell; Holland's Signing Of Agreement To Testify Against Appellant; And Holland's Interview By Detectives And Investigator Antone.**

On September 4, Detectives Grogan and Vaughn and Investigator Antone served a search warrant on Holland at his cell in the San Joaquin County Jail and confiscated the notes which Holland and appellant had written to each other, as well as appellant's confessions to both the capital crime and the San Diego homicide. (1 RT 195, 219, 274.) Following this seizure, the detectives and Investigator Antone tape-recorded an interview with Holland. (See RT 9/4/92 Interview at 5 CT 1302-1359.)

Antone began the interview by stating that Holland had initially refused to give a statement or to sign the agreement to testify against appellant, presented to him earlier that day by the detectives, Antone, and Holland's attorney. (5 CT 1302.) After Holland was informed that they had a search warrant for his property, Holland agreed to sign the agreement. (5 CT 1302-1303.) Holland stated that he had been confused and had asked his attorney what was going on, "is this still gonna be available . . . can I still do it at this time. . . ." (5 CT 1302.) Holland stated that he was not coerced into signing the agreement or giving a statement but felt "morally" that appellant had committed "these crimes" and wanted to commit other crimes. (5 CT 1305.) Holland said that when he had called Detective Grogan two days prior and said that he did not want to sign the agreement,

it was because he wanted to ensure that his name was not mentioned in the newspaper. (5 CT 1303.) Grogan and Antone assured Holland that they would speak to the reporters, but could not make any guarantee regarding what might be published. (5 CT 1303-1304.)

Holland then signed an agreement to disclose all information that he had regarding appellant and to testify truthfully against him in exchange for concurrent sentences on each of Holland's pending state charges, to be run concurrent with his pre-existing federal sentence.[133] (5 CT 1305- 1307; see People's Exhibit 9.) The agreement further provided that the mid-term would be imposed for each count to ensure that Holland's release date would be on or before the date of his anticipated release from federal custody. (Exhibit 9, pages 2, 5.) According to the agreement, Holland's pending cases from Madera, Fresno, Kern and Los Angeles Counties had already been consolidated into a new Stanislaus County Municipal Court case, and on the day before, Judge Vander Wall had represented that he would accept Holland's plea to the charges and would sentence him in accordance with the agreement. (See 5 CT 1304; Exhibit 9, pages 2-3, 5.)

After Holland signed, the detectives interviewed him regarding "everything" he knew about appellant, beginning with the first time he had met him. (5 CT 1308.) Holland described various discussions that he had had with appellant regarding the solicitations and the Modesto crime.[134] (5 CT 1309-1327.) Holland recounted appellant's confessions to the Modesto homicide and to his involvement in the Holloway homicide. (5 CT 1319-

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[133] Holland identified People's Exhibit 9 as the agreement he signed. (1 RT 258-259.)

[134] The details of Holland's statements are summarized *ante* in section (B)(5)(b).

1333.) The detectives had Holland review and explain the 17 pages of Modesto Case Notes (in appellant's and Holland's handwriting). (5 CT 1333, 1336-1354.) Holland told the detectives that most of those notes contained his cross-examination of appellant about the Modesto crimes. (5 CT 1333.)

The detectives asked Holland if he had seen any police reports concerning the Modesto case, and Holland responded that he "saw the discovery um after the confession was give [sic] to me." (5 CT 1358.) Holland went on to admit that he had reviewed all the discovery, "deeply getting into it." (*Ibid.*)

g. **Holland's 9/17/92 Interview By Detectives.**

On September 17, Detectives Grogan and Vaughn conducted another tape-recorded interview of Holland. (See RT 9/17/92 Interview at 5 CT 1360-1373.) Grogan told Holland that they had a few more questions since September 4 and wanted to go over some of the points, including (1) when Holland first started speaking to appellant; (2) what conversations they had before appellant received his discovery; (3) when Holland received the confessions; and (4) when Holland received the notes.[135] (5 CT 1360.)

C. **The Stanislaus County District Attorney Violated Appellant's Sixth Amendment Right To Counsel By Using Eric Holland As An Agent To Elicit Incriminating Statements.**

A defendant's Sixth Amendment right to have his counsel present during police questioning of any kind attaches upon the commencement of formal judicial proceedings on the charges. (*Kirby v. Illinois* (1972) 406

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[135] The details of Holland's statements to the detectives are summarized *ante* in section (B)(5)(a) & (b).

U.S. 682, 688-690.) Here, appellant's right to counsel attached on March 30, 1992, when following his arrest, a felony complaint was filed alleging that he committed multiple crimes at 121 Robin Hood Drive, including murder, attempted murder, robbery, and burglary on March 1, and he was arraigned and counsel was appointed. (*People v. Wader* (1993) 5 Cal.4th 610, 654; see 1 CT 36, 38-40; 2 CT 374-375.)

The trial court erred when it found that the police conduct involved here did not violate the principles set forth in *Massiah v. United States*, *supra*, 377 U.S. 201. Contrary to the trial court's ruling, the evidence clearly showed that Eric Holland deliberately elicited appellant's confessions and admissions regarding the capital crime and the San Diego homicide and that he acted as a police agent in doing so.

1. *Massiah* — Applicable Principles.

Once an adversary criminal proceeding has been initiated and the defendant's constitutional right to the assistance of counsel has attached, the Sixth Amendment right to counsel forbids admission of evidence of any incriminating statements deliberately elicited from the defendant by a government agent without counsel present. (*Massiah v. United States*, *supra*, 377 U.S. at p. 206; *United States v. Henry* (1980) 447 U.S. 264, 270-274; *In re Wilson* (1992) 3 Cal.4th 945, 950.) In order to prevail on a *Massiah* claim involving use of a government informant, the defendant must demonstrate that the government and the informant took some action, beyond merely listening, that was "designed deliberately to elicit incriminating remarks." (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459.)

This Court has held that "the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited

incriminating statements." (*In re Neely* (1993) 6 Cal.4th 901, 915.) The first prong of this test is not met where law enforcement officials merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance. (*Ibid.*) However, the preexisting arrangement, "need not be explicit or formal, but may be 'inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct' over a period of time. (Citation.)" (*Ibid.*)

2. Standard Of Review.

A trial court's ruling on a motion to suppress informant testimony is essentially a factual determination, entitled to deferential review on appeal. (*People v. Hartsch* (2010) 49 Cal.4th 472, 491; *People v. Coffman* (2004) 34 Cal.4th 1, 67.) The abuse of discretion standard is not a unified standard. (*Haraguchiv. Superior Court* (2008) 43 Cal.4th 706, 711.) "[I]nsofar as the trial court expressly or impliedly determined the historical facts bearing on admissibility, its ruling must be upheld so long as it is supported by substantial evidence. But insofar as the court selected and applied the governing legal principles, including the meanings of statutory terms, its ruling is subject to independent review." (*People v. Franzen* (2012) 210 Cal.App.4th 1193, 1205.)

3. Eric Holland Became A State Agent As Of His June 26, 1992 Interview With Investigator Antone, And Therefore, In Thereafter Eliciting Appellant's Incriminating Admissions And Confessions To Both The Modesto Case And The San Diego Case, Eric Holland Acted As An Agent Of The State.

The key issues here are (1) did Holland deliberately elicit incriminating statements from appellant? (2) did Holland become a state

agent and, if so, when? (2) what information did he elicit after becoming an agent of the state?

As established below in section (C)(3)(a), Holland deliberately elicited incriminating information from appellant in order to make a deal on his own pending charges. And, as discussed in section (C)(3)(c), the evidence established without a doubt that Holland deliberately elicited the written confessions to the capital crime and the San Diego homicide after June 26. As correctly found by the trial court, the Modesto capital case confession (and hence the San Diego confession as well) did not exist prior to Holland's June 26 and July 3 interviews with District Attorney Investigator Antone. (2 RT 352.) However, the court denied the *Massiah* motion on the basis that Holland acted on his own when he obtained those confessions, concluding that Holland was not an agent after either June 26 or July 3. (*Ibid.*) The court also ruled that prior to either interview, Holland "basically had the information" which was later introduced at trial against appellant. (*Ibid.*)

Appellant will establish below that there is no substantial evidence to support either of these latter conclusions. Rather, as we establish in section (C)(3)(b), the evidence shows that Holland became an agent of the State on June 26, the day of his first interview with Investigator Antone. Furthermore, as we establish in section (C)(3)(d), prior to June 26, Holland did not know any details of the San Diego homicide, knew only a few details of the capital case homicide, having heard only two early versions of that crime — versions which the prosecution disavowed at trial. Thus, after June 26, Holland was acting as a police agent when he acquired knowledge of the San Diego homicide, the incriminating details of the capital crime, and both written confessions. Therefore, the State deliberately elicited appellant's admissions and confessions in violation of his Sixth

Amendment right to counsel, and all statements (oral and written) obtained after June 26 should have been suppressed.

a. **Holland Deliberately Elicited Incriminating Admissions And Confessions To Both Cases In Order To Make A Deal On His Own Pending Charges.**

The evidence established without a doubt that Holland deliberately elicited appellant's admissions and confessions to both the Modesto case capital crime and the San Diego case homicide in order to work a deal on his own pending charges.[136] Indeed, the trial court found that Holland was motivated by "his interest in working a deal for himself," as well as "an ethical consideration." (2 RT 353.)

The relationship between Holland and appellant began when Holland overheard appellant asking other inmates if they knew someone who could take care of witnesses. (5 CT 1310-1311 [9/4/92 Interview].) Holland gained appellant's interest and confidence by claiming to know a colonel who could help him. (5 CT 1222 [6/26/92 Interview], 1292 [7/3/92 Interview], 1324 [9/4/92 Interview.) Holland then demanded that appellant

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[136] Holland was serving a federal sentence when he arrived at the Stanislaus County Jail to face forgery and theft charges in Stanislaus County. As discussed in section (C)(3)(b)(*i*), Holland was well aware, when he arrived at the jail, that he was also facing numerous felony charges in several other counties which could result in considerable state prison sentences. (See 5 CT 1271 [District Attorney Investigator Antone points out possibility that Holland could serve another five or six years in state prison for the pending charges].) Holland's main concern was to avoid having to serve any time in state prison, and thus he sought consolidation of all charges and then either dismissals of the charges or imposition of suspended or concurrent sentences. (See discussion in section (C)(3)(b)(*i*), *post.*)

confess in order to provide "collateral" to secure the services of the colonel (5 CT 1317, 1324 [9/4/92 Interview], 1370-1371 [9/17/92 Interview]) and doggedly pumped appellant for incriminating details regarding both cases.[137]

It is clear that Holland's intent was to obtain as much incriminating information as possible to avoid serving any time in state prison. It was not good enough for Holland when appellant, reluctant to confess to his pending capital charges, offered a confession to another homicide. (5 CT 1292-1294 [7/3/92 Interview], 1317 [9/4/92 Interview].) Holland, who had already met with Investigator Antone when he demanded a confession as collateral ("so now I'm playing . . . with you guys," meaning Antone), understood that he needed a confession to the pending Modesto case to make his deal. (5 CT 1292 [7/3/92 Interview], 1294-1295 [same] [addressing Antone, Holland says "I wanted [a signed confession to] the one [the case] in Modesto for you people. . . . I figured it's gonna look a hell of a lot . . . easier for you guys. . . . Well when I got that statement [appellant's confession to the San Diego killing] . . . then I started thinking well if I go ahead and I say I accept this I'm not going to get Modesto. I'm in Modesto."], 1317 [9/4/92 Interview].) Eager to obtain as much incriminating information as possible in order to obtain the deal that the State dangled in front of him,[138] Holland agreed to look at a confession to

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[137] See, e.g., 5 CT 1294-1295 [7/3/92 Interview] ["And you gotta realize too that when I went through this case with him and the last, the case in San Diego it was never, I never came right out and said well, what happened? I'd ask him a question and he'd write a note and then we went back and forth. And I kind of dug into it. And it took like you know five or six days. And then finally boom. Then he dumped it all you know."].

[138] As discussed below in sections (C)(3)(b)(*ii*) (*iii*) and (*vi*), the State held out the prospect that Holland's deal would happen if his information "was
(footnote continued on next page)

another homicide but did not guarantee to accept it instead of a confession to the capital charges. (5 CT 1294 [7/3/92 Interview], 1317 [9/4/92 Interview].) When appellant gave Holland a confession to the San Diego homicide, Holland "drilled" appellant on the details and then bragged to Investigator Antone about all the notes he had regarding that crime. (5 CT 1294-1295 [7/3/92 Interview].) Holland realized, however, that if he accepted appellant's confession to the San Diego crime, he would not obtain a confession to the capital case. (5 CT 1295 [same].) And so, after posing numerous questions to elicit as many incriminating details as possible concerning the San Diego homicide, Holland told appellant that his confession to that crime was not good enough; he would not help unless appellant confessed to the capital charges. (5 CT 1294-1295 [same], 1317 [9/4/92 Interview], 1323 [same].) Only then did appellant provide a written confession to the Modesto crime. (5 CT 1323-1324 [same].) Holland thus was able to secure two confessions, thereby increasing his leverage to obtain the lucrative deal he wanted.

In sum, after June 26, Holland deliberately elicited incriminating evidence in order to ensure secure his deal. He tricked appellant into confessing, vigorously pumped him for incriminating details to feed to "you guys," and then directed how appellant should write his confessions. (See 5 CT. 1317, 1319-1323 [9/4/1992 Interview]; 1 RT 243; see also People's Exhibit 18.) Holland's Modesto Case Notes, which he admitted consisted mostly of his cross-examination of appellant and the latter's responses (5 CT 1333 [9/4/92 Interview]), reflect the intense interrogation

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(footnote from previous page)
worth it" (5 CT 1248) and he gave them "everything that you think you can" (5 CT 1257).

and direction applied by Holland to secure appellant's admissions and confessions. (See Exhibits 5 and 6 at 6 CT 1374-1381, 1396-1410.)

b. <u>Under Established Law, Holland Became An Agent Of The State On June 26, 1992</u>.

The essential inquiry is whether Holland became an agent of the State on June 26, and that question turns on "whether [on that date] the government intentionally created a situation likely to induce the accused to make incriminating statements without the assistance of counsel." (*People v. Frye* (1998) 18 Cal.4th 894, 993, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390.) As established below, the answer to the question is in the affirmative.

The leading Supreme Court case regarding jailhouse informant testimony is *United States v. Henry, supra*, 447 U.S. 264. There, a government officer working on Henry's case contacted Nichols, who had previously acted as a paid informant. The record did not indicate that the officer contacted Nichols specifically to acquire information about Henry or his case. In any event, Nichols informed the officer that he was housed with several federal prisoners, including Henry, and was expressly told not to question or initiate any conversations with them, but to be alert to any statements which they might make if they initiated conversations. (*Id.* at p. 266.) Nichols and Henry subsequently engaged in some conversations, during which Henry made incriminating statements. (*Id.* at p. 271.) After Nichols' release from jail, the officer contacted Nichols. (*Id.* at p. 266.) Nichols reported his conversations with Henry and was paid for furnishing the information. (*Ibid.*) In determining that Nichols acted as a government agent in deliberately eliciting incriminating statements from Henry, the Supreme Court found significant the following three factors: (1) the informant was acting as a paid informant and therefore had an incentive to

provide information; (2) the informant appeared to be merely a fellow inmate and thus could engage the defendant in conversation without suspicion; and (3) the defendant was in custody and under indictment at the time of his conversations with the informant. (*Id.* at p. 270; *People v. Hovey* (1988) 44 Cal.3d 543, 559.) The Supreme Court concluded that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." (*United States v. Henry*, *supra*, 447 U.S. at p. 274.)

Each of these factors supports appellant's claim here in the present case that Eric Holland was a government agent when he elicited appellant's confessions to the Modesto and San Diego case homicides.

First, Holland was "ostensibly no more than a fellow inmate" (*Henry, supra,* 447 U.S. at p. 270), someone in whom appellant would have trust. There was nothing which would have made appellant aware of Holland's motivation to seek information for the police.

Second, appellant was in custody, charged with capital murder, and therefore "particularly susceptible to the ploys" of Holland. (*Henry, supra,* 447 U.S. at p. 274; *People v. Whitt* (1984) 36 Cal.3d 724, 742 (*Whitt I*).) As *Henry* explains:

> [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents. . . . [T]he incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct and apparent status as a person sharing a common plight.

(*Henry*, *supra*, 447 U.S. at p. 274.) Like the informant in *Henry*, Holland had gained the confidence of appellant by offering to help him escape and to facilitate the killing of witnesses against appellant. (*Ibid.*) Holland then

used that relationship and offer of help to obtain appellant's admissions and confessions.

Third, after June 26, Holland was no longer acting on his own initiative, but rather was induced to seek incriminating information in exchange for the "fee" of no state prison time in his pending state cases. As we will discuss in detail, the crucial facts which establish Holland's agency are:

(1) Holland asked for a deal on June 26 and made it clear that he wanted a *quid pro quo* in exchange for informing against appellant.

(2) During the June 26 interview, the State, through its representative, District Attorney Investigator Antone, gave Holland an incentive to extract further information from appellant. It did this by expressing a keen interest in Holland's information, — telling him that it was "definitely" interested in the deal he wanted, that such a deal was possible but that it would not be offered until the State heard what Holland had to offer, and setting up a mechanism for future interviews between Holland and the District Attorney's Office.

(3) During the June 26 interview, when Holland told Antone that he could obtain more incriminating evidence from appellant, the investigator did not tell him to refrain from initiating conversations with, or questioning, appellant. Instead, Antone gave Holland permission to continue his ruse at the same time as Antone knew or "'must have known' that [Holland] was likely to obtain incriminating statements from the accused in the absence of counsel." (*Maine v. Moulton* (1985) 474 U.S.

159, 176, fn. 12, quoting *United States v. Henry*, *supra*, 447 U.S. at p. 271.).

(4) The interview of July 3 followed the same basic pattern of the June 26 interview and confirms that Holland had become an agent. During the July 3 interview, the State continued to provide incentives. Not only did Antone, as a state officer, reiterate his previous communication that the deal Holland sought was possible, but he also expressly informed Holland that the Stanislaus County District Attorney's Office was working to put it together. Moreover, in response to Holland's concern about his safety and requests to be moved, Antone promised to move Holland out of the jail as soon as Holland gave him everything that he thought he could and provided all the written documents that he could access. The State provided further incentives for Holland to obtain additional incriminating information by telling him how difficult it was to arrange the deal and that whether the deal could be made depended on whether his information was "worth it." Holland responded to those incentives by offering to obtain additional evidence — written confessions.

(5) After the June 26 and July 3 interviews, Holland was returned to his same cell located next to appellant, with the State's knowledge that Holland would continue to obtain incriminating statements while the District Attorney's office pursued making the deal that Holland wanted.

(6) After meeting with the District Attorney's representative on June 26 and July 3, Holland obtained incriminating evidence

while operating with the understanding that as long as his information was "worth it," he would receive a deal in return.

(7) The State did follow through on its promises to Holland. It moved Holland in late August after Holland called Investigator Antone and stated that appellant had accused him of being a snitch. It gave Holland the deal that he wanted in exchange for his cooperation with the Stanislaus County District Attorney's Office and for his testimony against appellant.

i. **Holland Asked For A Deal And Made It Clear That He Wanted A Quid Pro Quo In Exchange For Informing.**

When Holland arrived at the Stanislaus County Jail, he was facing felony forgery and theft charges in not only Stanislaus County, but several other counties as well. (1 RT 178-179, 181.) In fact, when testifying at the suppression hearing, Holland was not sure of the exact charges that he had faced, because he had had so many. (1 RT 178-179.) Holland was well aware of his sentence exposure when he first contacted the Stanislaus County District Attorney's Office about appellant's case. (1 RT 270-271.) Prior to arriving at the jail, Holland had learned that the various counties had not agreed to run their sentences concurrent with the federal sentence he was then serving. (1 RT 180, 274.) At the hearing, Holland admitted his awareness in June 1992 that he was facing prison time on all of those charges. (1 RT 270-271.) Through his attorney, Holland approached the District Attorney's Office and offered to provide information about appellant's case in exchange for leniency in his pending cases. (5 CT 1218-1219; 1 RT 188, 190, 287-289.) Specifically, Holland wanted to work a deal whereby he could consolidate in Stanislaus County all of his

outstanding charges, enter a plea of guilty, and receive a suspended sentence or one to run concurrent with his federal sentence. (5 CT 1219, 1246, 1248-1251, 1283.) Although Holland denied that was his motivation, claiming that he "just wanted to give everything to the district attorney" and "didn't ask for anything" (1 RT 198-199), the trial court found otherwise (2 RT 353), and his actions belied that denial: (1) he spent the majority of the June 26 interview describing the deal that he wanted and various conditions which had to be met before he would turn over his information (5 CT 1218-1242); (2) during the July 3 interview, he wanted assurance that the authorities would not use his information until the deal was done, and he refused to provide much of his information, or to turn over any documents until he knew that that condition was met (5 CT 1246, 1254, 1256-1257); and (3) after the June 26 interview, Holland called Investigator Antone roughly a dozen times to discuss the status of the deal. (See 1 RT 290-291.)

Notably, both Holland's attorney and District Attorney Investigator Antone understood that Holland's intent was to make a deal, and everyone, including Holland, operated on that understanding while Holland was obtaining information from appellant and meeting with the investigator. Indeed, at the beginning of his first interview with Holland on June 26, Antone remarked: "I understand that you may want to work a deal or something along those lines." (5 CT 1218.) At the hearing, Antone explained that when Joe Rozelle, Holland's attorney, contacted the district attorney's office to schedule the first interview, Rozelle had asked if the district attorney was interested in Holland's information in exchange for consideration. (1 RT 289.) Thus, from the very beginning of Holland's relationship with the Stanislaus County District Attorney's Office, it was clear to all involved that Holland wanted a *quid pro quo* in exchange for informing against appellant.

ii. **<u>During The June 26 and July 3 Interviews, The District Attorney's Representative Gave Holland Incentives To Extract Incriminating Information From Appellant And Permission To Continue His Ruse To Do So, And Holland Responded to Those Incentives By Offering To Obtain Additional Evidence</u>.**

<u>June 26 Interview Incentives</u>

Investigator Antone opened the June 26 interview by advising Holland that the purpose of that interview was for him to get enough information so that the District Attorney's Office could make a determination regarding the deal Holland wanted. (5 CT 1218.) After Holland described generally some of the information that he could provide, Antone told him that the interview was a "just kind of feeling out type of situation" so that Holland could get to know Antone "*so that . . . when [they] talk again cause it sounds like its gonna happen. . . .*" (5 CT 1224, emphasis added.) Antone also advised Holland that they would *"get further into what's gonna be offered,"* but first Holland had to "lay out the cards." (*Ibid.*, emphasis added.) The investigator told Holland that he District Attorney's Office considered its contacts with Holland to be an "ongoing investigation" (5 CT 1228, 1229), and he was "definitely" interested in what Holland was offering but needed more information, and so Holland gave him a bit more (5 CT 1230-1233). Antone inquired regarding the status of Holland's pending charges and learned that Holland would be in the Stanislaus County jail, pending trial, for at least a month. (5 CT 1223-1224.)

Antone asked Joe Rozelle, Holland's attorney, how long he intended to "put . . . off" a pending motion in Holland's case. (5 CT 1233, 1236.)

Rozelle responded that if Holland waived the conflict created by his desire to inform against appellant, Holland's case could be put off for two weeks to give "you all" time to come to an "agreement either to do it or not do it [the deal]." (5 CT 1236.) Holland asked Antone if he thought that they could "get this done," and Antone replied that he thought something would "be resolved one way or the other" and that Holland would be dealing with him from that point on. (5 CT 1236-1237.) Antone also told Holland that he would make arrangements for their further discussions to occur away from the jail. (5 CT 1237.)

Holland inquired as to whether Landrum would be prosecuted, to which Antone responded that "at this point" Landrum was not being charged and that whether he would be charged later would be independent of "anything that you have told me today *or will tell me.*" (5 CT 1237-1238, emphasis added.)

Holland next inquired whether he himself risked being prosecuted for his actions in obtaining incriminating statements from appellant. (5 CT 1238.) Antone assured him that he would not be prosecuted for "leading Brian on or whatever you want to call it," and that "I want you to understand that I'm not asking you to be a police agent and do these things for me." (*Ibid.*)

Holland then stated that he was going to obtain information about another murder case involving appellant's girlfriend in San Diego and inquired of Antone whether that information would "have any pertinence on anything." (5 CT 1239.) Antone responded that it was up to Holland, because he did not want "anything construed" that he said "it would be ok." (5 CT 1239.) Holland started to reply that "as long as I can't get in trouble for misleading him [appellant] . . . ," at which point Antone interrupted and said, "I don't see . . . there's anything wrong with that." (5 CT 1240.)

Antone concluded the interview with a promise to contact Rozelle early the next week to schedule another interview. (5 CT 1242.)

Thus, knowing that Holland wanted a deal in exchange for obtaining and providing information, the District Attorney's Office told Holland that it was " definitely interested" in what Holland was offering them, and that they would "get further into what's gonna be offered" by Holland during the "ongoing" investigation. These kinds of statements, plus Antone's arrangement for future interviews and his discussion with Holland's counsel about whether Holland's case could be placed on hold long enough to attempt to put a deal together, all indicated that a deal was possible. Antone did avoid, on one occasion, a direct answer to Holland's question whether he thought they could get the deal done. However, Antone's statement that something would be resolved one way or the other, when considered with his other statements, would have been understood by any reasonable listener as dangling the possibility of the deal that Holland desperately wanted (he had been seeking it even before he arrived at the jail), as long as he would be able to provide useful incriminating evidence against appellant. Under these circumstances, the only reasonable inference is that Holland expected a quid pro quo and that the District Attorney's Office encouraged that expectation. By the end of the June 26 interview, the Stanislaus County District Attorney's Office thus provided incentives to Holland to provide information.

But the district attorney's office provided more than incentives on June 26; it gave Holland permission to continue his ruse in order to obtain more incriminating evidence. When Holland inquired regarding the "pertinence" of information regarding the San Diego homicide and expressed concern that he might get into trouble if he used his ruse to elicit that information, Antone did not tell him to refrain from initiating

conversations with, or questioning, appellant. Indeed, Antone went so far as to tell Holland that he "d[id]n't see there's anything wrong" with continuing to use the ruse to get the additional information.

Moreover, the incentives provided by Antone during the June 26th interview encouraged Holland to elicit additional incriminating statements from appellant. When Holland asked about when his information would be turned over to appellant's counsel as discovery, Antone responded, "what we're doing is considered *ongoing investigation*" and thus, the information would not have to be turned over until "it reaches a point where it's done." (5 CT 1228, emphasis added.) Antone further explained: "But if, if we have an *ongoing investigation where something is actively occurring*, we're not going to discover that to him." (5 CT 1229, emphasis added.) These statements informing Holland that he was part of an ongoing investigation obviously contemplated that Holland's efforts to obtain incriminating statements from appellant would also be ongoing. Furthermore, near the end of the interview, shortly after telling Holland that "you'll be dealing with me *from now on*," Antone agreed that they would have "more discussions" but that "I think I have enough [information] *at this point*" so that he could "at least go back to, to Mr. Fontan. . . ." (5 CT 1237.) Holland interrupted and asked if Mickey was being charged (5 CT 1237), and Antone responded that Mickey had not been charged yet, though it was possible he could be, but that decision would be independent "of anything that you have told me *or will tell me*" (5 CT 1238). Here, again, Antone's statements about "from now on," "at this point," and "will tell me" all supported the "ongoing investigation" message and told Holland that his role in eliciting information was yet not over. As the highlighted words clearly indicate, Antone was communicating that he was expecting Holland to "tell" him, in future interviews, further incriminating information from

appellant. Given these statements, the State must have known that its incentives would likely result in Holland eliciting additional statements from appellant; Antone "must have known that such propinquity likely would lead to that result." (*United States v. Henry*, *supra*, 447 U.S. at p. 271.)

<u>July 3 Interview Incentives</u>

At the July 3 interview, Investigator Antone continued to brandish the incentives provided on June 26. Antone told Holland that a deal to consolidate all of his charges was feasible and had been done before but that it would take effort and time. (5 CT 1246, 1248, 1252, 1266, 1287.) Antone promised: "I can guarantee you . . . that we will try to do it." (5 CT 1266.) In fact, Antone told Holland, he and his office had already been working toward putting the deal together. (5 CT 1248.) Making explicit what was implicit from the June 26 interview, Antone told Holland that whether the prosecution would offer a deal of this difficulty would depend upon "what it is you have to offer to us and if it's worth it." (*Ibid.*) And, raising the pressure on Holland still further, when Holland, in a negotiating posture, suggested that he did not need the deal because he could always fight for his original deal in the various counties, Antone warned that there was the possibility that he could "wind up doing another five or six years." (5 CT 1270-1271.) Even when Antone could not agree to one of Holland's requests — that Deputy District Attorney Fontan promise that if Holland's information was not used by the prosecution, Holland's name would not be released to appellant's defense counsel —Antone opined that it was not a final decision: "it's a back and forth situation." (5 CT 1281.) Antone wanted to "leave the door open;" his office would continue to contact the other counties and investigate the status of Holland's charges. (5 CT 1280-1281.) The investigator also told Holland that he hoped they would have a

next interview and that he himself would do everything possible to arrange for Fontan to appear at that interview to assure Holland of Antone's veracity and to enable Holland to provide his information directly to Fontan. (5 CT 1286.)

Thus, although no deal was consummated at the July 3 interview, the district attorney's office clearly continued to dangle the possibility of a deal as an incentive for Holland to provide incriminating evidence against appellant.

Holland's statements during the July 3 interview demonstrate that since his first interview with Antone, Holland had been deliberately eliciting incriminating information from appellant, acting just like a police detective or prosecutor. He "cross examined [appellant] over and over and over and over again." (5 CT 1256.) He "kept re-drilling him and . . . re-drilling him and finding out this and this and this you know." (5 CT 1292-1293.) He did so in order that it would be "a lot easier for you guys." (5 CT 1293.) He described how he was able to extract an oral confession from appellant to the San Diego homicide[139] (5 CT 1293-1295) but that he would not accept that confession in lieu of a confession to the capital crime "[c]ause I . . . wanted the one in Modesto for you people." (5 CT 1294.)

Additionally, Holland tried to further sweeten the deal by offering to obtain a written confession, and he asked Antone if such evidence would be "pertinent." (5 CT 1297.) When Antone explained that Holland, as an informant, would be considered an unreliable source, Holland argued that his reliability would not matter if he obtained a written confession. Holland would not have to say anything except that appellant gave it to him, and it

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[139] As discussed *post,* in section (C)(3)(d)(*ii*), Holland elicited information about the San Diego case after the June interview.

would all be in appellant's handwriting. (5 CT 1253, 1263.) It was thus clear that Holland's extraction of written confessions from appellant was an attempt to sweeten his side of the deal that the state was dangling in front of him. Indeed, that was certainly the investigator's understanding. (5 CT 1298 ["Because you think . . . what can I do to sweeten the deal to make them. . . ."].)

In sum, during both the June 26 and July 3 interviews, Investigator Antone provided incentives, as well as permission, to Holland to continue his ruse to extract incriminating evidence from appellant, and Holland responded to those incentives by offering to obtain such evidence, including written confessions.

iii. **After The June 26 And July 3 Interviews, Holland Was Returned To His Same Cell Next To Appellant, With The State's Knowledge That He Would Continue To Obtain Incriminating Statements From Appellant, While The District Attorney's Office Pursued Making The Deal.**

After the June 26 and July 3 interviews, Holland was returned to his same cell next to appellant, with the State's knowledge that he would continue his ruse and elicitation of incriminating statements from appellant, while the district attorney's office pursued making the deal. To be sure, Antone and the lead investigating detective denied any involvement in Holland's housing placement next to appellant's cell.[140] (1 RT 285-286; 2

[140] Holland found it odd that despite the continual cell movements on his tier during the summer of 1992, he and appellant always remained next to each other until late August, when the Stanislaus County District
(footnote continued on next page)

RT 308.) However, Antone acknowledged that not only did he have the power to move Holland out of the jail and away from appellant and the other accused "murderers," but that he promised Holland on July 3 that he would do so as soon as Holland gave him everything that he said he could access. (5 CT 1254, 1257-1258; 1 RT 292-293.) The Stanislaus County District Attorney's Office fulfilled that promise to move Holland to another jail in the latter part of August when Holland called Antone and told him that appellant had accused him of being a snitch. (2 RT 304-305.)

The District Attorney's Office knew, when it refused to move Holland despite his repeated requests that it do so, that he would continue to extract statements from appellant. Holland so advised Investigator Antone during both interviews. On June 26, Holland told Antone that he was going to obtain information about the San Diego case homicide, and on July 3, Holland said that he was going to obtain handwritten confessions to both homicides. (5 CT 1239, 1253, 1263, 1270, 1297-1298.) At the hearing, Antone admitted that (1) he understood that Holland did not already have the written confessions on July 3 but was going to get it (2 RT 307-308); and (2) he was aware that Holland was going to get information from appellant about the San Diego homicide. (2 RT 306.)

(footnote from previous page)
Attorney's Office had him moved after appellant accused him of being a snitch. Holland testified at the hearing on the motion to suppress that he had no idea why he was returned to that same location after he expressed concern for his safety and asked to be moved. (1 RT 276-277.) However, as he astutely expressed at the hearing: "If they would have moved me, none of this would have came about." (1 RT 208.) Despite the suspicious circumstances of Holland's placement in the jail, the record contains no evidence that the Stanislaus District Attorney's Office had anything to do with it. (2 RT 314.)

The only reasonable inference is that the Stanislaus County District Attorney's Office intended to capitalize on Holland's prime location with full knowledge that he would obtain incriminating statements to help them make its case against appellant. This is readily apparent upon consideration of Antone's explanations at the hearing for why he did not facilitate the move earlier. Investigator Antone admitted that Holland told him that he was concerned about his safety and asked to be moved from his current jail location. (1 RT 292.) Antone testified that he did not have Holland immediately transferred to another jail, because he did not feel his safety was in jeopardy, and it was better to keep him in the jail since they had to meet again. (1 RT 292-293.) However, Investigator Antone admitted that he could continue to conduct business with Holland had he arranged for Holland's transfer to another tier. (1 RT 296.) Antone testified that he never asked for Holland to be moved to another tier, because he did not think that the jail personnel would do so and "[t]here was no reason." (*Ibid.*) Yet, the investigator acknowledged that Holland was extremely concerned about his safety and spent a good portion of both the June and July interviews discussing his concerns. (1 RT 294-295.) Antone dismissed Holland's fears as "not uncommon." (1 RT 296-297.) Given that the Stanislaus County District Attorney's Office had the power to move Holland to another jail (which it eventually exercised), and the reasons provided for its failure to do so were wanting, the obvious conclusion is that it wanted to keep Holland next to appellant. And given its knowledge that Holland intended to elicit incriminating evidence, including handwritten confessions, the Stanislaus County District Attorney's Office must have expected and wanted Holland to stay in that location which was optimal to obtain such evidence.

Investigator Antone testified that his decision to deny Holland's request to be moved was not conditioned on Holland obtaining any additional information other than what he already had. (2 RT 301.) However, Antone told Holland that he would be moved from the jail "once you have given us everything you think you can." (5 CT 1257-1258.) This statement itself indicated that Holland was expected to extract all possible information ("everything you think you can") from appellant. Because Antone made the statement not long after Holland said that he could obtain handwritten confessions from appellant (5 CT 1253-1254), any person in Holland's situation would reasonably understand that he would not be moved until he obtained those confessions and anything else that he could extract. Antone's uncontroverted statements during the interview thus indicated that Holland was charged with "giv[ing] us everything you think you can."

It is true that, during both interviews, Antone made statements that: (1) Holland was not working for his office as an agent and (2) Antone was not asking him to gather information. (5 CT 1238-1239 [6/26/92 Interview], 1297-1298 [7/3/92 Interview].) However, as Antone admitted at the motion hearing, he did not tell Holland to discontinue his ruse to obtain additional information or to stop "cross-examining" and "drilling" appellant, nor did he say anything to discourage Holland from continuing to initiate conversations with appellant about the San Diego and Modesto killings. (1 RT 306-307.) Quite the contrary, as we have pointed out, Antone told Holland that Holland "you . . . will tell me" more at future interviews, that the difficult deal Holland wanted would be arranged only if "what you have to offer us . . . is worth it," and that Holland would only be moved out of the jail "once you have given us everything that you think you can." (5 CT 1238 [6/26/92 Interview], 1248 [7/3/92 Interview], 1257 [same].)

Significantly, at the June interview, Antone, in one breath, agreed that Holland was not an agent and stated that he did not want anything construed that he said it would be okay, and in the next breath, gave Holland permission to continue his deceit to obtain more information:

> Holland: I don't know about the case [San Diego]. I know he's gonna tell me about it tonight.
>
> Antone: Ok.
>
> Holland: Um. . . .
>
> Antone: I, you know . . . .
>
> Holland: And so I understand he'll, you know, want, you know, cause I'm not an agent for you but um, I just didn't know, if, would that have any pertinence on anything should I, I mean, I know you can't, I'm not an agent.
>
> Antone: Well, that's, that's up to you Eric. Ok. You know, I, I don't want . . . .
>
> Holland: But, but that . . . .
>
> Antone: I, I don't. I don't want get anything construed . . . .
>
> Holland: Right.
>
> Antone: . . . . Where at some point in time you come back and say, well, I only did it for, cause
>
> Antone, you know . . . .
>
> Holland: Right.
>
> Antone: Said it would be ok.
>
> Holland: Right.
>
> Antone: You know. I'm sure Mr. Roselle [sic] doesn't want to be in a position where . . . .

Holland: Well . . . .

Antone: You're saying that . . . .

Holland: Well, the whole thing is . . . .

Antone: My lawyer said it was alright [sic].

Holland: Well, it's basically is this. Is that as long as I'm not gonna ever be convicted, why, I guess I'm not doing, I mean, I'm not involved in any of it. But, as long as I can't get in trouble for misleading him . . . .

Antone: No . . . .

Holland: . . . for other purposes.

Antone: . . . I, I don't see any . . . .

Roselle: No.

Antone: There's anything wrong with that.

Roselle: No, No.

Holland: Ok.

(5 CT 1239-1240.)

Moreover, at the July interview, immediately after Antone told Holland that he should not think of himself as their agent, Holland said, "I guess I can ask you if it would be pertinent to [the prosecution's] case" if he had confessions and notes in appellant's handwriting (5 CT 1297) and if he had appellant's writings about the people he wanted killed, "would that be more pertinent than the notes and having to build the case?" (5 CT 1297-1298.) Antone's first response was **not** to return to the "you are not our agent" theme but rather to answer Holland's question. "[I]t's six of one, half a dozen of the other," Antone said, and then added that Holland should not "go out of your way to put yourself in jeopardy," which indicated that he expected Holland to take further steps in his ruse, so long as they were

safe steps. (5 CT 1298.) Antone subsequently said that he did not want Holland "to do anything to try and make [] my case better." (*Ibid.*) However, as noted above, at this same interview, Antone told Holland that the difficult deal he wanted would be arranged only if his information was worth it, and that he would only be moved out of the jail once he gave them "everything that you think you can." (5 CT 1248 [7/3/92 Interview], 1257 [same].) And, again, there was no warning to Holland to discontinue his ruse to obtain further information. Given the clear message that obtaining the difficult-to-obtain deal depended on the value of Holland's information, the likely result of the State's acts in this case, despite Antone's attempt to divorce his office from Holland's actions, was Holland's extraction of the written confessions, notes and oral admissions from appellant.

Even though Antone told Holland that he was not working for the Stanislaus County District Attorney, Antone knew, on both June 26 and July 3, that Holland would be returning to his cell to get more information. Indeed, as we have pointed out, Antone clearly gave Holland to understand on June 26 that Holland "will tell me" more later on as part of the "ongoing investigation" (5 CT 1228, 1229, 1238), and he informed Holland that "I don't see . . . there's anything wrong with" continuing to lie to appellant to obtain information about the San Diego case (5 CT 1240). And on July 3, when Holland returned with newly-obtained information about that case, Antone did not admonish him about extracting such information from appellant, even though Holland described with great relish how he set appellant up with his story of the colonel, how he was able to wrangle confessions to two crimes by using that ruse, and how he drilled and cross-examined appellant regarding both crimes. (5 CT 1256, 1291-1295.) Antone knew that the deal was an incentive for Holland to obtain additional

incriminating evidence. As noted above, Antone even accused Holland of using such evidence to "sweeten the deal." (5 CT 1298.)

Holland responded to Antone's admonishments as if they were mere formalities. During their interviews, Holland was careful to follow suit by stating that he was not an agent while, at the same time, telling Antone that he was gathering the evidence for the district attorney's case and asking for advice about how to proceed and what would be "pertinent" to the prosecution's case. (See 5 CT 1239 [after stating that he was going to learn about another homicide in San Diego involving appellant, Holland stated, "cause I'm not an agent for you but um, I just didn't know, if, *would that have any pertinence* on anything should I, I mean, I know you can't, I'm not an agent"] [6/26/92 Interview], emphasis added; 1296-1297 [after stating that he was not working for the district attorney, Holland asks whether "theoretically" getting confessions in appellant's handwriting "*would be pertinent* "] [7/6/92 Interview], emphasis added; 1294 [in describing how he had refused to accept a confession to the San Diego homicide in lieu of a confession to the Modesto homicide, Holland stated, "[c]ause I, I wanted the one in Modesto for you people . . . . I figured it's gonna look a hell of a lot . . . for you guys"] [same]; 1292 [in describing how he used his ruse to deceive appellant in order to get information about his crimes, Holland stated, "[s]o now I'm playing . . . with you guys. . . . I'm going along alway (sic) the way"] [same].)

The Supreme Court has made it clear that the State cannot divorce itself from an informant's action by such admonishments when it knows that he intends to extract incriminating evidence and when it provides incentives for him to do so. In *Henry*, *supra*, the government officer told the informant, Nichols, to be alert to any statements made by the other prisoners, but (unlike Investigator Antone) expressly instructed him not to

initiate any conversation with or question Henry regarding his charged offense. (*U.S. v. Henry*, *supra*, 447 U.S. at p. 266.) On appeal, the Government argued that it should not be held responsible for Nichols' conduct because its officer had instructed Nichols not to question Henry and had not intended that Nichols take affirmative steps to obtain incriminating statements. (*Id.* at p. 271.) The Supreme Court found the officer's disclaimers to be irrelevant, stating: "Even if the [officer's] statement that he did not intend that Nichols take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result."[141] (*Ibid.*; see also *Maine v. Moulton, supra,* 474 U.S. at p. 177, fn. 14 [court rejects similar argument that state took steps to prevent informant from inducing defendant to make incriminating statements by instructing the informant not to interrogate him, finding such instruction to be inadequate where the State's officers — aware that the informant and Moulton were expressly meeting to discuss their upcoming trial and pending charges — asked the informant to wear a body wire transmitter to record their conversation].) Here, Investigator Antone knew with certainty that Holland intended to extract more information from appellant. Thus, like the authorities in *Henry*, Antone and the Stanislaus County District Attorney's Office "intentionally creating a situation likely to induce [appellant] to make incriminating statements

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[141] The officer was aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry's suspicion. And, like Holland, Nichols had a motive to obtain incriminating information. Whereas Holland's motive was the deal to consolidate his state charges with a promise of no state time, Henry's motive was purely financial since he was paid for information on a contingent-fee basis. (*Henry*, *supra*, 447 U.S. at pp. 270-271.)

without the assistance of counsel," thereby violating his Sixth Amendment right to counsel. (*Henry*, *supra*, 447 U.S. at p. 274.)

iv. **After Meeting With The District Attorney's Representative On June 26 And July 3, Holland Obtained Incriminating Evidence In Order To Obtain The Deal That The State Was Dangling In Front Of Him.**

As noted above and discussed more fully below, Holland did, in fact, obtain incriminating evidence from appellant after meeting with Investigator Antone. After the June 26 interview, Holland elicited statements from appellant about the San Diego case and details of the Modesto case, including that appellant, alone, committed the Modesto crime. And after the July 3 interview, Holland extracted, among other things, signed confessions from appellant to both crimes. (See sections (C)(3)(c) & (d), *post.*) Holland secured this evidence in order to obtain the deal that the State was offering to give him if his information was "worth it." The discussion in section (C)(3)(b)(*i*), *ante*, demonstrates that Holland wanted a deal in exchange for the information he was eliciting from appellant, and section (C)(3)(b)(*ii*), *ante*, establishes that during the June and July interviews, Investigator Antone provided encouragement that the deal could be done. Holland received similar encouragement from Antone during the dozen telephone conversations they had between June 26 and September 4. (1 RT 291.) Antone acknowledged at the motion hearing that the primary subject of those conversations was what had Antone done towards contacting the counties and "how soon" could the deal be put together. (1 RT 290-291.) He also acknowledged that his contacting the counties "could be construed" as "part of the mechanism to . . . further the deal and eventually consummate it." (1 RT 291.)

Although Holland did not sign the deal agreement until September 4, it was clear that prior to that date, he anticipated receiving his deal and relied upon the authorities' inducements regarding their intent to pursue it. Holland testified that prior to his actual signing of the agreement, he had several conversations with Investigator Antone and other law enforcement officers regarding the specifics of the deal and he had expected to receive the deal. (1 RT 219-220.) The following questions and answers make it clear that although the deal was not completed and signed until September 4, Holland was told beforehand that it was going to happen:

> Question: And you signed that [referring to deal agreement] on what date?
>
> Holland: September 3rd or September – no, September 4th.
>
> Question: Now, prior to that time, were there any agreements between the – between the district attorney's office and yourself?
>
> Holland: Well, there was all kind of verbal agreements that came down to this.
>
> Question: Like what?
>
> Holland: It's in here. Just never came to pass.
>
> Questions: Are you – are you saying that you had actually entered into an Agreement before September 4th?
>
> Holland: No. I'm saying that there was verbally things that were going to take place, but it didn't happen until this . . . . *I was told this was going to be the agreement*. But things just kept going on and on and on. There was obstacles in the way of this taking place, I guess.

(1 RT 259, emphasis added.)

Moreover, Holland's behavior evidenced his belief that he was going to receive the deal. When the detectives arrived with a search warrant on

September 4, Holland told them that he had all of the written documents — the notes and the confessions — ready for them: "Everything all well you can see I mean I had it all ready for you I mean this all bundled up ready to go I mean I was ready to get this done." (5 CT 1359.) Holland's continued interviews with Investigator Antone and his continual telephone calls to him inquiring about the status of the deal also demonstrate that based on the State's inducements, Holland had an ongoing expectation that he would receive benefits in exchange for his information. (1 RT 290-291.)

Holland's statements to Antone on July 3 indicate that when Holland extracted information from appellant about both the San Diego and Modesto crimes after the June interview, he did so because of the prospect of the deal that Antone had promised to work on. He told Antone that (1) when he used his ruse to convince appellant to confess, he was "now . . . playing . . . with you guys" (5 CT 1292); and (2) he had refused to take the San Diego confession as collateral, because he wanted a confession to the Modesto case for the Stanislaus prosecution team. (5 CT 1294.) As Antone stated during that interview, Holland had done so in order to "sweeten the deal." (5 CT 1298.)

In sum, there can be no doubt but that after June 26, Holland's extraction of information from appellant was done as the result of the prospect of a deal that Antone had been dangling in front of him.

v. **Holland Did, In Fact, Receive The Deal He Wanted In Exchange For Eliciting Statements From Appellant.**

The State did, in fact, secure and provide the consideration that Holland requested in exchange for eliciting statements from appellant. It moved Holland in late August after he had called Investigator Antone and stated that appellant had accused him of being a snitch (2 RT 304-305), and

on September 4, it gave Holland the deal he had requested in exchange for his information and his testimony against appellant. (5 CT 1302-1304; see also Exhibit 9 [9/4/92 Agreement Between Eric Holland and the Office of the Stanislaus County District Attorney].)

Following the June 26 interview, Investigator Antone began working toward putting the deal together. (5 CT 1246-1248, 1252, 1266, 1281, 1285, 1287 [7/3/92 Interview].) By the time of the July 3 interview, the Stanislaus County District Attorney's Office had already determined that the deal was, in fact, feasible and at that interview, promised Holland that it would pursue securing it. (5 CT 1252, 1266.) It was, however, a time-consuming process as it involved contacting deputy district attorneys in all the counties in which Holland faced pending charges and persuading them to transfer jurisdiction of their cases to Stanislaus County. (5 CT 1248, 1287; 1 RT 291-292.) Between July 3 and September 4, the Stanislaus District Attorney's Office contacted deputy district attorneys in Madera, Fresno, Kern, and Los Angeles counties and persuaded them to allow Holland's pending charges to be consolidated in Stanislaus County and to have concurrent sentences imposed on all counts, to be run concurrently with his pre-existing federal sentence. (See Exhibit 9, pages 2-5.) On September 3, Stanislaus Deputy District Attorney Douglas Fontan and Holland's counsel presented the proposed deal to Judge Vander Wall, who agreed to accept Holland's guilty pleas to the consolidated charges and sentence according to the plea agreement. (5 CT 1304; see also Exhibit 9, page 5.) And on September 4, Holland signed the agreement. (5 CT 1302, 1536; Exhibit 9, pages 4, 6.) Accordingly, Holland did receive the consideration he requested in exchange for the statements he had elicited from appellant.

vi. <u>**The Stanislaus County District Attorney's Office Provided Powerful Inducements For Holland To Elicit Incriminating Statements From Appellant And Intentionally Created A Situation Likely To Induce Appellant To Make Incriminating Statements Without The Assistance of Counsel, Thereby Violating The Principles of *Massiah* And *Henry*.**</u>

The facts, discussed above, demonstrate that an agency relationship between Holland and the Stanislaus County District Attorney's Office was created on June 26, 1992. An agency relationship does not require the State to direct an informant to obtain incriminating information. (*Whitt I, supra*, 36 Cal.3d at p. 741.) *Massiah* is also violated when the State has created powerful inducements for the informant to elicit incriminating statements. (*Ibid.*) As made clear by the Supreme Court, whenever the state "intentionally creat[es] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel, the Government violate[s] [the defendant's] Sixth Amendment right to counsel." (*U.S. v. Henry, supra*, 447 U.S. at p.274 .)

Here, as in *Henry*, the State created a situation likely to induce an informant (Holland) to elicit incriminating statements from appellant. Whereas Nichols, the paid informant in *Henry*, was induced by financial considerations (*Henry, supra*, at pp. 270-271), Holland was lured by the prospect of a deal to avoid state prison time. On June 26, the State created incentives for Holland to elicit incriminating statements from appellant when it expressed a "definite" interest in his information, indicated that a deal was possible but that it would not be offered until it heard what Holland had to offer, arranged for future interviews, and started working toward putting the deal together. From that point on, Holland and the State

had an agency relationship, as was confirmed by roughly a dozen telephone conversations between June 26 and September 4, as well as the July 3 interview, during which the State continued to hold out the prospect that Holland's deal would happen if Holland's information was "worth it" and he gave them "everything that you think you can." The State knew that (1) Holland wanted consideration in return for informing against appellant; and (2) Holland intended to continue eliciting incriminating information from appellant in order to obtain that deal. The State gave Holland the green light to continue his charade, knowing that he intended to obtain more incriminating information. (*Cf. In re Williams* (*Stanley*) (1994) 7 Cal.4th 572, 592-593 [Referee finds agency relationship where informant came to authorities with information of Williams' escape plan and authorities thereafter enlisted informant's help in obtaining further details of the plan, encouraging informant "to feign his cooperation in the escape plan in order to gain as much information as possible"].) These factors provided inducements for Holland to extract as much information as possible from appellant to increase his chances of obtaining what the State described as a difficult deal to arrange. Accordingly, after June 26, Holland was acting as a police agent, because the Stanislaus County District Attorneys' Office intentionally created a situation which would likely induce him to extract incriminating evidence in the absence of counsel.

The Supreme Court has also made clear that the State may violate *Massiah* by taking advantage of a situation created by others:

> [K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have

> counsel present in a confrontation between the accused and a state agent.

(*Maine v. Moulton*, *supra*, 474 U.S. at p. 176; *accord*, *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1240 ["critical issue for *Massiah/Henry* purposes is the government's 'knowing exploitation' of an opportunity to coax information from a formally charged suspect in the absence of his lawyer"].) The State had argued in *Moulton* that its conduct could be distinguished from *Massiah* and *Henry*, because in those cases the police had arranged for the confrontation between the informant and the accused at which the incriminating information was obtained, whereas Moulton had invited the informant to the meeting where he made his incriminating statements. (*Maine v. Moulton*, *supra*, at p. 174.) The *Moulton* Court rejected the State's attempt to limit *Massiah/Henry* violations to situations where police set up the confrontation between the accused and the informant or take some other equivalent step. (*Id.* at pp. 174-176.) The State is under an "affirmative obligation" not to "circumvent" an accused's Sixth Amendment rights, the Court held, and "[k]nowing exploitation" by the State of an opportunity to confront the accused without counsel is a breach of this obligation, even where the State's officers have done nothing whatsoever to create its opportunity. (*Maine v. Moulton*, *supra*, at p. 176.)

On the issue of how such "knowing exploitation" could be established, the *Moulton* Court acknowledged that "[d]irect proof of the State's knowledge [that an informant would obtain incriminating information in the absence of counsel] will seldom be available to the accused." (*Maine v. Moulton*, *supra*, at p. 176, fn.12.) It made clear, however, that a Sixth Amendment violation occurs if the police "'must have known' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel." (*Ibid.*)

A finding of agency is compelled here under *Maine v. Moulton*. The Stanislaus County District Attorney may not have set up the initial interaction between appellant and Holland, but it certainly took advantage of the situation created by Holland. When Holland approached the district attorney's office with some information about appellant's case and made it clear that he wanted a deal in return, Investigator Antone, the district attorney's representative, encouraged Holland to understand that a deal was possible. When Holland stated that he intended to obtain more statements from appellant, Antone gave him permission to continue his deception to extract statements and allowed Holland to return to his cell, knowing that Holland would, in fact, continue to extract statements from appellant. These undisputed facts show that at the very least, as of June 26, the Stanislaus County District Attorney "must have known" that Holland was likely to obtain further incriminating statements from appellant because of the prospect of getting a deal. There was a knowing exploitation of an opportunity to confront appellant without counsel under *Maine v. Moulton*, and thus a Sixth Amendment violation.

The Ninth Circuit decision in *Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, also provides strong support for finding agency here. There, the informant (Moore), who shared a jail cell with defendant Randolph, sent authorities a letter offering to testify against Randolph. Moore met with a deputy district attorney and detective several times to discuss his possible testimony, as well as a deal relating to the crime for which Moore was being held. After each of those meetings, Moore was returned to the cell he shared with Randolph. At some point, Moore told authorities that Randolph had confessed. (*Id.* at p. 1139.) The Ninth Circuit observed that unlike in *Henry*, there was no explicit deal under which Moore was promised compensation in exchange for his testimony, and the court

accepted as true the State's contention that Moore was told not to expect a deal in exchange for his testimony. (*Id.* at p. 1144.) However, the Ninth Circuit explained:

> *Henry* makes clear that it is not the government's intent or overt acts that are important; rather, it is the "likely . . . result" of the government's acts. (Citation.) *It is clear that Moore hoped to receive leniency and that, acting on that hope, he cooperated with the State. [The deputy district attorney and the detective] either knew or should have known that Moore hoped that he would be given leniency if he provided useful testimony against Randolph.*

(*Ibid.*, emphasis added.) The Ninth Circuit concluded that the lack of an explicit agreement was no bar to a finding of agency, because there was "substantial evidence to support a conclusion that [the authorities] knew or should have known that Moore believed that he would receive leniency if he elicited incriminating statements from Randolph, circumstances sufficient to make Moore a government agent." (*Id.* at p. 1147.) The Ninth Circuit concluded:

> There is sufficient undisputed evidence to show that the State made a conscious decision to obtain Moore's cooperation and that Moore consciously decided to provide that cooperation. That cooperation rendered Moore an agent of the State.

(*Id.* at p. 1144.)

Moreover, the Ninth Circuit determined that subject to factual determinations to be made by the district court, Randolph had potentially established a *Massiah* violation.[142] Although there was no suggestion in the

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[142] The district court had not made factual findings regarding whether Moore obtained the incriminating information after his first meeting with the authorities and whether Moore had taken any action to elicit that
(footnote continued on next page)

decision that Moore's original placement in Randolph's cell was orchestrated by the State, the Ninth Circuit observed that if, in fact, the State returned Moore to his cell with Randolph after the former had indicated his willingness to cooperate with the prosecution, "the State 'intentionally create[d] a situation likely to induce [Randolph] to make incriminating statements without counsel's assistance.' (Citation.)" (*Id.* at p. 1146.) If that was true, the authorities "took the risk that Moore might 'deliberately elicit' information from Randolph within the meaning of *Massiah* and *Henry* and that such information would be excluded at trial." (*Ibid.*)

The same is true here. Although there was no final deal made on June 26 or July 3, it was clear that Holland was trying to receive a deal and that, encouraged to believe that a deal was feasible, he proceeded to extract statements from appellant to sweeten his offering to the prosecution. There was more than sufficient evidence that the Stanislaus County District Attorney's Office made a conscious decision to obtain Holland's cooperation, that it knew Holland would return to his cell located next to appellant after he had indicated his willingness to inform in exchange for a deal, and that Holland decided to provide that cooperation in furtherance of his goal of achieving the deal that the prosecution was "definitely" interested in. In fact, this case provides a much stronger case for a *Massiah* violation than *Randolph*, for the authorities here **did** communicate to the informant that a deal was possible and that they were working to put it together. Moreover, it was clear to the authorities when Holland was

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(footnote from previous page)
information. The Ninth Circuit vacated the district court's denial of Randolph's *Massiah* claim and remanded to the district court to determine those matters. (*Randolph v. California*, *supra*, 380 F.3d at pp. 1144-1146, 1149.)

returned to his cell after the June 26 interview that he intended to go back and get more statements for the prosecution. He told Antone that he was going to obtain statements about the San Diego homicide case. This case cannot be meaningfully distinguished from *Randolph*, and under its reasoning, a finding of agency is compelled.

This case stands in stark contrast to others in which this Court has rejected *Massiah* claims on the ground that informants were not police agents. In *People v. Coffman*, *supra*, 34 Cal.4th at p. 68, for example, the Court held that the mere fact that a "known informant . . . was housed near" the defendant did not "compel[]" the conclusion that the informant was a police agent. That holding was based on the fact that the informant "acted on her own initiative," and on "the absence of any evidence that the authorities had encouraged her to supply information or insinuated that to do so would be to her benefit, or that her release from jail was other than in the normal course for a minor parole violation." (*Ibid.*) Notably, there was no evidence in *Coffman* that the informant asked for or received any benefits. (*Id.* at pp. 67-68.) Unlike the informant in *Coffman*, Holland asked for and received benefits for his information. Unlike that case, Holland received encouragement from the Stanislaus County District Attorney's Office to provide information. Antone dangled a deal conditioned on Holland providing sufficient information worth the trouble of contacting other counties and persuading them to agree. Antone promised to try to put that deal together and to move Holland after he had "given us everything you think you can," and Antone gave Holland permission to continue his ruse to obtain more information. Thus, in appellant's case, unlike *Coffman*, (1) the authorities encouraged Holland to supply information and led him to understand that to do so would be to his benefit; and (2) Holland did, in fact, receive a deal for his provision of information against appellant.

People v. Howard (1988) 44 Cal.3d 375, 399-402, found no agency relationship where a jailhouse informant contacted the authorities and reported conversations in which Howard solicited his assistance in killing witnesses. The informant did not ask for any benefits and was told not to ask any questions or request documents, but simply to listen and accept any material offered him. At a second meeting, also initiated by the informant, he turned over documents which he had received from Howard. The police arranged a third meeting to tell the informant that he might be called to testify. The informant then asked to serve his time in Southern California and was told that no promises could be made but that they would try to accommodate him. Thereafter, the informant reluctantly testified at Howard's trial. (*Id.* at pp. 399-400.) This Court found no *Massiah* violation on the basis of the following factors: (1) after the informant initiated contact with the authorities, he was warned not to solicit any information from Howard, and there was no indication that he breached that directive; (2) no discussions regarding any possible benefit to the informant were had until the third and final meeting, and the bulk of his relevant information was communicated at the first two meetings; (3) the informant did not seek compensation for his information, was motivated by concern for the witnesses whom the defendant wanted to kill, and did not receive any leniency toward his term. (*Id.* at pp. 401-402.) Most critically, this Court observed, "although [the informant] may have gotten the placement he desired, he had not been promised any quid pro quo in return for evidence before he testified." (*Id.* at p. 401.)

Here, in contrast, it was clear from the very first interview with the authorities that Holland was seeking a deal in return for his information. Moreover, Holland was promised and received that quid pro quo in return for evidence before he testified. Finally, Holland was never instructed not

to solicit any information from appellant. In fact, when he told Investigator Antone that he intended to get more information, he was given permission to continue his ruse to do so and thereafter, the Stanislaus County District Attorney's Office gladly received that information. This case is a far cry from *Howard*.

It is also distinguishable from *People v. Pensinger* (1991) 52 Cal.3d 1210 and *People v. Fairbank* (1997) 16 Cal.4th 1223, cases in which there was no evidence that anyone made the informants any promises, direct or implied, of benefit or leniency in return for the statements they obtained from the defendant. In *Pensinger*, a jailhouse informant contacted the authorities and stated that Pensinger was talking about his crime. (*Pensinger*, *supra*, 52 Cal.3d at p. 1247.) Although the informant was interviewed six times, he initiated each interview, he did not ask for or expect any benefit, no officer ever promised him any benefit, and he was repeatedly told not to expect any reward. (*Id.* at pp. 1247-1250.) Detectives and the deputy district attorney in Pensinger's case later testified for the informant at his own penalty phase, but there was no evidence that this had been requested or proposed prior to the informant obtaining the defendant's statements or that it resulted as quid pro quo for his testimony against Pensinger. (*Id.* at pp. 1248-1250.) This Court concluded in *Pensinger*: "It is impossible on this record to conclude that [the informant's] statements were motivated by any promises of the police or prosecutor." (*Id.* at p. 1250.)

In *Fairbank*, a jail informant contacted the authorities, wishing to provide information about a capital defendant's case. This time the informant, who was awaiting sentencing, did ask for a deal in return for his provision of notes and information about Fairbank's case, but the police told him that the deputy district attorney handling his cases was not inclined

to make a deal.[143] (*People v. Fairbank, supra,* 16 Cal.4th at p. 1246.) Although the informant, with the authorities' knowledge, continued to obtain information from Fairbank after meeting with police, this Court held that his contact with police did not by itself make him a police agent. (*Id.* at p. 1248.) The trial court specifically found that "'law enforcement . . . made deliberate and direct efforts and attempts to do everything they could to dispel the fact that they would be able to be of any help [to the informant] and that there was any implied promise of leniency.'" (*Id.* at pp. 1248-1249.) The *Fairbank* Court concluded that there was substantial evidence to support this finding; even though the police asked the informant to provide his information and notes, they made no promises about a possible deal, did not direct him to obtain more information, and did not suggest that obtaining more information would benefit him. (*Id.* at pp. 1248-1249.) This Court thus rejected Fairbank's argument that the informant and the police were operating under an implicit agreement: "[the informant] may have hoped to receive some benefit in exchange for his ongoing receipt of information, but he nevertheless continued to act on his own initiative." (*Id.* at p. 1248.) Moreover, this Court stated that Fairbank had failed to show that the informant deliberately elicited information from him. (*Id.* at p. 1249.) The informant denied initiating any communications with Fairbank, and Fairbank presented no evidence to the contrary. (*Ibid.*)

Unlike the informant in *Pensinger*, Holland asked for a benefit and unlike the situation in *Fairbank*, was not told to expect no help with his own cases. To the contrary, Holland was led to believe that the deal he desired was possible and that attaining it depended on the value of his

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[143] Eventually, the informant did receive a lower sentence than he otherwise would have received. (*Fairbanks, supra,* 16 Cal.4th at p. 1246.)

information. In fact, Holland was promised that the Stanislaus District Attorney would try to obtain the requested deal, and Holland did receive that deal as quid pro quo for the evidence he produced against appellant. In contrast to *Fairbank*, the authorities not only made promises but made clear that obtaining more information would benefit Holland. Whereas the informant in *Fairbank* merely hoped unilaterally to receive some benefit, the Stanislaus County District Attorney's Office encouraged Holland to believe that his deal was attainable. In both *Pensinger* and *Fairbank*, this Court stated that police simply made use of the informant's own initiative. But here, the authorities let Holland know they were "definitely" interested in his information and that a deal was within the realm of possibility, as long as his information was "worth it" and he gave them "everything that you think you can."

This case is also distinguishable from *People v. Williams (Barry)* (1997) 16 Cal.4th 153, another jailhouse informant case in which this Court rejected a *Massiah* claim. There, the informant contacted the authorities and stated that he wanted to cut a deal for information. The informant was told by an officer that (1) he could not promise anything; (2) the informant would have to see the district attorney; (3) the informant was not his agent; and (4) there was no deal. (*Id.* at p. 202.) A week later, the officer and a deputy district attorney met with the informant; according to the deputy district attorney, his primary interest in talking with the informant was in connection with the informant's status as a victim and witness on an unrelated murder case. During that meeting, the informant related Williams' statements regarding a series of gang incidents; the informant was not promised any leniency or asked to obtain any additional information. The informant was merely told that if anything could be worked out, it was up to supervisors and that it would take a considerable

amount of persuasion to get anything done. The deputy district attorney also stated that he had an airtight case against Williams and did not need the informant's statement. (*Id.* at pp. 202-204.) The informant subsequently called the authorities with information about Williams' intimidation of a witness in his capital case — information which Williams alleged was obtained in violation of *Massiah.* In that conversation, police did not request any additional information or promise any reward. (*Id.* at p. 203.) Thereafter, the informant pled guilty to his robbery charge with the use of a firearm and in exchange for the plea, the deputy district attorney struck an allegation which would have barred probation. (*Ibid.*)

This Court rejected Williams' argument that State representatives/officers induced the informant to act on their behalf in exchange for leniency on his pending charge. (*Id.* at pp. 202-206.) Williams argued that although no express promises were made, the informant was given the impression that a deal was possible and was led by indirect comments to expect leniency if he elicited incriminating information from Williams. (*Id.* at p. 202.) This Court held that the trial court properly denied Williams' *Massiah* motion because he failed to establish that the informant deliberately elicited incriminating statements and that he acted as an agent of the State. (*Id.* at p. 204.)Williams failed to provide any factual support for the former prong, and the agency prong was not met because the authorities merely accepted information without providing any promises, encouragement, or guidance. (*Id.* at pp. 204-205.) As found by the trial court in that case, the informant "had neither been promised nor led to expect any benefit in return for his statements." (*Id.* at p. 204.)

Superficially, *Williams* may appear somewhat similar to this case. However, there are several substantial differences. One, Holland was promised that the Stanislaus District Attorney would try to put together the

deal he desired and was informed that the deal was possible and that the prosecution was working toward obtaining it. Thus, unlike the informant in *Williams*, Holland was, in fact, led to understand that a benefit was possible in return for him continuing to elicit incriminating statements. Moreover, Holland was told that attaining the deal depended on the value of his statements, thus providing incentive for him to obtain as much incriminating evidence as possible. Two, the evidence here shows that from the beginning, the authorities worked toward putting the deal together and that Holland did, in fact, receive the requested deal in exchange for his evidence. In contrast, although the informant in *Williams* subsequently received what might be interpreted as favorable treatment on his case, there was no evidence that such treatment resulted from the information he elicited from Williams. According to the decision, the striking of the no-probation allegation was made in exchange for the informant's plea. (*Id.* at p. 203.) And there certainly was no evidence that a deal was ever promised or reached, as occurred in this case. Three, the record in this case shows beyond any doubt that Holland deliberately elicited incriminating statements from appellant. *Williams*, accordingly, provides no support for rejection of the *Massiah* claim here.

People v. Whitt I, *supra*, 36 Cal.3d 724, the case upon which the trial court relied in denying appellant's motion to suppress (2 RT 354-355), also provides no support for such rejection. Whitt and the informant had known each other before they were placed in the same cell, and within hours, Whitt told the informant the story of his offense.[144] The informant contacted the

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[144] Their cell placement was purely coincidental, based on the availability of space. (*Whitt I*, *supra*, 36 Cal.3d at p. 737.) According to the informant, Whitt volunteered all his statements; the informant had not asked any questions. (*Id.* at p. 739.)

authorities and on the next day, July 8, met with detectives. He gave them a brief version of Whitt's story and at the conclusion of that conversation, a detective said that he would contact the district attorney's office about the informant's case. (*Whitt I*, *supra*, 36 Cal.3d at pp. 737-738.) The detective warned the informant not to solicit any further information, but told him that if he happened to hear any more information, "there was nothing that [they] could do, you know." (*Id.* at p. 738.) Following that meeting, the informant spoke to his attorney and asked whether he could get a suspended or concurrent sentence on his pending charge in return for his cooperation on the Whitt case. (*Ibid.*) On July 25, a detective came to see the informant, to ensure that he was in protective custody before his statement was released to Whitt's counsel. At that meeting, the informant volunteered that he had had further conversations with Whitt and gave the detective a more detailed description of Whitt's crime. (*Ibid.*) At some point between the meetings, the detectives had contacted the district attorney, but the informant never received any promises of leniency, nor did he ever receive any benefits (other than protective custody). The informant testified that by July 25, he no longer expected any favors. (*Ibid.*)

On appeal, Whitt argued that all statements made after July 8 should have been suppressed because after that date, the informant was acting as a police agent. (*Whitt I*, *supra*, 36 Cal.3d at p. 739.) This Court found the question to be "a very close and difficult one." (*Id.* at p. 744.) Particularly, the Court was bothered by the detectives' offer to speak to the prosecutor on the informant's behalf, observing that it raised a serious concern as to whether the state gave the informant an incentive to extract further statements from Whitt. (*Ibid.*) Furthermore, stated the Court, "the fact that the police must have realized on July 8th that the informant was interested in informing and hoped for a reward for his information gives pause."

(*Ibid.*) However, this Court found that the detectives' mere acceptance of the informant's information, even with the promise to talk to the prosecutor, was not sufficient evidence that the informant expected a quid pro quo and that the police encouraged that expectation. (*Ibid.*) The Court noted that there was no prior working relationship between the informant and detectives, the offer to contact the district attorney was in no way conditioned on the informant providing any further information, the police did not indicate that more information would help influence the prosecutor toward leniency, and the police made no arrangements to contact the informant again after July 8 regarding his conversations with Whitt. (*Ibid.*) The most significant factor for the Court, however, was that the detectives did not obtain any benefit for the informant, "who must have been aware by July 25th that no promises were likely." (*Ibid.*) Whitt argued that an agency relationship was established because (1) the informant "obviously wanted leniency;" and (2) "the police wanted the information and, therefore, must have given [the informant] some promise of leniency." (*Id.* at p. 745.) This Court responded:

> However, these motivations suggest at most a hope for some reward by [the informant]. They do not demonstrate that the police actively encouraged this hope or that the police actually promised to do anything in exchange for information. Thus, the record does not demonstrate that an agency relationship was established.

(*Ibid.*)

Whereas the facts in *Whitt I* were "close" but insufficient to establish that the police gave the informant an incentive to obtain information from Whitt after July 8, the facts here demonstrate that Investigator Antone did actively encourage Holland to hope for his deal. Antone did not merely say that he would speak to the district attorney. He was the district attorney's

representative, and he told Holland that his office "definitely" had interest in working out a deal in exchange for Holland's information, that the deal was possible and had been done in other cases. Moreover, Antone promised that his office would try to put the deal together. This, and the fact that Holland, unlike the informant in *Whitt I*, **did** receive his desired benefit, distinguish the instant case from *Whitt I*. Additional factors which distinguish this case from *Whitt I* and establish agency are that (1) from the very beginning, Holland made it clear that he wanted a deal in exchange for his information; (2) unlike the informant in *Whitt I*, Holland, in order to secure and protect his deal, would not release his evidence until the deal was made; (3) the authorities made arrangements to contact Holland after June 26 regarding his conversations with appellant; and (4) Holland testified that he did expect to get his deal; he was told that there was going to be an agreement but obstacles had to be overcome. (1 RT 219-220, 259.) Thus, in contrast to *Whitt I*, the evidence showed that Holland was led to believe that a quid pro quo was feasible. Moreover, unlike the informant in *Whitt I*, (1) Holland deliberately elicited statements from appellant by using a ruse and actively questioning and prodding him for information; and (2) when Holland told Antone that he intended to use his ruse to extract more information from appellant, he was never instructed not to, but was instead given permission to do so. In sum, whereas the informant in *Whitt I* never received any promises, direct or implied, of leniency and did not expect any favors, throughout the negotiations between Holland and the Stanislaus District Attorney's Office there was explicit discussion of a deal and its feasibility, which both Holland and the district attorney pursued until it was done.

Thus, this case is distinguishable from cases in which this Court found insufficient evidence that the informant was acting as a police agent.

Unlike those cases, the Stanislaus County District Attorney's Office provided powerful inducements for Holland to elicit incriminating statements from appellant and intentionally created a situation likely to induct appellant to make incriminating statements without the assistance of counsel.

vii. **The Trial Court Erred In Finding That Holland Was Not An Agent After Either The June 26 Or July 3 Interviews.**

The trial court found no agency under *Whitt I* and *United States v. Henry*, albeit conceding that like *Whitt I*, this was a close case. (2 RT 354.) The court acknowledged that similar to *Henry*, (1) Holland was "no more than a fellow inmate"; and (2) appellant was in custody at the time of his conversations with Holland. (2 RT 355.) However, the court found that this case was governed by *Whitt I*, and not *Henry*, because Holland was not a paid informant and no deal was made with him "before the information was finally received by the People." (2 RT 354.)

In concluding that Holland was not acting as an agent of the police after either the June 26 or July 3 interviews, the trial court relied on the following reasons: (1) "Antone told [Holland] he wasn't to consider himself a police agent"; (2) Antone "did not instruct [Holland] to elicit the information"; (3) "there were no inducements made to [Holland] to do this"; (4) Holland would not give his documents to the authorities and they had to serve a search warrant to obtain them; (5) there was no evidence that the police had any involvement in Holland's continued housing next to appellant's cell, and the prosecution's subsequent movement of Holland from the jail did not "constitute making him an agent" because "[h]e had the information"; and (6) the deal was not struck until after the authorities obtained the information from Holland. (2 RT 352-354.) The third reason is

factually incorrect, the fifth reason ignores evidence in the record, and given the incentives provided to Holland, the other reasons are legally insufficient to support the court's conclusion that Holland did not become an agent of the State.

As discussed *ante* in sections (C)(3)(b)(*ii*) and (*iv*), contrary to the trial court's statement, Antone did give inducements to Holland, and it was clear that Holland obtained incriminating information in order to obtain the deal that the State was dangling in front of him. Although the court acknowledged that Antone expressed interest in Holland's information (2 RT 352), it ignored the following significant inducements which established Holland's agency:

1. At the June 26 interview, Antone understood that Holland "may want to work a deal or something along those lines" under which, as Holland explained, his sentences in "this county and all the other counties I have warrants in . . . would run concurrent with the time I had in federal [prison]" (5 CT 1218-1219), Antone informed Holland there "definitely" was interest in such a deal (5 CT 1230), Antone anticipated that Holland "will tell me" more (i.e., in the future) (5 CT 1238), and Antone told Holland that what he was doing was part of an "ongoing investigation" (5 CT 1228, 1229), that Antone "d[id]n't see . . . there's anything wrong with" Holland methodology of misleading appellant to elicit statements that he would give to the district attorney (5 CT 1240), and that there would be further interviews after Antone talked to the

prosecutor assigned to appellant's case about what Holland had to offer (5 CT 1237, 1242).

2. At the July 3 interview, Antone told Holland that the deal Holland wanted would "involve some legwork" because Deputy District Attorney Fontan would have to contact each county and explain "what it is you have to offer us and if it's worth it" (5 CT 1248), that the prosecution was "gonna have to jump through a hell of a lot of hoops" (5 CT 1253), that the prosecution had already been working toward putting the deal together (5 CT 1248), that Holland "need[ed] to understand" as the "number one" thing that he was "gonna be moved . . . out of this jail" only "once you have given us everything that you think you can. . . ." (5 CT 1257-1258), and that the deal Holland sought was "feasible" and had been "done before" and that Antone would "guarantee . . . that we will try to do it" (5 CT 1266).

The trial court also ignored the following statements made by Holland during the July 3 interview which demonstrated he had been, since the June 26 interview, acting as the State's agent in eliciting incriminating information from appellant:

1. Holland told Antone that he had "cross examined [appellant] over and over and over and over again" (5 CT 1256), and had "kept re-drilling him and . . . re-drilling him" (5 CT 1292-1293) in order that it would be "a lot easier for you guys" (5 CT 1293).

2. Holland described how he was able to extract an oral confession from appellant to the San Diego

homicide[145] (5 CT 1293-1295), but that he would not accept that confession in lieu of a confession to the capital crime "[c]ause I . . . wanted the one in Modesto for you people" (5 CT 1294).

3. In describing how he enticed appellant by creating a fictional colonel who could help him, Holland stated: "So now I'm playing with you guys." (5 CT 1292.)

4. Holland asked if it would be pertinent to the prosecution's case if he obtained a written, signed confession from appellant and appellant "wrote in there exactly I want these people done." (5 CT 1297-1298.)

In addition to ignoring these substantial inducements and statements evidencing agency, the trial court operated under a fundamental misconception. The court opined that because the deal was not actually delivered until after Holland obtained the information from appellant, Holland was not acting as an agent for the State. (2 RT 353 ["And it seems to me the deal was struck after the information was obtained."].) This conclusion is based on a misapplication of controlling law. Although the trial court quoted the governing principle set forth in *Henry*, *supra*, 447 U.S. at page 274, and *Whitt I*, *supra*, 36 Cal.3d at page 742 — "the critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused" (2 RT 355) — it failed to apply it. Neither of those cases or the legion of cases discussing *Massiah* claims have required that a deal must be struck before an informant can become an

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[145] As discussed *post,* in section (C)(3)(d)(*ii*), Holland elicited information about the San Diego case after the June interview.

agent. The decisive questions are: (1) did the State create inducements for the informant to elicit incriminating statements? and (2) did the State encourage Holland to provide information and insinuate that to do so would be to his benefit? The answer here is a resounding yes to both questions. Thus, the fact that the deal agreement was not signed until after Holland obtained the information and the authorities obtained the written documents, is legally insufficient to support the trial court's conclusion that Holland did not become an agent of the State. As explained by the Ninth Circuit in *Randolph v. California*, *supra*, 380 F.3d at p. 1144, an explicit deal or agreement is not necessary to a finding that an informer acted as an agent of the State; what matters is the relationship between the informant and the State, and whether the informant cooperated with the State in the expectation of receiving benefits. Here, long before September 4, Holland and the Stanislaus County District Attorney's Office behaved as though there was an agreement between them — that Holland would provide evidence against appellant in exchange for leniency on his own pending charges.

Also legally insufficient are the trial court's reasons that (1) Antone told Holland that he was not an agent for the Stanislaus County District Attorney; (2) Antone did not instruct Holland to elicit information; and (3) Holland would not give his documents to the authorities — they had to serve a search warrant to obtain them. In section (C)(3)(b)(*iii*), *ante*, appellant has explained why Antone's admonishment that Holland was not an agent did not shield the State from its responsibility for its "'knowing exploitation' of an opportunity to coax information from a formally charged suspect in the absence of his lawyer." (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1240, quoting *Maine v. Moulton*, *supra*, 474 U.S. at p. 176.) The State, with knowledge that Holland intended to continue extracting

information from appellant, provided inducements for him to do precisely that and gave him permission to continue his ruse to do so despite knowing that Holland was trying to "sweeten the deal."

As also explained in section (C)(3)(b)(*iii*), the United States Supreme Court in *Henry* found irrelevant that the agent in that case cautioned the informant not to ask Henry any questions. (*United States v. Henry*, *supra*, 447 U.S. at p. 271; see also *Whitt I*, *supra*, 36 Cal.3d at p. 742 [if state has "created a situation likely to provide it with incriminating statements from an accused," it "may not disclaim responsibility for this information by the simple device of telling an informant to 'listen but don't ask'"].) Here, although Antone knew that Holland intended to elicit more information from appellant, he did not even instruct him not to ask appellant any questions. The investigator merely did not affirmatively ask him to do so.[146] This matters not, since Antone provided inducements and, like the agent in *Henry*, must have known that Holland's "propinquity [to appellant] likely would lead to" Holland's continued extraction of information. (*Ibid.*)

The trial court's fifth reason — there was no evidence that the police had any involvement in Holland's continued housing next to appellant's cell and the prosecution's subsequent movement of Holland from the jail did not "constitute making him an agent," because "[h]e had the information" — also does not support its conclusion that Holland did not act as the State's agent after June 26. The court acknowledged that Antone promised to move Holland "when they got the papers and notes," but did

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[146] See 1 RT 265-266, 276 [no one from law enforcement asked Holland to gather information, but nobody told him not to solicit further information from appellant].)

not consider that promise as supportive of an agency theory, stating: "Moving him, it seems to me, doesn't constitute making him an agent. He had the information." (2 CT 353.) This, however, is after-the-fact reasoning and ignores the fact that the promise was to move Holland if he obtained the incriminating documents. The court reasoned that (1) "the police would probably be remiss if they didn't attempt to move him to some location at some point, some different location for his own safety" (*ibid.*); and (2) Investigator Antone put no conditions on moving Holland. (2 CT 354.) The court was wrong. It overlooked the following statement by Antone which made it clear that his promise to move was conditional. Antone specifically told Holland: "A couple of things that you need to understand. Number one is, again, *once you have given us everything that you think you can* . . . everything you know, you're gonna be moved." (5 CT 1257 [7/3/92 Interview].) As discussed above in (C)(3)(b)(iii), the highlighted language told Holland that he first had to extract all possible information from appellant. The court, however, ignored this evidence which demonstrated the condition placed by the district attorney's office on its promise to move Holland.

Moreover, although the trial court was correct that there was no evidence that the authorities were responsible for Holland's continued housing next to appellant's cell, the court failed to consider that, as discussed *ante* in section (C)(3)(b)(*iii*), the Stanislaus County District Attorney's Office knew (1) Holland was housed in the cell next to appellant, and (2) Holland would continue his ruse and elicitation of incriminating statements from appellant, while the district attorney's office pursued making the deal.

Finally, the court's third reason does not support its conclusion that Holland did not act as the State's agent after June 26. The court stated that

Holland's refusal to give his documents to the authorities was inconsistent with a theory of agency. (2 RT 353.) However, this is simply a slightly rephrased statement of the court's erroneous belief that an informant is not an agent until a deal has actually been agreed to. Holland's refusal to turn over documents was merely a conditional refusal intended to secure his deal. At the hearing on the motion to suppress, Holland testified that he was not going to turn over the signed confession until the deal was done. (1 RT 197-199, 264.) As Holland had explained to Antone, he wanted to protect his deal by making sure that the authorities could not use any of his evidence until the deal was done. (5 CT 1254, 1256-1257 [7/3/92 Interview].) This was in no way inconsistent with a finding of agency. As demonstrated *ante* in section (C)(3)(b)(*v*), it was clear that after June 26, Holland was working to "sweeten" his side of the deal, and that he elicited incriminating evidence from appellant so as to make the deal "worth it" to the prosecution. The fact that Holland did not want to turn over his documents until the deal was agreed to does not negate the fact that when he obtained the incriminating evidence, he did so in response to the State's inducements. In fact, at one point during the hearing, the court agreed that the authorities' seizure of Holland's notes and confession did not negate a finding that Holland was acting as a state agent. (1 RT 275.) Nevertheless, when it ruled on the *Massiah* motion, the court appears to have been focusing on the wrong issue — whether the deal was signed and delivered when the information was obtained and given to the authorities — rather than the controlling issue — whether the State provided incentives which induced Holland to extract incriminating evidence from appellant.

Accordingly, the trial court's conclusion that Holland was not an agent after the June interview was unsupported by both the evidence and law.

c. **Holland Received The Written Confessions To The Modesto Crime And The San Diego Homicide After The July 3 Interview.**[147]

Holland's testimony at the hearing regarding the dates upon which he received the Modesto case and San Diego case confessions was inconsistent and obscure and contradicted by statements he made during his taped interviews with the authorities. To fully understand these problems with Holland's evidence requires a detailed examination of his various utterances, and rather than attempt to undertake such an examination here in the body of the brief, appellate counsel has chosen to do so in the form of an annotated chart that appears in Appendix D, near the end of this brief. For present purposes, appellant notes that the trial court found that the Modesto case confession dated July 4 did not exist prior to the June 26 and July 3 interviews between Holland and Antone. (2 RT 352.) Thus, the court found that Holland did not receive that confession from appellant until after the July 3 interview. This factual finding is supported by substantial evidence and, as appellant will now explain, applies with equal force to the San Diego case confession.

Holland's initial testimony at the hearing, his statements to the detectives during his September 17 taped interview, his statements to Antone during the July 3 interview, and the confessions themselves establish that Holland received both the Modesto confession and the San Diego confession after the July interview with Antone. For one thing, both

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[147] As noted in the factual summary, the Modesto case confession totaled 14 pages and the San Diego case confession totaled 7 pages. At the hearing, both parties, Holland and the court, often referred to the Modesto case confession as the "14-page confession." (See, e.g., 1 RT 212-213, 222, 238, 243-244, 250, 252-253; 2 RT 352.)

confessions were dated July 4. (See 6 CT 1424-1425 [Modesto case confession]; 6 CT 1433 [San Diego case confession].) Moreover, at the hearing, Holland testified that he did not have the 14-page confession (the Modesto confession) on July 3 and that as of that date, none of that confession existed. (1 RT 212-214.) Holland also testified that he received the written confessions to both the Modesto and San Diego cases on July 6, 7, or 8 (1 RT 218), and he told the detectives during the September 17 interview that appellant gave him the confessions to both crimes somewhere around July 4, July 5, July 7. (5 CT 1365-1366.) Other statements by Holland to Antone during the July 3 interview make it clear that he did not have either written confession prior to that interview.[148] (See, e g., 5 CT 1253 [7/3/92 Interview], emphasis added [Holland to Antone: "*If Brian wrote on a piece of paper exactly what happened signed it*, um, for the whole purpose and the reason why he gave this to me. . . . [¶] *That's what I can do. I could put it, I can get in writing*. . . . [¶] right now, exactly what's going on. In Brian's hand and that it's not just my heresay (sic). . . ."]; 5 CT 1263 [same], emphasis added [Holland to Antone: "Wh . . . why can't it be like this? You guys aren't gonna give me nothing' . . . until you guys have this. I'm telling you *if I, he, he signs a complete thing*, it's all done, boom, boom, boom, I show it to you, have my lawyer, however it's done. . . . The deals (sic) done and it's over with. . . ."]; 5 CT 1269-1270, emphasis added [Holland to Antone: "I mean, *it's gonna be in a signed confession*."]; 5 CT 1297 [Holland to Antone: "I'm on the, on the brink to where um I've got access to both the confessions."].)

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[148] Antone confirmed this point when he testified that he understood Holland's remarks during the July 3 interview to indicate that he did not already possess the confessions but was intending to obtain them. (2 RT 308.)

Similarly, during his September 4 interview, Holland told the detectives that "the confessions weren't brought at the time" he spoke with Antone. (5 CT 1366.) When Detective Grogan asked if Antone had said anything to Holland about questioning appellant or getting a confession, Holland answered: "I asked him I don't I believe I said ah would a confession make a big difference and he wanted to make he says ah um well everything would make difference. Everything that would be um pertinent to would make a difference." (5 CT 1366.) Grogan responded, "But he already told you that he was writing this confession up," and Holland replied: "Why I already knew he was *gonna write the confession* to me because that was gonna be the payment that he was gonna give me." (*Ibid.*, emphasis added.) Grogan asked, "Ok so for you to arrange all the killings your payment was going to be confessions to ___ [sic]," and Holland interrupted, stating: "Yeah well first my fee was gonna be just the San Diego case and ah um . . . ." (*Ibid.*) Holland was obviously referring to that discussion during the July 3 interview when he inquired whether it would be "pertinent" if he obtained signed confessions to both cases. (See 5 CT 1297-1298.) This passage thus demonstrates that as of the July 3 interview, appellant had not yet written either confession; Holland only knew that he was "gonna write" them.

Accordingly, it is clear that the trial court's finding that the Modesto confession did not exist until after the July 3 interview is supported by substantial evidence and applies equally to the San Diego case confession.

d. **Prior To June 26, 1992, Holland Did Not Know The Details Of The San Diego Homicide, Knew Only A Few Details Of The Capital Case Homicide, And Had Heard Only Two Early Versions Of That Homicide — Versions Which The Prosecution Disavowed At Trial.**

The trial court stated that "[a]s of the June 26th, 1992 interview, Mr. Holland basically had the information against Mr. Johnsen. He had notes, he had been talking with Mr. Johnsen. . . ."[149] (2 RT 352.) This statement is not supported by substantial evidence.

As noted above, a trial court's ruling on a motion to suppress informant testimony is entitled to deferential review; its findings of fact are reviewed for substantial evidence. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 67.) Substantial evidence is defined as "evidence that 'reasonably inspires confidence and is of "solid value."'" (*People v. Morris* (1988) 46 Cal.3d 1, 19, disapproved on an unrelated point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) As noted by one Court of Appeal, although the abuse of discretion standard of review is deferential, it is not empty. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) "A trial court abuses its

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[149] The court's reference to "the information" was vague. The court did not clarify whether "the information" encompassed both crimes — Modesto and San Diego. Nor did it identify which notes it was referring to. Holland claimed that he wrote his own notes summarizing what appellant had told him and that he and appellant exchanged notes concerning the Modesto crime — the so-called "Modesto Case Notes." (Exhibits 5 and 6; see 6 CT 1374-1410.) It was in these latter notes that Holland, through a barrage of questions, learned the details of the Modesto crime. (5 CT 1292-1295.) Holland and appellant also exchanged notes concerning the San Diego crime, which Holland labeled "Teri! Notes!." (Exhibit 7; see 6 CT 1466-1478.) We assume for the sake of argument that the judge's reference to "the information" encompasses both crimes and all of Holland's notes.

discretion when the factual findings critical to its decision find no support in the evidence." (*Ibid.*)

The record in this case lacks credible evidence to support the statement that as of the June 26 interview, Holland knew the information about the Modesto and San Diego crimes and possessed the Modesto and San Diego notes exchanged with appellant or his own notes summarizing oral conversations. The court's statement is based solely on the portion of Holland's testimony that before June 26, he knew all the information contained in both confessions and possessed the notes. (1 RT 250, 253.) Detailed examination of the Modesto case notes, however, proves that the majority of them were written after June 26. And examination of Holland's statements during his June 26 and July 3 interviews with Investigator Antone and his September 4 and 17 police interviews shows beyond dispute that (1) he did not learn the details of the San Diego homicide until after June 26; and (2) as of that date, he had heard only early versions of the capital case crime and knew only a few details of that crime. Moreover, the versions of the capital case that Holland knew at the time of the June 26 interview were disavowed by the prosecution at trial. Holland's statements during those interviews also refute Holland's claim that he possessed his own notes of the Modesto crime prior to June 26. In short, Holland's wild claim was soundly refuted by the record.

i. **<u>The Modesto Case Notes Exchanged Between Appellant And Holland</u>.**

Holland identified 35 notes, which he labeled "Modesto Case Notes," as notes that he and appellant exchanged concerning the Modesto crime. (1 RT 192-193.) According to Holland, these notes were originally not dated or numbered. (5 CT 1318.) Holland explained to the detectives on September 4 that he had recently assembled and numbered the notes, but

his numbering was not in chronological order. (5 CT 1339, 1354.) During his September 4 interview, he was asked to review and explain each of these notes, which he did. (See 5 CT 1334-1354.)

Upon close examination, the record refutes any conclusion that prior to June 26, Holland possessed all of these notes. Holland first testified that all the notes were written before June 26[150] (1 RT 278), but then testified otherwise. (1 RT 279.) His latter estimate was that "probably 85 percent" of the notes were written before June 26, but Holland could not date which notes were written before or after that date. (*Ibid.*) The trial court and the parties made no attempt to make that determination. The court simply made a blanket finding that as of June 26, Holland had the notes.

The record shows otherwise. In Appendix E, appellant presents an analysis of when each of the 35 notes was written. This analysis, based on examination of the notes themselves as well as Holland's explanations of them and other exchanges between Holland and the detectives, enables us to distinguish between those notes which were written after June 26 and those which were written prior to the 26th. As explained in Appendix E, the evidence establishes that only three notes (notes ##2, 20, and 34) were written before June 26. (Appendix E, at pp. 075-077.) The evidence demonstrates that 23 of the notes (notes ##1, 3-6, 9-16, 18, 19, 21, 23, 25, 27-29, 31, 32) had to have been written after June 26. (See Appendix E, at

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[150] Holland also claimed, during his September 17 interview, that he possessed all of the notes when he spoke to Investigator Antone. When Detective Grogan asked if appellant gave him something prior to giving him the confessions, Holland replied: "Yeah he gave me all the notes I already told that when I talked to ah um Fred Antoine (sic) that I had notes and this man ah you know that he did this and ah I had access to ah confessions but the confessions weren't brought at the time I made the statement to Antoine (sic)." (5 CT 1366.)

pp. 051-075.) That leaves 9 notes (notes ##7, 8, 17, 22, 24, 26, 30, 33, and unnumbered note) that are not possible to date as having been written prior to or after the 26th. (See Appendix E, at pp. 078-084.) Analysis of Holland's Modesto case notes thus shows that at least two-thirds of those notes were written after June 26.

Moreover, upon examination of the content of the 12 notes likely written or even possibly written prior to June 26, it is clear that Holland did not know the details of the Modesto crime before June 26. One note (#34) merely lists the names of appellant's family members, as well as their addresses and telephone numbers. (See Appendix E, at p. 077.) Another (note #2) contains appellant's response to Holland's question why Landrum had not been charged – "[h]e knows how to control his nerves in order to beat a lie detector. anything is possible." (Appendix E, at pp.075-076.) The other notes demonstrate appellant's desire to kill the two detectives, Mickey Landrum and other associates (see notes ##17, 20, 22, 24, 26, 30, Appendix E, at pp. 076, 079-082), his intention to lie at trial to defend himself (see note #7, Appendix E, at p. 078), a callous attitude toward the surviving victim (see note #8, Appendix E, at pp. 078-079), and a desire to "set [Landrum] up the way he set me up." (See note#24, Appendix E, at p.081). These notes also include appellant's description of the evidence which his attorney told him was in possession of the police (note #22, Appendix E, at p. 080), reasons why Landrum would be convicted of the Modesto crime (note #33, Appendix E, at p. 083), a reference to the name of a person whom Landrum was trying to persuade to give him an alibi (unnumbered note, Appendix E, at p. 084), and appellant's admission that when he moved to Modesto in July, he could not get a job and because he was broke, he "robbed the house for money." (See Note #33, Appendix E, at p. 083.) What they do not contain, however, are any significant details or

admissions regarding the Modesto crimes. In fact, the *only* detail revealed in any of the notes was a fact that had been widely reported by the media. In note #24, appellant indicated awareness that the victims had been attacked with a hammer and a knife. (See Appendix E, at p. 081.) The fact that the victims had been stabbed and beaten with a hammer or crowbar, however, was reported by the media in numerous articles; indeed, as noted *ante* in Argument I, one article falsely reported that a bloody hammer had been found in appellant's apartment. (7 CT 1777, 1780, 1784, 1786, 1790, 1793, 1797.)

In conclusion, contrary to the trial court's statement, examination of the Modesto case notes demonstrates that the majority of those notes were written after June 26. And, of those notes even possibly written prior to June 26, none supports the conclusion that Holland knew the details of the Modesto homicide prior to June 26. Moreover, as we are about to discuss, Holland's recorded statements on June 26 show conclusively that the most incriminating version of the March 1 crimes he had heard was a version that the prosecution repudiated at trial, namely, that Landrum and appellant committed the crimes together.

ii. Holland's Knowledge Of The Details Of The Modesto And San Diego Crimes.

Examination of the other evidence introduced at the hearing on the motion to suppress also refutes the trial court's belief that Holland knew the information about both crimes prior to June 26.

First, the record is abundantly clear that Holland did not learn the details of the San Diego crime until after the June 26 interview. During that interview, Holland told Antone that appellant had mentioned his involvement in a murder case in San Diego. (5 CT 1239.) Holland stated: "I

don't know about the case. I know he's gonna tell me about it tonight." (*Ibid.*) Holland then inquired whether obtaining information about that case would have "any pertinence" to the prosecution's case against appellant. (*Ibid.*) During the July 3 interview, Holland confirmed that he did not learn about the San Diego crime until after their first interview on June 26. (5 CT 1293-1294.)

Second, the record is also clear that as of June 26, Holland had only a few details of the Modesto crimes, and those details related to two early versions of that crime — versions which the prosecution disavowed at trial. It is true that Holland testified at the hearing that prior to his first interview on June 26, he knew all the details of the Modesto crime — he knew "everything," including all the various versions which appellant allegedly gave of that crime. (1 RT 250, 268.) However, Holland's statements during his June 26 interview refute that testimony. As noted earlier, Holland claimed that appellant gave several substantially different versions of the Modesto crimes. (5 CT 1313-1316 [9/4/92 Interview]; 1 RT 221-222.) The first version was that Landrum had committed it and was framing appellant, the second version was that appellant had been involved with Landrum, and the third version was that appellant, not Landrum, committed it. (*Ibid.*) At trial, the prosecution disavowed the first and second versions; its case was that appellant, alone, committed the crime. Holland's statements during the June 26 interview show conclusively that as of that date, he had heard only the first and second versions of the Modesto crime, not the third one. Holland stated that the confession he claimed to have access to would show that "both" appellant and Landrum engaged in the "physical act of the attack." (5 CT 1233.) "One did one, one did the other." (*Ibid.*) That Holland knew only this version of events (and not the later version attributing the crime solely to appellant) is confirmed by the fact that Holland expressed a

deep fear of Landrum and asked if Landrum was going to be prosecuted as well (5 CT 1225-1227, 1237-1238), utterances that only make sense if Holland believed that Landrum was involved in the crimes. Accordingly, the June 26 interview establishes that contrary to his claim at the hearing, Holland did not know all the details of the Modesto crime, including all versions of that crime, prior to his first interview with the District Attorney's Office.

Holland's claim that he knew all the details of appellant's involvement in the Modesto crime prior to the 26th was also contradicted by his statement to detectives on September 4 that he knew only "bits and pieces" of appellant's involvement in the Modesto crime prior to his receipt of the written confession. (5 CT 1326-1327.) As discussed above, Holland did not receive that written confession until after July 3.

And this claim was further refuted by statements made by Holland during the July 3 interview, in which he made clear that he had been in contact with Antone before he interrogated appellant about the Modesto crime and learned the "truth" of his involvement in that crime. During the July 3 interview, Holland told Antone that appellant had approached him and asked if he could "get someone taken care of." (5 CT 1291.) Holland went on:

> I'm going yeah I think I can probably get that done. That's when I called my lawyer. . . .Then he starts saying well hey man you know more people he needed to get done. He started thinking maybe I better cover bases and get this and this and this done. So he starts writing down more people that he wants done. How he wants it done. . . . And then he comes down to the point to where he's saying uh how did he put it? He goes uh hey man I know that uh you're writing checks and you probably don't need anything. He says is there any way you could get your person to do this? And what I'll do is I'll go ahead and do you a favor when I

> get out. Anything you want. If you need someone taken care of. Cause now he's thinking that I can get you know people taken out. I may need this. *So now I'm playing you know with you guys. I mean, I mean you know so sure you know. I mean I'm going along always (sic) the way*. Yeah man I can, you know whatever you, I can do everything. I've got a colonel. . . .

(5 CT 1291-1292, emphasis added.) As Holland continued, appellant then asked what he could give to pay for his colonel's assistance. Holland told him that he (Holland) had to have something to hold over appellant's head to make sure that he would pay up, and that is when Holland learned "the truth" about the Modesto crime. (5 CT 1292-1293.) As Holland told Antone on July 3:

> And that's when this thing came out. Boom. And then, I said then it wasn't just like ok well this is what I did. I went through details. Notes. I mean I bet you a hundred and fifty notes. And I kept re-drilling him and I kept re-drilling him and finding out this and this. . . . And then when I found out the truth. Cause all this time I'm thinking that man this guy broke into the house . . . and burglary. . . . [¶] That's not the way it happened. You know. And then he gave it to me. . . .

(5 CT 1292-1293.)

Accordingly, in Holland's own words, he did not learn the "truth" about the Modesto crime and the details of appellant's involvement until after he had been in contact with Antone. At the hearing, Holland initially attempted to deny that he had been in contact with Antone before appellant gave him the information about his involvement in the Modesto crimes. (1 RT 217.) However, after several incoherent attempts to explain away his recorded words, Holland admitted that he had, in fact, already spoken to Antone when he told appellant that his confession to the San Diego crime

was insufficient, thus resulting in appellant's confession to the Modesto crime. (1 RT 217-218.)

Notably, this account is confirmed by Holland's statements to Antone during the July 3 interview that he looked at the San Diego case confession, but wanted the Modesto case confession for "you people." (5 CT 1294.) During that interview, Holland also explained that it took a considerable time — five or six days — for him to obtain the information about the San Diego and Modesto cases:

> And you gotta realize too that when I went through this case with him and the last, the case in San Diego it was never, I never came right out and said well, what happened? I'd ask him a question and he'd write a note and then we went back and forth. And I kind of dug into it. And it took like you know five or six days. And then finally boom. Then he dumped it all you know.

(5 CT 1294-1295.)

In conclusion, the record refutes the trial court's finding that Holland knew the information about both crimes prior to June 26. He knew nothing about the San Diego case other than appellant's admission that he was involved in a murder case in San Diego, and he knew only a few details of the Modesto crime relating to two early versions of the crime that were disavowed by the prosecution at trial.

iii. **The "Teri! Notes!" And Holland's Own Notes Concerning The San Diego Crime.**

Exhibit 7, which was received into evidence at the hearing, contained 20 notes, labeled "Teri! Notes!" exchanged between Holland and appellant concerning the San Diego homicide. (1 RT 205.) Holland provided no specific testimony concerning those notes or the timing of his

receipt of those notes at the hearing. As noted above, Holland did testify generally that prior to June 26, he had received all of the notes exchanged between him and appellant.[151] (1 RT 253, 278.) Although it was clear that Holland was including the Modesto case notes in such references, it was not clear whether he was also encompassing the San Diego case notes. (*Ibid.*) In any event, given Holland's own statements establishing that he did not learn any details about the San Diego crime until after his first interview with Antone on June 26, it is abundantly evident that the "Teri! Notes!" had to have been written and exchanged after June 26.

iv. **Holland's Notes Summarizing Appellant's Oral Account Of The Modesto Crime.**

Holland identified Exhibit 8 as his own notes summarizing what appellant told him about the Modesto crime. (1 RT 253, 256.) These notes present a fairly detailed account of appellant's commission of the Modesto homicide, similar to the allegations contained in his signed confession. (See Exhibit 8.) At the hearing, Holland claimed that he wrote these notes prior to June 26. (*Ibid.*)

Here again, however, the record refutes Holland's claim. As discussed *ante* in section (C)(3)(d)(*ii*), the record establishes that (1) Holland did not learn the truth about the Modesto crime and the details of appellant's involvement in it until after his first interview with Antone; and (2) prior to that interview, Holland had heard only two early versions of the crime — the first version in which Landrum, alone, committed the crime and the second version in which appellant was also involved with

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[151] As noted previously, Holland subsequently testified that he received approximately 85% of the notes prior to June 26. (1 RT 279.)

Landrum in committing the crime. In short, Holland could not have written and possessed the notes contained in Exhibit A prior to June 26.

D. Conclusion.

In sum, the record establishes that Holland became an agent on June 26, 1992, encouraged — despite the utterance, for the record, of statements denying agency — to elicit incriminating statements from appellant by the explicitly dangled prospect of the Stanislaus County District Attorney's Office working out the comprehensive deal for concurrent state prison time that Holland had been seeking for months. The record further establishes, largely through Holland's own words, that it was after his June 26 interview with Antone that Holland elicited appellant's written confessions to the Modesto and San Diego crimes and his oral and written admissions supporting the prosecution's versions of those offenses.

E. Prejudice.

Because the State deliberately elicited incriminating statements from appellant in violation of his rights under the Sixth Amendment to the federal Constitution, this Court must reverse appellant's conviction and resulting death sentence unless the People can establish that the violation was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *accord*, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) In making this determination, the inquiry is *not* "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered" based upon the strength of the evidence. (*Ibid.*) Rather, the reviewing court must determine "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Ibid.*) Under these standards, respondent cannot prove that the error was harmless beyond a reasonable doubt.

1. Guilt.

At the guilt phase, the trial court admitted 23 of the 35 Modesto Case Notes exchanged between Holland and appellant (People's Exhibits 96 through 118) and the written confession to the capital crime (People's Exhibits 80 through 95).[152] Holland was also permitted to testify to his conversations with appellant regarding the charged Modesto offenses — special circumstance murder, attempted murder, robbery, burglary, and solicitations to murder. (See 17 RT 3484-3567.)

The admission of this evidence was prejudicial even though the admissibility of Holland's testimony concerning his conversations with appellant prior to June 26 and the admission of notes exchanged prior to that date were not affected by the *Massiah* violation. As discussed *ante* in section (C)(3)(d)(*ii*), prior to June 26, Holland knew only a few details of the Modesto crimes, and those details related only to two early versions of those crimes — a version in which Mickey Landrum alone committed the crimes and a second version in which both appellant and Landrum were involved in their commission. And, as demonstrated in Appendix E and discussed *ante* in section (C)(3)(d)(*i*), the evidence establishes that only three notes (notes ##2, 20, and 34) were written before June 26 (see Appendix E, at pp. 075-077) and that 9 other notes (notes ##7, 8, 17, 22, 24, 26, 30, 33, and unnumbered note) are not possible to date as having been written prior to or after the 26th. (see Appendix E, at pp. 078-084.). Of these 12 notes, the Court admitted seven of them — notes #7 (People's Exhibit 99), #8 (People's Exhibit 100), #17 (People's Exhibit 106), #20 (People's Exhibit 108), #22 (People's Exhibit 110), #24 (People's Exhibit

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[152] The Modesto Case Notes are reproduced in Appendix A and the Modesto case confession is reproduced in Appendix B.

112), and #30 (People's Exhibit 116).[153] (See Appendix A, at pp. 003-004, 007-009, 011.) Notably, as also discussed *ante* in section (C)(3)(d)(*i*), these notes did not contain any details of the attack and merely demonstrated (1) appellant's desire to set up Landrum the way that he set up appellant and to kill Landrum, other associates, and the two detectives; (2) a callous attitude toward the surviving victim; and (3) appellant's intention to lie at trial to defend himself. Unlike the case of Stanley Williams, this pre-June 26 evidence was not the core of Holland's testimony. (See *In re Williams, supra,* 7 Cal.4th at p. 599 [where evidence that was properly obtained and presented to the jury constituted the core of the informant's testimony and evidence that was obtained from the defendant after the alleged date of the *Massiah* violation consisted merely of "fine tuning" of the pre-*Massiah* violation evidence, introduction of evidence arguably obtained in violation of the defendant's Sixth Amendment rights was harmless beyond a reasonable doubt]. Here, it was the third version of the Modesto confession — the version elicited after June 26, 1992 — which was the core of the prosecution's guilt phase case.

That version pinned the crime solely on appellant and was set forth in a confession that contained 14 pages of graphic details about the crime, including terrifying details of the motivation for the crime and the attack

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[153] The Court also admitted notes #3 (People's Exhibit 96), #5 (People's Exhibit 97), #6 (People's Exhibit 98), #10 (People's Exhibit 101), #12 (People's Exhibit 102), #14 (People's Exhibit 103), #15 (People's Exhibit 104),#16 (People's Exhibit 105), #19 (People's Exhibit 107), #21 (People's Exhibit 109), #23 (People's Exhibit 111), #25 (People's Exhibit 113), #27 (People's Exhibit 114), and #29 (People's Exhibit 115). (See Appendix A, at pp. 002-010.) But, as discussed in Appendix E, the evidence established that those notes had to have been written after the *Massiah* violation (June 26), and thus they should not have been admitted at trial. (See Appendix E, at pp. 051-074.)

itself. The prejudicial effect of the admission of the confession and the notes which Holland obtained after June 26[154] is manifest. There can be nothing more damning than a detailed account of the crime and admission of guilt by an accused. In this case, the confession was particularly prejudicial because, at Holland's direction and insistence, it not only contained every minute detail of the crime but was written to characterize both the crime itself and appellant's motivation as terrifying and horrific. As stated by the prosecutor when he began his description of the case against appellant: "We have a 16-page written confession in Mr. Johnsen's hand detailing the grisly aspects of his crime. . . ." (20 RT 4392.) The Court need only read the confession and notes #10, #12, and #14 to realize the enormity of the prejudicial impact of this evidence. After reading the confession and those notes, it would be impossible for any juror to objectively evaluate the other evidence in this case.

The confession was so central to the prosecution's case that the prosecutor began his discussion of the evidence by quoting verbatim the entire 16-page confession. (20 RT 4393-4407.) That, however, was not enough, for the prosecutor then went through the confession page by page so that the jurors would "have some markers when [they] look[ed] at the actual confession." (20 RT 4407-4408.) But even that was not enough. After quoting and then discussing the confession, the prosecutor turned his attention to Holland's Modesto Case Notes. The prosecutor quoted and discussed each of the 23 notes admitted into evidence. (20 RT 4414-4426.) When the prosecution's opening argument is examined in detail, it is clear how paramount the confession and notes were to the State's case against

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[154] In several of those notes — #10, #12, and #14 — appellant admitted his guilt and in note #14, appellant gave details of the attack. (Exhibit 5; see also 6 CT 1377, 1379, 1380, 1397-1398; Appendix E, at pp. 058-062.)

appellant and thus how impossible it would be conclude beyond all reasonable doubt that those matters did not contribute to the jury's verdict. That argument totaled 66 pages (20 RT 4389-4409, 4414- 4458) and of those 66 pages, the prosecutor devoted 3 pages to discussing basic principles of law (20 RT 4389-4391), one page summarizing all the evidence presented at trial (20 RT 4392), 10 pages discussing evidence other than the confession and notes (20 RT 4427-4436), 4 pages to discussing defense witnesses and credibility of prosecution witnesses (20 RT 4449-4452), and *47 pages* to discussing (and quoting) the confession and notes and using statements from the confession to argue the elements of the charged offenses. (20 RT 4393-4409, 4414-4426, 4437-4448, 4453-4457.) In short, the evidence resulting from the State's violation of appellant's Sixth Amendment rights, especially the written confession, was the heart of the prosecution's guilt phase case.

There is yet another reason why this Sixth Amendment violation was not harmless. Even though Holland could have testified to his early conversations with appellant regarding the solicitations and appellant's admission that he and Landrum committed the attack on the Braggs, the written confession was crucial to obtain appellant's conviction for without it, the jury may well have doubted Holland's testimony. As conceded by the prosecution, Holland was "a con artist and a thief" — "[t]here's no question about that." (20 RT 4452.) Indeed, Holland was a chameleon[155] who had suffered numerous counterfeiting and forgery convictions and who was, at the time of his encounter with appellant, serving a 37-month federal sentence for a conviction of counterfeit security charges and a consecutive

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[155] Holland had operated under numerous aliases, including Eric Allen, Robert Lauer, Erik Holland, Robert Daniel Lauer, and John Carl Hall. (5 CT 1285.)

36 months for aiding an attempted escape from a federal facility. (17 RT 3550-3556, 3558-3562.) Holland was also facing a substantial number of years in the California state prison system for theft and forgery charges pending in six different counties (17 RT 3550-3558; 18 RT 3838-3839) and was clearly doing everything possible to avoid having to spend a single day in state prison.

Holland, however, was disingenuous about his motivation for contacting the prosecution in this case, claiming that his motives were purely altruistic.[156] Holland denied at trial that his motivation was to obtain a deal, insisting that he already had a deal. (17 RT 3546.) That was not so. At the time of his federal plea and sentencing, Holland had sought to work a deal with the counties whereby all of his county charges would be run concurrent to his federal sentence. But after he aided an attempted escape from a federal facility, the Stanislaus County District Attorney's Office refused to drop its pending charges. (17 RT 3555-3558.) By the time that Holland returned to Stanislaus County to face his charge pending there, he had learned that all of the counties, including Stanislaus, were not going to enter into, or honor, such a deal. (17 RT 3556-3557.) When his deal with Stanislaus County and the other counties fell apart, Holland had to figure out a way to get his deal back.

Thus, Holland's agenda, from the get-go, was to obtain a deal to resolve all of his pending felony charges without having to go to state prison — and he was willing to build a case against appellant and put together a confession in order to obtain it. (See, e.g., 18 RT 3836-3837

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[156] At trial, Holland claimed that he obtained appellant's confession and offered it to the district attorney because he thought appellant was "sick" and was concerned that he "might get off." (17 RT 3520, 3546.)

[Antone opens June 26 interview by asking, "I understand you may want to work a deal or something along those lines."]; 17 RT 3519 [Holland wrote a note (People's Exhibit 118) to appellant telling him "exactly" how to write the confession].) As testified by Antone, the main subject of his July 3 interview with Holland "was the deal."[157] (18 RT 3838-3839.) Indeed, the first two interviews between Holland and the district attorney's office representative consisted almost entirely of negotiations — what Holland could do, his demands and conditions for a deal, and what the authorities

[157] Holland's intent to do whatever was necessary to achieve the deal was also evidenced by his statements during his conversations with Antone on June 26 and July 3. (See, e.g., 5 CT 1218-1219 [Although Holland responds that his main purpose is not to make a deal, he then states that (1) he wants to run all of his pending state charges concurrent to his federal sentence; and (2) his main goal is to avoid going to state prison on any of his pending state cases.]; 5 CT 1223, 1225-1226 [At June 26 interview, Holland tells Antone that there are conditions which must be met before he will turn over any information, one condition being an assurance that the Stanislaus District Attorney would not use any provided information unless they give him a deal.]; 5 CT 1236 [At June 26 interview, Holland inquires whether Antone thinks that his office can get the deal done]; 5 CT 1239 [At June 26 interview, after Holland talks about the kind of information he can provide and Antone responds that his office is interested, Holland asks whether it would be pertinent to the prosecution for him to obtain information about another homicide]; 5 CT 1246 [At beginning of July 3 interview, Holland again seeks an assurance that the authorities will not use his information until a deal is done and asks if the deal is possible]; 5 CT 1248, 1252-1253 [At July 3 interview, after Antone tells Holland that a deal is possible but he must convince the other counties that the information Holland is providing is worth the deal, Holland asks whether premeditated murder is a death penalty crime and says he can get appellant to write a detailed confession]; 5 CT 1297-1298 [At July 3 interview, Holland asks if it would be pertinent to the prosecution's case if he obtains a written confession from appellant and he has appellant write an explanation of why he is giving the confession – "I have notes. . . . But I have to build the notes to show . . . how it happened. But would it be pertinent to where he wrote in there exactly I want these people done."].)

were willing and able to do. In sum, Holland's statements throughout his interviews with Antone belied his claim that he merely wanted to provide information to ensure that appellant was convicted and never set free.

Accordingly, the jurors had plenty of reasons to doubt Mr. Holland's veracity. But, the prosecutor argued, the jurors did not have to rely on Holland's suspect testimony because they had the confession and the notes. (20 RT 4452.) As stated by the prosecutor, "That's the important thing. You've got Mr. Johnsen's confession." (*Ibid.*) Given the prosecutor's own words, it is clear that the confession was critical to securing appellant's conviction.

It is true that the prosecution introduced other evidence to connect appellant to the crime. However, even assuming there was sufficient evidence to convict apart from the improperly admitted writings and associated testimony from Holland, that would not matter. "The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259, quoting *Chapman v. California, supra,* 386 U.S. at p. 24; *accord*, e.g., *Yates v. Evatt* (1991) 500 U.S. 391, 404 ["To satisfy *Chapman*'s reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the [matter affected by the error]. Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing [guilt] beyond a reasonable doubt, independently of the [error]."].) Here, it is clear from both the prosecutor's argument to the jury and the nature of the evidence that was improperly admitted that the error "contribute[d] to the verdict obtained." At the very least, it is impossible to

conclude, beyond all reasonable doubt, that the error did not contribute to the verdict.

Moreover, even if one were to take an approach inconsistent with a proper *Chapman* analysis and look only to the evidence untainted by the error, it would still be impossible to conclude, beyond a reasonable doubt, that the judgment against appellant could be sustained. The unaffected evidence was: (1) DNA evidence from the pantyhose found in the living room; (2) Mickey Landrum's testimony alleging that appellant possessed and directed or participated in disposal of property taken from the Rudy residence during the two prior burglaries and the March 1 attack; (3) Landrum's testimony alleging that appellant possessed and disposed of keys to the Rudy residence and the yellow gloves containing Mr. Bragg's blood; and (4) evidence that appellant attempted to suppress or fabricate evidence — Chester Thorne's testimony that appellant solicited him to kill Mickey Landrum, Linda Lee's testimony that appellant asked her to arrange a burglary of the Rudy residence following the modus operandi of the March 1 attack, and two notes to Chester Thorne suggesting an attempt to blame Landrum for the crime and suggesting that Linda Lee should declare no memory of appellant's transfer of property to her.

As argued *post* in Argument V, the DNA evidence placing appellant at the scene was beset by problems and the jurors might well have discounted it absent their consideration of the evidence obtained from Holland. Moreover, as argued *post* in Arguments III and IV, (1) there was substantial evidence that would have allowed Mickey Landrum to be prosecuted for the three burglaries, two robberies, attempted murder and murder charged against appellant; and (2) there was substantial evidence that it was Landrum who disposed of the gloves and secreted most of the property taken from the Rudy residence. Landrum thus had substantial

motive to fabricate his testimony. Accordingly, the prosecution cannot establish beyond a reasonable doubt that the jurors would have convicted appellant of the charged offenses in the absence of Holland's tainted evidence.

Moreover, even had the jurors credited the DNA and Landrum's testimony, such evidence simply pointed to appellant's presence in the home and possible participation in the three burglaries. That, alone, would provide motive for appellant to suppress or fabricate evidence to avoid being implicated in the burglaries even if he was not the actual killer. Thus, there is no basis from which this Court can reasonably conclude, beyond a reasonable doubt, that the jury would have concluded that this other evidence established that appellant was the person who killed Mrs. Bragg and attacked Mr. Bragg. It was the confession which the prosecution relied upon to establish that appellant attacked the Braggs and killed Mrs. Bragg. Indeed, it was the confession which the prosecutor relied upon to establish:

(1) the elements of first degree murder — that appellant intended to kill and that the murder was willful, deliberate and premeditated. (See 20 RT 4437 ["In order for a murder to be first degree under this theory, you have to have the intent to kill. What evidence do we have in this case? You have defendant's statements."], 4438-4439 ["How do we know that it was willful? What did the defendant say in his confession?" . . . [¶] Was it deliberate? Again the defendant writes. . . . "], 4437-4438 [prosecutor quoted again from the written confession in order to establish those elements].);

(2) the elements of first degree felony-murder (20 RT 4439-4443.);

(3) the elements of the robbery-murder and burglary-murder special circumstance allegations (20 RT 4444-4448.);

(4) the elements of attempted murder (Count II) and that the act was willful, premeditated and deliberate (20 RT 4454 ["We know he had the intent to kill because we've got his confession."], 4454-4455 [discussing statements in confession to show that appellant deliberated and premeditated].); and

(5) the elements of the robberies charged in Counts III and IV. (20 RT 4455-4456.)

In fact, during a discussion concerning instructions, the prosecutor admitted that he needed the confession to prove the special circumstance allegations and first degree murder:

> You can prove the special circumstance allegations I've alleged by extrajudicial admission. And, in fact, we have to do that almost exclusively. Otherwise I'm stuck arguing the robbery of the phones.
>
> . . . . .
>
> You can do anything you want, judge, as long as you include the special circumstances and degree of crime.[158] Because I'm going to use his confession to argue first degree. And I'm going to use his confession to argue the special circumstances of commission of a murder during the course of a robbery and burglary.

(20 RT 4287-4288.)

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[158] The prosecutor was requesting modification of the corpus delicti instruction, CALJIC No. 2.72, to clarify that the degree of the crime and the special circumstance allegations could be established by an extra-judicial confession or admission without the need to independently establish a corpus. (20 RT 4287-4288.)

Moreover, the prosecutor relied on the Modesto Case Notes to provide the corroboration necessary for the solicitations charged in Counts VIII, X, XI, XII, and XIII.[159] (20 RT 4456-4457.) In short, the State's case against appellant depended on the confession to provide proof of necessary elements of all of the charged offenses.

In summation, the question to be answered here is whether the evidence of the confession and notes contributed to the verdicts obtained. Given the emotional impact of this evidence, as well as its pivotal position in the prosecution's case, it is impossible for the State to "prove beyond a reasonable doubt that [the evidence] did not contribute to the verdict obtained." (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140, citing *Chapman v. California*, *supra*, 386 U.S. at pp. 23-24.) A constitutional violation does not contribute to the verdict under *Chapman* if it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt, supra,* 500 U.S. at p. 403.) That cannot be said to be the case here. Reversal of all counts is required.

2. Penalty.

At the penalty phase, the trial court admitted 12 of the 20 San Diego case notes exchanged between appellant and Holland (People's Exhibits 169 through 180[160]) and the written confession to the uncharged homicide of Teresa Holloway (People's Exhibits 161-168). Holland also testified to his conversations with appellant regarding that murder. (See 22 RT 4868-4884.) And the jury was permitted to consider the guilt phase evidence of

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[159] The jury was unable to agree on two of the solicitation counts (Counts IX and XIV) and those were later dismissed. (8 CT 2222.)

[160] These notes are reproduced in Appendix C.

the Modesto case confession and notes as circumstances of the crime under section 190.3, subdivision (a).

Even should this Court conclude that the erroneous admission of the Modesto case confession and case notes was harmless as to the guilt phase verdicts, this Court cannot find that the jurors' consideration of that evidence and the evidence of the confession to the murder of Teresa Holloway was harmless beyond a reasonable doubt at the penalty phase. That is particularly true in light of the requirement of heightened reliability applicable to all phases of capital cases. (*Woodson v. North Carolina* (1976) 428. U.S. 280.)

The jurors' consideration of the Modesto case confession and notes, alone, was so prejudicial as to require reversal of the death judgment. The prosecutor quoted extensively from appellant's Modesto case confession to emphasize:

(1) the motivation for that crime:

> You should consider the reason that Mr. Johnsen killed Juanita Bragg. Consider his own words: "I decided that I wanted to know what it felt like to kill somebody. Just in case I ever had a reason to, I would know how. I guess I also wanted to know if I could get away with murder."

(25 RT 5696);

(2) the vulnerability of the victims:

> Listen to Mr. Johnsen's own perception of the vulnerability of the Braggs: "I crept into the hallway and heard noises coming from the guest bedroom. I looked in the room and saw what appeared to be two people in bed sleeping."

(*Ibid.*);

(3) the amount of reflection preceding the attack:

> Consider the time taken by Mr. Johnsen to reflect upon the murder he was – which he was about to attempt to commit. "I got up my nerve and crept into the room and went up to the bedside nearest the door. The man was nearest me and the woman farthest. I stood there for almost three minutes trying to decide if I was mentally crazy enough to go through with it or not."

(25 RT 5697); and

(4) the depravity of the crime and appellant's lack of compassion:

> Consider his own description of what he did to those elderly people. I want you to ponder his depravity, his absolute lack of human sympathy or compassion.

(*Ibid.*)

The prosecutor then went on to quote appellant's lengthy page-and-a-half description of the attack (25 RT 5697-5698) and asked:

> Are those the words of a man whose life you should spare? Remember his description of the murder of Juanita and the attempted murder of Leo when you're listening to the defense plead for his life and when you are deciding whether he should be put to death, whether he should be allowed to live. Remember these words. Don't forget the evil that you are confronting.

(25 RT 5698-5699.)

Moreover, when evidence of the confession and notes concerning Teresa Holloway's murder is considered, it is impossible to conclude that the cumulative effect of such incriminating evidence of both homicides did not contribute to the jury's verdict of death. Relying on statements contained in that confession, the prosecutor highlighted that appellant participated "in the murder of his pregnant girlfriend, the woman who was carrying his baby." (25 RT 5702.) Here, again, the prosecutor quoted extensively from appellant's confession to emphasize his depravity in

participating in Holloway's murder. (25 RT 5702-5705.) And based on statements contained in that confession, the prosecutor argued:

> Consider the context of Terry Holloway's murder. It occurred while he was in jail. And this is an individual who's supposed to not constitute a threat to other human beings while incarcerated in state prison? [¶] She was his girlfriend. He was in a position of trust. They needed him to set her up and he had no qualms about doing just that. This was a person he purportedly loved. This was a person who was carrying his child. He sets her up to be killed. That crime, that murder is particularly wanton and despicable given his knowledge of her pregnancy and his belief that the child he was carrying was his child. [¶] Think about the motive. He decided to participate in her murder because she was going to go to the object of a plot he was involved with, a plot to kill another person. So we have a killer here, ladies and gentlemen, who not only premeditates and deliberates his killings, we have a killer that kills so he can continue to kill. . . .

(25 RT 5706-5707.)

In concluding his opening argument, the prosecutor, on the basis of statements contained in both confessions, told the jury that none of the defense mitigating evidence should "absolve a repeat, cold-blooded, cavalier killer of blame for murder or immunize him against imposition of the death penalty." (25 RT 5727.) The prosecutor's arguments concerning the two homicides, arguments which were based on the statements contained in the confessions, indicate how prejudicial this evidence was. Given that the two homicides constituted the backbone of the State's case for death[161] and the prosecutor relied on the confessions to establish and

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[161] The only other aggravating matters were evidence of a prior felony conviction for possession of a controlled substance and victim impact evidence. (25 RT 5708.) Although the prosecution introduced testimony by
(footnote continued on next page)

argue the aggravated natures of those crimes, it cannot be doubted that it was the evidence of the two confessions which prompted one or more or the jurors to choose death over life.

Even if the Court were to conclude that the Modesto case confession and notes were admissible, the admission of the San Diego case confession and notes require reversal of the penalty. The prosecution cannot establish beyond a reasonable doubt that the evidence of appellant's complicity in the gruesome death of his girlfriend, who was pregnant with his child, did not contribute to the death verdict.

Reversal of the death judgment is therefore required.

(footnote from previous page)
a former co-worker of Holloway that appellant brandished a gun and a bat and once slapped Terry Holloway (22 RT 4889-4896, 4898-4905), the prosecutor conceded during argument that the witness was not credible and urged the jurors not to base their penalty determination on that witness's testimony. (25 RT 5708.)

ERRORS IMPACTING GUILT DETERMINATION

III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT, *SUA SPONTE*, REGARDING THE UNRELIABILITY OF ACCOMPLICE TESTIMONY AND THE REQUIREMENT OF CORROBORATION OF THE TESTIMONY OF AN ACCOMPLICE.

Mickey Landrum had his hands all over the property taken during the three burglaries at the Rudy residence. In fact, at one time or another, Landrum possessed nearly all of the stolen property, and it was Landrum who secreted much of the stolen property and who provided the testimony tying the stolen property to appellant. Landrum testified on behalf of the prosecution as the result of an agreement whereby he would not be prosecuted for his "handling" of the stolen property. He obviously had a motive to blame the thefts and the capital crime on appellant and to distance himself from those offenses as far as possible. The trial court acknowledged that there was sufficient evidence to suggest that Landrum was involved in the burglaries and the capital crime. (20 RT 4410.) Yet, no accomplice instructions were provided or even discussed. The jury was never told that Landrum's testimony deserved special scrutiny and corroboration; his status as an accomplice was never mentioned. The failure to provide such crucial instructions was reversible error under California statutory law; article I, sections 7, 15 and 16 of the California Constitution; and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A. **The Trial Court Erred When It Failed To Instruct The Jury, *Sua Sponte*, On The Law Of Accomplices With Regard To The Burglary, Robbery, Attempted Murder And Murder Charges.**

The trial court has a duty to instruct the jury, *sua sponte*, on the law of accomplices and to determine whether the witness was an accomplice "whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice." (*People v. Warren* (1940) 16 Cal.2d 103, 118-119; *People v. Gordon* (1973) 10 Cal.3d 460, 466, disapproved on another ground by *People v. Ward* (2005) 36 Cal.4th 186; *People v. Zapien* (1993) 4 Cal.4th 929, 982.) In such instances, a trial court is required to instruct the jury: (1) on the definition of an accomplice (CALJIC No. 3.10); (2) on the requirement that a defendant cannot be found guilty based upon accomplice testimony unless such testimony is corroborated by other evidence (CALJIC No. 3.11; Pen. Code, § 1111); (3) on the sufficiency of corroborative evidence (CALJIC No. 3.12); and (4) on the critical principle that accomplice testimony is to be viewed with distrust (CALJIC No. 3.18) "because it comes from a tainted source and is often given in the hope or expectation of leniency or immunity." (*People v. Gordon, supra*, 10 Cal.3d at p. 466, fn. 3, 468; *People v. Frye, supra,* 18 Cal.4th at pp. 965-966.)

An accomplice is defined in Penal Code section 1111 as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." To be chargeable with an identical offense, a witness must be considered a principal under section 31. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113.) There must be evidence that the accomplice aided and abetted the defendant in the commission of one of the charged crimes or conspired with the defendant. (*People v. Ward, supra*, 36 Cal.4th at p. 212.) An aider and

abettor is an accomplice if he or she "promotes, encourages, or assists the perpetrator and shares the perpetrator's criminal purpose." (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.)

If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. (*People v. Horton, supra,* 11 Cal.4th at p. 1114.) The applicable standard is whether there is substantial evidence, that is evidence "enough to deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable men could have concluded'" that a witness is an accomplice. (*People v. Flannel* (1979) 25 Cal.3d 668, 684, quoting *People v. Carr* (1972) 8 Cal.3d 287, 294.) In making that assessment, the trial court is required to resolve any doubts as to the sufficiency of evidence in favor of the defendant. (*Flannel, supra,* at p. 685.) Furthermore, the court may not refuse to provide accomplice instructions on the basis of a credibility assessment. (*Flannel, supra,* at p. 684 ["trial court should not . . . measure the substantiality of the evidence by undertaking to weigh the credibility of witnesses, a task relegated to the jury"]; *People v. Carmen* (1951) 36 Cal.2d 768, 773 ["The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. [Citations.] That is a question within the exclusive province of the jury."].)

"Unless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence, whether a witness is an accomplice is a question for the jury." (*People v. Whalen* (2013) 56 Cal.4th 1, 59; *People v. Sully, supra,* 53 Cal.3d at p. 1227 ["Accomplice status is a question of fact for the jury unless the evidence permits only a single inference."].) Only if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, may the trial court fail to

instruct on accomplice testimony. (*People v. Horton*, *supra*, 11 Cal.4th at p. 1114.)

There was sufficient evidence in the instant case from which the jury could conclude that Mickey Landrum was an accomplice in the murder, attempted murder, robberies, and all of the burglaries charged against appellant in Counts I, II, III, IV, V, VI, and VII. First, given Landrum's possession of property that had been stolen from the Rudy residence during all three of the burglaries of that residence, the jury could reasonably have concluded that he was an accomplice in the burglaries.

Landrum himself admitted that, on February 19, 1992, he removed from the Johnsen home several items (a microwave, VCR,[162] boom box, china, jewelry, and a portable bar) that had been taken during the September 3 and February 15 burglaries and that he did so in order to avoid the items being found by police officers who had just arrested appellant on a traffic warrant. (15 RT 3263-3268, 3272; 16 RT 3310-1311.) Landrum, who acknowledged knowing that the property had been stolen, first tried to give it to a friend, who refused to take it. (15 RT 3266.) Landrum then contacted appellant's mother and arranged to give the property to her. (15 RT 3266-3268, 3272.) Although Landrum claimed that appellant told him that he had taken the property from the Rudy residence (15 RT 3261-3262, 3269-3270) and that he moved the property at appellant's behest (15 RT

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[162] Landrum initially testified that a VCR was among the property which was shown to him by appellant and which Landrum admittedly transferred to Faye Johnsen to avoid its discovery by the police. (15 RT 3261.) Landrum then purported to correct himself and stated that he observed a microwave, not a VCR. (*Ibid.*) However, Rudy's stolen microwave and VCR were both recovered by the police at the home of Faye Johnsen's parents, intermingled with the other property from Rudy's home which Landrum gave to Mrs. Johnsen. (16 RT 3384.)

3265-3266; 16 RT 3300), the jury was not required to believe Landrum's claims.

Landrum further testified that, on February 29, 1992, he traded a camera to Linda Lee and Chester Thorne in exchange for drugs, without revealing that it had been stolen. (16 RT 3291.) He claimed that he did not act alone and that the trade was done by both him and appellant. (*Ibid.*) However, Lee, who was no friend of appellant and readily gave damaging testimony against him, testified that the camera had been stolen and that she bought it from Landrum alone.[163] (16 RT 3414.) Lee was adamant that she had never purchased stolen property from appellant, whereas she had done so with Landrum. (*Ibid.*) Notably, a camera had been stolen from the Rudy residence during the February 15 burglary. (15 RT 3166-3167, 3178.) Rudy's camera was not part of the property recovered by the police, and there was no evidence as to what happened to the camera which Lee got from Landrum. Given Landrum's possession of other property that had been stolen during the February 15 burglary and the timing of his transaction with Lee, it is reasonable to conclude that it was Rudy's stolen camera that was exchanged.

But Landrum's connection to property stolen from the Rudy apartment did not stop with these items. On March 26, Landrum went with an officer to his mother's house, where he turned over property (a jewelry box containing gold chain and charms, three telephones, and a calculator) that had been stolen from the Rudy home during the attack on March 1 and

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[163] Lee testified that this sale occurred around Valentine's Day in 1992. (16 RT 3414.) Although Lee characterized the transaction as a sale, rather than a trade for drugs, given the similarity in dates and her likely reluctance to admit that she and Thorne possessed drugs, it is reasonable to infer that she and Landrum were describing the same transaction.

during the earlier burglary on September 3. (16 RT 3279-3280, 3441-3444; 18 RT 3842-3843.) When asked how the property ended up at his mother's house, Landrum said that two to five days after their March 1 move, appellant and he had taken a bag of "stuff" to his mother's house.[164] (16 RT 3297.)

Conscious possession of recently stolen property, accompanied by corroborating evidence tending to show the defendant's guilt, permits an inference of guilt, whether the crime charged is theft, burglary, or knowingly receiving stolen property. (*People v. McFarland* (1962) 58 Cal.2d 748, 755; see also CALJIC No. 2.15.) In determining whether there is sufficient corroborating evidence, the jury may consider the time, place and manner of possession, that the defendant had an opportunity to commit the charged crime, the defendant's conduct such as false or contradictory statements or a false account of how he or she acquired possession of the stolen property and any other evidence which tends to connect the defendant with the crime. (*People v. Citrino* (1956) 46 Cal.2d 284, 288; *People v. Mosqueira* (1970) 12 Cal.App.3d 1173, 1176; *People v. Dickerson* (1969) 273 Cal.App.2d 645, 648-649; *People v. Taylor* (1935) 4 Cal.App.2d 214, disapproved on another ground by *People v. Allen* (1999) 12 Cal.4th 846; *People v. Russell* (1932) 120 Cal.App. 622, 623-626; see also CALJIC No. 2.15.) Such corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt. (*People*

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[164] It is also possible that some of this property was given to Landrum's mother by Linda Lee. Lee testified that on March 1, appellant gave her a bag containing a telephone. (16 RT 3403-3404, 3349.) Lee's friend, Johanna Oliver, who was also present, testified that she saw two telephones and a calculator in the bag. (16 RT 3366, 3368.) Lee testified that she gave the bag to Landrum's mother, Ella Pokorney, who took the bag to her home. (16 RT 3369, 3406.)

v. Citrino, *supra*, 46 Cal.2d at p. 288.) "[T]he very nature of the goods possessed and other attributes of the possession" — time, place, and manner — "may supply the necessary corroboration." (*People v. Dickerson*, *supra*, 273 Cal.App.2d at pp. 648-649; *People v. Hallman* (1973) 35 Cal.App.3d 638, 641 [defendant was observed driving a stolen car less than four hours after owner parked it; defendant was speeding and heading away from where car had been parked].) Among the circumstances which, coupled with the possession of stolen property, have been held sufficient to connect the accused with the crime and to sustain his conviction are false statements showing consciousness of guilt and opportunity to commit the crime (*People v. Roldan* (1928) 93 Cal.App. 677, 678-680); false statements as to how the property came into the person's possession (*People v. Farrell* (1924) 67 Cal.App. 128, 133; *People v. Garcia* (1924) 68 Cal.App. 131, 133); and giving false testimony and making an effort to throw away the stolen property. (*People v. Crotty* (1925) 70 Cal.App. 515, 518-19.)

In the case at bar, Landrum admitted that on two occasions, he knowingly possessed recently stolen property. He admitted that on February 19, he possessed property that had been stolen on February 15 (and on September 3) and that on March 26, he possessed property that had been stolen on March 1 (and on September 3). Additional evidence showed that on a third occasion, February 29, Landrum possessed a camera that had been stolen on February 15. It is true that Landrum denied committing the burglaries or any other crimes with appellant. (16 RT 3288-3289.) However, a witness may be found to be an accomplice whether or not he expressly admits complicity in the crime. (See *People v. Gullick* (1961) 55 Cal.2d 540, 542-543.)

Landrum, of course, claimed that that property had been stolen by appellant, not by him. Furthermore, Landrum attributed to appellant the motive to hide the stolen property from the police. However, the jurors could reasonably have rejected Landrum's exculpatory claims and attempts to blame appellant. "[I]n all cases where the [possessor] offers an explanation as to the manner in which he came into possession of the stolen property, the question as to whether he is telling the truth is one solely for the jury. [Citations.]. . . . [E]ven though the story told by the [possessor] may exculpate him, such as where he claims an alibi and there is no direct contradiction of his story, it is still for the jury to say whether he shall be believed." (*People v. Russell* (1939) 34 Cal.App.2d 665, 669-670.) In fact, here, there was contradiction of Landrum's claim that he and appellant traded the camera to Lee and Thorne, thus providing sufficient cause for the jurors to doubt all of Landrum's denials of complicity. According to Lee, it was Landrum, not appellant, who on the evening before the capital crime, provided her with Rudy's stolen camera.

Beyond the undisputed evidence that Landrum was in possession of property stolen from the Rudy residence, there was also corroborating evidence tending to show that he was an accomplice in the three burglaries. As noted above, this corroboration need only be slight. (See, e.g., *People v. Taylor*, *supra*, 4 Cal.App.2d 214 [defendants' possession of stolen property ten days after the burglary under circumstances which defendants failed to explain constitutes sufficient evidence to support burglary convictions even though there was no evidence connecting them to the scene of the burglary].) Here, the corroboration was substantial.

First, Landrum's failure to show that his possession of the stolen property was honestly obtained was itself a strong circumstance tending to show his guilt of the burglaries. (*People v. Citrino*, *supra*, 46 Cal.2d at pp.

288-289.) Second, Landrum's statement that appellant participated with him in disposing of the camera was impeached by Lee, and his failure to admit that the camera was stolen was contradicted by Lee. (See, e.g., *People v. Garcia, supra,* 68 Cal.App. at pp. 133-134 [contradictions of material parts of the defendant's testimony by witnesses for the prosecution, as well as inconsistencies in his testimony, justify the inference that his explanation of his possession of the stolen property was false].) Third, Landrum's admission that he attempted to secrete stolen property from police officers provided further corroboration. (See, e.g., *People v. Crotty, supra*, 70 Cal.App. at pp. 518-519 [evidence of defendant's possession of stolen property, his evasive actions to avoid police, and his effort to throw away the stolen property is sufficient to sustain his conviction for theft, despite his testimony providing an exculpatory explanation].) Fourth, Landrum, a drug abuser[165] who admitted that on at least one occasion he had traded a stolen item for drugs, had ample motive to commit the burglaries to support his drug habit.

Moreover, there was direct evidence that Landrum had the opportunity to commit two of the burglaries — the burglary on February 15 and the burglary on March 1, when the Braggs were attacked.[166] Although he denied entering the Rudy residence on February 15, Landrum admitted being present at the Johnsen home (located directly behind Rudy's home) on that very day when, according to Landrum, appellant asked him to help move a television set from the nearby home and pointed out items taken

[165] Landrum acknowledged that during the time period surrounding the events in this case, he was abusing crystal methamphetamine ("crank"). (16 RT 3289-90, 3295-3296.)

[166] As to the third burglary (September 3, 1991), the record contains no evidence concerning Landrum's whereabouts on that date.

from that home. (15 RT 3259-3262, 3269-3270.) Landrum claimed that he refused to help (15 RT 3260), but the jury could have believed otherwise. In any event, his own testimony established that he certainly had the opportunity to commit the February 15 burglary. Such proof of opportunity to commit the charged crime has been held to be sufficient corroboration to support a conviction. Ipso facto, it supports the conclusion that a jury could reasonably conclude Landrum was a principal in the burglaries charged against appellant. (*People v. Mosqueira, supra*, 12 Cal.App.3d at p. 1176 [sufficient evidence supports theft conviction where defendant possessed recently stolen wallet and had clear opportunity to commit the theft in that he had access to the car trunk in which the wallet had been locked].)

The evidence also showed that Landrum had an opportunity to commit the March 1 crimes. He admitted being at appellant's home during the evening preceding the burglary. (16 RT 3317-3318.) Although Landrum left sometime between 9:00 and 10:30 p.m. and claimed that he slept at his mother's house that night (16 RT 2192; 19 RT 3960-3961, 3863), there was no evidence to substantiate his story as to where he spent the entire night. The only person at his mother's home that night was his mother who, according to Landrum, left for work the next morning at 6:00. (19 RT 3961.) Landrum's testimony was that he did not awake until 8:00 that morning.[167] (*Ibid.*) Landrum was expected to arrive early at the Johnsen home on March 1 to help with the move, but he did not arrive until 10:00 a.m. (16 RT 3318.) Landrum claimed that between 8:00 a.m. and 10:00 a.m., he was home, eating breakfast and watching television (*ibid.*) but again, there was no corroboration of that testimony. Thus, Landrum not

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[167] Landrum testified that he "guessed" his mother left at 6:00 a.m., suggesting that she was already gone before he awakened and that he surmised she had left for work at 6:00. (19 RT 3961.)

only had an opportunity to commit the crime, but was unable to verify his whereabouts during the time period in which the attack occurred, and he showed up at a residence directly behind the Rudy apartment shortly after the attack on the Braggs had occurred.[168]

In sum, Landrum was up to his ears in stolen property: on three separate occasions, he possessed property stolen during all three burglaries at the Rudy residence. Despite his attempts to place the blame on appellant, the suspicious circumstances surrounding his possession, in combination with his attempt to hide property from the police, his impeached statement concerning his possession on one of those instances, and his motive and opportunities to commit the crimes, provided sufficient corroboration to support an inference that he was an accomplice in the burglaries.

This same evidence, and more, also supported the theory that Landrum was involved in the March 1 attack on the Braggs: (1) when Landrum arrived to help the Johnsens move that morning, he had a gauze bandage wrapped around his hand, indicative of a recent injury (19 RT 3988); and (2) after he and appellant moved to Strivens street, Landrum gave to an acquaintance, George Romo, a pair of yellow gloves which contained the blood of Mrs. Bragg (18 RT 3753). Of course, Landrum denied that he had a cut on his hand that morning or was wearing a bandage when he arrived at the Johnsen home. (19 RT 3961.) However, two people

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[168] The coroner opined that Mrs. Braggs died between 10:00 a.m. and noon and that she probably lived several hours after the infliction of her injuries. (19 RT 3972, 3977-3979.) But all he could really say is that she survived less than 24 hours but more than 5 minutes. (19 RT 3977-3979.) The defense evidence showed that appellant was at his home between 6:45 and 7:00 a.m., when they arose and went out for breakfast before the move. (19 RT 4004, 4011-4013.) The prosecution's theory was that the attack occurred around 5:00 to 6:00 a.m. (20 RT 4446.)

present during the move, appellant's mother Faye Johnsen and Ray's Sewing employee David Johnson, testified to their observations of the bandage. (19 RT 3986-3988, 4014.) Indeed, Mr. Johnson, who did not know either Landrum or appellant, remembered seeing Landrum playing around with the bandage. (19 RT 3988, 3990, 3998.)

Landrum attempted to deny the significance of his possession and disposal of the gloves by once again pointing the finger at appellant. Landrum testified that appellant and he were walking along Strivens Street, each holding a glove, when they ran into Romo. (16 RT 3283.) Appellant, for reasons which Landrum claimed he did not know, wanted to get rid of the gloves, and so they gave them to Romo. (16 RT 3283-3285.) Romo, however, testified that it was Landrum who had both gloves, it was Landrum who asked Romo if he wanted them, and it was Landrum who gave them to him. (16 RT 3420.)

The testimony of George Romo and the evidence of Landrum's physical appearance at the time of the move, thus provided additional corroborating evidence that Landrum was involved in the March 1 burglary, robberies, attempted murder and murder.

Based on all this evidence — Landrum's possession of stolen property and attempt to hide it from the police, his admitted physical proximity to the Rudy residence on the dates in question and thus his opportunity to commit the crimes, his motive to steal, his bandage indicating a recent injury, the lack of corroboration of his whereabouts during the crime, the contradiction of some of his exculpatory accounts of possession, and his possession and disposal of gloves containing Mrs. Bragg's blood — a reasonable jury could have concluded that Landrum was not only a principal in all three burglaries but that he actually committed the attacks on Mr. and Mrs. Bragg.

In conclusion, the evidence was sufficient to warrant the jury's conclusion that Landrum was an accomplice in all three charged burglaries, as well as the charged robberies, attempted murder, and murder on March 1, and the trial court thus erred in failing to give the full panoply of accomplice instructions.

B. **The Trial Court Also Erred In Failing To Instruct The Jury, *Sua Sponte*, On The Law Of Accomplices With Respect To The Special Circumstances.**

The trial court also erred in failing to instruct the jury on the law of accomplices with respect to the special circumstances, particularly CALJIC No. 8.83.3, which provides:

> A special circumstance based upon the commission of a crime other than the murders[s] of which the defendant is accused in this case, cannot be found true based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the crime.

In a capital case, "[w]hen the special circumstance requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice." (*People v. Hamilton, supra,* 48 Cal.3d at p. 1177.)

Appellant was charged in this case with two special circumstances — that the murder was committed while he was engaged in the commission of the crime of burglary (Pen. Code, § 190.2, subd. (a)(17)(vii)) and while he was engaged in the commission of the crime of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). (3 CT 837.) Both special circumstances required proof of other crimes in addition to murder — burglary and robbery. Because the prosecutor relied on Mickey Landrum's testimony to prove the burglary, robbery and murder (20 RT 4441, 4445-4448), the trial court was required to instruct with 8.83.3. As discussed above, the evidence was

sufficient to support a reasonable conclusion that Landrum was an accomplice in the March 1 offenses.

Research has not revealed any case law discussing whether the trial court has a *sua sponte* obligation to instruct with 8.83.1 in a proper case. "In a criminal case, however, the trial judge is required to instruct the jury of his own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence." (*People v. Buffum* (1953) 40 Cal.2d 709, 724, overruled on another ground by *People v. Morante* (1999) 20 Cal.4th 403.) This "rule as to the duty of the court to give, on its own motion, instructions in criminal cases on the general principles of law pertinent to the case on trial is thus stated in *People v. Warren,* 16 Cal.2d 103, 118, to arise: '. . . whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice. . . .'" (*People v. Bevins* (1960) 54 Cal.2d 71, 76.) Given this Court's holding that under this rule, the trial judge is obligated to instruct *sua sponte* as to section 1111 of the Penal Code, which provides that the testimony of an accomplice must be corroborated (*People v. Warren, supra*, 16 Cal.2d at pp. 118-119; *People v. Gordon, supra*, 10 Cal.3d at p. 466), it follows that the trial court has a *sua sponte* duty to instruct that the burglary-murder and robbery-murder special circumstances cannot be based on the testimony of an accomplice unless that testimony is corroborated by evidence tending to connect the defendant with the crimes underlying those special circumstances. For, as found by this Court in *Warren*, instructions concerning the law relating to the insufficiency of the uncorroborated testimony of an accomplice "deal with the vital question of the sufficiency of the evidence to sustain the conviction under the salutary rule laid down

in section 1111 of the Penal Code." (*People v. Warren, supra*, 16 Cal.2d at p. 117.)

Accordingly, the trial court was required to instruct with CALJIC No. 8.83.3 and its failure to do so was error.

C. **These Instructional Errors Violated The Federal Constitution And Require A New Trial.**

1. **The Errors Violated Appellant's Constitutional Rights To Due Process, A Fair Trial, And To Present A Defense Under The Fifth, Sixth, And Fourteenth Amendments And Deprived Him Of The Reliable Capital Guilt And Sentencing Determinations Guaranteed By The Eighth Amendment.**

The trial court's failure to instruct on the law of accomplices was error under both state law and the federal Constitution.

Penal Code section 1111 proscribes basing a conviction upon the uncorroborated testimony of an accomplice:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(Pen. Code, § 1111.) The court's failure to instruct on this requirement of corroboration in the case at bar thus violated California statutory law.

Distrust of accomplice testimony is an important component of a defendant's right to a fair trial and a reliable jury verdict. (*People v. Guiuan* (1998) 18 Cal.4th 558, 564-569.) The requirement of a cautionary instruction concerning accomplice testimony is of ancient lineage, because of its importance in insuring a fair trial and a reliable verdict. (*Id.* at pp.

564-569.) As Justice Kennard explained in her concurring and dissenting opinion:

> A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony.

(*Id.* at p. 570, Kennard, J., concurring and dissenting, quoting *Phelps v. United States* (5th Cir. 1958) 252 F.2d 49, 52.)

Historical practice is the primary guide for determining whether a rule is of sufficient importance to justify protection under the due process clause. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 43 (plur. opn.); *id.* at pp. 58-59, Ginsburg, J., concurring.) A secondary factor in the due process analysis is "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." (*Medina v. California* (1992) 505 U.S. 437, 448, citing *Dowling v. United States* (1992) 493 U.S. 342, 352; see also *Cooper v. Oklahoma* (1996) 517 U.S. 348 [relying upon "historical practice" and "fundamental fairness in operation" to invalidate state procedural rule on due process grounds].) Applying those tests, the accomplice cautionary instruction is compelled by due process. (See also, e.g., *People v. Tobias* (2001) 21 Cal.4th 327, 331 ["The cautionary instructions governing accomplice testimony have their roots in English common law"].)

The requirement that the testimony of an accomplice be corroborated is a substantive rule of law concerning the sufficiency of evidence to convict. Thus, the failure to instruct the jury on this rule of law, when the evidence supports such instruction as in this case, undermines a defendant's due process right not to be convicted except upon the basis of evidence establishing guilt beyond a reasonable doubt (*In re Winship* (1970) 397

U.S. 358, 364) and lightens the State's burden of proof in violation of the Due Process Clause. (*Francis v. Franklin* (1985) 471 U.S. 307, 313; *Carella v. California* (1989) 491 U.S. 263, 265-266.) It also violates a defendant's Sixth and Fourteenth Amendment rights to a jury determination on the question whether guilt has been so established. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Cabana v. Bullock* (1986) 474 U.S. 376, 384-385.)

The trial court's failure to instruct on the law of accomplices in appellant's case also violated due process by depriving appellant of a state-created liberty interest. A person's liberty interests are protected by the Due Process Clause of the Fourteenth Amendment even when the liberty interest itself is a statutory creation of the State. (*Wolff v. McDonnell* (1974) 418 U.S. 539, 557-558; *Vitek v. Jones* (1980) 445 U.S. 480, 488-489; *Hewitt v. Helms* (1983) 459 U.S. 460, 468-471; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) In *Hicks* the Supreme Court held:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of liberty only to the extent determined by the jury in the [proper] exercise of its . . . discretion . . . and that liberty is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

(*Id.* at p. 346.) By forbidding a conviction based upon the uncorroborated testimony of an accomplice (Pen. Code, § 1111), California has created a liberty interest in having a jury instructed on the definition of an accomplice, on the requirement that a defendant cannot be found guilty based upon accomplice testimony unless such testimony is corroborated by other evidence, on the sufficiency of corroborative evidence, and on the

principle that accomplice testimony is to be viewed with distrust. Accordingly, because appellant was entitled under state law to have his jury properly instructed, the trial court's failure to do so violated his right to due process under the Fourteenth Amendment.

Moreover, the failure to give accomplice instructions also prevented the guilt verdicts, used to support appellant's death judgment, from having the degree of reliability necessary to satisfy the requirements of the Eighth and Fourteenth Amendments (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638) and deprived appellant of the reliable capital sentencing determination guaranteed by the Eighth Amendment. (*Ibid.*; see also *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

Finally, because the instructions embodied a central facet of appellant's theory of the case and were supported by the evidence, the failure to give them violated appellant's right to present a meaningful defense, to trial by jury, and to due process as guaranteed by the Sixth and Fourteenth Amendments. (See, e.g., *Taylor v. Illinois* (1988) 484 U.S. 400; *United States v. Escobar DeBright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202; *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372.)

2. The Instruction That One Witness's Testimony Was Sufficient To Prove Any Fact Compounded The Error In Failing To Give Accomplice Instructions.

The giving of CALJIC No. 2.27 in this case compounded the error in the trial court's failure to give accomplice instructions. The jury was instructed pursuant to CALJIC No. 2.27 as follows:

> You should give the uncorroborated testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact whose testimony about that fact does not require corroboration is sufficient for the

> proof of that fact. You should carefully review all the
> evidence upon which the proof of such fact depends.

(8 CT 2136; 21 RT 45587-4558.) Given that the jury was *not* instructed that any testimony required corroboration, this instruction told the jurors that testimony believed from a single witness, including Mickey Landrum, was sufficient to prove any fact. This instruction provided exactly the wrong message about the weight to be given to Landrum's testimony.

Notably, in this case, the problem is not that the proper accomplice instructions might have been somewhat neutralized by CALJIC No. 2.27. Rather, here, 2.27 was the *only* word on the subject of testimony from a single witness. This instruction sanctioned the sufficiency of Mickey Landrum's testimony, instead of challenging it. The vacuum created by the omission of the accomplice instructions was filled with an instruction that, under the circumstances of this case, was flatly wrong.

3. <u>The Errors Were Prejudicial and Require A New Trial</u>.

In assessing non-constitutional error at the guilt phase of a capital trial, this Court applies the standard of review for state law errors — whether it is reasonably probable that a result more favorable to the defendant would have been reached had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Brown* (1988) 46 Cal.3d 432, 446-47.) Because, however, these instructional errors violated the federal Constitution, the appropriate prejudice standard is *Chapman*'s reasonable doubt standard. (*Chapman v. California, supra,* 386 U.S. 18.) "The question is whether there is a reasonable possibility that the [error] might have contributed to the conviction." (*Id.* at p. 23, internal quotation marks omitted.) Or, put another way, the Constitution "require[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) In the next argument, appellant will discuss the prejudice flowing from the trial court's error in failing to instruct on accomplice law. (See Argument IV, section E, *post.*) The bottom line is that reversal of the burglary, robbery, murder, and attempted murder convictions and special circumstance findings is required no matter what prejudice standard is used.

Appellant anticipates that respondent will argue that the correct test is the one set forth in *People v. Lewis* (2001) 26 Cal.4th 334, under which a reviewing court looks to see if the record contains corroboration of the accomplices' testimony, which corroboration can be slight. *Lewis*, however, did not consider the following argument which demonstrates that its approach is not a constitutional one. Appellant requests the Court to reconsider its approach in *Lewis* for the following reasons.

It is appellant's position that his Sixth Amendment right to a jury trial, his Fifth and Fourteenth Amendment rights to due process and to a jury determination of guilt, and his Eighth Amendment right to reliable guilt and penalty determinations in a capital case would be violated if this Court were to employ a test for prejudice that looks to see whether a jury *could* have found corroborative evidence, rather than a test that looks at whether there is a reasonable likelihood of a different outcome (*People v. Watson*, *supra*, 46 Cal.2d 818) or (more appropriately) whether the prosecution has proved beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Neder v. United States* (1999) 527 U.S. 1.)

A criminal defendant has a constitutional right to a determination by a jury of all facts necessary for a conviction, and in this case, convictions for burglary, robbery, attempted murder and murder (and true findings as to the special circumstances) could only be had if a jury found there was

sufficient corroboration of the accomplice testimony. It would thus violate the Constitution to affirm a judgment simply on the basis that the prosecution presented evidence that *could* have been deemed to corroborate the accomplice testimony but which no jury *did* so find.

The question whether a witness's testimony was corroborated is a factual one entrusted to the jury, not one to be resolved by a reviewing court that effectively and conclusively assumes the credibility and sufficiency of any evidence that might be deemed to favor the prosecution on the point. For even if there was evidence from which a properly-instructed jury *could* have found corroboration, it does not follow that every reasonable jury *would* have found corroboration. The issue for a factfinder is not the mere existence of *possible* corroborating evidence but the existence of *actual* corroboration, i.e., of evidence that "tend[s] to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v. Davis* (2005) 36 Cal.4th 510, 543.) The *Lewis* approach — which obliterates the difference between evidence, however slight and however incredible, that *might* corroborate and evidence that is sufficiently credible and weighty to *actually* corroborate — violates appellant's Sixth Amendment right to trial by jury and his right to due process and to a trial.

Moreover, quite apart from its constitutional deficiencies, a scheme in which the credibility and corroborative value of any prosecution-favorable corroborative evidence in the record is conclusively presumed is unsound judicial policy. If the failure to instruct on accomplice corroboration is deemed to be harmless error whenever the record contains *any*, or any substantial, evidence of corroboration, then the trial courts have no incentive to instruct properly to begin with, because such an error would *never* be reversible. The lack of sufficient corroborating evidence is itself a

basis for reversal and therefore, the lack of proper instruction in such a case would not be an issue. The failure to instruct on corroboration cannot always either be harmless (if corroborating evidence exists) or moot (if corroborating evidence does not exist). Such a scheme undermines the requirement that accomplice instructions be given *sua sponte* whenever warranted. (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 569.) Moreover, this line of harmless error analysis results in no one — neither a properly instructed jury, nor a reviewing court applying a permissible harmless error standard — ever considering whether the witness actually was an accomplice in the first place.

IV.

THE TRIAL COURT ERRED IN INSTRUCTING PURSUANT TO CALJIC NO. 2.11.5 AND REFUSING TO GIVE DEFENSE-REQUESTED INSTRUCTIONS WHICH WERE NECESSARY FOR THE JURY'S EVALUATION OF MICKEY LANDRUM'S TESTIMONY AND CONSIDERATION OF APPELLANT'S THIRD-PARTY CULPABILITY DEFENSE.

As discussed in the previous argument, there was substantial evidence that Mickey Landrum was an accomplice and could have been prosecuted for the burglaries, robberies, attempted murder and murder charged against appellant. However, the trial court failed to instruct on the law of accomplices and thereby, the jury was never told that Landrum's testimony deserved special scrutiny and corroboration. Here in the present argument, appellant will argue that the trial court compounded this error in two ways. First, the court erroneously gave CALJIC No. 2.11.5, which instructed the jurors not to discuss or give any consideration as to why

Landrum was not being prosecuted. As explained below, this instruction likely misled the jurors to believe that they could not consider the evidence of Landrum's complicity in the crimes and the benefits he received for testifying against appellant. The law is clear that this instruction should not be given when there is evidence that a prosecution witness, such as Mickey Landrum, was or may have been involved in the charged crimes.

Second, the trial court further erred in refusing defense-requested instructions Nos. 14 and 28, which would have corrected the error in CALJIC No. 2.11.5 by (1) informing the jurors that they could consider third-party culpability evidence in determining whether there was reasonable doubt of appellant's guilt and (2) telling the jurors that the testimony of a prosecution witness who has been provided immunity or other personal benefit "must be examined to determine whether this testimony had been affected by the grant of immunity, by personal interest, [or] by expectation of reward." These instructions were not argumentative and contained the correct principles of law applicable to, and necessary for, the jury's evaluation of Landrum's testimony and consideration of appellant's third-party culpability defense.

In combination, these instructional errors — the failure to give accomplice instructions, the erroneous giving of CALJIC No. 2.11.5 and the refusal of defense instructions — unduly constrained the jury's consideration of appellant's third-party culpability defense and restricted the jury's ability to evaluate Landrum's bias, in violation of appellant's state law right to instructions on his theory of the defense, as well as his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to due process, to a fundamentally fair trial, to trial by jury, to present a meaningful defense, and to reliable guilt and penalty determinations.

A. CALJIC No. 2.11.5 Was Improper In This Case.

The trial court instructed the jury with CALJIC No. 2.11.5 during the guilt phase of trial as follows:

> There has been evidence in this case indicating that a person(s) other than defendant was or may have been involved in the crimes for which the defendant is on trial.
>
> There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendant on trial.
>
> CALJIC No. 2.11.5 (1989 revision).

(8 CT 2187; see also 21 RT 4583-4584.)

There is at least a reasonable likelihood the jury would have applied this instruction to prosecution witness Mickey Landrum. In fact, there was no one else to whom it could reasonably have been applied. As discussed in the previous argument, there was evidence indicating that Landrum was involved in all three burglaries, as well as the March 1 robberies and attacks on Mr. and Mrs. Bragg. Landrum, who possessed property taken during that attack and the two previous burglaries, could have been, but was not, prosecuted for any of those offenses.

Witnesses like Landrum who are exposed to criminal prosecution will commonly have a motive to fabricate testimony based on either undue pressure from the authorities (*Davis v. Alaska* (1974) 415 U.S. 308, 317-318) or the hope of lenient treatment in exchange for cooperation. (*People v. Brown* (1970) 13 Cal.App.3d 876, 883, disapproved on another ground by *People v. Chi Ko Wong* (1976) 18 Cal.3d 698.) In fact, Landrum did receive benefits which rendered his testimony suspect. When he

relinquished property stolen from the Rudy residence to the authorities, Landrum was promised by the Stanislaus County District Attorney's office that he would not be prosecuted for his "handling" of that property, nor would he be prosecuted "for holding dope at the time, of having dope, been doing dope at the time of moving the merchandise." (16 RT 3303-3304, 3287.)

The defense argued that Landrum should not be believed because of these benefits. (See 20 RT 4463 ["Mr. Landrum has been given immunity from prosecution for stolen property and drug offenses. This is some evidence of motive or bias to testify in this case. . . . [¶] He's . . . a person who's admitted certain criminal offenses for which he's being given immunity to come here and testify for the prosecution."[169]].) The defense also argued that evidence pointing to Landrum's involvement in the capital offense provided reasonable doubt that appellant was guilty. (21 RT 4507.) Indeed, reasonable doubt premised on that third-party culpability evidence was appellant's sole defense. CALJIC No. 2.11.5, however, directed the jurors not to discuss or give any consideration as to why Landrum had not been and would not be prosecuted. Given this command, it is reasonably likely that the jurors believed that they could not consider the evidence of Landrum's complicity in the crimes and the benefits he received for testifying against appellant.

This instruction should not have been given. This Court has often made clear that trial courts should not give CALJIC No. 2.11.5 when, as

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[169] The record contains no evidence that the Stanislaus County District Attorney's promise of immunity to Landrum was memorialized in a written agreement. The only mention of such immunity in the record was Landrum's testimony at trial that he was promised he would not be prosecuted. (16 RT 3287.)

here, there is evidence that a prosecution witness was or may have been involved in the crimes charged against the defendant. (*People v. Hernandez* (2003) 30 Cal.4th 835, 875, disapproved on another ground by *People v. Riccardi* (2012) 54 Cal.4th 758; see also *In People v. Marks* (1988) 45 Cal.3d 1335.) Indeed, "[t]he use note cautions that 'this instruction is not to be used if the other person is a witness for either the prosecution or the defense.'" (*People v. Garrison* (1989) 47 Cal.3d 746, 780.) As observed by the Court of Appeal in *People v. Rankin* (1992) 9 Cal.App.4th 430, 437, the instruction should not be given when the non-prosecuted person testifies "because the jury is entitled to consider the lack of prosecution in assessing the witness' credibility."

Therefore, the trial court erred in giving CALJIC No. 2.11.5. The jury was entitled to consider the fact that Landrum was not prosecuted for his involvement in the burglaries, robberies, attempted murder, and the capital crime in determining whether he had a bias or motive to testify for the prosecution. The jury was also entitled to consider evidence pointing to Landrum's involvement in the crimes in determining whether there was reasonable doubt of appellant's guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833.) By giving CALJIC No. 2.11.5, the court precluded the jury from considering that Landrum was not being prosecuted and that therefore he had a strong incentive to skew his testimony to the prosecution's benefit. CALJIC No. 2.11.5 thus restricted the jury's ability to evaluate Landrum's bias on the basis of benefits provided by the prosecution and also undercut appellant's defense — that reasonable doubt premised on the evidence connecting Landrum to the crime required a verdict of not guilty.

This Court has "frequently said that a jury is not misled by [CALJIC No. 2.11.5] when the trial court gives the standard instructions on

accomplice liability."[170] (*People v. Hernandez, supra,* 30 Cal.4th at p. 877.) However, as discussed in the previous argument, the court omitted all of the standard accomplice instructions at appellant's trial. The trial court's giving of CALJIC No. 2.11.5 under these circumstances was thus improper.

B. The Court Also Erred In Refusing To Instruct With Defendant's Special Instructions Numbers 14 And 28, Non-Argumentative Instructions Which Contained Correct Principles Of Law Necessary For Consideration Of Landrum's Testimony And Appellant's Defense.

In addition to erroneously giving CALJIC No. 2.11.5, the court refused two defense-requested instructions which contained the correct principles of law applicable to, and necessary for, the jury's evaluation of Mickey Landrum's testimony and consideration of appellant's third-party culpability defense.

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[170] In some cases, this Court has concluded that there was no error in the giving of CALJIC No. 2.11.5 where the trial court has also provided the standard accomplice instructions. (See, e.g., *People v. Cain* (1995) 10 Cal.4th 1, 34-35 [although CALJIC No. 2.11.5 should have been omitted or clarified, there was no error where standard instructions on accomplice testimony were also given]; *accord, People v. Price* (1991) 1 Cal.4th 324, 445-46; *People v. Lawley* (2002) 27 Cal.4th 102, 162-163; *People v. Williams* (*Michael Allen*) (1988) 45 Cal.3d 1268, 1312-13.) In other cases, the Court has found error but concluded that it was harmless, believing it unlikely that a jury would understand CALJIC No. 2.11.5 to preclude consideration of evidence of bias or motive where full accomplice instructions were given. (See, e.g. *People v. Cox* (1991) 53 Cal.3d 618, 666-668 [trial court error in giving CALJIC No. 2.11.5 was not prejudicial where trial court gave full panoply of accomplice and aiding and abetting instructions specifically directed to the prosecution witnesses in question], disapproved on another ground by *People v. Doolin, supra,* 45 Cal.4th 390; *accord, People v. Carrera* (1989) 49 Cal.3d 291, 312-13; *People v. Hardy* (1992) 2 Cal.4th 86, 189-90.)

As noted above, defense counsel wanted the jury to consider evidence of Landrum's involvement in the capital crime and the benefits he had received and was hoping to receive for cooperating with the prosecution as bases to distrust his testimony and to find reasonable doubt. In order to support those arguments, counsel submitted two special instructions which countermanded that portion of CALJIC No. 2.11.5 which restricted consideration of reasons for non-prosecution of a prosecution witness who might have been involved in the crime. First, counsel requested defendant's special instruction number 14, which would have told the jurors that the testimony of a prosecution witness who had been provided immunity or other personal benefit "must be examined to determine whether this testimony has been affected by the grant of immunity, by personal interest, [or] by expectation of reward."[171]

Second, counsel also submitted an instruction permitting consideration of third party culpability evidence (defendant's special instruction number 28). (8 CT 2066, 2070.) Defendant's special instruction number 28 proposed to modify CALJIC No. 2.11.5 so as to permit the

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[171] Defendant's special instruction number 14 stated:

> The testimony of a witness who provides evidence against a defendant for immunity from punishment, or for any other personal advantage, must be examined to determine whether this testimony has been affected by the grant of immunity, by personal interest, by expectation of reward, or by prejudice against the defendant.

(8 CT 2093.)

jurors to consider evidence of "the guilt of any other person" in determining whether there was reasonable doubt of appellant's guilt.[172]

The court, however, rejected 14, and instead of giving defendant's special instruction number 28, instructed with CALJIC No. 2.11.5, which affirmatively commanded the jurors *not* to consider why Landrum was not being prosecuted and hence to ignore evidence indicating that he was or may have been involved in the capital offense and related crimes. (8 CT 2066, 2070, 2093, 2187; 20 RT 4283, 4375, 4410-4413.)

This was error. As argued above, CALJIC No. 2.11.5 should not have been given here where there was evidence that a prosecution witness may have been involved in the crimes charged against appellant. Moreover, the court should have instructed with defendant's special instructions 14 and 28. These instructions contained proper statements of law that were fully supported by the evidence and were not covered by other instructions; they were not argumentative; they were necessary to guide the jury's

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[172] Defendant's special instruction number 28 requested to "[m]odify CALJIC 2.11.5 as follows":

> You are here to determine the guilt or innocence of the accused from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons also are guilty. But if a reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, including any evidence of the guilt of any other person or persons, it is your duty to find the accused not guilty.

(8 CT 2070.)

consideration of Landrum's testimony; and they pinpointed appellant's third-party culpability theory of the case, not specific evidence.

A criminal defendant is entitled upon request to instructions which either relate the particular facts of his or her case to any legal issue, or pinpoint the crux of the defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.) Thus, a defendant is entitled to jury instructions on any theory of the case which is supported by substantial evidence, so long as the requested instruction is not argumentative or duplicative of other instructions. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.)

In *People v. Hunter* (1989) 49 Cal.3d 957, 976-978, this Court approved an instruction like defendant's special instruction number 14. There, the defendant requested a jury instruction stating that the testimony of immunized witnesses must be viewed with "suspicion" and examined with "greater care and caution" than the testimony of an ordinary witness. (*Id.* at p. 976.) The trial court modified the requested instruction, "directing the jury to determine whether an immunized witness's 'testimony has been affected by it [sic] or by his prejudice against the defendant,' but to weigh the witness's credibility 'by the same standards by which you determine the credibility of other witnesses.'" (*Ibid.*) This Court concluded that this modified instruction, coupled with CALJIC No. 2.20, the standard instruction on witness credibility which directs the jury to weigh the "existence or nonexistence of a bias, interest, or other motive," "adequately informed the jury of the necessity to weigh the motives of the immunized witnesses." (*Id.* at p. 978.)

Defendant's special instruction number 14 contained the same correct principle of law, simply directing the jurors to examine "[t]he testimony of a witness who provides evidence against a defendant for

immunity from punishment, or for any other personal advantage," "to determine whether [the] testimony has been affected by the grant of immunity, by personal interest, by expectation of reward, or by prejudice against the defendant." (8 CT 2093.) Substantial evidence supported this instruction. Landrum's admission that he had been promised he would not be prosecuted for his involvement with the stolen property provided sufficient cause for the jurors to reasonably conclude that his testimony may have been affected by this promise of immunity.

The trial court, though, summarily rejected number 14 on the basis that it was giving CALJIC No. 2.20, which instructed the jurors to consider "[t]he existence or nonexistence of a bias, interest, or other motive" in determining the believability of a witness. (8 CT 2133; 20 RT 4283.) However, the "bias, interest, and motive," which the defense wanted the jurors to consider in this case, was premised on Landrum's avoidance of prosecution by denying any involvement in the capital offense and instead pinning the blame on appellant. CALJIC No. 2.11.5 commanded the jurors not to consider why Landrum was not being prosecuted. Thus, under these circumstances, CALJIC No. 2.11.5 had the effect of undercutting CALJIC No. 2.20, a defect that special instruction number 14 would have corrected. Because defendant's special instruction number 14 delivered a correct statement of law which was not adequately covered by the instructions given by the court, its refusal was error.

As for defendant's special instruction number 28, the trial court did not reject this instruction because it was an incorrect statement of the law, but rather as the result of misunderstanding. When the court first examined number 28, it noted that the proposed instruction was related to CALJIC

No. 2.11.5[173] and immediately turned its attention to CALJIC No. 2.11.5. (20 RT 4308-4309 ["Number 28. . . . [¶] This again has to do with reasonable doubt. Let's see. 2.11.5. . . ."].) The court read CALJIC No. 2.11.5 and questioned whether there was sufficient evidence to support it. (20 RT 4309-4310.) The prosecutor read the use note to 2.11.5, which explicitly stated that it was *not* to be given when the other person was a witness for either the prosecution or the defense, but the prosecutor then mistakenly asserted that use note was no longer applicable.[174] (20 RT 4311.) The court concluded that it depended upon how the defense argued its case. (20 RT 4313.) If the defense was going to argue that Landrum was the killer, the court thought that it might have to give the instruction.[175] (*Ibid.*) On the other hand, the court was not sure that it wanted to modify CALJIC No. 2.11.5. (*Ibid.*) So the Court put number 28 in its "possible"

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[173] The instruction, at the top, read: "Modify 2.11.5 to provide as follows. . . ." (8 CT 2070.)

[174] The prosecutor asserted that because the 1989 revision to CALJIC No. 2.11.5 incorporated the changes recommended by this Court in *People v. Farmer* (1989) 47 Cal.3d 888, the use note specifying that the instruction is not to be used if the other person is a witness for either the prosecution or the defense was no longer operative. (See *People v. Farmer*, *supra*, 47 Cal.3d at pp. 919-919 [CALJIC No. 2.11.5 "would be more informative and might better deter speculation if it told the jury explicitly that its sole duty is to decide whether *this* defendant is guilty and that there are many reasons why someone who also appears to have been involved might not be a codefendant in this particular trial"].) He was wrong. The 1989 revision of CALJIC No. 2.11.5, as well as subsequent revisions in 1996 and 2004, contain the same use note. And in *People v. Hernandez*, *supra*, 30 Cal.4th at page 875, this Court held that it was improper to give, in a case where the other person was a prosecution or defense witness, the 1989 revised version of CALJIC No. 2.11.5 — the same instruction given in the case at bar.

[175] The record is not clear whether the court was referring to CALJIC No. 2.11.5 or defense special instruction number 28, since the court appeared to have been discussing CALJIC No. 2.11.5. (20 RT 4309-4313.)

file. (*Ibid.*) The court subsequently stated that it would hold onto the instruction until it had heard defense counsel's argument. (20 RT 4372.)

Later that day, the court stated that it had been thinking about the instruction "having to do with other persons." (20 RT 4410.) The court opined that it had to give that instruction, because there had been evidence that other people were in possession of stolen property and thus could be involved in the charged offenses of robbery and burglary and there had been evidence from which the defense could argue that someone else did the murder. (*Ibid.*) At the end of the discussion, the court asked the prosecutor to give him a CALJIC No. 2.11.5 instruction, and the prosecutor provided the court with the version of CALJIC No. 2.11.5 that was ultimately delivered to the jury. (20 RT 4413; 21 RT 4583-4584.) The court never again mentioned defendant's special instruction number 28 and never revisited the defense request for number 28 after stating its intent to hold onto it. The copy of number 28 in the Clerk's Transcript contains the handwritten note, "Given elsewhere." (8 CT 2070.) Of course, number 28 was not given; it was CALJIC No. 2.11.5 that was given.

These discussions and the handwritten notation on defendant's special instruction number 28 indicate that the court did not see the significant difference between the defense instruction and CALJIC No. 2.11.5. However, as recognized by the CALJIC committee and this Court, the latter was likely to mislead the jurors to believe that they were not to consider third-party culpability evidence and benefits received by a prosecution witness, whereas number 28 informed the jurors that they could consider such evidence in determining whether reasonable doubt existed. Although the defense instruction clearly stated that it was to modify CALJIC No. 2.11.5, the court did not appear to understand that its modification, in fact, corrected this flaw in CALJIC No. 2.11.5.

As argued earlier, it was error to give CALJIC No. 2.11.5 under the circumstances of this case. The court also should have given defendant's special instruction number 28, which was modeled on the federal form instruction cited with approval by this Court in *Farmer*. (*People v. Farmer* (1989) 47 Cal.3d 888, 919, abrogated on another ground by *People v. Waidla* (2000) 22 Cal.4th 690 ["Cf. 1 Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed. 1977) § 11.06."].) Number 28 corrected the error in CALJIC No. 2.11.5 by permitting the jurors to consider third party culpability evidence ("But if a reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, including any evidence of the guilt of any other person or persons, it is your duty to find the accused not guilty"), while preserving the correct principles in CALJIC No. 2.11.5: "You are here to determine the guilt of innocence or the accused from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should find, even though you may believe one or more other persons also are guilty." (8 CT 2070.)

The trial court's refusal to give number 28 was error. The instruction contained correct statements of law, was supported by substantial evidence, and was not covered by other instructions. As outlined in the previous argument, there was substantial evidence that Mickey Landrum could have been prosecuted for the burglaries, robberies, attempted murder and murder. However, the only instruction which the jurors received concerning third-party culpability evidence was CALJIC No. 2.11.5, which was likely to mislead them to believe that they could not consider such evidence. The defense of third-party culpability is well-established. It is settled law that where sufficient evidence exists to support that theory, the defense may rely

on the claim that a third party committed the charged offense, and may present "third-party culpability evidence" in support of that theory. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017; *People v. Hall, supra*, 41 Cal.3d at p. 833.) As explained by this Court in *Hall*: "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." (*Ibid.*) Here, the trial court found sufficient evidence to support a defense argument that Landrum could have committed the crimes, but failed to give any instruction to permit the jury to consider such evidence in determining whether there was reasonable doubt of appellant's guilt.

In sum, both special instructions 28 and 14 were correct statements of law which were necessary for the jury's evaluation and consideration of Landrum's testimony and appellant's sole defense. Neither instruction was argumentative, i.e., they did not "invite the jury to draw inferences favorable to the parties from specified items of evidence." (*People v. Wright* (1990) 45 Cal.3d 1126, 1135.) Indeed, neither instruction mentioned any specific evidence and contained only correct statements of law. The trial court thus erred in refusing them.

C. The Error In Giving CALJIC No. 2.11.5 Was Not Invited.

Defense counsel requested that the trial court give CALJIC No. 2.11.5, but the error was not invited because counsel did not make a conscious, deliberate tactical choice. Instead, counsel's actions are attributable to ignorance and mistake.

When a defense attorney makes a conscious, deliberate, tactical choice either to forego or request a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted or

given in error. (*People v. Wader, supra,* 5 Cal.4th at pp. 657-658.) "Invited error, however, will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) Invited error will not be found when defense counsel acts out of ignorance, neglect or mistake, rather than for a tactical reason. (*People v. Graham* (1969) 71 Cal.2d 303, 319, disapproved on another ground by *People v. Ray* (1975) 14 Cal.3d 20; *People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on another ground by *People v. Barton* (1995) 12 Cal.4th 186.) For the doctrine to apply, it must be clear from the record that counsel acted for tactical reasons and not out of ignorance or mistake. (*People v. Wickersham, supra,* at p. 330.) When it would have made "no sense" for defense counsel to agree to a particular instruction, it is likely that counsel's request for the instruction was made out of ignorance or mistake. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1128; see also *People v. Stitely* (2005) 35 Cal.4th 514, 553, fn. 19 ["There also seems to be no plausible tactical reason why defendant would forgo the chance to escape a first degree murder conviction based on his reasonable belief in consent as to rape. [Citation.] Thus, we reject the claim of invited error."].) And if the record is ambiguous as to defense counsel's motivation, the doctrine of invited error should not be applied. (*People v. Valdez, supra,* 32 Cal.4th at pp. 115-116.)

The record here shows that defense counsel's strategy was to expose Landrum's complicity in the capital crime as a means of attacking his credibility and establishing reasonable doubt. As noted above, counsel made those arguments to the jury (20 RT 4463; 21 RT 4507), and to support those arguments, submitted several special instructions. (8 CT 2066, 2070, 2093.) CALJIC No. 2.11.5 was contrary to this strategy and counsel's own requested special instructions. Examination of the colloquy

among court and counsel over the proposed instructions reveals that it was only through ignorance and mistake that counsel eventually responded affirmatively to the court's question whether he wished the court to give CALJIC No. 2.11.5.

The court and counsel first discussed defendant's special instruction number 17, which would have informed the jury that evidence that a third party was the perpetrator of an offense charged against appellant needed only to raise a reasonable doubt as to appellant's guilt in order to warrant a not-guilty verdict. (20 RT 4290-4292; see 8 CT 2066.) Defense counsel summarized the evidence which he believed supported the instruction: Landrum's possession of the stolen property, his physical proximity to the crime scene, his whereabouts during the time of the crime, his giving of the yellow gloves to George Romo, and the injury on his hand. (20 RT 4291.) The court questioned whether there was sufficient evidence to support the instruction, but stated that it would read the case law before deciding. (*Ibid.*) The court thus put number 17 in its "question pile." (20 RT 4292.)

During that same instruction conference, they discussed defendant's special instruction number 28, which would have modified CALJIC No. 2.11.5 in the ways discussed above. (20 RT 4308-4313.) Again, the court questioned whether there was sufficient evidence to support the instruction and put it in its "possible" file. (20 RT 4309-4311, 4313.)

During the next instruction conference, the court reiterated its uncertainty whether the evidence warranted defendant's special instruction number 28, but stated that it would hold onto the instruction until it had heard defense counsel's argument to the jury. (20 RT 4372.) Defense counsel repeated his argument that there was sufficient evidence of Landrum's involvement in the crimes to support the instruction. (20 RT 4373.)

Later that day, the court stated that it had been thinking about the instruction "having to do with other persons." (20 RT 4410.) As noted above, the court opined that it had to give that instruction, which was usually a prosecution instruction, because there had been evidence that someone else was involved in the robbery and burglary and there was evidence from which the defense could argue that someone else did the murder. (*Ibid.*) Defense counsel responded that he thought the court was required to give "this instruction." (20 RT 4411.) The court told counsel, "And, you know, you can tell them in your argument about that particular instruction." (*Ibid.*) The court said that it had often given "this" instruction where there was some evidence that someone else may have done it; "it" says "that a person other than the defendant was or may have been involved." (20 RT 4411-4412.)

Notably, during this discussion, the court did not specifically identify whether it was referring to defendant's special instruction number 28 or CALJIC No. 2.11.5. Although, given the context of the court's comments and the court's quotation of language that only appears in CALJIC No. 2.11.5 ("a person other than the defendant was or may have been involved"), it is clear upon review that the court was referring to CALJIC No. 2.11.5, the record does not reflect that defense counsel so understood. The record also does not illuminate which instruction defense counsel was referring to when he said the court was required to give "this instruction."

After both sides presented their arguments to the jury, the prosecutor asked the court whether it had received his CALJIC No. 2.11.5, "which the defense counsel requested," and the court responded affirmatively. (21 RT 4521.) Defense counsel was silent. (*Ibid.*) During a subsequent review of all instructions to be given, the court asked defense counsel if he wanted

CALJIC No. 2.11.5 and when counsel asked what 2.11.5 was, the court began to read the second and subsequent sentences of CALJIC No. 2.11.5 ("There has been evidence in this case that a person other than the defendant was or may have been involved in the crime. There may be reasons why such person is not here on trial. Therefore do not discuss or give any consideration."). (21 RT 4542.) At that point, defense counsel interrupted and said that he wanted it. (*Ibid.*)

It is first obvious that counsel never expressed a deliberate, tactical purpose for having the jury instructed pursuant to CALJIC No. 2.11.5. Nor is there any basis in the record to infer such a tactical reason, let alone clearly establish that counsel acted for such a reason. Given counsel's strategy to focus the jury's attention on Landrum's complicity in the crimes and his request of several instructions to guide that focus, it would have made no sense for counsel to agree to an instruction which would restrict consideration of that evidence. The doctrine of invited error is inapplicable under these circumstances. (*People v. Boyette* (2002) 29 Cal.4th 381, 438 [although defense counsel joins prosecutor in requesting CALJIC No. 2.03, error is not invited where the record demonstrates no obvious tactical reason for defense counsel to want the jury given an instruction that allows jury to find consciousness of guilt based on a false pretrial statement]; *People v. Maurer*, *supra*, 32 Cal.App.4th at pp. 1127-1128 [no invited error despite trial court's statement that both counsel requested CALJIC No. 2.51; reviewing court concludes that defense counsel acted out of ignorance or mistake because it would have made no sense for counsel to request an instruction that would allow the jury to dispense with finding the mental state element required to convict the defendant].)

Moreover, during much of the discussion, the record is ambiguous whether the court and counsel were referring to defendant's special

instruction number 28 or CALJIC No. 2.11.5. No one, including defense counsel, appeared to understand that CALJIC No. 2.11.5 contradicted the guidance that defense counsel wanted to provide to the jurors by his requested instructions. Although defense counsel eventually responded affirmatively that he wanted the jury instructed pursuant to CALJIC No. 2.11.5, he acted as a result of neglect and mistake. This also defeats application of invited error in the case at bar. (See, e.g., *People v. Valdez*, *supra*, 32 Cal.4th at pp. 114-116 [no invited error found where defense counsel advised the trial court that he did not want the jury instructed on lesser included offenses, because the record was ambiguous whether counsel was referring solely to voluntary and involuntary manslaughter instructions, which had been raised as possible jury instructions in previous discussions, or whether counsel considered and rejected instructions on all potential lesser included offenses].)

In contrast, this Court has found invited error either where counsel directly expresses a deliberate, tactical choice or indicates that choice through argument. (See, e.g., *People v. Avalos* (1984) 37 Cal.3d 216, 228-229 [invited error found where counsel's argument showed that his lack of objection to erroneous instruction was more than mere unconsidered acquiescence; at sentencing, counsel urged the trial court to enter a verdict in accord with the erroneous theory on which the instruction was based]; *People v. Hernandez* (1988) 47 Cal.3d 315, 353-354 [defense counsel's closing arguments showed that requesting CALJIC No. 8.75 was not negligence, inadvertence, or mistake]; *People v. Phillips* (1966) 64 Cal.2d 574, 580 [failure to instruct on manslaughter was invited error where defense counsel strongly opposed the instruction and indicated to trial court that he considered it "tactically" to defendant's advantage to confront the jury with the limited choice between murder and acquittal], overruled on

another ground by *People v. Flood* (1998) 18 Cal.4th 470; *People v. Cooper* (1991) 53 Cal.3d 771, 827 [invited error found where defense counsel, in repeatedly objecting to a second degree murder instruction, made a deliberate, tactical choice to prevent a compromise verdict]; *People v. Duncan* (1991) 53 Cal.3d 955, 969-970 [invited error found where record showed that defense counsel requested trial court to give only a felony-murder instruction as a matter of trial tactics because then the prosecution would have to prove robbery and intent to kill; counsel stated he had considered the matter, discussed it with his client and that in weighing all the factors, decided not to request any lesser included offenses]; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234-1236 [invited error found where defense counsel asked trial court to withdraw several second degree murder instructions and replied affirmatively to the trial court's question whether defense position was that it was either murder in the first degree or not at all].)

This case is akin to *Lankford v. Arave* (9th Cir. 2006) 468 F.3d 578, 582-585, where the Ninth Circuit concluded that counsel's behavior in similar circumstances was not based on a strategic decision, but rather resulted from ignorance. Defense counsel in that case submitted an erroneous instruction, which omitted a critical element of state law requiring corroboration of accomplice testimony. (*Id.* at pp. 582-583.) Counsel also submitted two additional instructions which contradicted that instruction by requiring corroboration. (*Ibid.*) The Ninth Circuit observed that there was no reasonable tactical advantage for counsel to submit an instruction that misstated state law and made it easier for the jury to convict the defendant by allowing the jury to give greater weight to the uncorroborated testimony of the defendant's accomplice. (*Id.* at p. 584.) The same is true here. There was no reasonable tactical advantage for

counsel to agree to an instruction which was erroneous under state law and would allow the jurors to give greater weight to Mickey Landrum's testimony.

In sum, defense counsel did not express a deliberate, tactical reason for the giving of CALJIC No. 2.11.5. The record, instead of supporting an inference of such purpose, shows that counsel wanted the jurors to consider the reasons why Landrum was not prosecuted. Thus, the error was not invited.

However, should this Court disagree, appellant submits that his counsel rendered ineffective assistance of counsel in violation of Article I, section 15 of the California Constitution and the Sixth Amendment by agreeing that the jurors be instructed with CALJIC No. 2.11.5. As recognized by this Court in *People v. Wader*, *supra*, 5 Cal.4th 610:

> Even a deliberate tactical choice by counsel, however, may be an incompetent one. Thus, we have also recognized that a defendant who is barred from raising instructional error by the invited error doctrine may "always claim he received ineffective assistance of counsel."

(*Id.* at p. 658.) To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, that there was no rational tactical purpose for counsel's act and that it is reasonably probable that absent counsel's deficiencies, a more favorable result would have been obtained. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) In *Lankford v. Arave*, *supra*, 468 F.3d 578, the Ninth Circuit found that counsel's conduct in requesting an erroneous instruction which allowed the jury to give greater weight to the uncorroborated testimony of the defendant's accomplice constituted ineffective assistance of counsel:

> By inviting a jury instruction that misstated state law and made it easier for the jury to convict his client, counsel unwittingly undermined the very "adversarial testing process" he was supposed to protect. [Citation.] We agree with the district court that in this regard his performance fell below the "range of reasonable professional assistance."

(*Id.* at p. 585.) Likewise, the conduct of appellant's counsel, in agreeing that the court give CALJIC No. 2.11.5, fell below the range of reasonable professional representation. As discussed above, there was no possible rational tactical reason for his agreement. The instruction, similar to the instruction in *Lankford*, was erroneous under state law and allowed the jurors to give greater weight to Landrum's testimony. In subsection E, *post*, appellant will discuss the prejudice flowing from this error.

D. These Instructional Errors Violated State Law And The Federal Constitution.

The court's erroneous giving of CALJIC No. 2.11.5 and its refusal to give the requested instructions was error under both state law and the federal Constitution. These errors denied appellant his state law right to instructions on his theory of defense (*People v. Rincon-Pineda*, *supra*, 14 Cal.3d at p. 885; *People v. Bynum* (1971) 4 Cal.3d 589, 604) as well as his federal constitutional rights to present a defense, trial by jury, due process and reliable guilt and penalty determinations.

The United States Constitution guarantees criminal defendants the right to present a defense, and therefore the right to requested instructions on the defense theory of the case. (*Matthews v. United States* (1988) 485 U.S. 58, 63 ["As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."].) Consequently, the trial court's erroneous giving of CALJIC No. 2.11.5 and its failure to

instruct on appellant's third-party culpability defense violated appellant's Sixth Amendment right to present a meaningful defense. (See, e.g., *Taylor v. Illinois, supra,* 484 U.S. 400; *United States v. Escobar DeBright, supra,* 742 F.2d at pp. 1201-1202; *United States v. Unruh, supra,* 855 F.2d at p. 1372.) These errors, which effectively deprived appellant of the jury's consideration of his sole defense, also violated appellant's Fifth, Sixth, and Fourteenth Amendment rights to due process, a fundamentally fair trial, and to trial by jury (*Estelle v. McGuire* (1991) 502 U.S. 62) as well as his Eighth Amendment right to reliable guilt and penalty determinations. (*Beck v. Alabama, supra,* 447 U.S. at pp. 637-638; *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-585.) These instructional errors also violated due process in depriving appellant of his state law right to have his jury properly instructed. (*Wolff v. McDonnell, supra,* 418 U.S. at pp. 557-558; *Vitek v. Jones, supra,* 445 U.S. at pp. 488-489; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

E. **These Instructional Errors, In Combination With The Failure To Instruct On The Law Of Accomplices, Were Prejudicial And Require Reversal of The March 1 Crimes And The Two Prior Burglaries.**

The erroneous giving of CALJIC No. 2.11.5 and the failure to give defendant's special instructions numbers 14 and 28, in combination with the failure to instruct on the law of accomplices, were prejudicial and require reversal of the charged March 1 offenses — burglary, two robberies, special circumstance murder, and attempted murder — and the September 3 and February 15 burglaries. Because these errors violated the federal Constitution, they require a new trial unless the State can prove beyond a reasonable doubt that they did not contribute to appellant's conviction. (*Chapman v. California, supra,* 386 U.S. 18.) The State cannot meet that burden here with respect to the March 1 crimes and the two prior

burglaries. However, even under the reasonably probable standard applicable to errors of state law (*People v. Watson*, *supra*, 46 Cal.2d at p. 836), the errors require reversal of those findings and convictions.

These instructional errors were prejudicial for two reasons. One, they precluded consideration of appellant's third-party culpability defense — that the evidence connecting Landrum to the burglaries, robberies, attempted murder, and murder provided reasonable doubt of appellant's guilt. Two, the errors restricted the jury's ability to evaluate the bias of this significant prosecution witness whose testimony was critical to establish appellant's guilt of those crimes.

Landrum's testimony was critical to establish appellant's guilt of all three burglaries. His testimony was the crucial link to tie appellant to the property taken during those burglaries. It was Landrum who gave the property taken during the September 3 and February 15 burglaries (a microwave, VCR, boom box, china, jewelry and a portable bar) to appellant's mother in order to hide it from the police. And it was Landrum who testified that appellant, not he, stole the property and that he hid the property at appellant's command. Landrum also possessed property taken during the March 1 burglary (one or two of the telephones), which he delivered to his mother's home. Again, it was Landrum who testified that appellant and he took a bag of "stuff" to the home of Landrum's mother a few days after March 1.

Landrum's testimony was also critical to establish appellant's guilt of the March 1 robberies, attempted murder, murder and the burglary. It was Landrum's testimony which tied appellant to the gloves containing Mrs. Bragg's blood. Moreover, Landrum's testimony was necessary to establish the burglary and robbery special circumstances. In making his case that there was sufficient evidence to support those special

circumstances, the prosecutor argued that neither the burglary nor robbery was incidental to the killing, because appellant had dual motives to both kill and steal. (20 RT 4444-4447.) He argued that the evidence which established appellant's intent to steal on March 1 was his commission of the two prior burglaries. (20 RT 4440 ["in order to have a burglary, you have to have an intent to steal when you enter a home. And how do we know that besides killing thievery was also an objective that Mr. Johnsen had? How do we know that the theft he committed on March 1, 1992, was not the result of an afterthought after he found himself in there? Well, let's look at the history of Mr. Johnsen at 121 Robin Hood drive. He committed two prior burglaries over a span of months."]; see also 20 RT 4445-4448.) Of course, it was Landrum who provided the testimony necessary to support that point.

Had the jurors been instructed to view Landrum's testimony with distrust, it is reasonably probable that they would have disbelieved his story that appellant committed the prior burglaries. As outlined in the previous argument, Landrum had substantial motive to fabricate his testimony. Landrum was up to his neck in stolen property. Indeed, he was tied to almost every item of property stolen from the Rudy residence. Landrum also was responsible for secreting a substantial portion of the property so that it would not be discovered by the police. When Landrum was forced by his mother to turn over the additional stolen property stored at her home, he obviously had a great incentive to provide an explanation for his possession which attributed the thefts to appellant, not himself. Inevitably, Landrum detailed a version of the events that minimized his own possession and denied any responsibility for the thefts, while attributing both the thefts and the directive to hide the property to appellant. Had the jury been allowed to consider Landrum's ample motive to testify adversely to appellant, it is

quite likely that a properly instructed jury would have disbelieved his testimony in its entirety.

Moreover, had the jurors received adequate instructions to permit their consideration of appellant's third-party culpability defense, it is highly likely that they would have concluded that it was Landrum, not appellant, who committed the attempted murder and murder. For it was Landrum, not appellant, who possessed the gloves with the victim's blood and it was Landrum, not appellant, who appeared to have suffered a recent injury to his hand. Landrum had both opportunity and motive to commit the crimes. Landrum was in close proximity to the Rudy residence during the critical time period. Notably, there was no evidence to substantiate Landrum's story that he spent the night at his mother's home. And Landrum's drug habit certainly supplied a sufficient motive for him to commit the crimes.

It is true that there was other evidence linking appellant to the Rudy home on March 1, but there were enough problems with that evidence that it is reasonably probable that a different result would have been reached in the absence of these instructional errors. Certainly, this Court cannot conclude beyond a reasonable doubt that the improper instructions did not contribute to the verdicts obtained.

Consider, for example, the hair in the pantyhose, which the prosecution claimed matched appellant's DNA. First, however, this evidence should not have been admitted because of the chain-of-custody problems with respect to the hair, as discussed in Argument V, *post*. Second, even if the evidence was properly admitted, the chain-of-custody problems were such that jurors would reasonably have been skeptical of the DNA results.

There was also testimony by Linda Lee and Chester Thorne implicating appellant in the March 1 crime. Linda Lee testified that

(1) appellant told her, "I'm done for now," when she told him that she had given Sylvia Rudy's clock radio to the police; (2) appellant told her to tell the police that she did not remember that statement; (3) on March 1, appellant gave her a bag containing a telephone; (4) appellant asked her to get someone to burglarize the Rudy residence to take the heat off him; and (5) appellant told her that he had a key to the Rudy residence because his mother used to rent the place. (16 RT 3404, 3406, 3408-3411.) Chester Thorne testified that appellant solicited him to kill Mickey Landrum and a woman and place a telephone and other items in a dumpster so that the police would think the killer was still "out there killing people." (16 RT 3334-3335.) However, this evidence did not establish that appellant did any more than participate in the burglary on February 15, the burglary which resulted in the theft of the clock radio. (15 RT 3166-3168; 18 RT 3840.) Appellant's participation in the February 15 burglary would certainly provide motive for him to avoid being implicated in that burglary even if he was not involved in the March 1 crimes. Appellant could well have believed that the authorities would automatically suspect that he was involved in the March 1 crimes if they received information implicating him in the earlier burglary. Furthermore, Mickey Landrum's killing of a witness during a burglary of a home next to appellant's home would provide motive for appellant to seek revenge against Landrum.

There were, of course, the written confession and notes elicited by Eric Holland as to the March 1 crimes and the two prior burglaries. However, as outlined in Argument II, this evidence should never have been admitted because Holland, in eliciting appellant's confession, was acting as an agent of the State. Moreover, the analyses in Arguments II, *ante*, and V, *post*, show that the jury had much reason to disbelieve Holland and question the authenticity of the alleged confession.

In sum, it is reasonably probable that had the jury been instructed that (1) Landrum's testimony deserved special scrutiny and corroboration, and (2) they could consider the evidence of his complicity in the crimes and the benefits he received in avoiding prosecution, it would not have convicted appellant of either the March 1 crimes or the two prior burglaries. Ipso facto, respondent cannot establish beyond a reasonable doubt that these errors were harmless. These errors thus require reversal of Counts I, II, III, IV, V, VI and VII.

V.

APPELLANT WAS DENIED DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL BY THE ERRONEOUS ADMISSION OF TESTIMONY CONCERNING THE RESULT OF DNA TESTING OF A HAIR FOUND AT THE CRIME SCENE, BECAUSE THE PROSECUTION FAILED TO ESTABLISH WITH REASONABLE CERTAINTY THAT THE TESTING RESULT COULD BE ATTRIBUTED TO THE HAIR FROM THE CRIME SCENE.

A. Introduction.

A single blond hair was found inside a pair of pantyhose located at the crime scene. The State had Cellmark Diagnostics in Maryland perform PCR (polymerase chain reaction) DNA testing on the hair, but by the time that the "hair" arrived at Cellmark, it was no longer one hair — but two hairs. A Cellmark analyst tested both hairs in one test tube without first determining whether they were from one or two individuals. That testing detected DNA DQ-Alpha type "2,4" alleles, which the analyst testified was the same as appellant's DQ-Alpha type and shared by about nine percent of the general population.

There was considerable evidence presented at trial regarding the handling of the pantyhose hair prior to Cellmark's testing, and trial counsel objected to admission of the hair evidence on the basis of chain of custody irregularities. He did so after testimony concerning the result of the PCR testing had been elicited during his cross-examination of the Cellmark analyst. The trial court found the objection to be timely, but overruled it. Appellant submits that the court's ruling was wrong, because the prosecution failed to meet its burden of establishing a proper chain of custody as required by *People v. Riser* (1956) 47 Cal.2d 566, *cert. den.* (1957) 353 U.S. 930. Appellant further submits that he was deprived of due process and effective assistance of counsel by the erroneous admission of testimony regarding the result of the PCR testing.

B. Factual Summary.

1. Testimony Regarding the Pantyhose Hair — Its Handling and Testing.

The pantyhose was delivered to Dr. Richard Lynd, a Department of Justice criminalist in Modesto, who found a single nearly colorless blond hair, which he determined to be a head hair, inside the pantyhose. (17 RT 3455, 3458-3459, 3465.) Upon visual comparison of the hair to sample hairs from Sylvia Rudy, Juanita Bragg, Mickey Landrum and appellant, Dr. Lynd eliminated all but appellant and concluded that it could have originated from appellant because it had similar color, length, and texture. (17 RT 3458, 3463-3466, 3468.)

Dr. Lynd then sent the pantyhose hair in a Petrie dish to John Yoshida, a Department of Justice Senior Criminalist in French Camp, who performed PGM-1 (phosphoglucomutase) testing but obtained no result. (16 RT 3434; 17 RT 3469; 18 RT 3757-3758.) When Yoshida opened the tape-sealed container, he saw one hair with a root and a small amount of

tissue attached to the root. (18 RT 3757.) After completing his testing, Yoshida returned the hair to the Petri dish, which he then sealed and placed in the freezer awaiting transport back to the Department of Justice's Modesto laboratory. (18 RT 3759-3760.)

The sealed Petri dish was subsequently returned to Dr. Lynd at the Modesto lab; Dr. Lynd was to photograph the hair because he understood that it was to be sent off for testing that might consume it.[176] (18 RT 3760, 3764, 3801.) When Dr. Lynd received the hair, "it was taped to a plastic container." (17 RT 3470.) He could not say whether the container was sealed when he received it. (18 RT 3763.) Upon lifting the hair from the container, Dr. Lynd broke it into two pieces. (*Ibid.*)

Dr. Lynd then compared one of those hair segments to five sample hairs from appellant and took photographs of the comparisons but they did not turn out, and so he took three comparison photographs two weeks later. (18 RT 3769-3770, 3801.) Dr. Lynd did not photograph both segments of the hair and at trial, was unable to tell, by looking at the photographs, whether he had photographed the root end or the other end. (18 RT 3770.) All he had was a photograph of a piece of the hair, with the shaft going from one border to the other border of the photograph. (18 RT 3770-3771.)

Dr. Lynd explained that in order to do the comparison photography, he prepared one slide for one of the pantyhose hair segments and five slides of appellant's hair, setting the hairs in mounting media and placing glass

[176] Subsequent PCR testing did, in fact, destroy the pantyhose hair(s). Although the jury was not explicitly informed of this, the prosecutor so informed the court. (18 RT 3864-3865.)

cover slips over them.[177] (18 RT 3767-3768, 3801-3803.) Dr. Lynd could not recall whether he mounted the pantyhose hair segment and appellant's hair samples at the same time, but suspected that they would have been mounted "pretty close together." (18 RT 3807.) His normal procedure was to mount one hair sample at a time, in sequence. (*Ibid.*) He mounted the pantyhose hair segment on slides at least three times, maybe more. (18 RT 3805-3806.) Dr. Lynd did not know whether he returned the pantyhose hair segment to the Petrie dish, or put it inside an envelope, after mounting and photographing it.[178] (18 RT 3764-3765.) He did not record that kind of information. (18 RT 3764.) His notes did not indicate whether he had other hairs out at the time that he was working with the pantyhose hair segment. (18 RT 3765.)

After each time that he mounted the pantyhose hair segment, Dr. Lynd removed it from the slide and wiped off the mounting media with a chemical rinse and chemical wipe before repackaging it. (18 RT 3764, 3803-3806.) While handling the hairs, Dr. Lynd was not wearing a mask and was not sure whether he was wearing gloves or lab coat. (18 RT 3766-3667.) There were others present in the lab while Dr. Lynd was doing his work. (18 RT 3768.) He did not think that any of those individuals were wearing hair nets and could not recall any wearing masks or gloves. (*Ibid.*) Dr. Lynd could not recall whether his supervisor, who reviewed the results,

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[177] When he did the second round of comparison photography, Dr. Lynd used the slides of appellant's hair that he had previously prepared, but re-mounted the pantyhose hair segment. (18 RT 3802, 3805-3806.)

[178] Dr. Lynd explained that although his standard procedure would have been to return the hair segment to the container and place the container in a freezer for preservation, it would have been more convenient to put the hair segment into a coin envelope and place that in the freezer. (18 RT 3765.) He could not say what he did in this case. (*Ibid.*)

also handled the hair segments. (18 RT 3768-70.) The supervisor may have handled the slides that contained the hairs. (18 RT 3772.)

After completing his photography, Dr. Lynd packaged the hair segments in a sealed container, which was then personally delivered by one of the detectives to Julie Cooper, a senior molecular biologist, at Cellmark. (18 RT 3766, 3773-3775, 3803.) When Ms. Cooper broke the seal and opened the container, she observed two very fine blond hairs. (18 RT 3776.) She did not remove the hairs from the container at that time. (*Ibid.*)

Three months later, when Cooper removed the hairs from their container and observed that both appeared to have root ends. (18 RT 3777.) She did not examine the hairs under a microscope. (18 RT 3778.) Cooper clipped "the root and/or roots off and [sic] an adjacent hair shaft from that root and placed those two root ends" in a tube, where she did her PCR analysis. (18 RT 3777.) Cooper tested both hairs together in one test tube. (18 RT 3778-3779.) She did not know, and did not inquire, whether the hairs were from one or two individuals. (18 RT 3779-3780.) If there had been two root ends, her PCR testing would have extracted DNA from both root ends and mixed them together. (18 RT 3780.) The PCR test would not be able to tell whether the result had come from a single source or from two different individuals. (18 RT 3707-3708, 3725-3726.) Testing of DNA from two different individuals could combine to look like DNA from another individual. (18 RT 3707.)

Another Cellmark employee testified that because the PCR method of analysis is such a sensitive system, one of the largest concerns in any laboratory is to avoid any extraneous sources of DNA getting into a sample. (18 RT 3701, 3706-3707.) Contamination can occur not only in the samples but can also occur in the test tubes and the chemical reagents used. (18 RT 3710.) As a result, lab employees take precautions such as wearing gloves,

trying to manipulate the sample as little as possible, working with only one sample at a time, using only uncontaminated reagents and sterilized equipment, and starting over with clean gloves, new tray etc. when working with the next sample. (18 RT 3718.) When testing, they use a chemical hood, described as a metal box with a glass shield, to prevent an employee from contaminating samples by coughing.[179] (18 RT 3701-3702.) And any time an evidence sample is manipulated, Cellmark requires a witness to verify that the proper number sample is going to the proper place. (18 RT 3720.)

2. Elicitation of Testimony Regarding the PCR Test Result During Defense Counsel's Cross-Examination of Cellmark Analyst, and Counsel's Objection Based on Chain of Custody Irregularities.

During cross-examination of Cellmark biologist Julie Cooper, defense counsel asked, "[w]hat DQ-Alpha type did you get from the **pantyhose** that you processed?" (18 RT 3780, emphasis added.) The prosecutor objected that Cellmark did not process the pantyhose at all, but the court said to let the witness answer. (*Ibid.*) Cooper responded that "[t]he DQ-Alpha type that was obtained from the hair in the box labeled 'hair from pantyhose' was a 2,4."[180] (*Ibid.*) (The prosecutor had earlier elicited testimony that appellant's DQ-Alpha type was a "2,4," and that about nine percent of the general population has that DQ-Alpha type (18 RT 3683-

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[179] Dr. Lynd did not use such a hood during his work in this case. (18 RT 3768.)

[180] On direct examination of Ms. Cooper, the prosecutor had simply elicited testimony that she opened the container, saw two hairs, and subjected both to PCR testing. (18 RT 3776-3778.) He did not ask for the result of her testing. (18 RT 3778.)

3684, 3743-3744).) According to Ms. Cooper, if the two hairs had come from two different persons, in order to yield a "2,4" DQ-Alpha type when mixed, the DQ-Alpha type of the two donors would have had to be either (1) both "2,4" or (2) one a "2,2" and one a "4,4."[181] (18 RT 3793.)) Defense counsel then asked Ms. Cooper if she had ever processed the pantyhose, and Cooper testified no, she had never received the pantyhose. (18 RT 3780-3781.)

Thereafter, when the court and counsel reviewed exhibits to determine their admissibility, they discussed, and the court ruled upon, defense counsel's objection to the hair evidence on the ground of "chain of custody problems." (18 RT 3863-3868.) It is clear that defense counsel had earlier voiced such an objection to that evidence.[182] As stated by the court:

> Okay. Then there's an issue on – I want you to go over the items of evidence between the two of you. Most of it, from what I've seen, is admissible evidence. [¶] The one piece that you have a real question on, Mr. Faulkner [defense counsel], is this hair. And my understanding of the chain of custody problems, and I'll put something on the record on that when we get into arguing about it, is that unless it's clearly altered or there's more than just mere speculation that it was

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[181] Leo Bragg Sr.'s DQ-Alpha type is "1.1, 1.1;" Juanita Bragg's was "1.3, 2;" Sylvia Rudy's is "1.1, 2;" Mickey Landrum's is "1.1, 1.2;" and George Romo's is "1.2, 4." (18 RT 3743-3744.)

[182] The record does not elucidate when defense counsel first raised his chain of custody objection, but it does indicate that the court had previously been alerted to it. (See 18 RT 3662 [before presentation of evidence concerning the handling and testing of the pantyhose hair(s), the court stated its understanding that there was a "chain of custody problem that's in issue is going to be brought up later," the prosecutor confirmed that the hair was the subject of that "issue," and defense counsel agreed that questioning regarding that issue would be conducted in front of the jury], 3798 [at the close of the day on which Ms. Cooper testified to her PCR test result, the court stated that it had been researching chain of custody problems].)

> altered, it goes to the weight of the evidence, not to its admissibility.

(18 RT 3863.)

The prosecutor argued that the defense had not objected to the evidence when it was elicited and that it had been elicited during the defense cross-examination. The prosecutor stated:

> In fact, the evidence came in on cross-examination, not direct. We had the witness Julie Cooper up on cross-examination. There was a question about the pantyhose going to Cellmark. I knew darn well it hadn't gone. I tried to preclude further inquiry along there by raising an appropriate objection, assuming a fact not in evidence. I was overruled. [¶] The exchange between Mr. Faulkner and the witness continued and then she answered, I think in good faith, anticipating that that's what he wanted – being a layperson, she couldn't know that we were arguing about the chain of custody – and she responds that "Yeah, I did the typing on the hair and it was a 2,4."

(18 RT 3863-3864.) The prosecutor further argued that the hair testimony was already in evidence and questioned why they were discussing chain of custody at that point. (18 RT 3864.) The court responded that (1) defense counsel had the right to cross-examine on the issue of chain of custody; and (2) the prosecutor had not yet moved that evidence into evidence. (*Ibid.*) The prosecutor responded that he did not have the hair(s), that the evidence had been destroyed in the DNA testing, and that he thus was not asking that it be admitted into evidence. (18 RT 3864-3865.)

The court clarified with defense counsel that his objection had nothing to do with the fact that the hair had been destroyed, but with the manner in which it was handled, especially by Dr. Lynd who had broken the hair into two pieces. (18 RT 3865-3866.) As the court summarized, the defense was suggesting that there was evidence that the hair evidence had

been contaminated by Dr. Lynd's handling of the hair and that he had sent Ms. Cooper hairs from two different individuals. (*Ibid.*) Defense counsel confirmed that was the basis for his objection. (18 RT 3866.)

3. **<u>The Trial Court's Ruling</u>.**

The court opined that there was an insufficient basis to exclude the hair evidence because Dr. Lynd offered an explanation for the presence of two hairs, Ms. Cooper did not microscopically examine the hairs, and "it [was] not as if it was altered or it's definitely missing or something like that." (18 RT 3866-3867.) The court overruled appellant's objection, reasoning that the question went to the weight of the evidence, not its admissibility. (*Ibid.*) The court explained:

> And I think . . . it goes to speculation and goes to the weight of the evidence. It's just the bare speculation that it's not the same hair. The procedures in the labs were testified to, and, in any case, it seems to me if it was one of the – if it was mixed up with a hair from a hair that Mr. Lynd got from Mr. Johnsen, a known hair, then obviously it wouldn't make any difference.[183]

(18 RT 3867-3868.)

C. **<u>The Trial Court Erred In Admitting The DNA Evidence Because It Did Not Meet The Chain Of Custody Requirements Set Forth By This Court In *People v. Riser*</u>.**

The trial court's admission of evidence over a chain of custody objection is reviewed on appeal for abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

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[183] The court observed that (1) Dr. Lynd's hair was a different color, and (2) Ms. Cooper testified that the container contained two blond hairs. (18 RT 3868.)

In *People v. Riser*, *supra*, 47 Cal.2d 566, this Court set forth the "chain of custody" rule for the admissibility of expert analysis of demonstrative evidence. Then-Justice Traynor stated:

> Undoubtedly the party relying on an expert analysis of demonstrative evidence must show that it is in fact the evidence found at the scene of the crime, and that between receipt and analysis there has been no substitution or tampering. . . .
>
> The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration.
>
> The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.

(*People v. Riser, supra,* 47 Cal.2d at pp. 580-581, internal citations omitted.)

The defendant in *Riser* argued that the fingerprint evidence in that case should have been suppressed on the ground that the objects on which the prints were found had been left in an unlocked bookcase in a policeman's office for four hours. (*Id.* at pp. 579-580.) This Court affirmed the trial court's refusal to suppress, stating:

> [D]efendant did not point to any indication of actual tampering, did not show how fingerprints could have been forged, and did not establish that anyone who might have been interested in tampering with the prints knew that . . . [the objects were in the] book case.

(*Id.* at p. 581.)

In the current case, however, there was both evidence indicating that the hair evidence had been altered either by contamination or by substitution/addition of one or both of the hair fragments and evidence indicating how that alteration could have occurred. With respect to the latter form of alteration, the prosecution here was unable to satisfactorily explain a critical anomaly between the hair evidence discovered at the scene and that analyzed by Cellmark analyst Julie Cooper: how did one hair with one root end become two hairs with two root ends? The trial court reasoned that Dr. Lynd's testimony that he broke the hair in two provided a satisfactory explanation for the presence of two hairs in the container opened by Cooper. Dr. Lynd's testimony could only provide a reasonable explanation for the presence of two segments of the same hair. But Cooper testified that she observed and placed two root ends in her test tube, making it clear that the container contained two distinct hairs, not two segments of the same hair. (18 RT 3777.) Even when questioned whether she meant to say two root ends, Cooper responded: "Yes. The two pieces of hair, they both looked like they had an end that breathed out a bit which, from my experience, I know that hairs usually with a root, that's the fatter end." (*Ibid.*) The court discounted this testimony on the basis that Cooper did not microscopically examine the hairs, but there was no testimony that root hairs could only be observed with the use of a microscope. In fact, Cooper's testimony itself showed otherwise.

Moreover, there was evidence in the record that given Dr. Lynd's failure to follow standard lab protocols in handling and working with the hair samples, the hair evidence in this case could easily have been altered by either contamination or substitution/addition. Dr. Lynd did not wear a mask or use a chemical hood and was not sure whether he wore gloves.

Moreover, he mounted the slide containing the pantyhose hair sample and those containing appellant's hair samples "pretty close together," he mounted the pantyhose hair segments on slides at least three times, he did not know what he did with those segments after each mounting, and he did not have witnesses verify that he correctly labelled his slides or returned hair samples to their proper places. The trial court itself recognized that Dr. Lynd's handling of the evidence raised questions. As stated by the court:

> And Rich Lynd testified that he broke the hair in two pieces. I mean, obviously his testimony created some questions about the methods he used in transferring that hair from one place to another. And, I mean, at this lab in Maryland, they're all wearing gloves and masks and all that other kind of stuff, and Rich Lynd is doing it without gloves or anything else. Whether that has any affect [sic] on the hair, I don't know. They wash it and all that sort of stuff, and whether, if you sneeze on it, it can be absorbed into the hair or whatever, none of that was ever testified to. [¶] But, in any case, it seems to me there is a question about that hair sample and the question is whether that goes to it's – not because it's missing now . . . , but as to the way it was handled.

(18 RT 3866.)

The court ultimately discounted the possibility of substitution/addition, because Dr. Lynd's hair was a different color than the two hairs tested by Ms. Cooper. However, the court failed to account for the presence of others in Dr. Lynd's lab during the time that he was working with the hair evidence, including his supervisor, who may have handled the slides containing the hair samples. These individuals, too — like Dr. Lynd — did not follow standard lab protocols. As Dr. Lynd recounted, they were not wearing hair nets and he could not recall any wearing masks or gloves. And Dr. Lynd's own notes did not indicate

whether he had other hairs out at the time that he was working with the pantyhose hair segment. (18 RT 3765.)

The trial court overruled the chain of custody objection, because it was "just the bare speculation that it [was] not the same hair." (18 RT 3868.) The court was wrong, for Ms. Cooper's testimony that she put two root ends in her test tube showed that it was "likely as not that the evidence analyzed was not the evidence originally received." (*People v. Riser*, *supra*, 47 Cal.2d at p. 581.) Furthermore, contrary to the court's belief, Dr. Lynd's testimony did not provide the reasonable certainty necessary to show that the hair evidence had not been contaminated, substituted, or added to. Because the prosecution failed to meet its burden of establishing a proper chain of custody as required by *Riser*, the trial court erred in admitting the result of the DNA testing of the pantyhose hair.

D. Trial Counsel Rendered Ineffective Assistance Of Counsel In Eliciting And Then Failing To Move To Strike The Testimony Regarding The Result Of The PCR Testing Of The Hair.

Defense counsel's cross-examination of Cellmark analyst Julie Cooper resulted in evidence that her testing of the pantyhose hair disclosed DQ-Alpha alleles that matched appellant's. Defense counsel was not directly responsible for the introduction of this extremely prejudicial evidence, because Cooper had erroneously answered his question seeking information regarding her processing of the pantyhose, not the hair obtained from the pantyhose. (18 RT 3780.) Nonetheless, counsel had forewarning, once his question was asked, that Cooper might misunderstand and answer in the way that she did. (See *ibid.* [prosecutor's objection that Cellmark did not process the pantyhose].) Accordingly, to the extent that defense counsel was responsible for the elicitation of this harmful evidence, appellant submits that counsel rendered ineffective

assistance of counsel. Moreover, once Cooper testified to her PCR test result, counsel should have moved to strike that testimony as nonresponsive and inadmissible on chain of custody grounds and to seek an admonition to the jury. His failure to do so deprived appellant of effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution. (*Strickland v. Washington, supra,* 466 U.S. at pp. 686-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

The legal standard for assessing ineffective assistance of counsel is discussed in Argument VI, beginning on page 344, *supra*. Defense counsel has a duty to learn and apply applicable legal standards and to apply the law to further the defendant's interests. (*People v. Pope* (1979) 23 Cal.3d 412, 425-426; *Smith v. Lewis* (1975) 13 Cal.3d 349, 358.) Counsel also has a duty to object to, and move to strike, inadmissible evidence. (See, e.g., *People v. Ledesma, supra,* 43 Cal.3d at pp. 224-225 [counsel rendered deficient performance in failing to object to prosecutor's comments and questions regarding critical extrajudicial identification which prosecutor committed not to introduce]; *People v. Nation* (1980) 26 Cal.3d 169, 178-182 [failure to object to identification evidence that was critical to the prosecution's case but of questionable admissibility constituted deficient representation]; *In re Jones* (1996) 13 Cal.4th 552, 882 [failure to object to misleading impeachment evidence regarding the defendant's involvement in a prior shooting constituted deficient representation; competent counsel would have objected or at least requested a continuance for the purpose of investigating the circumstances surrounding the shooting which was accidental]; *People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104 [failure to object to critical hearsay testimony that lacked personal knowledge constituted deficient representation]; *People v. Williams* (1971) 22

Cal.App.3d 34, 46-50 [failure to object to inadmissible, prejudicial hearsay amounted to deficient representation]; ABA Project on Standards for Criminal Justice (4th Ed.), Stds. Relating to the Prosecution Function and the Defense Function, Std. 4-1.5, Preserving the Record ["At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. Such steps may include . . . making objections and placing explanations on the record; requesting evidentiary hearings"].) Indeed, as stated by the Court of Appeal in *Williams*, "[o]ne right and never to be forsaken duty of defense counsel in the instant case in the critical area of motive was to keep away from the attention of the jury any matter which the law deemed unsatisfactory as proof." (*Williams, supra*, 22 Cal.App.3d at p. 48.)

Here, defense counsel had an obligation to ensure that critical DNA evidence linking appellant to the crime scene, evidence which lacked a sufficient foundation to support its admission, be kept from the jury. When Ms. Cooper testified to her test result, counsel was aware that there was a chain of custody problem with the pantyhose hair. (18 RT 3662.) Reasonably competent counsel would have moved to strike Ms. Cooper's extremely prejudicial testimony both as nonresponsive and on chain of custody grounds. There could simply be no conceivable tactical reason for counsel's failure to do so. The test result linked appellant to the crime scene at the time of the attack, and counsel obviously believed the evidence to be inadmissible because he had raised the issue earlier and objected on that basis not long thereafter. In sum, like the situations in *Nation* and *Ledesma*, counsel "was incompetent in failing to take [necessary] steps to keep from the jury [DNA] evidence that was critical to the prosecution's case but of questionable admissibility." (*Ledesma, supra*, 43 Cal.3d at p. 224; see also *Nation, supra*, 26 Cal.3d at pp. 178-182.)

As argued above, the testimony regarding the PCR test result was inadmissible because the prosecution failed to establish with sufficient certainty that the hair evidence had not been altered by contamination or substitution/addition. And as argued below, had this evidence been stricken, it is reasonably probable that the guilt phase verdict would have been different. Counsel thereby deprived appellant of effective assistance of counsel in eliciting and then failing to move to strike Ms. Cooper's nonresponsive testimony regarding her PCR test result.

E. The Erroneous Admission Of The Testimony Regarding The Results Of The PCR Testing Of The Hair Violated Appellant's Rights Under The Federal Constitution And Was Prejudicial, Requiring Reversal.

The erroneous admission of the evidence of the PCR test result violated appellant's Fifth and Fourteenth Amendment right to due process and his Sixth Amendment right to a fair jury trial. Erroneous admission of this evidence was so prejudicial as to render the trial fundamentally unfair and offended due process. (*People v. Partida* (2005) 37 Cal.4th 428, 439; *Estelle v. McGuire, supra,* 502 U.S. at p. 70.) And, as argued above, the erroneous admission of this evidence also violated appellant's Sixth Amendment right to effective assistance of counsel.

The result of the questionable DNA test seemed to the jury to prove that the pantyhose hair's genetic make-up matched appellant's. This inadmissible testimony thus appeared to place appellant directly in the Rudy residence on March 1, 1992.

Regardless of whether prejudice is assessed under *Chapman*'s[184] "harmless beyond a reasonable doubt" standard or *Watson's/Strickland*'s[185] "reasonable probability" standard, the admission of this seemingly strongly inculpatory piece of evidence cannot be deemed harmless. Apart from this physical evidence placing appellant at the scene of the crime, the prosecution depended largely upon the testimony of, and evidence obtained from, Eric Holland. But, as demonstrated in Argument II, the evidence of appellant's confession and notes should never have been admitted because Holland, in eliciting it, was acting as an agent of the State.

Moreover, the jury had much reason to disbelieve Holland and question the authenticity of the alleged confession:

(1) Holland was an incorrigible liar and manipulator: (a) he lied to the jury when he twice insisted that his colonel friend was real (17 RT 3545); (b) as discussed below, he lied about not being motivated by a desire to obtain a deal; (c) as established in Argument II, he lied about when the confessions and notes were allegedly written; and (d) as also established in Argument II, his entire interaction with appellant was filled with lies and manipulations. Even the prosecution conceded that Holland was "a con artist and a thief" — "[t]here's no question about that." (20 RT 4452.)

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[184] *Chapman v. California*, *supra*, 386 U.S. at page 24 (prosecution has burden to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained").

[185] *People v. Watson*, *supra*, 46 Cal.2d at page 836 (defendant must show "that it is reasonably probable that a result more favorable . . . would have been reached in the absence of the error"); *Strickland v. Washington*, *supra*, 466 U.S. at page 694 ("defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

(2) Holland was an experienced, convicted forger[186] of cashier's checks, payroll checks, driver's licenses, and birth certificates (17 RT 3550, 3552-3555, 3559-3562); an exact replica (excepting the signature) of the Modesto case confession was found in his handwriting (17 RT 3549-3550); Holland admitted reading all of the discovery provided to appellant, including all police reports and witness statements (17 RT 3562-3565); and People's Exhibit No. 118 showed that Holland instructed appellant exactly how to write the confession and what to include.

(3) Holland had much reason to fabricate evidence against appellant in order to obtain a deal: he was facing substantial state prison time due to forgery and theft charges pending in six different counties. (17 RT 3550-3558.) The testimony and evidence which he provided in this case resulted in a very sweet, yet difficult-to-attain, deal: all of the counties agreed to transfer their pending charges to Stanislaus County, where they were consolidated into one case, and Holland was allowed to plead guilty with a promise of concurrent sentences on all counts to be run concurrently with his pre-existing federal sentence so that he would serve no state prison time in exchange for his testimony against appellant. (17 RT 3536, 3550-3558.) As demonstrated in Argument II, Holland worked very hard to get this deal and shaped the confessions to maximize their attractiveness to the prosecution.

(4) There were many aspects of Holland's testimony which simply did not ring true, including his many denials that his actions were motivated by a desire to obtain a deal. (See, e.g., 17 RT 3487-3488 [Holland claimed that he told appellant that he knew a marine colonel who could help him, because he figured that would shut appellant up], 3525, 3528 [Holland

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[186] Indeed, he admitted that he was a forger by occupation. (17 RT 3550.)

wanted to give the confessions "free and clear" to the authorities — he "didn't want anything for it" — but after he received the written confession, he did not give it to the district attorney's office; he held onto it because Antone "said he wouldn't take it, didn't want it"], 3520, 3526, 3546, 3836-3839 [Holland claimed that he went to the authorities because he thought appellant was sick and was concerned that "he might get off" and not because he wanted a deal, but his actions evidenced that putting together a deal to resolve his pending charges without having to serve state prison time was his goal from day one], and 3546, 3556 [Holland denied that he went to the authorities because he wanted a deal, claiming that he already had a deal, but subsequently admitted that prior to arriving at the Stanislaus County Jail, he had learned that Stanislaus and the other counties had not dropped their charges].)

Accordingly, without the introduction of the physical evidence tying appellant to the crime, the jury would likely have discounted Holland's testimony and the evidence obtained from him. As previously demonstrated (see Argument IV, § E, *ante*), the other evidence introduced against appellant was also subject to doubt. There were enough problems with that other evidence and with Holland's evidence that it is reasonably probable that a different result would have been reached in the absence of the erroneous admission of the pantyhose DNA evidence.

In sum, it is highly likely that had the evidence concerning the DNA test result of the pantyhose hair not been admitted, appellant would not have been convicted of the charged March 1 crimes — first degree special circumstance murder, attempted murder, burglary and two counts of robbery. (*Strickland v. Washington*, *supra*, 466 U.S. 668, *People v. Watson*, *supra*, 46 Cal.2d 818.) Ipso facto, respondent cannot establish beyond a reasonable doubt that this error was harmless. (*Chapman v. California*,

supra, 386 U.S. 18.) This error thus requires the reversal of Counts I, II, III, IV, and V.

VI.

APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE PROSECUTOR AND DEFENSE COUNSEL MISDEFINED AND SUBSTANTIVELY DILUTED THE REASONABLE DOUBT STANDARD AND IMPROPERLY SHIFTED THE BURDEN OF PROOF DURING THEIR GUILT PHASE ARGUMENTS.

A. Introduction.

In a capital case, it is particularly important that the prosecutor not undermine the defendant's fundamental right to be found not guilty unless there is proof of guilt beyond a reasonable doubt. It was undoubtedly important that the jury understand its responsibility to decide whether or not appellant's guilt had been established under the proper standard of reasonable doubt in this case, given that the prosecution's case hinged largely on the basis of questionable informant testimony. The prosecutor's and defense counsel's guilt phase arguments, however, deprived appellant of his right to have the jury decide his fate under the constitutionally required standard of proof and his right to a unanimous jury verdict.

In his arguments, the prosecutor misstated the standard of reasonable doubt by telling the jurors that a doubt is not reasonable unless they can (1) "point to something in the evidence" which creates that doubt; and also (2) convince the other jurors that the doubt is reasonable. In his argument, defense counsel disputed the prosecutor's second misstatement but agreed with, and confirmed, his first misstatement. These misstatements were a substantive dilution of the requisite standard of proof and improperly

shifted the burden to appellant to produce evidence which creates reasonable doubt in violation of his state and federal constitutional rights to proof beyond a reasonable doubt, due process, trial by jury, a unanimous jury verdict, and a reliable guilt determination in a capital case, requiring reversal of appellant's convictions. (U.S. Const., Amends. V, VI, VIII, & XIV; Cal. Const., art. I, §§ 7, 15, 16, 17.)

B. Factual Summary.

In his opening guilt phase argument, the prosecutor read verbatim the reasonable doubt instruction (CALJIC No. 2.90[187]), but then told the jurors:

> So having that definition which the Court will read to you in mind, you can see that reasonable doubt doesn't mean a mere possible doubt. It does not mean proof to an absolute certainly (sic) and it doesn't mean proof beyond a shadow of a doubt.

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[187] The jury was instructed with CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether guilt is satisfactorily shown, the defendant is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving the defendant's guilt beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(See 8 CT 2140; 21 RT 4559-4560.)

> I'm going to suggest to you that, based on this definition of reasonable doubt, if any one of you feels that he or she might have a reasonable doubt, he or she should be able to do three things. One, they should be able to put the doubt into words; two, they should be able to point to something in the evidence that makes them have that doubt; and, three, that juror should be able to convince his or her fellow jurors that the doubt is reasonable.
>
> If you can't do all three of these things then I suggest to you, ladies and gentlemen, the doubt that you are contemplating is the imaginary or mere possible doubt that is referred to in the Court's instruction.

(20 RT 4389-4391.)

Defense counsel did not object. During his closing argument, he argued:

> Mr. Fontan mentioned that the Court is going to talk about reasonable doubt and there's going to be an instruction on that issue, and, in fact, I think he read part of it. And Mr. Fontan talked about a method to decide whether or not any doubt that you might have on any particular fact is reasonable.
>
> And I agree with the first two steps that he said to take, and that number one step is articulate the doubt. If you have a doubt that you can talk about, if you can put it into words, if you can articulate it, it may be a reasonable doubt. If you can point to a particular piece of evidence to support that doubt and say, "I don't feel good about this evidence and it makes me doubt that which it's offered to prove," those are two steps that you should do.
>
> However, Mr. Fontan is wrong on the third step. You're not required and you don't need to be able to convince your fellow jurors regarding whether or not the doubt is reasonable. Your job is not to convince others. Your job is to deliberate. Your job is to deliberate and decide in your own mind whether each piece of evidence is reasonable, whether it's

> unreasonable, what it means, what it doesn't mean. And if you have a doubt, you're entitled to retain that doubt and to consider it a reasonable doubt, even though you cannot convince another juror or the rest of your fellow jurors about that particular issue.
>
> And when we talk about articulating a doubt and talking about it, you might say, "Well, I'm having a problem with Dr. Ernoehazy's testimony," for instance. "He said something that goes against everything that Mr. Fontan says, and yet he's Mr. Fontan's witness. He's an experienced pathologist. But what he said was totally at odds with the theory, Mr. Fontan's theory of the case."
>
> And if you can talk about that to somebody else, articulate it, that's a piece of evidence that we're talking about. There may be any other number of particular pieces of evidence that you feel cause you some doubt.

(20 RT 4458-4460.)

Defense counsel continued this line of argument later during his argument:

> And, again, I can't articulate for you or I can't say for you what is reasonable and what is unreasonable, but I think if you can state it in your mind, if you can talk about it to someone else and point to a piece of evidence that you think is crucial and critical to the prosecution's case that you have a doubt about, that creates in your mind a doubt which is reasonable, and you can talk about then you have not been convinced beyond a reasonable doubt, to a moral certainty.
>
> It's not necessary, as I said before, it's not necessary that you're able to convince anybody else in this jury. Your duty is to deliberate, which means to discuss, listen with an open mind, state your opinion, listen to other people's opinions. But if you believe something to be such that it creates a doubt in your mind and you can't get rid of that doubt then you don't have to

> change your mind. You're entitled to maintain that opinion as long as you deliberate fairly.

(21 RT 4506.)

Thereafter, in his rebuttal, the prosecutor argued:

> Reasonable doubt is the burden of proof which the People shoulder. And the operative word is "reasonable." If you don't have any method of assessing whether or not any doubt that you have is reasonable or unreasonable, then the instruction is meaningless. The concept is useless.
>
> And you have to test the reasonableness of any doubt. And one of the ways you do that is to discuss any perceived doubt with your fellow jurors, put it into words, test it, and see if anybody else agrees with you that that is a reasonable doubt. That's how you test it. There's no other way to assess any doubt. There's no way to tell whether a doubt is fanciful, imaginary, or just a mere possible doubt.

(21 RT 4509-4510.)

C. **The Prosecutor Misstated And Considerably Diluted The Reasonable Doubt Standard And Shifted The Burden Of Proof.**

A defendant's due process rights are violated when prosecutorial misconduct at argument renders his trial fundamentally unfair. (*Darden v. Wainwright* (1986) 477 U.S. 168, 180-181.) "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Id.* at p. 181.) Under *Darden*, the first issue is whether the prosecutor's remarks were improper; if so, the next question is whether such conduct infected the trial with unfairness. (*Tan v. Runnels* (9th Cir. 2005) 413 F.3d 1101, 1112.)

It is improper for a prosecutor to misstate the law. (*People v. Bell* (1989) 49 Cal.3d 502, 538; *People v. Hill, supra,* 17 Cal.4th at p. 829.) A

prosecutor commits serious misconduct when he attempts to reduce or "absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Hill, ibid.*)

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra,* 397 U.S. at p. 364.) The reasonable doubt standard is a fundamental right protected by the Due Process Clause, as it "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" (*Id.* at p. 363, citation omitted.) Misinstruction on this critical standard violates a defendant's Sixth Amendment jury trial right as well as due process. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278.) As explained by a unanimous Supreme Court, "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated . . . the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." (*Ibid.*)

Jury instructions are constitutionally deficient if they permit conviction on a lesser standard, either by (1) shifting the burden of proof from the prosecution to the defendant (see, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 524 [presumption in instruction which has the effect of shifting the burden of persuasion to the defendant violates a defendant's right under the Due Process Clause to have the State prove every element of a criminal offense beyond a reasonable doubt]; *accord, Francis v. Franklin, supra,* 471 U.S. at pp. 314, 317-318, internal quotations omitted ["A State must prove every ingredient of an offense beyond a reasonable doubt and . . . may not shift the burden of proof to the defendant by

presuming that ingredient upon proof of the other elements of the offense"]); or by (2) suggesting a higher degree of doubt than is necessary for acquittal — is constitutionally deficient. (See, e.g., *Cage v. Louisiana* (1990) 498 U.S. 39, 41 [jury instructions defining reasonable doubt as an "actual and substantial doubt" and a "grave uncertainty" "suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard," and thereby unconstitutionally lowered the burden of proof], *disapproved on another ground by Estelle v. McGuire, supra,* 502 U.S. 62.) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

In this case, it was argument by both counsel,[188] rather than the court's instructions, which allowed the jurors to convict appellant based on proof insufficient to meet the *Winship* standard of proof beyond a reasonable doubt. But, as argued below, the likely effect on the jury's guilt phase deliberations was the same, given that (1) the given instructions did not contradict or dispel the attorneys' arguments; (2) both counsel committed the same misstatement of the reasonable doubt standard in one significant respect; and (3) the misstatements by both counsel introduced ambiguity into the court's reasonable doubt standard and resulted in misdirection of the jury.

The prosecutor misstated and diluted the standard of reasonable doubt by telling the jurors that a doubt is not reasonable unless they can

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[188] Defense counsel's ineffective representation is discussed *post* in section (D).

(1) point to something in the evidence which makes them have that doubt; and (2) convince the other jurors that the doubt is reasonable. These two arguments diminished the presumption of innocence and reduced the State's burden of proof in violation of due process and the Sixth Amendment right to trial by jury and deprived appellant of his right to a unanimous jury and a reliable guilt determination in violation of article I, § 16, of the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments.

The prosecutor's approach to reasonable doubt in the first argument — stating that a doubt is not reasonable unless the juror can identify some piece of evidence that causes the juror to have that doubt — presumes guilt as its starting point and then suggests that the defense must overcome that presumption by producing some evidence which creates reasonable doubt. That is the opposite of what the reasonable doubt standard is about. This argument was patently improper, because there is never a burden on the defense to produce any evidence that the elements of a crime do not exist, and the prosecution "may not suggest that 'a defendant has a duty or burden to produce evidence. . . .'" (*People v. Young* (2005) 34 Cal.4th 1149, 1195-1196.) The burden is always on the prosecution to prove each element beyond reasonable doubt. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

Moreover, a juror need not point to evidence that creates a doubt in order to find reasonable doubt. A juror can say that there is not enough evidence to convince me, or the prosecution's case has too many holes, or I am simply not persuaded to a near certainty. In short, a juror may simply not be persuaded by the prosecution's case. (See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at p. 831 ["the jury may simply not be persuaded by the prosecution's evidence"]; *People v. Riel* (2000) 22 Cal.4th 1153, 1178 ["some unanswered questions [about the prosecution's proof of guilt] might

create a reasonable doubt of guilt" by themselves]; *People v. Brigham* (1979) 25 Cal.3d 283, 298 (conc. opn. of Mosk, J.) ["a reasonable doubt can arise not only from the presence of evidence in the defendant's case — e.g., persuasive alibi testimony — but also from the absence of evidence from the prosecution's case — i.e., some link in the chain of guilt that the jury deems to be missing from the People's presentation."]; *People v. Simpson* (1954) 43 Cal.2d 553, 565-566, emphasis in original [instruction defining reasonable doubt as "a doubt which has *some good reason* for its existence *arising out of evidence in the case*; such doubt as you are able to find a *reason for in the evidence"* was erroneous, because "[t]he reasonable doubt prescribed by statute may well grow out of the lack of evidence in the case as well as the evidence adduced."].)

In *People v. Hill, supra*, 17 Cal.4th at pages 831-832, this Court condemned an argument nearly identical to the prosecutor's "point to evidence that causes a doubt" argument. There, the prosecutor, in addressing the concept of reasonable doubt, stated: "it must be reasonable. It's not all possible doubt. Actually, very simply, it means, you know, you have to have a reason for this doubt. *There has to be some evidence on which to base a doubt.*" (*Id.* at p. 831, emphasis in original.) *Hill* concluded that it was reasonably likely that this argument was understood by the jury to mean that the defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt. (*Id.* at p. 832.) Further, the Court stated:

> [T]o the extent [the prosecutor] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution's evidence. (Cf. CALJIC No. 2.61 (6th ed. 1996 bound vol.) ["the defendant may choose to rely on the state of the evidence and upon the failure, if

> any, of the People to prove beyond a reasonable doubt every essential element of the charge"].)

(*Id.* at pp. 831-832.) *Hill* found that the prosecutor committed misconduct by misstating the law "insofar as her statements could reasonably be interpreted as suggesting to the jury she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt." (*Ibid.*) In this case, too, there is a reasonable likelihood that the jurors construed the prosecutor's "point to evidence" argument to shift the burden of proof to appellant and to permit conviction based on a degree of proof below the *Winship* standard.

The prosecutor's second argument — that a doubt is not reasonable unless a juror can convince his fellow jurors — also shifted the burden of proof and in addition unconstitutionally diluted the reasonable doubt standard. This argument required, for acquittal, not only a doubt that appears "reasonable" in the juror's mind, but a doubt that the other jurors agree is "reasonable." Reasonable doubt does not require a juror to persuade her fellow jurors of the reasonableness of her doubt. Reasonable doubt simply requires a juror "to reach a subjective state of near certitude of the guilt of the accused." (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; *Victor v. Nebraska, supra*, 511 U.S. at p. 15 [in rejecting the defendant's claim that the reasonable doubt instruction was defective, Supreme Court reasoned that the instruction's reference to moral certainty, in conjunction with the abiding conviction language, "'impress[ed] upon the factfinder the need to reach a subjective state of near certitude'"].) And as explained by Justice Mosk in *People v. Brigham*:

> [E]ach juror brings to the deliberations his personal store of experience, knowledge, and judgment; these are the tools by which he tests "the credibility, the probability of the testimony of witnesses, or of the inferences to be drawn from circumstances. The doubt

> lingering in his mind, after the evidence has been concluded, may be produced by the application of these subjective criteria to it. Is such a doubt illegitimate?" (Citation omitted.) Surely not, even though its source is his individual perception of the evidence put before him.

(*People v. Brigham*, *supra*, 25 Cal.3d at p. 299 (conc. opn. of Mosk, J.)

The "agreement of another juror" qualification asserted by the prosecutor was highly likely to dissuade a juror from giving proper weight to her doubt and to encourage her to convict because her doubt may not convince other jurors or because her ability to persuade may be inadequate. The prosecutor's argument indicated that although a juror may be persuaded that the prosecution has not met its burden of proof, her analysis is mistaken if she cannot persuade the other jurors of the same. Thus, even though the juror, herself, might harbor a reasonable doubt of appellant's guilt, the juror would have to conclude, under the prosecution's argument, that her doubt was unreasonable if she was unable to persuade fellow jurors. Accordingly, there is a reasonable likelihood that the jurors understood this argument, as well as the prosecutor's "point to evidence that causes a doubt" argument, to allow conviction based on proof lower than due process requires.

Moreover, by defining reasonable doubt as requiring more than the juror's own conclusion of reasonable doubt, but rather a doubt which the other jurors also find reasonable, the instruction improperly shifted the burden of proof from the State to appellant. This qualification required the jurors to focus on the wrong question: it required the jurors to ask whether their doubts were substantial enough to persuade the other jurors, rather than whether, in their own minds, they had concluded/found that the prosecution's evidence was not strong enough to convict. As a result, the prosecutor's "agreement of another juror" argument shifted the burden of

proof, requiring the jurors, or defendant, to show that the evidence was too weak to convict.

Furthermore, this argument violated appellant's constitutional right to a unanimous jury. In a criminal case in California, the jury must agree unanimously that defendant is guilty. (*People v. Benavides* (2005) 35 Cal.4th 69, 101; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The right to a unanimous verdict in criminal cases is a fundamental safeguard secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693; *People v. Superior Court of Orange County* (1967) 67 Cal.2d 929, 932; *People v. Feagley* (1975) 14 Cal.3d 338, 352, 356) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Vitek v. Jones, supra,* 445 U.S. at p. 488). And because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley*, *supra*, at p. 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638). Therefore, jury unanimity is required in capital cases. The prosecutor's "agreement of another juror" argument, however, told the jurors that even if they personally concluded/found there was a reasonable doubt of appellant's guilt, that doubt was not reasonable if they could not convince fellow

jurors. This argument thus deprived appellant of his constitutional right to a unanimous jury.

In sum, the prosecutor committed misconduct by twice diluting the reasonable doubt standard and shifting the burden of proof, and there is a reasonable likelihood that the jury was misled by the prosecutor's arguments to apply the reasonable doubt instruction in a way that violated the federal and state constitutions.

D. Defense Counsel Rendered Ineffective Assistance Of Counsel By Failing To Object To The Prosecutor's Misconduct And By Repeating In His Own Argument The Same Erroneous Claim That A Doubt Is Not Reasonable Unless The Juror Could Point To Evidence On Which To Base It.

Defense counsel did not object to the prosecutor's arguments even though they were patently erroneous and considerably lowered and shifted the prosecution's burden of proof. (20 RT 4389-4391; 21 RT 4509-4510.) To the contrary, defense counsel compounded the error by agreeing with the prosecutor's claim/assertion that a doubt is not reasonable if the jurors cannot point to a piece of evidence that creates the doubt. (20 RT 4459-4460; 21 RT 4506.) By failing to object to the misstatements and then agreeing with one of them, counsel deprived appellant of effective assistance of counsel in violation of the state and federal constitutions. Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to effective assistance of counsel. (*Strickland v. Washington, supra,* 466 U.S. at pp. 686-692; *People v. Ledesma, supra,* 43 Cal.3d at p. 215.)

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of

reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., a reasonable probability exists that but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington*, *supra*, at pp. 687-688.)

A defendant is entitled to the "reasonably competent assistance of an attorney acting as his diligent, conscientious advocate." (*People v. Ledesma*, *supra*, at p. 215.) Specifically, defense counsel has a duty to learn and apply applicable legal standards and to apply the law to further the defendant's interests. (*People v. Pope, supra,* 23 Cal.3d at pp. 425-426; *Smith v. Lewis, supra,* 13 Cal.3d at p. 358 [an attorney "is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques."], disapproved on another ground in *In re Marriage of Brown* (1976) 15 Cal.3d 838; e.g., *People v. Plager* (1987) 196 Cal.App.3d 1537, 1543-1544 [counsel ineffective for failing to know law and then acting contrary to client's interests].)

Appellant's counsel provided deficient performance by failing to object to the prosecutor's misstatements relating to reasonable doubt. Although in his own argument, defense counsel attempted to counter the prosecutor's second argument — that a doubt is not reasonable unless the jurors can persuade their fellow jurors — counsel's effort was insufficient to cure the harm. Such competing formulations by the advocates would only have confused the jury's understanding of the court's reasonable doubt instruction. (See *People v. Beltran* (2013) 56 Cal.4th 935, 954-955.) Moreover, defense counsel agreed with, and confirmed, the prosecutor's first argument, namely, that a doubt is not reasonable unless the juror can

point to something in the evidence which creates that doubt. Thus, like the prosecutor, defense counsel encouraged the jurors to apply a standard of proof that reduced the prosecution's burden to prove its case beyond a reasonable doubt and placed a burden on the defense to point to/come up with evidence that supported a verdict of not guilty. Counsel's agreement with the improper "point to evidence that causes a doubt" argument thus also constituted deficient performance.

There was no conceivable reasonable reason for counsel to (1) use his own argument to address the prosecutor's misstatement, rather than object to the argument when it was made, and (2) agree and confirm the argument that a doubt is not reasonable unless the juror can point to something in the evidence which creates that doubt. The prosecutor's misstatements of the reasonable doubt requirement were patently erroneous and had counsel objected, the court would have so advised the jurors and corrected the significant misstatements. There could be no conceivable rational reason for defense counsel to encourage the jurors to apply an improper standard of proof. Indeed, the core of the defense case was that the prosecution had failed to meet its burden of proving its case beyond a reasonable doubt. (See 21 RT 4505-4508.) Thus, undermining and diluting the reasonable doubt standard was anathema to the analysis defense counsel wanted.

Counsel's own misstatement of the requirements of the reasonable doubt standard demonstrates his obvious ignorance of the law, and thus his actions cannot be excused as a reasonable tactical decision. "'There is nothing strategic or tactical about ignorance. . . .'" (*Smith v. Lewis, supra,* 13 Cal.3d at p. 359.) As explained by this Court in *People v. Pope*:

> [W]here the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must

> be affirmed. (Citation omitted.) In contrast, where the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel. (Citation omitted.)

(*People v. Pope*, *supra*, 23 Cal.3d at pp. 425-426.)

Defense counsel neglected his duty to learn and apply the most critical of all legal principles governing appellant's prosecution and acted contrary to his client's interests in failing to ensure that the prosecution was held to its burden of proof. Because there could be no satisfactory explanation for this dereliction, counsel's failure to object and his agreement with the improper shifting of the burden of proof cannot be excused as a reasonable tactical decision. His actions were outside the range of reasonably competent counsel and thereby constituted deficient performance. As argued below in section (F), had counsel performed competently here, it is reasonably probable that the guilt phase verdict would have been different. Counsel thereby deprived appellant of effective assistance of counsel.

E. <u>The Misstatements Of The Reasonable Doubt Standard Made By Both Counsel Confused The Jury's Understanding Of The Court's Reasonable Doubt Instruction And Resulted In Instructional Error</u>.

As demonstrated above, both counsel diluted the reasonable doubt standard and improperly shifted the burden of proof. The trial court instructed the jury according to the definition of reasonable doubt contained in CALJIC No. 2.90 (4th ed. 1979), the standard reasonable doubt instruction found constitutional by the Supreme Court in *Victor v. Nebraska*, *supra*, 511 U.S. at pages 7-17, and by this Court in *People v. Webb* (1993) 6 Cal.4th 494, 531. However, the misstatements of the

reasonable doubt requirement made by both counsel confused the jury's understanding of the court's instruction and resulted in instructional error.

In *People v. Beltran*, the instructions properly defined the heat of passion principle, but "the parties' closing arguments muddied the waters on this point." (*Beltran*, *supra*, 56 Cal.4th at p. 954.) The prosecutor's argument suggested application of an incorrect standard and although defense counsel's argument countered the prosecutor's misstatements,"[t]hese competing formulations by the advocates may have confused the jury's understanding of the court's instructions." (*Id.* at pp. 954-955.) This Court concluded that counsel's arguments introduced ambiguity into the instructions which resulted in "Instructional Error." (*Id.* at p. 954; see *id.* at pp. 955-956.)

Here, too, counsel's arguments "muddied the waters" and introduced ambiguity into the reasonable doubt instruction provided by the trial court. The error thus resulted in instructional error which misdirected the jury on the vital concept of reasonable doubt. In fact, the instant case presents an even clearer example of instructional error. Although defense counsel challenged the prosecutor's second argument (that a doubt was not reasonable if the juror could not persuade fellow jurors), he agreed with the prosecutor's first argument so that both counsel exhorted the jurors to apply the same unconstitutional standard — requiring the jurors to find their doubts unreasonable unless they could identify some evidence which created the doubts. Moreover, as discussed below, the instructions did not contradict or dispel counsel's arguments. Thus, the error in this case, although originating in counsel's arguments, was "instructional error." (*Id.* at p. 954, initial capitalization omitted; see also *id.* at p. 954 fn. 15 [*Beltran* observes that the prosecutor's argument "arguably approached the improper argument condemned in *People v. Najera* (2006) 138 Cal.App.4th 212;"

however, *Najera*, which found the defendant's prosecutorial misconduct claim forfeited for failure to object, "did not consider the instructional claim before us"].)

F. Because This Misdirection Of The Jury On The Vital Concept Of Reasonable Doubt Affected Appellant's Substantial Rights, It Is Reviewable On Appeal Despite The Lack Of Objection Below.

Although the general rule is that failure to object to prosecutorial misconduct forfeits the defendant's ability to raise the issue on appeal (*People v. Green* (1980) 27 Cal.3d 1, 27, abrogated on another ground by *People v. Martinez* (1999) 20 Cal.4th 225; *People v. Benson* (1990) 52 Cal.3d 754, 794), the error here is not simply that of prosecutorial misconduct. As discussed above, the error originating in the argument of both parties resulted in instructional error on the vital concept of reasonable doubt. (*People v. Beltran, supra,* 56 Cal.4th at p. 954-956.) Because appellant's substantial rights were affected by this misdirection which reduced the prosecutor's burden of proof, review is required under Penal Code section 1259. Section 1259 provides in pertinent part: "The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

In *Beltran*, this Court, in reviewing circumstances nearly identical to those here, rejected the idea that instructional error resulting from improper prosecutorial argument which injected ambiguity into the instructions could be forfeited for failure to object. (*Beltran, supra,* at p. 954, fn. 15 [any suggestion that defendant's failure to object to the prosecutor's misstatement resulted in forfeiture of his claim on appeal must be rejected because the issue in the case was an "instructional claim"].)

The court of appeal in the case of *People v. Johnson* (*Danny*) (2004) 115 Cal.App.4th 1169, reached the same result in another case involving misdirection on the reasonable doubt requirement. In that case, the trial court improperly amplified on the concept of reasonable doubt. (*Id.* at pp. 1171-1172.) Relying on Penal Code section 1259 and this Court's decision in *People v. Brown* (2003) 31 Cal.4th 518, 539, footnote 7, the court of appeal held that the failure of defense counsel to object did not bar appellate review, because the "defendant's substantial rights were affected by an instruction that reduced the prosecution's burden." (115 Cal.App.4th at p. 1172.)

The same is true here. Counsel's dilution of the reasonable doubt standard struck at the core instrument responsible for providing "concrete substance for the presumption of innocence" (*In re Winship*, *supra*, 397 U.S. at p. 363) and *a fortiori* affected appellant's substantial rights. As a result of counsel's arguments, the reasonable doubt instruction was vitiated and the burden on the prosecution was shifted. This instructional error is thus reviewable under section 1259 despite the lack of objection below.

Moreover, there is no possible forfeiture as to the ineffective representation claims raised in section D. For these reasons, this claim is cognizable on appeal.

G. <u>Prejudice</u>.

The prosecutor's arguments, in combination with defense counsel's argument, created a "reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." (*Victor v. Nebraska*, *supra*, 511 U.S. at p. 6.) This instructional error affected the fundamental framework of appellant's trial and requires reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.)

Nothing in the instructions disabused the jury of the notion that a doubt was not reasonable if the jurors could not point to something in the evidence which created the doubt or could not persuade fellow jurors that the doubt was reasonable. The arguments of both the prosecutor and defense counsel purported to expound upon and provide a test to implement the definition of reasonable doubt set forth in CALJIC No. 2.90 (4th ed. 1979.) While CALJIC No. 2.90 did not expressly require the jurors to identify a piece of evidence that created doubt or to persuade fellow jurors that their doubt was reasonable, it also did not contradict or dispel the arguments made by both counsel. CALJIC No. 2.90 therefore did not cure the fatal infection caused by counsel's erroneous arguments. (See e.g., *People v. Morales* (2001) 25 Cal.4th 34, 58-59 (dis. opn. of Brown, J.).)

Nor did the routine admonishments provided in the concluding instructions cure this error. The jury was instructed pursuant to CALJIC No. 17.40 as follows:

> The People and the defendant are entitled to the individual opinion of each juror.
>
> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

(8 CT 2196; 21 RT 4593.) Although CALJIC No. 17.40 told the jurors that each must decide the case for himself or herself, it instructed the jurors to do so only after discussing the evidence and instructions with the other jurors. The instruction was notably silent on the question of how the jurors should determine whether a doubt was reasonable and did not directly

contradict the prosecutor's argument that the jurors had to test a possible doubt to determine whether it was, in fact, reasonable under the law and that test required the jurors to persuade others of the reasonableness of their doubts. CALJIC No. 17.40 could not salvage the prosecutor's constitutionally deficient argument, since it remained likely that, despite its language, the jurors understood that argument to require such testing of possible doubt before it could be considered reasonable.

Furthermore, because CALJIC No. 2.90 contains such an ambiguous definition of reasonable doubt, the jurors most likely looked to the prosecutor's "test" for determining whether their doubts were "reasonable." Given that No. 2.90's confusing definition of reasonable doubt in no way conflicted with the prosecutor's arguments and that the jurors were given no specific guidance to understand that definition, it is reasonably likely that jurors would have relied on the prosecutor's arguments to provide that guidance. (See *People v. Morales*, *supra*, 25 Cal.4th at pp. 58-59 (dis. opn. of Brown, J.).)

Finally, it must be remembered that "[a]lthough courts presume that jurors understand the instructions they are given, empirical research suggests that jurors in criminal trials often fail to understand the presumption of innocence." (*Stoltie v. California* (2007) 501 F. Supp.2d 1252, 1257, internal citation omitted; see e.g., Solan, *Convicting the Innocent Beyond a Reasonable Doubt: Some Lessons About Jury Instructions from the Sheppard Case,* 49 Clev. St. L.Rev. 465, 483 (2001) [discussing a Wyoming study in which nearly one-third of jurors who had participated in a criminal trial believed the burden of proof shifted to the defendant]; David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice,* 59 Judicature 478 (1976) [finding that only 50 percent of prospective jurors in a Florida study instructed on reasonable doubt

understood that the defendant did not have to present any evidence of his innocence and that the state had to establish her guilt].) "Though jury instructions are supposed to help laypersons understand legalese, this comprehension gap suggests that the essential meaning of the reasonable doubt standard is often lost in translation." (*Stoltie*, *supra*, 501 F.Supp.2d at p. 1257.)

Thus, the instructional error caused by both counsel's arguments allowed, indeed exhorted, the jurors to convict appellant based on proof insufficient to meet the *Winship* beyond-a-reasonable-doubt standard, and reversal is thereby required.

Constitutionally deficient reasonable doubt instructions can never be harmless error. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 278-282.) Denial of the right to a jury verdict of guilt beyond a reasonable doubt, "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (*Id.* at pp. 281-282.) As explained by the Supreme Court:

> [T]he essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation — its view on what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."

(*Id.* at p. 281, internal citation omitted.) Thus, if a jury instruction defines reasonable doubt in a manner that raises the degree of doubt required for acquittal, the error cannot be harmless and the conviction cannot stand. The instructional error in this case thus requires reversal.

However, even if prejudice is assessed under *Strickland's* "reasonable probability" standard, reversal is required. (*Strickland v.*

Washington, *supra*, 466 U.S. at p. 694 ["defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"].) As explained in *Stoltie v. California*, *supra*, 501 F. Supp.2d at page 1257, "studies of jurors' behavior suggest that the definition of the reasonable doubt standard jurors receive has a significant impact on their decisions." Here, the prosecutor's and defense counsel's improper definitions of reasonable doubt were provided in a way that made it easier for the jury to find appellant guilty. Their improper arguments were on an issue — reasonable doubt — which was central to our system of justice and to the case. Indeed, the defense put on only a few witnesses, and the principal thrust of the defense case was that the prosecution had failed to prove its case beyond a reasonable doubt. To be sure, the prosecution presented evidence that linked appellant to the crime scene, but its case for first-degree, special-circumstance murder was based on the highly questionable testimony of a jailhouse informant — Eric Holland. The analyses in Arguments II and V, section E, *ante*, show that the jury had much reason to disbelieve Holland and question the authenticity of the alleged confession he produced. Moreover, as discussed in Argument V, *ante*, the DNA evidence placing appellant at the scene was beset by problems. The erroneous definitions of reasonable doubt propounded by both counsel undoubtedly affected how the jury viewed the DNA evidence and that obtained from Holland, as well as the other questionable evidence presented by the prosecution,[189] and contributed to the convictions of first-degree, special-circumstance murder, attempted murder, burglary, and solicitation to murder. It is reasonably probable that

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[189] As previously demonstrated in Argument IV, *ante*, the other evidence introduced against appellant was also subject to doubt.

had this instructional error not occurred, appellant would not have been convicted. Reversal of all counts is required.

ERRORS IMPACTING PENALTY DETERMINATION

VII.

REVERSAL OF THE DEATH JUDGMENT IS REQUIRED BECAUSE OF THE TRIAL COURT'S FAILURE TO EXCUSE A JUROR WHO ADMITTEDLY VIOLATED HER OATH AND INSTRUCTIONS BY CONTACTING HER PRIEST AND LEARNING THE CHURCH'S POSITION ON THE DEATH PENALTY, BUT IF NOT, THE COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY INTO SUCH MISCONDUCT REQUIRES REVERSAL.

A. Introduction.

The jurors in this case were admonished continually and specifically not to discuss any matter connected to the case with anyone. It was undisputed that immediately after rendering her verdict convicting appellant of capital murder and once again hearing that admonishment, a juror (Juror Y.P.), in violation of her oath and the court's instructions, contacted her priest to inquire whether it would be a sin to vote for the death penalty. Although the priest gave her an opportunity to decline to hear his answer, Juror Y.P. persisted and was informed not merely that it would not be a sin but that the Catholic Church did "believe in capital punishment." In a phone conversation with the trial court four days after receiving this information, the juror attempted to minimize the reason why she contacted her priest. However, her behavior and the nature of the information she obtained clearly demonstrated that the Church's support for

the death penalty was very important to her as a juror during the penalty phase.

The trial court did not question Juror Y.P. in person. Nor did the court ask any questions designed to probe the effect of the priest's information on her ability to decide appellant's fate free from outside influence and solely on the basis of the court's instructions. To the contrary, the judge told Y.P. not to "worry about" what she had done and that it was "fine." The court failed to instruct Y.P. not to consider what she had been told, and it even failed to tell her not to tell other jurors about what she had done and learned. Clearly, Y.P. committed misconduct that diminished her sense of responsibility for the decision to have appellant put to death,[190] violated appellant's right to reliability in the determination that death is the appropriate punishment in a specific case,[191] deprived appellant of his right to trial by impartial jury,[192] deprived appellant of his right to confront the witnesses against him,[193] violated appellant's right to be free of an establishment of religion,[194] and substituted a source of law, other than the law of California as instructed by the trial judge, for determination of the penalty. The trial court's failure to discharge Y.P. constituted reversible

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[190] In violation of the Eighth and Fourteenth Amendments to the United States Constitution, and California Constitution, article I, section 17. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

[191] In violation of the Eighth and Fourteenth Amendments to the United States Constitution, and California Constitution, article I, section 17. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305 (plurality opinion).)

[192] In violation of the Sixth and Fourteenth Amendments to the United States Constitution, and California Constitution, article I, section 16.

[193] In violation of the Sixth and Fourteenth Amendments to the United States Constitution, and California Constitution, article I, section 15.

[194] In violation of the First Amendment to the United States Constitution, and California Constitution, article I, section 4.

error, but even if this Court were somehow to conclude otherwise, reversal would still be required because of the trial court's failure to adequately inquire into Y.P.'s misconduct.

B. Factual Summary.

On Thursday, March 10, the jury returned guilt phase verdicts convicting appellant of capital murder. (8 CT 2222; 21 RT 4634, 4646-4650.) The court told the jurors to return on March 28 for the penalty phase and thoroughly admonished them not to talk to anybody about any matter connected to the trial and not to seek or receive information from any outside source. (21 RT 4658-4659.) On the following Tuesday, March 15, the court, prosecutor, and defense counsel had a discussion in chambers regarding one juror's contact with her priest. (21 RT 4662.) The priest had called another judge (Judge Girolami) to alert him. (*Ibid.*) The juror, Juror Y.P., had also called the trial court and told the bailiff of her contact with the priest. (21 RT 4662-4663.) The court observed to counsel that if the juror had spoken to a priest about the church's stance on the death penalty, she violated her oath, which required that she not talk about the case at all. (21 RT 4663.)

The court then placed a telephone call to Juror Y.P., in the presence of both counsel, and asked her about her conversation with the priest. (21 RT 4666.) Y.P. said that after the guilt phase verdicts were returned, she called and left a message for her priest. (21 RT 4666-4667.) She explained to the judge: "The thing – I'm Catholic." (21 RT 4666.) "I was just curious to know if it was a sin to decide on the death penalty. I'm not saying I'm going to. I . . . just wanted to know." (21 RT 4666-4667.) Juror Y.P. did not say exactly when she placed the call to her priest but did state that the priest had returned her call on Friday, March 11, and informed her that he had already spoken to a judge. (21 RT 4667.) The juror remarked that he could

not know who her judge was since she had left no information about the case, but the priest said he had read about it in the newspaper. (*Ibid.*) Juror Y.P. asked him if "it" was a sin, and he responded that if he answered her question, she would have to tell her judge. (21 RT 4668.) The juror said that was "fine" and then asked if she would "get in trouble." (*Ibid.*) The priest replied that he did not think so, because she was not telling him any of the circumstances of the case. (*Ibid.*) The priest asked Juror Y.P. if she wanted to know the answer and she responded affirmatively. (*Ibid.*) He asked if it was going to change the way she felt, and she replied, no, it was just something that she wanted to know. (*Ibid.*) The priest then informed Juror Y.P. that it was not a sin and added that the **church did "believe in capital punishment**." (*Ibid.*, emphasis added.) The juror told the court that she did not give the priest any information, just asked "that one question," and "[e]ven if he were to tell me yes, it is a sin, it doesn't mean that I wouldn't or vice versa. I just wanted to know." (21 RT 4669.) Juror Y.P. repeated that she was just curious, and she said it was not going to change the way she felt. (*Ibid.*)

The court had earlier told Juror Y.P. that it, too, was Catholic, and it concluded by telling her, "Don't worry about it. That's fine." (21 RT 4666, 4669.) The court also told Y.P. to remember the admonition not to discuss the case with anybody. (21 RT 4668.)

After the call, the prosecutor lamented that they should have done the kind of probing questioning he had wanted to do during voir dire and remarked, "This woman was worried about committing a sin if she voted for the death penalty," and "Now, she's going to be worried about offending God." (21 RT 4669-4770.) The court responded that it did not see any reason to do anything. (21 RT 4671.) The prosecutor opined that Juror Y.P. did not violate her oath because she did not discuss the case. (*Ibid.*)

The court responded that she should not have been talking about the death penalty; although the juror had not specifically been told not to talk about the death penalty, "it does involve the case." (*Ibid.*) Defense counsel opined that Juror Y.P.'s behavior was technically a violation, but he did not think there was "much substance in it." (*Ibid.*) The court agreed and added, "And for either one of your standpoints, if you wanted to bring a motion to get her off to bring - -" (*Ibid.*) The prosecutor interrupted, stating that he was sure defense counsel was happy as a lark. The court responded that on the other hand, the priest told the juror that capital punishment was okay with the church — it was not a sin. (*Ibid.*)

The court stated that they would have a further discussion with Juror Y.P. on the 28th when the jurors arrived for the penalty phase. (*Ibid.*) However, the record contains no indication that any further discussion was had with the juror.

C. **Argument.**

1. **Standard of Review.**

a. **Juror Misconduct.**

In reviewing a claim of juror misconduct, the reviewing court "accept[s] the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citation.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) "Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [(Citations.]" (*Ibid.*)

b. **Adequacy of Trial Court's Inquiry.**

The adequacy of a trial court's inquiry into a claim of juror misconduct based on exposure to extrinsic information is reviewed for an

abuse of discretion. (*People v. Pinholster* (1992) 1 Cal.4th 865, 928 [applying abuse of discretion standard to claimed failure to conduct hearing adequate to determine whether juror should be discharged for exposure to negative publicity], disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Beeler* (1995) 9 Cal.4th 953, 989 [it is within court's discretion to determine what procedure to employ or inquiry to conduct to determine whether juror should be discharged].) Although the "good cause" determination whether to discharge a juror subject to improper influences calls for the exercise of the trial court's discretion, it is the court's duty, once put on notice of the possibility that a juror has been exposed to improper influences, to make whatever inquiry is reasonably necessary to exercise its discretion and failure to do so must be regarded as error. (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838-840; *People v. Burgener* (1986) 41 Cal.3d 505, 520, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743.)

2. <u>General Law</u>.

A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd, supra,* 366 U.S. at p. 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) The Due Process Clause of the Fourteenth Amendment guarantees a "fair trial by a panel of impartial, 'indifferent' jurors," whose verdict is based solely on the evidence developed at trial. (*Irvin v. Dowd, supra*, 366 U.S. at p. 722; *Turner v. Louisiana* (1965) 397 U.S. 466, 471; see also *Sheppard v. Maxwell, supra,* 384 U.S. at p. 362 [due process requires a trial "by an impartial jury free from outside influences"].) "An impartial jury is one in which no member has been improperly influenced [citations] and every member is '"'capable and willing to decide the case solely on the evidence before it'"' [Citations.]." (*In re Hamilton* (1999) 20

Cal.4th 273, 294.) "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Turner v. Louisiana*, *supra*, 397 U.S. at p. 472.)

The constitutional right to an impartial jury imposes a duty on each individual juror to maintain his or her impartiality throughout the case (*In re Hamilton*, *supra*, 20 Cal.4th at p. 293; *People v. Nesler*, *supra*, 16 Cal.4th at p. 578; *Dyer v. Calderon* (9th Cir. en banc 1998) 151 F.3d 970, 973), and the loss of impartiality at any time during the case requires dismissal of the juror in question. (*People v. Keenan* (1988) 46 Cal.3d 478, 532-533; *People v. Nesler, supra*, at pp. 581-582.)

A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

3. There Was a Substantial Likelihood That Y.P. Was Improperly Influenced as the Result of Her Contact with Her Priest, and the Trial Court Committed Reversible Error by Failing to Remove Her.

a. In Contacting Her Priest, Juror Y.P. Committed Misconduct.

Juror Y.P.'s actions in contacting her priest constituted misconduct. Her consultation violated the court's orders and her solemn duties as a juror to make her decision on the basis of evidence and law received in the trial and not from any other source, to refrain from discussing the case or any

matter connected to the case with others and also to refrain from conducting independent investigation of the law or the facts or consulting others for additional information.

Penal Code section 1122 requires the trial court to instruct the jury after it is sworn and before opening arguments regarding "its basic functions, duties, and conduct," including that the jurors "shall not converse among themselves, or with anyone else, conduct research or disseminate information on any subject connected with the trial." (Pen. Code, § 1122, subd. (a).) "The jury shall also, at each adjournment of the court before the submission of the cause to the jury, . . . be admonished by the court that it is their duty not to conduct research, disseminate information or converse among themselves, or with anyone else, on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them." (Pen. Code, § 1122, subd. (b).)

A juror commits misconduct by violating his or her oath and/or failing to follow the instructions and admonitions given by the trial court. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 305; *People v. Linton* (2013) 56 Cal.4th 1146, 1194.) "[I]t is misconduct for a juror to discuss a case with a nonjuror during the course of a trial." (*People v. Linton*, *supra*, at p. 1194; see also *People v. Cowan* (2010) 50 Cal.4th 401, 507 ["jurors should not converse with anyone on any subject connected to the trial"].) It is also misconduct for a juror to receive any information relating to the case from sources outside the evidence in the case. (*Remmer v. United States* (1954) 347 U.S. 227, 229 ["any private communication . . . with a juror during a trial about the matter pending" is "deemed presumptively prejudicial"]; *People v. Karis* (1988) 46 Cal.3d 612, 642 ["Jurors are not allowed to obtain information from outside sources either as to factual matters or for guidance on the law."]; *People v. Tafoya* (2007) 42 Cal.4th 147, 192 ["A

juror who 'consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors' commits misconduct."].)

At the beginning of voir dire proceedings in this case, the court informed all prospective jurors that if selected to serve, they "must base [their] decision on the evidence produced during the course of trial and not from any other source" and that during the pendency of the proceedings, they were not to talk about the case with anyone else. (6 RT 1468, 1470; see also 6 RT 1489, 1492, 1508, 1510; 7 RT 1637, 1639.) Throughout the guilt phase, at the end of each day, the court admonished the jurors of their duty "not to converse with anyone else, nor permit anyone to talk with [them] on any subject or matter connected with the trial" and not to "seek or receive evidence or information from any source outside of the witnesses and evidence presented at [the] trial." (15 RT 3272; see also 15 RT 3136; 16 RT 3386, 3445; 17 RT 3578, 3650; 18 RT 3797, 3849-3850, 3887; 19 RT 4102, 4149-4150; 20 RT 4471; 21 RT 4614, 4631.)

After guilt phase arguments, the jurors were instructed:

> You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information. [¶] You must not discuss this case with any other person except a fellow juror and you must not discuss the case with a fellow juror until the case is submitted to you for your decision and only when all jurors are present in the jury room.

(21 RT 4553.)

And on the day before Juror Y.P. spoke to her priest, she and the other jurors were informed that they would take a two-week break before the start of the penalty and then instructed:

> Remember it's your duty not to converse among yourselves or with anyone else nor permit anyone to talk with you on any subject or matter connected with the trial or to form or express any opinion thereon until the cause is finally submitted to you. [¶] You're further admonished not to visit the scene or the place where any material fact occurred nor must you seek or receive evidence or information from any source outside of the witnesses and evidence presented at this trial.

(21 RT 4658-4659.)

It is undisputed that despite the court's repeated and explicit instructions not to discuss any subject or matter connected with the trial with anyone, Juror Y.P. contacted her priest to ask whether it would be a sin to vote for the death penalty. Despite her concern that she might "get in trouble," despite the priest's admonition that she would have to tell the judge, and despite being afforded an opportunity to decline to hear the answer, the juror pushed ahead and told the priest that she wanted him to answer her question. This was not inadvertent misconduct, but a purposeful seeking and receiving of information which the juror obviously felt was relevant to her decision-making process at the penalty phase. Juror Y.P.'s discussion with her priest was clearly in violation of the court's order not to talk with "anyone" "on any subject or matter connected with the trial" (21 RT 4659) or to "seek or receive . . . information from any source outside of the witnesses and evidence presented at th[e] trial" (*ibid.*), and thus constituted misconduct. (*People v. Tafoya*, *supra*, 42 Cal.4th at pp.191, 193 [substantial evidence supported trial court's findings that juror committed misconduct first by talking to a retired priest about the Catholic Church's

position on the death penalty, and second by relaying the contents of that conversation to other jurors during deliberations]; see also *People v. Danks* (2004) 32 Cal.4th 269, 309 [juror's conversation with her pastor, in which she asked if there was anything in the Bible which spoke against the death penalty, constituted misconduct].) As explained by this Court in *Danks*:

> [I]t is misconduct for a juror to discuss a case with a nonjuror. Here, Juror B.P. asked her pastor about the Bible's stand on the very issue she was deliberating. Thus, her misconduct was more egregious than that of [another juror who inadvertently received information from her pastor].

(*Danks*, *supra*, at p. 309.[195])

The court, although noting that Juror Y.P. should not have been talking about the death penalty with her priest, did not "see any reason to do anything." (21 RT 4671.) As discussed below in section (3)(b), the court's failure to dismiss the juror or, at the very least, conduct an adequate hearing regarding her conversation with the priest and its impact on her ability to determine the appropriate penalty free from outside influence was

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[195] Notably, in *Danks*, this Court expressed concern that "not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase" and recommended that juries be expressly instructed "that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists." (*People v. Danks*, *supra*, 32 Cal.4th at p. 307, fn. 11.) CALJIC No. 0.50 has now been revised to instruct: "You must not converse among yourselves, or with anyone else, including but not limited to, spouses, spiritual leaders or advisers, or therapists, on any subject connected with the trial. . . ." (CALJIC No. 0.50 (Spring 2011.) Similarly, CALCRIM No. 101 provides: "During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone, not even your family, friends, spiritual advisors, or therapists." (CALCRIM 101 (Summer 2011 Edition, Vol. 1).)

erroneous. For all the reasons set forth below, the consequences of this misconduct were severe.

i. **<u>The Misconduct Improperly Injected Perceived Divine Authority into the Capital Sentencing Process</u>.**

The injection of perceived biblical authority into the capital sentencing process has been repeatedly recognized as constituting an unlawful substitution of outside legal concepts over the applicable law for the governance of penalty determination. In this State, the issue has generally come up in the context of prosecutorial misconduct rather than juror misconduct; however, the underlying rationale applies with equal force in both contexts.

In *People v. Hill, supra,* 17 Cal.4th 800, a capital conviction and death sentence were reversed on a number of grounds, including a host of improper actions by the prosecutor. One of those improper actions was the prosecutor's attempt to persuade the jury that the biblical maxim "Vengeance is mine sayeth the Lord" should not dissuade them from imposing the death penalty, since the Bible also said "an eye for an eye, a tooth for a tooth." This Court observed:

> We cannot emphasize too strongly that to ask the jury to consider biblical teachings when deliberating is patent misconduct.

(*Id.* at p. 836, fn. 6.)

> By relying on the Bible in this manner, [the prosecutor] committed misconduct. As we have explained repeatedly, an appeal to religious authority in support of the death penalty is improper because it tends to diminish the jury's personal sense of responsibility for the verdict. [Citations omitted.] Such argument also carries the potential the jury will believe

> a higher law should be applied and ignore the trial court's instructions. [Citations omitted.]

(*Id.* at p. 837; see also *People v. Ervin* (2000) 22 Cal.4th 48, 99-100; *People v. Wash* (1993) 6 Cal.4th 215, 260 [prosecutor's message, which was not only that capital punishment existed in the Bible, but that it was sanctioned by it, and by God, was "precisely the sort of appeal to religious principles that [this Court has] repeatedly held to be improper"]; *People v. Sandoval* (1992) 4 Cal.4th 155, 191-194 [prosecutor may not invoke religious doctrine as a consideration in the jury's sentencing determination],[196] aff'd on other grounds sub. nom. *Sandoval v. California*

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[196] Although this Court ruled in *Sandoval* that the prosecutor's biblical arguments were harmless, the Ninth Circuit set aside Sandoval's death sentence on federal habeas corpus. (*Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 776-777.) The Ninth Circuit noted:

> In a capital case like this one, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. See *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (holding that capital sentencing statutes must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death") (internal citations and quotation marks omitted). The Biblical concepts of vengeance invoked by the prosecution here do not recognize such a refined approach. See *Jones*, 706 F.Supp. at 1559-60; cf. *Tison v. Arizona*, 481 U.S. 137, 180-81 (1987) (Brennan, J., dissenting) (noting the "crude proportionality of 'an eye for an eye'"); *Coker v. Georgia*, 433 U.S. 584, 620 (1977) (Burger, C.J., dissenting) ("As a matter of constitutional principle, [the Eighth Amendment

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(1994) 511 U.S. 1; *People v. Wrest* (1992) 3 Cal.4th 1088, 1105-1107 [prosecutor's reference to Old Testament support for capital punishment was improper — such argument tends to diminish the jury's sense of responsibility and to imply that another, higher law should displace the law in the court's instructions]; *accord, People v. Hughes* (2002) 27 Cal.4th 287, 389-392.)[197]

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> proportionality] test cannot have the primitive simplicity of 'life for life, eye for eye, tooth for tooth.'").
>
> Argument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty. The Supreme Court has disapproved of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. See *Caldwell v. Mississippi*, 472 U.S. 320, 330-34 (1985) (holding that a prosecutor's argument that the jury's capital sentencing decision was not final because it would be reviewed by an appellate court unconstitutionally encouraged the jury to delegate its feeling of responsibility for the defendant's sentence to the appellate court). A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process.

(*Ibid.*)

[197] In addition, see *Jones v. Kemp* (N.D. Ga. 1989) 706 F.Supp. 1534, 1558-1560, setting aside a death sentence imposed by a state court because the trial court permitted the jury to take with it, and have available to it, during the course of its penalty deliberations, a Christian Bible not introduced into evidence nor in any way connected to petitioner's trial; Ex parte *Troha* (Ala. 1984) 462 So.2d 953, reversing a rape conviction after it was found that a juror contacted his brother, who was a minister, during deliberations, in order to receive guidance and scriptural references to follow in order to reach a proper decision; *Commonwealth v. Chambers* (1991) 528 Pa. 558, 584-587, setting aside a death sentence because the prosecutor invoked the Bible in support of imposition of a death sentence; and *Ne Camp v. Com.* (1949) 311 Ky. 676, 679-681, reversing death
(footnote continued on next page)

This Court explained in *Sandoval*: "What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority." (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 194.) Justice Mosk, in his concurring and dissenting opinion in *People v. Mincey* (1992) 2 Cal.4th 408, expounded:

> The jury has "a duty to apply the law of the [jurisdiction] as given by the trial judge, not its own interpretation of the law or its own interpretation of precepts of the Bible, in determining whether the [defendant] should live or die." [Citation.]
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> " . . . . A search for the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted. The use . . . of an extrajudicial code . . . cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction." [Citation omitted.]

(*Id.* at p. 486 (conc. & dis. opn. of Mosk, J.).) And as pointed out by the Supreme Court of Pennsylvania in *Commonwealth v. Chambers*, *supra*, 528 Pa. at pages 586-587, the interjection of religious law as an additional factor for the jury's consideration destroys the impartiality and objectivity of the jurors and when jurors are urged to consider religious doctrine in their sentencing decision, courts cannot be assured that their sentencing decisions are not the product of passion, prejudice or an arbitrary factor.

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judgment where during the trial, a juror inquired of her priest what, if any, moral guilt would attach to a juror in a case involving a possible death sentence, he informed her that no moral guilt would attach so long and the juror acted in good conscience, and the juror then told another juror of that conversation during deliberations.

The few cases in which this issue has arisen during jury deliberations are distinguishable. In *People v. Mincey, supra*, 2 Cal.4th 408, a juror brought a Bible into the jury room during penalty phase deliberations and read verses with other jurors. On the next day, after learning of that misconduct, the trial court questioned the jurors individually and gave a strong admonition not to permit any outside books into the jury room and to decide the penalty strictly based on the evidence and the court's instructions on the law. (*Id.* at p. 465-467.) This Court rejected Mincey's argument that the incident violated his Eighth Amendment rights, stating that the reliability of the jury's decision to impose the death penalty was not significantly impugned by the reading of the Bible verses because:

> Promptly upon learning of the Bible incident, the trial court in this case questioned each of the jurors. The jurors said that the Bible verses were read after the completion of deliberations for the day, and that they did not discuss the Bible verses. Before allowing the jurors to resume deliberations, the trial court admonished them to decide the case solely on the evidence and the court's instructions on the law.

(*People v. Mincey, supra*, at p. 467.)

In this case, however, Juror Y.P. consulted an outsider for guidance and was not admonished to disregard the information provided by the priest, and as discussed below, there was a substantial likelihood that the priest's information improperly influenced her.

This case is also distinguishable from *People v. Lewis, supra,* 26 Cal.4th 334. There, the defendant unsuccessfully sought a new trial on the basis that during penalty deliberations, a juror, who expressed difficulty with actually voting for death, was told by another juror that "'he did not know if it would help her, but what had helped him make his decision was that [defendant] had been exposed to Jesus Christ and if that was in fact

true [defendant] would have 'everlasting life' regardless of what happened to him.'" (*Id.* at p. 387.) This Court held that for jurors to consider their religious beliefs, or even to discuss those beliefs and pray together, does not constitute juror misconduct. (*Id.* at pp. 389-390.) The Court rejected the defendant's contention that jurors improperly referred to an extraneous source to influence another juror's vote:

> We find nothing in the record, moreover, that suggests the jurors disregarded the law or the court's instructions, and instead imposed a higher or different law. (*People v. Sandoval, supra,* 4 Cal.4th at p. 193.) The fact that some jurors expressed their religious beliefs or held hands and prayed during deliberations may have reflected their need to reconcile the difficult decision — possibly sentencing a person to death — with their religious beliefs and personal views. (See *Jones v. Kemp, supra,* 706 F.Supp. at p. 1560.) But it does not show that jurors supplanted the law or instructions with their own religious views and beliefs. (See *People v. Sandoval, supra,* 4 Cal.4th at p. 194 ["We do not mean to rule out all reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment"].). . . .
>
> * * * *
>
> The cases upon which defendant relies are inapposite. Unlike in *People v. Sandoval, supra,* 4 Cal.4th at pages 193-194, the prosecutor here did not make the religious references to Jesus Christ and everlasting life. "Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle [that the jury should base their penalty determinations on evidence and legal instructions before it] is improper." (*People v. Sandoval, supra,* 4 Cal.4th at p. 194.) A juror, Paul W., made the references in the course of deliberations. Unlike in *People v. Mincey, supra,* 2 Cal.4th at pages 465-467, and *Jones v. Kemp, supra,* 706 F.Supp. at page 1559, the jurors did not consult material extraneous to the record, like the Bible. Rather, Paul W. merely shared with Sally B. his personal religious

> view and how he reconciled his vote for the death penalty. Finally, unlike *In re Stankewitz*, *supra*, 40 Cal.3d at pages 399-400, Paul W. did not disregard a court's instructions, consult his own outside experience and share his erroneous legal advice with other jurors.

(*People v. Lewis, supra,* 26 Cal.4th at pp. 390-391.)

The very improprieties that this Court found absent in *People v. Lewis* were present in the case at bar. Juror Y.P. did disregard the court's instructions by consulting an outside "expert" to seek information relevant to her penalty decision. And the juror did receive additional extraneous information, a religious doctrine — the Catholic Church's belief in the death penalty. There clearly was misconduct, and indeed the misconduct improperly injected the perceived divine authority of the Catholic Church into the Y.P.'s capital sentencing process.

ii. **The Misconduct Resulted in Appellant's Punishment Being Determined, in Part, by Religious Doctrine in Violation of the Establishment Clauses of the State and Federal Constitutions.**

The first Clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. (*Santa Fe Independent School District v. Doe* (2000) 530 U.S. 290, 301.) Under the Establishment Clause, the "[g]overnment may neither promote nor affiliate itself with any religious doctrine or organization." (*Lee v. Weisman* (1992) 505 U.S. 577, 599 (conc. opn. of Blackmun, J.).) "Neither a state nor the Federal

Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' [Citation.]" (*Everson v. Board of Ed. of Ewing Tp.* (1947) 330 U.S. 1, 16.)

In rendering appellant's sentence, Juror Y.P. was not acting as a private person, but as an agent of the government of the State of California in the discharge of her duties. Thus, the exercise of peremptory challenges by a litigant in a civil action to exclude jurors on account of their race was held to violate the equal protection rights of the challenged venirepersons and to entitle the losing adverse litigation party to a new trial. (*Edmonson v. Leesville Concrete Company, Inc.* (1991) 500 U.S. 614, 620 ["Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints."].) Similarly, a school district's policy of permitting student-led, student-initiated prayer before football games, violated the Establishment Clause of the First Amendment and justified injunctive relief. (*Santa Fe Independent School District v. Doe, supra,* 530 U.S. 290.)

It is hard to imagine a greater power and responsibility that the government can invest in a private person than the power to decide whether a fellow person shall live or die. If the state cannot permit prayers to be broadcast on a public address system at a school football game, surely the state cannot permit a criminal defendant's life or death to turn on the doctrines of any particular religion. To avoid this and other arbitrary influences, the State of California has written into law the factors that are to be considered by jurors in the penalty phase of a capital trial. When one or

more jurors substitute for those statutory factors commands of a particular religion the State has a duty to intervene and set aside the results of that misconduct. Here, as discussed below in section (3)(b), there is a substantial likelihood that the priest's information that the Catholic Church did believe in capital punishment improperly influenced Juror Y.P.'s penalty decision.

Since the misconduct of Y.P., if allowed to stand, would result in the enforcement by the State of the perceived stand of the Catholic Church in favor of the death penalty, failure to reverse the death sentence imposed on appellant would deprive him of rights guaranteed by the Establishment Clauses of the First Amendment to the United States Constitution and article I, section 4 of the California Constitution. (See *People v. Sandoval, supra*, 4 Cal.4th at p. 200 (conc. & dis. opn. of Mosk, J.) [prosecutor's argument invoking religious law in support of the death penalty "violates the United States and California Constitutions — including their respective clauses concerning establishment of religion. . . ."].)

iii. **The Misconduct Diminished the Juror's Sense of Responsibility for Her Choice of Sentence.**

This Court has repeatedly held, "an appeal to religious authority in support of the death penalty is improper because it tends to diminish the jury's personal sense of responsibility for the verdict." (*People v. Hill, supra*, 17 Cal.4th at pp. 836-837; *accord*, *People v. Wash*, *supra*, 6 Cal.4th at p. 261; *People v. Sandoval, supra,* 4 Cal.4th at pp. 191-194; *People v. Wrest*, *supra*, 3 Cal.4th at pp. 1105-1107.) In this case, Juror Y.P.'s

inferable reliance[198] on her priest's counsel and his statement that the Catholic Church endorsed the death penalty, reduced her personal sense of responsibility for the verdict. One of the key protections of the accused in a capital offense is the severe reluctance that any normal person has to commit an act that will lead to the death of a fellow human. The law of this State imposes on jurors a great burden in evaluating whether or not a murder, coupled with the aggravating and mitigating circumstances, warrants a death verdict. For a Catholic juror to be told by her priest that the Catholic Church "do[es] believe in" capital punishment diminishes this burden and provides an easy solution to her dilemma. Irrespective of whether Juror Y.P. could be deemed to have simply been seeking comfort in discharging her solemn duties, it cannot be gainsaid that this ecclesiastical consolation diminished her sense of responsibility for her choice of a sentence of death.

This action violated appellant's rights to due process and freedom from cruel and/or unusual punishment guaranteed by the United States Constitution, Amendments 8 and 14, and California Constitution, article I, section 17.[199]

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198 Given Y.P.'s contact with the priest despite the court's repeated admonitions and her insistence on obtaining an answer even after she was given an opportunity to decline, the Catholic Church's position on the death penalty must have been quite important to her penalty phase decision-making process. It can thus be inferred that she relied on her priest's counsel. For all the reasons discussed in section (3)(b), there is a substantial likelihood that Y.P. was, indeed, influenced by her improper contact with the priest.

199 See *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.This is true even under the narrower interpretation of *Caldwell* set forth in *Romano v. Oklahoma* (1994) 512 U.S. 1, 9-10, which found a constitutional violation in arguments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the
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iv. **The Misconduct Deprived Appellant of the Right to Confront the Witnesses Against Him.**

"A juror's receipt of extrajudicial information about the case 'deprives [the parties] of the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction.'" (*In re Carpenter* (1995) 9 Cal.4th 634, 673-674 (dis. opn. of Mosk, J., quoting *United States v. Bagnariol* (9th Cir. 1981) 665 F.2d 877, 884, fn.3); *accord, Gibson v. Clanon* (9th Cir. 1980) 663 F.2d 851, 854, *cert. den.* (1981) 450 U.S. 1035.)

In *People v. Hill, supra,* 17 Cal.4th 800, in which the prosecutor was held to have committed misconduct by invoking, during argument, the biblical injunction concerning "an eye for an eye, a tooth for a tooth," this Court noted that it is open to debate whether the Bible really calls upon believers to have murderers put to death:

> We cannot emphasize too strongly that to ask the jury to consider biblical teachings when deliberating is patent misconduct. (Citation omitted.) Moreover, although such matters of theology are, of course, well beyond our purview, *we observe some scholars have suggested reliance on the lex talionis in this context may oversimplify the meaning of the pertinent scriptural passages*. (Citations omitted.)

(*Id.* at p. 836, fn. 6, emphasis added.)

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sentencing decision." As discussed below, the priest's information that the Catholic Church did "believe in capital punishment" was misleading, given the growing tendency in the Church at the time of appellant's penalty phase to condemn the use of the death penalty. As explained in the next section, the Church's position on the death penalty was not cut-and-dried, as suggested by the priest's response to Y.P.'s inquiry.

Similarly, the question of capital punishment within the Catholic Church is a thorny one. Although the traditional teaching of the Church was that the death penalty was not a moral evil, in 1995, Pope John Paul II acknowledged in his encyclical Evangelium Vitae (The Gospel of Life) a "growing tendency" in the church and civil society to demand that the death penalty be restricted or abolished. (http://www.priestsforlife.org/articles/1231-evangelium-vitae, Chapter III, ¶ 56.) The Pope endorsed this attitude as "more in conformity to the dignity of the human person," and spoke against execution "except in cases of absolute necessity" — in other words, when it would not be possible otherwise to defend society:

> It is clear that, for these purposes to be achieved, *the nature and extent of the punishment* must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, *such cases are very rare, if not practically non-existent.*

(*Ibid.*, emphasis added.) In his Evangelium Vitae, Pope John Paul II also spoke of affirming the sacredness of human life even in the person of a murderer:

> And yet God, who is always merciful even when he punishes, *"put a mark on Cain,* lest any who came upon him should kill him" (*Gen* 4:15). He thus gave him a distinctive sign, not to condemn him to the hatred of others, but to protect and defend him from those wishing to kill him, even out of a desire to avenge Abel's death. *Not even a murderer loses his personal dignity,* and God himself pledges to guarantee this. And it is precisely here that the *paradoxical mystery of the merciful justice of God* is shown forth. As Saint Ambrose writes: "Once the crime is admitted at the very inception of this sinful act

> of parricide, then the divine law of God's mercy should be immediately extended. If punishment is forthwith inflicted on the accused, then men in the exercise of justice would in no way observe patience and moderation, but would straightaway condemn the defendant to punishment. . . . God drove Cain out of his presence and sent him into exile far away from his native land, so that he passed from a life of human kindness to one which was more akin to the rude existence of a wild beast. *God, who preferred the correction rather than the death of a sinner, did not desire that a homicide be punished by the exaction of another act of homicide*."

(*Id.*, Chapter I, ¶ 9, emphasis added.)

Even before 1995, American Catholic bishops voiced strong opposition to the death penalty. In 1980, the National Conference of United States Bishops published a statement on capital punishment urging its abolition and discussing "the evils associated with capital punishment and the harmony of the abolition of capital punishment with the values of the Gospel." (http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/statement-on-capital-punishment.cfm.) As set forth in that statement:

> We believe that in the conditions of contemporary American society, the legitimate purposes of punishment do not justify the imposition of the death penalty. Furthermore, we believe that there are serious considerations which should prompt Christians and all Americans to support the abolition of capital punishment.

(*Ibid.*)

Accordingly, at the time of the penalty phase in this case, the Church's position on the death penalty was not cut-and-dried, as suggested by the priest's response to Y.P.'s inquiry. Indeed, in contrast to the priest's statement that the Church did believe in capital punishment, during voir

dire, several Catholic venirepersons expressed understandings that the church was opposed to capital punishment. (See, e.g., 10 RT 2277-2278 [Rita Himes — Catholic, understood that Catholic Church was opposed to capital punishment]; 12 RT 2553-2555 [Maria Morrison- raised as a Catholic with the understanding that "thou shalt not kill" meant opposition to the death penalty].) The court and prosecutor also wrangled with the question of the Catholic Church's position on capital punishment, with the prosecutor expressing his understanding that the Church was anti-death penalty and the Court stating that the church was not against it in certain circumstances. (14 RT 2897-2898.)

Thus, even assuming that the divine law of the Catholic Church was relevant to the jury's task of choosing an appropriate penalty for appellant, by consulting with her priest outside of the courtroom, Juror Y.P. deprived appellant of the opportunity of disputing that priest's interpretation of Catholic doctrine on the death penalty. Appellant could well have presented experts who, on the basis of the 1980 Bishops' Statement on Capital Punishment, could have discredited the priest's information that the Church believed in the death penalty. The juror's misconduct thus deprived appellant of his right to confront the witnesses against him, as guaranteed by the United States Constitution, Amendments 6 and 14, and California Constitution, article I, section 15.

v. **The Misconduct Deprived Appellant of his Right to Trial by Impartial Jury in Violation of the State and Federal Constitutions.**

Implicit in the institution of trial by jury is the requirement that jurors will rely on the trial court to instruct them in the applicable law, and that they will not look to any other source for such guidance. (*People v.*

Williams (2001) 25 Cal.4th 441, 448 ["A juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of Penal Code section 1089. As soon as a jury is selected, each juror must agree to render a true verdict 'according only to the evidence presented . . . and *to the instructions of the court.*' (Code Civ. Proc., § 232, subd. (b), italics added.)"].) In consulting with her priest, Juror Y.P. failed to comply with this duty and as discussed *post* in section (3)(b), there is a substantial likelihood that the extrinsic information imparted by the priest improperly influenced Y.P.'s penalty phase verdict. By failing to comply with her duty, Juror Y.P. thus deprived appellant of his right to trial by impartial jury, guaranteed by the jury trial and due process provisions of the United States Constitution, Amendments 6 and 14, and California Constitution, article I, section 16. (See *Bayramoglu v. Estelle* (1986) 806 F.2d 880, 887; *Jones v. Kemp*, *supra*, 706 F.Supp. 1534, 1560.)

vi. **The Misconduct Undermined the Integrity of California's Death Penalty Process.**

Finally, Juror Y.P.'s misconduct undermined the integrity of California's death penalty process. Justice Moreno, in his concurring and dissenting opinion in *People v. Danks*, *supra*, 32 Cal.4th 269, another case where jurors spoke to their pastors about the death penalty, found that juror misconduct such as that here undermines the integrity of the death penalty process. (*Id.* at pp. 333-334 (conc. & dis. opn. of Moreno, J.).) Justice Moreno explained:

> [S]ociety cannot ignore its legitimate concept of justice even for such an insubordinate member. As stated by [Justice Frankfurter of] the Supreme Court of the United States not long ago in regard to a heinous crime: "A shocking crime puts law to its severest test. Law triumphs over natural impulses aroused by such a crime only if guilt be ascertained by due regard for

> those indispensable safeguards which our civilization has evolved for the ascertainment of guilt. It is not enough that a trial goes through the forms of law. . . . Of course society must protect itself. But surely it is not self-protection for society to take life without the most careful observance of its own safeguards against the misuse of capital punishment."

(*Id.* at p. 334.) "'From the point of view of society, the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action. It is of vital importance . . . to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'" (*Id.* at p. 335, quoting *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) While acknowledging the enormity of the crimes committed by *Danks*, Justice Moreno concluded that the penalty phase verdict, tainted by the misconduct of two jurors who received approval from their spiritual leaders to impose a sentence of death, fell "far short of this standard." (*Ibid.*)

The same is true here. As discussed below, there is no assurance in this case that Juror Y.P.'s decision to impose a death sentence was based on her own reasoned evaluation of the evidence presented at the penalty phase, rather than on the doctrine of her church. In fact, as discussed below, there is a substantial likelihood that the priest's information improperly influenced her. To allow the penalty judgment to stand undermines the integrity of this State's death penalty process.

b. <u>There Is A Substantial Likelihood That Juror Y.P. Was Influenced By Her Improper Contact With The Priest; At The Very Least, The Presumption Of Prejudice Was Not Overcome</u>.

As this Court has declared on many occasions, jury misconduct raises a presumption of prejudice, and unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial. (*People v. Honeycutt* (1977) 20 Cal.3d 150, 156; *People v. Pierce* (1979) 24 Cal.3d 199, 207; *People v. Karis, supra*, 46 Cal.3d 612 at p. 642.)

The presumption of prejudice is even stronger in a capital case. "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." (*Mattox v. United States* (1892) 146 U.S. 140, 149.)

In *In re Stankewitz* (1985) 40 Cal.3d 391, this Court noted how the presumption of prejudice has its most forceful effect in a capital case, particularly when the misconduct goes to a key issue in the case:

> The misconduct of juror Knapp raises a presumption of prejudice. [Citations.] Such a presumption is even stronger when, as here, the misconduct goes to a key issue in the case: the resolution of the question whether a robbery took place was critical to the prosecution's felony-murder theory, to the separate robbery count, and to the robbery special-circumstance allegation. [Citation.] Finally, "the presumption . . . is even stronger in the context of a capital case." [Citation.]

(*Id.* at p. 402.)

In making his ruling, the trial judge herein made no mention whatsoever of the presumption of prejudice and cited nothing rebutting that presumption. Although he acknowledged that Juror Y.P. should not have been talking about the death penalty and by doing so, violated her oath and the court's instructions (21 RT 4663, 4671), he simply dismissed her willful violation as inconsequential, stating that he did not "see any reason to do anything." (21 RT 4671.) Indeed, the court ended its colloquy with the juror by saying, "Don't worry about it. That's fine" (21 RT 4669), as if she had done nothing wrong and need not concern herself with the ramifications of her conversation. The court did not even admonish Juror Y.P. to disregard what the priest told her or to refrain from informing the other jurors of her conversation with him.[200] The judge's treatment of Juror Y.P.'s misconduct as trivial was erroneous, for her violation of her oath and the court's instructions and the information received from the priest were not insignificant. As discussed below, the trial court failed to afford sufficient consideration to the evidence of Juror Y.P.'s conduct which demonstrated the willfulness of her misconduct, as well as the significance of the priest's counsel to her penalty decision.

"In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . ." (*Remmer v. United States*, *supra*, 347 U.S. at p. 229.) Even the inadvertent receipt of information is considered misconduct and triggers the presumption of prejudice. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 579.) "The presumption is not conclusive, but the burden rests heavily upon the

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[200] The court only admonished Juror Y.P. to remember the admonition not to discuss the case with anybody. (21 RT 4668.)

Government to establish . . . that such contact with the juror was harmless to the defendant." (*Remmer v. United States, supra*, at p. 229.) The same rule operates under the federal Constitution for juror misconduct based on a juror's receipt of extraneous information relating to the case. (*People v. Marshall, supra,* 50 Cal.3d at pp. 949-951; *People v. Ramos* (2004) 34 Cal.4th 494, 519; *United States v. Vasquez* (9th Cir. 1979) 597 F.2d 192, 192-194.) "Juror misconduct gives rise to a presumption of prejudice [citation] [which] the prosecution must rebut . . . by demonstrating 'there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment' [citations]." (*People v. Gamache* (2010) 48 Cal.4th 347, 397.) "[T]he key question is whether there exists a possibility that extrinsic information influenced the verdict." (*People v. Marshall, supra*, 50 Cal.3d at p. 951, internal quotations and citation omitted.) "Some of the factors to be considered . . . are 'the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued.' [Citations.]" (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 557.)

In determining whether there is no substantial likelihood that any juror was improperly influenced or biased against the defendant, actual bias does not mean that a juror must dislike the defendant or desire to treat him unfairly. (*In re Boyette* (2013) 56 Cal.4th 866, 899 (conc. & dis. opn. of Corrigan, J.).) "Rather, '[t]he Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence "based on the evidence presented in court." [Citations.]' [Citations.]" (*Ibid.*) "An impartial juror is someone 'capable and willing to decide the case solely on the evidence' presented at trial," and "[t]he term 'actual bias' may include a

state of mind resulting from a juror's actually being influenced by extraneous information about a party." (*People v. Nesler, supra,* 16 Cal.4th at p. 581.)

Such bias may appear in either of two ways: "(1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra*, at pp. 578-579.) The test for determining whether juror misconduct likely resulted in actual bias is "different from, and indeed less tolerant than," normal harmless error analysis. (*People v. Marshall, supra*, 50 Cal.3d at p. 951.) "If [this Court] find[s] a substantial likelihood that a juror was actually biased, [it] must set aside the verdict, no matter how convinced [it] might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*Nesler, supra*, at p. 579.)

In the extraneous-information case, the entire record bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. (*In re Carpenter, supra*, 9 Cal.4th at p. 654.)

A consideration of the relevant facts shows a substantial likelihood that, *under the circumstances of this particular case,* Y.P. was actually biased with respect to the penalty decision: (1) Juror Y.P. willfully violated her oath and instructions; (2) she deliberately sought outside guidance for

making her penalty decision; (3) the extrinsic information went to the key issue at the penalty phase, and both her behavior and the nature of the information imparted to her indicate that the priest's information was vital to her penalty phase decision; and (4) she was never admonished to disregard the extraneous information or to refrain from sharing it with the other jurors.

i. **Willful Violation of Oath and Instructions.**

First, as discussed *ante*, Juror Y.P. willfully violated her oath and the court's instructions. The Penal Code provides that jurors must not converse with anyone else on any subject connected with the trial and Juror Y.P. was so instructed. (Pen. Code, § 1122.) "Violation of this duty is serious misconduct." (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118 [juror violated her oath as a juror and the trial court's instructions by discussing the case with nonjurors before the trial was over]; *accord*, *People v. Nesler*, *supra*, 16 Cal.4th at p. 586 [a juror's violation of her oath and the court's instructions constitutes serious misconduct]; *People v. Pierce*, *supra*, 24 Cal.3d at p. 207 [juror committed serious misconduct when, in derogation of his oath and promise on voir dire not to engage in conversations with others about the case, he consulted a friend, an officer who worked on the case].) This Court has made it clear that "'[w]hen a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties.'" (*In re Hitchings*, *supra*, 6 Cal.4th at p. 120; *accord*, *People v. Nesler*, *supra*, at p. 586.) In finding a substantial likelihood that the jurors who committed misconduct in *Hitchings* and *Nesler* were biased as a result, the Court emphasized the fact that both jurors violated their oaths and the court's instructions. (*Ibid.*)

Notably, Juror Y.P.'s violation cannot be characterized as inadvertent or insignificant. After the jurors returned their guilt verdict, the court thoroughly admonished them not to talk to anybody about the case and not to seek or receive information from any outside source. (21 RT 4658-4659.) By Y.P.'s own admission, soon after this strong admonition, she called and left a message for her priest.[201] (21 RT 4666-4667.) And when he returned her call, she persisted in obtaining an answer from him regarding the Church's position on the death penalty even after he gave her an opportunity to abandon her request for information. (21 RT 4666-4668.) This was not an inadvertent or minor violation, but an intentional violation of a substantial responsibility.

ii. **Deliberately Sought Outside Information Relevant to Her Penalty Decision.**

Second, Juror Y.P. deliberately sought outside information from a spiritual advisor that was relevant to her penalty decision. As recognized by this Court in analogous situations, a juror's contact with an outside "expert" for guidance or information is serious misconduct which creates a high potential for prejudice. (See *People v. Honeycutt*, *supra*, 20 Cal.3d at p. 157 [juror who contacted outside attorney for advice during deliberations in criminal case held guilty of egregious misconduct]; *accord*, *People v. Pierce*, *supra*, 24 Cal.3d at p. 207 [juror's consultation with friend, an officer who worked on the case, about the evidence constituted serious misconduct].)

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[201] The guilt phase verdicts were rendered on Thursday, March 10, and the jurors were dismissed shortly after 3:00 that afternoon. (8 CT 2222; 21 RT 4660.) Although the record does not clarify when Y.P. called her priest, it is clear that he returned her call and they spoke on Friday, March 11. (21 RT 4667.)

In condemning such conduct as "egregious misconduct," this Court explained in *Honeycutt*, "we cannot condone a practice whereby a juror receives outside counseling relative to the applicable law, as to do so would subordinate the court's evaluation of the law to that of the juror's outside source. . . ." (*Honeycutt, supra*, at p. 157.) "Such conduct in clear violation of the trial court's admonitions interjects outside views into the jury room and creates a high potential for prejudice." (*Ibid.*)

Here, Juror Y.P. deliberately set out to obtain information relevant to the sole issue to be determined at the penalty phase: whether appellant should be sentenced to death or life without possibility of parole. Akin to the jurors in the cases cited above, she consulted an "expert," her priest, for information. Her misconduct was thus tantamount to seeking legal guidance from a person other than the trial judge. Given the priest's answer — that the Catholic Church did believe in the death penalty — this consultation created a great risk of prejudice that, as discussed below, the priest's information would influence her to impose a sentence of death.

iii. Extrinsic Information Went to Key Issue at Penalty Phase, and Juror Y.P.'s Behavior Indicated That It Was Vital to Her Penalty Decision.

Third, the extrinsic information provided by the priest went to the key issue at the penalty phase. (See *In re Stankewitz, supra*, 40 Cal.3d at p. 402 ["presumption [of prejudice] is even stronger when, as here, the misconduct goes to a key issue in the case: the resolution of the question whether a robbery took place was critical to the prosecution's felony-murder theory, to the separate robbery count, and to the robbery special-circumstance allegation."]; see also *People v. Hogan* (1982) 31 Cal.3d 815, 847 [jury's consideration of inadmissible evidence establishing the

defendant's reluctance to submit to a lie detector test in a case in which his truthfulness was the key issue].)

Courts have found the presumption of prejudice rebutted in cases where the extraneous information is insignificant, such as where it added nothing contradictory to the evidence at trial or dealt with mere social amenities unrelated to the trial. (See, e.g., *People v. Lewis* (*Bernard*) (2009) 46 Cal.4th 1255, 1305-1309 [presumption of prejudice arising from juror's misconduct in discussing the case with her husband was rebutted, where she did not discuss any substantive matters, but only the manner in which the jury picked the foreperson and the foreperson's refusal to reveal the results of the first jury poll]; *People v. Ramos*, *supra*, 34 Cal.4th at pp. 520-521 [jury misconduct in possible exposure to newspaper articles was not prejudicial where articles were objective and contained no information the jurors did not hear or see themselves in the courtroom]; *People v. Marshall*, *supra*, 50 Cal.3d at pp. 949-953 [presumption was rebutted where extraneous law introduced during penalty deliberations was immaterial under the given penalty charge]; *People v. Loker* (2008) 44 Cal.4th 691, 754-755 [juror's conversation with outsider, who he later learned was the victim's father, was nonprejudicial where they discussed only fact that both had been Marines and the father's impending surgery]; *People v. Sutter* (1982) 134 Cal.App.3d 806, 820-821 [evidence from juror's improper visit to scene added nothing contradictory to the evidence at trial, and there was no issue relating to the scene of the crime]; *People v. Martinez* (1978) 82 Cal.App.3d 1, 25 [jury's consideration of maps that duplicated evidence already before the jury].)

On the other hand, where the misconduct is substantially related to important matters raised during the trial, courts have not found the presumption rebutted. (See, e.g., *People v. Holloway*, *supra*, 50 Cal.3d at

pp. 1110-1112 [presumption not rebutted where juror read newspaper article revealing defendant's prior criminal conduct, which had been ruled inadmissible]; *People v. Honeycutt*, *supra*, 20 Cal.3d at pp. 155-158 [presumption not rebutted where juror received information from an attorney that involuntary manslaughter could be reduced to a misdemeanor at sentencing in case where defendant presented a diminished capacity defense]; *People v. Nesler*, *supra*, 16 Cal.4th at pp. 584-585 [extraneous information concerning defendant's drug use and parenting was prejudicial, because her drug use and parental concern played a significant role in the testimony of a number of expert witnesses with regard to the defendant's sanity]; *People v. Pierce*, *supra*, 24 Cal.3d at p. 209 [where juror asked officer about lack of fingerprints on murder weapon, officer's information that it would have been difficult to lift any valuable prints from the weapon could have assuaged the juror's doubts]; *People v. Thomas* (1975) 47 Cal.App.3d 178 [presumption not rebutted where several jurors read newspaper article stating that a codefendant had pled guilty and been sentenced]; *People v. Andrews* (1983) 149 Cal.App.3d 358 [presumption of prejudice was not rebutted where the jury was inadvertently informed that a codefendant had pled guilty to charges stemming from the same crime].)

In the present case, the extraneous information was not merely significant; it went to "the first, last, and only issue before the jury in the penalty phase" — whether appellant's life should be taken or spared. (*People v. Sandoval*, *supra*, 4 Cal.4th at p. 204 (conc. and dis. opn. of Mosk, J.).) Moreover, despite Juror Y.P.'s attempt to minimize the importance of her question to the priest, her behavior indicated that his response likely influenced her penalty decision.

As discussed *ante*, both state and federal courts have recognized the great potential of religious doctrine to influence a juror's penalty

determination. (See, e.g., *Jones v. Kemp, supra*, 706 F.Supp. at pp. 1559-1560 ["the Bible is an authoritative religious document . . . [which] has great potential to influence the jury's deliberations."].) That certainly is true in this case. A critical factor here is that Juror Y.P. was Catholic and the Church's position on the death penalty was very important to her, as evidenced by her beginning remark to the Court: "The thing. . . . I'm Catholic." (21 RT 4666.) Y.P.'s question to her priest, "whether it was a sin to decide on the death penalty" (21 RT 4666-4667) suggested that she was struggling with the decision whether to deprive a fellow human being of his life and was seeking the Church's blessing to impose a death sentence. The priest's response — that the Catholic Church endorsed the death penalty — was substantially likely to relieve that struggle and contribute significantly to a decision by Juror Y.P. that death was the appropriate punishment for Brian Johnsen. As observed by the Supreme Court in *Caldwell v. Mississippi*:

> 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.

(*Caldwell v. Mississippi, supra*, 472 U.S. at p. 333.) Justice Mosk, in his concurring and dissenting opinion in *People v. Sandoval*, recognized that the kind of answer provided by the priest to Juror Y.P. in this case offered her "an easy way to avoid a hard choice - in fact, an especially hard

choice," to evaluate the aggravating and mitigating circumstances and then determine the appropriate penalty. (*People v. Sandoval, supra*, 4 Cal.4th at p. 205 (conc. & dis. opn. of Mosk, J.) Moreover, the priest's response must have carried special force, "coming as it did from what many consider an authoritative source - if not Authority Itself." (*People v. Mincey, supra,* 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).)

It was clear that Y.P. approached the priest because of concerns and doubts about voting for death, and the priest's information assuaged those doubts. (See, e.g., *People v. Pierce, supra*, 24 Cal.3d at p. 209 [where juror asked officer about lack of fingerprints on murder weapon, officer's information that it would have been difficult to lift any valuable prints from the weapon, could have assuaged the juror's doubts].)

When questioned by the court, Juror Y.P. understandably attempted to downplay the significance of her contact with the priest. She claimed that she contacted her priest merely out of curiosity and that any answer to her question would make no difference — it was not going to change the way she felt. (21 RT 4666-4667, 4669.) If Juror Y.P. was just curious, why would she make the effort, and risk getting into trouble, to contact the priest after hearing the court's repeated admonitions not to discuss any aspect of the case with anyone? Given that she was so admonished not long before her call to the priest and, in fact, asked the priest whether she could get into trouble, she plainly understood she was not supposed to consult her priest, but went ahead and did it anyway. Moreover, even after the priest told her that she would have to tell the judge and asked if she still wanted to hear the answer, Juror Y.P. responded affirmatively. If the opinion of the church was not significant to her penalty decision, why did she insist on hearing it? The facts show the Church's position on the death penalty was relevant for her, and the further facts that she asked even though she had doubts about

whether it was proper and was given an opportunity to withdraw the question, heightens its importance. In short, the active and persistent nature of this juror's conduct, in addition to the very nature of what the priest said, establishes a substantial likelihood that she was influenced by the information she received. (See, e.g., *In re Boyette*, *supra*, 56 Cal.4th at p. 902 (conc. & dis. opn. of Corrigan, J.) [the "active nature" of the jurors' misconduct in renting and watching a film, "provides insight into the film's potential influence on them. . . . That they devoted such time to acquiring this extraneous information reflects that they believed it was important to consider in deciding upon a penalty."].)

Appellant anticipates that the State will argue that Juror Y.P.'s statements to the Court (that she was just curious) rebutted the presumption of prejudice. However, the juror's statements are not dispositive and both state and federal courts recognize that a juror's assurance of impartiality is insufficient to demonstrate lack of bias. (See, e.g. *Marshall v. United States, supra,* 360 U.S. at p. 312 [Supreme Court, in setting aside conviction where jurors were exposed to prejudicial news accounts, does not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles."]; *Irvin v. Dowd*, *supra*, 366 U.S. at pp. 724-728 [Supreme Court sets aside conviction even though each juror indicated he could render an impartial verdict despite exposure to prejudicial newspaper articles.]; *Holbrook v. Flynn* (1986) 475 U.S. 560, 570 [in evaluating prejudice from courtroom security measures, "[t]he Court of Appeals was correct to find that [trial judge's] assessment of jurors' states of mind cannot be dispositive here. If 'a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in

due process,' (citation), little stock need be placed in jurors' claims to the contrary."]; *People v. Cleveland* (2001) 25 Cal.4th 466, 477 [court cannot merely accept juror's claim of impartiality but must conduct adequate inquiry in order to evaluate claim].)

The United States Supreme Court has recognized that a juror may very well not be aware of his or her own bias and even if aware, may be reluctant to admit it. "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence." (*Crawford v. United States* (1909) 212 U.S. 183, 196.) Similarly, in *Irvin v. Dowd*, *supra*, 366 U.S. at page 728, the Court stated that although a juror may be sincere when he says that he was fair and impartial to the defendant, the "psychological impact requiring such a declaration before one's fellows is often its father." And as explained by Justice O'Connor in her concurring opinion in *Smith v. Phillips*:

> Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.
>
> Nevertheless, I believe that in most instances a postconviction hearing will be adequate to determine whether a juror is biased. A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.

(*Smith v. Phillips, supra,* 455 U.S. at pp. 221-22 (conc. opn. of O'Connor, J.); see also *Smith v. Phillips, supra*, at pp. 230, 236 (dis. opn. of Marshall, J.) [a juror is unlikely to admit he is unable to weigh the evidence fairly and will be reluctant to admit that he acted improperly]; *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71 [although "[b]ias can be revealed by a juror's **express** admission of that fact, . . . more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence."].) Accordingly, "[b]ecause the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it,' [citation], it necessarily must be inferred from surrounding facts and circumstances." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 558 (conc. opn. of Brennan, J.).)

Here, as discussed above, the facts and circumstances of Juror Y.P.'s contact with her priest show a substantial likelihood that the priest's information affected her penalty phase determination to appellant's detriment. In evaluating the juror's statements to the court, it must be remembered that she was already concerned about "getting into trouble" for contacting her priest. She had every reason to minimize the importance of her conversation with the priest and to assure the court that the information was not going to affect the way she felt. (21 RT 4669.)

Moreover, where misconduct raises a presumption of prejudice, as was the case here, a trial court cannot merely accept a juror's statement that she can remain impartial. "It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality. [Citation.]" (*People v. Cleveland, supra*, 25 Cal.4th at p. 477, quoting *People v. McNeal, supra*, 90 Cal.App.3d at p. 838.) As explained in *People*

v. McNeal, once a court is alerted to the possibility that a juror might not be able to properly perform his duty to render an impartial and unbiased verdict, it is the court's obligation to determine the factual basis and then determine, for itself, whether impartiality has been affected. It is not the province of the juror to make the ultimate determination whether her impartiality has been impaired. (*Id.* at p. 839; *see also People v. Holloway, supra*, 50 Cal.3d at p. 1109 [court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror].) As discussed *post*, in section (C)(5), the court failed to make an adequate inquiry to evaluate Juror Y.P.'s claim of impartiality.

In sum, the information provided by the priest in response to the juror's inquiry went to the key issue at the penalty phase, and there is at least a substantial likelihood that she was influenced by that information.

iv. Juror Y.P. Was Never Admonished to Disregard the Extraneous Information or Not to Share With Other Jurors.

Fourth and finally, Juror Y.P. was never admonished to disregard the extraneous information or not to share it with the other jurors. An admonition by the trial court may dispel the presumption of prejudice arising from misconduct. (*People v. Pinholster, supra*, 1 Cal.4th at p. 925 [the presumption of prejudice may be dispelled by an admonition to disregard the improper information]; *accord*, *People v. Zapien, supra,* 4 Cal.4th at p. 996; see also *People v. Tafoya*, *supra*, 42 Cal.4th at pp. 192-193 [trial court removed offending juror and admonished other jurors to disregard juror's improper comments]; *People v. Mincey*, *supra*, 2 Cal.4th at p. 467 [individual questioning of all jurors and strong admonition were sufficient to rebut presumption of prejudice]; cf. *People v. Holloway*, *supra*, 50 Cal.3d at p. 1111 [presumption not rebutted where extraneous

information was prejudicial and court was unable to give admonition to disregard the information].)

But here, no admonition to disregard the information was given to Juror Y.P. The court told the juror not to "worry about it" and that all was "fine," as if she had done nothing wrong. (21 RT 4669.) Thus, Y.P. was left with the message that it was perfectly fine for her to consider and follow her church's position on the death penalty in determining the appropriate sentence for appellant. She was also left free to discuss the Catholic Church's belief in the death penalty with the other jurors during deliberations.

v. **The Presumption of Prejudice Was Not Rebutted.**

When all of the circumstances of Juror Y.P.'s misconduct are considered, it is clear that the presumption of prejudice was not rebutted:

(1) Evidence that the misconduct occurred was uncontested and incontestable. Juror Y.P. admitted calling and pursuing her inquiry with her priest.

(2) The misconduct was serious in that Juror Y.P. deliberately sought outside information in violation of her oath and the court's repeated instructions and admonitions.

(3) The extrinsic information went to the one and only issue to be determined at the penalty phase, and Juror Y.P.'s behavior showed how important the information was to her sentence determination.

(4) The extrinsic information Y.P. received from the priest was that the moral authority of her church was "in favor of" the

death penalty, thus putting that moral authority on the death side of Y.P.'s weighing process.

(5) Juror Y.P. was never admonished to disregard the church's purported stand in favor of the death penalty or to refrain from sharing that information with the other jurors.

People v. Tafoya, supra, 42 Cal.4th 147, another case where a juror spoke to a priest regarding the church's stand on the death penalty, is instructive. There, during the guilt phase, the juror had had a brief conversation with a friend who was a retired priest. According to the juror, he met with the priest for personal reasons and not to seek advice on how to vote at the penalty phase. During the conversation, the juror inquired about the Catholic Church's position on the death penalty and the priest said that he personally "'probably would be against it'" but that "the Church approves the law of the land" and thus a vote for the death penalty would not be a violation of any church law. (42 Cal.4th at pp. 190-191.) When questioned by the trial court as to the reasons for his question, the juror essentially replied that he was curious and "'it wasn't for the purpose of [the priest] telling me what I could do and what I can't do. . . .'" (*Id.* at p. 191.) During penalty deliberations, the juror mentioned his conversation with the priest to the other jurors, telling them that he was told they could follow the law of the land. (*Ibid.*)

The trial court found that the juror had engaged in misconduct, first by talking to the priest about the Catholic Church's position on the death penalty and second, by relaying the contents of the conversation to the other jurors. (*Ibid.*) The court removed the juror from the jury and individually questioned the remaining jurors whether they could disregard his comments. After all said they could, the court admonished them to

disregard the juror's comments, selected an alternate juror and instructed the jury to deliberate anew. (*Ibid.*)

On review, this Court concurred with the trial court's finding that the juror committed misconduct and found that the presumption of prejudice arising from that misconduct was rebutted because the trial court had removed the juror and admonished the remaining jurors to disregard his comments. This Court concluded that there was no substantial likelihood that the extraneous information influenced the other jurors because the church's position on the death penalty "did not weigh in favor of a death verdict as it was a neutral position that encouraged the jurors to follow the law of the land." (*Id.* at p. 193.) Moreover, the offending juror, in telling the other jurors about the priest's comments, did not advocate for one position over the other. (*Ibid.*) And, the priest's opinion that he probably would be against the death penalty weighed in favor of leniency toward the defendant. (*Ibid.*)

Tafoya is informative for several reasons. First, the misconduct itself was similar to that here. During the trial, both the *Tafoya* juror and Juror Y.P. contacted priests to inquire regarding the Catholic Church's position on the death penalty. In fact, both jurors attempted to minimize the significance of their contacts with the priests in similar terms, claiming they were merely motivated by curiosity and the information would not make any difference. Although the information provided by the priest in *Tafoya* was not as detrimental to the defense as that provided to Juror Y.P., the trial judge in *Tafoya* took the right action. He individually questioned the juror in person, removed that juror from the panel, and then admonished all of the remaining jurors to disregard the juror's comments. Because the offending juror had been removed and the other jurors were strongly

admonished, this Court found that the presumption of prejudice was rebutted.

Tafoya thus instructs how the court should have handled the situation here. Indeed, the instant case provides an even more compelling case for removal of the offending juror, given that the information provided by the priest did weigh in favor of a death verdict. Unlike the neutral information provided in *Tafoya*, which merely encouraged the juror to follow the law of the land, Juror Y.P. was told that the Catholic Church did affirmatively believe in the death penalty.

Second, whereas *Tafoya* involved additional misconduct in that the juror communicated the information to the other jurors, which was not confirmed here, the fact that the information was shared in that case with the other jurors suggests that it was just as likely that similar sharing occurred in this case, especially since the court told Juror Y.P. that she had not done anything wrong, did not ask her whether she had already communicated with other jurors regarding what the priest had told her, and did not admonish her not to tell the other jurors thereafter.

People v Danks, *supra*, 32 Cal.4th 269, is also instructive. There, two jurors had conversations with their pastors during penalty deliberations. When one juror ("K.A.") encountered her pastor at church, her husband said that it might be a good time to talk to the pastor about the Bible verses she had read or her feelings about the verdict. She said that she did not need to discuss anything. The pastor said that he understood she had read several scripture verses and she responded that she had and that they gave her comfort. The pastor said that they were good scriptures and jokingly said that if he were a juror, he would impose the death penalty on defendant. (*Id.* at pp. 306-307.)

This Court concluded that in light of the "extraordinary penalty phase evidence," the conversation as a whole, including the pastor's gratuitous remarks, were not inherently and substantially likely to have influenced Juror K.A. (*Id.* at p. 307.) The Court emphasized several factors: (1) Juror K.A. told her pastor that she had nothing to discuss with him, and he nevertheless insisted on imparting his personal, unsolicited view; (2) unlike other cases, where jurors continued to listen to unsolicited information, the conversation between Juror K.A. and her pastor ended after the one gratuitous remark and Juror K.A. did nothing to continue the conversation; and (3) there was no evidence that Juror K.A. repeated the pastor's comment in the jury room. (*Ibid.*)

The second *Danks* juror ("B.P.") told her pastor that she was a juror on a murder case and had already made up her mind about the verdict; she then asked if there was anything in the Bible which spoke against the death penalty. Her pastor responded that there was "no place in the Bible that takes the law out of the Bible. If you are sitting on the case I'm thinking you are sitting on, if I was in your shoes, I would not hesitate to give him the death penalty." (*Id.* at p. 309.) When Juror B.P. returned to deliberations, on all occasions she voted for the same verdict as she had three times before her conversation with her pastor. (*Ibid.*)

This Court found that Juror B.P.'s misconduct was more egregious than K.A.'s misconduct, since she "asked her pastor about the Bible's stand on the very issue she was deliberating." (*Id.* at p. 309.) In concluding, nonetheless, that the misconduct was not prejudicial, the Court emphasized the following factors: (1) Juror B.P. had already made up her mind as to the appropriate penalty and voted three times for the death penalty prior to her conversation with her priest; (2) her general inquiry was not to determine whether her vote was correct but whether it violated a religious

proscription; (3) the pastor's personal view of the appropriate penalty was unsolicited and Juror B.P. did not continue the conversation after that gratuitous remark; (4) Juror B.P. did not discuss the content of her conversation in the jury room; and (5) the penalty phase evidence against the defendant was compelling.

Juror Y.P. in our case, in contrast, had not made up her mind regarding the appropriate penalty. She had not even heard the penalty phase evidence. Moreover, the priest's information was, indeed, solicited. Juror Y.P. contacted her priest and pursued the conversation even when her priest provided an opportunity for her to walk away. The juror's active and persistent effort to obtain information evidenced its importance to her penalty decision. And the information that she was given told Juror Y.P. that under divine law her church was affirmatively "in favor of" death. These circumstances demonstrate that the State cannot rebut the presumption of prejudice.

In sum, Juror Y.P. committed misconduct. She violated her oath and the court's instructions. She contacted her priest for the express purpose of acquiring information relevant to her penalty determination. Even when provided an opportunity to decline receipt of such information, she pushed ahead, and was told that the church was "in favor of capital punishment." This misconduct raises a presumption of prejudice which was not rebutted. Far from rebutting the presumption, the record reveals a substantial likelihood that she was actually biased.

4. **The Trial Court Erred In Failing To Conduct a Sufficient Inquiry Into Juror Y.P.'s Misconduct.**

Even assuming, arguendo, that this Court were to conclude that the record fails to establish a substantial likelihood that Y.P. was influenced

and that the presumption of prejudice was rebutted, appellant's conviction would still have to be set aside because of the trial court's failure to conduct an adequate in-person inquiry into Juror Y.P.'s misconduct to determine if there was, in fact, a substantial likelihood that she was impermissibly influenced by her conversation with her priest.

This Court has recognized that once a trial court is put on notice of the possibility that a juror is subject to improper influences and unable to perform his or her duties, it is the court's obligation to make whatever inquiry is reasonably necessary to determine whether the juror's impartiality has been affected. (*People v. Burgener*, *supra*, 41 Cal.3d at p. 520; *People v. Davis* (1995) 10 Cal.4th 463, 547 ["A trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist.'"]; *accord*, *People v. McNeal*, *supra*, 90 Cal.App.3d at p. 839; *Dyer v. Calderon*, *supra*, 151 F.3d at p. 974 [court confronted with a colorable claim of juror bias must undertake an investigation reasonably calculated to resolve the doubts raised about the juror's impartiality].) "The specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion." (*People v. Seaton* (2001) 26 Cal.4th 598, 676.) However, a hearing is required "where the court possesses information which, if proven true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case." (*People v. Ray* (1996) 13 Cal.4th 313, 343.) The United States Supreme Court also insists on the necessity of adequate inquiry. (*Remmer v. United States*, *supra*, 347 U.S. 227 [court must hold hearing to determine if juror had improper communication with third party].) Failure to so inquire is error. (*People v. Burgener*, *supra*, 41 Cal.3d at p. 520; *People v. McNeal*, *supra*, 90 Cal.App.3d at pp. 838-839.)

Under both state and federal law, the trial court was required to conduct an adequate inquiry to determine whether the priest's answer to Juror Y.P.'s inquiry would likely influence her penalty determination. The trial court's inquiry here was patently inadequate. The Court merely had a telephone chat with Y.P., in which the juror briefly summarized her conversation with the priest. (21 RT 4666-4669.) The court failed to ask any questions to determine the impact of the priest's information on Juror Y.P. In fact, the court asked only three questions: (1) When did the juror speak to her priest? (2) Did the conversation occur during confession? and (3) Which priest did she talk to? (*Ibid.*) The entire conversation was reported in less than four pages. (21 RT 4666-4669.) After Juror Y.P. told the court that she just wanted to know if it was a sin to decide on the death penalty, the court responded: "Just generally you wanted to find that out? Was that on Friday that you asked that?" (21 RT 4667.) And after the juror stated that she just asked the one question and just wanted to know, the court replied: "Okay. You were just curious?" (21 RT 4669.) The court ended his discussion with Y.P. by telling her: "Don't worry about it. That's fine." (*Ibid.*)

Thus, instead of probing the details of Juror Y.P.'s conversation with the priest or the possibility that his information would influence her penalty determination, the court simply repeated and affirmed the juror's own limited description and assessment that the information would make no difference. Moreover, although the court stated its intent to "have further discussions" with Juror Y.P. on March 28, when the jurors were scheduled to arrive for the penalty phase (21 RT 4672), the court failed to conduct any further discussion with the juror.

Notably, the Court did not even ask Juror Y.P. whether the priest's statement that the Catholic Church believed in the death penalty might

influence her penalty decision. The court asked no questions to test and assure Juror Y.P.'s impartiality. This was an inadequate inquiry. It was the court's responsibility to evaluate whether Juror Y.P. could remain impartial and fulfill her duty to determine the appropriate sentence free from outside influence. A trial court must conduct an adequate inquiry in order to assess the juror's impartiality. (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 477; see also *United States v. Davis* (5th Cir. 1978) 583 F.2d 190, 197 [a "juror is poorly placed to make a determination as to his own impartiality. Instead the trial court should make this determination."]; *Silverthorne v. United States, supra,* 400 F.2d at p. 638 ["in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient (to test that impartiality).'(citation omitted)"].)

The telephone chat between Juror Y.P. and the court was insufficient to allow the court to make a determination as to the juror's ability to remain impartial. The determination whether a juror is biased depends on a finding as to state of mind, and a finding as to state of mind depends in turn on a finding as to "demeanor and credibility." (*Uttecht v. Brown* (2007) 551 U.S. 1, 7.) Historically, such findings are considered peculiarly within a trial judge's province because given his ability to speak face-to-face with the jurors, he is in the best position to assess their states of mind. (*Ibid.*) Here, however, without an in-person discussion with Juror Y.P., the court was unable to assess her demeanor and credibility when she claimed that the priest's information was insignificant.

The court had just learned that right after rendering her guilt-phase verdict convicting appellant of capital murder, a juror ignored the court's instructions and contacted her priest, seeking information relevant to her obligation at the penalty phase to determine the appropriate penalty. There

was no dispute that she willfully violated both oath and instructions. Juror Y.P.'s intentional violation of her oath and instructions and persistence in obtaining an answer from the priest provided reason to suspect that her inquiry was more significant to her than she portrayed, and the additional information that she received from the priest — as to the church's belief in the death penalty — was not only inherently likely to influence a church member who was seeking guidance but was not explored at all by the trial court. Because the court possessed information which, if proven to be true, would constitute good cause to doubt Juror Y.P.'s ability to impartially perform her duties, the court was required to hold a hearing. (*People v. Ray*, *supra*, 13 Cal.4th at p. 343; see also *Smith v. Phillips*, *supra*, 455 U.S. at p. 222 (conc. opn. of O'Connor, J.) [a hearing permits the trial judge to prove the juror's memory, reasons for acting as she did, and her understanding of the consequences of her actions and also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate her answers in light of the circumstances].)

Given the seriousness of this violation of the juror's oath, the court, at a minimum, should have probed why she violated her oath and the court's instructions merely out of curiosity? Why was she concerned about getting into trouble? If the inquiry was "just curiosity," why did she persist in obtaining an answer even after the priest told her that she would have to inform her judge and provided her an opportunity to withdraw the question? Yes, she said she was "just curious," but it was an extremely strong curiosity because she initiated it even though (1) she was violating her oath and instructions and (2) she had concerns that she might get in trouble, and she persisted despite the fact that (3) the priest gave her an opportunity to halt her inquiry and told her she would have to tell the judge. Without more searching inquiry designed to test and assure Juror Y.P.'s

impartiality, the court had no way of objectively assessing the likelihood that the extrinsic information would influence the juror's penalty determination.

In short, the trial court abused its discretion by failing to conduct an adequate inquiry into Juror Y.P.'s misconduct. Consequently, its conclusion that nothing needed to be done was based upon incomplete information and should be rejected. (See, e.g., *Dyer v. Calderon, supra*, 151 F.3d at pp. 973-979 [because state court failed to adequately investigate juror's alleged bias, its finding that juror was unbiased was not entitled to presumption of correctness].)

5. **This Claim Has Not Been Forfeited.**

The State may argue that this claim has been forfeited because appellant's counsel did not object to the trial court's manner of inquiry, request further questioning, or request removal of Juror Y.P.[202] (21 RT 4669-4672.)

This Court has held, however, that forfeiture is not appropriate when the defendant claims that the trial court erred in failing to conduct an adequate investigation into juror misconduct, as is the case here. In *People v. Cowan, supra*, 50 Cal.4th 401, the State argued that the defendant forfeited his claim of inadequate inquiry into juror misconduct by failing to request additional inquiry. (*Id.* at pp. 506-507.) This Court disagreed, stating: "The duty to conduct an investigation when the court possesses

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[202] After questioning Juror Y.P., the court asked, "Anything else, Counsel?" and defense counsel shook his head. (21 RT 4669.) After discussing the matter, the court told both defense counsel and the prosecutor: "And for either one of your standpoints, if you wanted to bring a motion to get her off to bring - -" (21 RT 4671.) Appellant's counsel made no motion. (*Ibid.*)

information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defense objects to such an inquiry." (*Id.* at p. 506.) Accordingly, this Court held, no action by the defense was required to preserve the claim. (*Id.* at pp. 506-507.) As emphasized in *Cowan*, this Court places the "'ultimate responsibility upon the court to make [an] inquiry' when the trial court is 'alerted to facts suggestive of potential misconduct.'" (*Id.* at p. 506.)

Here in the case at bar, the trial court failed to fulfill its responsibility to conduct an adequate inquiry into Juror Y.P.'s misconduct. Thus, trial counsel's failure to object or request further inquiry or dismissal of the juror has not forfeited this claim for review.

However, should this Court disagree, appellant submits that his counsel rendered ineffective assistance of counsel in failing to request further questioning of the juror. Under Article I, section 15 of the California Constitution and the Sixth Amendment, a criminal defendant is entitled to the effective assistance of counsel. (*Strickland v. Washington, supra,* 466 U.S. at p. 686.) He is entitled to the competent assistance of an attorney acting as his diligent, conscientious advocate. (*People v. Ledesma, supra,* 43 Cal.3d at p. 215.) Effective assistance requires performance of advocacy duties in accordance with prevailing norms. (*Strickland, supra*, at pp. 687-688.) One of these duties is a duty to safeguard a defendant's Sixth Amendment right to impartial jurors. (See *In re Neely, supra,* 6 Cal.4th at pp. 906-907.) In a capital case, it is especially critical that counsel ensures that persons who are unable or unwilling to follow the applicable sentencing law, whether because they would automatically impose the death penalty and/or are unable to give meaningful consideration to mitigating evidence, are excluded from the jury. (See, e.g., ABA Guidelines

for Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 Ed.) GL 10.10.2.)

To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland*, *supra*, at pp. 687-688.)

Given Juror Y.P.'s acknowledgment that she willfully contacted her priest in violation of her oath and the court's instructions and also given the priest's statement that the church did endorse the death penalty, competent counsel would have insisted that the juror be questioned further and in-person in order to assess her ability to remain impartial after receiving such information. There could be no tactical reason not to insist on an inquiry designed to test and assure her impartiality. Trial counsel's failure to so insist thus constituted ineffective assistance of counsel, which was prejudicial as it resulted in a biased juror determining appellant's fate. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 579 ["a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard"].)

6. <u>Conclusion</u>.

Juror Y.P. should have been removed from the panel. It is undisputed that she committed serious misconduct in willfully contacting her priest and then learning the Catholic Church's stand on the death penalty. The undertaking of the inquiry, Y.P.'s insistence on going ahead despite warnings from the priest, and the nature of the information the priest gave her demonstrate a substantial likelihood that his information would influence her to vote for a death verdict. However, even if this Court

disagrees on the basis of the instant record, reversal of the death sentence is required, because it was the trial court's "failure to make an appropriate inquiry" that created an "absence of evidence to rebut the presumption" of prejudice that arose from the juror's misconduct. (*People v. McNeal*, *supra*, 90 Cal.App.3d at pp. 839-840; see also *People v. Honeycutt, supra*, 20 Cal.3d at p. 145; *Gray v. Mississippi* (1987) 481 U.S. 648, 662-663 [inadequate questioning regarding the venire members' views in effect precludes an appellate court from determining whether the trial judge erred in refusing to remove them for cause and therefore the state cannot rely on the possibility that such refusal was erroneous and constituted justification for a subsequent erroneous removal].) The absence of evidence that could either further demonstrate the extent of prejudicial effects of this misconduct, or actually rebut the presumption of prejudice arising from the misconduct, is due to the trial court's failure to adequately inquire. This error alone requires reversal of the penalty judgment.

VIII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING HIGHLY PREJUDICIAL EVIDENCE REGARDING THE SURVIVING VICTIM'S REHABILITATION AND THE IMPACT OF HIS INJURIES ON HIMSELF AND HIS FAMILY, IN VIOLATION OF STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

In addition to presenting evidence at the penalty phase regarding the impact of Mrs. Bragg's death on her family, the prosecution presented considerable evidence regarding Mr. Bragg's injuries, his rehabilitation, and the impact of his injuries on himself and his family. This evidence

regarding Mr. Bragg was highly prejudicial, including detailed information about his lengthy rehabilitation and the physical, cognitive and psychological effects of his injuries, the responsibilities for his care that fell to his daughter, son, and son's spouse, and the changes in their lives effected by their caretaking responsibilities.

Appellant objected to the admission of this evidence on both state and federal constitutional grounds. Appellant argued that the evidence was outside the purview of Penal Code section 190.3, subdivisions (a) and (b), and that its admission would violate appellant's Eighth and Fourteenth Amendment rights. (22 RT 4734-4735.) The trial court initially questioned whether such evidence should be admitted when the sole issue to be decided was the appropriate penalty to be imposed for the murder of Juanita Bragg. (21 RT 4720-4723.) However, the court ultimately admitted the evidence under factor (a) as circumstances of the crime on the basis of this Court's decisions in *People v. Mitcham,*[203] *People v. Karis,*[204] and *People v. Mickle.*[205] (22 RT 4732-4737.)

Appellant submits that because Mr. Bragg was not the victim of the capital offense, the trial court erred in admitting the extensive evidence regarding his rehabilitative process and the impact of his injuries[206] on

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[203] (1992) 1 Cal.4th 1027.

[204] (1988) 46 Cal.3d 612.

[205] (1991) 54 Cal.3d 140. The trial court also cited this Court's decisions in *People v. Ramirez* (1990) 50 Cal.3d 1158 and *People v. Bacigalupo* (1991) 1 Cal.4th 10 (22 RT 4734), but neither case involved the presentation of evidence regarding the impact of a defendant's noncapital crimes on the families of victims of those crimes or evidence of a noncapital victim's rehabilitation.

[206] Medical testimony describing the injuries suffered by Mr. Bragg during the attack was presented by two doctors at the guilt phase. (See 15 RT
(footnote continued on next page)

himself and his family. First, the admission of the evidence regarding the impact on his family was improper under state law. (See section C.2, *post.*) Second, the admission of both that evidence and the evidence regarding his rehabilitative process and the impact of his injuries on himself exceeded the constitutional boundaries of *Payne v. Tennessee*[207] and violated appellant's rights to a fair penalty trial and reliable penalty determination in violation of the Eighth and Fourteenth Amendments. (See section C.3, *post.*) And third, even if some victim-impact evidence regarding Mr. Bragg was admissible, the volume and nature of the evidence introduced at appellant's trial was so excessive as to violate the Eighth Amendment and Due Process. (See section C.4, *post.*) The presentation of this evidence was prejudicial, requiring reversal of the death judgment. (See section D, *post.*)

B. Factual Summary.

The prosecution presented victim impact testimony from four witnesses. One witness presented medical testimony regarding Mr. Bragg's rehabilitation and the cognitive, psychological and emotional effects of his injuries on Mr. Bragg himself; three family witnesses testified to the effects/impact of Mr. Bragg's injuries on him and on their own lives.[208]

Dr. Lloyd Brown, medical director of a rehabilitation facility in Tennessee, testified regarding Leo Bragg's out-patient rehabilitation at that facility. (22 RT 4909, 4914, 4916-4917.) Mr. Bragg came to the facility after having received acute hospital care and rehabilitative services in

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(footnote from previous page)
3154-3159; 17 RT 3450-3454.) Appellant does not contest the admission of that evidence detailing his injuries.

[207] (1991) 501 U.S. 808.

[208] The family members also testified about the impact of Mrs. Bragg's death on their lives, testimony that appellant is not challenging.

California. (22 RT 4915.) Mr. Bragg arrived with a history of fairly significant head injury followed by surgery, but he presented with problems related more to communication and cognition than to physical disabilities. (*Ibid.*) Testing upon Mr. Bragg's arrival demonstrated that his ability to receive, process, and understand information was severely impaired and his ability to express was much more impaired. (*Ibid.*) Mr. Bragg was unable to talk other than to say an occasional word. (*Ibid.*) For the most part, his facial expressions were inappropriate and he was unable to appropriately use gestures. (*Ibid.*) His reading and writing were also severely impaired. (22 RT 4918.) Upon admission, he could not write his name, telephone number, or address. (*Ibid.*) He also had difficulties with problem solving, sequencing, categorization, and orientation. (22 RT 4915.) He could not touch his body parts or hold up two fingers on command. (22 RT 4916.) In short, communication with Mr. Bragg was very difficult. (*Ibid.*)

While at the facility, Mr. Bragg could not be left alone at any time, because he would wander off. (22 RT 4917.) Even with one-on-one supervision, he "eloped" on two or three occasions. (22 RT 4918.) One of his cognitive deficits was impulsivity, a common result of head injuries, and thus he had to be constantly watched. (22 RT 4917-4918.)

Between June 1 and December 4, 1992, Mr. Bragg received cognitive, occupational, speech, and physical therapy at the facility. (22 RT 4914, 4917.) Mr. Bragg made slow and modest progress; upon discharge, he was still very severely impaired. (22 RT 4919.) He remained impulsive with poor judgment. (22 RT 4920.) Mr. Bragg still could not converse, either verbally or in writing. (22 RT 4919.) He could only respond with head nods and give rote-like responses, such as good morning, when cued. (22 RT 4919-4920.) He could sometimes, but not always, write his name, telephone number and address and could count up to ten, but always

omitted "six." (22 RT 4918.) His prognosis for a full recovery was very poor. (22 RT 4920.) At best, Mr. Bragg would have to live in a supervised living environment under constant observation for his safety. (*Ibid.*)

The Braggs' children, Sylvia Rudy and Leo Bragg, Jr.,[209] testified regarding the effect of their mother's death on them and also offered extensive testimony regarding Mr. Bragg's rehabilitation and the effect of his injuries on their lives. (22 RT 4923-4935.) Additional testimony regarding Mr. Bragg's injuries and their impact was presented by Leo Jr.'s wife, Merriam Bragg. (22 RT 4935-4944.)

Sylvia Rudy described her relationship with her mother as "wonderful." (22 RT 4924.) Prior to the attack, they usually spoke on the telephone at least once a week, and her parents visited once a year. (*Ibid.*) Her mother was a source of emotional support for Ms. Rudy. (*Ibid.*) Ms. Rudy was "their baby and they worried about [her] a lot because [she] was single, and [she] didn't think [she] had to worry about them but –" (*Ibid.*) Mrs. Bragg's death had been particularly "devastating" to Ms. Rudy, who every day relived the vision of discovering her parents after the attack: "There's not a day that goes by that I don't see that vision that I saw when I got home that day. Not a day goes by." (*Ibid.*) Ms. Rudy sometimes found herself "breaking down at work and for no reason. I just — the thoughts [what she saw and what happened] come back and so I have to go someplace where I can get away for a little bit." (*Ibid.*) Ms. Rudy continued to suffer "a lot of guilt" over her mother's death, thinking that it would not have happened had she not gone away for the weekend or had she realized that her key was missing. (22 RT 4925.) Ms. Rudy kept thinking that if she

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[209] To avoid confusion, Leo Bragg, Sr., will be referred to as "Mr. Bragg" and Leo Bragg, Jr., will be referred to as "Leo Jr."

had returned home earlier, perhaps her mother could have been saved "and for sure [her] dad wouldn't have had to go through so much pain and agony before he got help." (*Ibid.*) Ms. Rudy's personality changed after the attack. (*Ibid.*) She became fearful and avoided people because she thought that they were uncomfortable around her. (*Ibid.*) She testified: "It's just been something that's your worst nightmare, something you just never think you'd have to go through." (*Ibid.*)

Ms. Rudy further testified that coping with her father's assault had been very difficult:

> For one reason, because he can't talk to us. He hasn't been able to communicate and so we've been – we don't know how to talk to him. . . . We don't know how much he can handle. We don't really know how much he knows. I'm sure he knows, I'm pretty sure that he knows pretty much what happened, but it's hard to talk to him about it because he can't talk back to us and his yeses, when he'll nod his head, don't always mean yes and the nos don't always mean no, so you don't know when you are trying to communicate with him if he really understands.

(22 RT 4925-4926.) Prior to the assault, her father had been very healthy, active, vital, learned and sharp. (22 RT 4927.) He loved to travel and to play golf — "18 holes a day whenever he could and sometimes 27" — and still worked part-time, selling and hanging drapes. (22 RT 4926-4927.) Ms. Rudy had a wonderful relationship with her father; when he visited, he would always do projects for her home. (22 RT 4926.)

After the assault, Mr. Bragg remained hospitalized in Modesto for almost three months; Ms. Rudy visited him usually once or twice a day. (22 RT 4927.) Upon his discharge from the hospital, Mr. Bragg stayed with her for a few days until Leo Jr. took him to Tennessee to live in his home. (*Ibid.*) Ms. Rudy described her father as a different person:

> There was no comparison [to his abilities prior to the assault]. . . . [H]e didn't have any control of his bodily functions. . . . [Y]ou had to watch him all the time because he was so unpredictable. You never knew what he was going to do. He didn't know what he was going to do and he was just not there.

(*Ibid.*) Ms. Rudy also described an incident at the hospital when Mr. Bragg, confused about the date of his upcoming discharge, became out of control when he mistakenly thought it was time to leave. Hospital staff called Ms. Rudy who had to convince her father that it was not time for him to leave:

> I went over there and – because they had been talking to him for an hour, and he was holding onto the rail there at the hospital and they couldn't do anything. He was just . . . out of control, and so I finally convinced him that . . . this wasn't the day. . . . But it was just things like that, when he never was a violent person. . . . [I]t's not the same dad that I had.

(22 RT 4928.)

Leo Jr. also described his mother and testified about the impact of her death. Before her death at the age of 74, Juanita Bragg was very active. (22 RT 4929.) She enjoyed golf and gardening. (*Ibid.*) It was difficult for Leo Jr. to cope with her loss, because she had been so viable and had "just loved life. . . ." (22 RT 4929-4930.)

Leo Jr. also testified regarding the changes in his father after the assault. Previously, despite being 75 years old, Mr. Bragg had been very active, working out of his home and playing golf. (22 RT 4932-4933.) After the attack, Mr. Bragg could no longer engage in those activities and could not even talk. (22 RT 4933.) Leo Jr. attempted to get his father interested in playing golf again, but when Mr. Bragg saw that he was unable to hit the ball, he no longer wanted to play. (22 RT 4934.)

Leo Jr. explained how his father's assault completely changed his and his wife's lives. (22 RT 4930.) Mr. Bragg lived with them for about 15 months before moving to a retirement facility. (22 RT 4931-4932.) It had been difficult for both Leo Jr. and his wife, because Mr. Bragg could not communicate to express his needs and they could never leave him alone. (22 RT 4930-4931.) When they attended a function, they normally took Mr. Bragg with them. (22 RT 4931.) If they were unable to take him, they had to hire a sitter, which Mr. Bragg resented. (*Ibid.*) Leo Jr.'s wife, Merriam, was Mr. Bragg's primary caretaker and because of her caretaking responsibilities, her work and other activities outside the home had been limited. (*Ibid.*) While Mr. Bragg was receiving rehabilitative services at Dr. Brown's facility, Merriam Bragg took him there and back daily. (*Ibid.*)

Merriam Bragg offered further testimony regarding the changes in Mr. Bragg and the impact of his injuries on their lives. She, like Ms. Rudy and Leo Jr., described how active Mr. Bragg had been before the assault. (22 RT 4936.) She added that in addition to his work, golf, gardening, and travel, Mr. Bragg had been active in several civic organizations. (*Ibid.*) Merriam Bragg then described the deficiencies in Mr. Bragg when he lived with them following the assault:

> [I]t was like seeing a child that I had to retrain in using the silverware and his toothbrush, his comb and brush, his razor. This man was a very independent man and it was very hard to have to treat him like he was a child that knew nothing.

(22 RT 4937.)

Because Leo Jr. traveled for his work and was gone two to three nights a week, Merriam had the primary responsibility for Mr. Bragg. (*Ibid.*) She helped him each morning to make certain that he showered and brushed his teeth. (*Ibid.*) At first, Mr. Bragg could not distinguish between

objects and would attempt to use a razor to brush his teeth or a comb to shave his face. (22 RT 4937-4938.) It took several months of retraining before he was able to distinguish and correctly use such objects. (22 RT 4938.)

During the first few months of living in their home, Mr. Bragg was very restless and insecure. (22 RT 4939.) At times, he became agitated and frightened and was very emotional if his wife's name was mentioned. (22 RT 4938-4939.) If Merriam or Leo Jr. tried to talk to him about his wife, he cried and left the room. (22 RT 4939.) If he heard noises outside, "he would get up and he would pace and he would look out the door and he would walk around and he would make sure the doors were locked." (22 RT 4938.) When Merriam asked if he was afraid, Mr. Bragg nodded his head affirmatively. (*Ibid.*) When attempting to communicate, he became easily frustrated because he could not speak the words. (22 RT 4939.) Merriam and Leo Jr. also attempted to communicate with him in writing, "but it came out exactly as he tried to talk. The prepositions, the, there, was, is, those were there but the other words that he tried to put in you could not make out." (22 RT 4940.)

Merriam testified that Mr. Bragg currently spent his time watching television and volunteering a few days a week at the rehabilitation center, where he picked up papers, helped stack papers, and opened doors for patients in wheel chairs. (22 RT 4941-4942.) As Merriam explained, "It gives him something to do. And we feel it helps him feel productive." (22 RT 4942.) In contrast to his former self, Mr. Bragg had become very sedentary, mostly sitting in front of the television. (*Ibid.*)

Merriam also testified to their current interactions with Mr. Bragg. Three days a week, at 8:00 a.m., she took him to the rehabilitation center and then picked him up in the afternoon and returned him to his care

facility. (22 RT 4943.) Frequently, she and Leo Jr. would take Mr. Bragg out to eat on Friday evenings. (*Ibid.*) On Saturdays, they sometimes brought him to their house to watch ball games, and usually on Sundays, they brought him over for dinner. (*Ibid.*)

When asked to describe Mr. Bragg's current level of social interaction, Merriam testified:

> His level of communication basically would consist of a smile and maybe an extended hand and a squeeze to some of his friends. As far as verbalizing within a group, even his old friends, he does not. Occasionally he will say, "Bye."

(22 RT 4943-4944.)

C. **The Admission Of The Impact Of Mr. Bragg's Injuries On His Family Was Improper Under This Court's Victim Impact Jurisprudence, And Its Admission, As Well As The Admission Of Extensive Evidence Regarding His Rehabilitation And The Effect Of His Injuries On Himself, Exceeded The Constitutional Boundaries of *Payne v. Tennessee* And Violated Appellant's Due Process And Eighth Amendment Rights To A Fair And Reliable Sentencing Hearing.**

1. **Applicable Principles.**

Prior to 1991, the United States Supreme Court held that victim impact evidence was barred by the Eighth Amendment. (*Booth v. Maryland* (1987) 482 U.S. 496.) In *Payne v. Tennessee, supra,* 501 U.S. 808, the Court overruled *Booth* to the extent that *Booth* had prohibited admission of (1) evidence of the personal characteristics of the victim of a capital crime, or (2) evidence concerning the impact of the crime on the members of the victim's family. (*Id.* at p. 827.) *Payne* determined that victim impact evidence may be admitted where it relates to the specific harm caused by the defendant's capital crime, which is a legitimate sentencing

consideration. (*Id.* at p. 825.) While *Payne* opened the door to victim impact evidence, it did not hold that such evidence was admissible without limitation. The Court recognized that if, in a particular case, "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair," the Due Process Clause of the Fourteenth Amendment would be violated. (*Id.* at p. 825; *accord, People v. Sanders* (1995) 11 Cal.4th 475, 549-550 [while victim impact evidence is not per se inadmissible, irrelevant or inflammatory emotional evidence must be curtailed in order to ensure a fundamentally fair — rather than an emotionally driven — penalty determination].)

In *People v. Edwards* (1991) 54 Cal.3d 787, 832-836, this Court determined that, under Penal Code section 190.3, subdivision (a), some victim impact evidence may be admissible as "circumstances of the crime of which the defendant was convicted in the present proceeding." (*Id.* at p. 833.) *Edwards* held that section 190.3 (a) "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*Id.* at p. 835.)

2. <u>The Admission Of Evidence Regarding The Impact Of Mr. Bragg's Injuries On His Family Was Improper Under This Court's Victim Impact Jurisprudence</u>.

The trial court reasoned that admission of the evidence regarding Leo Bragg's rehabilitation and the impact of his injuries on himself and his family was compelled by this Court's decision in *People v. Mitcham, supra*, 1 Cal.4th 1027. As the court stated to the prosecutor: "I can't see any way to distinguish the two cases, that case [*Mitcham*] and our case. . . . Do you see any distinction between the circumstances of that case where they're putting on evidence of the attempted murder's current condition including her psychological?" (22 RT 4735.) Of course, the prosecutor didn't. The

court also relied on *People v. Mickle*, *supra*, 54 Cal.3d 140, and *People v. Karis*, *supra*, 46 Cal.3d 612.

None of these cases or any others in this Court's victim impact jurisprudence supports the admission of testimony regarding the impact of a *surviving victim's* injuries on his or her *family members*. This Court's victim impact decisions sanction presentation of evidence regarding the effects of a defendant's *non-capital* violent activity, whether it occurred during the capital crime or during another incident, on *the victim of that activity*, not the impact of that victim's injuries on the victim's family. In *Mitcham*, the primary decision relied on by the trial court, the defendant shot a jewelry store owner and his clerk during a robbery, killing the owner and wounding the clerk. (*People v. Mitcham, supra*, 1 Cal.4th at pp. 1038-1039.) At the penalty phase, the surviving victim described the emotional and psychological trauma that she suffered as a result of the shooting. (*Id.* at p. 1062.) This Court held that evidence was admissible under factor (a) as a circumstance of the crime, stating: "Evidence of the impact of the defendant's conduct on victims other than the murder victim is relevant if related directly to the circumstances of the capital offense." (*Id.* at p. 1063.)

Mickle, another decision cited by the trial court, involved testimony by victims of prior forcible sexual assaults, which had been introduced under factor (b), regarding the impact of those assaults *on their lives*. (*Mickle*, *supra*, 54 Cal.3d at p. 187.) This Court held that the "foreseeable effects of defendant's prior violent sexual assaults upon the victims — ongoing pain, depression, and fear — were thus admissible as circumstances of the prior crimes bearing on defendant's culpability." (*Ibid.*)

Similarly, *Karis* also involved testimony by victims of a defendant's prior violent activity. There, two prior rape victims testified to the

circumstances of the crimes. (*Karis*, *supra*, 46 Cal.3d at pp. 638-640.) This Court found "no merit in defendant's claim that proving the commission of a capital defendant's prior assaultive conduct through the testimony of the victim violates *Booth v. Maryland* (citation)." (*Id.* at p. 640.) *Karis* distinguished the evidence at issue in its case — "live testimony by the actual victim of a capital defendant's prior crimes to prove those crimes" from the evidence at issue in *Booth* — "evidence of the impact of defendant's capital offense on the family of the murder victim" and found no error in its admission. (*Id.* at pp. 640-641.) *Karis* said nothing about the issue here — the admission of a non-capital crime's impact on others, and thus provides no support for the trial court's ruling.

Examination of this Court's victim impact cases shows that this Court has never approved the admission of testimony, such as that presented here, regarding the impact of the defendant's *non-capital* offense on the family of the non-capital victim, regardless of whether the offense was committed simultaneously with the capital offense or at another time. In cases involving the surviving victim injured in the same attack that claimed the life of a capital victim, this Court has authorized presentation of evidence only regarding (1) the surviving victim's injuries, and (2) the impact and harm caused by the defendant's criminal conduct on the *surviving victim*, including the psychological and physical effects. (See, e.g., *People v. Brown* (*John George*) (2004) 33 Cal.4th 382, 397 [testimony by surviving victims regarding their injuries, their rehabilitation, and the psychological effects of their injuries on their lives was admissible]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172 [evidence regarding extent of injuries, physical and psychological, suffered by murder victim's husband in the same attack was "relevant at the penalty phase to show the circumstances of defendant's crimes and the nature and extent of his violent

acts other than [capital victim's] murder (see § 190.3, factors (a), (b))"]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 101-102 [admission of 911 call made by surviving victim after she and her mother were shot by the defendant during a home invasion robbery, her mother fatally, was relevant and admissible under factor (a) as circumstances of the crime; tape showed the immediate impact and harm caused by the defendant's criminal conduct on the surviving victim], abrogated on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610; *People v. Clark* (1990) 50 Cal.3d 583, 614-615, 628-629 [where husband was killed and wife was seriously injured during fire set by defendant, the trial court did not err in admitting (1) evidence regarding the surviving victim's physical and emotional suffering, her rehabilitation, and the permanent physical and disabling aftermath of her injuries, and (2) testimony by the wife's father regarding the impact of the husband's murder on his daughter and his wife's family]; *People v. Mitcham, supra*, 1 Cal.4th at p. 1063 [evidence of the impact of the offense on the surviving victim, including the suffering of emotional and psychological trauma, constitutes a circumstance of the crime and was admissible and relevant under factor (a)].)

Similarly, in cases involving victims of a defendant's other violent criminal activity introduced under factor (b), this Court has upheld presentation of evidence or argument concerning the circumstances of those crimes, the injuries suffered by the victims, and the impact of those crimes on their lives, but not the impact of those crimes injuries on family members. (See, e.g., *People v. Benson, supra,* 52 Cal.3d at p. 797 [prosecutor's argument regarding suffering inflicted upon victims of defendant's prior violent criminal activity was permissible in that it did not

cross "the constitutional barrier marked by *Booth* and *Gathers*[210] into such forbidden areas as the victims' personal characteristics, the emotional impact of the crime on their families, and the opinions of family members about the crimes and the criminal;" the prohibitions in "*Booth* and *Gathers* do not extend to evidence or argument relating to the nature and circumstances of other criminal activity involving the use or threat of force or violence or the effect of such criminal activity on the victims"]; *People v. Karis*, *supra*, 46 Cal.3d at p. 641 [no error in admitting testimony by rape victims describing the circumstances of the defendant's prior violent activity]; *People v. Jones* (*William*) (2012) 54 Cal.4th 1, 72-73 [trial court did not err in admitting evidence regarding the lasting effects of the defendant's prior assault upon the victim; "the circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, are admissible under factor (b)"]; *accord*, *People v. Bramit* (2009) 46 Cal.4th 1221, 1241 [testimony by victims of uncharged bank robberies regarding continuing impact of defendant's crimes upon them]; *People v. Davis* (2009) 46 Cal.4th 539, 617-618 [testimony by victims of defendant's prior crimes about how those crimes affected their lives]; *People v. Morris* (1991) 53 Cal.3d 152, 221-222 [argument that victim of defendant's prior violent criminal activity suffered anguish and emotional scars for the remainder of her life], disapproved on another ground by *People v. Stansbury, supra,* 9 Cal.4th at p. 830; *People v. Demetrulias* (2006) 39 Cal.4th 1, 39 [evidence of the effect that defendant's attack had on non-capital victim's physical and mental condition]; *People v. Mickle*, *supra*, 54 Cal.3d at p. 187 [testimony by victims of defendant's prior assaults regarding the impact of those assaults on their lives]; *People v. Price* (1991) 1 Cal.4th 324, 478-479 [evidence of the emotional effect of

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[210] *South Carolina v. Gathers* (1989) 490 U.S. 805.

defendant's prior violent criminal acts on the victims]; *People v. Martinez* (2010) 47 Cal.4th 911, 961 [testimony by victims of defendant's other violent criminal activity describing the psychological and emotional impact of the crimes]; *People v. Virgil* (2011) 51 Cal.4th 1210, 1274-1276 [evidence regarding the effects, physical and psychological, of defendant's prior violent assault on the victim of that assault]; and *People v. Brady* (2010) 50 Cal.4th 547, 581-582 [testimony by victims of defendant's prior criminal activity describing the effects of the crimes upon them].)

In conclusion, this Court has never sanctioned the admission of testimony regarding the impact of a surviving victim's injuries on his or her family members. This Court's victim impact decisions have only authorized presentation of evidence regarding the circumstances of the non-capital violent criminal activity and its impact on the victim personally. As made clear by this Court's decision in *People v. Brown, supra,* 33 Cal.4th 382, the allowable evidence regarding impact is limited to evidence of the impact on the surviving victims, not their families:

> Defendant contends testimony by Terezia's [surviving victim's] wife was irrelevant because she herself had not been a crime victim. While not a direct victim of the assault, she was a witness to the impact on Terezia, and her testimony was limited to giving additional details about his rehabilitation.

(*Id.* at p. 397.)

Accordingly, the trial court erred in admitting evidence regarding the impact of Mr. Bragg's injuries on his family. As summarized above, this evidence concerning the responsibilities for his care that fell to his daughter, son, and son's spouse and the changes in their lives effected by their caretaking responsibilities was extensive. As argued below, its admission was prejudicial.

3. **The Admission Of Evidence Regarding The Impact Of Mr. Bragg's Injuries On Himself And His Family and His Extensive Rehabilitation Exceeded The Constitutional Boundaries of *Payne v. Tennessee* And Violated Appellant's Due Process And Eighth Amendment Rights To A Fair And Reliable Sentencing Hearing.**

The federal Constitution also limits the admissibility of victim impact evidence relating to a crime other than the capital offense for which the defendant is on trial. Indeed, the constitutional limits are more restrictive than those that this Court has imposed, thus requiring reconsideration of some of this Court's prior decisions. To understand the constitutional limits, it is necessary to look at the United States Supreme Court's case law again but with a slightly different focus.

As noted above, the Supreme Court held in *Booth v. Maryland*, *supra*, 482 U.S. 496, that the Eighth Amendment created a *per se* bar to victim impact evidence[211] at the penalty phase of a capital trial. (*Id.* at p. 509.) The rationale was that evidence of the personal characteristics of the victim and the impact of the victim's death on his family and friends was not constitutionally relevant to the decision on penalty, which must focus on matters for which the defendant is morally culpable. (*Id.* at pp. 503-507.) These matters, the High Court reasoned, went beyond such moral culpability since the defendant does not contemplate in his act, necessarily, the quality of the victim's life or the impact of his death on his family. (*Id.*

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[211] The victim impact evidence condemned in *Booth* consisted of descriptions of the victim's personal characteristics and the emotional impact of their deaths on their family, as well as the family member's opinions and characterizations of the crimes and the defendant. (*Booth v. Maryland*, *supra*, 482 U.S. at pp. 499-500, 502.)

at pp. 504-505.) In *South Carolina v. Gathers, supra*, 490 U.S. 805, the Court extended its ruling in *Booth*, holding that the prosecutor engaged in improper argument during the sentencing phase when he read from a religious tract that the victim was carrying at the time of his death and commented on personal characteristics which he inferred from the victim's possession of that tract. (*Id.* at pp. 810-812.)

The Court partially overruled *Booth* and *Gathers* in *Payne v. Tennessee, supra*, 501 U.S. 808.[212] *Payne* recognized that prior jurisprudence dictated that a capital defendant must be treated as a "uniquely individual human being." (*Id.* at p. 822.) It then concluded that victim impact evidence is permissible, because "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual *whose death represents a unique loss to society* and in particular to his family." (*Id.* at p. 825, emphasis added, citation and internal quotation marks omitted; *accord*, *id.* at pp. 830-831 (O'Connor, White, and Kennedy, JJ., concurring) [the State could "remind the jury that the person *whose life was taken* was a unique human being," emphasis added]; *id.* at pp. 838-839 (Souter and Kennedy, JJ., concurring) [permissible to introduce "evidence of the specific harm caused *when a homicidal risk is realized*" . . . and to ask the jury "to take account of a victim's individuality and the *effects of his death* upon close survivors," emphasis added].) As the Court noted,

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[212] *Payne* did not overrule *Booth's* holding that the Constitution forbids eliciting witnesses' opinions about the crime, the defendant, or the appropriate penalty. (See *Booth*, *supra*, 482 U.S. at pp. 508-509; *Payne*, *supra*, 501 U.S. at p. 831, fn. 1 (conc. opn. of Souter, J., joined by Kennedy, J.)

"[b]y turning the victim into a 'faceless stranger at the penalty phase of a capital trial,' [citation], *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary *to determine the proper punishment for a first-degree murder*." (*Id.* at p. 825, emphasis added.)

Payne held, contrary to *Booth*, that the State could "offer . . . 'a quick glimpse of the life' . . . [the] defendant 'chose to extinguish. . . .'" (*Id.* at p. 822, emphasis added; *accord*, *id.* at p. 830 (O'Connor, White, and Kennedy, JJ., concurring) [same].) Concluding that the Eighth Amendment erects no *per se* bar to the admission of victim impact evidence, the Supreme Court stated: "A State may legitimately conclude that evidence about the victim *and about the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827, emphasis added; *accord*, *id.* at pp. 832-833 (O'Connor, White, and Kennedy, JJ., concurring) ["[t]he Eighth Amendment does not prohibit a State from choosing to admit evidence *concerning a murder victim*'s personal characteristics or the impact of the crime on the victim's family and community," emphasis added].)

As is evident, *Booth*, *Gathers*, and *Payne* all concern victim impact evidence for the capital crime only, and *Payne* held only that the Eighth Amendment does not prohibit a State from choosing to admit evidence concerning a *murder victim's* personal characteristics and the impact of the capital crime on the *murder victim's* family. *Payne* did not contemplate and did not authorize the admission of victim impact evidence concerning the surviving victim of a non-capital crime, even if related to the capital crime.

Moreover, the rationale for victim impact evidence set forth in *Payne* simply does not justify permitting victim impact testimony for any crimes other than the capital crime. *Payne* reasoned that in order for the

jurors to hear all information necessary for their determination of "*the proper punishment for a first-degree murder*" (*id.* at p. 825, emphasis added), the State must be able to present evidence showing that "the victim is an individual *whose death represents a unique loss. . . .*" (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) *Payne* reasoned that the specific harm caused by the capital crime is relevant to the defendant's moral culpability which the jury must assess in determining the proper sentence for that crime. (*Id.* at pp. 819-822.) At a capital sentencing hearing in California, the only issue to be determined by the jury is the appropriate sentence for the capital crime. It is the judge who imposes sentence for any non-capital offenses. Accordingly, although victim impact evidence concerning surviving victims of non-capital offenses may be relevant to the judge who imposes sentence for those crimes, it is not relevant to the jurors who decide the proper punishment for only the capital crime. Because the only crime for which punishment is determined at the penalty phase is the capital crime, a defendant's moral culpability must be assessed on the basis of that crime alone. As explained by the Colorado Supreme Court, evidence regarding the impact of a capital defendant's other crimes on the victims of those crimes "is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced. *See Payne,* 501 U.S. at 821, 111 S.Ct. 2597." (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 745.) Thus, the rationale upon which *Payne* relied to authorize the presentation of victim impact evidence was premised on the relevance of impact evidence about the decedent, not surviving victims.

Accordingly, the evidence regarding Mr. Bragg's extensive rehabilitation, the cognitive, psychological, and emotional effects of his injuries, the responsibilities for his care that fell to his daughter, son, and daughter-in-law, and the changes in their lives effected by their caretaking

responsibilities was not constitutionally relevant to the jury's penalty phase decision, and its admission exceeded the constitutional boundaries of *Payne*. Mr. Bragg was not the person whose "life . . . the defendant chose to extinguish." (*Payne*, *supra*, at p. 822.) The Eighth Amendment permits capital sentencing juries to consider only evidence relating to the capital victim's personal characteristics and the emotional impact of the murder on the victim's family in deciding whether an eligible defendant should receive a death sentence.

As discussed above, appellant recognizes that this Court has reached a contrary conclusion, finding no constitutional violation in the admission of evidence regarding (1) the surviving victim's injuries, and (2) the impact and harm caused by the defendant's criminal conduct on the surviving victim, including the psychological and physical effects of the victim's injuries. (See, e.g., *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1063; *People v. Brown*, *supra*, 33 Cal.4th at p. 397; *People v. Taylor*, *supra*, 26 Cal.4th at pp. 1171-1172; *People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 101-102; *People v. Clark*, *supra*, 50 Cal.3d at pp. 628-629.) For all the reasons set forth above, however, these holdings should be reconsidered.

4. The Prosecutor Elicited Excessive, Overly Emotional, And Constitutionally Impermissible Evidence Regarding Mr. Bragg's Rehabilitation And The Impact Of His Injuries On Himself And His Family In Violation Of Appellant's Due Process And Eighth Amendment Rights To A Fair And Reliable Sentencing Hearing.

Even if this Court concludes that *Payne v. Tennessee* allows the admission of evidence regarding the impact of non-capital crimes on surviving victims, the victim impact evidence presented in this case, considered collectively, was so over the top as to exceed constitutional

limits. As we have pointed out, *Payne* specifically noted that when victim impact evidence is introduced "that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne*, *supra*, 501 U.S. at p. 825.) Moreover, in authorizing the admission of victim impact evidence, *Payne* held that the Eighth Amendment does not bar a State from allowing the prosecutor to "offer . . . '*a quick glimpse of the life*' which a defendant 'chose to extinguish. . . .'" (*Id.* at p. 822, emphasis added.) This limitation was repeated in Justice O'Connor's concurrence (which was joined by Justices White and Kennedy). (*Id.* at p. 830.) Justice O'Connor found that the victim impact evidence introduced against Payne survived a due process analysis, because the evidence was brief and redundant of evidence concerning the facts of the crime which had already been admitted during the guilt phase. (*Id.* at pp. 831-833.)

In the present case, the portrayal of Mr. Bragg's life after his assault, including his rehabilitation and the physical, cognitive, and psychological effects of his injuries, as well as the picture of the impact of his injuries on his family, was anything but "quick" or a "glimpse." The evidence concerning Mr. Bragg's rehabilitation, the impact of his injuries on himself and on his daughter, son and son's spouse, and the changes effected in all of their lives was excessive in both quantity and emotional content/impact. Dr. Brown testified at length regarding Mr. Bragg's six months of rehabilitation, describing the state of his cognitive and physical impairments at the beginning of his rehabilitation, his progress, and his prognosis upon discharge. All three family members then described in heartbreaking detail the differences between Mr. Bragg's life style before the assault and that resulting from his limited faculties after the assault. Leo Jr. and his wife also provided exhaustive testimony regarding their

caretaking responsibilities and the changes effected in their own lives. Merriam Bragg's description of her "retraining" of Mr. Bragg was especially emotional: "This man was a very independent man and it was very hard to have to treat him like he was a child that knew nothing." (22 RT 4937.) She recounted how he tried to use a razor to brush his teeth and how it took several months for him to be able to distinguish between objects. (22 RT 4938.) Merriam Bragg also provided emotional testimony regarding the psychological impact of the crime on Mr. Bragg, reporting how he would become agitated and frightened and pace if he heard noises outside. (22 RT 4938.) She further described the fragility of his emotional state — that he did not feel secure, that he would get very emotional, and that he would cry. (22 RT 4939.)

The victim impact testimony presented at appellant's penalty phase was not just excessive and emotional, but also redundant. Dr. Brown and all three family members described the cognitive and emotional effects of the injuries on Mr. Bragg. All three family members described Mr. Bragg's life style and activities before the assault and his life style and activities after the assault. And both Leo Jr. and his wife testified to the impact of Mr. Bragg's injuries on their home life. The impact testimony about Mr. Bragg was thus unnecessarily cumulative.

In short, the prosecutor's victim impact presentation here — considered in its entirety — made a fair and reliable penalty determination impossible. "'[T]he sentence imposed at the penalty stage should reflect a *reasoned* moral response to the defendant's background, character, and crime.' [Citation.]" (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319, emphasis added, abrogated on another ground by *Atkins v. Virginia* (2002) 536 U.S. 304.) Because "the jury must face its obligation soberly and rationally, [it] . . . should not be given the impression that emotion may reign over

reason." (*People v. Edwards*, 54 Cal.4th at p. 836.) "The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." (*Conover v. State* (Okla. Crim. App. 1997) 933 P.2d 904, 921.)

The Supreme Court has repeatedly recognized that death is a unique punishment, qualitatively different from all others, and "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; see also *Gardner v. Florida, supra,* 430 U.S. at p. 357; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Furthermore, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida, supra*, at p. 358.) Here, however, the volume and nature of the elicited details "create[d] an impermissible risk that the capital sentencing decision w[as] . . . made in an arbitrary manner" and was "based on reason rather than caprice or emotion." (*Booth*, *supra*, 482 U.S. at pp. 505, 508.) *Payne* holds that creating such risk is constitutional when the shift away from the defendant's moral culpability is minor and toward the victim of the capital homicide. It does not sanction the risk of arbitrary death sentencing when the shift is to any other individual. In this case, the shift was excessive and likely to inflame the jurors' emotions. Elicitation of the extensive, emotional evidence regarding Mr. Bragg's rehabilitation and the impact of his injuries on himself and his family thus violated appellant's due process and Eighth Amendment rights to a fair and reliable sentencing hearing.

D. **The Admission Of This Surviving-Crime Victim Impact Evidence Requires Reversal Of The Penalty Phase Verdict.**

To the extent that the erroneous admission of this evidence violates the Eighth Amendment, reversal of the penalty phase verdict is required unless the State can prove the error harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) To the extent that its admission violated only state law, reversal is required if there is a "reasonable possibility that [the] error affected the verdict." (*People v. Allen* (1986) 42 Cal.3d 1222, 1281; *People v. Brown, supra,* 46 Cal.3d at pp. 447-448.) This Court has noted that despite the difference in phrasing, this state law standard for errors at the penalty phase is identical to the *Chapman* test. (*People v. Jones* (2003) 29 Cal.4th 1229, 1265, n. 11; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.)

The State will be unable to prove the error harmless here. As this Court has stated on numerous occasions, "any 'substantial error' at the penalty phase of a capital case requires reversal of a judgment of death." (*People v. Allen*, *supra*, at p. 1281; *People v. Robertson* (1982) 33 Cal.3d 21, 54.) The erroneous admission of the extensive victim impact evidence regarding Mr. Bragg was a substantial error, which could only inflame the jury against appellant. "[S]uch potent, emotional evidence is likely to cause a jury to make a determination . . . on the improper basis of inflamed emotion and bias. . . ." (*United States v. Johnson* (N.D. Iowa 2005) 362 F.Supp.2d 1043, 1107, *aff'd in part* (8th Cir. 2007) 495 F.3d 951.) Although the crime, like all capital crimes, was tragic, there were many reasons why the jurors could have chosen a life sentence over a death sentence absent the admission of such prejudicial evidence. Appellant had endured a painful childhood – born with an extremely difficult temperament, neglected by his mother, and essentially abandoned by his father. He also suffered emotional

and mental deficiencies, including depression, ADHD, and drug dependence. Despite such difficulties, appellant had several redeeming qualities, including high average intelligence and musical talent. The State cannot establish that the erroneous placement of this emotionally charged victim impact testimony on death's side of the scale made no difference to even a single juror. (See *People v. Brown*, *supra*, 46 Cal.3d at p. 471, n. 1 (conc. opn. of Broussard, J.); *accord*, *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1054.) This error requires reversal of the death judgment.

IX.

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE VIOLATED THE UNITED STATES CONSTITUTION.

As described in Argument VIII, the prosecution presented extensive victim impact testimony during the penalty phase. Appellant submitted two proposed jury instructions to ensure that the jury was instructed regarding the appropriate use of this evidence. (See defendant's instructions 35 and 61.[213]) The trial court refused to give either instruction. (25 RT 5615, 5627-5628.)

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[213] Defendant's instruction number 35 provided:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective

(footnote continued on next page)

Given the highly inflammatory nature of the crime itself, there was a very real danger that emotions engendered by the victim impact evidence in this case would preclude the jury from making a rational penalty decision unless the trial court provided guidance on how that evidence should be used and considered. An appropriate limiting instruction was therefore necessary to adequately guide the jury's consideration of this highly inflammatory and sympathetic evidence.

"Because of the importance of the jury's decision in the sentencing phase of a death-penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

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> response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(9 CT 2449.) Defendant's instruction number 61 provided:

> The facts of this case may arouse in you a natural sympathy for the victim or the victim's family. Such sympathy, while natural, is not relevant to the penalty decision in this case. [¶] You are to base your decision on the evidence, the arguments of counsel and the law stated in these instructions. You are directed not to consider any feelings of sympathy you may feel for the parties injured or aggrieved in this case.

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The highest courts of Oklahoma, New Jersey, Tennessee, and Georgia have held that in every case in which victim impact evidence is introduced, the trial court must instruct the jury on the appropriate use, and admonish the jury against the misuse, of the victim impact evidence. (*Cargle v. State* (Okla. Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d at p. 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required instruction varies in each state, common features are an explanation of how the evidence can properly be considered and an admonition not to base a decision on emotion or the consideration of improper factors. The limiting instructions proposed by appellant appropriately conveyed this explanation and admonition. Assuming, arguendo, that the proposed instructions were somehow deficient, the trial court should have given a properly-revised version of those instructions. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924.) An appropriate instruction for California would read:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Further,

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(9 CT 2477.)

> you must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the appropriate punishment to be imposed.[214]

This Court has addressed similar proposed instructions in *People v. McKinnon, supra,* 52 Cal.4th at pp. 691-692; *People v. Hartsch, supra,* 49 Cal.4th at pp. 510-511; *People v. Foster* (2010) 50 Cal.4th 1301, 1361-1362; *People v. Ochoa* (2001) 26 Cal.4th 398, 455; and *People v. Pollock* (2004) 32 Cal.4th 1153, 1195, and has repeatedly rejected this argument, holding either that the instructions were improper or that the trial courts properly refused them because they were covered by the language of CALJIC No. 8.84.1, an instruction which was also given in this case (9 CT 2501; 26 RT 5830-5831[215]). However, CALJIC No. 8.84.1 does not cover any of the

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[214] The first four sentences of this instruction duplicate the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159. The last sentence is based on *State v. Koskovich*, *supra*, 776 A.2d at p. 177.

[215] The version of CALJIC No. 8.84.1 given to appellant's jury read:

> You will now be instructed as to the law that applies to the penalty phase of this trial. You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I state to you. Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias nor prejudice against the defendant nor swayed by public opinion or public feeling. In the penalty portion of the trial or penalty phase of the trial, you may consider sympathy, compassion, mercy, or pity for the defendant in determining whether to impose the death penalty or life in prison without the possibility of parole.
>
> Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the

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points made by defendant's instructions or the instruction proposed here. It does not tell the jurors why victim impact evidence was introduced or how it may be considered. It does not caution the jurors against an irrational assessment of appellant's culpability nor admonish them not to consider what they may perceive to be opinions of the victim impact witnesses – a clearly improper factor. (*Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn. 2.)

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instructions requested by appellant and proposed here would have conveyed that message to the jury; none of the instructions given at the trial did.[216] Consequently, there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision. The court's refusal of appellant's proposed instructions and failure to provide adequate guidance regarding the appropriate use of victim impact evidence violated appellant's right to a decision by a rational and properly-instructed jury, his

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> law, exercise your discretion conscientiously and reach a just verdict.

(26 RT 5830-5831.)

[216] CALJIC No. 8.84.1 contains the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim-impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victim's relatives, or by any direct appeal for vengeance on behalf of the victim's family or society as a whole.

due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) These violations require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown, supra,* 46 Cal.3d at pp. 447-448.) In view of the emotionally volatile nature of the victim impact evidence presented in this case, the trial court's instructional error cannot be considered harmless, and therefore reversal of the death judgment is required.

X.

THE ERRONEOUS ADMISSION OF IRRELEVANT, GRUESOME PHOTOGRAPHS OF VICTIM THERESA HOLLOWAY REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE.

A. Introduction And Factual Summary.

At the penalty phase, the prosecution sought admission of three autopsy photographs of Theresa Holloway, appellant's former girlfriend who had been killed by appellant's friends Robert Jurado, Denise Shigemura and Anna Humiston while appellant was in jail.[217] Evidence of appellant's participation in Holloway's death was admitted as Penal Code section 190.3, factor (b), violent criminal activity. All three photographs — People's Exhibit Nos. 185, 186, and 187 — depicted close-up shots of Holloway's face, neck and scalp. (22 RT 4745-4745, 4751-4755.) Exhibit

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[217] Additionally, the prosecution sought admission of photos depicting the position of Holloway's body lying in a culvert (People's Exhibit Nos. 181, 182) and defensive wounds on her hands (People's Exhibit Nos. 183, 184). (22 RT 4745-4746, 4751-4752.) Those four photographs were also admitted (22 RT 4760), but are not the subject of this argument.

Nos. 186 and 187 were photos of the left (No. 186) and right (No. 187) sides of Holloway's face and neck showing patterned bruising and abrasions and fractures to her right eye and nose. (22 RT 4753-4756, 4781.) Exhibit No. 186 also depicted two linear marks on her neck. (22 RT 4755-4756.) Exhibit No. 185 was a close-up photo of Holloway's shaven head showing deep lacerations to her scalp and abrasions and contusions to her scalp and face. (22 RT 4753, 4780.)

Appellant objected under Evidence Code section 352 to admission of these three exhibits on the ground that their probative value was greatly outweighed by their potential for prejudice. (22 RT 4747, 4758.) The prosecution contended that all three photos were "relevant to the autopsy surgeon's conclusions regarding the cause of death." (22 RT 4746.) In particular, argued the prosecutor, the thread pattern of the abrasions suggested that they were inflicted by a tire jack, and the linear marks on Holloway's neck were consistent with the use of a ligature. (*Ibid.*)

At a 402 hearing, Dr. Super, the medical examiner who had performed the autopsy, testified that the abrasions depicted in all three exhibits contained a parallel pattern consistent with the threaded part of a tool, which he opined was a scissors jack. (22 RT 4753-4756.) Dr. Super testified that the linear lines visible on the neck in Exhibit No. 186 could possibly be ligature marks, but he was not able to establish that.[218] (22 RT 4755-4756.) Those injuries were not consistent with the use of a rope or

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[218] At trial, Dr. Super described those lines as horizontal abrasions and contusions. (22 RT 4782.) He testified that they appeared to be more tool marks, similar to the pattern of the abrasions and lacerations to Holloway's face and scalp, than ligature marks. (*Ibid.*) However, Holloway suffered other injuries suggesting strangulation — hemorrhaging of her eyes, as well as fractures of her larynx and a bone under her chin. (*Ibid.*)

wire; they could possibly have been made by the same object that struck Holloway's face. (22 RT 4754.)

According to the medical examiner, the cause of death was blunt force head injuries and strangulation. (22 RT 4757.) Dr. Super believed that the three photographs were effective to demonstrate the peculiar nature of Holloway's injuries, but stated that he could adequately describe and explain the cause of death without the exhibits. (*Ibid.*) Dr. Super agreed that the photographs were only really helpful to show what might have been the instrument that caused death and also to show the extensive nature of the injuries — that Holloway suffered multiple blows about her scalp, face and upper chest. (*Ibid.*) Dr. Super testified, however, that he could recount to the jury the "number or range in numbers" of blows inflicted. (22 RT 4757-4758.) When asked by the court whether he found both Exhibit Nos. 185 and 186 "necessary to explain [his] analysis," Dr. Super replied: "Well, it shows that she sustained multiple blows on not just one side but both sides of the face." (22 RT 4754-4755.) The medical examiner agreed when the prosecutor added, "[w]ith the object that you described as a scissors jack." (22 RT 4755.)

Appellant offered to stipulate to the cause of death and to the facts that Holloway was struck a number of times and that the instrument used was a scissor jack. (22 RT 4758.) Defense counsel argued:

> I think there's a two-level problem with this: Number one, they may be relevant to corroborate some testimony, but really not necessary, especially in view of the fact that the defense would stipulate to whatever those pictures are going to purport to establish.
>
> Number two, the defendant's culpability certainly goes to his participation in conspiracy but he didn't actually commit the crime. In fact, he was in jail when it was committed. So I don't know that it's important to have Mr. Fontan show those to the jury to show how [badly]

> she was injured, the force of violence that was used that you might normally do if he had committed the crime himself physically, personally.
>
> So for that reason, the fact that there's some attenuation between the defendant and the actual commission of the crime and the fact that the pictures, although are minimally relevant, certainly we would stipulate to whatever he wants to establish, and number three, the prejudice going to the defendant is so gross and overwhelming, that I think they need to be kept out in their entirety, 352. . . .
>
> The aggravation, 190.3(b) is that the defendant entered into a conspiracy to have this woman go in a car and the argument is going to be that he knew she was going to be murdered. And . . . we would stipulate that, yes, she was struck with a jack, yes, she was strangled, and, yes, there were defensive wounds and . . . whatever those pictures might purport to show.

(22 RT 4747-4748.)

The prosecutor responded that (1) he was entitled to establish the circumstances of the crime regardless of whether appellant was merely a coconspirator or facilitator of the crime; and (2) although appellant did not actually inflict the injuries, he had to accept responsibility for the manner of execution of the homicide because he agreed to participate in the conspiracy. (22 RT 4748.)

The court admitted all three exhibits, stating:

> Six[219] photographs which are relevant and probative of establishing the circumstances of the crime of this prior criminal activity and how it occurred. Obviously any photograph or any piece of evidence against the defendant is prejudicial. And these do show the

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[219] The court misspoke. There were actually seven photographs of Holloway introduced into evidence — People's Exhibit Nos. 181 through 187. (22 RT 4745-4746, 4751-4752, 4760.)

brutality of the murder. But I don't think this prejudice outweighs their evidentiary value here.

As I say, the People have kept the number of photographs down.[220] And we apply the same analysis here as in the guilt phase in looking at the photographs. The doctor needs the photographs, as he indicated, to show the peculiar circumstances of the injuries and the incident and they're relevant and probative of the circumstances of the prior crime and the nature of the injuries that were suffered by Miss Holloway.

And on that basis, I'm going to admit them.

(22 RT 4760.)

B. **The Trial Court Erred In Admitting The Three Autopsy Photographs.**

The test for admissibility of photographic evidence has two components:

> (1) whether the challenged evidence satisfied the "relevancy" requirement set forth in Evidence Code section 210, and (2) if the evidence was relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the photograph was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice.

(*People v. Scheid* (1997) 16 Cal.4th 1, 13.) Appellant submits that the three autopsy photographs at issue here were not relevant to any disputed issue at

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[220] The prosecutor told the court that "[t]here were well over . . . a hundred such photos" (22 RT 4745), but he "had the autopsy surgeon select the photos that he thought that he needed during his testimony." (22 RT 4748.) As the prosecutor stated: "This is what we came up with. The vast majority of them were put by the wayside." (*Ibid.*)

the penalty phase, and even if they had some minimal probative value, that value was substantially outweighed by the prejudicial effect of the photos. Their admission violated appellant's Fifth and Fourteenth Amendment right to due process, his Eighth Amendment right to a reliable verdict in a capital case, and his Sixth Amendment right to a fair jury trial.

The rules governing admissibility of this evidence are well established. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Crittenden*, *supra*, at p. 132.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, internal citations omitted.) The trial court has broad discretion in determining the relevance of evidence (*Crittenden*, *supra*, at p. 132), but lacks discretion to admit photographs of a crime victim that are probative only on non-issues, and are thus irrelevant. (*People v. Turner* (1984) 37 Cal.3d 302, 320-321.)

The prosecution offered the three disputed autopsy photos as relevant to the autopsy doctor's conclusions regarding the cause of death, the instrumentality used to inflict the injuries, and the extent of the injuries. Generally, the "nature and placement of the fatal wounds" are of consequence to the determination of a homicide prosecution. (*People v. Pride* (1992) 3 Cal.4th 195, 243.) Although, as discussed *post*, the photographs were not necessary to support the doctor's testimony on these issues, appellant acknowledges that this Court has consistently upheld the introduction of autopsy photographs disclosing the manner in which a victim was killed as relevant to the question of deliberation, premeditation

and malice or other theories underlying the prosecution's case, at least when the defendant participated in the killing. (See, e.g., *People v. Pride*, *supra*, at pp. 243-244 [where first degree murder charges were tried under theories that the killings were premeditated or perpetrated during a rape, photographs of the wounds and sexually suggestive position of the bodies were relevant to support prosecution's theories of first degree murder]; *People v. Price, supra,* 1 Cal.4th at pp. 440-441 [photographs of the position of the victims' bodies, bullet holes in the back of one victim's head, and brutal beating of the other victim were relevant to prove deliberation, malice, and intent to kill and to support prosecution's theory that one victim was killed execution style in order to serve as a warning to those who were considering defection from the gang]; *People v. Box* (2000) 23 Cal.4th 1153, 1198-1199 [where first degree murder charges were tried under the theory that the killings were premeditated or perpetrated during a robbery and burglary, photographs of the victims' bodies and the surrounding crime scene were relevant "because they showed the nature and placement of the fatal wounds" and thus helped establish that the murders were premeditated]; *People v. Hart* (1999) 20 Cal.4th 546, 645-646 [autopsy slides depicting abrasions and ligature marks were relevant because they showed the bondage endured by the victim and the savage nature of her killing and supported the prosecution's theory that the killing was premeditated]; *People v. Ashmus, supra,* 54 Cal.3d at pp. 973-974 [autopsy and other photos of the victim were relevant to show malice to support the prosecution's theory of premeditated murder]; *People v. Milner* (1988) 45 Cal.3d 227, 246-247 [where defendant was prosecuted on alternate theories of felony murder and premeditated and deliberate murder, photographs of the murder victim were relevant to issue of defendant's state of mind]; *accord, People v. Cox* (1991) 53 Cal.3d 618, 665-666, disapproved on

another ground by *People v. Doolin, supra,* 45 Cal.4th 390; *People v. Crittenden, supra*, 9 Cal.4th at pp. 132-133.)

In all of these cases, because the defendants personally committed or participated in the killings, the injuries inflicted could shed light on their states of mind, and the photographs were therefore relevant to establish that they premeditated, deliberated, or acted with malice. However, appellant's research has revealed no case law finding autopsy photos relevant to these issues where the defendant did not personally commit or participate in the killings.

Because Holloway's death was offered as section 190.3, factor (b), criminal activity, the nature and placement of her injuries would ordinarily be relevant to prove such criminal activity. However, here, unlike the cases summarized above, appellant did not inflict any of the injuries, was not present when the injuries were inflicted, and had no knowledge of how Holloway was, or was to be, killed. The prosecution's theory of appellant's guilt was predicated on aiding and abetting principles: that although he was not present at the crime scene, appellant agreed with Jurado and Shigemura to have Holloway killed and with the intent that she be killed, he aided and abetted her murder by encouraging Holloway to leave with them. (9 CT 2521-2522; 25 RT 5705-5706.) There was no evidence that appellant was informed of how Holloway was to be killed. In fact, the evidence showed that appellant was not informed; Jurado merely told appellant that he would take care of her. (People's Exhibit No. 162.)

In these circumstances, the infliction of injuries by Jurado may have been probative of Jurado's state of mind but revealed nothing about appellant's. They provided no link between appellant and Holloway's death and had no bearing on appellant's role in Holloway's death. In order to find appellant guilty as an aider and abettor of Holloway's murder, the jury had

to determine appellant's state of mind, not Jurado's. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1118, 1120 [aider and abettor liability is premised on the aider and abettor's own mens rea; "the liability of each of the secondary parties should be assessed according to his own mens rea"].) Thus, this photographic evidence which could only be probative of Jurado's state of mind — a nonissue at appellant's penalty phase — was irrelevant and inadmissible. (*People v. Turner*, *supra*, 37 Cal.3d at pp. 320-321 [where prosecution rested its case on felony murder, the only issue was whether the defendant committed a burglary; hence, photographs of the victims' bodies were inadmissible, because their probative value could go only to intent to kill — a nonissue].)

For the same reason, they had no bearing on aggravation of the crime and the choice of penalty. This Court has stated that generally "[p]hotographs which disclose the manner in which a victim was wounded are relevant on the issues of malice and aggravation of the crime and the penalty." (*People v. Milner*, *supra*, 45 Cal.3d at p. 247; *accord*, *People v. Thompson* (1990) 50 Cal.3d 134, 182; *People v. Cox*, *supra*, 53 Cal.3d at p. 666; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 133.) However, here, the photographs of injuries inflicted by Jurado shed no light on appellant's state of mind or actions, and hence they had no bearing on appellant's culpability.

Accordingly, because the three autopsy photographs were irrelevant, the trial court lacked discretion to admit them. Moreover, even if they had some minimal probative value, that value was substantially outweighed by the prejudicial effect of the photos and required exclusion under Evidence Code section 352.

Evidence that is technically relevant must still be excluded under Evidence Code section 352 when "its probative value is substantially

outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Rulings under section 352 are reviewable for abuse of discretion. (*People v. Avila* (2006) 38 Cal.4th 491, 578.)

Appellant recognizes that a trial court has broad discretion over admission of evidence that is claimed to be more prejudicial than probative under Evidence Code section 352. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 133.) "The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect." (*Id.* at p. 134.) Moreover, this Court has stated that the discretion to exclude photographs under Evidence Code section 352 is narrower at the penalty phase than at the guilt phase. (*People v. Box*, *supra*, 23 Cal.4th at p. 1201; *People v. Bonilla* (2007) 41 Cal.4th 313, 353.) "This is so because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (§ 190.3, factor (a)), and because the risk of an improper guilt finding based on visceral reactions is no longer present.[221] (*People v. Bonilla*, *supra*, 41

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[221] *Box* explains:

> During the guilt phase, there is a legitimate concern that crime scene photographs such as are at issue here can produce a visceral response that unfairly tempts jurors to find the defendant guilty of the charged crimes. Such concerns are greatly diminished at the penalty phase because the defendant has been found guilty of the charged crimes, and the jury's discretion is focused on the circumstances of those crimes solely to determine the defendant's sentence. Indeed, the sentencer is *expected* to subjectively weigh the evidence, and the prosecution is entitled to place the capital offense and the offender in a morally bad light.

(*People v. Box*, *supra*, 23 Cal.4th at p. 1201.)

Cal.4th at pp. 353-354; see also *People v. Box, supra*, 23 Cal.4th at p. 1201.) However, as pointed out by this Court in *Box*, this reduction in section 352 discretion to exclude applies more to factor (a) evidence than factor (b) evidence:

> The question of whether evidence is unduly inflammatory is closer under factor (b) than factor (a) to the extent the penalty jury must decide whether the factor (b) crime actually occurred beyond a reasonable doubt as well as assess its moral weight for purposes of sentencing. [Citation.] The factor (b) evidence, even if it fairly depicts the moral blameworthiness of the defendant, may nonetheless be excludable under Evidence Code section 352 insofar as it unfairly persuades jurors to find the defendant guilty of the crime's commission. This danger is not present with factor (a) evidence at the penalty phase because the jury has already found the defendant guilty of the capital offense. The trial court's Evidence Code section 352 discretion to exclude relevant factor (a) evidence is reduced accordingly.

(*People v. Box, supra*, 23 Cal.4th at p. 1201.)

Here, the autopsy photographs were admitted at the penalty phase as relevant to the circumstances of factor (b) criminal activity, and any probative value of the photographs was clearly outweighed by their prejudicial effect. As demonstrated above, the exhibits were not relevant to establish appellant's state of mind or any other issue required to establish his guilt under an aiding and abetting theory. Moreover, even if the Court were to disagree, any probative value on this point was severely diminished, because the exhibits were unnecessary to the State's case. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405-406 [where inflammatory evidence is merely cumulative regarding an issue that is not reasonably subject to dispute, the prejudicial effect of such evidence would outweigh its probative value]; *People v. Cardenas* (1982) 31 Cal.3d 897, 905; see

also *People v. Burns* (1952) 109 Cal.App.2d 524, 541-542 [photographs should not be admitted for any purpose other than to help the jury and where there is no necessity for exhibiting the injuries to the jurors, they should be excluded].)

Dr. Super testified that he could adequately describe and explain the cause of death without use of the photographs and could also testify as to the number (or range in numbers) of blows inflicted upon Holloway. (22 RT 4757-4758.) The exhibits were only helpful to support his opinion and testimony concerning the instrument used and the extent of Holloway's injuries. (22 RT 4757.) Even though the court directly asked him whether the exhibits were necessary to explain his analysis, the doctor merely responded that they showed that she sustained multiple blows on both sides of her face and supported his opinion that a tire jack was used. (22 RT 4754-4755.) Notably, none of those issues — the cause of death, the instrument used, or the extent of Holloway's injuries — were in dispute and all had been readily established by Dr. Super's detailed testimony,[222] as

[222] Dr. Super testified that the cause of death was blunt force head injuries and strangulation, and that Holloway suffered extensive injuries, primarily around her face and scalp. (22 RT 4778, 4784.) Specifically, she suffered (1) multiple deep lacerations to her scalp; (2) smaller lacerations to her face; (3) multiple abrasions and bruises to her face; (4) extensive fractures, including fractures of her nose and all of her facial bones, a fracture of her jaw, and eggshell-type fractures of her skull; (5) horizontal abrasions and contusions to her neck which appeared to be more tool marks than ligature marks; (6) deep bruising in her neck under the skin; (7) bruising about both sides of the brain beneath fractures; and (8) multiple abrasions and bruises to both hands, which the doctor characterized as defensive wounds. (22 RT 4778-4783.) Dr. Super testified that the injuries had a peculiar pattern in that they were often linear and parallel, sometimes V-shaped, indicative of infliction by a threaded tool. (22 RT 4778-4781.) Dr. Super concluded that they were inflicted by a scissors jack. (22 RT 4781.) Dr. Super further testified that Holloway's head was disfigured from impact injuries to her
(footnote continued on next page)

well as admissions by Jurado's accomplices, Anna Humiston and Denise Shigemura, that Jurado attempted to strangle Holloway and beat her to death with a tire jack. (22 RT 4850, 4852-4853, 4859.) In sum, these three autopsy photographs were unnecessary to the State's case and their probative value was minimal at best.

On the other hand, the photographs exhibited substantial potential for prejudice. Evidence is prejudicial in the context of Evidence Code section 352 if it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 134.)

The three photos at issue here were gruesome and unduly prejudicial. All three pictures provided close-range shots of the face and scalp of a young woman beaten to a pulp. In Exhibit No. 185, Holloway's head was completely shaved, accentuating the horrific deep lacerations to her scalp. (See, e.g., *People v. Burns*, *supra*, 109 Cal.App.2d at p. 541 [autopsy photos of victim's face and neck were "particularly horrible because the head was completely shaved"].) Particularly upsetting is Exhibit No. 187, a picture of Ms. Holloway's face with one swollen and badly bruised eye open. Looking into her face, seeing the blank expression of death on her face, has a distinct emotional impact on the viewer. Observing in detail the gruesome wounds has an equal, if not more

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(footnote from previous page)
face, that the bones around her right eye were fractured such that the eye was depressed, that the fractures to her skull were so extensive that pieces of the bone had been compressed down into the brain, and that she suffered injuries consistent with strangulation — hemorrhaging of the eyes and factures of her larynx and a bone under her chin. (22 RT 4778-4779, 4782-4783.)

sickening, impact. In short, it is impossible to view these photographs without feeling repulsed.

"Autopsy photographs have been described as 'particularly horrible,' and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's emotions against the defendant." (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997-998, internal citation omitted.) That is certainly the case here. These photos did not reflect upon appellant's culpability, but given the savageness of Jurado's beating, they were sure to invoke horror in the jurors. In short, they were sure to incite the jurors to make appellant pay with his life for the brutality inflicted by another.

The Court of Appeal's ruling in *People v. Boyd* is particularly instructive here. The evidence in *Boyd* showed that the defendant and an accomplice burglarized the victim's home and that when the victim discovered them, the accomplice beat the victim. After the defendant and his accomplice removed items from the victim's home, the accomplice returned, alone, and inflicted a second beating. The victim subsequently died from her injuries. (*People v. Boyd* (1991) 95 Cal.App.3d 577, 581-583.) *Boyd* held that the trial court erred under Evidence Code section 352 in admitting two photographs which pictured black and blue areas on the victim's face. (*Id.* at pp. 589-590.) The reviewing court did not find the photos to be particularly gruesome or inflammatory, but concluded "[n]evertheless, they presented a danger of prejudice to defendant by reason of their reflection of a severe beating to an elderly female." (*Id.* at p. 589.) The court then concluded that the photos had little probative value. Because the defendant was prosecuted under a felony-murder theory, the photos were not relevant on issues such as intent, malice or degree of the offense. (*Id.* at p. 589.) Furthermore, *Boyd* rejected the prosecution's argument that

the photos were relevant on the issue of whether the victim died from the first or second beatings inflicted by the accomplice; the photographs could shed no light on whether the victim was beaten simply on one occasion or two occasions, and "[t]he evidence, without the photographs, established that [the victim] was beaten to death." (*Id.* at p. 590.) *Boyd* concluded:

> The photographs were not needed to clarify or explain in any way the testimony of the physician at the hospital who observed the victim before her death or the testimony of the deputy medical examiner who performed the autopsy. The trial court thus erred in admitting the two color photographs since they had little probative value as contrasted with a substantial danger of prejudice to defendant.

(*Ibid.*)

The same is true here. For the reasons discussed above, the photos were not relevant on the issue of appellant's intent or any other issues required for a finding that he was guilty of aiding and abetting Holloway's murder and did not reflect on his culpability as relevant to aggravation of the penalty. And here, too, the photos were not needed to clarify or explain Dr. Super's testimony. Like the medical examiner in the *Boyd* case, Dr. Super was able to testify to Holloway's injuries and the cause of death.[223] In fact, Dr. Super was able to provide extremely detailed descriptions of Holloway's injuries. (See *People v. Smith* (1973) 33 Cal.App.3d 51, 68-69 [where there was ample descriptions of the appearances of the bodies and autopsy testimony regarding the precise location and nature of the wounds,

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[223] According to the *Boyd* decision, the deputy medical examiner who performed the autopsy testified that the victim's death was due to multiple injuries resulting from blunt force trauma of the head and neck area, and that the force could have been the result of blows from the hand. (*People v. Boyd*, *supra*, 95 Cal.App.3d at pp. 589-590.)

which needed no clarification or amplification, photos of the victims' bodies "supplied no more than a blatant appeal to the jury's emotions" and should have been excluded].) Moreover, this case provides an even stronger case for exclusion than in *Boyd*, because unlike in that case, the autopsy photos here were indeed gruesome and inflammatory.

That the photographs were offered at penalty phase, rather than at guilt phase, does not change that conclusion. As stated by this Court in *People v. Love* (1960) 53 Cal.2d 843, evidence which is primarily inflammatory must be excluded from the penalty phase:

> Since the jury has complete discretion to choose between the alternative penalties in the light of the objectives of criminal law, the permissible range of inquiry on the issue of penalty is necessarily broad. The determination of penalty, however . . . must be a rational decision. Evidence that serves primarily to inflame the passions of the jurors must therefore be excluded, and to insure that it is, the probative value and the inflammatory effect of the proffered evidence must be carefully weighed.

(*Id.* at p. 856, internal citations omitted.) Among the factors to be considered is "the availability of less inflammatory methods of imparting to the jury the same or substantially the same information." (*Ibid.*)

In *Love*, the State argued that a photograph of the victim showing her facial expression in death and a tape recording of her discussing the shooting while dying in the hospital were admissible on the issue of penalty "to demonstrate the enormity of the crime." (*Id.* at pp. 854, 856.) This Court disagreed, observing that the evidence had no significant probative value because the basic facts of the shooting had been admitted and established at the guilt phase, and the pain experienced by the victim, even if considered relevant, had been more than adequately described in medical testimony. (*Id.* at pp. 856-857.) This Court concluded: "Both the

photograph and the tape recording served primarily to inflame the passions of the jurors and should have been excluded." (*Id.* at p. 857.) This case is indistinguishable for all of the reasons discussed above.

As observed by one California court, "[s]urely there is a line between admitting a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors." (*People v. Burns, supra,* 109 Cal.App.2d at p. 542.) That line was crossed here. These three autopsy photos were irrelevant and could be of no value other than to inflame the jurors. Accordingly, the trial court erred in admitting them.

C. The Erroneous Admission Of The Three Autopsy Photographs Violated Appellant's Rights Under The Federal Constitution And Was Prejudicial, Requiring Reversal.

The erroneous admission of the three photographs violated appellant's Fifth and Fourteenth Amendment right to due process and his Sixth Amendment right to a fair jury trial. The federal Constitution is violated by the admission of prejudicial photographs if they render the trial fundamentally unfair. (*Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463, 1464-1465; see also *People v. Partida, supra,* 37 Cal.4th at p. 439 [a defendant may argue on appeal that the erroneous admission of evidence contrary to Evidence Code section 352 violated his right to due process by rendering his trial fundamentally unfair]; *accord, Estelle v. McGuire, supra,* 502 U.S. at p. 70.)

The use of this evidence to inflame the jury against appellant on the basis of another's actions also deprived appellant of his right under the Eighth Amendment to a reliable and individualized determination of sentence based on reason, rather than caprice or emotion. (See *Zant v. Stephens* (1983) 462 U.S. 862, 879 [Eighth Amendment requires an

"*individualized* determination on the basis of the character of the individual and the circumstances of the crime"]; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305 [Eighth Amendment requires heightened reliability for capital sentencing determination]; *Gardner v. Florida, supra,* 430 U.S. at p. 358 ["It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."].)

"[T]he admission at the penalty phase of evidence designed to appeal to the passions of the jury " is particularly prejudicial, " for both the People and the defendant are entitled to have the jury fix the penalty dispassionately and rationally." (*People v. Love, supra*, 53 Cal.2d at p. 857.) Moreover, the presence of such inflammatory evidence renders impossible a reasonably accurate assessment of how jurors would have reacted to mitigating factors in its absence. (*Ibid.*) This Court cannot disregard the reasonable possibility that the gruesome photographs of appellant's brutally battered former girlfriend might have swayed at least one juror to vote for death. (*People v. Brown, supra,* 46 Cal.3d at p. 447; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *In re Lucas* (2004) 33 Cal.4th 682, 690, 734 ["at least one juror would have struck a different balance"]; *accord*, *Wiggins v. Smith* (2003) 539 U.S. 510, 537.) Moreover, as discussed *post* in Argument XII, the cumulative prejudicial effect of this error and the other penalty phase errors requires reversal of appellant's sentence.

XI.

REVERSAL IS REQUIRED DUE TO PROSECUTORIAL MISCONDUCT DURING PENALTY PHASE ARGUMENTS TO THE JURY.

A. Introduction.

During his penalty phase arguments, the prosecutor committed flagrant misconduct by urging the jury to put appellant to death on the basis of improper (1) appeals to passions, fears, and prejudices and (2) argument designed to ensure that the jury would not consider mercy as a mitigating factor. The prosecutor also argued that (1) the jurors had a duty, as representatives of 30 million Californians, to impose a sentence of death; (2) if they did not have the will and courage to impose such a sentence, their decision for a life sentence would be immoral, weak, and criminally negligent; (3) a life sentence would be interpreted as valuing appellant's life more than the victim's life; and (4) a sentence of death was necessary to maintain the integrity of the law. Furthermore, with respect to the evidence of the conspiracy to murder Doug Mynatt, which had been introduced for the limited purpose of establishing motive, the prosecutor improperly urged the jurors to consider this evidence as an aggravating 190.3, factor (b), offense, despite the fact that as a matter of law the conspiracy was not supported by sufficient evidence, and he also based his argument on a mischaracterization of the evidence.

This misconduct was deliberate and inexcusable and violated appellant's constitutional rights to due process, to a fair jury trial, to present a defense and to a reliable and individualized penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments.

B. General Law And Legal Standards.

The same standards applicable to prosecutorial misconduct at the guilt phase are applicable at the penalty phase. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1153; *People v. Valdez, supra,* 32 Cal.4th at p. 132.) A defendant's due process rights are violated when misconduct at argument renders his trial fundamentally unfair. (*Darden v. Wainwright, supra*, 477 U.S. at pp. 180-181.) Misconduct by a prosecutor may also violate a defendant's right to a reliable determination of penalty under the Eighth Amendment. (*Id.* at pp. 178-179.)

C. The Prosecutor Committed Misconduct In Making Improper Appeals To The Jurors' Passions, Fears And Prejudices, Suggesting That It Was Their Duty To Sentence Appellant To Death, And Urging The Jury To Render A Decision Based On Emotion And Vengeance.

1. Factual Summary.

The prosecutor began his opening penalty phase argument with the following "preliminary remarks:"

> The first thing I would like to talk to you about is your duty as jurors. Your job as jurors is to base your decision in this phase of the trial on the evidence and the law.
>
> Each and every one of you represented that you could consider imposing the death penalty and would, if you found it to be appropriate, given the evidence and the law. I would remind you that you are representatives of 30 million Californians, the great majority of whom are law abiding citizens. You owe them and yourselves a conscientious, courageous and thorough review of the evidence in this phase of the trial. You owe yourselves and your fellow citizens the imposition of a just and appropriate punishment.
>
> I urge you to remain faithful to your oath and to do the right thing. Fellow citizens expect that you will

discharge your duty and they are entitled to the discharge of that duty.

I wanted to say a few things about the moral underpinnings of capital punishment. Capital punishment has several purposes. It establishes a sanctity and worth of innocent life. By subjecting certain murderers to death, society acknowledges the level of their evil and their depravity and the preciousness of the innocent lives which such murderers violently and prematurely ended.

Capital punishment also protects society from those who kill repeatedly. In that sense, and in those cases, imposition of the death penalty is an act of collective self-defense on the part of society.

In this case, ladies and gentlemen, the defendant has demonstrated that he has killed — or the evidence has demonstrated that the defendant has killed more than once. One time while he was incarcerated. Mr. Johnsen participated in the murder of his girlfriend, Terry Holloway, while he was incarcerated in the San Diego County Jail. Mr. Johnsen attempted to effect the murders of investigating officers and witnesses in this case while he was incarcerated in our county jail.

There is absolutely no uncertainty in concluding that if allowed to live, Mr. Johnsen will constitute a threat to the lives of others.

A society which lacks the will to protect its citizens from the likes of the Brian Johnsens of the world, is as immoral as it is weak and criminally negligent. Fortunately, we live in a society which has the courage and the will to confront evil and to eradicate it.

When capital punishment is justly and appropriately applied, it permits the justice to impose a punishment which fits certain crimes [sic].

Why should a cold-blooded, cavalier, thrill-killer like Mr. Johnsen be permitted to live after killing twice and attempting to kill again? Why should he live while the remains of his victims decay in the earth and their survivors are condemned to grieve the manner and the

> fact of the death of their loved one, each and every day of their life? *Why should Brian Johnsen's life be valued more than he valued those of his victims? Why should Brian Johnsen's life be spared when he failed to show any compassion or sympathy for his victims at the time he committed his murders?*

(25 RT 5693-5696, emphasis added.)

The prosecutor ended his opening by repeating much of this same argument for emphasis:

> Why should defendant, a cold-blooded, cavalier, thrill killer, be permitted to live after killing twice, attempting to kill once, and arranging for the assassination of nine individuals?
>
> Why should you place a higher value on the defendant's life than he did on those of Juanita Bragg and Terry Holloway?
>
> Why should you spare the defendant's life when he failed to show any compassion or sympathy for Juanita, Leo and Terry?
>
> Why should you spare defendant's life when he showed no consideration for his own child developing in Terry Holloway's womb?
>
> Why should the defendant live while the remains of his victims decay in the earth and their survivors are condemned to grieve the manner and the tragedy of the death of their loved one each and every day that they live?

(25 RT 5727-2728.)

Defense counsel did not object but responded to this argument during his opening penalty phase argument:

> The prosecutor has asked you to return a death sentence and the message is if you vote for the death penalty, you're tough on crime; and if you vote for life without possibility of parole, well, then you're not

> tough on crime because you've got all these 30 million people behind you.
>
> Well, that's not true. There's 12 people and they're all individuals. Each one of you are the ones who are responsible for making this decision. You don't have to worry about the 30 million people out there. No convicted murderer will go free here. You couldn't vote for a lenient sentence in this case if you wanted to. The law prevents it.

(25 RT 5788.)

The prosecutor then argued in his closing penalty phase argument:

> You will be voting for death to, one, maintain the integrity of the law, to insure that it works the way it has been designed to work. You will be voting for death to impose a just and an appropriate penalty, and you will be voting to impose death to insure that Mr. Johnsen doesn't kill again.

(25 RT 5797-5798, emphasis added.)

And defense counsel, in his closing argument, responded:

> I think that Mr. Fontan is wrong when he says that we have to kill Mr. Johnsen to maintain the integrity of the law. What we have to do to maintain the integrity of the law is do the right thing. That's the way integrity is maintained in the legal system. The system works and if it works then it's in good shape.
>
> . . . [K]illing Mr. Johnsen would certainly not do anything to make the system work better, make anybody have any more respect for the system. . . .
>
> . . . [I]t's not necessary to kill Brian Johnsen to maintain the integrity of the system. The system will be in good shape, thank you, tomorrow and next week and next month and next year whether you kill Mr. Johnsen or whether you sentence him to life without possibility of parole.

(25 RT 5801.)

Following these arguments, defense counsel again requested that the court instruct with defense special penalty phase instruction No. 60, which stated:

> After weighing all the aggravating and mitigating factors, it is up to you individually to decide which of the punishments, life without parole or death, should be imposed in this case.
>
> You must always keep in mind that each of you bears the ultimate moral responsibility to determine the appropriate penalty under all the circumstances of this case.

(9 CT 2466; 26 RT 5809.) Counsel argued that this instruction was necessary in light of the prosecutor's argument that the jurors were representatives of 30 million Californians and would be doing the will of the people by imposing the death sentence. Defense counsel further argued that the instruction was necessary to correct the prosecutor's incorrect argument that a death sentence was necessary to preserve the integrity of the system. (26 RT 5809.) As counsel explained, the system's integrity was inviolate, regardless of which penalty was imposed, because it was designed to allow the jurors to make the decision. (*Ibid.*) The prosecutor responded that in a case like the instant where appellant deserved death, the system would not work as designed and its integrity would be compromised if a lesser punishment was imposed, because the system was designed to produce appropriate results. (26 RT 5809-5810.)

Instead of giving No. 60, the court amended CALJIC No. 8.88 to insert "individually" after "each of you." As amended, the instruction read: "To return a judgment of death, each of you individually must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (9 CT 2541-2542; 26 RT 5810-5811.)

2. **<u>The Prosecutor's Arguments Constituted Misconduct</u>.**

In his arguments, the prosecutor committed at least six acts of misconduct. In his opening argument, he (1) told the jurors that, as representatives of all Californians, their duty was to impose a death sentence. He told them that they owed the citizens of California a conscientious, courageous review of the evidence and the imposition of a just appropriate punishment. His following remarks then made it clear that the just and appropriate punishment in this case was imposition of a death sentence to protect society. He also told the jurors that (2) if they did not have the will and courage to "confront the evil and to eradicate it," their decision for a life sentence would be immoral, weak, and criminally negligent; and (3) a life sentence would be interpreted as valuing appellant's life more than Mrs. Bragg's life. He (4) told the jury not to consider sympathy or mercy for appellant because he did not show any to the victims and (5) asked, with inflammatory rhetoric, why appellant should be allowed to live "while the remains of his victims decay in the earth and their survivors are condemned to grieve . . . every day of their life." In his closing penalty phase argument, the prosecutor continued his misconduct by telling the jurors (6) that a sentence of death was necessary to maintain the integrity of the law — "*to insure that it works the way it has been designed to work.*" All six instances constituted inflammatory remarks, designed to appeal to the juror's passions and fears and urging them to render their sentencing decision on the basis of emotion and vengeance.

Inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely emotional response, is inappropriate in penalty phase arguments. Appeals to the passions and prejudices of the jury by the prosecution in a capital case violate "the Eighth Amendment principle that the death penalty may be constitutionally imposed only when

the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is considering." (*Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 776.) The Eighth Amendment requires that a verdict of death must be a ""“reasoned *moral* response to the defendant's background, character and crime,""" not "an unguided emotional response." (*Penry v. Lynaugh, supra,* 492 U.S. at p. 328 (citations omitted, emphasis in original), overruled on other grounds in *Atkins v. Virginia, supra,* 536 U.S. 304.) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida, supra,* 430 U.S. at p. 358.)

Accordingly, it is misconduct for a prosecutor to make comments calculated to arouse passion or prejudice at the penalty phase. (*People v. Mayfield* (1997) 14 Cal.4th 668, 803; see also *Viereck v. United States* (1943) 318 U.S. 236, 247-248; *Sandoval v. Calderon, supra*, 241 F.3d at p. 776.) "'The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.'" (*Darden v. Wainwright, supra*, 477 U.S. at p. 192 (dis. opn. of Blackmun, J.), quoting ABA Standards for Criminal Justice 3-5.8(c) (2nd ed. 1980); see also *People v. Lewis* (1990) 50 Cal.3d 262, 284 [it is improper to make arguments that give the jury "the impression that emotion may reign over reason" and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response"]; *accord*, *People v. Sanders, supra,* 11 Cal.4th at p. 550 [prosecutor's argument must be examined to determine if it called upon irrelevant facts, or led the jury to be overcome by emotion].)

In *People v. Sanders, supra,* at page 549, this Court stated that argument should be allowed on "emotional though relevant subjects that

could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." On the other hand, *Sanders* recognized, there are limits on emotional argument, and the prosecutor should not be allowed to use inflammatory rhetoric that diverts and invites irrational responses. (*Id.* at pp. 549-550.)

The prosecutor's argument crossed that line here. After telling the jurors that they owed an obligation to the citizens of California to impose an appropriate punishment and that capital punishment served the purpose of protecting society from those who kill repeatedly, he stated that there was no question but that appellant, if allowed to live, would pose a threat to the lives of others. The prosecutor then argued that a society which lacked the will to protect its citizens from "the likes of the Brian Johnsens of the world" is immoral, weak, and criminally negligent. (25 RT 5695.) The message to the jurors was clear: if they did not have the will and courage to impose a sentence of death, their LWOP verdict would be immoral, weak and criminally negligent. This argument and the following argument that an LWOP sentence would be interpreted as valuing appellant's life more than Mrs. Braggs' could only have been made for the purpose of arousing passion and prejudice. His use of inflammatory rhetoric ("Why should a cold-blooded, cavalier, thrill-killer like Mr. Johnsen be permitted to live," "Why should he live while the remains of his victims decay in the earth and their survivors are condemned to grieve the manner and the fact of the death of their loved one, each and every day of their life," "Fortunately, we live in a society that has the courage and the will to confront evil and to eradicate it") injected into the jury's deliberations elements of emotion and fear that invited an irrational, purely subjective response.

The prosecutor's argument also involved an improper appeal to the jurors to sentence appellant to death in order to maintain the integrity of the

law and fulfill their obligation to society. "It is . . . improper for the prosecutor to state that the duty of the jury is to find the defendant guilty." (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224; *United States v. Young* (1985) 470 U.S. 1, 18 [prosecutor's argument that jury would not be doing its job if it acquitted the defendant was improper — "that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice"]; see also *United States v. Polizzi* (9th Cir. 1986) 801 F.2d 1543, 1558 [improper for prosecutor to tell jury it had any obligation other than weighing evidence]; *United States v. Mandelbaum* (1st Cir. 1986) 803 F.2d 42, 44 [prosecutor's argument urging jury to "do its duty" was improper]; *United States v. Manning* (1st Cir. 1994) 23 F.3d 570, 572-574 [prosecutor's arguments ("Twelve responsible people will deliberate on this case. Take responsibility for yourselves. Take responsibility for your community. . . . Convict the Defendant fairly because the facts and the law compel conviction. Convict the Defendant because justice compels conviction.") amounted to "improper appeals to the jury to act in ways other than as a dispassionate arbiter of the facts"]; *Brooks v. State* (Fla. 2000) 762 So. 2d 879, 903-904 [prosecutor's arguments that jury "may be tempted to take the easy way out . . . and not want to fully carry out [its] responsibility and just vote for life. . . . I'm going to ask you to follow the law. I'm going to ask you to do your duty" were "egregiously improper"]; *Garron v. State* (Fla. 1988) 528 So.2d 353, 358-359 [prosecutor's arguments, including argument that it "is your sworn duty as you came in and became jurors to come back with a determination that the defendant should die," constituted "egregious," "inflammatory," and prejudicial misconduct].) As explained by the Ninth Circuit:

> There is perhaps a fine line between a proper and improper "do your duty" argument. It is probably appropriate for a prosecutor to argue to the jury that "if you find that every element of the crime has been

> proved beyond a reasonable doubt, then, in accord with your sworn duty to follow the law and apply it to the evidence, you are obligated to convict, regardless of sympathy or other sentiments that might incline you otherwise." Here, however, the prosecutor did not tell the jury that it had a duty to find the defendant guilty only if every element of the crime had been proven beyond a reasonable doubt. Nor did he remind the jury that it had the duty to acquit Sanchez if it had a reasonable doubt regarding his guilt.

(*United States v. Sanchez, supra*, 176 F.3d at p. 1225.)

Here, too, the prosecutor did not simply tell the jurors that they had the duty to sentence appellant to death only if they found that the aggravating factors outweighed the mitigating factors and they determined that death was the appropriate punishment. He began his argument appropriately by telling the jurors that their job was to base their decision on the evidence and the law and reminding them of their representations that they would impose a sentence of death if they found it to be appropriate. (25 RT 5694.) He then told them that, as representatives of "30 million Californians," they owed a "conscientious, courageous, and thorough review of the evidence" and "the imposition of a just and appropriate punishment." (*Ibid.*) He urged the jurors to "remain faithful to your oath and "to do the right thing" — "[f]ellow citizens expect that you will discharge your duty and they are entitled to the discharge of that duty." (*Ibid.*) His following argument made it clear that there was only one conscientious, courageous, and just punishment in this case — imposition of a sentence of death:

> A society which lacks the will to protect its citizens from the likes of the Brian Johnsens of the world, is as immoral as it is weak and criminally negligent. Fortunately, we live in a society which has the courage and the will to confront evil and to eradicate it."

(25 RT 5695.)

This argument would readily have been understood by the jurors to mean that they had a duty to act courageously and impose a sentence of death in this case to protect society and fulfill their obligation to the community at large. The prosecutor made this abundantly clear in his closing argument when he told the jurors:

> You will be voting for death to, one, maintain the integrity of the law, to insure that it works the way it has been designed to work. You will be voting for death to impose a just and an appropriate penalty, and you will be voting to impose death to insure that Mr. Johnsen doesn't kill again.

(25 RT 5797-5798.)

These arguments were made to shame the jurors into believing that nothing less than a verdict of death would satisfy their obligation to society. Additionally, they had the effect of diverting the jury's focus from its proper role of rendering an individualized determination on the basis of appellant's background and character and instead, to consider the message that an LWOP verdict would send to the community. (See, e.g., *Bertolotti v. State* (Fla.1985) 476 So.2d 130, 133 [prosecutor's argument ("Anything less in this case would only confirm what we see running around on the bumper stickers of these cars, and that is that only the victim gets the death penalty") improperly urged the jury to consider the message its verdict would send to the community — "an obvious appeal to the emotions and fears of the jurors"].)

The prosecutor's "duty" argument thus constituted misconduct which diverted appellant's jury from its true duty to render an individualized penalty decision based on an assessment of appellant's circumstances and the crime. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 7

[capital sentencing decisions must "'rest on [an] individualized inquiry,' under which the 'character and record of the individual offender and the circumstances of the particular offense' are considered"]; see *United States v. Mandelbaum, supra,* 803 F.2d at p. 44 [argument urging jury to "do its duty" "is designed to stir passion and can only distract a jury from its actual duty: impartiality"]; *State v. Singh* (Conn. 2002) 793 A.2d 245 ["An appeal to the jury to decide the case out of a sense of duty to the state or the prosecutor diverts the jury from its true mission; to decide whether the state has proven beyond a reasonable doubt that the defendant committed a crime."].)

This argument also constituted misconduct because it was an inflammatory appeal to the jurors to act as a conscience of the community. Whereas it is not necessarily improper for a prosecutor to ask the jury to act as a conscience of the community, such a request does constitute misconduct if it is designed to inflame the jury. (*United States v. Williams* (9th Cir. 1993) 989 F.2d 1061, 1072; *United States v. Leon-Reyes* (1999) 177 F.3d 816, 822.) The prosecutor's argument here was obviously designed to inflame the jury. He told the jurors that if they did not impose a sentence of death in this case, their verdict would be "as immoral as it is weak and criminally negligent." (25 RT 5695.)

"'The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.'" (*Darden v. Wainwright*, *supra*, 477 U.S. at pp. 191-192 (dis. opn. of Blackmun, J.), quoting ABA Standards for Criminal Justice 3-5.8(d) (2d ed. 1980).) But that is exactly what the prosecutor did in this case. He improperly deflected the jurors' attention from the facts of this case to

external considerations about the community at large. Accordingly, by appealing to the jury's sense of obligation to the community and arguing that, as representatives of all Californians, their duty was to impose a death sentence, the prosecutor committed misconduct.

Lastly, in asking the jurors why they should permit appellant to live "while the remains of his victims decay in the earth and their survivors are condemned to grieve the manner and the fact of the death of their loved one, each and every day of their life," "[w]hy should Brian Johnsen's life be valued more than he valued those of his victims," and "[w]hy should Brian Johnsen's life be spared when he failed to show any compassion or sympathy for his victims at the time he committed his murders," the prosecutor improperly appealed to the passions and prejudices of the jurors, asking them to decide appellant's fate based on emotion and vengeance rather than as a reasoned moral response to the evidence, as required by the Fourteenth and Eighth Amendments.

In *Duckett v. State* (Okla. Crim. App. 1995) 919 P.2d 7, the prosecutor argued in comparable language:

> Ladies and Gentlemen, is it justice to send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while John Howard [the victim] lies cold in his grave? Is that justice? Is that your concept of justice? How do Jayme and Tom and John's son [the victim's family] go visit him?"

(*Id.* at p. 19.) The Oklahoma court unhesitatingly found this to be error: "These kinds of comments cannot be condoned. There is no reason for them and counsel knows better and does not need to go so far in the future." (*Ibid.*) Similarly, the prosecutor's argument here should not be condoned.

Moreover, the prosecutor's argument here improperly urged the jurors not to consider sympathy or mercy for appellant because he did not

show any to his victims. As recognized by this Court, "*Eddings* [*v. Oklahoma* (1982) 455 U.S. 104, 113-15] and *Lockett v. Ohio* (1978) 438 U.S. 586 'make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any "sympathy" factor raised by the evidence before it.'" (*People v. Lanphear* (1984) 36 Cal.3d 163, 166-167.) Most jurisdictions addressing the legality of similar arguments asking jurors to determine penalty on the basis of emotion and vengeance and urging jurors not to consider sympathy for the defendants because none was shown to the victims, have found them improper.

In *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, the Third Circuit condemned, as misconduct, a prosecutor's argument that the jury should show the same sympathy toward the defendants as they showed the victims: "Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men on January 3rd, 1980 [the date of the crime]. No more. No more." (*Id.* at p. 1540.) The Third Circuit found that these comments were "'directed to passion and prejudice rather than to an understanding of the facts and of the law.'" (*Id.* at p. 1545.) "[T]he prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned [their victim] and shot [their victim]." (*Ibid.*)

The Tenth Circuit in *Duvall v. Reynolds* (10th Cir. 1998) 139 F.3d 768, reached a similar conclusion. *Duvall* found that the prosecutor improperly encouraged the jury to allow sympathy, sentiment or prejudice to influence its decision in a capital case where he argued, "you may find that only those who show mercy shall seek mercy, and that as a verdict of

this jury, that you may show him the same mercy that he showed [the victim] on the night of the 15th of September." (*Id.* at p. 795.)

The Supreme Court of Tennessee followed *Lesko* in *State v. Bigbee*: "The prosecutor strayed beyond the bounds of acceptable argument by making a thinly veiled appeal to vengeance, reminding the jury that there had been no one there to ask for mercy for the victims of the killings . . . , and encouraging the jury to give the defendant the same consideration that he had given his victims." (*State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812, superseded by statute on another ground as stated in *State v. Odom* (Tenn. 2004) 137 S.W.3d 572, 580-581.) The court held that this was an improper argument that "encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." (*Ibid.*)

The Florida Supreme Court has repeatedly found similar arguments by prosecutors to be error. (E.g., *Nowell v. State* (Fla. 2008) 998 So.2d 597, 606-07 [court condemns, as unnecessary appeal to the sympathies of the jury, the following argument: "Mercy. State asks that you recommend mercy if mercy is warranted. And mercy wasn't given in this case, not by Mr. Nowell, not by Mr. Bellamy. There was no mercy there, none whatsoever."]; *Urbin v. State* (Fla. 1998) 714 So.2d 411, 421-422 [urging the jury to show defendant the same mercy he showed the victim was "blatantly impermissible"]; *Rhodes v. State* (Fla. 1989) 547 So.2d 1201, 1206 [argument for jury to show defendant the same mercy shown to the victim on the day of her death was "an unnecessary appeal to the sympathies of the jurors calculated to influence their sentence recommendation"]; see also *Kearse v. State* (Fla. 2000) 770 So.2d 1119, 1129-1130; *Richardson v. State* (Fla. 1992) 604 So.2d 1107, 1109.)

This Court has taken a different view, repeatedly stating it is not improper to urge the jury to show the defendant the same level of mercy he showed the victim. (*People v. Ochoa* (1998) 19 Cal.4th 353, 464-465; *People v. Benavides, supra,* 35 Cal.4th at pp. 107-108; *People v. Leonard* (2007) 40 Cal.4th 1370, 1418; *People v. Collins* (2010) 49 Cal.4th 175, 229-230.)

In *Ochoa,* where the prosecutor urged the jury to "show [defendant] the same mercy that he showed [the victim]," this Court stated its rationale for finding no state law violation on the basis of such arguments. (*People v. Ochoa, supra,* 19 Cal.4th at pp. 464-465.) This Court reasoned that in light of the instruction that the jury could show mercy or sympathy, the prosecutor was simply arguing that defendant did not deserve mercy given the circumstances of the crime. (*Id.* at p. 465.)

Ochoa stated that "other jurisdictions reflect various views on this question" (19 Cal.4th at p. 465), citing to the contrasting opinions of *Duvall v. Reynolds, supra,* 139 F.3d at page 795, *Rhodes v. State, supra,* 547 So.2d at page 1206, and *Commonwealth v. Pelzer* (1992) 531 Pa. 235, 252 [612 A.2d 407, 416] [no error in prosecutor arguing that "the jurors should 'show (the defendants) the same mercy they showed (the victim)'"]. Actually, though, Pennsylvania appears to be the only jurisdiction besides California which has repeatedly and consistently approved argument of this sort. But it is noteworthy that *Ochoa* and the Pennsylvania cases are not endorsements of appeals to vengeance. Instead, they simply *interpret* the prosecutor's remarks as urging the jury not to show sympathy or mercy.[224]

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[224] Pennsylvania cases, including *Commonwealth v. Pelzer, supra,* 531 Pa. at pages 252-253, which approve such arguments, do so with little or no analysis until traced back to *Commonwealth v. Travaglia* (1983) 502 Pa. 474, 500 [467 A.2d 288, 301], where the prosecutor urged the jury to
(footnote continued on next page)

Appellant submits that taking the prosecutor's words at face value — as an improper, direct call for vengeance — reflect a better understanding of the prosecutor's argument in his case. Prosecutors who truly want to argue that sympathy and mercy are uncalled for in a particular case need not resort to the inflammatory and prejudicial language used here. This Court should disapprove of the argument in this case and such arguments generally. Such disapproval would be consistent with California law condemning a prosecutor's use of deceptive or reprehensible methods to persuade the jury. Such methods include appeals to passion or prejudice. (See *People v. Lewis*, *supra*, 50 Cal.3d at p. 284.)

The prosecutor's comments (1) urging the jury to show no mercy or sympathy to appellant because none was shown to the victims; and (2) asking why appellant should be allowed to live "while the remains of his victims decay in the earth," were improper appeals to the passions and prejudices of the jury and invitations for the jury to decide appellant's fate on the basis of vengeance.

Furthermore, this Court has repeatedly held that appeals to religious principles by the prosecution in argument are improper. (*People v. Wash, supra,* 6 Cal.4th at pp. 258-261; *People v. Sandoval, supra,* 4 Cal.4th at pp.

(footnote from previous page)
"[e]xhibit the same sympathy that was exhibited by these men on [the date of the crime]." In *Travaglia,* the jury was instructed that sympathy was *not* to be considered in making its sentencing decision. (*Id.* at p. 501.) The appellate court found, from reading the whole argument, "that the prosecutor was seeking to remind the jury that sympathy was not a proper consideration, but that if they were inclined to be sympathetic they should temper their sympathy." (*Ibid.*) *Travaglia*, however, involved the state court judgment later set aside in *Lesko v. Lehman*, *supra*, 925 F.2d 1527, for prosecutorial misconduct during argument, including the very appeal to vengeance approved by the state court. As such, the Pennsylvania line of cases appears to be based on a shaky foundation.

193-194.) Such appeals imply that extra-judicial law should be applied in the case, "displacing the law in the court's instructions." (*People v. Wrest, supra,* 3 Cal.4th at p. 1107.) An appeal to extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. (*Sandoval v. Calderon, supra*, 241 F.3d at p. 776.)

Although the prosecutor's "no-sympathy" argument did not explicitly invoke the Bible, it improperly invoked the Biblical concept of vengeance, which is antithetical to the constitutional principle of guided discretion in capital cases. (See *Jones v. Kemp, supra,* 706 F.Supp. at pp. 1559-1560.) Calling on the jury to show no mercy to appellant because none was shown to the victims was appealing to the "crude proportionality of 'an eye for an eye'" (see *Tison v. Arizona* (1987) 481 U.S. 137, 180-181 (dis. opn. of Brennan, J.)), which this Court has condemned when prosecutors directly invoke biblical authority. (*People v. Hill, supra*, 17 Cal.4th at pp. 836-837; *People v. Roybal* (1998) 19 Cal.4th 481, 519-521.)

This Court should therefore consider the propriety of the prosecutor's argument urging the jurors not to consider sympathy or mercy in light of its own authorities condemning appeals to passion, prejudice, and extra-judicial authority, and in light of substantial authorities from other jurisdictions condemning the argument identical to the one made to appellant's jury.

In conclusion, the prosecutor committed misconduct by improperly appealing to the jurors' passions, prejudices and fears, by urging them to render a decision based on emotion and vengeance, by presenting improper argument designed to ensure that the jury would not consider mercy as a

mitigating factor, and by arguing that only imposition of a sentence of death would satisfy the jurors' obligation to the community and maintain the integrity of the law.

D. The Prosecutor Committed Misconduct In Arguing Evidence Of The Conspiracy To Kill Doug Mynatt As Aggravating 190.3, Factor (B), Evidence And Basing That Argument On A Mischaracterization Of The Evidence.

1. Background Information And Factual Summary.

The prosecution sought to introduce evidence at the penalty phase that appellant participated in an uncharged conspiracy to kill Doug Mynatt, a drug dealer who had sold drugs to appellant and Robert Jurado. (8 CT 2257-2269) [State's Trial Brief: Admissibility Of Defendant's Statement Regarding Motive For Prior Murder]; 21 RT 4677-4683, 4693-4694, 4709-4712.) The prosecution intended to introduce evidence of appellant's written confession to Eric Holland regarding the death of appellant's former girlfriend, Theresa Holloway. In the confession, appellant stated that he and Jurado had plotted to kill Mynatt, that Holloway had threatened to tell Mynatt and that while appellant was in jail, Holloway had been killed by Jurado and others to prevent her from revealing the plot to Mynatt. (8 CT 2257-2258; 21 RT 4677-4678, 4694.) The prosecution conceded that it could not prove a criminal conspiracy to murder Mynatt, independent of appellant's statements, and since it could not establish a corpus, evidence of that conspiracy could not be admitted as section 190.3 (b) criminal activity. (8 CT 2258; 21 RT 4710.) However, the prosecution asked that the evidence be admitted as circumstances of the Holloway homicide,[225]

[225] Evidence of appellant's participation in Holloway's death was admitted as violent criminal activity under Penal Code section 190.3, subdivision (b).

because the plot and Holloway's threat to disclose it constituted the motive for her murder. (8 CT 2259-2261; 21 RT 4681-4682.) The prosecutor argued that in order to prove appellant's participation in the Holloway homicide, he had to provide some explanation as to why appellant would want to murder his pregnant girlfriend, and "so the motive evidence [was] indispensable to that." (21 RT 4682.) The prosecutor suggested that any conceivable prejudice could be cured by giving a limiting instruction stating that evidence of the plot was not evidence of any criminal activity and could not be used to conclude that appellant participated in a conspiracy to kill Mynatt. (8 CT 2260; 21 RT 4682.)

Defense counsel argued that the evidence should be excluded under Evidence Code section 352, because it was inflammatory and it could not be sanitized by a limiting instruction. (21 RT 4682, 4710.) Given that a limiting instruction is simply one of many instructions that the jurors gloss over, so instructing would be fairly useless. (21 RT 4710-4711.) The trial court replied that a limiting instruction could be given to the jurors when the evidence was admitted, but acknowledged that such an instruction tends to highlight evidence which may be detrimental to the defendant. (*Ibid.*) Defense counsel argued that as a practical matter, the jury would be unable to separate the issue of motive from the evidence of a conspiracy and would consider it "as just another factor B." (21 RT 4682, 4710-4711.) The prosecutor responded that he would "even argue it to the jury that they [could not] consider it as evidence of prior criminal activity."[226] (21 RT 4711.)

The court admitted the evidence, concluding that its probative value outweighed its prejudicial effect. (21 RT 4711.) The evidence was admitted

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226 The prosecutor never did so. (See 25 RT 5693-5728, 5794-5798.)

via appellant's confession and his notes to Holland[227] and via San Diego County District Attorney Investigator Tony Bento's testimony regarding his interview of appellant about the Holloway homicide. (22 RT 4868.) In the confession, appellant wrote that he and Jurado were involved in a plot to kill Doug Mynatt.[228] (People's Exhibits 161.) According to the confession, on May 15, appellant called Jurado from jail, and Jurado told him that Holloway was threatening to tell Mynatt. (*Ibid.*) Although appellant doubted that Holloway would do so and told Jurado so, Jurado was worried and insisted that appellant speak to Holloway about her threat. (*Ibid.*) Jurado thus gave the telephone to Holloway and when she told appellant that he had better tell her everything about the plot or she would tell Mynatt, appellant replied that would "get a lot of people killed, including me."[229] (People's Exhibit 162.) Appellant told Holloway that he needed to discuss it with Jurado, who then insisted that Holloway had to be killed, otherwise she would probably tell Mynatt and then they all would die. (*Ibid.*) Jurado told appellant that he would take care of the situation. (*Ibid.*) Appellant deferred to Jurado's decision and when Holloway came back on

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[227] See People's Exhibits 161-168, 170-174, 176-178; see copies of the notes at 6 CT 1467-1471, 1477-1478 and reproduced in Exhibit C.

[228] Mynatt was never killed. (People's Exhibit 172; see copy at 6 CT 1467 and reproduced in Appendix C.)

[229] As appellant explained in a note to Eric Holland, he and Jurado feared retaliation from Mynatt and his friends, because Mynatt's best friend was the son of the Hell's Angels president. (People's Exhibit 172 ["His best friend was the son of the H.A. president, so you couldn't just beat his ass & not expect him to retalliate [sic]"]; see copy at 6 CT 1467 and reproduced in Appendix C.)

the telephone, appellant suggested that she leave with Jurado — whereupon she was killed.[230] (People's Exhibits 162, 163.)

Investigator Bento testified that appellant told him that Mynatt was a drug dealer who had sold drugs to appellant and Jurado. (22 RT 4887.) Appellant, Jurado, and their friends, Denise Shigemura, and Anna Humiston, became upset with Mynatt because of his various bad deeds,[231] and appellant suggested that they kill him. (*Ibid.*) From jail, appellant called Jurado and Shigemura and they discussed killing Mynatt. (*Ibid.*) On May 15 — the evening of Holloway's homicide —, when appellant spoke to Jurado by phone at Schmidt's home, Jurado told appellant that things had changed and they should kill Mynatt right away; appellant agreed. (22 RT 4888.)

During his opening penalty phase argument, prosecutor argued:

> Think about the motive. He decided to participate in her murder because she was going to go to the object of a plot he was involved with, a plot to kill another person. So we have a killer here . . . who not only premeditates and deliberates his killings, we have a killer that kills so he can continue to kill. That was his motive. He had his girlfriend killed so he could kill Doug Mynatt. . . .

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[230] Other evidence introduced at the penalty phase showed that Holloway was killed by Jurado, Shigemura, and their friend Anna Humiston.

[231] As explained in notes exchanged between appellant and Eric Holland, while appellant had been in jail, Mynatt had been going through his belongings and taking whatever he liked, had stolen Shigemura's purse and the key to her bosses's business and safe, and had threatened and kidnapped Jurado. (People's Exhibit 176; see copy at 6 CT 1467 and reproduced in Appendix C.) Because of Mynatt's Hell Angels connections, appellant and Jurado did not believe that they could ignore Mynatt or stop him by simply "beat[ing] his ass." (*Ibid.*)

(25 RT 5706-5707.)

At the conclusion of the prosecutor's argument, defense counsel moved for mistrial on several bases, including that "he's talking about the murder of Doug Mynatt not just as motive but he's using it to aggravate the defendant's — he's using it as a factor in aggravation, in my opinion." (25 RT 5730.) The court denied the motion, responding that it "didn't get from his argument that he was saying the Mynatt case should be considered as a circumstance in aggravation," plus the jurors were going to be instructed that they could only consider that evidence for a limited purpose. (25 RT 5733.)

The jury had not been given a limiting instruction when the evidence of the plot was first introduced (through Investigator Bento's testimony). (22 RT 4887-4888; see also 22 RT 4977; 24 RT 5477-5478.) The limiting instruction was simply read when the other penalty instructions were given. It stated:

> Certain evidence was admitted for a limited purpose. [¶] Evidence regarding a plot to kill a Doug Mynatt was admitted only to establish the motive for the murder of Terry Holloway and evidence pertaining to Terry Holloway's pregnancy was admitted only to establish the circumstances of her murder. [¶] Do not consider such evidence for any purpose except the limited purpose for which it was admitted. [¶] CALJIC 2.09 as modified.

(9 CT 2530; 26 RT 5845-5846.)

2. **The Prosecutor's Argument Constituted Misconduct.**

The prosecutor's argument concerning evidence of appellant's participation in the conspiracy to kill Doug Mynatt was improper for two reasons: (1) it went beyond the limited motive purpose for which the

evidence was introduced and urged the jurors to consider the evidence as an aggravating 190.3, factor (b), offense which, as a matter of law, was not supported by sufficient evidence; and (2) it was based on a mischaracterization of the evidence.

As the prosecutor conceded, the uncorroborated extrajudicial admissions of participation in the conspiracy to kill Mynatt were not admissible to establish a section 190.3, factor (b) offense, because the prosecution could not establish a corpus. (*People v. McClellan* (1969) 71 Cal.2d 793, 805-806; *People v. Hamilton* (1963) 60 Cal.2d 105, 129-131, disapproved on another ground by *People v. Daniels, supra,* 52 Cal.3d at p. 866.) Accordingly, this evidence was admitted solely for the purpose of establishing appellant's motive for the Holloway homicide. Yet, the prosecutor did not, as he had promised earlier, merely argue that the evidence should be considered as motive. Although the prosecutor began the discussion of the evidence by using language of motive, he went on to argue that the evidence demonstrated appellant's intent to kill again: "we have a killer that kills so he can continue to kill. . . . He had his girlfriend killed so he could kill Doug Mynatt. . . ." (25 RT 5707.) Thus, the prosecutor specifically urged the jury to consider this evidence as additional independent aggravating circumstances. These remarks, without a doubt, would have been understood to mean that what we have here is a bad guy who kills and kills again. In fact, this was one of the central themes of the prosecution's penalty phase case — that appellant was a repeat killer who would kill again unless he was executed. (See, e.g., 25 RT 5695, 5798.) The prosecutor's argument, thus, was an intentional misuse of the evidence, which had been introduced for the explicitly limited purpose of establishing motive, to urge the jurors to consider it as criminal activity involving an express threat to use violence under Penal Code section 190.3, subdivision

(b), in order to support the theme that appellant was a repeat killer who had to be stopped.

What is especially troublesome here is that the prosecutor knew he was unable to produce sufficient evidence to enable admission of the evidence of the plot as aggravation under section 190.3, subidivision (b), so instead argued for its admission as motive. He, then, however, urged the jury to consider it as aggravating evidence. Given the nature of the evidence — a plot to kill another individual — the prosecutor knew full well that the jury would find it to be extremely aggravating.

Appellant's jury should never have been allowed to consider evidence of the conspiracy to kill Mynatt as an egregious example of violent criminal activity, because the corpus of that crime could not be established. (*People v. Boyd* (1985) 38 Cal.3d 762, 778 [penalty phase jury may not be permitted to consider an uncharged crime as an aggravating factor unless a "'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'"]; see also *People v. McClellan*, *supra*, 71 Cal.3d at pp. 804-806 [penalty phase jurors may consider evidence of other crimes only when the commission of such crimes is proved beyond a reasonable doubt; "the corpus delicti of an earlier crime must be established before an uncorroborated extrajudicial confession can be admitted"]; *People v. Thompson* (1988) 45 Cal.3d 86, 128-129 ["[s]ince there was insufficient substantial evidence to establish violation of section 653f as a separate crime, we conclude that whatever relevance of this evidence at the guilt phase to show defendant's consciousness of guilt, the trial court should not have permitted it to be argued under factor (b) at the penalty phase"].) Thus, the prosecutor's argument urging such consideration was highly improper.

The argument was also improper because it was based on a mischaracterization of the evidence. The prosecutor argued that appellant participated in Holloway's murder so that he could kill Mynatt: "we have a killer that kills so he can continue to kill." (25 RT 5707.) The evidence showed otherwise. It showed that appellant did not agree to Jurado's suggestion that he take care of Holloway so that they could then kill Mynatt, but rather did so because of fear that Mynatt would kill them if Holloway told him about the plot. In fact, the plot to kill Mynatt was never carried out. (People's Exhibit 172; see copy at 6 CT 1467 and reproduced in Appendix C.) According to the prosecution's evidence, appellant did not want to see Holloway killed. But, believing that Holloway would in fact inform Mynatt of their plan and that Mynatt's Hell's Angels connections would then come after him, appellant felt that he had no choice. (People's Exhibit 178 ["I didn't want it [Holloway's murder] to take place. I had no choice. It was her or all of us."]; see copy at 6 CT 1471.) Appellant suffered remorse over that decision. As explained in People's Exhibit 177, a note exchanged between appellant and Eric Holland:

> Holland: Why didn't you just forget about doing anything to Doug? Just have nothing to do with him. Promise Teri nothing would happen to him. And just take your losses. That would have been better than killing someone you supposedly loved. The losses the 3 of you took because of Doug seem awfully small compared to killing Teri!
>
> Appellant: I'm not proud of what I did! I hate myself for doing it! She haunts me for it. You don't know what it's like to be haunted. Believe me, I pay for my mistakes every day!
>
> Holland: Then why didn't you do like I suggested above.
>
> Appellant: She wouldn't have believed my promise. So I had no alternative.

(People's Exhibit 177; see copy at 6 CT 1470 and reproduced in Appendix C.)

As characterized by the prosecution, however, appellant's decision to allow Jurado to kill appellant's girlfriend was nothing more than a cold-blooded decision made without remorse in order to enable appellant to "continue to kill." This deliberate misrepresentation, which was clearly made to inflame the jurors, constituted misconduct.

"While counsel is accorded 'great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation],' counsel may not assume or state facts not in evidence [citation omitted] or mischaracterize the evidence [citation omitted]." (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 133-134; *People v. Hill*, *supra*, 17 Cal.4th at p. 823.) A prosecutor's "vigorous" presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." (*People v. Purvis* (1963) 60 Cal.2d 323, 343, disapproved in part on other grounds in *People v. Morse* (1964) 60 Cal.2d 631.) Federal courts agree that it is misconduct for a prosecutor to manipulate or misstate the evidence, to assume the existence of prejudicial facts not in evidence, or to make unfounded insinuations calculated to mislead the jury. (See, e.g., *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182; *Berger v. United States* (1935) 295 U.S. 78, 84-88.)

The assertion that appellant killed Holloway in order to continue to kill cannot be characterized as a reasonable inference based on the evidence, where the prosecution's own evidence demonstrated otherwise. The prosecutor's argument here was calculated to mislead the jury to believe that appellant callously participated in the death of his pregnant girlfriend for the most abominable reason when, in fact, appellant's

participation was a desperate and reluctant acquiescence to save his own skin.

In sum, for both reasons discussed above, the prosecutor's argument that appellant killed Holloway to continue killing constituted misconduct.

E. **The Prosecutor's Misconduct Is Reviewable On Appeal.**

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (Citation omitted.)'" (*People v. Hill, supra*, 17 Cal.4th at p. 820.) The reason for this rule is to give the trial court an opportunity to correct the misconduct and, if possible, to prevent by suitable instructions the harmful effect upon the jurors. (*People v. Gree*n, *supra*, 27 Cal.3d at p. 27.) However, even where defense counsel fails to make an objection, a claim of misconduct is reviewable on appeal if a timely objection and admonition would not have cured the harm. (*Id.* at p. 34.) Additionally, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*Hill, supra*, at p. 820.) Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if the court overrules an objection to the misconduct. (*Ibid.*)

The issue of the prosecutor's misconduct during his penalty phase arguments was properly preserved for appeal . On March 24, 1994, prior to the commencement of the penalty phase, appellant filed an in limine motion to prohibit the prosecutor from presenting specified improper and unconstitutional penalty phase arguments. (9 CT 2283-2312.) This motion was made prior to the prosecutor's argument "so that the prosecutor [would] have specific guidelines as to what matters may be referred to in

his closing argument, and so that the defendant [would] preserve the issue of prosecutorial misconduct for appellate review by objecting, in advance, to any such misconduct." (9 CT 2311.) The motion asked the court (1) to issue an order prohibiting various unconstitutional and impermissible penalty phase arguments; and (2) to declare a mistrial or in the alternative, to instruct pursuant to a defense-requested special instruction[232] in the event that the prosecutor ignored any limitations imposed by the court. (9 CT 2283, 2309.)

The motion specifically asked that the prosecutor be prohibited from (1) presenting "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response" (9 CT 2285, 2289); (2) "appeal[ing] to passion and prejudice" (9 CT 2295); (3) "suggest[ing] that mercy [is] an inappropriate consideration" (9 CT 2293); (4) "[u]sing the analogy of jurors to soldiers in a war on crime, and coupling it with a challenge to the juror's patriotism," because it "misrepresents the task the jury is charged by law to carry out" (*ibid.*); (5) "improperly present[ing] through argument what he [cannot] present through evidence" (9 CT 2295); (6) "urg[ing] the jury to consider the message its verdict would send to the community at large" (9 CT 2299);

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[232] This instruction provided:

> Ladies and Gentlemen of the jury, the prosecutor has just committed serious misconduct. I want you to know that the prosecutor has absolutely no justification for this misconduct. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to in any way be influenced by this misconduct, and to sentence defendant to death on the basis of it, I would have to declare a mistrial. Therefore, you must disregard these improper, unjustified remarks.

(9 CT 2310.)

and (7) "offer[ing] . . . argument concerning . . .nonstatutory factors in aggravation." (9 CT 2307.)

The motion asked the court to issue an order in advance of argument for a number of reasons, including the fact that objections by the defendant during argument often exacerbate the effect of the misconduct and risk antagonizing the jurors. (9 CT 2287-2289.) Moreover, the motion argued, the court could "intelligently rule in advance of argument that certain arguments are improper as a matter of law." (9 CT 2288.)

In *People v. Leonard, supra,* 40 Cal.4th at pp. 1417-1418, the Court held that the defendant's in limine motion to restrict the scope of the prosecutor's penalty phase argument did not preserve his right to challenge, on appeal, the prosecutor's statements in closing argument. There, although the prosecutor did not contest the principles of law outlined in the motion, he opposed the motion and urged the trial court not to make any ruling about misconduct in advance. (*Id.* at p. 1418.) The trial court denied the motion and this Court concluded:

> We conclude that defendant's motion did not preserve his right to challenge, on appeal, the prosecutor's comments in question. As the prosecutor pointed out at trial, the remarks must be considered in context, and cannot be evaluated in advance. In any event, the comments in question were not misconduct, as explained below.

(*Ibid.*)

In this case, however, the prosecutor did not oppose the motion; instead, he agreed with the majority of the points raised by the defense and stated his intent not to commit any such misconduct during his argument. (25 RT 5651-5663.) During discussion of the motion, the court declined to make any rulings, stating its reluctance to "put shackles on [the prosecutor] at this point and time." (25 RT 5651.) As the court pointed out, it assumed

that the prosecution was not going to commit such misconduct. The court suggested that "if [the prosecutor] makes an improper argument, you can raise that. You can object to it at the time. If he goes too far, it becomes error, you know." (*Ibid.*) Defense counsel pointed out the problems created by the necessity of having to interrupt and object during the argument itself (such as antagonizing the jury and exacerbating the impact of the misconduct) and suggested that "maybe we could shortcut this by articulating some of the —." (*Ibid.*) Both the court and the prosecutor then agreed to go through the points raised by the defense in its motion so that the prosecutor could respond. (25 RT 5651-5652.) The prosecutor assured the court and counsel that he was not going to make any improper arguments. (25 RT 5652-5653.) The defense was thus led to believe that the prosecutor had no intent of making any of the improper penalty phase arguments discussed in the motion and that his motion was sufficient to preserve any issues of misconduct for appeal should the prosecutor violate his assurances.

In this situation, it would be extremely unfair to penalize the defense for failing to interrupt the prosecutor's argument and object on the spot. Both this Court and the United States Supreme Court have noted that objections by an attorney during the argument of opposing counsel are extremely problematic. "[I]nterruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously." (*United States v. Young*, *supra*, 470 U.S. at p. 13.) Such interruptions may be perceived as tactics designed to disrupt the opposing party's train of thought and therefore "involve(d) a risk of antagonizing the jurors." (*People v. Bain* (1971) 5 Cal.3d 839, 849, n.1.) As observed by this Court in *People v. Kirkes* (1952) 39 Cal.2d 719, 726, in some situations, such as when improper remarks and assertions are interspersed throughout the

prosecutor's closing argument, repeated objections might actually result in more prejudice to the defendant. Defense counsel did what he could to prevent the misconduct and to preserve these issues for appeal without prejudicing appellant in front of the jury at an especially critical and delicate juncture of the trial — penalty phase argument. A defendant should not have to risk antagonizing the very persons who will decide whether he lives or dies in order to raise on appeal critical claims of prosecutorial misconduct. This is especially so, given that the prosecutor had been forewarned of the improper arguments and had stated his intent not to commit any misconduct. Accordingly, appellant submits that the defense motion should be found to have preserved these issues of misconduct. In essence, that motion, which objected to all of the improper arguments raised herein (see 9 CT 2285, 2289, 2293, 2295, 2299, 2307), served as advance objection to such misconduct.

Moreover, appellant did object, immediately following the prosecution's opening penalty phase argument, to the improper argument concerning the conspiracy to kill Doug Mynatt. (25 RT 5730.) As soon as the jury left the courtroom, defense counsel objected to the prosecutor's argument and moved for a mistrial. (25 RT 5729-5731.) The court, however, ruled that the prosecutor's argument did not constitute misconduct.[233] (25 RT 5733.) This objection was clearly sufficient to preserve that issue of misconduct for appeal. The trial court was given the opportunity to correct the misconduct, but declined to do so. And given the

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[233] The court also stated that in any event, the jury would be instructed that it was to consider evidence of that conspiracy for a limited purpose. (25 RT 5733.) As discussed in the next section, that limiting instruction was insufficient to mitigate the prejudicial effects of the prosecutor's argument.

court's ruling, it is clear that an objection at the time of the misconduct would have been futile.

Furthermore, given the number and seriousness of the improprieties found in the prosecutor's arguments, it is clear that objections and admonitions would not have cured the harm created by this misconduct. As noted above, this Court has recognized that "[r]epeated objections might well have served to impress upon the jury the damaging force of the challenged assertions." (*People v. Kirkes*, *supra*, 39 Cal.2d at p. 726.) In a situation where objectionable remarks are interspersed throughout argument, "[a] series of admonitions to the jury could not have cured the harmful effect of such misconduct." (*Ibid.*) That is certainly the case here where the prosecutor began and closed his opening argument with improper remarks and interspersed improper arguments throughout both his opening and closing arguments. Furthermore, as Justice Jackson observed, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury [citation omitted], all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453 (conc. opn. of Jackson, J.).)

For all of these reasons, the Court should review these serious instances of misconduct on appeal.

F. <u>This Misconduct Violated Appellant's Rights Under The Federal Constitution And Was Prejudicial, Requiring Reversal</u>.

The prosecutor's argument injecting non-statutory aggravation into appellant's penalty phase (consideration of the Mynatt conspiracy as an aggravating section 190.3, factor (b), offense) violated an important state procedural safeguard and liberty interest (the right to not be sentenced to

death except on the basis of statutory aggravating factors[234]) that is protected as a matter of federal due process under the Fifth and Fourteenth Amendments. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Puckett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301.) It, and the other arguments identified above, also misled the jurors, distorted the record, encouraged the jurors to make the sentencing decision on improper bases, and rendered the penalty phase fundamentally unfair. This misconduct therefore violated due process under the case law cited at the outset of this claim and appellant's constitutional rights under the Eighth and Fourteenth Amendments to a fundamentally fair and reliable penalty trial, based on a proper consideration of relevant sentencing factors and undistorted by improper, nonstatutory aggravation. (See *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-585.) The prosecutor's arguments violated the Eighth Amendment (1) requirement of individualized capital sentencing (*Romano v. Oklahoma, supra*, 512 U.S. at p. 7; *Zant v. Stephens, supra,* 462 U.S. at p. 879) and (2) requirement that objective criteria guide the imposition of the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362-364; *McCleskey v. Kemp* (1987) 481 U.S. 279, 302-306.) They also deprived appellant of "a meaningful opportunity to present a defense" in violation of the Sixth and Fourteenth Amendments. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

Moreover, the improper arguments were all incendiary. In particular, the argument that appellant so ruthlessly participated in the killing of his own girlfriend, who was pregnant with his child — that he had her killed so he could kill again — was extremely inflammatory. It invited speculation into an area unsupported by the evidence and then encouraged the jury to

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[234] *People v. Boyd, supra,* 38 Cal.3d at pp. 773-775.

use this provocative insinuation as a reason to sentence appellant to death. (See *People v. Terry* (1962) 57 Cal.2d 538, 566-567.) This misconduct "so infected the [penalty] trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

The court's limiting instruction regarding the evidence of appellant's participation in the conspiracy to murder Doug Mynatt did not cure this prejudice. That instruction, which advised the jurors that evidence of the plot to kill Doug Mynatt was admitted only to establish motive and was not to be considered for any other purpose, was not given until after the prosecutor made his improper argument. (9 CT 2530; 26 RT 5845-5846.) By that time, the damage had already been done. "It has been truly said: "You can't unring a bell.'" (*People v. Hill, supra,* 17 Cal.4th at p. 845, citation and internal quotations omitted.) The prosecutor had already urged the jurors to consider that evidence as evidence of appellant's involvement in a criminal activity involving an express threat to use violence and the jurors would inevitably have so considered the evidence, given the lack of a contemporaneous admonition not to do so. No limiting instruction given after the fact could change that.

Although this Court "presume[s] that jurors comprehend and accept the court's directions" (*People v. Welch* (1999) 20 Cal.4th 701,771), this presumption, like all things legal, is subject to exceptions. As stated by the Supreme Court: "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*Bruton v. United States* (1968) 391 U.S. 123, 135.) Thus, it is settled that a limiting instruction cannot cure the prejudice from the introduction of the "powerfully incriminating

extrajudicial statements" of a non-testifying codefendant. (*Id.* at pp. 135-137.) Likewise, here, it would be impossible for the jurors to limit their consideration of appellant's powerfully incriminating admission that he conspired to kill Doug Mynatt as mere evidence of motive and to ignore the core of that evidence — that appellant engaged in further criminal activity involving the express threat to kill another individual. As defense counsel had pointed out to the trial court, the jury would simply be unable to separate the issue of motive from the evidence of the conspiracy and would consider it "as just another factor B." (21 RT 4710-4711.) Furthermore, as noted above, Justice Robert Jackson — whose courtroom experience as a trial lawyer and as chief prosecutor for the United States at Nuremberg made him a leading authority on such issues — scoffed at the effectiveness of limiting instructions. (*Krulewitch v. United States*, *supra*, 336 U.S. at p. 453 (conc. opn. of Jackson, J.).) This Court also has cautioned that limiting instructions appear to call for "'discrimination so subtle [as to be] a feat beyond the compass of ordinary minds.'" (*People v. Antick* (1975) 15 Cal.3d 79, 98.)

Moreover, the fact that evidence of appellant's participation in the conspiracy had been permissibly introduced to show motive for the Holloway homicide does not alleviate the prejudicial effect of the prosecutor's argument. The clearly inflammatory argument likely "had the effect of motivating the jury to draw and focus upon the impermissible inferences from the otherwise properly admitted evidence" — that it demonstrated appellant's intent to kill again and his participation in a conspiracy to do so. (*Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 974-975 [where evidence of defendant's Sikh beliefs was introduced to offer a potential motive but the prosecutor "highlighted the . . . testimony in a way that went beyond merely providing evidence of motive and intent,"

suggesting that all Sikh persons are predisposed to violence when a family member has been dishonored, Ninth Circuit rejected state court's conclusion "that because the general beliefs of the Sikh faith already had been presented permissibly as evidence of [defendant's] motive and intent, the limited use by the prosecutor of concededly impermissible arguments did not have any significant prejudicial effect"].)

There is "a reasonable possibility that [the prosecutor's improper arguments] might have contributed to" the jury's decision to impose death. (*Chapman v. California*, *supra*, 386 U.S. at pp. 23-24; see also *People v. Brown, supra,* 46 Cal.3d at pp. 446-449.) The prosecutor's argument concerning the Mynatt conspiracy asked the jury to add another aggravating factor under 190.3, subdivision (b). Since the jury's task was to weigh the aggravating factors against the mitigating ones, the improper inflating of one side of the scale was highly prejudicial. Moreover, the argument itself could hardly be more prejudicial, since it portrayed appellant as a cold-blooded killer planning another killing. And the prosecutor's other improper arguments focused on extremely emotional matters that led the jury to believe that a sentence of death was required without any real consideration of mitigating evidence — an easy way to make a hard choice. If a death sentence were required to satisfy the obligation to the community or were necessary to avenge the victim's loss, then the jury need not make a "'reasoned moral response to the defendant's background, character and crime.'" (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328, emphasis deleted.) Given the great weight afforded a prosecutor's words and the improper arguments used here, it is reasonably possible that the jurors took the prosecutor's invitation and imposed the death penalty without the kind of determination required under the federal and state constitutions. (See *Berger v. United States*, *supra*, 295 U.S. at pp. 88-89 [prestige of

prosecutor carries great weight]; *United States v. Young*, *supra*, 470 U.S. at pp. 18-19 ["prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence"].)

"'[A]any substantial error occurring during the penalty phase of the trial . . .must be deemed to have been prejudicial.'" (*People v. Robertson, supra,* 33 Cal.3d at p. 54.) The potential for prejudice is "particularly serious" when the error concerns the jury's consideration of "other crimes" evidence, "a type of evidence which this court long ago recognized 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.'" (*Ibid.*) In this case, the emotional and far-reaching impact of the prosecutor's arguments affected the jurors' understanding of their basic duty and ensured that they would vote for death. The prosecution cannot establish beyond a reasonable doubt that these improper arguments did not contribute to at least one juror's decision to impose a death sentence. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) That sentence must therefore be overturned.

XII.

THE CUMULATIVE PREJUDICIAL EFFECT OF THE TRIAL COURT'S ERRORS REQUIRES REVERSAL OF THE GUILT AND PENALTY PHASE VERDICTS.

As demonstrated above, each claim of error raised in this brief requires reversal. However, even if any single error was not by itself cause for reversal, the cumulative effect of the errors rendered appellant's trial, both guilt and penalty phases, fundamentally unfair in violation of due process. (U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7 & 15.) As made clear by the Supreme Court, the combined effect of multiple trial errors

may violate due process and render a trial fundamentally unfair. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488, fn. 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303.) When analyzing prejudice in a case in which it is questionable whether any single error examined in isolation is sufficiently prejudicial to warrant reversal, it is important to consider the cumulative effect of multiple errors and "not simply conducting a balkanized, issue-by issue harmless error review." (*Daniels v. Woodford, supra,* 428 F.3d at p. 1214, quoting *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1178.)

The cumulative, prejudicial effect of the errors also violated appellant's right under the Eighth Amendment to heightened reliability in both the guilt and penalty determinations. (*Beck v. Alabama, supra,* 447 U.S. at p. 638.) This right may be violated even if due process is not. (E.g., *id.* at pp. 636-638 [Eighth Amendment need for reliability requires lesser included offense instructions even if due process does not]; *Sawyer v. Smith* (1990) 497 U.S. 227, 235 [distinguishing between due process protections and the "more particular guarantees of sentencing reliability based on the Eighth Amendment"].) Even if the errors demonstrated above did not alone, or in combination, violate due process, they violated the "heightened need for reliability" in capital cases.

"[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill, supra,* 17 Cal.4th at p. 844.) Where it is reasonably possible that multiple errors "tipped the scales against the defendant," the errors must be found to be prejudicial. (*People v. Purvis, supra,* 60 Cal.2d at p. 353, overruled on another ground by *People v. Morse, supra,* 60 Cal.2d at p. 648.)

The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349, disapproved on another ground by *People v. Whitmer* (2014) 59 Cal.4th 733.) A reviewing court examines each allegation and assesses the cumulative effect of any errors in order to determine if it is reasonably probable the jury would have reached a more favorable result in the absence of such errors. (*Ibid.*) Where federal constitutional error has been shown, the burden is on the state to prove beyond a reasonable doubt that the errors complained of did not contribute to the verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

At the guilt phase, numerous errors made it easier for the prosecution to carry its burden of proof by (1) allowing the jurors to convict appellant based on proof insufficient to meet the *Winship* beyond-a-reasonable-doubt standard (Argument VI), (2) exposing the jurors to inadmissible, highly prejudicial evidence (Arguments II and V), (3) precluding consideration of appellant's third-party culpability defense (Arguments III and IV), (4) restricting the jury's ability to evaluate the bias of a significant prosecution witness (Arguments III and IV), and (5) inflaming the jurors' emotions (Argument II). Most damaging, however, was the erroneous admission of the highly incriminating admissions and confessions supplied by police agent Eric Holland (Argument II). As discussed in Argument II, given the emotional impact of this evidence, as well as its pivotal position in the prosecution's case, it is impossible for the State to prove beyond a reasonable doubt that its erroneous admission did not contribute to the guilt phase verdict.

At the penalty phase, numerous errors deprived appellant of his rights to due process and to a fair, reliable determination of penalty, as well as his right not to be deprived of his life except in accordance with the rules

set forth in California's death penalty scheme. Numerous errors prevented the jury from carrying out its duty to determine the appropriate sentence under California law by (1) encouraging the jurors to impose a sentence of death on the basis of improper considerations, including vengeance (Arguments VIII, IX, and X), (2) improperly appealing to the jury's passions, fears and prejudices (Arguments VIII, IX, and X), (3) improperly inflaming the jurors against appellant on the basis of another's actions (Argument IX), and (4) attempting to sway jurors with non-statutory aggravating evidence. Moreover, as demonstrated in Argument VII, appellant's death verdict was rendered by a jury, which included one biased juror who violated both her oath and the court's instructions. And, here again at the penalty phase, the erroneous admission of the extremely inflammatory evidence from Eric Holland concerning appellant's involvement in the aggravated murder of his former girlfriend – pregnant with his child (Argument II) – surely must have inflamed the jurors and contributed to their decision to impose the ultimate sanction. Finally, as demonstrated in Argument I, the trial court's erroneous denial of appellant's motion for a change of venue resulted in the rendering of guilt and penalty determinations by a biased jury – tainted from exposure to inflammatory publicity.

As a result, these proceedings were neither fundamentally fair, nor reliable, within the requirements of the Sixth, Eighth and Fourteenth Amendments. The cumulative, prejudicial effect of these errors therefore requires that appellant's convictions and death sentence be reversed.

XIII.

OTHER ISSUES ARISING FROM THE USE OF THE DEATH PENALTY.

1.

THE JUDGMENT AGAINST APPELLANT VIOLATES THE FEDERAL CONSTITUTION BECAUSE APPELLANT'S CAPITAL TRIAL WAS CONDUCTED, AND/OR HIS APPEAL IS BEING CONDUCTED, BEFORE JUDICIAL OFFICERS WHO EITHER HAD TO WIN, OR STILL HAVE TO WIN, A VOTE OF THE POPULACE IN ORDER TO STAY IN OFFICE AND WHO THUS HAD OR HAVE A MOTIVE, INCENTIVE, AND TEMPTATION TO RULE AGAINST HIM.

It has long been settled that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." (*Tumey v. Ohio* (1927) 273 U.S. 510, 532.) This basic tenet of constitutional law was and is violated in appellant's case. (See also, e.g., *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 876 ["A fair trial in a fair tribunal is a basic requirement of due process."], citations omitted.)

In California, superior court judges and the justices of this Court are subject to periodic voter approval, in either contested elections or in approval or retention elections. Thus, they face the possibility of removal if they make a controversial and unpopular decision. Decisions and rulings in death penalty cases can become highly political and controversial, jeopardizing the judge's or justice's continued tenure in office. But only one kind of decision in a death-penalty case puts the judge or justice at risk: a decision in favor of a capital defendant or appellant. Whereas cases are

common where a judicial officer lost an election because of voting in favor of a capital defendant, no judge or justice ever lost his or her job by being "tough" on capital defendants. The result is a tilted system that violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process and a fair proceeding before a fair tribunal, to the effective assistance of counsel, to a reliable and non-arbitrary determination that death is the appropriate penalty, and to freedom from cruel and unusual punishment.

A. <u>Historical Context</u>.

At the time of the adoption of the United States Constitution, which is the benchmark for the protection afforded by the due process clause (see, e.g., *Medina v. California, supra,* 505 U.S. at pp. 445-46), it was firmly established that English judges qualified to preside in capital cases had tenure during good behavior. More than 75 years earlier, in 1701, a provision requiring that "Judges' Commissions be made *quamdiu se bene gesserint* [during good behavior]" was considered sufficiently important to be included in the Act of Settlement (see W. Stubbs, *Select Charters* (5th ed. 1884) p. 531); and in 1760, a statute ensured judges' tenure despite the death of the sovereign, which had formerly voided their commissions. (See W. Holdsworth, *History of English Law* (7th ed., A. Goodhart and H. Hanbury rev. 1956) at p. 195.) Blackstone quoted the view of King George III, in urging the adoption of this statute, that the independent tenure of the judges was "essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown." (Blackstone, *Commentaries on the Laws of England* (1765) *258.)

The Framers of the Constitution, who included in Article III of the Constitution the protection of tenure during good behavior for federal

judges, would not likely have taken a looser view of the importance of this due process requirement than King George III. In fact, the Framers used the grievance that the king had made the colonial "judges dependent on his will alone, for the tenure of their offices" to partly justify the Revolution. (Declaration of Independence (1776) ¶ 11; see Smith, *An Independent Judiciary: The Colonial Background* (1976) 124 U. Pa. L.Rev. 1104, 1112-1152.) Our founding fathers were well-aware that "there is no liberty" without a truly "independent judiciary." (*The Federalist*, No. 78 [Alexander Hamilton], at p. 523, citing Montesquieu, *Spirit of the Laws*.) Such independence ensures that courts serve as a "citadel of the public justice and the public security." (*Id.* at p. 524.) The genius of the system is that the basic rights of the unpopular and powerless are to be protected by the Constitution from the will of the majority. (See *Griswold v. Connecticut* (1965) 381 U.S. 479, *Brown v. Board of Education* (1955) 349 U.S. 1083.)

At the time of the Constitution's adoption, none of the states permitted judicial elections. (*Smith*, *id.* at pp. 1153-1155.)

B. California History.

Unlike the federal Constitution, the California Constitution of 1849 provided for direct election of judges by the citizenry. This system is inherently problematic because the resulting lack of independence of judges from political pressures has raised the specter of over-politicization of the often emotionally charged capital review system. Or, put another way, a primary "reason for the reluctance to reverse in criminal cases — even in the face of serious procedural error — is that criminal appeals are often the subjects of political campaigns, and always in the same way: American judges are never criticized for affirming convictions, only for reversing them." (Mathieson and Gross, *Review for Error* (2003) 2 Law, Probability & Risk 259, 267.)

In this state, the most famous examples of politicization involve the justices of this Court, starting with the successful 1986 campaign to remove former Chief Justice Rose Elizabeth Bird and two associate justices, which was "a classic example" of the politicization of the process of judicial review. (*Ibid.*, fn. 30.) That campaign was successful primarily because of the Court's reversal rate in death penalty cases. (See Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California* (1990) 23 U.C. Davis L.Rev. 160, 209 [hereafter "Poulos"]; *People v. Cox, supra,* 53 Cal.3d at p. 696 [the ousted justices were "the objects of a strenuous and well publicized campaign to unseat them at the impending retention election. It coalesced around the high percentage of death penalty reversals"].)

Recognizing the dangers, former Chief Justice George made ongoing and commendable efforts to "protect the neutrality of judges and minimize politicization of the judicial branch" by proposing amendments to Article VI of the California Constitution, including increasing judges' terms from six to ten years. (See McCarthy, *Bench, Bar Mull Overhaul of State Court System* (April 2005) California Bar Journal, at pp. 1, 7.) Though these efforts were both praise-worthy and appropriate, they also demonstrated persuasive acknowledgment that politics can easily affect California's judiciary.

There has been no subtlety in the attacks on justices who have ruled in favor capital defendants. In the successful campaign against the three justices in 1986, then-Governor George Deukmejian "served as a vigorous public spokesman for the forces seeking to oust the incumbent Supreme Court justices in the 1986 election." (*Geary v. Renne* (9th Cir. 1990) 911 F.2d 280, 290 fn. 8 (conc. opn. of Reinhardt & Kozinski, JJ.).) He not only targeted Chief Justice Bird but openly threatened to oppose Justices

Reynoso and Grodin unless they voted to uphold more death sentences, and then he carried out his threat when they failed to live up to his standards. (Bright and Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases* (1995) 75 Boston Univ. L.Rev. 759, 760-761; Grodin, *Judicial Elections: The California Experience* (1987) 70 Judicature 365, 367.) Less than two years later, Governor Deukmejian announced that he had "now had an opportunity to appoint five new justices to the state supreme court," proclaiming that whereas "Chief Justice Rose Bird upheld only four death sentences in nine years [,] [i]n just the last year and a half, the new supreme court, under the leadership of Chief Justice Malcolm Lucas has affirmed 43 cases." (*Poulos, op cit. supra*, at p. 220, fn. 336 [quoting from transcript of radio broadcast].)

The 1986 election outcome "remains fresh in the minds of jurists who want to avoid being seen as stepping into controversies too willingly." (Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons From the California Recall Experience* (2004) 92 Cal. L.Rev. 927, 939.) As well it should, since making menacing noises about the handling of death penalty cases has become almost routine for politicians. Thus, for example, former Governor Gray Davis declared that "[a]ny judge I appoint will understand my strong support for public safety, long-standing commitment to the death penalty. . . ." (Weinstein, *Sparring for Best Crime-Fighting Honors,* Los Angeles Times (Oct. 12, 1998) Part A, p. 3.) "The Governor [made] no secret of the fact that he strongly supports the death penalty, and he thinks it's important that those he appoints understand where he's coming from on that issue." (Off-Beat, *Judicial Litmus*, LA Weekly (July 9, 1999), citing Gov. Davis' press secretary Michael Bustamante.)

It is not surprising, then, that former Chief Justice George found it necessary to pointedly distinguish himself from former Chief Justice Bird during his retention election in 1998:

> Hoping to win the Republican Party endorsement in September, the George campaign is trying to fend off conservative opposition by portraying the incumbent as an ideological opposite of Bird, who was ousted by voters twelve years ago because of her liberal opinions. One of George's brochures heralds his "conservative record" and refers critically to Bird or the court she led no fewer than eight times. The brochure says the George court has restored common sense and individual responsibility to our civil justice system by overturning numerous Rose Bird-era precedents. George's campaign also wants to *remind voters of Bird's penchant for overturning death sentences, while playing up the George Court's 90 percent rate for upholding capital convictions. . . .*

(Egelko, *George Goes Bird Hunting,* California Lawyer (June 1998), p. 17.)

Such campaign tactics caused Santa Clara law professor Gerald Uelmen to describe former Chief Justice George as a "thoughtful judge who has risen above politics" but who, by "waving an anti-Bird banner, . . . allow[ed] [himself] to be perceived as a jurist who is 'willing to compromise his independence to win an election.'" (*Ibid.*)

This Court's affirmance rate in automatic appeals reinforces the concern, for of the last 311 such decisions (going back to January 1, 2000), the Court has reversed the guilt-phase judgment in just five cases (1.6%), the special-circumstance judgment in one case (0.3%), the penalty-phase judgment in sixteen cases (5%), and 190.4(e) hearing judgments in two cases (0.6%), leading to an overall affirmance rate of 92 percent.

Meaningful appellate review with non-arbitrary and non-capricious decision-making is a constitutional requirement for every capital sentencing jurisdiction, including California. The Supreme Court has regularly looked at the affirmance rates of the state court. For example, in the seminal decision of *Gregg v. Georgia* (1976) 428 U.S. 153, the lead opinion noted that "[i]t is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously" and recited various principles that the state court regularly relied upon as a basis for scrutinizing, and occasionally invalidating, death sentences. (*Id.* at pp. 205-206, opn. of Stewart, Powell, and Stevens, JJ.) In *Profitt v. Florida* (1976) 428 US. 242, the lead opinion observed that the Florida Supreme Court, "like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date." (*Id.* at p. 253 (opn. of Stewart, Powell, and Stevens, JJ.).) And similarly, in *Jurek v. Texas* (1976) 428 U.S. 262, the lead opinion observed that Texas "has thus far affirmed only two judgments imposing death sentences under its post-*Furman* law." (*Id.* at p. 270 (opn. of Stewart, Powell, and Stevens, JJ.).)

Subsequently, in *Pulley v. Harris* (1984) 465 U.S. 37, the High Court was confronted with California's appellate review process and held that intercase proportionality review is not constitutionally required. (*Id.* at pp. 43, 45.) The Court did not overlook, however, that this Court's opinions included "many reversals in capital cases." (*Id.* at p. 42, fn. 5.) In fact, the Court felt it significant to observe that it was "aware of only one case besides this one in which the [state] court affirmed a death sentence." (*Ibid.*)

And in *Barclay v. Florida* (1983) 463 U.S. 939, Justices Stevens and Powell expressly cast their concurring votes because the Florida Supreme

Court's reversal record refuted the contention that the state court failed to provide meaningful appellate review. Justice Stevens explained:

> [T]he question is whether, in its regular practice, the Florida Supreme Court has become a stamp for lower court death-penalty determinations. It has not. On 212 occasions since 1972 the Florida Supreme Court has reviewed death sentences; it has affirmed only 120 of them. The remainder have been set aside, with instructions either to hold a new sentencing proceeding or to impose a life sentence.

(*Id.* at p. 973 (conc. opn.).)

As the affirmance statistics make clear, however, California can no longer show such meaningful review of capital sentences. (See also Brace & Boyea, *State Public Opinion, the Death Penalty and the Practice of Electing Judges* (2009) 52 American Journal of Political Sciences, pp. 360-371 [showing that capital review systems such as the one used in California are prone to improper influences inconsistent with proper principles of due process].)

C. **Further Corroboration.**

Arbitrariness and susceptibility to political influence have been identified as "disturbing" aspects of the imposition of the death penalty in not just California but throughout much of the United States. (International Commission of Justice, *Administration of the Death Penalty in the United States,* issued June 1, 1996.) Focusing on the influence of electoral politics on judges and district attorneys, the ICJ report found that "the prospect of elected judges bending to political pressures in capital punishment cases is both real as well as dangerous to the principle of fair and impartial tribunals." Specifically, the ICJ found that "among elected judges, those who covet higher office — or those who merely wish to retain their status as judges — must constantly proclaim their fealty to the death penalty" and

that "prospects of a fair hearing for capital offenders cannot . . . be assured." (*Ibid.*)

These concerns have been echoed in the highest court in the nation. For example, in her dispositive concurring opinion in *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, former Justice Sandra Day O'Connor wrote,

> We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects. See Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L.Rev. 733, 739 (1994) (quoting former California Supreme Court Justice Otto Kaus' statement that ignoring the political consequences of visible decisions is "'like ignoring a crocodile in your bathtub'"); Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U.L.Rev. 759, 793-794 (1995) (citing statistics indicating that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty than are judges who do not run for election). Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so.

(*Id.* at pp. 788-789.)

And in his dissenting opinion in *Harris v. Alabama* (1995) 513 U.S. 504, former Justice John Paul Stevens addressed the political reality for

judges and justices who handle capital cases and thereafter face the electorate, saying

> The Framers of our Constitution "knew from history and experience that it was necessary to protect . . . against judges too responsive to the voice of higher authority." . . . The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office — or who merely wish to remain judges — must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

(*Id.* at pp. 519-520, quoting *Duncan v. Louisiana, supra,* 391 U.S. at p. 156, citation omitted.)

Scholars, too, have identified the due process problems of having elected judges preside over capital trials. "Judges ignore public attitudes in their political supporters at the peril of losing their position in the next election." (Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights* (2000) 78 Tex. L.Rev. 1805, 1832.) Another scholar has reported that a survey of ten states in which judges periodically face retention elections had found that a "high percentage of judges [] acknowledge that retention elections exert a major influence on their behavior." (Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, *supra*, 65 U. Colo. L.Rev, 739.) In fact, 27.6 percent stated that facing election made them "more sensitive to public opinion," and 15.4 percent conceded that facing election "prompts them to 'avoid controversial cases and rulings.'"

(*Ibid.*) "[T]he survey suggests," Eule wrote, "that fear of losing plays a role even when losing is highly unlikely." (*Ibid.*)

In Texas, the Republican Party decided to take over the courts by running pro-death penalty campaigns after the Texas Court of Criminal Appeals reversed the death penalty in a particularly notorious case. (Bright & Keenan, *op cit. supra*, at pp. 761-762.) Similarly two justices were voted off the Mississippi Supreme Court for being soft on the death penalty as a result of ruling that the death penalty was not permitted in the case of a rape that did not result in the loss of life. Neither the voters nor the opponents of the judges were appeased by the fact that the United States Supreme Court had declared the death penalty unconstitutional in such cases over ten years earlier, thus forcing the action of the Mississippi court. (*Id.* at pp. 763-765.)

In 1996, Tennessee Supreme Court Justice Penny White stood for a retention vote. A few months before the election, she had concurred in a decision that affirmed the conviction of Richard Odom but reversed his death sentence. In fact, the court was unanimous that the sentence had to be set aside, though the justices did not entirely agree upon the reason. (*State v. Odom* (Tenn 1996) 928 S.W.2d 18.) At the time, Justice White was the newest member of the Court and the only one facing a retention vote. She was attacked for the decision, which she did not write, and that campaign lead to her removal from the Court. (See Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary* (1998) 14 Ga. State L.Rev. 817, 847-848.)

Thereafter, the same groups that successfully attacked Justice White went after United States District Court Judge John Nixon, successfully obtaining a vote in the Tennessee Senate urging Congress to begin impeachment proceedings against him and a resolution in the Tennessee

House of Representatives urging that Nixon not be permitted to hear any more death penalty cases. (*Id.* at pp. 854-855.) These actions came despite the facts that neither body had any jurisdiction over Judge Nixon or the federal courts, and that the United States Court of Appeals for the Sixth Circuit had upheld the very decisions for which Judge Nixon was being berated. (See also Bright & Keenan, *op. cit. supra* [other examples of judges losing their seats because of rulings in favor of capital defendants].)

Nevada, too, has a system of elected judges, and as one justice there wrote, "[i]f recent campaigns are an indication, any laxity toward a defendant in a homicide case would be a serious, if not fatal, campaign liability." (*Beets v. State* (1991) 107 Nev. 957, 976, 821 P.2d 1044, 1057-58 (Young, J., dissenting).) As another Nevada justice had noted, the lesson of an election campaign focusing on the allegation that a justice of Supreme Court "wanted to give relief to a murderer and rapist" was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'" (Remarks of Rose, J., reported in Nevada Legislative Comm'n Subcomm. to Study the Death Penalty and Related DNA Testing Tr. (Feb. 21, 2002).)

What is particularly important about the turbulent seas faced by judges who make defense-favorable rulings in capital cases is that those decisions are necessarily compelled by the facts and by legal precedent, yet these niceties are irrelevant to those who attempt to remove the judges who have ruled in favor of capital defendants. The history of the electoral defeat of judges who make defense-favorable decisions in death penalty cases offers strong justification for the position of the American Bar Association that judges, given their role in our constitutional system of checks and balances, should not stand for election. (See *An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial*

Independence 96 (1997) ["The American Bar Association strongly endorses the merit selection of judges, as opposed to their election. . . . Five times between August 1972 and August 1984 the House of Delegates has approved recommendations stating the preference for merit selection and encouraging bar associations in jurisdictions where judges are elected . . . to work for the adoption of merit selection and retention"].)

As we have pointed out, the law is settled that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law" and is structural error. (*Tumey v. Ohio*, *supra*, 273 U.S. at p. 532.) For a judge or justice subject to voter approval, there is an inherent conflict between the obligation to follow the law in a capital case and the desire for career self-preservation, and that conflict cannot pass constitutional muster.

2.

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

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these

attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Appellant has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[235] appellant identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

1. Factor (a): Section 190.3, subdivision (a) — which permits a jury to sentence a defendant to death based on the "circumstances of the crime" — is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from

[235] See, e.g., *People v. Johnson* (2015) 60 Cal.4th 966, 997; *People v. Adams* (2014) 60 Cal.4th 541, 579-582; *People v. Contreras* (2013) 58 Cal.4th 123, 172-173; *People v. Homick* (2012) 55 Cal.4th 816, 902-904; *People v. Eubanks* (2011) 53 Cal.4th 110, 152-152; *People v. Taylor* (2010) 48 Cal.4th 574, 661-663; *People v. Ervine* (2009) 47 Cal.4th 745, 810-811.

cruel and unusual punishment. The jury in this case was instructed in accord with this provision. (26 RT 5840.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona* and its progeny[236] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, *supra*, 536 U.S. at p. 609.)

This Court has repeatedly rejected these arguments. (See, e.g., *People v. Foster*, *supra,* 50 Cal.4th at pp. 1362-1364; *People v. Collins, supra,* 49 Cal.4th at p. 260; *People v. Mills* (2010) 48 Cal.4th 158, 213-214; *People v. Martinez, supra,* 47 Cal.4th at p. 967; *People v. Ervine*, *supra*, 47 Cal.4th at p. 810; *People v. McWhorter* (2009) 47 Cal.4th 318, 378; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

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236 *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; *United States v. Booker* (2005) 543 U.S. 220; *Cunningham v. California* (2007) 549 U.S. 270.

2. Factor (b): During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence and that they did not have to be unanimous as to whether those criminal acts had been established. (26 RT 5840, 5842.) Evidence supporting this instruction had been admitted at the penalty phase over appellant's objection. (24 RT 5485.) The jurors were not told that they could rely on this factor (b) evidence unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. The United States Supreme Court's decisions in *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey* (2000) 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, the failure to require such unanimity violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty" (*Ring*, 536 U.S. at p. 609) and his due process right to a fair sentencing hearing. In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308; *People v. Martinez*, *supra*, 47

Cal.4th at p. 968; *People v. Lewis* (2006) 39 Cal.4th 970, 1068; *People v. Ward, supra,* 36 Cal.4th at pp. 221-222; *People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decision-maker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

3. Factor (c): During the penalty phase, the state introduced evidence that appellant had had a prior felony conviction. (22 RT 4944; People's Exhibit 188.) This evidence was admitted pursuant to section 190.3, subdivision (c). The jurors were instructed they could not rely on the prior conviction unless it had been proven beyond a reasonable doubt. (26 RT 5842.) The jurors were never told that

before they could rely on this aggravating factor, they had to unanimously agree that defendant had committed the prior crime. In light of the Supreme Court decisions in *Ring v. Arizona*, *supra*, 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Taylor*, *supra*, 48 Cal.4th at p. 662; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

4. Factor (i): The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (26 RT 5841.) This aggravating factor was unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. (See, e.g., *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Ray, supra,* 13 Cal.4th at p. 358.) These

decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

5. Inapplicable, Vague, Limited And Burdenless Factors And Failure To Delineate Between Aggravating And Mitigating Factors: At the penalty phase, the trial court instructed the jury in accord with the standard instruction — CALJIC No. 8.85. (26 RT 5840-5841.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors; (2) it failed to delineate between aggravating and mitigating factors; (3) it contained vague and ill-defined factors, particularly factors (a) and (k); (4) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial;" and (5) it failed to specify a burden of proof as to either mitigation or aggravation. (30 RT 5840-5841.) These errors, taken singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Thompson* (2010) 49 Cal.4th 79, 143-144; *People v. Taylor*, *supra*, 48 Cal.4th at p. 662; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v. Schmeck*,

supra, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

6. Failure To Instruct That Statutory Mitigating Factors (D)-(H) And (J) Were Relevant Solely As Potential Mitigators: In accordance with customary state 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 (26 RT 5840-5841), and the trial court refused defense-requested instructions to clarify which factors were aggravating and which were mitigating. (See Defendant's Instruction ##04 and 05 at 9 CT 2404-2405; 25 RT 5571-5573.) The 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, supra,* 48 Cal.3d at p. 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.)

Appellant's jury, however, 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.) The Court's decision in *Hillhouse* should be reconsidered because it is inconsistent with the aforementioned provisions of the federal constitution.

7. Mitigating Factors – Failure To Set Forth Burden Of Proof And To Instruct That Unanimity Not Required: 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, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina, supra,* 428 U.S. at p. 304.) Constitutional errors occur 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* (1990) 494 U.S. 370, 380.) That occurred here because the jury was left with the impression that appellant 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 *McCoy v. North Carolina* (1990) 494 U.S. 433, 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. Failure To Narrow: California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. 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, supra,* 47 Cal.3d at p. 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. at p. 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses charged against appellant (1992), Penal Code section 190.2 contained 19 sets of 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; see also *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) This Court should reconsider this line of decisions 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.

9. Burden Of Proof And Persuasion: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist; (2) finds that the aggravating circumstances outweigh the mitigating circumstances; and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona*, *supra*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). (See 26 RT 5830-5852.) These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at pp. 260-261; *People v. Taylor*, *supra*, 48 Cal.4th at p. 662; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Ervine*, *supra*, 47 Cal.4th at pp. 810-811; *People v. McWhorter*, *supra*, 47 Cal.4th at p.

379; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

10. Written Findings: The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Thompson*, *supra*, 49 Cal.4th at p. 143; *People v. Taylor*, *supra*, 48 Cal.4th at p. 662; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

11. Vague Standard For Decision-Making: The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances that death is warranted (CALJIC 8.88, provided to appellant's jury at 26 RT 5851) creates an unconstitutionally vague standard, in

violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. The phrase "so substantial" is an impermissibly broad standard 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 Fifth, Sixth, Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright, supra,* 486 U.S. at p. 362.) This Court has repeatedly rejected these arguments. (*People v. Foster, supra*, 50 Cal.4th 1301; *People v. Russell* (2010) 50 Cal.4th 1228, 1272-1273; *People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v. Catlin, supra,* 26 Cal.4th at p. 174; *People v. Mendoza, supra*, 24 Cal.4th at p. 190; *People v. Breaux* (1991) 1 Cal.4th 281, 316-317.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

12. <u>The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment</u>: 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 clear to jurors that this is the overriding concern; 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*, *supra*, 6 Cal.4th at pp. 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) This decision should be reconsidered because it is inconsistent with the aforementioned provisions of the federal Constitution.

13. <u>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</u>: 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*, *supra*, 494 U.S. at p. 377.) Yet, CALJIC No. 8.88 fails to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. 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); it also violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to equal protection, due process of law, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment.

This Court has repeatedly rejected these arguments. (See, e.g., *People v. McWhorter, supra*, 47 Cal.4th at p. 379; *People v. Carrington*, *supra*, 47 Cal.4th at p. 199.) It 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, supra,* 53 Cal.3d at p. 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 nonreciprocity 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.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

14. CALJIC 8.88 Was Also Constitutionally Flawed In Failing To Convey The Following Principles Critical To Defining The Scope Of The Jury's Sentencing Discretion And The Nature Of Its Deliberative Process: (1) that one mitigating factor may be sufficient to support a decision that death is not the appropriate penalty; (2) that the jury could impose a sentence of life without parole even if they found that the factors in aggravation outweighed those in mitigation; and (3) that the jury could impose a sentence of life without parole even if they failed to find any mitigating factors. Appellant requested instructions to clarify these principles, but the trial court erroneously refused them and instead simply instructed with CALJIC 8.88. (See defendant's instructions numbers 25 at 9 CT 2433, 36 at 9 CT 2451, 38 at 9 CT 2453, 39 at 9 CT 2454, 40 at 9 CT 2455, 41 at 9 CT 2456, 43 at 9 CT 2458-2459, 54 at 9 CT 2471, 55 at 9 CT 2472, 68 at 9 CT 2485, 73 at 9 CT 2490-2491; see also 26 RT 5809, 5811, 5851.)

CALJIC No. 8.88 was defective because it implied that death was the *only* appropriate sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances. . . ." However, it is clear under California law that a penalty jury may always return a verdict of life without the possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown* (1985) 40 Cal.3d 512, 538-541 ["The jury must be free to reject death if it decides on the basis of *any* constitutionally relevant evidence or observation that it is not the appropriate penalty"], reversed on another ground by *California v. Brown* (1987) 479 U.S. 538.) CALJIC 8.88, thus, improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed that in mitigation. (Cf. *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

CALJIC 8.88 was also defective, because it improperly suggested that a quantitative comparison of the totality of mitigating and aggravating factors was required. This Court has repeatedly indicated that one mitigating factor, standing alone, may be sufficient to outweigh all other factors. (*People v. Howard, supra,* 44 Cal.3d at p. 435; *People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5.) The Court has also made clear that under the 1978 death penalty law, the sentencer may determine, "even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan*, *supra*, 53 Cal.3d at p.

979.) The language of CALJIC 8.88 not only failed to communicate these crucial concepts but also suggested that the jury was required to consider the totality of the mitigating circumstances, balance them against the totality of aggravating circumstances, and impose a sentence of death if the aggravating factors outweighed the mitigating factors.

The failure to instruct on these critical points was prejudicial because it deprived appellant of his right to have the jury given proper information concerning its sentencing discretion. (*People v. Easley* (1983) 34 Cal.3d 858, 884.) Second, in the absence of qualitative comparisons, the quantitative formula set forth in CALJIC 8.88 could weigh the scales in favor of a judgment of death, thereby depriving appellant of the individualized consideration required by the Eighth Amendment. (*Stringer v. Black* , *supra*, 503 U.S. at pp. 231-232.) Third, since the defect in the instruction deprived appellant of important procedural protections that California law affords capital defendants, delivery of the instruction deprived appellant of due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; see *Hewitt v. Helms, supra,* 459 U.S. at pp. 471-472), and made the resulting verdict unreliable, arbitrary and capricious (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Furman v. Georgia*, *supra*, 408 U.S. 238).

This Court has repeatedly rejected these arguments. (See, e.g., *People v. Famalaro, supra,* 52 Cal.4th at pp. 76-77; *People v. Lewis, supra,* 46 Cal.4th at p. 1316; *People v. Kelly II* (2007) 42 Cal.4th 763, 799; *People v. Morgan* (2007) 42 Cal.4th 593, 625-626; *People v. Jones* (1998) 17 Cal.4th 279, 314; *People v. Medina* (1995) 11 Cal.4th 694, 781–782.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

15. Failure to Require Unanimity/Majority-Facts Used To Justify Death:

As noted above, appellant's jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor were the jurors told that they had to unanimously agree that appellant had committed a prior crime in order to consider an alleged prior conviction in aggravation. Moreover, his jurors were expressly informed that they did not have to be unanimous as to whether other criminal acts involving the express or implied use of violence had been established before considering such acts in aggravation. (26 RT 5840, 5842.)

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 *Woodson v. North Carolina*, *supra*, 428. U.S. at p. 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.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto* (2003) 30 Cal.4th 226, 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." (*McCoy v. North Carolina*, *supra*, 494 U.S. at p. 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., Pen. Code, § 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. Ylst* (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*, *supra*, 11 Cal.4th at pp. 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

The Court's decisions in *Taylor* and *Prieto* should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

16. <u>Intercase Proportionality Review</u>: The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these

arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Thompson*, *supra*, 49 Cal.4th at pp. 143-144; *People v. Taylor*, *supra*, 48 Cal.4th at pp. 662-663; *People v. D'Arcy*, *supra*, 48 Cal.4th at pp. 308-309; *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

17. Disparate Sentence Review: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v. Ervine*, *supra*, 47 Cal.4th at p. 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

18. Equal Protection Clause: The California death penalty scheme violates the equal protection clause by providing

significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and have been found true beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) Additionally, a trial court must state on the record its specific reasons for choosing the term of imprisonment it may be imposing. (Cal. Rules of Court, rule 4.420 (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 statements of reasons to justify the defendant's sentence. This Court has previously rejected these equal protection arguments. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.) The Court's decision should be reconsidered because it is inconsistent with the equal protection clause.

19. International Law: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including the International Covenant of Civil and Political Rights — and thereby violates the Eighth Amendment and the

Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Taylor*, *supra*, 48 Cal.4th at p. 663; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v. Carrington*, *supra*, 47 Cal.4th at pp. 198-199; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of federal law and the Constitution.

20. Cruel And Unusual Punishment: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, *supra*, 49 Cal.4th at p. 144; *People v. Taylor*, *supra*, 48 Cal.4th at p. 663; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

21. Cumulative Deficiencies: Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the Supreme Court has stated, "[t]he constitutionality of a State's death penalty

system turns on review of that system in context."
(*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6; see also
Pulley v. Harris, supra, 465 U.S. at p. 51 [while
comparative proportionality review is not an essential
component of every constitutional capital sentencing
scheme, a capital sentencing scheme may be so lacking in
other checks on arbitrariness that it would not pass
constitutional muster without such review].) Viewed as a
whole, California's sentencing scheme is so broad in its
definitions of who is eligible for death and so lacking in
procedural safeguards that it fails to provide a meaningful
or reliable basis for selecting the relatively few offenders
subjected to capital punishment.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

* * * * * *

CONCLUSION

For all of the reasons stated above, this Court should reverse both the convictions and sentence of death in this case.

Dated: July 22, 2015

Respectfully submitted,

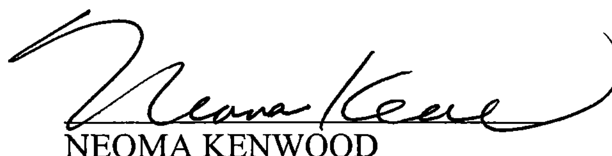
NEOMA KENWOOD

Attorney for Appellant
BRIAN DAVID JOHNSEN

CERTIFICATION OF WORD COUNT
PURSUANT TO RULE 8.630(B)(2)

I, Neoma Kenwood, appellate counsel for appellant Brian David Johnsen in the current case, hereby certify that the Appellant's Opening Brief and Appendices D, E, F, and G were produced on a computer using a 13-point Times New Roman font. I further certify that, exclusive of the table of contents, the proof of service, and this certificate, this brief and the four appendices, in combination, contain 190,203 words, according to the word count of the computer program used to prepare the documents. An application for leave to file an over-length brief is being filed simultaneously with this brief pursuant to California Rules of Court, rule 8.630(b)(5). (The record in this case was filed before January 1, 2008.)

I declare under the penalty of perjury that the foregoing is true and correct, and that this certificate was executed on July 22, 2015, at Berkeley, California.



NEOMA KENWOOD

PEOPLE V. BRIAN DAVID JOHNSEN, Automatic Appeal No. S040704
Stanislaus County Superior Ct. No. R239682

PROOF OF SERVICE BY MAIL
CCP § 1013(a)
STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I declare as follows:

I, NEOMA KENWOOD, am over the age of 18 years, and not a party to the within action; my business address is P.M.B. #414, 1563 Solano Avenue, Berkeley, CA 94707.

On July 24, 2015, I served a true and correct copy of the attached

APPELLANT JOHNSEN'S OPENING BRIEF AND ACCOMPANYING APPENDICES A-G (SEPARATELY BOUND)

on the interested parties or counsel for interested parties named below, by placing a true copy enclosed in a sealed envelope, with postage fully prepaid, in an official depository under the care and control of the United States Postal Service:

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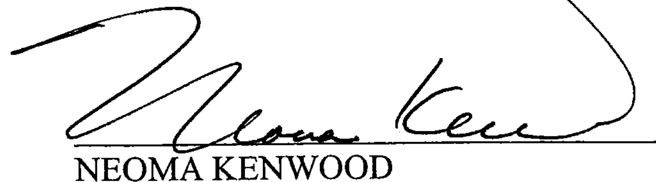
I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 24, 2015, at Berkeley, California.



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