SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEVEN HOMICK Defendant and Appellant.	S044592 (Los Angeles County Number A973541) **DEATH PENALTY**

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Honorable Florence-Marie Cooper, Trial Judge

APPELLANT'S OPENING BRIEF

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SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. STEVEN HOMICK Defendant and Appellant.	S044592 (Los Angeles County Number A973541)

APPELLANT'S OPENING BRIEF

WORD COUNT CERTIFICATION (Rule 8.630 (b)(2))

Pursuant to California Rules of Court, Rule 36 (b)(1)(B) and (b)(2), counsel for Steven Homick hereby certifies that this oPening brief contains 197,240 words. Because this exceeds the 92,500 word limit specified in Rule 8.630 (b)(1)(A), an application for permission to file an oversize brief is being sought pursuant to Rule 8.630 (b)(5)

STATEMENT OF THE CASE

On June 19, 1986, Information number A779943 was filed in the Los Angeles County Superior Court charging Steven Homick, Robert Homick,

Stewart Woodman, Neil Woodman, and Anthony Majoy[1] with two counts of murder and two counts of conspiracy to commit murder, as follows:

Count 1 - Conspiracy to murder Vera Woodman (Penal Code section 182), occurring from April 18, 1983 through January 26, 1986.

Count 2 - Conspiracy to murder Gerald Woodman (Penal Code section 182), occurring from April 18, 1983 through January 26, 1986.

Count 3 – Murder of Vera Woodman (Penal Code § 187) on September 25, 1985, with a principal armed with a firearm (Penal Code § 12022 (a)).

Count 4 – Murder of Gerald Woodman (Penal Code § 187) on September 25, 1985, with a principal armed with a firearm (Penal Code § 12022 (a)).

Three special circumstances in regard to the murder counts were alleged as to each of the five defendants: Murder for financial gain (Penal Code § 190.2 (a)(1), commission of multiple murders (Penal Code § 190.2(a)(3)), and murder by lying in wait. (Penal Code § 190.2(a)(15)). (SCT 8, Vol. 2:225 *et seq.*.)[2]

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1 All five defendants were convicted of conspiracy and of both counts of murder, with special circumstances. However, only Steve Homick received a sentence of death.

2 Throughout this brief, references to the record on appeal in the present case will be abbreviated as follows: References to the 29 volume Clerk's Transcript on Appeal will be designated by "CT" followed by the volume number and page number, separated by a colon. References to the seventeen series of Supplemental Clerk's Transcripts on Appeal will be designated by "Supp. CT" or "SCT." For the first series (which has no series number) this will be followed by the volume number within that supplement, a colon, and the page number. Supplemental CT series 2, 2-A, and 3 through

(Continued on next page.)

Steven Homick was arraigned on this Information on July 16, 1986. Ralph Novotney and James Barnes were appointed as counsel. Steven Homick entered pleas of not guilty to each count and denied all enhancement and special circumstance allegations. (SCT 12, Vol. 1:252-261.)

Over the next twenty-one months, a variety of motions were filed and heard. Included among these was a motion to dismiss, pursuant to Penal Code § 995, based on denial of substantial rights at the preliminary examination. That motion was denied by the Superior Court. However, on April 12, 1988, the Court of Appeal, Fourth Appellate District, issued an alternative writ of prohibition commanding the Superior Court to vacate its order denying relief and to enter a new order dismissing the Information. This order resulted from a finding that Steven Homick was denied a substantial right at his preliminary examination when the magistrate, during an ex pate hearing, directed a key prosecution witness to lie under oath in order to avoid revealing his status as a long-time informant for the Federal Bureau of Investigation. (See CT 22:6066-6089, a copy of the Court of Appeal opinion as published in the advance sheets, prior to an order that the

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7, 8-A and B, and 9 through 15, will be designated "Supp. CT" or "SCT" followed by the series number and a hyphen, the volume number within that series, a colon, and the page number. The series number will always be in decimal form, regardless of whether the actual transcripts use a decimal or a Roman numeral form.

References to the 149-volume Reporter's Transcript on Appeal (numbered "A-1" and then individually from 1-148, with several short volumes combined so that 2 volumes appear in single transcripts) will be designated RT followed by the volume number and page number, separated by a colon. Miscellaneous Reporter's Transcripts with dates but no volume number will be cited in the form "mm/dd/yy RT:[page number]."

opinion not be published.)

The case was refiled against all five defendants and subsequently, on November 30, 1989, Information # A973541 was filed in the Los Angeles County Superior Court charging Steven Homick with the same four counts and the same three special circumstances, but there were no allegations regarding a principal being armed with a firearm.[3] (CT 5:1317-1328.)

On March 6, 1989, during the period of time when Steven Homick was in Nevada, a severance motion was granted, ordering a separate trial for Stewart Woodman and Anthony Majoy. (RT A-1:A-195, A-208, A-214.) Thus, once Steven Homick was arraigned, subsequent proceedings included only him, Robert Homick, and Neil Woodman.[4]

Over the next thirty-three months, a variety of motions were filed and heard. Included among these were a considerable number of discovery motions (usually related to efforts to obtain documents from the Federal

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3 This Information charged on Steven Homick. When the case was initially refiled in the Municipal Court in 1988, Steven Homick was unavailable as he had been taken to the State of Nevada for trial on other charges. The other four defendants were held to answer after a preliminary examination and an Information was filed against them, without Steven Homick. When Steven Homick was returned from Nevada, he had a separate preliminary examination, leading to the present Information with the same case number that was being used for the other four defendants. Once Steven Homick had been arraigned in Superior Court, his case was treated as part of the same case as the other defendants.

4 On June 1, 1990, an amended Information was filed, naming as defendants Steven Homick, Robert Homick, and Neil Woodman. The two conspiracy counts had been combined into a single conspiracy count, some overt acts were amended and some were added, and the arming allegation was included in a summary of the charges, but not in the body of the Information. (SCT 1:42-53.)

Bureau of Investigation), a motion to suppress the fruits of a number of search warrants (see CT 10:2512 et seq. for the motion, filed by Robert Homick and joined by Steven Homick at RT 15:624 and RT 22:998), and motions regarding claims of former jeopardy, based on a related federal prosecution.[5] (See CT 14:3667, CT 14:3809, CT 23:6344.)

On July 9, 1992, the case was assigned for trial to Judge Florence-Marie Cooper. (CT 18:5038.)

Jury selection began on August 26, 1992 and concluded on October 9, 1992. (CT 21:5839, CT 22:5870.) The evidentiary portion of the guilt trial commenced October 14, 1992 and continued until jury deliberations began on March 26, 1993. (RT 21:5918; SCT 3:881.)

On April 2, 1993, during the sixth day of deliberations, the jury reported that one juror was unwilling to deliberate. (RT 133:16717-16718.) After questioning that juror (who turned out to be the foreperson of the jury) and other jurors, the court determined the juror was deliberating properly and ordered the jury to continue deliberating. (RT 133:16753-16758.) However, on the next day of deliberations, April 5, 1993, the foreperson left during a recess and never returned to court, leaving behind a note to the Court saying he could not continue to deliberate due to the bias and stupidity of the other jurors. The Court replaced him with an alternate juror and deliberations resumed. (RT 133:16763, 16803-16808.)

On April 19, 1993, on the eleventh day of deliberations after the juror

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5 The federal case alleged conspiracy and racketeering counts against Steven Homick and a number of other persons, based in part on the activities shown by the evidence in the present case, and in part on acts that occurred in other states.

substitution, the jury returned verdicts finding Steven Homick guilty of both counts of murder and of conspiracy, found both murders to be of the first degree, and found the firearm arming enhancement and all three special circumstance allegations against him. (RT 133:16842-16843.) Robert Homick was also convicted of both murders, in the first degree, but the jury was unable to reach a unanimous verdict on the conspiracy count. As to Robert Homick, the jury returned a true finding on the multiple-murder special circumstances, but was unable to reach a unanimous verdict on the other two special circumstance allegations. (RT 133:16845-16848, 16855-16856.) The jury was unable to reach any unanimous verdict in regard to Neil Woodman, and a mistrial was declared. (RT 133:16871.)

The People did not seek a death sentence against Robert Homick, and Neil Woodman had to undergo a new guilt trial, so Steven Homick was the sole defendant when his penalty trial commenced on 5/6/93. (SCT 4:1076.) Jury deliberations began on June 2, 1993. (SCT 5:1339.) On the third day of penalty deliberations, June 4, 1993, the jury reported that a unanimous decision could not be made. (RT 146:16468.) The new foreperson reported that one juror had made it clear she saw no way she could change her mind. (RT 146:18473.) After questioning a number of jurors, the Court concluded the one juror was deliberating properly but was simply disagreeing with other jurors. (RT 146:18489-18490.)

The jury was sent home for the weekend. (RT 1436:18491-18492.) On Monday, the Court changed its mind and decided that the juror was not deliberating properly (even though the juror insisted she was deliberating properly and no other juror ever contended she was not); the juror was replaced by an alternate over strong defense objection, and deliberations

began again. (RT 147:18509-18512, 18521-18523.) On June 9, 1993, the third day of deliberations after the substitution, a death verdict was returned. (RT 147:18529.) On January 13, 1995, the court denied Steven Homick's motion for a new trial and automatic motion for modification of the verdict and imposed a judgment of death.[6] (SCT 7:2165.)

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6 The prosecution's evidence in aggravation at the penalty trial consisted mainly of evidence relating to the murder charges for which Steven Homick had been tried and convicted in Nevada after his arrest on the present charges but before his guilt trial. Following the penalty trial, the imposition of judgment was postponed a number of times while a post-conviction challenge to the Nevada murder convictions was being pursued in Nevada. Thus, sentencing in California did not occur until 19 months after the penalty verdict had been reached.

STATEMENT OF THE FACTS

A. Guilt Phase Evidence

1. Introduction

The "story" contained in the facts of this case reads more like the plot of a popular novel or movie than an actual criminal trial. Indeed, before the trial had even begun, the two primary investigating officers signed a contract with an author intending to write a book about the case. The officers agreed to provide assistance to the author in return for $500 advances and a percentage of any book or movie profits. (CT 22:6010.) Before that book was ever written, and while the trial was in progress, NBC broadcast a 2-part four-hour movie about the case, adapted from a story by the wife of Stewart Woodman. (RT 112: 13470-13472.)

The prosecution theory was that two wealthy brothers, Stewart and Neil Woodman, took over a successful business that had been started by their father, Gerald Woodman. This takeover involved considerable acrimony and multiple lawsuits, and after the takeover was accomplished, the elder Woodman promptly started a competing business. According to the prosecution, at some point, the two brothers decided to have their parents killed, and they hired two other brothers, Steven and Robert Homick, to accomplish the task. The Homicks, in turn, allegedly hired Michael Dominguez and Anthony Majoy to assist them.

The great bulk of the prosecution evidence pertained to the Woodman family, tracing the relationships between parents and children over a number of years to show what the prosecution believed eventually led two brothers

to pay to have their parents killed. Even though Steven Homick played little or no role in the various events over these several years, the Woodman story must be fully understood in order to evaluate the evidence against Steven Homick. In particular, after being found guilty of murder with special circumstances in a separate trial, Stewart Woodman struck a deal with the prosecution to testify against his own brother, as well as both Homick's, in order to avoid a death sentence. Much of the prosecution case against Steven Homick rests on the testimony of Stewart Woodman. His life must be understood in some detail in order to properly assess his credibility as a prosecution witness.

2. Overview of the Guilt Phase Evidence

The Woodman family can be described as off-the-scale in both strengths and weaknesses. Gerald and Vera Woodman had three sons and two daughters, supported nicely by Manchester Products, a plastics manufacturing company started from scratch by Gerald Woodman and built into a very successful business. The two older sons, Stewart and Neil, started working for Manchester Products when they were still teenagers. At a surprisingly young age, Stewart was traveling around the country and even to England to generate sales of the company's products, while Neil was more proficient at overseeing work in the factory. The third son, Wayne, was the first in the family to go away to college.

Gerald Woodman did not like the idea of having property in his own name, so ownership of the company was divided between Neil, Stewart, and Vera Woodman; Vera owned half of the company and the two brothers each

owned a quarter.[7] It was understood that when Wayne finished college, he would also come to work for the company and would be given half of Vera's share of the company. In order to provide an inheritance for the daughters, and to assure that the company would remain in the hands of the brothers after the death of Vera, Manchester Products took out a $500,000 insurance policy on Vera's life. This would enable the company to buy her shares in the event of her death.

While all indications were that Neil and Stewart poured their hearts and souls into the business, Gerald Woodman was not an easy man to work for. Despite no formal ownership interest in the company, Gerald always took it for granted that he had total control, without the need for consulting the actual owners of the business. He never complimented his sons in public, but often berated them in front of other employees for any mistake or problem, real or imagined. Nonetheless, his sons remained loyal to him, accepting as their reward very high salaries and lavish fringe benefits instead of the open love or gratitude of a father.

Even aside from the relationship between the father and his sons, there was a dark side to Gerald Woodman. He was a compulsive gambler who frequently traveled to Las Vegas, gambling large sums of money. He also exploited the business for money, keeping large sums off the books and tax-free and having the company pay for personal items such as luxury cars.

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[7] One possible reason that Gerald did not own any of Manchester was that he had sold a similar earlier business, Lancaster Products to another company and had signed an agreement not to compete with them for five years. He started Manchester Products before the five years had passed. (RT 105:12134-12137.)

Eventually Wayne Woodman graduated from college and returned to take his place in the business as an equal. The two older brothers might well have accepted the fact that their brother had the same ownership share in the business and matched their salaries even though they had already devoted years of their lives to the business. However, all indications are that Wayne came up with one idea after another that cost large sums of money for improvements considered frivolous by his older brothers and other long-time employees of the business. Tension developed between the brothers, and Wayne started spending less and less time at the company, since being on the premises had become unpleasant for him.

Simultaneously, Gerald Woodman's health deteriorated seriously, forcing to take months off of working, and then to return in a part-time capacity. This enabled Stewart and Neil to finally take over the day-to-day running of the company without their father around to interfere or criticize. But eventually Gerald returned, determined to regain his control. To the great dismay of his older sons, Gerald remained convinced that Wayne, as the college graduate, should eventually be the one to run the company.

By this time, Stewart had long ago given up his life of traveling and stayed in the Los Angeles area with his wife and children, while continuing to generate great sales for the business over the telephone. That life seemed about to end when Gerald announced that he wanted Stewart to go back on the road, and he wanted Neil to stay out of the business offices and oversee the factory. He threatened to liquidate the business if his sons would not do as he commanded. Stewart and Neil countered by calling a shareholder's meeting that they alone attended, voting themselves a small amount of

additional shares for a nominal amount of money, and then used their greater-than-half ownership to fire their father and brother.

This quickly led to a lawsuit that pitted parents against children. The case went to trial and resulted in a judgment that allowed Neil and Stewart to buy the other half of the company.

Neil and Stewart finally had total control of the company, but they also had a large debt to pay. Also, they inherited their father's gambling and free-spending habits, and over the years they had nearly exhausted the company of its available cash. Then, Gerald and Wayne Woodman started a competing business with the proceeds of the court-ordered sale. As a cutthroat businessman, Gerald Woodman started with prices too low to make a profit and made generous job offers to long-time employees of Manchester Products. Within a year, Gerald and Wayne were bankrupt, but Neil and Stewart had to lower prices to accomplish that, so they had not seen the steadily rising profits they had experienced in the past. They also invested in a new plant and a major new piece of equipment that did not work as it was supposed to for several months, leading to a cash-flow disaster.

Neil and Stewart began falsifying financial records that were regularly given to the bank that financed the company, causing the bank to lend the company much more money than they would have loaned if they understood the true condition of the company. Eventually the bank suspected wrongdoing, performed audits, and cut off the cash flow demanding instead that the brothers rapidly repay a large portion of the debt.

Throughout the period of acrimony between the two sons and their father, employees and acquaintances regularly heard the brothers make comments about hating their parents and wishing they were dead. Also

during this period the two brothers became friendly with the Homick brothers, meeting Steven Homick in Las Vegas where he worked providing security to a gambling casino. Through Steven Homick, they met Robert Homick, a member of the California State Bar who lived in Los Angeles and shared Stewart Woodman's passion for betting on sports events.

The prosecution theory was that another Las Vegas contact eventually suggested to Stewart Woodman that Steven Homick could end the aggravation that Stewart's parents were causing him. This allegedly led to a series of contacts over a two-year period. One night, after returning from a large family gathering to celebrate the end of the Yom Kippur fast, Gerald and Vera Woodman drove into the gated underground parking area at their apartment building and were apparently surprised by an armed man who shot and killed them both. A neighbor saw a man dressed in black, wearing a black hood over his head, flee from the scene. He described the man as being dressed like a Ninja, and the press promptly dubbed the case the Ninja Killings.

Nearly two months after the killings, police were contacted by a man who had been hired by Steven Homick months before the killings to assist in providing security at a Bar Mitzvah for Neil Woodman's eldest son. This man alleged that Steven Homick had made a strange comment about the elder Woodmans which, in light of the subsequent killing, caused the man to feel that Steven Homick might have been involved. After attention focused on Steven Homick, police developed evidence that he had traveled from Las Vegas to Los Angeles and back just before and after the Woodmans were killed. Later, authorities learned that Neil Woodman made a wire transfer of

$28,000 to Robert Homick, soon after the Woodman brothers had received payment of the $500,000 proceeds of their mother's insurance policy.[8]

Nearly six months after the killings, Michael Dominguez was arrested in Las Vegas on an unrelated matter. He quickly sought to make a deal based on providing information about the Ninja murders. He gave a statement claiming that the Woodman brothers had hired Steven Homick to kill their parents, and that Steven Homick had employed his brother Robert, along with Dominguez and Anthony Majoy, to carry out the contract. Although Dominguez perfectly matched the description of the fleeing man dressed as a Ninja, and none of the other alleged participants were even close, Dominguez insisted he was not actually present when the killings occurred. Instead, he claimed he was blocks away at a bus stop, watching for the Woodmans to return home and contacting Steven Homick by radio to report when the Woodmans were almost home.[9] Within days, the Homick brothers,

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8 Once Neil and Stewart Woodman had purchased full control of Manchester Products, there was no longer any business reason to continue the insurance policy for Vera Woodman. Mrs. Woodman expressly requested the cancellation of the policy, but the brothers insisted on maintaining it. Thus, when Mrs. Woodman was killed, the proceeds of the insurance policy were not needed for the original purpose of buying her share of the company. Instead, this was simply an infusion of considerable cash into the cash-starved business. The prosecution argued this was a major motivation for the murders, even though their major witness, Stewart Woodman insisted that played no part in the decision to have his mother killed.

9 Notably, while denying Steven Homick's Penal Code section 190.4 automatic motion for modification of the death verdict, the trial court expressly conceded there was evidence suggesting Michael Dominguez may have been the actual shooter. (RT 148:18677.)

the Woodman brothers, and Anthony Majoy were arrested for the Woodman murders.

3. An Overview of the Format of the Detailed Statement of the Facts

Guilt phase evidence was presented over a period of more than five months, which consumed nearly 10,000 pages of transcript. Thus, the summary presented in the previous section is a very abbreviated one. In the following section, a very detailed summary of these events will be provided. Later, the argument portion of this brief will disclose many very serious evidentiary errors, often pertaining directly to the assessment of the credibility of Michael Dominguez and Stewart Woodman.

It will be shown that the undisputed evidence provides an unusual variety of reasons to greatly distrust anything that came from the mouths of Michael Dominguez and Stewart Woodman. Michael Dominguez was a career criminal known to be totally untrustworthy who gave information only after being promised that he would received a sentence that would allow him to be paroled in what he expected would be 8-15 years. He gave a number of statements which contradicted each other in important matters. After testifying at the preliminary examination, he became dissatisfied with his treatment by the prosecution and refused to testify at the federal trial.[10] At the present trial, his "testimony" was completely bizarre, consisting of obvious efforts to mock the court and the prosecutor, while failing to answer

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10 See footnote 5, supra, concerning the federal trial.

most of the questions. Describing the procedures that would be used in examining Dominguez, the trial court correctly stated, "This will be unique in the annals of the criminal jury trial system." (RT 87:9124.) The actual evidence at the present trial came from a mixture of his prior statements.[11]

According to the prosecution, Stewart Woodman paid to have his own parents killed, then turned on his brother in order to save his own life. The prosecution evidence makes clear that throughout his business life, Stewart Woodman lied to friends, family, creditors, customers, and anybody else who could benefit him.

Thus, there is ample reason to distrust both of these witnesses, but the results of the trial indicate the jury chose to believe at least one of them. Nonetheless, the case has to be considered close, in light of the numerous weaknesses in the testimony of these two crucial witnesses. A major theme throughout the argument portion of this brief will be that the many evidentiary errors were highly prejudicial and deprived Steven Homick of a fair trial. In order to clearly demonstrate how prejudicial these errors were, the facts will first be described based on all of the evidence except for the testimony of Michael Dominguez and Stewart Woodman. Then the testimony of these two witnesses will be summarized. In this fashion, it will

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[11] Extracting testimony from Dominguez was so tedious that Gerald Chaleff, trial counsel for one of the co-defendants (so experienced that he was the President of the Los Angeles County Bar Association while the case was in progress) stated after one of Dominguez' days on the witness stand, "Today is close to being the most arduous day I have seen in court." (RT 90:9632.)

be clear precisely how thin the case was without them, and how important they are to the conviction of Steven Homick.

4. A Detailed Summary of the Guilt Phase Evidence

a. The Woodman Family Relationships and Manchester Products

Vera Woodman had three sisters, Muriel Jackson, Gloria Karns, and Sybil Michelson. The sisters were very close and communicated often. Their father, Jack Corvelle, became business partners with Gerald Woodman. Their business started in the mid to late 1960s as a door business, and eventually became a plastics business. When Corvelle died, Gerald continued with the business. At one point it became a boat company called Lancaster Products. (RT 72:6226-6227.) In the early 1970's, Gerald brought his two older sons, Neil and Stewart, into the business. (RT 71:5987.)

In 1975, Gerald started Manchester Products. One of Vera Woodman's sisters, Gloria Karns, loaned $100,000 that she had inherited when her father died, to Vera and Gerald to help start Manchester Products. The loan was due in 5 years. In the meantime, Ms. Karns received interest payments, a salary from Manchester Products of about $1,000 per month, and health insurance coverage. (RT 72:6130-6131.) Gerald and Vera's sons, Neil and Stewart were brought into Manchester Products as co-owners; a third son, Wayne, was still in college in 1975. (RT 72:6228-6229.) Gerald Woodman did not want any of Manchester Products to be in his name, so

Vera Woodman owned 50% of the company and Neil and Stewart each owned 25%. (RT 76:7023, 79:7652.)

In early 1977, Gerald Woodman hired Rick Wilson as a sales representative. Wilson described Gerald Woodman as absolutely in charge of the company and in control of his sons. Gerald was President of the company. Stewart was a Vice President and was in charge of sales. Neil was Vice President in charge of manufacturing, and was also the Secretary-Treasurer. Gerald was a good businessman, but he was also a hard and ruthless businessman. (RT 76:6931-6934, 7023.)

In 1980, the $100,000 that Gloria Karns had loaned to Manchester Products came due. Satisfied with the return she had been receiving, Ms. Karns renewed the loan for another 5-year term, in the amount of $95,000. (RT 72:6132, 72:6169-6170, 76:7083.)

Vera Woodman was a shareholder in Manchester Products. In October 1980, the company purchased insurance on Vera's life so the company would be able to buy her shares when she died, with the proceeds then going to the Woodman's two daughters, so they would have an inheritance while the sons would still own the business. (RT 72:6234-6236, 73:6355-6356.)

In mid-1978, Wayne Woodman graduated from college and started working for Manchester. Wayne did not invest any money in Manchester, and was given a 25% ownership interest, the same as Neil and Stewart each had. (RT 76:6934-6935, 79:7651, 7653, 7692.) He started at the same salary

his brothers were earning, $125,000 per year plus expenses.[12] (RT 76:6985.) Sales Representative Rick Wilson thought Neil and Stewart seemed bitter and disappointed. As a college graduate, Wayne thought that he knew more than those who had been involved in the business for years. Wayne immediately started arguing with his brothers, his father, and Rick Wilson about the day-to-day running of the company. Gerald often ended up taking Wayne's side. (RT 76:6936-6937.)

According to Rick Wilson, Wayne Woodman spent $50-60,000 to redesign the company logo. Wayne was supposed to be in charge of freight trafficking and accounts receivable, but he kept interfering in sales, where he had no expertise. He was alienating customers. He was very abrasive and would upset good clients when they had past due balances, to the point where they would not do repeat business with Manchester. He tried to intimidate freight trafficking companies. He interfered in every part of the business. (RT 76:6981-6982.)

However, in late 1979, not long after Wayne's arrival, Gerald Woodman suffered a heart attack in late 1979 and had to take a less active role in the business, coming in only in the mornings. Stewart and Neil gradually took charge of running the business, and Wayne was less

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12 The "expenses" that went with the high salary were quite generous. As later explained by future Manchester Controller Steven Strawn, it was common to run personal expenses through the company. When Strawn was hired he was given a new BMW, later replaced by a new Mercedes. He had an expense account he could use as he pleased, without any need for justification. (RT 77:7277-7278.) The company paid for country club memberships, lunches, and dinners. Autos bought by the company were detailed and maintained at company expense. (RT 77:7333.)

influential. (RT 76:6938, 6980, 79:7654.) From Wayne's perspective, disputes over who was in control and difficulties in personal relationships made it impossible for him to continue working at Manchester. (RT 79:7654-7655.)

In February, 1981, about a month after Gerald's health forced him out of any active involvement in the management of the company, Steven Strawn was hired to be the credit manager, in charge of collecting accounts receivable. (RT 77:7169-7170.) Strawn worked with Stewart Woodman on a daily basis. Eventually he was promoted to an office manager position. (RT 77:7171, 79:7654.)

Strawn was actually hired by Wayne Woodman. He quickly noticed the disputes between Wayne and his brothers. Sometimes it appeared to be Wayne versus everybody else. Wayne constantly reminded others that he was a college graduate. (RT 77:7300-7301.)

Manchester Products still appeared to be successful. However, in 1981, Neil and Stewart came to Muriel Jackson's home to speak to her husband Lou alone. Muriel Jackson learned afterward that Vera and Gerald had essentially been locked out of Manchester Products. Vera and Gerald had both been receiving a salary, a car allowance, and health benefits, but all that suddenly ended, and Gerald stopped working for Manchester Products. (RT 72:6229-6232.)

This all resulted from a Board of Directors meeting that Neil and Stewart held without Gerald.[13] (RT 72:6234.) Rick Wilson had learned from

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13 The Board of Directors of Manchester consisted of Gerald, Neil, and Stewart Woodman. Thus, Neil and Stewart had enough votes to

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Wayne Woodman that Gerald Woodman planned to send Stewart back on the road, and tell Neil to stay in the plant. This would allow Wayne to take over the company.[14] Wilson tipped Stewart Woodman about these plans, and that led to the ouster of Gerald and Wayne. In late 1981, Gerald and Wayne instituted a Corporations Code section 2000 lawsuit that divested Vera and Wayne of their ownership interest and allowed them to get their capital from the company. In a March or April 1982 judgment, Neil and Stewart were required to pay them $675,000, which they borrowed from Union Bank. (RT 76:6983-6984, 7087, 79:7657.)

After Neil and Stewart were able to buy out the rest of the interest in Manchester Products, Stewart became Chief Executive Officer and Neil became President. Rick Wilson became the Vice-President and Steven Strawn was the Controller, overseeing accounts receivable and customer shipments. This 4-man management team met daily, usually at a 90 minute working lunch. (RT 76:6938-6940.) Cash flow was a major topic at the daily lunch. Neil and Stewart had borrowed $700,000 from Union Bank to buy out Wayne and Vera Woodman's share of the company; Manchester's debt had

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control the board. They voted to add a small amount of their own money to the company and issue themselves additional shares, giving them just over 50% control of the company. This allowed them to terminate Gerald and Wayne as employees of the company, cancel their health insurance, and end their car allowance. (RT 79:7655-7657.)

14 Wayne went to his father in August 1981 and told him he could not tolerate the many disagreements, and that going to work had become a substantial burden. (RT 79:7698.) At that time, Wayne was 23 or 24, drove a new Cadillac El Dorado, and was receiving a salary of $100,000 per year. (RT 79:7713.)

grown to a point that the company needed $40,000 per day in gross sales to be able to service its debt and stay in business. (RT 76:6943-6945.)

After Gerald and Wayne Woodman left Manchester, they took the buyout money, mortgaged Gerald and Vera's home, and started Woodman Industries in Pacoima in August 1982, in direct competition with Manchester Products. They made the exact same items Manchester made. They had the exact same machines. Rick Wilson described the relationship between the two companies as "war." Manchester Products lost business it desperately needed to pay its increasing debt. Some of Manchester's salespeople and manufacturing employees left and went to work for Woodman Industries. One such employee was Warren Kemp, who knew all of Manchester's accounts nationally. Gerald Woodman knew Manchester's way of business and its customers. He was a tough businessman. Neil Woodman was disgusted at these events. Gerald Woodman had always told Neil, Stewart, and Rick Wilson to hate the competition and seek to crush them. When Gerald Woodman started his business, that was the attitude his sons and Rick Wilson took toward him. (RT 76:6966-6970, 6986, 79:7669.)

Manchester quickly obtained a copy of the price list from Gerald Woodman's new business, and then reduced their own prices so they would be 20-25% below Woodman Industries' prices. This still left Manchester a profit, but a very small one just when they had the extra expenses to pay back the loan needed to buy out Vera and Wayne Woodman's shares of the company. (RT 76:6976-6977.)

Twyla Morrison had been hired by Stewart Woodman in 1980 as one of about a dozen outside salespersons. She was usually on the road, but attended some meetings of all sales staff, either at the plant or in Las Vegas.

Such meetings were both for business and social purposes. Neil and Stewart acted as joint owners of the company and generally both attended sales meetings, even though Neil was the production manager. (RT 72:6082-6085.)

At some point, Gerald Woodman offered her a similar position at his new company with a more attractive financial package, but she turned it down because she did not believe his business would succeed. However, other Manchester sales persons did go to work for Gerald Woodman. (RT 72:6087-6089, 6097.) As a Manchester Products sales person, she was told to lower prices and even give the product away in order to avoid losing any accounts to Gerald Woodman. As had Rick Wilson, she described the competition between the brothers and their father as being like a war. (RT 72:6090.)

Steven Strawn also recalled a panicked response at Manchester to the formation of Woodman Industries. Manchester responded with aggressive counter-measures. Aside from lowering prices, Manchester tried to pressure freight companies and mutual suppliers to decline to do business with Woodman Industries. Strawn heard both Neil and Stewart engage in such tactics. (RT 77:7192-7194.) Employees were told that if they chose to leave Manchester to work for Gerald Woodman, they would have no jobs to return to after Woodman Industries went out of business. Freight companies were told Manchester would stop doing business with them if they did anything for Woodman Industries. (RT 77:7195-7196.)

Once Vera Woodman was no longer a shareholder in Manchester Products, she expressed some concerns to her sister, Muriel Jackson, about the insurance policy the company held on her life. Muriel discussed this with

her insurance agent, Harold Albaum, who was also Manchester's insurance agent. Harold said he would try to do something about the policy. A few weeks later he reported he had talked to Neil and Stewart, but had been unsuccessful. (RT 72:6236-6241.) Muriel then spoke to Stewart about this herself several times, telling him his mother was terribly upset about the continued policy on her life. Finally, in a last-effort phone call, Muriel told Stewart he would never be able to forgive himself if he benefited from the death of his mother. Muriel then heard Neil Woodman come on the phone line, say "Look at the odds," and laugh.[15] Muriel felt sick and hung up. (RT 72:6245-6249.)

Subsequently, Muriel wrote to the insurance company and then to the California Commission of Insurance, but the policy remained in force. (RT 72:6250-6253.) Muriel received a copy of a letter Stewart wrote to the insurance company, explaining that Manchester wished to keep the policy in force and that any correspondence about canceling the policy should be ignored.[16] (RT 72:6252-6256.)

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15 Although Neil Woodman may have put it crassly, Manchester's Controller Steven Strawn agreed that it was a good business investment to keep the policy in force. Vera Woodman was elderly and not in good health. Unless she survived another thirty years, Manchester's annual premium payments would be well-worthwhile from a business standpoint. (RT 77:7210.) However, Strawn noted that the brothers also wanted to keep the policy in force simply to irritate other family members. (RT 77:7211.)

16 Since Manchester Products owned the policy, it had control over the policy. It could decide to cancel the policy, but Vera Woodman could not. Such policies were very common, to allow companies to buy back stock from heirs when a shareholder died. Under the law, the owner of the

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Woodman Industries went bankrupt in June 1983, just 10 months after it started. Gerald and Vera lost everything, including the beautiful home in Bel Air they had mortgaged to help start the new company. After the bankruptcy, they had to move into a condominium at 2311 Roscomare Rd., with their younger son, Wayne, and Wayne's family. Soon after that, Wayne's condominium also had to be sold because of the bankruptcy. Wayne's family moved to a duplex at 8420 Blackburn and his parents moved to an apartment of their own on Gorham Avenue. (RT 72:6232-6233, 73:6300, 76:6987, 79:7672-7676.)

Back in 1980 or 1981, when Gloria Karns had become aware of the dispute between Gerald Woodman and his two sons, Ms. Karns sided with Vera and Gerald. Eventually, Ms. Karns became concerned about the security of her loan to Manchester Products and she asked Neil and Stewart for collateral. That made them angry and they refused. Matters worsened when a dispute arose over payments that Ms. Karns felt were due. Ms. Karns began suing Manchester Products monthly in small claims court after Stewart said she would never see her money again.[17] Eventually Manchester

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policy was required to demonstrate such an insurable interest in order to purchase this kind of policy. However, once the policy was in force, there was no continuing requirement to demonstrate an insurable interest. (RT 73:6324-6328, 6345, 6354.)

The policy was a term insurance policy in the amount of $500,000. The annual premium increased each year and had gone from $2,115 in 1980 to $6,525 in 1984. (RT 73:6324, 6331-6332.)

17 Gloria Karns did nothing for Manchester Products to earn the salary she was receiving, or to justify the employee health benefits. She described this as just Gerald Woodman's way of taking care of her.

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Products filed a lawsuit against Ms. Karns in Superior Court, to stop her from filing monthly suits in Small Claims Court and to challenge the claim that they owed her any further interest payments. (RT 72:6132-6135, 6178-6179, 76:7083.)

Prior to 1983, Manchester Products was located on Mason Street in Redondo Beach. In 1983, Manchester moved to a new plant on Prairie Street, in Chatsworth. (RT 71:5986-5987.)

When Manchester's new plant on Prairie Street was built in 1983, it was accomplished by a partnership that Neil and Stewart formed with a real estate developer, Edward Saunders, along with Saunders' uncle and cousin. The Woodman brothers owned 50% of the partnership and the others owned the remaining 50%. One hundred percent financing was arranged to build the plant, a factor that was crucial to the Woodman brothers in view of apparent cash flow problems. Once the plant was built, Manchester paid $25,000 per month to the partnership as rent, and the partnership used that money to make payments on the loan.[18] (RT 72:6189-6196.)

After the move to the new plant, another problem plagued Manchester. The company purchased a new plastic extruding machine at

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Sometime in 1982, after Gerald had left the company, the monthly salary and health benefits stopped. In 1983, the quarterly interest payments also stopped. Manchester argued that, in light of the unearned salary and health benefits she had been receiving, no more interest was due on the loan. (RT 72:6168-6172, 6180, 76:7101-7102.)

18 The rent payments and the mortgage payments were the same amount. Thus, the partnership only made a profit if the value of the property appreciated. (RT 72:6205.)

great expense, to make polycarbonate and expand its sales. However, the machine did not operate properly for the first six months, decreasing production just when the company needed to increase its cash flow. (RT 76:6945-6948.)

In April 1984, Manchester's lawsuit against Gloria Karns over the interest payments on her loan to Manchester went to trial. The court ruled in Ms. Karns' favor. (RT 76:7085.) Manchester was ordered to resume monthly interest payments, to pay 17 or 18 thousand dollars in back interest, and to pay the full $95,000 note on its due date, September 29, 1985. (RT 76:7092-7095, 7103-7104.)

Manchester's Controller, Steven Strawn, concluded in 1984 that the company was unstable. The company was not able to pay its bills on time. Receivables were not being collected in a timely fashion. (RT 77:7200-7201.)

Manchester Products had a credit arrangement with Union Bank through which the bank would advance cash to the company based on their accounts receivable. When Manchester made sales it would submit copies of the invoices to the bank and the bank would loan 80% of the amount of the sale. Then when Manchester was paid by the customer, it would repay the bank. This was a common method of financing for manufacturing companies, allowing the manufacturer to pay its suppliers prior to being paid by its own customers. (RT 74:6685-6687.)

When accounts receivable are not paid by their due date, the more time passes without payment the less valuable they become as collateral. Standard practice was for Manchester to give their customers up to 60 days to pay their accounts. The bank would allow the account to be used as

collateral for another 90 days after that, for a total of 150 days. If an account remained unpaid longer than that, it became ineligible to serve as collateral and was subtracted from the borrowing base. That could result in an existing loan becoming over-advanced. (RT 75:6708-6709.)

In early 1984, Diane Eng was the loan officer overseeing the Manchester account, and she reviewed the account because it was time for renewal of the credit arrangements. She became concerned that accounts receivable were being paid more slowly than in the past. She requested a special audit in order to obtain some specific information she needed to determine whether to renew the credit arrangement. Manchester responded affirmatively to the special audit request, but then refused to cooperate when the auditors arrived. This caused further concern and Ms. Eng arranged a meeting with Neil and Stewart Woodman. (RT 76:7063-7070.)

She met the brothers at the plant and they again agreed to cooperate with the audit. The special audit was performed about a month after the original attempt. Ms. Eng was still left with some concerns and did not feel the audit had been thorough enough. In June 1984, she left her position at the bank. At that point she did not feel she could recommend renewal of the line of credit, so it was temporarily extended pending further investigation. (RT 76:7071-7072.)

After Ms. Eng left the bank, Union Bank auditor John Strayer was assigned to the Manchester Products account. He took over the responsibility to review Manchester's monthly 300 page computer printout summarizing the status of all current accounts receivable. (RT 74:6688-6690, 75:6706.)

Around the time that Strayer took over the account, the bank was becoming concerned about the failure of Manchester's customers to pay

them on a timely basis. Strayer started reviewing the monthly reports more closely and discovered that Manchester was changing invoice due dates from one monthly report to the next, thereby keeping receivables eligible to be collateral for a longer period than the bank rules intended. In this way, Manchester was misrepresenting the collateral for the loans. (RT 75:6710-6711.)

By late 1984, Strayer determined Manchester monthly reports typically indicated that 2 or 3% of the accounts receivable had become ineligible to be used as collateral, but the true situation was that 33% had become ineligible. As a result, the total amount of credit that had been advanced to Manchester was more that $1 million higher than what was justified by the true collateral.[19] Strayer promptly met with Neil and Stewart Woodman and implemented two changes, pending a more thorough audit. First, Manchester was required to present cash receipts verifying which customers were paying which accounts. Second, 10% of all cash receipts

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19 According to Rick Wilson, the accounting improprieties were instituted by Controller Steve Strawn, acting at the direction of Neil and Stewart Woodman. Another example of the kinds on maneuvers practiced by Manchester occurred when it received an order from the government for over $100,000 worth of high impact acrylic for jet airplane windows. When the specifications came in it was clear the contract called for a different type of material than Manchester was able to produce. The $100,000 invoice was still sent on to the bank to support additional credit, even though the product would clearly never ship. (RT 76:6949-6952.)

Strawn acknowledged that he participated in these activities at the direction of the Woodman brothers. (RT 77:7204.) He believed that no more than 10% of the accounts were altered, but the false information represented about 1/3 of the dollar amount claimed to be available as collateral to support the line of credit. (RT 77:7214-7215.)

were to be used to reduce the amount of credit that had been over-advanced. (RT 75:6724-6725.)

According to outside salesperson Twyla Morrison, through 1984 and 1985, Manchester fell further and further behind in paying her on time, but Stewart kept reassuring her the company was not in trouble. (RT 72:6094-6097.) By 1985, the monthly rent payment from Manchester to the partnership that owned its plant was regularly late. The tardiness worsened over time. Edward Saunders had to call Stewart each month to ask for the payment, and Stewart indicated he was waiting for money to come in. (RT 92:6197-6198.) However, the rent payments were due on the 1st of the month and the mortgage payment was due the following 25th of the month; the tardy rent payments were never so late that they caused a tardy mortgage payment. (RT 72:6205-6206.)

By mid-1985, Rick Wilson believed Manchester's financial condition was hopeless. Production was still unstable, sales were being lost, and the company did not have the cash flow to pay the $100,000 judgment won by Gloria Karns. Union Bank was planning to conduct an audit, and it was clear that if the bank dug deep enough, many discrepancies would be uncovered. (RT 76:6952-6955.)

Neil Woodman decided to solve the audit problem by installing a bugging device in the office the bank auditors would be using. Then, anybody in Neil's office could hear the auditors discussing the invoices and the information they would want to verify. Neil, Stewart, Rick Wilson, and Steve Strawn all listened to the auditors. This allowed them time to pull the documents the auditors would be asking for and change the shipping dates to match the invoice dates. (RT 76:6955-6959, 77:7206-7208.)

Despite the bugging efforts, the Union Bank audit showed $1.7 million in ineligible invoices. The bank then demanded additional collateral to secure the loan. The bank obtained trust deeds to the homes of both Neil and Stewart Woodman. The Woodmans were also required to submit proof of delivery to verify that the items shown on invoices had been delivered to customers.[20] Both Neil and Stewart agreed to cut their salaries in half, injecting $85,000 into the company. By early 1986, they put another $200,000 in cash into the company. (RT 75:6727-6729.) Throughout these events, the bank continued to extend credit to Manchester, reasoning that it was better to keep the company in business and hope that eventually all of the loaned money could be recovered. (RT 75:6769.)

Meanwhile, in July 1985, Rick Wilson left Manchester Products and moved to Arizona. (RT 76:6992.) Wilson resigned after Neil Woodman accused him of trying to steal Manchester customers.[21] (RT 76:7001-7003.)

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20 Jack Ridout, owner of E.J.R. Plastics, one of Manchester's biggest customers and a close friend of Stewart Woodman's, recalled receiving monthly forms from Manchester to verify the amount of money his company owed Manchester. Once he told Stewart he could not sign the form because it was not accurate. Stewart asked him to sign it anyway, as a favor from a friend. (RT 75:6844-6845, 6870.) Ridout refused to sign the form because he believed it would have been fraud, since the amount shown was not anywhere close to his true debt to Manchester. (RT 75:6866.)

21 Wilson maintained he voluntarily left Manchester, and that he was not trying to steal any Manchester customers, but was merely suggesting where to buy items that Manchester did not produce. (RT 76:7001-7005.) However, Steven Strawn testified that Wilson was fired after he was overheard on a crude bugging device telling a client not to order products from Manchester now, but to wait until Wilson got to his new company. (RT 77:7271-7272, 7277.)

b. Neil and Stewart Woodman's Expressions of Their Feelings about Their Parents and Brother, and Related Comments

Fred Woodard started working for Gerald Woodman in 1959, as a general laborer in an aluminum sliding glass door business. That evolved into a plastics manufacturing business, and eventually became Manchester Products in 1975. By then, Woodard was the plant superintendent. (RT 71:5984-5985.) At times, Gerald would holler at people. (RT 71:5995.)

Fred Woodard worked with Neil and Stewart for a number of years. Now and then he heard them express hatred for their father, but he took that with a grain of salt. However, one occasion that occurred after the move to the new plant on Prairie stood out in Woodard's memory. After Stewart completed a phone conversation in his office, he stated, "The old man is still fucking with us." Neil responded, "We ought to just kill the old bastard and be done with it." This made Woodard feel uneasy and he left Stewart's office.[22] (RT 71:5987-5990.)

Prior to their marriage, Woodard's wife, then known as Nancy Housel, worked on the order desk at Manchester from 1977 until early

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22 However, Neil Woodman's use of such expressions were not limited to his father. According to Rick Wilson, Neil had a temper and was always threatening people. When he was frustrated or angry, his manner of communicating was to say "I will kill you if I do not get what I want," or that he knew people in high places. (RT 76:6995.) Steve Strawn also recalled multiple incidents of hearing Neil on the telephone saying things like "I will kill you if you do not do what I want." (RT 77:7295.)

1981.[23] She was hired by Gerald Woodman and came to know Neil and Stewart. During that time period, she could recall 5-10 occasions when she heard Neil Woodman make statements about killing someone. The one that stuck in her mind the most was "We should just kill the bastard and be done with it." She heard Neil make negative comments about his parents on a weekly basis. These comments were typically made in the room containing four order desks, with other employees also present. The comments typically came in a statement Neil would make to Stewart, that could easily be heard by others in the room. (RT 71:5998-6003.)

On another occasion after Gerald Woodman had left Manchester, Ms. Housel recalled that Stewart received a call informing him that his father had suffered a heart attack. Stewart told Neil and his response was, "So what?" (RT 71:6006.)

In mid-1981, after Gerald and Wayne had been forced out of the company, Wayne and some other family members went out to dinner to celebrate the birthday of Wayne's wife. One of Wayne's sisters, Hilary, had mentioned to Stewart where the family was going for dinner. After dinner, Wayne's Cadillac, which was owned by Manchester Products, was missing from the parking lot. Stewart had given Wayne no request for the return of the car or warning it would be repossessed. Wayne never got the car back. (RT 79:7714-7715, 7726-7727.)

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23 Nancy Housel Woodard never worked at the new plant on Prairie. When she left Manchester, she went to work for Gerald Woodman at his new business. (RT 71:6008.)

According to outside salesperson Twyla Morrison, it was public knowledge that the brothers did not get along with their father. She recalled hearing both brothers express malice and hatred toward their father, but could not recall specific incidents. (RT 72:6092-6093.) However, she did recall telling the police that a typical statement that Stewart would make was that he had dreamed that his father was beaten to death with his mother's face. (RT 72:6103.) Neil made statements about his parents similar to the ones Stewart made. (RT 72:6105-6106.)

Catherine Clemente was the receptionist for Manchester Products at the old plant on Mason, working there from April, 1982 until April, 1983. (RT 73:6418.) She frequently heard Neil and Stewart make unflattering comments about their parents. They did this jokingly; it seemed funny to them that they did not like their parents. They enjoyed putting their parents down and talked about how much grief they could cause them. Ms. Clemente perceived this as a serious hatred, although it amused the brothers to cause grief for their parents. Once, Stewart said they had called OSHA to report that Gerald Woodman's plant was substandard. (RT 73:6425-6427.)

Manchester employee Steven Strawn heard Neil and Stewart Woodman make statements about hating their parents, hoping their parents would go out of business, and hoping they would die prematurely. (RT 77:7191.)

Diane Eng was a Union Bank Loan Officer who oversaw the Manchester Products account from 1982 to 1984. Sometime after she was assigned to the account, she visited the plant with her supervisor, Klaus Riesz. When she met Neil and Stewart Woodman, they were reviewing some kind of transcript and were referring to their father, Gerald Woodman, as

crazy. They were pointing to specific statements their father had made in the transcript. This went on for fifteen minutes and did not strike Ms. Eng as appropriate behavior for a business meeting. (RT 76:7063-7067.)

On another occasion when Ms. Eng and her supervisor met with the Woodman brothers, the brothers had learned that Gerald Woodman was trying to obtain a loan through a different branch of Union Bank. The brothers repeatedly tried to persuade Ms. Eng's supervisor to contact the other branch and convince the loan officer to deny the loan sought by Gerald. (RT 76:7073-7074.)

Sales Manager Rick Wilson was another Manchester Products employee familiar with Neil and Stewart's negative feelings about their parents. Neil expressed his hatred and bitterness toward his parents on a daily basis. Stewart expressed disappointment and feelings of being hurt. After Woodman Industries went bankrupt, Neil Woodman bragged that he had broken his parents. Wilson went so far as to warn the brothers not to talk like that so openly, because if anything ever happened to their parents, they would be in trouble. Wilson believed every Manchester employee knew of Neil's hatred toward his parents. Stewart also made such statements in front of employees. (RT 76:6964-6966, 7043.)

Wilson also noted that Stewart told him he was deeply disappointed in his father, but understood why his father did what he did. Stewart said he understood the way his father felt better than he understood why his mother sided with his father. (RT 76:7022.) Wilson had never heard Gerald Woodman express any hatred toward his sons. (RT 76:7042.)

Edward Saunders, who was the Woodman brothers' partner in the venture to build the new plant on Prairie Street, recalled a number of

occasions when both Woodman brothers commented that they hated their parents and wished they were dead. Sometimes this occurred when a number of people were present. Once Stewart said he wished both his parents would be killed in a head-on collision. Saunders would tell Stewart he could not believe Stewart really wanted his parents dead. Stewart would reply, "I am serious."[24] (RT 72:6198-6202, 6209.)

Jack Ridout owned E.J.R Plastics in San Diego and bought materials from Manchester Products, starting in 1982. By 1984 or 1985, E.J.R. Plastics had become one of Manchester's largest accounts, and Ridout became close friends with Stewart Woodman. Ridout regularly stayed in Stewart's million dollar home when he was in Los Angeles. He had met Neil Woodman, but did not deal directly with him very much. (RT 75:6814-6820.)

Once in late 1984 or early 1985, Ridout was at the Manchester plant in Stewart's office and Neil was also present. During a conversation about a 2-year long child custody battle Ridout had been having with his ex-wife, Neil made an off-the-cuff statement that Ridout did not have to worry. He could have his ex-wife "hit" and all of his problems would be over.[25] (RT 75:6821-6823, 6834-6835.) Ridout also knew that the Woodman brothers

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24 Although both brothers made such statements, most of Saunders' contacts were with Stewart, and he only met with Neil on a couple of occasions. The comments were made during the time that the lawsuit between the brothers and their parents was pending. The comments were mainly in regard to how their father was trying to ruin their business. (RT 72:6207-6209.)

25 This specific statement was admitted only against Neil Woodman, and not against Steven Homick. (RT 75:6877-6878.)

did not like their parents. Stewart talked about his dislike for them a lot, and it seemed like an obsession. He seemed to hate his father more than his mother. (RT 75:6823-6824.)

William Blandin started working for Manchester Products as a salesman in October 1983. He was hired by Stewart Woodman and considered him a friend, but he was not that close to Neil Woodman. Initially, he spent only a day or two per week in the office and was on the road the rest of the time. He mainly interacted with Stewart and with the sales manager, Rick Wilson. In May or June 1985, after Rick Wilson left Manchester, Blandin was promoted to sales manager and then spent most of his working time in the office and reported directly to Stewart. (RT 72:6044-6047.)

Blandin recalled that sometime in 1985 or early 1986, Neil Woodman changed the office policy in regard to incoming phone calls from sales people in the field. Although Stewart was in charge of sales and Neil was in charge of production, Neil directed that calls from sales people should go directly to Neil. If Neil was not available, such calls would go to Blandin. This new policy was due to Stewart's health problems, involving high blood pressure and excessive weight.[26] (RT 72:6048-6049, 6056.) However, in general the two brothers appeared to be equals in running the business, rather than one or the other being in charge. (RT 72:6054.)

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26 Blandin explained that when Stewart answered calls, he sometimes got excited and yelled at customers or his own sales people. Neil wanted to keep Stewart off the phone to keep Stewart from making himself sicker. (RT 72:6056.6057.)

Blandin also recalled hearing a number of conversations about Gerald Woodman. Gerald was often made the butt of a joke, and was typically referred to as an asshole. (RT 72:6047-6048.)

Meanwhile, in February 1984, Vera Woodman's sister, Gloria Karns, was at her attorney's office for a deposition in regard to her pending lawsuit against Manchester Products. Neil Woodman was also present. At one point Ms. Karns' attorney left the conference room and she was alone with Neil, his attorney, and a court reporter. Neil made reference to the January 1982 issue of Los Angeles magazine, which was lying on a table. Neil flipped through the magazine to a story about hit men, turned the magazine toward Ms. Karns, so she could see a story entitled. "This Gun for Hire." Speaking to his attorney loud enough for Ms. Karns to hear, Neil said, "When somebody annoys you, you can look in a magazine and find someone to stop them annoying you." (RT 72:6161-6166, 6183.) Ms. Karns claimed to be shocked by this, but she acknowledged that after his comment, Neil simply closed the magazine and the deposition resumed. (RT 72:6185.)

Sometime in the first half of 1985, Gary Goodgame attended a Bar Mitzvah. Stewart Woodman attended the same Bar Mitzvah and ended up seated at the same table as Goodgame. They were engaged in conversation for a period of 1-1/2 to 2 hours. Goodgame had never before met Stewart Woodman. Goodgame's wife had heard that Stewart's yellow Rolls Royce had been stolen and she asked Stewart about that. Stewart responded, "Yes, my god damn fucking father stole my Rolls Royce," Stewart also said his father was in a competing business, was trying to put him out of business, and that he hated his father. (RT 71:6013-6016.)

c. The Relationship Between the Woodman Brothers and the Homick Brothers

1). Robert Homick's Background

Robert Homick lived in an apartment at 1523 Corinth, #9, with a roommate, Hassan Abdullah, from 1976 until 1986. When Robert moved into the apartment already rented by Abdullah, Robert was an unemployed UCLA law student. He always paid his share of the rent and other bills on time and in cash. (RT 94:10046-10048.)

Eventually Robert graduated and passed the California Bar exam, but to Abdullah's knowledge he never actually practiced law. He did some work serving legal documents, and was also employed by Security Pacific National Bank for a few months in 1984. Abdullah described Robert as a very friendly, bright, intelligent, and social roommate. Paradoxically, he seemed to have few social skills in dealing with other people and preferred a reclusive, hermit-like lifestyle. He spent most of his spare time alone in the apartment, usually in his own room, which was very cluttered with books and magazines. (RT 94:10048-10051.)

Abdullah answered occasional calls from Robert's brother, Steven, and met him 2 or 3 times. Some messages for Robert from a variety of other people made little sense unless they were construed as gambling lingo. The messages would be something like "Rams minus 3, Giants plus 10." Many such messages were from someone named Stu. (RT 94:10057-10059, 10064.) Robert was called "Jesse" by his close friends and relatives (RT 94:10065.)

Robert received mail under a variety of names, including National Collections. (RT 94:10070.) Robert rarely had friends over, and when Abdullah's friends were at the apartment Bob would be cordial, but not very talkative except for offering opinions about sports or politics. (RT 94:10071.) Robert watched a lot of sports on television, especially football, but also baseball and basketball. (RT 94:10076-10077.)

2). Visits by Robert or Steven Homick to Manchester Products

Shortly after Gerald Woodman left Manchester Products, Rick Wilson saw Robert Homick's brother, Steven, at the old Mason Street plant. Stewart and Neil had hired Steven Homick to sweep the plant for any bugging devices that might have been planted there by Gerald Woodman.[27] This was

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27 According to Rick Wilson, after the family break-up Neil and Stewart Woodman were also concerned that their father would surreptitiously enter the Manchester plant and damage the machinery. (RT 76:7017.) Later, after Manchester moved to the new plant, Stewart told Wilson he feared his father would try to blow up the plant. (RT 76:7039-7040.) No such retaliation by Gerald Woodman ever actually occurred. (RT 76:7042.)

However, Steven Strawn did witness an incident at the old plant when he was working there on a weekend. He noticed a car that looked like Gerald Woodman's drive by, in a cul-de-sac where it was rare to see cars on the weekend. He called Stewart Woodman to report that Gerald was apparently scoping out the plant. Shortly afterward, Strawn heard a shot and then discovered the window of Strawn's car had been knocked out. (RT 77:7281-7283.)

in July 1981, and was the first time Rick Wilson met Steven Homick.[28] On another occasion, while still at the Mason Street plant, Stewart Woodman introduced Robert Homick to Rick Wilson. After meeting Steven Homick, Rick Wilson saw him at the plant about once a month. After meeting Robert Homick, Wilson saw him at the plant about 3 or 4 times a month. (RT 76:6960-6962, 7034, 7045.)

Between 1977 and 1981, when she worked for Manchester Products at the older Mason Street plant, Nancy Housel Woodard never saw Steven or Robert Homick at the plant. (RT 71:6011.) When Manchester was still on Mason Street, Fred Woodard saw Steven Homick at the plant on one occasion. (RT 71:5993.)

Rick Wilson's office was near both Neil's and Stewart's offices, both at the old plant and later at the new plant. He noticed that when Steven Homick visited he usually saw Neil, while Robert Homick usually saw Stewart. (RT 76:6963-6964.) Wilson recalled hearing Neil say that Steve Homick could get anything done of an illegal nature, upon request.[29] (RT 76:6964.)

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28 Wilson did not personally observe Steven Homick sweep the plant for bugs; that was something that Neil and Stewart told him that Steven Homick did. (RT 76:7006.) According to Stewart Woodman, Steve Homick never swept the Mason Street plant for bugs; rather, that was done at the Prairie Street plant and by a different investigator hired by Neil. (RT 105:12253.) According to Det. Holder who interviewed Rick Wilson in December 1985, Wilson had told him he first met Steven Homick in July 1985. (RT 110:13051-13052.)

29 Wilson acknowledged that the first time the police questioned him, he did not mention this alleged statement about Steven Homick. He believed he did mention it in the second interview, but when he reviewed

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Stewart Woodman was a heavy gambler and Wilson noticed that Robert Homick was involved in Stewart's gambling activities.[30] (RT 76:7024, 7027.) From 1980 to 1985, Wilson observed Stewart engaged in gambling on a daily basis. Stewart wagered on baseball, football, and other sporting events. There would be 10-12 baseball games each day and Stewart would bet $50-$150 on each game. (RT 76:7039.) Another Manchester employee described Stewart as addicted to gambling. In contrast, Neil Woodman gambled very little, placing a small wager on a football game about once a month. (RT 76:7048-7049, 77:7315.)

Catherine Clemente, the Manchester receptionist at the old plant on Mason from April, 1982 until April, 1983, sat at a desk directly opposite the front door. She recalled seeing Steven Homick at the plant on one occasion, around March, 1983. He came in and asked for Stewart, then went into an office with Stewart and Neil where they met for 30 to 60 minutes. After Steven Homick left, Stewart said that was Steve, his man in Vegas. Stewart also said that if he needed anything done, that was the man to do it. Neil added something like if I thought the Mafia was tough, he was even

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police reports describing his first three interviews by police, none of them mentioned this statement. (RT 76:6992-6994.) This statement was admitted against Steven Homick over a hearsay objection, after the trial court concluded the statement was made in furtherance of a conspiracy. That erroneous ruling is discussed in the argument later in this brief, pertaining to improperly admitted hearsay statements that were not in furtherance of any conspiracy.

30 Wilson claimed he never saw Robert Homick carrying wagers or payoffs for Stewart, but a police report indicated Wilson had told the police he had seen Robert Homick do such things. (RT 76:7028-7033.)

tougher.[31] Stewart and Neil made similar comments on some subsequent occasions. (RT 73:6418-6423.) There was also a reference to around $100,000 in gambling money Steve had collected for Stewart.[32] (RT 73:6427, 6449-6551.)

Notably, however, Ms. Clemente described the car that Steven Homick left in as old rusty blue Buick or Chevrolet, and she identified Robert Homick's car as similar to the one she had seen.[33] (RT 73:6428.)

Ms. Clemente never saw Steven Homick at the plant on any other occasion. She did receive a number of calls from a man who identified himself only as Steve and asked for Stewart. If Stewart was unavailable he would talk to Neil. Neither Stewart nor Neil ever told Ms. Clemente to have "Steve" call back or leave a message; they would always immediately take his calls. (RT 73:6423-6425, 6442.) However, prior to her testimony, Ms. Clement was not aware of the fact that Stewart Woodman had a bookie named Steve. (RT 73:6431, RT 76:7027.)

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31 Ms. Clemente acknowledged that the first time she ever discussed this event with the police was more than five years after it occurred, on July 6, 1988. She also acknowledged testifying previously that when Stewart made the comment about Steve being his man in Vegas, Neil did not say anything. (RT 73:6429-6430.)

32 Once again, all this hearsay came in over objection and will be discussed later in this brief in the argument pertaining to the improper admission of hearsay that was not in furtherance of any conspiracy.

33 No other witness ever described Steven Homick using Robert's car. Instead, when Steven Homick came to Los Angeles, he always rented a new car. (See, for example, RT 82:8250, 8252, 8263-8265. Ms. Clemente also described the man she saw as disheveled, a description commonly used for Robert Homick but not for Steven Homick. (RT 73:6445.)

Steven Strawn first met Steven Homick at the old Mason Street plant in 1982 or 1983. He met Robert Homick at the old plant during the same year. After that, he saw Steven Homick an average of once a month, in Neil or Stewart's office.[34] It appeared to Strawn that Steven Homick had a closer relationship with Neil than with Stewart. Steven Homick always came in through the front door and was nicely dressed in a business suit. He was not at all scruffy or unshaven. Robert Homick was there at least as often and perhaps more often. He talked to Stewart more than to Neil, and their relationship was centered on their common gambling interest, usually involving collecting on or paying off a bet.[35] (RT 77:7187-7190, 7269, 7322-7323.)

On more than one occasion after Manchester moved to Prairie Street, Fred Woodard saw Robert Homick at the plant playing poker with other people. (RT 71:5991-5993.)

Between October 1983 and late 1986, when he worked at Manchester Products, William Blandin never saw Steven Homick around the plant. (RT

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34 Thus, Strawn believed he saw Steven Homick at Manchester approximately 24 times between 1983 and 1985. However, at the preliminary examination held much closer to the time of the events, Strawn had testified he had seen Steven Homick at Manchester about six times, and once more at the Bar Mitzvah. (RT 77:7269-7271.)

Indeed, Strawn testified at a preliminary examination in 1988 that he did not recall ever seeing Steven Homick at the old Mason Street plant. In his 1993 trial testimony, Strawn expressed surprise to learn he had said that previously. (RT 77:7346-7348.)

35 Strawn also saw a bookie arrive at Manchester weekly, to collect or pay off gambling debts, primarily during football season. (RT 77:7326.)

72:6060-6061.) He did recall seeing Robert Homick there once or twice. Blandin was aware of football betting at Manchester Products, and he participated in it. (RT 72:6061-6062.)

Jack Ridout, a major customer of Manchester's and a close friend of Stewart Woodman's, recalled meeting Steven Homick once at the Manchester plant in later 1984 or 1985. He recalled another occasion in Las Vegas when he and Stewart had breakfast with Steven Homick at a casino.[36] Stewart said Steven Homick did collections work for him and had successfully obtained payment from a customer who had been a particular problem. (RT 75:6826-6828.)

3). Payments from Manchester Products to Delores Homick

Steven Strawn identified a check for $2,296 drawn by Manchester Products and payable to Dolores Homick.[37] It was indicated in the paperwork that the check was a commission in connection with Steal Shields, one of Manchester's accounts. The check was unusual in that it was typed manually rather than generated by a computer.[38] An accompanying

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36 Ridout often went to Las Vegas with Stewart Woodman and Stewart's wife. (RT 75:6831-6832.) He described Stewart as a very serious gambler who sometimes lost $30-40,000 on a single Las Vegas trip. Stewart would bet as much as $5-10,000 on a football game. Stewart's betting was an obsession. (RT 75:6851.)

37 Dolores Homick was the wife of Steven Homick. (RT 76:7054, 114: 13823.)

38 Although Strawn testified that such manually typed checks were unusual, he acknowledged he had previously testified that the

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memo, with a Las Vegas address for Dolores Homick, directed payment of the amount and was in Neil Woodman's handwriting. Another Manchester Products check was dated September 26, 1984 and made out to Dolores Homick, was also accompanied by a memo apparently written by Neil Woodman.[39] To Strawn's knowledge, Dolores Homick was never a Manchester salesperson. (RT 77:7217-7224.)

4). "Theft" of Monte Carlo from Manchester Products

Around 1982, Manchester Products owned a Chevrolet Monte Carlo automobile that disappeared after Stewart Woodman had told Rick Wilson to give the keys to the car to Robert Homick. Rick Wilson's understanding was the Robert Homick took the car to Nevada while Stewart reported it stolen and collected the insurance money. (RT 76:6978-6979.) Steve Strawn recalled a business flight between Los Angeles and Las Vegas during which Rick Wilson made a joking comment that he could see the burned Monte

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Woodman brothers commonly thought of items that had to be paid at the last minute, and that both computer generated checks and manually typed checks were used in the normal course of business. (RT 77:7242-7245.)

Indeed, Strawn noted that it was common for both Woodman brothers to hand-write checks for a variety of reasons and fail to note them at all in the check register. The company checking account balance was always off and could never be properly reconciled. (RT 77:7305-7307.)

39 Strawn acknowledged testifying previously that Neil and Stewart had handwriting that was so similar he could not tell which one of them had written these two memos. (RT 77:7246-7248.)

Carlo below. Stewart responded angrily. Strawn confirmed that Manchester collected insurance money for the car. (RT 77:7211-7214.)

On August 22, 1983, a Las Vegas police officer patrolling outlying areas in a 4 wheel drive vehicle, discovered the Monte Carlo that belonged to Manchester. It was completely burned up and looked like it had been burned intentionally.[40] (RT 98:10891-10903.)

5). The June 9, 1984 Incident at Soft-Lite

Jack Swartz ran Soft Lite, a small manufacturer of luminous ceilings. He regularly ordered plastic from Manchester Products. In the spring of 1984, Manchester told Swartz to place his orders more in advance so they would be ready to ship when he needed the product. In compliance, he placed an order 30 days in advance of his needs, and the product arrived well before he needed it. He had phone conversations with Stewart Woodman, who was demanding prompt payment, but he was delaying payment until his customer took delivery of the finished product and paid him. There were several conversations in which Stewart Woodman lost his temper and was verbally abusive toward Swartz or Swartz' daughter, Tracey Hebard, who worked with Swartz. (RT 71:5920-5923, 5976.)

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40 Two-and-one-half years later, when Robert Homick's apartment was searched pursuant to a search warrant, police found a note inside a briefcase that contained directions that led to the same remote location where the officer found Manchester's Monte Carlo. (RT 99:10970-10973.) They also found the vehicle registration, other booklets and documents related to the vehicle, and its license plates. (RT 100:11202-11204.)

In early June 1984, a man Tracey Hebard had never seen before arrived at the Soft Lite plant. She identified Robert Homick as that man, and also identified his older green-blue Buick. He came to the back of the plant, confronted Jack Swartz, and said he had been sent by Manchester Products because Swartz owed them a great deal of money. According to Tracey Hebard, Robert Homick said that if Swartz did not pay Stewart Woodman right away, he [Robert Homick] would come back and break his legs or snuff out his life. (RT 71:5923-5929.) Tracey Hebard promptly called the police and later told them that the man had forced his way into the building and threatened her father's life.[41] (RT 71:5929-5930, 5941-5942.)

Tracey Hebard never saw Robert Homick at Soft Lite again, and no harm ever came to her father. In August, 1984, Manchester Products filed a lawsuit over the debt. Manchester won a judgment in March 1985 and after that, the debt was paid. (RT 71:5944-5947.)

6). July 14, 1984 Bar Mitzvah for Neil Woodman's Son

Jean Scherrer and John O'Grady had both served more than 20 years on the Los Angeles Police Department. Indeed, Scherrer had served more than 30 years, the last 22 of them as an investigator and then a supervisor in

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41 Notes made when the police received the initial call from Tracey Hebard did not mention anything about a threat, even though that is something a responding officer would definitely want to know. After the police responded to the Soft-Lite scene, no official report was written, indicating the responding officer concluded no criminal activity had occurred. (RT 72:6117-6118, 6123-6127.)

the Organized Crime Division. After they each retired, O'Grady operated a private detective agency. Scherrer was in the cosmetics business, but occasionally O'Grady asked him to assist in a private security matter. (RT 74:6469-6471.)

In the Spring of 1984, O'Grady introduced Scherrer to Steven Homick at a restaurant in Hollywood. Steven Homick had also been a Los Angeles Police Department officer, but that was many years ago and only for a short time. On July 14, 1984, O'Grady and Scherrer met Steven Homick and Neil Woodman at Page's Restaurant on Ventura Blvd in the San Fernando Valley. Neil Woodman's son was having a Bar Mitzvah that day and he had hired Steven Homick to provide security, both at the temple, and at a party later at El Caballero Country Club.[42] Homick, in turn, hired O'Grady to assist and O'Grady asked Scherrer to also assist. (RT 74:6471-6474, 6478, 6652.)

The major security concern was that Neil Woodman did not want his parents to attend the Bar Mitzvah, but he feared they might show up uninvited and cause a problem.[43] Steven Homick described the Woodmans

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42 The manager of the country club had been approached earlier by Neil Woodman about having his own security men at the Bar Mitzvah. That was no problem and was not considered unusual. Neil told him he wanted the security because of the large amount of jewelry that would be worn by guests at the Bar Mitzvah, and because he had been threatened by his father. (RT 74:6651-6656.)

43 According to Steven Strawn, Stewart thought that having security guards at the Bar Mitzvah was ridiculous overkill. Strawn added that Stewart ridiculed Steven Homick on a number of occasions. (RT 77:7283.) At one point Stewart said that Steven Homick's presence was a waste of

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and their car and if O'Grady or Scherrer saw them, they were to report that immediately to Homick. All the security people would be in plain clothes. At one point while they were still at Page's Restaurant, Steven Homick said that if the Woodman parents did show up, he would take care of the situation. He said, "If necessary, I will waste them." When he said that, Neil Woodman nodded in apparent approval.[44] (RT 74:6474-6477, 6528.) Neither Gerald

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time. Stewart ridiculed Homick in front of Neil and made fun of their relationship. (RT 77:7313-7314.)

According to Strawn, Stewart would accuse Neil of going beyond the limits when Neil referred to Steven Homick as a heavy guy, in conversations with other people. Stewart thought that such comments by Neil discredited both Neil and the company. (RT 77:7331.)

According to Stewart, Neil agreed with him that their parents knew they were not welcome at the Bar Mitzvah, and they would not come and make a scene, since that would spoil the occasion for their grandson. Nonetheless, Neil wanted to have a security guard there because he was confident people would tell his parents about it and they would be humiliated. (RT 103:11719-11720.)

44 Scherrer acknowledged that on a prior occasion he testified this statement was made at the temple, rather than at the restaurant. He also said it might have happened on the sidewalk outside the temple. (RT 74:6495-6496.) On another occasion, he testified it must have been at the restaurant because in his mind he was sitting down when he saw Neil Woodman nod. (RT 74:6529-6530.)

Scherrer also acknowledged that after the Woodman murders, when he first talked to the police about these events in an effort to earn a $50,000 reward offered for information about the murders, he did not mention the fact that Neil Woodman nodded in response to Steven Homick's statement. However, he was sure he had told the officers about that before he ever testified. (RT 74:6515-6516, 6521.)

Scherrer claimed that Steven Homick's statement concerned him immediately and he discussed it with O'Grady, but he also maintained

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nor Vera Woodman ever did show up at the temple or the party. (RT 74:6480.)

7). Fall 1984 Installation of Bugging Device at Manchester Products

In the fall of 1984, Jean Scherrer, who had helped Steven Homick provide security at the Woodman Bar Mitzvah, was again contacted by Steven Homick. Homick asked Scherrer to assist him in installing an intercom system at Manchester Products. They met there on a day when the plant appeared closed. Homick had keys and opened the necessary doors. Homick wanted to run an intercom between an empty office and Neil Woodman's office. Scherrer determined what was needed, went to Radio Shack and bought supplies, and then he and Homick installed the system, so that anything said in the empty office could be heard in Neil Woodman's office. (RT 74:6481-6490, 6497-6498.)

8). "Theft" of Stewart Woodman's Rolls Royce

Stewart Woodman owned a yellow Rolls Royce Corniche convertible. One night after dropping Stewart off at his home, Rick Wilson received a

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he did not take it seriously at the time. He did not ask Steven Homick what he meant or voice any concern about being involved with Steven Homick in providing the Bar Mitzvah security. He acknowledged testifying previously that when the remark was made he did take it very seriously. He was sure that "waste them" was the actual terminology used, but at the time, he did not think that meant "kill them." (RT 74:6546-6556.)

call from him at 1 AM. Stewart had looked in his garage and discovered his Rolls Royce was missing. After the theft, Stewart told people he believed his father had stolen the car. Stewart had previously told Rick Wilson he did not like the car anymore. The car was found at the bottom of Mulholland Canyon, a month or six weeks after Stewart had received payment from the insurance company. (RT 76:6977-6978. 7007-7008.)

In connection with the theft of the Rolls Royce, Stewart also expressed anger or dissatisfaction toward the guards at his gated community, blaming them for letting someone get past the gate. (RT 76:7040.)

In 1982, Stewart Woodman had spent approximately $4,000 to have a mobile telephone unit installed in his yellow Rolls Royce convertible. (RT 99:10999-11002.) Long after the Rolls Royce was stolen, when Robert Homick's apartment was searched in March, 1986, part of the telephone unit was found there. (RT 100:11205.)

9). June 22, 1985 Observation of Robert Homick Parked in Front of the Building Where Gerald and Vera Woodman Lived

In June 1985, David Miller lived at 11933 Gorham Ave., Apt. 3 in the Brentwood area of West Los Angeles. This was next door to the building where Gerald and Vera Woodman lived. One day in the late morning or early afternoon he noticed an older light bluish-green car with a man inside. The car was parked in front of his building for several hours, but its position changed several times, from one side of the street to the other. In mid-afternoon, his neighbor Eric Grant came home and he pointed out the car. Later, when the car was still there, Eric walked his dog by the car and wrote

down the license number. David looked through the telephoto lens of his camera to get a good look at the man in the car. (RT 78:7439-7451.)

After Eric walked his dog by the car, he returned and phoned the police at 7:24 PM, suspecting the man in the car might be planning a burglary. The car had Nevada license plate CSC 148. The man in the car was reading a newspaper. Fifteen to twenty minutes later, officers arrived and talked to the man. David identified Robert Homick as the man he observed in the car. (RT 78:7452-7456, 7497-7476, 83:8641-8643.)

Thomas O'Neil was one of the 2 officers who responded to Eric Grant's call, on June 22, 1985 at 7:40 PM. He talked to the driver, Robert Homick, who provided a Nevada driver's license. The car was a 1960 Blue Buick 2 door. (RT 78:7485-7496.) O'Neil's partner, Jacquelyn Cohee, also talked to the man in the car, telling him why the officers had questioned him. The man replied that it was not against the law to read a newspaper in your car. (RT 78:7500-7503.)

June 22, 1985 was also the date that Vera and Gerald Woodman celebrated their 45th wedding. Customarily, they would go out to dinner with their children, and sometimes their grandchildren, on their anniversary. Neil and Stewart stopped joining those dinners in the early 1980s. Maxine Stern, one of the Woodman's daughters, recalled that there was such a family dinner on June 22, 1985, although she had testified previously that she was unsure whether there was an anniversary dinner in 1985. Indeed, in April 1986, she told the police that her parents did not go out for their anniversary in 1985 because her father had not bee feeling well. (RT 79:7546-7550, 7555-7557.)

Wayne Woodman's recollection was that the family did go out to dinner on June 22, 1985. They went to Guido's Restaurant in Santa Monica. (RT 79:7650-7651.)

Investigating officers had no evidence at all that indicated Steven Homick was in Los Angeles on June 22, 1985. (RT 110: 13058.)

d. Events Shortly Before the Murders

Around September 10, 11, or 12, 1985, Steven Homick brought some small, hand-held Maxon FM radios to Art Taylor's place of business in Las Vegas, known as Art's CB Shop.[45] These were inexpensive devices that

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45 Art Taylor and Steven Homick had been friends since the late 1970s or early 1980s. They talked on the phone almost every day, and when Steve was in Las Vegas he came into Art's shop almost every day. (RT 82:8299-8302. 8306, 8310.)

Unknown to Steven Homick, Taylor began supplying information to the FBI about Homick, starting around 1983. Before that, Steve Homick had been using Taylor's shop to send and receive numerous packages related to a vitamin business Homick had. Later, Taylor learned that some of these packages contained illegal drugs, and that offended Taylor because he had given his daughter one such package to take to the post office. As a result, Taylor contacted the FBI and began supplying them with regular information about Homick's activities. (RT 82:8361-8368.) When Taylor was in daily communication with Steve Homick, he was also in daily communication with his FBI contact, passing on everything he learned. (RT 83:8479.)

The FBI paid Taylor for his information, giving him approximately $10,000 between 1983 and early 1986. (RT 82:8369.) Taylor acknowledged he had many financial problems as a small businessman, and he had a large tax lien on his home (more than $20,000) when he started working for the FBI. (RT 82:8444-8447, 83:8473.) Taylor explained these were due to unpaid payroll taxes, although he insisted he had paid the taxes

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worked like walkie-talkies with a range of one to five miles, but requiring line-of-sight contact. (RT 82:8322-8326.) Steve asked Art to check them out. One of them was not working and Taylor determined it had a dead battery. Steve said he was using them for surveillance work.[46] (RT 82:8326-8327.)

On September 23, 1985, Steve Homick again came to Art Taylor's shop with the radios.[47] (RT 82:8327.)

Sidney Michelson was married to one of Vera Woodman's sisters, Sybil. When Neil and Stewart were growing up, the Michelsons lived two doors away, and Stewart was the same age as their daughter, Linda Newman (also known as Linda Rossine). Stewart was very close to the Michelsons and would go to them whenever he was in any kind of trouble. They

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and the IRS had simply lost the forms and claimed he had filed none for 6 years. (RT 83:8462-8464.) Taylor conceded that he asked his FBI contact for help dealing with the IRS, but Taylor insisted they were not able to help him. (RT 83:8469-8470.)

Taylor also conceded that during one of his earliest encounters with the FBI, they asked him for information to help identify a person named Cowboy, a person they wanted to talk to in connection with their investigation of Steve Homick's activities. (RT 83:8535-8536.) Taylor himself had long been known to his friends by the nickname Cowboy. (RT 83:8527.) Taylor assumed they were talking about him, but he did not reveal he was Cowboy until some time later. (RT 83:8563.)

46 Around the second week of September 1985, Steven Homick brought one of these non-working radios to Stewart Siegel's assistant, Dennis Scott. Siegel was a friend of Steve Homick's and used these radios to communicate with Scott while Scott was making deliveries for Siegel. The non-working radio was exchanged for another radio. (RT 84:8743-8751.)

47 Taylor explained that his birthday was on July 23, and he tended to remember any significant event that occurred on the 23rd of any month. (RT 82:8327.)

maintained a close relationship after the family breakup, and Sidney Michelson often tried to be a go-between in reconciling the family. He frequently communicated to Stewart, and occasionally to Neil, the fact that Vera very much wanted to see her grandchildren or at least obtain photographs of them. Stewart also talked to Sybil Michelson on the phone regularly, but Sidney asked him to stop doing that because Sybil became very emotional and upset about the lack of success in bringing the boys back together with their parents. (RT 79:7729-7734, 7839-7840.)

After Sidney told Stewart to stop calling Sybil, Stewart would call Sideny at his office, and sometimes Sidney would call Stewart. They talked about once a week, about Stewart's children or about business. (RT 79:7734-7735.) Sometimes Stewart would say that it was okay for his mother to see his children, but then it never actually happened. (RT 79:7733, 7843.)

On September 23, 1985 (two days before the elder Woodmans were killed), Sidney left his office about 3 or 3:15 PM and drove home, which took about 20-25 minutes. When he arrived home, Sybil was on the phone with Stewart and was crying. Sidney took the phone and just said good-bye, telling Stewart to call him at the office if he wanted to talk. (RT 79:7740-7741.)

Sybil had answered the call from Stewart at 3:45 PM. He told her he wanted her to tell his mother he loved her and hoped she would have a good year. Sybil thought he sounded sincere and suggested he call his mother, but Stewart said that would be too emotional. Sybil then said he should send his mother a card but Stewart responded he did not know his parents' current address. Sybil said he should send the card to her and she would give it to his

mother. No such card ever arrived. (RT 80:7841-7842, 7848-7849, 7853-7854.)

During the call, Stewart said something to the effect of, I guess you will all be getting together to break the fast.[48] Sybil responded that the family would be getting together for the holiday. (RT 80:7850-7851.)

On September 24, 1985, Art Taylor met with Steven Homick and his brother William Homick (often called "Moke") at the residence of Larry Ettinger in Las Vegas, at approximately 10:00 AM. Ettinger wanted some alarms and some cameras installed. Steven Homick left at 10:30 AM, in a hurry to get to the airport for an 11 AM plane. As he left, his brother Moke handed him a rolled-up sandwich bag and said it was the ammo he had requested. (RT 82:8328-8329, 8333-8338.)

Records from U.S. Air (formerly known as Pacific Southwest Airlines, or PSA) showed a ticket had been issued to Steven Homick for flight 119-Y, which left Las Vegas for Burbank, California on September 24, 1985 at 11:50 AM. The ticket was issued September 23, 1985 and was, in fact used.[49] A ticket for the adjoining seat was issued to "M. Dome" and had the next consecutive serial number. (RT 80:7865-7873.) A ticket for a third adjoining seat, on the same side of the aisle, was issued to Burnell

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48 This referred to the upcoming Jewish holiday, Yom Kippur, a traditional day of fasting.

49 Airline records would show whether a ticket was actually used, but it was not possible to specify that a ticket was actually used by the person named on the ticket. (RT 80:7882-7883.)

Shelton.[50] (RT 80:7883-7885.) Passengers did not always sit in the seats that had been assigned to them.[51] (RT 80:7922.)

Budget Rent-a-Car rented a Fifth Avenue Chrysler to Steven Homick at 1:01 PM on September 24, 1985, at Burbank, California, near the airport. (RT 82:8239-8241, 8246-8247.) Alphonse King, who managed the Burbank Airport branch of Budget Rent-A-Car and who rented the car to Steven

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50 Mr. Shelton was shown photos by the police on January 13, 1986, nearly four months after the flight. He picked out Steven Homick as possibly being the person who sat in front of him. He picked Michael Dominguez as someone who could have been on the same plane and walked down the aisle. (RT 81:8002-8007.)

51 Marilyn Clark was a flight attendant on PSA flight 119 on September 24, 1985. Nearly **five months later**, on February 12, 1986, she was shown some photos by Detectives Holder and Crotsley. She picked a photo of Steven Homick as someone she recognized. She believed she remembered him from flight 119, but she was not sure that was where she had seen him. (RT 80:7937-7944.)

Ms. Clark acknowledged there was nothing special about that particular flight. At that time, she worked on 12-18 flights per week, many of which were between Las Vegas and Burbank. She came in contact with hundreds of different passengers every week. She believed the photo of Steven Homick looked familiar because of the light gray-blue color of his eyes. (RT 80:7953-7957.) That was the only feature of the person she recalled. She acknowledged that the photo of Steven Homick she was shown by the police when she made her identification was a black and white photo. (RT 79:7961-A.)

Ms. Clark also acknowledged that Steven Homick now looked familiar to her because she had seen him in court on prior occasions. However, she was sure that the very first time she saw him in court, his eyes were familiar. Ms. Clark's first appearance as a witness in these proceedings was on October 24, 1989, more than **four years** after the flight in question. Furthermore, on that occasion, Steven Homick was not present. (RT 80:7962-7965.)

Homick, identified Michael Dominguez as being with Mr. Homick when he rented the car. Mr. King described Dominguez as a 5'8" tall Hispanic male in his early 20s, with black hair.[52] (RT 82:8250, 8263-8265.)

Between 4 and 5 PM on September 24, 1985, Art Taylor received a call from Steven Homick in Los Angeles saying he was still having problems with the radios and asking where he could get a new battery. Taylor called one of his vendors and then suggested to Steve that he find a Henry's Radio store. (RT 82:8338-8341.) Business records for a nearby Henry's Radio store showed that on September 24, 1985, someone purchased a rechargeable battery pack, giving the name Art's CB and using an address that matched Robert Homick's residence. (RT 84:8672-8674.) The clerk who made the sale identified **Robert** Homick as the person who purchased the battery.[53] (RT 84:8701-8703.)

Around 8 PM, Steven Homick called Art Taylor at Taylor's home and said the radios were still not working properly. He said he would be back in Las Vegas in the morning. (RT 82:8341-8343.)

A Western Airlines ticket was issued to "S. Hommick" for a flight from Los Angeles to Las Vegas, departing on September 24, 1985 at 10 PM. (RT 80:7874-7877.)

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52 However, in prior testimony, Mr. King claimed that the only time he had seen Michael Dominguez with Steven Homick was when they rented a car one morning and returned it later the same day. He also testified previously he did not know if anybody was with Steven Homick when he rented the car on September 24, 1985. (RT 82:8268-8270.)

53 Totally contrary to Taylor's testimony, the clerk believed the sale occurred between 10:30 and 11 AM. He was quite certain it could not have been as late as 4:30 PM. (RT 84:8715.)

Around 10 or 10:30 AM on September 25, 1985, Steven Homick again arrived at Art Taylor's shop in Las Vegas, with the radios. Taylor checked the radios, determined the batteries were not fully charged and the radios were not working well. Steve took the radios with him anyway, saying they were better than nothing. (RT 82:8344-8352.) Steve left Taylor's shop between 11 and 11:30 AM to call Steve's brother Jesse[54] and tell him to pick Steve up at the airport at 1:00 PM. Before Taylor called Jesse, Jesse called him, looking for Steve. Taylor conveyed the message about picking Steve up at the airport. (RT 82:8352-8356.)

Another ticket was issued to Steven Homick for a flight from Las Vegas to Burbank, departing at 10:50 AM on September 25, 1985.[55] It was issued on September 25, 1985 and was used. (RT 80:7874-7877.)

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54 Jesse was a nickname often used to refer to Robert Homick. (RT 79:7573, 82:8320, 94:10065.)

55 In response to police questioning and photo displays, two different passengers on that flight, one seated in the rear and the other seated in the front of plane, identified Mr. Homick as having been seated across the aisle from where they sat.

Trisha Burnett and her husband James Burnett flew from Burbank to Las Vegas on September 25, 1985, on a PSA flight that left at 10 AM. Four months later, in January 1986, officers showed her some photographs. She identified Steven Homick as looking like the person seated across the aisle from her and her husband. She recognized his thinning hair and his eyes. (RT 80:7966-7974.) Ms. Burnett's husband sat next to the window, and Ms. Burnett recalled two empty seats between her and the man she believed was Steven Homick. Their seats were near the rear of the plane. (RT 80:7983-7986.)

Ms. Burnett conceded her attention was focused on her baby son, traveling with her. The baby was born September 5, 1985. (RT 81:8143, 8148.) The total amount of time she spent looking at the man across the aisle

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e. Events on September 25, 1985

Two important Jewish holidays occur in September or early October each year. First is Rosh Hoshana, the Jewish New Years, and then Yom Kippur, the Day of Atonement. In 1985, Yom Kippur occurred on September 25. (RT 73:6307.)

Manchester sales manager William Blandin was not Jewish and worked on Yom Kippur in 1985. He got to the plant that day earlier than usual, about 7 or 7:15 AM. Stewart was not there, but he was at the plant later that day. Blandin did not believe Neil was at the plant at all that day. (RT 72:6057-6058, 6063-6068.)

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was 20-30 seconds. (RT 81:8151.) The man was looking through magazines. Ms. Burnett believed he was in his mid-thirties. (RT 81:8152-8153.)

Ms. Burnett also recalled a Mexican male in his twenties who sat 4 or 5 rows in front of her, on the other side of the aisle. She remembered that a group of women told that man he was sitting in one of their seats, but then they said it was okay and he did not need to move. She notice the man turn and look at her several times. She was shown more photos, but could not identify that man. (RT 80:7977-7980.)

Lorraine O'Hara and her husband were also passengers on this flight. Ms. O'Hara recalled sitting near the front of the plane, on an aisle seat. She quite specifically recalled being near the front of the plane. **Eighteen months later**, on March 19, 1987, she identified Steven Homick as a man who she believed sat across the aisle from her, also sitting in an aisle seat. (RT 81:8041-8047, 8057.) She recalled that after she made her identification, Det. Holder told her she had picked the right person. That reinforced her belief she had been correct in her identification. (RT 81:8071.)

Ms. O'Hara acknowledged she had testified about this in November, 1989, and at that time she was unable to recall the faces of two officers who had interviewed her face-to-face for thirty minutes. (RT 81:8075-8078.)

Muriel Jackson picked up Vera Woodman on the morning of Yom Kippur and they met Gerald Woodman at a temple. Muriel went on to another temple to meet her husband, Lou, and then returned home around 2 PM. Vera and Gerald arrived at Muriel's home soon afterward. Yom Kippur was a day of fast, and the sisters spent the afternoon preparing food for the breaking of the fast after sundown. The whole family and some friends traditionally gathered for the dinner to break the Yom Kippur fast. This had occurred at Muriel's home since 1982, and about 70 people came over for the dinner in 1985. (RT 73:6307-6310.)

Neil and Stewart Woodman participated in these annual family dinners in the 1970s and early 1980s. Before 1982, the dinners had been at Vera and Gerald's home. In 1981, Stewart came to the dinner but Neil did not. After that, neither of them came. (RT 73:6310-6311, 6315-6316.)

On September 25, 1985, guests started arrived at Muriel Jackson's home around 6:30 PM, and the gathering lasted until 11 PM. Vera and Gerald left early, about 10:15 PM, in their small two-seater Mercedes. (RT 72:6258, 73:6312.)

Meanwhile, around 6:30 to 7:30 that evening, Richard Altman left his residence for a meeting, pulled out of an alleyway near his apartment, and hit the rear end of another vehicle, causing minor damage. He spoke for a few minutes to the driver of the other car, Robert Homick. They both got into their cars to move to another location that would be out of the way of traffic. Altman waited 10 minutes at the other location, but Robert Homick did not show up there. The accident occurred very close to the apartment building where Gerald and Vera Woodman lived. (RT 99:11038-11045.) A few days later, Altman found Robert Homick waiting at Altman's parked car, where

Homick wanted to discuss arrangements for Altman to pay for the damage to Homick's vehicle. (RT 99:11050-11055.)

Robert Kelly, Jr. was an Emergency Medical Technician working for UCLA Emergency Medical Services. He lived in an apartment at 11959 Gorham, on the 2nd story of a 3 story building next door to the one in which the Woodmans lived. On September 25, 1985, he got off work at 10 PM, took 5 minutes to drive home, then changed clothes and laid down on his bed. He heard a woman scream and also heard 5 gunshots that sounded close by, looked out his window, then went to his front door and saw his roommate, Jeff Carolan.[56] Opening the door, Kelly heard a man calling for medical assistance. (RT 82:8371-8377.)

Kelly grabbed some of his equipment and ran downstairs. The man yelling for help was Rodger Backman, who was by the underground garage next door. (RT 82:8377-8378.) Backman had been visiting his mother, who lived in the same building as Kelly. Backman was in his mother's third floor apartment around 10:30 PM, when he heard 5 gunshots. He ran to the balcony that overlooked the building where the Woodmans lived. He looked over the railing and down and saw a person jump a bare wall between the two apartment complexes. The man then headed down the walkway on Backman's side of the wall. The man had jumped over the wall and onto the sidewalk directly below Backman. Just before he jumped, Backman could hear him running through the ivy, while also hearing other rustling sounds

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56 Carolan was quite certain he had only heard 4 shots. (RT 93:9969-9970, 9989.)

going in the opposite direction.[57] (RT 85:8822-8826, 8859.) The walkway and planter areas were well lit with floodlights. (RT 85:8853.)

Backman had brief eye contact with the man. Backman had yelled to the man, "Hey, I see you," and the man looked up at him and froze for a few seconds. The man was dressed in a black martial arts type of workout clothes and had a hood covering his head. Backman could not see his hair or mouth at all, only the top of his nose and his eyes. He was about 5'6" tall, weighed about 160 pounds, and had olive-colored skin. He was definitely not Black or Caucasian. Backman believed he was Asian, Hispanic, or Spanish.[58] Backman was consciously trying to make observations that would help him identify the man later.[59] The man came over the wall in one swift motion,

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57 Backman believed the sounds he heard came from two different people, but he was not sure of that. (RT 85:8880.)

58 Backman's original description to the police put the man at 5'8" to 5'9", early to mid twenties, dark or olive-complected, possibly Asian or Hispanic. (RT 85:8878-8879.) Michael Dominguez was Hispanic, 5'10" tall, weighed 175, and in 1985 he would have been 26 years old. (RT 85:8947, 89:9390-9391, 9394-9395.)

According to Det. Holder, Steven Homick was 6'2" tall. (RT 110:13045.) Investigating officers conceded there was no physical evidence whatsoever to indicate that Steven Homick ever entered the garage at the Woodman's apartment building on September 25, 1985. (RT 115:13893.)

59 When shown photographs of the Homick brothers, Anthony Majoy, and Michael Dominguez, Backman picked Dominguez as most closely resembling the man he saw. Dominguez had the same skin color and build. His eyes appeared the same as the man Backman saw. (RT 85:8891-8892.) Backman had previously testified that the man's slanted eyes were the feature he most vividly recalled, and that was what caused him to believe the man was Asian or Hispanic. (RT 85:8905-8906.)

(Continued on next page.)

landing in a crouched position with his hands at his side; he seemed fairly athletic and flexible.[60] The man ran toward the alley behind the building, and Backman ran downstairs, to where he last saw the man. He saw no further sign of the man, but stopped to talk to the driver of a 300-ZX Nissan. (RT 85:8825, 8834-8839, 8852, 8863-8869, 8872, 8883.)

Backman went to the front of the building and looked for signs of forced entry. He got on the retaining wall between the two buildings and could see a sub-level gate in the planter area that was swung open, leading into the underground garage for the building next door. He went through that gate into the garage, saw a parked Mercedes with the doors open, and saw a man in the driver's seat with his head slouched over and bleeding. Backman exited the way he had entered and yelled for help. (RT 85:8839-8846.)

(Continued from last page.)

Notably, Art Taylor had noted his awareness of the fact that Steve Homick had bad knees. Steve was often in pain and had to use drugs to control the pain. (RT 83:8532-8533.) During 1985, Steve was in constant pain and had to give up handball. (RT 83:8550.)

60 Backman noted that the wall was significantly steeper coming from the planter side than it was on the walkway side. Backman was very tall, 6'6", and described the wall as waist high on the walkway side but shoulder high (or about 5' high) on the planter side. (RT 85:8969-8972.) The man came over the wall very fast and did not appear to have anything wrong with his legs. (RT 85:8872.)

As an example of Michael Dominguez' athletic ability, in 1987 while at an airport being transported by officers, he attempted to escape. He ran about 1-1/2 miles with the police chasing him, then climbed a cyclone fence that was taller than he was and had 3 strands of barbed wire at the top, but was captured when he got to the top and realized there was no place to go on the other side of the fence. (RT 89:9392-9393.) Dominguez described himself as athletically inclined. He enjoyed rodeo, wrestling, and boxing. (RT 90:9603-9604.)

Hearing Backman's calls for help, Robert Kelly followed Backman through the same open gated window into the security parking garage, to a 2-seat light tan Mercedes sports car. Kelly went to the driver's side and saw a man bleeding. He also saw a bleeding woman on the other side, falling out of the car. He checked the man, determined he had been shot in the back of the neck, was bleeding heavily, and was likely to die. Kelly turned his attention to the woman, but soon determined she was in worse shape than the man. He and Jeff Carolan pulled her out of the car and raised her feet, as she was in shock. (RT 82:8379-8386.)

An officer soon arrived. Somebody inside the garage used the emergency mechanism to open the main garage gate. The officer entered with a shotgun, telling the men inside that it might still be dangerous in the garage. The officer ordered them out. Other officers and paramedics soon arrived. (RT 82:8388-8391.)

Detective Daniel Horan and his partner, Sean Kane, were the first officers to arrive at the scene, soon after 10:30 PM. After directing the civilians to leave the garage, they checked and found nobody hiding in the garage. They secured the crime scene. Det. Horan noticed that the female victim wore fancy jewelry, including a gold watch, a gold necklace, and a ring with several diamonds. Examining the area around the garage, he noticed that a bicycle chain that secured one of the security gates had been cut. (RT 94:9998-10010.)

Robert Smalley and his partner Al Bush were the paramedics that responded to the scene. Smalley noted that the male victim was still alive. He had a gunshot wound to the left side below his skull and a grazing wound across his chest. He had powder burn marks on his ears and the back of his

neck, indicating a close-range shot. Smalley and Bush determined that the female victim was already dead. The male was put on a gurney and transported to a hospital. However, while the male's heart was still pumping, his pulse stopped at the scene and he was clinically dead before his body left the scene. (RT 94:10019-10031.)

A subsequent autopsy established that Gerald Woodman was shot twice. One bullet entered the back left side of his neck, went through the neck, and exited below the chin. The other bullet entered the right chest, near the nipple. The shots were fired from a gun within 12 inches of the victim. (RT 97:10660-10665.) Mrs. Woodman had three wounds. One entered the left chest below the shoulder, injured the lungs and aorta, and exited on the right side of her back. Another entered the front of her chest and went downward, stopping in the region of her hip. The other wound entered the lower portion of the left side of her chest, passed through her stomach and liver, and exited the front right side of her chest. (RT 97:10670-10677.) It was possible only 4 bullets were fired, and one passed through both victims. (RT 98:10763.)

Bullets and fragments recovered from the victims, their clothing and their automobile appeared to be either .38 caliber or .357 caliber, which is very similar in size. Examined microscopically, all 4 recovered bullets had markings establishing they must have been fired from the same gun. (RT 100:11125-11139, 11234, 108:12630-12631.) The weapon was apparently a revolver rather than an automatic. (RT 100:11141-11143, 101:11352-11353.)

Detectives Richard Crotsley and Jack Holder were the lead investigating officers assigned to the Woodman homicides.[61] Crotsley was called at home in the early morning hours of September 26, 1985, went to meet Holder, and they both arrived at the scene just after 3 AM. (RT 95:10287-10290.)

Because of the jewelry left on Mrs. Woodman, and the fact that her purse was unopened and intact, the detectives dismissed the possibility of robbery as a motive. (RT 95:10300-10302.)

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61 Det. Holder acknowledged that in April 1989, while he was still employed as a Los Angeles Police Department Detective, he signed a contract with writer Larry Attebery, a television news commentator, to advise Attebery in connection with a book that Attebery was writing about the Woodman murders. He was paid $500 and was to receive 5% of any profits the book made, and 1% of any profits that resulted from any subsequent movie based on the book. (RT 113:13577-13578, 114:13754-13755.)

Holder did not disclose this contract to the police department or the District Attorney's Office until 3 years later when the prosecutor found out about it and questioned Holder. The police department policy manual expressly forbid entering into such a contract until a case was closed, but Holder believed that, technically, a case was considered closed by the department when charges were filed. Another regulation required officers to take certain steps before entering into such a contract and Holder did not take those steps. (RT 113:13578-13581.)

Holder maintained he had no idea whether the success of a book or movie about the case would be affected adversely if the suspects he had arrested ended up being found not guilty. (RT 113:13581.)

Det. Crotsley also entered into the book and movie contract with Attebery. He also said nothing to the department or the prosecutor until the prosecutor came to him with questions three years later. Crotsley had never previously entered into such a contract on any other case.) RT 115:13892.)

The officers noted that all doors to the security parking area required a key. The iron gate was operated by pager units. The officers found unsecured gates on the west side of the garage, but the gates on the east side were secured with bicycle chains that required keys to open. (RT 95:10319-10323.) The inside of the garage was well-lit with fluorescent bulbs. Detective Crotsley found a piece of green tubing and 2 pieces of chain links that were all similar to the bicycle chains securing the gates, and which appeared cut. (RT 95:10329-10332.)

The two portions of chain links were examined by a police criminalist who determined they had originally been one continuous chain, and could have been cut by bolt cutters. (RT 96:10456-10461.)

Bette Saul was one of the friends that celebrated the breaking of the fast at Muriel Jackson's home on September 25, 1985. She and her husband had stopped at the Fine Affair for a cocktail on the way to the Jackson's, some time around 6:30 to 7 PM. The Fine Affair was just a few minutes away from Muriel Jackson's home. Ms. Saul stood at the front of the restaurant while her husband parked their car. While she was there, a car across the street caught her attention. It was banged up and dirty, had decals, and had a Nevada license plate. She noticed it because her son was attending college in Nevada. She identified a picture of Robert Homick's auto as similar to the one she saw. She made eye contact with a man standing outside the car. The man was burly, had piercing eyes, looked frightening,

and had dark and longish hair. She picked a photo of Robert Homick as looking similar to the man she saw.[62] (RT 73:6304, 93:9870-9889.)

Anthony Majoy participated in a Wednesday night bowling league. Bowling alley records indicated he bowled in the league on the night it started, September 11, 1985. He bowled again on September 18, but was absent on September 25. He again bowled on October 2. (RT 100:11110-11120.)

Two consecutively numbered tickets were issued to Steve Homick and M. Dome for flight 512 from Los Angeles to Las Vegas, departing on September 26, 1985. Both of those tickets were actually used for a different flight, #446 from Burbank to Las Vegas. (RT 80:7878-7879.) The car Steven Homick had rented in Burbank on September 24 was returned on September 26, 1985 at 10 AM. 197 miles had been put on the car since it was rented. (RT 82:8242, 8246.) According to Alphonse King, the Budget Rent-A-Car Burbank Airport branch manager, Michael Dominguez was with Steven Homick when he returned the car. (RT 82:8267.)[63]

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62 Ms. Saul conceded that when she saw the man and car, she just had a fleeting feeling it did not belong there, but the event was insignificant enough that she did not bother to mention it to her husband. (RT 93:9893-9894.) The police did not show her photos of the car until at least 3-1/2 months later, and it was apparently four years until she identified the photograph of Robert Homick, after being unable to identify him in 1986. (RT 93:9906-9909, 9936, 101:11425-11430.)

63 As noted previously, King had given contrary prior testimony. (RT 82:8268-8270.) See footnote 52, at p. 59, supra.

f. Events after the Woodmans Were Killed

Manchester sales manager William Blandin recalled that on the day after the Woodmans were killed, he went to lunch at Solley's with Neil and Stewart and other employees. After lunch, Neil was upset and in shock. He did not seem to be himself, although he was still in control of himself. (RT 72:6055-6056.) According to Steve Strawn, Neil received a call during lunch from Manchester employee Robyn Lewis, who told Neil that somebody from a news organization had called seeking a reaction to the murder of the parents of Stewart and Neil Woodman. This was apparently the first notification Neil had received of his parents' death, and he seemed unsure it was true. Neil told Strawn about this as they were leaving the restaurant, while Stewart was still inside paying the bill. Neil said that if this was true, it would kill Stewart. He was always concerned about Stewart's high blood pressure problem. (RT 77:7284-7285.)

After the group returned to the plant, Neil and Stewart went into Neil's office. When they came out 5 or 10 minutes later, Stewart was crying and shaken. Neil did not think Stewart was capable of driving himself home, so a neighbor was called to come and get Stewart. Neil remained in better control of his emotions. (RT 77:7285-7288.)

Stewart Woodman's good friend and customer, Jack Ridout, talked to Stewart soon after the murder. Stewart was weeping and seemed very taken aback and mournful. He expressed regret that he had not reconciled with his mother. (RT 75:6839-6840.) Ridout believed Stewart was sincere and was convinced he was grief-stricken. (RT 75:6861-6862.)

In late September, 1985, Jean Scherrer, the retired police officer who had assisted Steven Homick at the Woodman Bar Mitzvah and in installing the intercom at Manchester Products, went to Australia for 4 weeks. The night he returned, he received a phone call from John O'Grady, the other retired officer who had introduced Scherrer to Steven Homick. They met and O'Grady showed Scherrer a newspaper article about the Woodman murders, which had occurred while Scherrer was in Australia. The article referred to a $50,000 reward for information about the murders. Scherrer took steps to obtain the reward, and eventually received $25,000. (RT 74:6491, 6493-6494, 6512.)

Despite his many years on the police force, mostly with the organized crime division, Scherrer did not contact the police after reading the newspaper article. Although he could have easily located the investigating officer on the case, he instead called the lawyer who was named in the article as the contact person in regard to the large reward. It was the lawyer who instructed him to convey any information he had to the police.[64] (RT 74:6504-6507.)

Scherrer and O'Grady did meet with Detectives Holder and Crotsley in late October 1985, and shared their recollection of the Bar Mitzvah incident. This was the first time Steven Homick's name had come to the attention of the investigating officers. Eventually, Scherrer and O'Grady did

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64 At O'Grady's request, the attorney overseeing the reward, Michael Holtzman, wrote a letter to Scherrer and O'Grady regarding the reward. After that, Scherrer was in frequent contact with investigating Det. Holder in regard to the progress of the case, since a conviction was required before he would receive the reward. (RT 74:6511-6512.)

receive the $50,000 reward for the information they provided, after Detective Holder discussed their role in the investigation with attorney Michael Holtzman, who oversaw the reward for a portion of the Woodman family. (RT 101:11360-11361, 11392-11393.)

The company that had insured Vera Woodman's life for $500,000 required the return of the policy before it would pay the benefits. After Vera Woodman was killed, Manchester Products discovered that the policy had been lost. It was necessary to file a lost policy form, which the insurance company received on November 21, 1985. Later, the insurance money and interest, a total of $506,855.94, was paid to Manchester Products in a check. The check was subsequently endorsed by Stewart Woodman. (RT 73:6341-6344, 6350.)

On December 30, 1985, Neil Woodman opened an account with California First Bank in the name of Manchester Products, for the exact amount of the check that had been received for the insurance on Vera Woodman. Neil and Stewart also each applied for $125,000 lines of credit, supported by second trust deeds on their homes. If the loans were not repaid, the bank would foreclose on the real estate. (RT 99:10912-10922.)

On January 7, 1986, Neil Woodman took possession of a brand new top-of-the-line Mercedes 560 S.E.L. automobile. It cost nearly $60,000. He traded in his top-of-the-line 1983 Mercedes for over $30,000. He gave the car dealer a check for almost $10,000, and the dealer received the balance due 10 days later. Five days after Neil took possession of this car, Stewart Woodman took possession of a similar car. (RT 97:10576-10587.)

On January 9, 1986, Neil Woodman arranged for a wire transfer of $28,000 from his bank account to an account in the name of Robert T.

Howick.[65] (RT 96:10509-10514.) Immediately before the transfer, the balance in Robert Homick's account had been $8.13. His balance at the end of each year from the time the account was opened in 1981 varied from $3.94 to $123.64. (RT 96:10530-10534.) The day after the funds arrived in Robert Homick's account, he requested a wire transfer of $25,000 to the account of Anthony Majoy. (RT 96:10536-10538.) That account also had much lower balances prior to the wire transfer. (RT 96:10547-10548.)

On January 24 and 25, 1986, Los Angeles Police Department Officer James Vuchsas was in charge of a surveillance team that had been asked by Det. Holder to conduct surveillance of Steven and Robert Homick. On January 24, Officer Vuchsas had information Steven Homick would be arriving at the Burbank airport around 8 or 9 AM. After Steven Homick arrived and rented a car, Vuchsas followed him from the airport to an apartment building at 1930 Tamarind. Other officers were in an apartment building directly across the street, taking photographs. Steven Homick apparently spent the night in that apartment. The next morning, the officers saw Robert Homick arrive and enter. Shortly after that, Anthony Majoy arrived and entered. (RT 79:7571-7577, 7622-7623.)

Officers observed the three men sitting around a table for about 45 minutes, and then all three left the apartment. They drove a short distance to another apartment building on Alexandria, stayed inside for several hours, then emerged and all returned to Tamarind. (RT 79:7578-7579.)

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65 The account number belonged to Robert Homick. His name was misspelled in the wire transfer documents. (RT 96:10513-10530.)

On February 11, 1986, Officer Vuchsas and 10 officers from his team conducted surveillance of Robert Homick at his apartment at 1523 Corinth in West Los Angeles. They started observing at 8 AM. Around 10 AM they saw Robert Homick leave the apartment alone and walk down the alley to Santa Monica, then west to Butler. As he always did, Robert Homick was wearing blue shorts and a white T-shirt.[66] He crossed the street and went to a group of 6 public telephones. He remained in the area for 45 minutes, placing 2 or 3 short calls, hanging up, and then receiving calls. He used 3 different phones. (RT 79:7581-7587, 7628.)

After Robert Homick left the phones, Officer Vuchsas obtained the numbers of the three phones he had used, (213) 479-9708, (213) 479-9421, and (213) 479-9711.

On March 11, 1986, Steven Strawn arrived at work at 8 or 8:30 AM and found police officers searching the plant pursuant to a search warrant. The search lasted until 10 or 10:30 AM. Strawn learned that Neil Woodman had been arrested at the plant before Strawn's arrival, and Stewart Woodman had been arrested elsewhere.[67] (RT 77:7173-7175.)

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66 Officer Vuchsas observed Robert Homick numerous times between November 1985 and March 1986. He invariably wore shorts, a T-shirt and a windbreaker. He never wore jeans or a business suit. (RT 79:7627-7628.)

67 The two brothers had continued to run Manchester Products up until the date of their arrest. The day after their arrest, the bank took over the company as the receiver for the State of California. Steven Strawn ran the company for the bank and later became an owner of the company. Manchester Products was sold in 1989. Strawn received stock at that time and remained an employee of the company through the time of the 1993 trial. (RT 77:7255-7257.)

Around 11 AM, Strawn received a phone call from Neil Woodman at the Van Nuys jail, asking in a hushed voice if the police had left yet. Once assured the police were no longer at the plant, Neil asked Strawn to go to Neil's office and move his desk. He said Strawn would find some papers under the right hand corner of the desk. Neil wanted Strawn to burn the papers or flush them down the toilet. Strawn agreed. Under the corner of the desk, Strawn found 2 or 3 business cards with Steven Homick's name on them, folded in half, then folded again, and then wrapped in a piece of paper.[68] After he looked at them, he ripped them in pieces, burned them in an ash tray, and flushed the ashes down the conference room toilet.[69] (RT 77:7175-7181, 7262.)

Robert Homick's apartment was also searched on March 11, 1986. A pair of bolt cutters was found on a desk in Robert's bedroom.[70] (RT 92:9816-9822.) A police criminalist examined them and determined they were used to cut the pieces of chain link found at the murder scene by Detective Crotsley. (RT 96:10462-10468.) No effort was made to check the bolt cutters for fingerprints. (RT 96:10475-10476.)

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68 The cards said American International Airways, Steve Homick, Director of Special Projects. (RT 77:7263.)

69 The jury was instructed that evidence concerning Neil Woodman's telephone instructions to Steve Strawn was to be considered only as to Neil Woodman, and that it could not be considered in any fashion against Steven Homick. (RT 77:7357.)

70 Robert's roommate, Hassan Abdullah, had never seen the bolt cutters in the apartment. (RT 94:10066.)

Anthony Majoy's apartment was another target of search warrants on March 11, 1986. A briefcase was found in a downstairs office. Inside the briefcase was a manila envelope and an address book. A business card was also found in the apartment. On the back of the card was what appeared to be a phone number and the words "Need to total zero."[71] A document found in the bedroom contained Robert Homick's address. (RT 97:10610-10612, 10617-10622.)

Majoy's apartment was searched again on April 25, 1986. Officers located a Los Angeles telephone book. On a page containing zip code information, 90049 was circled and the word "Barrington" was written. Other things written nearby were "GOUIAM" and "11949 #203." The "11949" looked liked it might have originally read "11349," with 9 then written over the 3. (RT 98:10782-10788.)

g. Steven Homick's Monthly Calendars

On March 11, 1986, police officers armed with a search warrant conducted a search of Steven Homick's home in Las Vegas. In a bedroom under a chest of drawers, an officer found a white envelope with the name "Steve" on it. Inside they found three monthly calendar books, covering September, October, and November 1985. Steven Homick's wife and daughter were present when the search occurred, but Steven Homick himself

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71 Detective Crotsley determined that if each digit of some apparent phone numbers in Steven Homick's monthly calendar books were subtracted from 10, the resulting numbers matched the phone numbers of 2 pay phones located near Majoy's residence. (RT 99:10974-10984.)

was not. (RT 76:7051-7054.) An FBI Agent who also participated in the search found 9 more months' worth of calendar books in a box that was in or on a desk in the master bedroom.[72] (RT 78:7381-7384.) In the same desk, he located a plastic bag containing 8 telephone/address books that were designed to write in names and numbers. (RT 78:7390.)

On the same day, Steven Homick was arrested at 7:05 AM at a residence at 17961 Hatton, in the Reseda area of the San Fernando Valley. Officers had followed him to that residence the preceding day, and he spent the night there. Officers also searched the premises where he was arrested, pursuant to a search warrant. A briefcase was recovered from the trunk of a Pontiac rental car that had been driven by Steven Homick to that residence the preceding day. (RT 81:8100-8111, 8121, 82:8224.)

On a table in the bedroom next to the location where Steven Homick was arrested, officers found a telephone/address book. Page 4-M of that book contained the names Peg and Sonny Majoy. The third from last page contained the words Stu and Melody Woodman, and Neil and Maxine. (RT 81:8105-8110.)

In the February 1985 calendar book, on the page for February 12, 1985, "Wayne, 8420 Blackburn, 90048" was written. That was the address and zip code where Wayne Woodman was living at that time. Wayne Woodman knew of no reason why Steven Homick would have his address. (RT 79:7675-7678.) A number of entries earlier in 1985 and in 1984

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72 Steven Homick was known by his friends and acquaintances to carry such calendar books with him all the time, and often make notations in them. (RT 82:8255-8256, 8312, 8315.)

calendar books contained numbers and abbreviations that appeared to be portions of Wayne's earlier Roscomare Rd. address. Many of these references also contained the words "Byrne" and "grape."[73] (RT 79:7679-7686, 100:11257-11267.)

On the monthly calendar book page for February 26, 1985, there was a phone number that would reach the Beaumont Property Management Company, and the address of Stoneridge. Stoneridge was the apartment building at 11956 Gorham Avenue, which was across the street from the building where Vera and Gerald Woodman lived at the time they were killed. A sign in front of Stoneridge read "Managed by Beaumont Company, Stoneridge Building" and had Beaumont's phone number. (RT 78:7404-7409.)

Sharon Armitage was a real estate agent who had the listing for a vacant apartment at 11939 Gorham Avenue, which was the same building the Woodmans lived in. There was a real estate sign in front of the building

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73 In one of the more bizarre exercises in speculation during this trial, the prosecutor theorized that Steven Homick used the word "Byrne" as a code name for Gerald Woodman. Steven Homick was apparently a fan of the popular television series "77 Sunset Strip." In that series, actor Ed Byrnes played the character Kookie, whose full name was Gerald Lloyd Kookson III. Kookie was well-known for constantly combing his hair. (RT 100:11241-11250.) Gerald Woodman always carried a pocket comb in his shirt pocket. (RT 79:7687.)

The prosecutor also theorized that Steven Homick, who was known to enjoy eating grape leaves at a Greek restaurant when he visited Los Angeles (RT 100:11187-11188), used "grape" as a code word to indicate an intent to reward himself months later with a grape leave dinner, when the killing of the Woodman parents was accomplished. (RT 125:15486; 127:15835.)

with her name on it. She showed the apartment to a number of people in early 1985. Sometimes when she showed the apartment, she would also explain the building security and show the underground parking area. The February 1985 calendar book, at the page for February 24, 1985, contained her name and office phone number. The February 26, 1985 page contained the first 3 letters of her first name and the license plate number of her car. (RT 78:7419-7429.) Ms. Armitage was shown some photographs in 1987 and picked out one of Steven Homick as looking familiar, but she did not know where she may have seen him. (RT 78:7433-7437.)

On the calendar book page for September 24, 1985, there was a reference to Henry Radio. (RT 82:8413-8414.)

The many calendar books did **not** contain any reference to the license plate number on Gerald and Vera Woodman's automobile. In 1985, a private individual could have gone to the Department of Motor Vehicles with a license number and obtained the address of the residence of the owner. (RT 101:11395-11396.)

h. Michael Dominguez' Testimony

1). Introduction

As noted at the outset of the Statement of the Facts, before considering the testimony of Michael Dominguez and Stewart Woodman, it is important to understand where the case stood without them. That has now been done. This section will attempt to present Michael Dominguez' version of the events. However, Dominguez' actual testimony was of little use to the prosecutor or to any of the defendants. Indeed, for much of the time

Dominguez was on the stand, he simply refused to answer questions put to him. Useful information came from a convoluted tangle of contradictory prior statements, most of which were introduced by the prosecution pursuant to the trial court's pronouncement that Dominguez' refusal to answer a question would be deemed a "No" and would support the introduction of prior "inconsistent" statements. Any meaningful summary of this evidence that attempts to capture the inferences that could have been drawn to support the prosecution case will necessarily be misleading in that it will convey a coherence that simply did not exist in the courtroom. In the argument portion of this brief, it will be shown that many well-established evidentiary rules and state and federal constitutional protections were repeatedly violated in order to attempt to extract meaningful evidence from Dominguez.

2). Michael Dominguez' Plea Agreement

When Dominguez testified in the present trial in November 1992, he was in custody, serving concurrent terms of 25 years to life for the first degree murders of Gerald and Vera Woodman. He entered his guilty plea on May 9, 1986, but was not sentenced until 1988. (RT 85:8925-8926, 8936, 90:9532.)

Michael Dominguez was arrested on March 2, 1986 for possession of cocaine, ex-felon in possession of a firearm, and for violating his parole. He was also concerned about the Woodman murders and an investigation into his involvement into a shooting and arson in Hawaii. About 10 days later, he was playing cards in jail when he saw his picture on a television news show, saying he had been indicted along with Steve and Jesse Homick and the two

Woodman brothers. (RT 88:9275-9277.) He knew he was in trouble and wanted to cut a deal, so he immediately told his lawyer to set up a meeting with the police. He met with Los Angeles police officers on March 12, 1986. Las Vegas officers and FBI agents were also present.[74] (RT 88:9281-9283.)

Aside from the charges arising in California and Hawaii, there were also serious charges against Dominguez from Texas. His attorney told him he should make a deal, so he did. (RT 88:9288.) Before long he learned he was also suspected of involvement in a Las Vegas triple homicide and a separate non-fatal shooting. (RT 88:9293-9296.) He was also under investigation for the murder of Kelly Danielson, for which he did feel responsible. (RT 88:9300-9302.) Dominguez faced a potential death sentence in Nevada for at least one of the crimes. (RT 88:9305.)

Dominguez was told by the police at his first meeting with them that he would get a deal if he cooperated and if he was not the actual shooter in the Nevada murders or the Woodman murders. The Los Angeles officers led him to believe he would be allowed to plead guilty to second degree murder and could be eligible for parole in 8 or 10 or 12 years. Nevada officers promised to try to get a similar sentence in Nevada. However, he ended up having to plead guilty to two counts of first degree murder in California. (RT 88:9308-9315.) Even so, he was advised by his attorney and by the

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74 When the FBI introduced Dominguez to Detective Holder, Dominguez already knew who Holder was. Holder had previously left a business card on the door of Dominguez' apartment. (RT 90:9509-9510, 115:13924.)

prosecutor he would be released in 12-1/2 years. (RT 88:9332-9334. 90:9575-9576.)

In his initial interview, Dominguez told the officers he was wearing a white T-shirt and white shorts the night of the Woodman killings. Dominguez knew before he talked to the police that the killer had been described as dressed in all black. (RT 89:9410.)

Dominguez was also told he would be able to choose the prison where he would serve his time. He expected to end up in a "cushy" federal prison, but that is not what eventually happened. (RT 88:9317.) The eventual formal agreement did include a promise that any sentence he received from Nevada, Texas, or Hawaii would run concurrently with his California sentence. (RT 88:9318.)

An additional formal term of his plea agreement in California, recited in court at the time his plea was entered, was that if the prosecutor found out that he **had** lied in any material way, **or** if he committed perjury when he eventually testified, then all of the agreements would be declared null and void. (RT 88:9331.) Dominguez believed it was up to the prosecutor to decide whether the agreement would be honored or nullified. (RT 90:9583.)

Dominguez testified that he pled guilty on the advice of his counsel, but when he appeared in court and told the judge what he had done, and that he was pleading freely and voluntarily, that was nothing but lies. (RT 85:8925-8927.) Dominguez also claimed he had been physically forced to give a videotaped statement to Detectives Holder and Crotsley in Las Vegas on March 13, 1986. (RT 85:8938-8940.) In his trial testimony, Dominguez said that when he talked to the police, he believed they wanted him to say certain things and he wanted to accommodate them. (RT 89:9435.)

In the spring of 1988, prosecutors and police officers came to talk to Dominguez in prison. He told them he was not satisfied with his deal, that he wanted to withdraw his plea, and that he would not testify any more. However, he did testify subsequently in October 1988 and in September 1990, in the second preliminary examination in the present case, which involved only defendants other than Steven. (RT 91:9645-9647; CT 1:1; 12:3143-3145.) When Stewart Woodman and Anthony Majoy went to trial, Dominguez was called as a witness on October 30, 1989, refused to testify at all, and was held in contempt. (RT 90:9531, 9675.)

3). Dominguez' Description of the Murder Plot

At the time he entered his guilty plea, Dominguez stated that Steve Homick recruited him to take part in a contract killing, and he went through extensive planning with Robert Homick, Steve Homick, and Anthony Majoy. After the killing he received $5,000 from Steve Homick. (RT 85:8932.)

Dominguez was born January 4, 1959 and had known Steve Homick since the 8th grade, or approximately 1972. He testified he never met Robert Homick, but in testimony given in May, 1986 he said he had known him for about a year. (RT 85:8947-8948.)

Dominguez also testified previously that he flew with Steve Homick from Las Vegas to Burbank on September 24, 1985. (RT 85:8951-8953.) Steve Homick had asked him to come to Los Angeles to help out with some people he was after, including a man who drove fast and walked his dog.

Steve told him that $50,000 was involved, and that Dominguez would get $5,000. (RT 85:8961-8968.)

In Burbank, they rented a white car and went to Jesse's home where Steve and Jesse made some phone calls. Steve brought some walkie-talkie radios with him. They went to an office to meet with an attorney named Max Herman.[75] Dominguez remained in the waiting room and when Steve emerged from meeting Max Herman he was carrying a black gun case he had not had when they arrived. Later, back in the car, Dominguez saw a revolver in the gun case.[76] (RT 85:8960-8962, 8975-8983.)

In the continuing prior testimony, Dominguez had said that at some point they drove around and tested the radios to see how far apart they would work. The radios were not working. (RT 85:8984-8987.) Dominguez was told that the place where they were testing the radios was where the people they were after would be coming from. (RT 85:9006-9007.) They also drove by a 3 story condo 3-1/2 to 4 miles away.[77] (RT 86:9044-9045.) While they were driving around, Steve said they were in Los Angeles to rob an older couple. When the radios were not working, Steve called Art in Las Vegas,

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75 Attorney Max Herman died prior to the present trial. Before becoming an attorney, he had been a well-known officer with the Los Angeles Police Department, with a solid reputation. (RT 96:10385, 10390-10391.)

76 However, in May 1986, Dominguez testified he never saw what was inside the black case, but nonetheless knew what was inside. (RT 88:9355-9356.)

77 In the trial testimony, Dominguez claimed that when he gave this prior testimony, he was reading from a script that had been prepared by the prosecutor and the investigating officers. (RT 86:9046.)

and then left and said he was going back to Las Vegas to pick up another radio. (RT 86:9054-9058, 87:9140.)

After Steve left, Dominguez went with Jesse to a hardware store where Jesse bought bolt cutters.[78] Norma Drinkern, manager of Rea's Hardware Store on Santa Monica Blvd., subsequently identified photos of Michael Dominguez and Robert Homick as persons who bought bolt cutters from her in September 1985.[79] The hardware store was located within one-quarter mile of Robert Homick's apartment. After buying the bolt cutters, Jesse (Robert Homick) took Dominguez to a motel on Wilshire Blvd. and

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78 In his March 1986 initial statement to the police, Dominguez said that Jesse bought the bolt cutters and that he (Dominguez) did not see them until they were in the car. (RT 89:9381.) In May 1986, he testified that Jesse bought the bolt cutters while Dominguez was in Los Angeles on an earlier trip, in which he had driven a truck to Los Angeles. (RT 89:9383-9384.)

79 Notably, in April 1986 Detective Holder brought Michael Dominguez into Rea's Hardware and asked Ms. Drinkern if she could identify him as someone to whom she had sold bolt cutters. Her response at that point was that she could not, since she waited on so many different people. (RT 95:10179-10180.) He also showed her photos of both Dominguez and Robert Homick, and she could not identify either of them. (RT 118:14419.)

Also, Ms. Drinker's description of the transaction was different from that of Michael Dominguez. She recalled two men coming in the store to look at bolt cutters, then leaving, then returning 40 minutes later to report that after comparison-shopping they had concluded her price was right. (RT 94:10105, 10109.) Register tapes indicated the sale occurred on September 14, 1985, at 2:34 PM. (RT 94:10137-10143.)

got him a room where he spent the night.[80] (RT 87:9142-9145, 9184-9185, 9188-9189, 94:10101-10107, 101:11323.)

Around noon the next day, September 25, 1985, Jesse picked Dominguez up at the motel in Jesse's blue-green car. They went to the airport and picked up Steve.[81] Dominguez went with Steve and Jesse in two cars to the same location as the preceding day, and they again tested the radios. (RT 87:9186-9191, 90:9625-9628.) They stopped and walked around the condo. At Steve's direction, Dominguez rang the doorbell at the condo by the name Woodman, to see if anybody was home. After verifying the Woodmans were not home, they drove around and continued testing the radios. (RT 87:9194-9201.)

While they were driving around testing the radios, Steve and Jesse were talking over the radios when Jesse got in an auto accident. That angered Steve and he yelled at Jesse over the radio. They drove to Jesse's location near the condo and Steve got out and talked to him. At that point, Anthony

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80 After this point in his "testimony," accompanied by generous readings from prior testimony and statements, Dominguez began making repeated references to a claimed polygraph examination. He answered question after question by simply saying the answers were in the polygraph exam. (RT 87:9146-9150.)

81 In his May 1986 testimony, Dominguez said he and Jesse drove to the airport to pick up Steve, but he also said that Steve had his white rental car. Every effort Dominguez made to explain why they needed to pick Steve up at the airport if Steve had his own rental car only led to more confusion. (RT 90:9626-9632.)

"Sonny" Majoy was in Jesse's car, wearing a hooded black sweatshirt.[82] (RT 87:9200-9207.)

Steve had a handgun with him. Although he had asked Dominguez to come to California with him to commit a robbery, Dominguez believed the victims would be killed.[83] (RT 87:9210-9212.)

Eventually Steve dropped Dominguez off at a major intersection of Gorham and another street. He gave Dominguez one of the radios and told him to watch for a two-door tan Mercedes with an elderly couple.[84] As soon as they came by, Dominguez was to radio ahead and let Steve know. Dominguez sat on a bus bench and waited. He saw the car with the elderly couple and called Steve on the radio.[85] After 2-1/2 or 3 minutes, Steve

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82 Richard Altman, the driver of the other car involved in the accident with Robert Homick, talked to Homick for several minutes before Homick left the scene. Altman did not see anybody else in Homick's car. He also did not see anybody else pull up and talk to Homick. (RT 99:11068-11069.)

83 However, in testimony in May 1986, Dominguez acknowledged that in his initial interview with Detectives Holder and Crotsley, he tried to convince them he did not know in advance anybody was going to be killed. (RT 88:9343.)

84 Steve did **not** provide any license number for the car. (RT 91:9736.)

85 In May 1986, Dominguez testified that he waited on the bus bench for 1-1/2 hours before seeing the car. Nonetheless, he incorrectly described the hand-held radio that he held for an hour-and-a-half as saying "Montgomery Ward" at the top. (RT 89:9401-9403.)

returned to pick up Dominguez.[86] Steve was coming from a different direction than the Woodman residence. They next drove to Fanny O'Brien's Greek restaurant and had dinner.[87] (RT 87:9216-9229, 91:9724-9725, 9729.)

Although the investigating officers received information from the FBI that a third person was with Dominguez and Steven Homick when they flew from Burbank to Las Vegas on September 26, 1985, and that Dominguez had used a credit card during these events, officers never asked Dominguez about those matters, and did nothing else to check on his credit card usage. (RT 111:13295-13299.)

In Las Vegas, about a week after the Los Angeles events, Steve gave Dominguez $5,000 in an envelope. (RT 87:9214, 91:9737-9738.)

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86 Despite his perfect match for the person seen by Rodger Backman fleeing from the murder scene, Dominguez maintained he never used the bolt cutters or the gun that night. (RT 87:9242.)

87 This was apparently the after-the-fact inspiration (and sole supporting evidence) for the prosecution's speculative theory that references to "grape" in the monthly calendar book was a code for a long-planned grape leaf dinner after killing the Woodmans.

However, Francis O'Brien, owner of the restaurant, knew Steven Homick well but did not recognize photos of Michael Dominguez. O'Brien was quite certain that when Steven Homick was in his restaurant, he was either alone or with Lew Cordileone and Lew's girlfriend Karen. (RT 100:11210-11214.)

i. Stewart Woodman's Testimony

1). Introduction

Although much information about Stewart Woodman's background was provided by other witnesses, a detailed recitation of that background from Stewart's own perspective is necessary in order to understand what kind of person he is. That understanding is necessary in order to properly evaluate his credibility. That assessment is, in turn, required in order to gauge the prejudicial impact of the many errors that occurred during the trial, and which will be set forth in the argument portion of this brief.

2). Stewart Woodman's Bargain with the Prosecution

Stewart Woodman's trial began in 1989 and he was found guilty of two counts of first degree murder and conspiracy in March 1990. Before the penalty phase began, Stewart decided to make a deal with the prosecution. He gave a videotaped statement to the prosecution and agreed to cooperate in the investigation and testify in the trials of everybody who was involved. He agreed to waive his right to any appeal of the guilt verdicts. In return, the prosecution did not go forward with a penalty trial. (RT 103:11832-11836.) He expected to be sentenced to life without the possibility of parole, but when he testified in the present trial in January 1993, he had not yet been sentenced. (RT 105:12196.)

When Stewart gave his videotaped statement, he had no guaranty he would get anything in return. His agreement was to make a statement and let the prosecution evaluate it. If the prosecution believed it was truthful and

that it was helpful to them, then there would be a deal. Otherwise, the penalty trial would go forward, but the prosecution would not be able to use Stewart's statement against him. (RT 103:11896.)

Stewart maintained that his reason for making this agreement was his fear that he would be killed in state prison. Other jail inmates had told him he would not last a week in prison. As part of the agreement, he entered the witness protection program and was housed in a federal prison, rather than a California State prison. His level of comfort was substantially better than it had been in the county jail.[88] His motivation was to stay alive so he could maintain contact with his children. (RT 103:11837-11839.)

Stewart insisted he was much less worried about the gas chamber than he was about being killed soon after arriving at state prison. (RT 103:11898.)

Despite agreeing to give up his appeal rights, within a few months of signing the agreement Stewart sought an attorney to file a new trial motion based on alleged misconduct by Stewart's attorney, Jay Jaffe.[89] He saw that

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88 In his federal prison, Stewart was able to use an outdoor track, weight area, exercise bikes, basketball court, and other such facilities whenever he wanted. He lived in his own room, which was 12 feet by 10 or 12 feet. The room had a regular door he could open or close, as he wished. The door was locked each night from 11 PM until 5:30 AM; the rest of each day Stewart was free to come and go from the room as he pleased. Each room had its own television. Outside the room there was a lounge with tables and chairs and a dining area. (RT 105:15168-12170, 106:12450-12451.)

89 Pursuant to a stipulation, the jury was instructed that if Attorney Jay Jaffe were called as a witness, he would testify that he did not commit any misconduct in his representation of Stewart Woodman. (RT 110:12926.)

as totally separate from his agreement to waive an appeal.[90] (RT 103:11885-11886, 11892-11893.) He maintained that when he entered the agreement, he had not thought about a new trial motion. He did not become aware of the potential grounds for the new trial motion until several days after his agreement with the prosecution had been made. (RT 105:12197-12198.)

3). Stewart Woodman's Version of the Events

a). The Family and the Business

Stewart described his early involvement working for his father. In 1966 or 1967, when Stewart was in high school and 16 years old, he started in a program where he went to school 4 hours a day and worked for his father 4 hours a day. That was interrupted in 1968, when Stewart was in the army. (RT 102:11547-11548.)

From the outset through 1975 or 1976, Stewart felt his relationship with his father was very good. Stewart handled sales for his father's business. Gerald Woodman was not one to compliment Stewart directly, but comments Stewart heard from others led him to believe his father

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90 Stewart denied telling his Rabbi, Steven Reuben, or the Rabbi's wife, DeeDee, that the statement he had given the prosecution had holes big enough to drive a truck through, or that he could eliminate his confession if he gained a new trial. However, he conceded he might have told them he was advised to confess and would do anything he had to do to stay out of the gas chamber. Stewart conceded he had often lied to his Rabbi in maintaining he was not guilty, and he might have told him his confession would have no impact on his motion for a new trial. (RT 103:11899-11905.)

appreciated his efforts. Stewart and Gerald argued, but Stewart still believed they were getting along well. (RT 102:11549.)

Stewart spent much of his time on the road, selling plastic throughout the United States and even travelling to England and France for the business. He opened a warehouse in England. (RT 102:11549.)

Stewart believed his father was a brilliant businessman, building a successful business after starting with very little money. He believed Gerald Woodman excelled at production and was great as long as he was kept away from meeting people. (RT 102:11550.) Gerald simply could not deal with other people and Stewart tried to keep him away from the customers and the salespeople. (RT 106:12382.)

Neil was six years older than Stewart and started working with Stewart and their father from the time Stewart returned from his Army service. Neil had worked for his father in the early 1960s, but then left and went to work for Mickey Stern, who was married to one of Vera Woodman's sisters. Stern was in business selling tax-free bonds. When Stewart returned from the army in 1969 he believed his father did not want Neil back in the business, but was pushed to allow that by Vera Woodman. Neil and his father always argued. (RT 102:11552-11556.)

Although Stewart heard from others that Gerald complimented his work, he did not hear that about Neil. In fact, Gerald often belittled Neil in front of other people, saying he did no know what he was doing and would never amount to anything. He would make such statements directly to Neil in front of other people, including Neil's wife and children. As a result, nobody at the plant respected Neil. Neil ignored the criticism in front of his father, but made comments to everybody else about what a son-of-a-bitch his

father was. (RT 102:11554-11557.) In slight contrast to his treatment of Neil, Gerald Woodman would scream at Stewart in front of others, but not tear him down. (RT 102:11559.)

In late 1978, Gerald Woodman had a heart attack. His typical work day before the attack had been from 6 AM until sometime between 4 and 7 PM. After the attack, he was off work for a few months. When he returned to work, he came in later in the morning, stayed through lunch, and then went home. Before the heart attack, Neil had never been allowed to run the machinery and neither brother had ever seen the company books. After the attack, Neil ran production and Stewart had his first chance to see what was happening in the company beyond sales. Neil and Stewart took over the business and it continued to prosper. (RT 102:11558-11562.)

When Gerald Woodman returned to work, he was against letting his sons run the business. Since his sons were doing well, Gerald felt unneeded. He wanted his sons to come to him to solve problems, but they did not do that. Neil told Stewart that Gerald started adjusting settings on the plant machinery to create problems just so the brothers would have to come to him for assistance. The brothers told their mother that Gerald was causing problems, but she did not believe them. Finally she came to the plant and they were able to have her observe what Gerald was doing. (RT 102:11562-11566.)

The elder Woodmans traveled to Europe every June, charging their expenses to the business. In 1980, they went with Sidney and Sybil Michelson and they spent $30-40,000 in 2 weeks. Stewart thought that was putting a strain on the company. When he returned from England, Gerald told his sons he almost bought a racehorse for $270,000. That led to another

argument, as the boys did not know where that would come from. Stewart and Neil then met with other supervisors at the plant and they agreed that they would take their orders from the brothers rather than from Gerald. That upset Gerald, and as a result, he took a trip to Israel by himself. (RT 102:11566-11569.) Gerald continued to draw a full salary of about $2,000 per week and a car allowance of $1,800 per month. (RT 102: 11569-11570)

As Neil and Stewart worked together running the company, their relationship improved. They felt they were working together with the same goals. However, Wayne Woodman had graduated from college and had come to work for the company. Within months he was receiving the same salary as his brothers. While Neil and Stewart shared their father's earlier custom of coming to work early and working long days, Wayne would come in at 9, spend an hour at the deli having breakfast, work for an hour or two, get in an argument with someone, find an excuse to walk out, and then go home. When Neil and Stewart heard that Wayne told Rick Wilson he was going to take over the business, they went to their father with their concerns. Gerald sided with Wayne in nearly every dispute, saying he had sent Wayne to Duke University so Wayne could run the company, and Wayne would do what his father wanted. (RT 102:11570-11581.)

The relationship between Neil and Stewart and the father deteriorated to the point where the brothers were not talking to their father. Steve Strawn was hired to do the work that Wayne was not doing. Neil and Stewart discussed the problem with their mother, who agreed to talk to their father, but she was unable to change his mind. (RT 102:11581-11583.)

By this time, Neil and Stewart both had their financial futures deeply tied to the company. In April 1981, Stewart decided to buy a million dollar

home in a gated community. He called his mother to tell her his plans and said he needed to be certain there would be no problems in the business, before he could commit himself to such an expensive home. Stewart was concerned that his father might try to close down the business. According to Stewart, his mother gave him her word that she would never vote her shares in the company against him, and would not allow Gerald to shut down the business. She promised to side with Neil and Stewart against Gerald in any decision about the future of Manchester Products. (RT 102:11583-11586.)

However, in late September or October 1981, Vera Woodman called Stewart and said Gerald wanted to have a Board of Directors meeting. There had never previously been a formal Board of Directors meeting; Gerald just did whatever he wanted to do. Now Gerald had decided Stewart should go on the road again, returning home only every other weekend. Neil was to stay in the factory and out of the offices. Wayne would run the business. (RT 102:11594-11595.)

Stewart was not willing to return to a life on the road.[91] He was no longer willing to be away from his family that much. But his mother said that if Stewart and Neil did not attend the meeting and did not do as their father wished, then Gerald would liquidate the business. Stewart felt betrayed, as it had only been 6 or 7 months since she he had relied on her promise and bought the very expensive home. (RT 102:11595-11597, 11611.)

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91 After he stopped spending most of his time on the road, Stewart continued to do his sales work on the telephone. He was still responsible for 60% of the company's sales. (RT 107:12461-12462.)

Stewart immediately went to Neil's home and they decided to fight their father's plan. They hired a lawyer to prevent Gerald from liquidating the company. Meanwhile, they became very fearful their father would take action to sabotage the machinery. The plant operated 24 hours a day, so they started taking turns staying in the plant overnight. They changed all the locks and hired a 24 hour security guard service. (RT 102:11598-1 1602.)

On the advice of their counsel, they had a stockholder's meeting at which they issued and purchased $10,000 worth of new shares. That gave them a majority of the shares, so they immediately fired their father and Wayne, eliminating their salaries and car allowances. Their parents were given a short period in which to find their own health insurance. (RT 102:11605-11607.)

According to Stewart, he asked Wayne to return the Cadillac he used, that was owned by the company. When Wayne failed to return it within a month, and Stewart learned from his sister Hilary where Wayne was going to be on his birthday, Stewart got an extra set of keys to the Cadillac, had his wife drop him off at the restaurant, and took the car. (RT 102:11612-11615.) Stewart insisted his sister Hilary lied when she had claimed Stewart had talked to her at length in an apparent effort to extract information from her. However, Stewart acknowledged that when Hilary called him after Wayne's car was taken, he lied to her and said that he had referred the matter to a repossessor, and it was just a coincidence that it disappeared from the location Hilary had revealed to Stewart. (RT 103:11842-11843.)

Inside the car, Stewart and Neil found documents that convinced that Wayne and Gerald had been planning for a number of months to drain the business of cash and liquidate it. Stewart could not believe his father could

have made such plans without his mother knowing about it. As a result, he became convinced that when he had talked to his mother about buying his new home, she already knew what Gerald was planning. Stewart was outraged that she could have let him get so deeply in debt while misleading him about the future. (RT 102:11616-11624.)

The lawsuit over the liquidation of the company lasted 6 months and was also very bitter, after Gerald rejected what his sons considered a generous settlement offer. By this point Stewart and Neil informed their mother she could no longer see their children. Neil and Stewart became very close. Stewart had suffered a stroke in January 1981 and Neil was very concerned for his health, so Neil participated in the trial over the breakup of the company and Stewart did not. The trial resulted in a judgment requiring Neil and Stewart to pay $675,000 to Wayne and their mother, for complete ownership of the company. The brother borrowed the money from Union Bank, to pay the judgment. Stewart did not see this loan as a financial strain, since it would be repaid with the savings from not having to pay Wayne and Gerald's salary and car allowance. (RT 102:11624-11633.)

By the end of the lawsuit, Neil and Stewart believed their father was completely insane. They expressed that belief often, to anybody who would listen. They expressed bitterness and hatred on a daily basis. Whenever they were with people, the lawsuit was an unavoidable topic of conversation. When new employees were hired by Manchester, Neil or Stewart would tell them at the outset the kind of stories they would inevitably hear. (RT 102:11633-11635.)

Stewart and Neil considered themselves equally in charge of the company. Neil retained the final say on production and Stewart on sales,

while they both dealt with financing and banking. However, the company got into a bind when a very expensive new piece of manufacturing equipment did not work properly for months after it was installed. The company was $2 million behind in shipments by the time the problem was resolved. Just at the time when the company was having a serious cash flow problem, Steve Strawn discovered that when new computer software had been installed, the programmer mistakenly left it possible to make changes in the accounting data that were not supposed to be permitted. (RT 102:11639-11643.)

This led to the plan to change the dates on invoices in order to continue getting more credit from Union Bank than the invoices would have properly supported. Stewart realized this was misleading the bank, but he saw it as a necessary way to get the company through the rough period that accompanied the problem with the new piece of equipment. According to Stewart, after the bank became concerned and insisted on an audit, it was Neil who hired Steve Homick to install the bugging equipment, and Stewart only learned about it after it was completed. When the audit was performed, the brothers thought they had fooled the bank, but they learned afterward that the auditors realized what they were doing. (RT 102:11643-11648.)

After the audit, the bank began sharply reducing the amount of credit extended to the business. Neil and Stewart had to cut their salaries. They had to refinance their homes to inject more cash into the business, giving Union Bank second deeds on their homes. The bank began seeking verification of invoices from Manchester's customers, and Stewart asked some of them to lie to the bank about whether products had been shipped. (RT 102:11648-11652.)

Despite the pressure from the bank, Stewart and Neil continued to enjoy the lifestyle to which they had become accustomed. As late as 1984, Stewart estimated that he alone received $500,000 in salary, expense allowances, and cash from the office slush fund. He estimated half of that was not on the books. (RT 106:12394-12395.) Stewart acknowledged that in addition to lying to the bank, he also lied to his wife about how much money he took out of the business. (RT 106:12410-12411.)

Meanwhile, Stewart became aware of Gerald's new company, Woodman Industries, in the spring of 1982, after the lawsuit had ended. Stewart was convinced his father had no intention of staying in business, and was simply out to force both Manchester Products and Woodman Industries into bankruptcy. The brothers knew their father could not make enough to run his business at the low prices he was charging, but they still felt forced to lower their own prices as much as they could without losing money. (RT 102:11653-11659.)

The brothers' strategy succeeded, when Woodman Industries started production in September 1982, and then went bankrupt by July 1, 1983. Soon afterward, the parents had to declare personal bankruptcy. Before that all happened, though, the competition had been very bitter. Stewart believed that Gerald was intentionally causing him aggravation on a daily business. For example, Manchester would receive orders from all over the country, ship the product, and then find out the orders were fake and originated from Woodman Industries. In other instances, Gerald Woodman would tell suppliers that Manchester and Woodman Industries were all one company. Gerald would order supplies and the bills would go to Manchester. When Manchester refused to pay, some suppliers cut them off. (RT 102:11658-

11660.) Manchester even received a bill for plumbing work that had been done at Gerald and Vera's home. (RT 103:11771-11772.)

The brothers had to call their suppliers and make it clear that Woodman Industries was a separate entity. They had to call customers back to verify every order that was received. Stewart and Neil began making even more hateful statements about their parents than they had previously. (RT 102:11661-11662.)

Once Woodman Industries went out of business, Union Bank called the brothers and asked them to look at the machinery and inventory. They did that and became more convinced than ever that Woodman Industries had never been designed to succeed, only to create problems for Manchester. Also, bills kept coming to Manchester for debts that were really Woodman Industries' responsibility. Stewart was constantly feeling aggravated and when he felt that way, he ate more and more food. He put on a lot of weight and had problems with his blood pressure and his heart. (RT 102:11662-11664.)

Neil was always concerned about Stewart's health, since Stewart had suffered a stroke in January 1982. Neil tried to take care of problems that Stewart would normally resolve, telling Stewart to relax. Both brothers realized that if Stewart's health forced him to stop working, the company would lose much of its sales. (RT 102:11664-11665, 104:12033.)

Stewart insisted that, although he was aware of the insurance policy on his mother's life, it was not something he thought about at all until Muriel Jackson started insisting that the brothers cancel it. Once they realized how much their mother wanted them to cancel it, they decided to keep it in force even if she lived to be 100. They felt that Muriel Jackson had caused them

aggravation and this was simply their way to aggravate her. (RT 102:11666-11669.)

b). The Homick Brothers

Stewart Woodman testified that he and his brother Neil hired Steven Homick to murder their parents. Steven Homick brought his brother Robert into the plan. Stewart did not find out until after the fact that Anthony Majoy and Michael Dominguez were also involved. The Woodman brothers paid approximately $50,000 to have their parents killed. (RT 102:11541-11543.)

Stewart was first introduced to Steven Homick in Las Vegas around 1980, by a mutual friend, Joey Gambino, a pit boss at the MGM Grand Casino. Stewart liked to gamble and was taking his family to Las Vegas every 4-6 weeks.[92] Once when Neil and Stewart were playing poker at the MGM Grande, Joey Gambino said he had someone he wanted them to meet. They walked out with Gambino and both were introduced to Homick. The Woodman brothers talked about betting on football games and Homick said he had a brother who also did that. It turned out that Stewart only bet on professional games while Robert Homick only bet on college games. Steve Homick obtained Stewart's phone number so Bob could call him in Los Angeles to talk about games. (RT 76:7036; 102:11678-11680.)

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92 Stewart was introduced to gambling by his father. Gerald Woodman took his sons with him to horse races when they were small children. He introduced Stewart to all aspects of gambling and Las Vegas. (RT 105:12133.)

Bob Homick did call Stewart, at the company, which was still on Mason Street. He gave Stewart tips of college games and Stewart gave him tips on pro games. Bob needed a new bookie and Stewart introduced him to the one he was using. Soon, Bob and Stewart were talking on the phone every day. Stewart placed bets for both of them and Bob would come by the plant to pick up money if he won, or drop off money if he lost. Stewart was regularly betting thousands of dollars every day. Bob was betting $2,000 to $2,500 per week on 40-50 different college games, and usually coming out ahead by $200-$300 per week. At some point, Stewart's bookies were arrested and after that he and Bob often used pay phones to communicate about their gambling.[93] Bob's parents lived in Ohio and one of them had cancer, so Stewart let Bob use the office WATTs phone lines regularly, to call his parents. Stewart expressed his feelings about his own parents. (RT 102:11680-11682, 103:11831, 104:11970, 107:12512.)

Bob Homick was unemployed most of the time Stewart knew him. Stewart hired him from time to time to do collections work for Manchester Products. Bob billed for those services under the name National Collections Service. Bob did the job well, collecting from several tough accounts. Stewart acknowledged sending Bob to Soft Lite, the company run by Jack Swartz and his daughter Tracey. However, Stewart maintained that he only sent Bob there to look around and see what assets they had at their business address. Stewart already had a judgment against Soft Lite for the money they owed Manchester, but he had to determine whether it was worthwhile to

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93 One of the bookies had been arrested while Stewart was talking to him on the phone. (RT 104:11969.)

send a marshal to attach their assets. Bob was not sent there to collect money. (RT 103:11804-911808, 105:12244-12245, 106:12372-12373, 107:12566-12568.)

Stewart also recalled an occasion when Bob borrowed and later returned a Monte Carlo that belonged to Manchester Products. On another occasion, he asked to borrow it again and said this time he would not return it and they should report it stolen. Neil and Stewart did not care, and they had Rick Wilson call the insurance company and report the car stolen. Manchester did receive payment from the insurance company for the car. (RT 103:11809-11811.)

Stewart acknowledged buying a 1983 Rolls Royce convertible that he ended up hating. When he drove it, people called him a dirty Jew. His children did not want to be driven to school in it because other kids made fun of them. In 3 months, he only drove it 3 or 4 times. However, he did not want to sell it because his wife liked it and would have objected. Stewart told Bob about this and Bob said he could take it and strip it, and Stewart could collect the insurance money and buy a hardtop. Stewart agreed and arranged for Bob to come to his home and take the Rolls Royce while the family was out to dinner. This plan also worked and once again Stewart collected $146,225 in insurance money. (RT 103:11812-11816, 11857.) Stewart also signed a false sheriff's report about the "theft," all because defrauding the insurance company was easier than arguing with his wife about selling the car. (RT 103:11857-11858.)

When the Rolls Royce disappeared from his home garage, Stewart told people his father had been jealous about the car and had been responsible for its disappearance. (RT 103:11818.) Furthermore, Stewart

publicly berated the guard service for the gated community in which he lived. He maintained at trial that he sincerely believed the guards had not done their job properly, or Bob Homick would not have been able to get in to steal the Rolls Royce. (RT 103:11851.)

Steven Homick came by the new plant on Prairie in October 1983. Steve was an acquaintance, but the relationship with him was nothing like the relationship with Bob. However, Neil and Steve did strike up a friendship and Steve would come by the plant occasionally to see Neil. (RT 102:11683-11684.)

By this time, Stewart's friendship with Joey Gambino had also grown closer. Sometimes when Stewart visited Las Vegas, Joey and his girlfriend would drive back to Los Angeles with him and stay at his home. On one occasion in June1983, when Joey was at his home, he overheard Stewart on the phone screaming at his parents. Afterward, Joey said "Stewart, you are going to kill yourself. Why don't you let me handle this, and we will put an end to it."[94] A week or ten days later, Steve Homick called. Steve said Joey told him Stewart and Neil had a problem with their parents and they were crazy to go through it. (RT 102:11684-11687, 103:11908, 104:11926, 105:12184.) According to Stewart, the thought of actually having his parents killed never occurred to him until the suggestion made by Joey Gambino. Prior to that, statements about wishing his parents were dead were just expressions of frustration, with no thought of doing anything about it. (RT

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94 At the time Joey Gambino made this suggestion, Woodman Industries was already out of business. (RT 103:11908.)

104:11924.) Even when Steve Homick called, Stewart was still not really taking the matter seriously. (RT 104:11926-11927.)

Steve said Stewart and Neil should think about it for a few weeks, and then Steve came to Los Angeles around October 1983, and met with both of them at the plant. In the meantime, Stewart and Neil had discussed the matter but reached no decision other than to find out whether Steve Homick was for real, and what it was he could do. When they did meet with Steve again, he said he would take care of Stewart's problem with his parents, and Stewart's father would never be in his life again. He asked about their parents' traits - when they were together, when they were apart, when they saw other people. Neil and Stewart both provided information about traditional family gatherings for birthdays and anniversaries, as well as for Passover and Yom Kippur. Stewart also gave Steve the address where his parents were living with Wayne.[95] Before this meeting, Stewart had only seen Steve twice - once at their initial introduction through Joey Gambino and once at a poker parlor in 1981, when they discussed investing in a business.[96] (RT 102:11685-11692, 103:11705, 11708, 104:11925, 11930.)

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95 However, Stewart also testified that his gave Wayne's Roscomare Rd. address to Robert Homick in 1982, when Stewart wanted surveillance done regarding Woodman Industries. At that time, Stewart sought to learn all he could about Woodman Industries. That had nothing to do with the subsequent plot to kill his parents. (RT 106:12269-12270.)

96 Thus, contradicting the testimony of several Manchester Products employees, Stewart was certain that Steve Homick never came to the old Manchester plant on Mason Street. (RT 104:11926, 105:12251.) He was also quite positive that if receptionist Cathy Clemente answered a number of calls for Stewart from Steve, it must have been Stewart's bookie, Steve Weinstein. (RT 105:12249-12251.) Furthermore, Stewart was certain

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Steve gave the brothers a price of $40-50,000. After he left, the brothers continued to debate whether Steve was serious, but they concluded they would see soon enough. In Stewart's opinion, both brothers wanted it to happen, but did not really think Steve would actually do it. When they discussed it, though, Neil would tell Stewart he would have to stay strong because both parents would have to be killed. If it was only their father who was killed, the brothers would be obvious suspects. But for a long time Stewart had been very close to his mother, even while feuding with his father, so if both parents were killed nobody would believe Stewart was involved. (RT 102:11693-11695.)

Stewart steadfastly maintained that the $500,000 life insurance policy on his mother had nothing at all to do with the decision to have her killed. Stewart did not care about the money. He agreed to the murder out of sheer anger and hatred. He and Neil included their mother in the murder because Neil said if only their father was killed, there would have been even more suspicion on them.[97] (RT 103:11910.) Stewart also acknowledged telling the prosecution in his statement to them that he had his mother killed because he felt betrayed when she gave him false assurances before he bought his expensive home. (RT 103:11912-11913.)

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he never pointed to Steve Homick and said that was his man in Vegas. The only person in Vegas he would have considered in that manner was Joey Gambino. (RT 105:12252-12253.)

97 Stewart acknowledged he had previously made negative comments about his mother, but he claimed he never told Twyla Morrison that he had a dream that my father was beaten to death with his mother's face. (RT 103:11911.)

Stewart was also firm in stating that the $100,000 note that would have to be repaid to Gloria Karns at the end of September 1985 had nothing to do with the eventual timing of the murders. (RT 104:11964-11965.)

Neil and Stewart met with Steve again around November 1, 1983. (RT 102:11707.)

When the brothers had first met with Steve and discussed killing their parents, Stewart specifically said he did not want Robert Homick to be involved. Stewart viewed Bob as a klutz and did not want something that could jeopardize his own life to be in Bob's hands.[98] Nonetheless, after Passover in March or April 1984, Bob mentioned to Stewart and Neil that there had been an attempt on the lives of the parents, but Gerald Woodman was driving so fast they were unable to catch up to him. Bob also said he needed $5-6,000 to cover expenses. The brothers agreed to arrange that. (RT 103:11709-11711, 104:11943-11944.) Stewart was not happy to learn that Bob Homick had become involved in the plans, and he rarely discussed the plans with Bob. (RT 105:12108.) Nonetheless, he did not discuss it further with Steve Homick or take any other steps to end Robert Homick's involvement. 9RT 106:12422-12424, 107:12509.)

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98 Stewart's belief that Bob was a klutz stemmed from the incident involving the Monte Carlo owned by Manchester Products. Stewart did not want other Manchester employees to know that Bob was involved in the disappearance of the Monte Carlo. He left keys in the wheel well so Bob would be able to take the car surreptitiously. However, when Bob came to take the car, the battery was low and it would not start. Bob just walked into the plant and asked Rick Wilson to give him a jump start. After that, the Monte Carlo became an office joke. (RT 104:12041-12043, 106:12298.)

Neil and Stewart each drew about $1,000 per week from the company in phony expenses. They decided that one week they would just draw larger expense checks and use that to pay the Homicks. They drew and cashed the checks, and within less than a week after Bob asked for the money, Stewart met him at Ralph's market and gave him $6,000. That had already been a common location for them to meet and exchange money, to pay off bets. (RT 103:11712-11713, 104:11957.)

Stewart again began having doubts the Homicks were serious. He thought they were just using him and Neil to obtain their money. Stewart expressed that view to Neil on several occasions, but Neil insisted they just needed to have patience. Stewart also had a growing problem with the thought of his mother being killed, but he never tried to stop the plans. Neil told Stewart to concentrate on sales while Neil would be the one to meet with Steve. After that, Steve would drop by the plant about once a month to meet with Neil. After such meetings, Steve would say hello to Stewart, ask how he was doing, and assure Stewart he would take care of everything, but after the two earlier meetings, Stewart did not participate in any meeting with Steve Homick about the murder plans.[99] This continued from March 1984 through September 1985, with Neil meeting regularly with Steve Homick and Stewart having little contact with Steve. (RT 102:11696-11698, 103:11714-11717, 104:11941.)

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99 According to Stewart, after the second meeting in November 1983, neither he nor Neil met with Steve Homick about the plans and nothing at all happened until Passover, in the spring of 1984. After that, Neil started to have the meetings with Steve that Stewart did not attend. (RT 104:11950-11953.)

Two months before Yom Kippur in 1985, Stewart Woodman's cousin, Linda Rossine (Sid and Sybil Michelson's daughter) called and encouraged Stewart and his wife and children to join the family to break the fast. Stewart declined, but during the conversation Linda mentioned the family would all be gathering at the Jackson home. That was no surprise, as Stewart knew the family had gathered there every year since his parents had lost their nice home. Nonetheless, this was confirmation and within a day or two, Stewart passed that information along to Bob Homick the next time he saw him. Stewart also mentioned this to Neil, adding that if the Homicks asked for expense money again and said they had tried to kill the elder Woodmans but missed, that would show they were lying as the Yom Kippur event was a sure thing. Stewart said this sarcastically, as he was still convinced the Homicks were just using them for expense money. (RT 103:11726-11732.)

On September 23, 1985, Stewart called Sid Michelson. He was simply calling to wish him a nice holiday and not to obtain information. Stewart already knew where his parents would be for Yom Kippur and did not feel he needed any further confirmation. Stewart called Sid at his office, but Sid had just left for home. Stewart waited 10-15 minutes to give Sid time to get home, then called his home number. Nonetheless, Sid was not yet home and Stewart found himself talking to Sybil.[100] The conversation got emotional

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100 Although Stewart thought he had waited long enough for Sid to get home, phone records showed the call to the Michelson home was made just a minute or two after the call to Sid's office. (RT 105:12114.)

when Sybil urged Stewart to bring his wife and children to the Jacksons. Then Sid arrived home and took the phone. (RT 103:11732-1 1737.)

Bob Homick called soon after Stewart talked to Sybil. He was just calling about bets, as he did almost every day. While they were talking, Stewart mentioned he had just talked to Sybil and there was no doubt that the family would be at the Jacksons on Yom Kippur. (RT 103:11738-11739.) Stewart maintained it was just coincidence that phone records showed calls to him from Bob Homick just before and just after Stewart had talked to Sybil Michelson. Stewart talked to Bob all the time about matters that had nothing to do with Stewart's parents. (RT 103:11847, 105:12 115-12117.)

On September 25, Stewart went to the office about 8:30 rather than his usual 7 AM, in accordance with his holiday custom. He had lunch with Steve Strawn, Rick Wilson, and Bill Blandin, and then went home early. He believed Neil was at the office briefly, early in the morning, as Neil liked to be there for the 7 AM shift change, even on holidays. Neil would have gone home after that, as he was more religious than Stewart and observed the holiday. That evening, Neil was at Stewart's house for the breaking of the fast, and 100-200 friends and neighbors were also there. (RT 103:11740-11745.)

During these days leading up to Yom Kippur Stewart did not discuss the murder plans with anybody, except to sarcastically say to Neil that he should not let the Homicks get away with any claim that their parents did not go to the Jacksons. Stewart did not know that the killings had actually occurred until Neil told him in Neil's office when they returned from lunch on the following day. All Stewart could recall of that conversation with Neil was that Neil said everything was done, and that they got both of them. Neil

told Stewart to be strong, as they would certainly be investigated. Stewart was upset about his mother's death and had a neighbor come and drive him home. (RT 103:11745-11747.)

Several days later Neil talked to Muriel Jackson's husband Lew on the phone, and then reported to Neil that Lew was absolutely convinced Neil and Stewart were involved in the murder of their parents. Neil again told Stewart he would have to hold himself together. About the same time, Neil told Stewart he would have to meet with Bob Homick and give him another $15,000. Stewart did that a few days later, again meeting Bob at Ralph's Market. (RT 103:11747-11751.)

This payment was made from spare cash that Neil and Stewart always kept on hand. The business insurance cost $20,000 per month, but they always paid $35,000 per month. Then, at the end of each year, their insurance agent returned $180,000 in cash, in envelopes with $5,000 each. They kept some in drawers in the office and the rest in safe deposit boxes. Stewart met with Bob Homick and gave him 3 of the envelopes. About a month later they gave Bob another $6,000 expense money, and then in late December or early January, when their new lines of credit were approved, Neil wired Bob $28,000 as the final payment.[101] (RT 103:11751-11758, 11762, 104:11957, 11964.)

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101 The Woodman brothers had to wait for their new lines of credit to be approved rather than use the insurance money, because the insurance was delayed. First, the brothers could not locate the insurance policy and had to obtain a new copy. Then Muriel Jackson tried to intervene and have the insurance check stopped, and the brothers had to wait while the attorneys resolved that. (RT 103:11759-11761.)

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c). Events Following Stewart Woodman's Arrest

Stewart Woodman was arrested March 11, 1986. The arrest came as a complete surprise. Stewart had not met or even known of the existence of Anthony Majoy or Michael Dominguez until the time of the first preliminary examination. (RT 103:11773-11777.) Stewart was told that Dominguez was the person who actually shot his parents. (RT 106:12300.)

According to Stewart, on one occasion when the Woodman brothers and the Homick brothers were together in a holding cell, Steven Homick complained that he had worked in a casino doing everything to get Bob to law school, and as smart as Bob was, Steven could not understand how he could get in an auto accident and then report to the police that it had occurred right around the corner from the murder scene. Bob replied that he did that on purpose, since nobody would ever believe he would do that if he had been involved in the murders. (RT 103:11779-11780, 107:12259.)

On another occasion when Stewart was with Bob Homick and Neil Woodman, Neil said he and Bob had an idea regarding how to explain the wire transfer from Neil's account to Bob's account. If questions were asked about it, they would claim they were planning to start a business involving video tapes of lost children.[102] (RT 103:11782-11783.) About a month

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Also, the brothers could not just pull $28,000 out of the business at that point, because auditors from Union Bank were reviewing every check that was written on the business account. (RT 104:11999.)

102 Stewart was not sure whether Steven Homick was present when this conversation occurred, so the court instructed the jury it was

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before the arrest, Bob had given Stewart an IOU for $28,000 so that if Stewart ever had to explain the payment to Bob, he could say it was for a loan or a business venture. (RT 104:11995-11997.) However, soon after Stewart was arrested, his wife found the IOU from Bob Homick and threw it away. (RT 104:12017-12018.)

Stewart explained that in the jail, Neil was paranoid about being bugged, even in the attorney room. As a result, much of the communication between Neil and Stewart was done by notes. Stewart retained 3 notes that Neil had passed to him as a result of an incident Stewart heard about from his attorney, Jay Jaffe. Jaffe told Stewart in July 1986 that on the day of Stewart's arrest, Stewart's wife Melody Woodman had come to Jaffe and told him that she had once met with Neil at the El Caballero Country Club. Neil was concerned about Stewart's high blood pressure and heart problem and he told Melody that the reason Stewart had these problems was because of the aggravation caused by his parents. Neil told Melody he would take care of that problem and she would not have to worry about it.[103] (RT 103:11785-11788.)

When Stewart heard this from Attorney Jaffe, he was upset that his wife had met with Neil and not told Stewart about it. Stewart and Attorney

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admissible only against Neil Woodman and Robert Homick, but not against Steven Homick. (RT 103:11782-11784.)

103 The jury was instructed that the statements made by Melody Woodman and Jay Jaffe were not admitted for the truth, but only to explain Stewart's subsequent conduct in confronting Neil. The jury was told that this testimony and the three notes from Neil were all admissible only against Neil and not against either of the Homicks. (RT 103:11790-11791.)

Jaffe decided it would be useful to get something in writing from Neil regarding the conversation between Neil and Melody. Stewart conceived a plan to trick Neil into writing something Stewart could use against him.[104] Stewart returned to his cell and falsely told Neil that he had met with Melody and Jaffe and that Melody was hysterical. She had told Jaffe about her meeting with Neil, but she would not tell Stewart. Neil said he would write Stewart a note about it and he did so. Stewart had been counting on that. He knew Neil would not want to talk about it on the tier, so Neil would have to write down whatever he had to say. (RT 103:11791-11796, 11866.)

However, Stewart did not find Neil's note very helpful. Neil wrote that he had talked to Melody to tell her to get junk food out of the house and cook healthier meals for Stewart. Neil added that Melody had replied that Stewart got mad at her when there was not food to eat in the house. (RT 103:11797.)

Wanting to get Neil to write more about the event, Stewart told him that there must be more to it, as that was not enough to have caused Melody to be so upset. Neil then wrote a second note. This time he said that Melody

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104 Stewart attempted to justify his actions by explaining he had told his wife and attorney he was not involved in the murder plot. When his attorney reported back what his wife claimed Neil had said to her, Stewart's wife and attorney wanted Stewart to get something in writing that would incriminate Neil. Stewart felt he could not refuse to do that without causing them to think he was also involved in the murder plot. On the other hand, Stewart readily admitted that he set up his brother so he could beat the case himself. (RT 106:12402-12405.)

Indeed, Stewart acknowledged he could not think of anything he would not have been willing to do if it would help beat the case. (RT 106:12408.)

was worried about Woodman Industries and that Neil had told her not to worry because Manchester would easily eliminate them. (RT 11800-11801.)

Stewart was still dissatisfied and told Neil that he must be lying, since Woodman Industries was already out of business by the time of the meeting between Neil and Melody. Neil then wrote a third note, saying that when he met with Melody she told him that the thing that was killing Stewart and making him eat was the aggravation from his parents. Neil also wrote that he told Melody that could be "arranged," but that he did not say it like he had that in mind. Neil expressed a fear that Melody might have told Jaffe a distorted version, in order to point a finger at Neil rather than Stewart. Neil was very concerned Jaffe would say something to Neil's attorney, as he did not want his attorney to think he was guilty. Neil said it was important for Stewart to find out what Melody had told Jaffe and why, and whether she had told anybody else. (RT 103:11801-11803.)

After receiving these notes, Stewart pretended to flush them in the toilet in his cell, but he actually kept them in a legal file and gave them to his attorney. Attorney Jaffe then used them as evidence at Stewart's trial, in an effort to cast blame for the killings on Neil rather than Stewart. (RT 103:11803-11804.) Stewart admitted that as early as July 1986, well before his case was severed from Neil's for trial, he was planning to put the blame on Neil. Even though Neil was the only person left in his family with whom he was close, after his arrest Stewart quickly agreed with his attorney that he should use Neil to get himself out of trouble. (RT 103:11866-11869.) That thinking continued after Stewart's conviction, when he specifically decided to sacrifice his brother to save himself from the gas chamber. (RT 103:11869.)

j. Evidence Presented on Behalf of Steven Homick

1). Steven Homick's Whereabouts on the Day of the Murders

Joseph Houston was an attorney in Las Vegas, practicing both civil and criminal law. He first met Steve Homick sometime in the late 1970s at the home of the son of the elected sheriff of Clark County, in which Las Vegas was located. Steve Homick was building a room addition on the home at which Moran met him. (RT 109:12762.)

In 1985, Houston represented Steve Homick in a divorce proceeding. He appeared in court in Las Vegas with Steve Homick on September 25, 1985, for the uncontested divorce trial. The case would have been scheduled for 9:00 AM. Typically, 20-30 such cases were scheduled on a particular day, all set for 9 AM. Each case would be heard fairly quickly. Houston had no independent recollection of the time that Steve Homick's case was actually heard. Steve would have had to give some testimony, and another witness would have been required to establish that Steve had lived in the county for at least six weeks. (RT 109:12762-12765.) Court records indicated that witness was Mick Shindell. (RT 109:12776-12777.)

Houston recalled an occasion when he appeared in court with Steve Homick and then went out to breakfast with Steve and another man who was a former police officer. He was not certain whether that occurred on September 25, 1985 or on another occasion. (RT 109:12766-12767, 12773.)

Mick Shindell had been a police officer in Toledo, Ohio for 9-1/2 years and then in Las Vegas for 3 years. Then he became Director of

Corporate Security at the Imperial Palace Hotel in Las Vegas.[105] He had known Steven Homick since 1979. He recalled being the residency witness at Steve Homick's divorce hearing on September 25, 1985. After the hearing he had breakfast with Steve and Attorney Joe Houston, at the Horseshoe Hotel. (RT 109:12864-12866.)

After breakfast, Shindell and Steve Homick went back to Shindell's office at the Imperial Hotel. Steve left close to 11:30 AM, saying he was going to Los Angeles to see a doctor. Shindell saw Steve again that evening after Steve had returned to Las Vegas and came to Shindell's residence between 10 and 11 PM. (RT 109:12866-12870.)

Deena Mann was employed at LA Sports Medicine in Marina del Rey in September 1985. LA Sports Medicine was a doctor's office and many of the patients were former athletes. Some time in September 1985, Steve Homick came in without an appointment. She remembered that because it was unusual for him to appear with no appointment. She recalled that he came in between 11:30 AM and 1:30 PM, since that was the split shift lunch period. She also remembered that the doctor had recently moved there from another office, and they had not yet received Steve Homick's chart from the old office. (RT 110:12928-12932.)

Paula Kamisher also worked for LA Sports Medicine, as the office manager. Originally, the office consisted of 4 doctors who specialized in treating injuries of knees, backs, shoulders, wrists, feet, and necks. In

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105 Shindell's position was an important one. The Imperial Palace was a 2800 room, 4 tower facility with a major casino. Shindell oversaw a department staff that ranged from 48 to 75 persons. (RT 111:13175-13176.)

September 1985, the 4 doctor partnership broke up and 2 of the doctors moved to another office in Marina del Rey, where they were joined by 2 new doctors. Steven Homick had been a patient at the old office and stayed with the doctors who moved to the new office. (RT 112:13407-13409.)

Ms. Kamisher also recalled Steve Homick coming to the new office in September 1985 on a day when he had no appointment. She remembered that because she always made an extra effort to take care of patients even when they had no advance appointment. She remembered that he came in on a Wednesday because that was the day his doctor did surgeries, so she was unable to accommodate his desire to see his doctor. She recalled him coming in during the lunch hour, between 12:30 and 1:30 PM. She also recalled that the day he came in was a Jewish holiday; she was Jewish herself and knew she should have gone to Temple. She recalled that Rosh Hashanah had already passed, so it must have been Yom Kippur when Steve Homick came in.[106] Steve Homick had knee surgery (arthroscopy) at the clinic in late 1983 or 1984 or earlier in 1985. (RT 112:13409-13416.)

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106 At first she thought the he came in during the second week of September, but then she remembered that the office had moved on September 9 and was not yet open on Wednesday September 11. Thus, it must have been September 18 or 25. (RT 112:13410, 13413-13415.) Rosh Hashana started on Sunday, September 15 in 1985 and ended the following day, so it would not have been on a Wednesday. (RT 120:14692.)

2). Joey Gambino's Refutation of Stewart Woodman

Joseph Gambino was the pit boss at the MGM Grand Casino in Las Vegas in the 1970s.[107] He had also worked as a pit boss in Mississippi and in Atlantic City, and in each state he was subjected to rigorous licensing investigations to make sure he had no involvement in organized crime. He met Steve Homick in 1970 or 1971 when both were doing carpentry work. (RT 109:12785-12789.)

Once when he was working as a pit boss in Las Vegas in the 1970s, Melody Woodman sat down and looked upset about a man who sat next to her. Gambino walked over and pretended to be a friend of Melody's, and referred to her husband, causing the man next to Melody to leave. Melody thanked him and then he introduced her to his own fiancé. The next day, Melody introduced him to Stewart Woodman. Gambino and his fiancé became friends with the Woodmans and regularly went to dinner together when the Woodmans were in town. Steve Homick was a dealer in the same casino where Gambino worked as a pit boss. (RT 109:12791-12793.)

Gambino knew Steve Homick as a workaholic, who left his job as a dealer at the MGM Grand and returned to carpentry work. Steve worked from dawn to dusk to help put his brother Bob through college and law school. (RT 109:12795.)

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107 Gambino acknowledged his Italian-American heritage, but insisted he had no relationship or involvement in the well-known Gambino organized crime family. His father was a barber and an employee of RCA and Joey was too proud of his father to change his last name. (RT 109:12787-12789.)

Through his friendship with Stewart Woodman, Gambino also met Neil Woodman and Neil's wife. Gambino was aware of Stewart's involvement in some family controversy that was related to keeping his business open, but Gambino considered that none of his business and he never offered Stewart advice regarding Stewart's relationship with his father. He never said he could take care of that problem or that he would have Steve Homick contact the Woodmans about the matter. He did introduce Steve Homick to Stewart, but that was only because Steve came by while Gambino was talking to Stewart. If Stewart had ever asked Gambino for advice about dealing with aggravation caused by his father, Gambino would have told him to sit down and have a talk with his father.[108] (RT 109:12796-12801.)

Gambino was aware of Stewart's weight problems, heart troubles, and stress from family conflicts. He was concerned about Stewart and encouraged him to go on a diet and get medical attention. (RT 109:12845-12847.) Gambino expressly denied ever referring Stewart Woodman to Steve Homick for the purpose of having harm done to Stewart's parents. He also denied having any involvement in the murder. (RT 109:12809, 12859.) At the time he introduced Steve Homick to Stewart, Stewart was just an acquaintance, not a close friend. Later, Gambino felt he and Stewart did become close personal friends. (RT 109:12832-12833.)

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108 Gambino believed Stewart and Melody were wonderful people who were very family-oriented. Gambino met Gerald Woodman in Las Vegas in the 1970s and Gerald told him he was very proud of Stewart. Gambino also met Gerald and Vera once while Gambino was a guest at Stewart's home, and thought they all seemed to be getting along well. (RT 109:12799, 12803-12805.)

Gambino learned of the death of Stewart's parents in a phone call from Stewart in which Stewart broke down and cried. Stewart seemed sincerely grief-stricken. Gambino was shocked. Later, Gambino attended a Bar Mitzvah for Stewart's son at which Stewart made a speech about how he wished his parents could be there. (RT 109:12805-12807.)

Gambino answered questions for the police in 1986 and voluntarily talked to them again in 1990. He was not represented by counsel when he talked to them. (RT 109:12808, 12860.) Gambino acknowledged he stayed at Stewart's home on 3 or 4 occasions prior to 1980. In 1980, he moved to Atlantic City and remained there until 1992. During that time, his contact with Stewart was by phone, and the only time he stayed at Stewart's home was when he came for Stewart's son's Bar Mitzvah, after Stewart's parents had been killed. (RT 109:12810-12814.)

Gambino acknowledged that after his arrest, Steve Homick called him and told him to expect to be contacted by the police. Steve advised him to handle that contact like it was cancer. (RT 109:12828-12829.) Gambino took that to mean he should avoid the police, but he felt he had nothing to hide and never avoided the police. He also noted that Steve often spoke in jargon that was not always easy to understand.[109] (RT 109:12849-12854.) Steve never told him to lie about anything. (RT 109:12856.)

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109 During the penalty phase, an officer who listened to hundreds of wiretapped phone conversations in which Steve Homick participated, said that he always talked in code or riddles. (RT 139:17561.) That was not simply an effort to communicate without revealing incriminating information; when the same officer spoke to Steve Homick in person, he spoke in much the same riddle manner. That was just his habitual way of

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3). Michael Dominguez' Background

Edward Bayard met Michael Dominguez when Bayard was 15 and Dominguez was 18. They were associates between 1980 and 1985. In 1981, Bayard went with Dominguez to a gas station where Ray Ordish worked. Bayard stayed in his truck and saw Dominguez go into the station with Ordish. Dominguez was dressed in red sweat pants and a red hooded sweater. When Dominguez returned to Bayard's truck and they departed, Dominguez said he had just robbed the gas station. He said Ordish had cooperated in setting up the robbery. He hit Ordish in the head with a gun to make it look like a real robbery and then locked him in a back room. (RT 110:12938-12942.)

On a subsequent occasion, Michael Dominguez told Bayard about another robbery he committed a month after the gas station robbery. Dominguez mentioned that he wore the same clothes as before, and he also wore a motorcycle helmet, which he used to cover his face to avoid being identified. (RT 110:12942-12943.)

Bayard knew Dominguez to possess at least two .38 caliber firearms.[110] (RT 110:12944.) When asked for his opinion regarding

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talking, and it made it difficult to understand what he was saying. (RT 139:17563-17564.)

110 One .38 caliber firearm that had previously been in Dominguez' possession was recovered by the police and an examination established it was not the gun used to kill the Woodmans. In regard to any other .38 caliber weapon that had been possessed by Dominguez, there was no evidence they had been recovered. (RT 108:12631-12632, 12672-12679.)

Dominguez' character in regard to honesty and truthfulness, Bayard responded that Dominguez was a wolf in sheep's clothing. (RT 110:12950-12951.)

During an interview by FBI agents, Dominguez admitted that in 1981 he stole a motor boat that was chained to a post in a friend's backyard. He used bolt cutters on the chain. (RT 114:13680.)

From 1970 to 1985, James Davis II was a police officer in Henderson, Nevada, a town 10 miles from Las Vegas where Michael Dominguez lived. He participated in the investigation of the robberies described by Edward Bayard and interviewed Ray Ordish about them. He corroborated Bayard's description of Dominguez use of a hooded sweater and/or motorcycle helmet to hide his face when committing robberies. (RT 112:13370-13375.)

Davis was very familiar with a variety of criminal activities carried out by Dominguez, and had investigated him for approximately 25 different felonies. In Davis' opinion, it would be foolhardy to ever believe what Dominguez had to say about anything, if his self-interest was at stake. Davis considered Dominguez a very dangerous individual who had killed people. Davis would absolutely not believe Dominguez when testifying under oath. Davis had no doubt that Dominguez would lie to save himself or to better his circumstances. Davis believed Dominguez had no conscience whatsoever, and would sell out anybody to further his own interests. (RT 112:13376-13379, 13390-13391.) Davis conceded that even criminals can tell the truth on occasion, but he quickly added that he had never seen or heard anything good about Michael Dominguez. (RT 112:13384.)

Los Angeles Police Department Officer Richard Aldahl provided more details about Dominguez' attempted escape from police custody, well

after he had negotiated his deal for leniency in the present case. On September 18, 1986, Aldahl assisted Det. Holder in transporting Dominguez from Burbank to Las Vegas. Just prior to boarding an airplane at the Burbank airport, Aldahl removed Dominguez' handcuffs, because commercial airline rules did not allow any passenger, even a prisoner, to fly while handcuffed. As a crowd of people came to the boarding gate, Dominguez pulled away and ran down a corridor. A civilian tried to stop him by blocking his path, but Dominguez threw the man to the ground. (RT 110:12963-12965, 12980.)

After running a couple of hundred yards, with Aldahl in pursuit, Dominguez exited the terminal and ran through a parking structure. He ran through a Lockheed facility, and then down a street. He started to climb a chin-link fence when Aldahl fired his gun in the air and ordered Dominguez to stop. Dominguez complied and other officers arrived and subdued him. (RT 110:12966-12970.)

4). Art Taylor's Background

In 1977 or 1978, Steve Homick introduced Robert Grogan to Art Taylor. In 1980 or 1981, Grogan invested $10,000 in Leisure Time Electronics, which was adjacent to Art's CB and was also run by Art and his wife. The business was dissolved about two years later because of missing inventory. Grogan also learned that Art and his wife had been writing checks on the business account for personal matters. None of the money Grogan invested was ever returned. (RT 114:13681-13683, 13687.) When Grogan learned that Taylor had no business insurance, Grogan himself obtained

insurance for the business. Art then suggested they burn the building down. In Grogan's opinion, Art Taylor was not an honest or truthful person. (RT 114:13695-13698.)

5). Other Events Witnessed at the Murder Scene

In September 1985, Melissa Paul lived in an apartment building across the street from the location of the Woodman apartment. She heard the gunshots the night the Woodmans were killed. After hearing the shots, she noticed a car outside her living room window that stayed there a long time, which was unusual. It was creeping down the alley very slowly. It was large and was black or dark blue. The license plate was not from California. Two men in business suits, with wing tip shoes, got out of the car. She could hear them talking, but could not make out what they were saying. (RT 109:12877-12881.)

k. Evidence Presented on Behalf of Robert Homick

1). Robert Homick's Relationship with Steven Homick

Helen Copitka was the sister of Robert and Steven Homick. When she testified in 1993, she was employed as a counselor and consultant in private practice. From 1975 to 1983 she was a parole commissioner for the state of Texas, appointed by Chief Justice Greenhill. She had lived in Texas since 1971. She had a bachelor's degree in psychology, a master's degree in

rehabilitation, and an EDS degree in counseling. She was two years younger than Steven and 9 years older than Robert.[111] (RT 117:14192-14194.)

Steve Homick was born in Steubenville, Ohio in 1940, and Helen was born there in 1942. Their brother William was born two years later, and a sister, Nadine, was born 5 years after William, followed by Robert 14 months later, in 1950. In 1953, another brother, John Paul, was born. (RT 117:14198-14199.)

John Paul had a number of medical problems and was not expected to live very long, but he did. He had brain damage and a problem with his intestines, so he had to be fed and exercised and turned on a regular basis. Nonetheless, his parents chose to care for him at home. They had no assistance from a private nurse, so most of the child's care was provided by their mother. Helen helped care for the child after school. Steve and their father also helped. Bobby and Nadine were still pre-school children at that time, so their mother had to care for them as well as John Paul while Steve and Helen were at school. When Steve and Helen came home, they would care for Bobby and Nadine so their mother could get some rest. (RT 117:14199-14201.)

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111 Although much of Miss Copitka's testimony seemed like what one would expect to hear in the penalty phase, rather than the guilt phase, it was not offered as character or background evidence relevant to penalty. Instead, the theory articulated by Robert Homick's counsel was that the evidence would support the argument that Steven Homick typically issued instructions to Robert Homick which Robert followed without question, even without knowing the reason why Steven wanted him to do the requested acts. (RT 117:14172-14173.)

Steve became the main care-person for Bobby, and Helen for Nadine. Bobby tagged along with Steve wherever Steve went. When their father, who worked varying shifts at a steel mill, was at home, he spent most of his time helping to care for John Paul, so he did not spend much time with Bobby or Nadine. (RT 117:14201-14202.)

When Steve graduated from high school, he left home and attended Ohio State University, where he was a star athlete. He was there for two years and played on the Ohio State baseball team. When he left school, he played minor league baseball. He was a very good pitcher. In 1965, he moved to California and married. In 1968, Robert finished high school and moved to California to live with Steve and his wife. (RT 117:14202-14204.) Steve was also an excellent handball player, and continued playing until he got too old. His knees went bad, and his back and shoulder developed problems, around the late 1970s. (RT 117:14229-14230.)

Helen saw both herself and Steve as surrogate parents to Bobby and Nadine. They told the younger kids what to do and when and how to do it. Helen regularly saw Steve issue orders to Robert. Robert idolized and trusted Steve, attempting to please him. Steve had an outgoing personality while Robert was very shy and withdrawn. She viewed Steve as a leader and Robert as a follower. In the occasional contact she had with Steve and Robert as adults, she had not detected any change in their relationship.[112] (RT 117:14208-14210.)

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112 Helen left Ohio herself, moving to Texas in 1971. Steve moved from Los Angeles to Las Vegas around 1971 or 1972. Thus, Helen's only contact with her brothers came at occasional family gatherings in Las Vegas

(Continued on next page.)

Lorraine Pritikin was married to an attorney who had been a prosecutor for 25 years.[113] In 1965, she and her husband met Steve and Dee Homick, who lived nearby. They became close friends and the two couples saw each other every weekend. In 1966, both couples had their first child. The two couples were best friends and the Pritikins were the godparents of the Homick's first child. (RT 117:14257-14260.)

Around 1967 or 1968, Ms. Pritikin met Robert Homick when he moved in with Steve and Dee. Robert was shy and quiet and she did not see much of him at first, but after 6-9 months she saw him almost daily. It was not unusual for her to see Steve telling him what to do and how to do it. Robert went to college and then to law school. Steve and Dee moved to Las Vegas around 1971, but the Pritikins maintained contact with them and continued to consider them best friends many years later. They maintained close contact with Robert after Steve and Dee moved to Las Vegas. Robert visited their home many times in the 1980s and stayed overnight on a number of occasions. Robert would housesit for the Pritikins when they were

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(Continued from last page.)

(where their brother William had also moved) or at home in Ohio. She acknowledged that in the period from 1979 to 1985, the only time she saw her brothers was during a one week Christmas visit to Las Vegas in 1978 or 1979, and a 4 or 5 day visit for a graduation around 1982 or 1983. (RT 117:14222-14228.)

113 Indeed, her husband worked for the Los Angeles County District Attorney's Office, the very agency prosecuting Steven and Robert Homick. Robert Homick's counsel argued this was a relevant factor as it would support the objectivity of the witness, offsetting the likelihood of bias in favor of a friend. The court allowed reference to the husband's position as a prosecutor, but disallowed any specific mention of the agency for which he worked. (RT 117:14251-14254.)

away from home, staying as long as a week on 10-20 occasions during the 1980s. (RT 117:14260-14263, 14264-14265, 14267-14269.)

When Robert first moved to California, Steve appeared domineering and controlling in his relationship with his brother. Robert was very agreeable with regard to Steve. Robert passed the bar and became a lawyer in California, but the relationship between Steve and Robert did not change between 1967 and 1986.[114] (RT 117:14263-14264.)

2). Additional Information Regarding Evidence that Had Been Offered by the Prosecution

Retired Superior Court Judge Clarence Stromwell had been a judge in Los Angeles County for many years, and a police officer for over 20 years before he became a lawyer. When he was an officer, Max Herman was his partner for 17 years. Herman and Stromwell maintained their friendship after both became lawyers. (RT 116:13963-13968.) In Judge Stromwell's opinion, Max Herman was an unquestionably honest person who would never have given a gun to Steve Homick to use in a crime. Max Herman was also not a person who could be easily manipulated, and he was a good judge of character. (RT 115:13972-13973, 13976-13977.)

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114 Ms. Pritikin acknowledged that when Steve Homick moved to New Jersey she did not see him much any more and did not see him interact with Bob except for occasional holidays when Steve would be in Los Angeles and they would all meet at the Pritikin home. Over time, Robert became a closer friend than Steve. (RT 117:14271-14274.)

Los Angeles Police Department Officer David Ybarra was assigned to the West Los Angeles front desk on October 5, 1985. On that date, Robert Homick came to the police department to report his involvement in a traffic accident on September 25, 1985 at 6:30 PM, when he was driving southbound on Westgate. He gave a license plate number of the other car, which the officer learned was registered to Richard Altman. Homick said Altman left the scene of the accident without complying with his statutory responsibilities. Homick named Steven Kolodin as a witness. (RT 117:14153-14158.)

Steven Kolodin was unavailable as a witness, but his former testimony was read to the jury. On September 25, 1985, he lived across the street from the building where the Woodmans lived and he witnessed an accident on Westgate. The drivers talked and then got back in their cars. Robert Homick stayed at the scene, but the other driver left. Kolodin talked to Robert Homick and did not see anybody else in Homick's car. (RT 116:14163-14168.)

In 1986, Joseph Gersky was a special agent for the FBI. On March 18, 1986, he interviewed Michael Dominguez. Dominguez told him he did not know who was involved in killing the Woodmans, aside from Steve Homick. Gersky did not believe Dominguez, so he questioned him again an hour later. Dominguez then told him that Steve Homick was assisted by Steve's brother Moke (William Homick) and by Anthony Majoy.[115] (RT 116:14080-14085, 14089-14090.)

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115 Gersky wrote this in his report at the time of the interview. He was subsequently instructed by other FBI agents or by Los Angeles Police

(Continued on next page.)

I. Evidence Presented on Behalf of Neil Woodman

Neil and Stewart Woodman's Rabbi, Steven Reuben, maintained communications with Stewart after his arrest. Rabbi Reuben visited Stewart in jail and Stewart called the Rabbi at home several times each week. Sometimes the Rabbi talked to him and sometimes his wife did. (RT 120:14701-04704.)

Before and during his trial, Stewart Woodman always told Rabbi Reuben he was not involved in the murders and expressed confidence he would be proved innocent. The Rabbi was present when the jury returned guilty verdicts and Stewart reacted with shock and devastation. He was in total panic, afraid he would get the death penalty and never see his children again. He thought the jurors were anti-Semitic and had been out to get him because he was rich. (RT 120:14704-14710.)

(Continued from last page.)

Department officers to change his report to say that it was Jesse [Robert Homick] and not Moke [William Homick] who participated. Gersky did write another report changing the name to Jesse, even though he was confident that Dominguez never used the name Jesse or Robert Homick. (RT 116:14090-14091, 14105-14106, 14124.) This was highly irregular; Gersky could not recall any other instance in his 20 year FBI career in which he changed a report in such a fashion. (RT 116:14121-14122.)

Gersky's explanation was that he had been briefed before he questioned Dominguez and had been told Steve Homick had a brother called Moke, but no other brother had been mentioned. When Gersky questioned Dominguez, he may have referred only to Steve's brother, without using any name, and Gersky assumed he was referring to Moke. (RT 116:14110-14114.) However, Robert Homick had already been arrested before Gersky questioned Dominguez, and Gersky was never able to explain why an officer briefing him on the suspects in the case would fail to mention Robert Homick. (RT 116:14115-14116.)

Rabbi Reuben talked to Stewart a week or two after Stewart made his bargain with the prosecution. The Rabbi was shocked to learn that Stewart had confessed, after maintaining his innocence in prior discussions with the Rabbi. Stewart explained he was going to get the death penalty and had to think of himself. This was the only way he could continue to have a relationship with his kids. Later, Stewart was convinced he would still get a new trial and would eventually get out of jail.[116] The Rabbi asked how that could happen after he had confessed and Stewart replied that was no problem, as there were enough holes in the confession to drive a truck through. (RT 120:14711-14714.)

Stewart complained that he had wanted to testify at his trial, but his attorney would not let him. He was convinced he would have been able to convince the jury he was not guilty. He believed his wife caused his lawyer to not let him testify, and that his wife wanted him in jail. (RT 120:14716-14717.)

B. Penalty Phase Evidence

1. Introduction

The penalty trial involved only Steven Homick, as the prosecutor opted not to seek a death sentence against Robert Homck, and the guilt phase

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116 The Rabbi explained that what Stewart expressed was not just a hope of getting out of jail, but an expectation. Stewart continued to express that attitude even through the time of his testimony at the present trial. (RT 120:14743.)

jury was unable to return a unanimous verdict as to Neil Woodman. (SCT 4:1076.) The prosecution penalty phase evidence consisted entirely of evidence that Steven Homick had committed a triple homicide in Las Vegas in December 1985. Steve Homick was convicted of that homicide before the present trial began, but the homicide had not been committed until after the Woodman homicides, and the Nevada convictions occurred even later. Thus, the Nevada convictions did not qualify as prior felony convictions under Penal Code section 190.3, par. 6, factor (c) and were not admitted in support of that aggravating factor. Instead, the prosecution introduced evidence to prove those homicides as if they were unadjudicated other violent crimes. However, the prosecution was permitted to also introduce evidence of the Nevada convictions for the sole purpose of serving as evidence that Steven Homick had, in fact, committed the offenses.

2. The Tipton Murders

Timothy Catt designed and made custom jewelry. In 1984 he started working as a custom designer for the tower of Jewels in Las Vegas, owned by Jack Weinstein. Eventually Catt became manager of one of the 4 Tower of Jewelry stores, supervising about 30 employees.[117] (RT 136:17092-17095.)

Catt met Steve Homick in mid-1984 when he was head of security for all 4 Tower of Jewelry stores. In that position, Steve Homick had access to

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117 Two of the stores were in Las Vegas and the other two were in Texas, in the Dallas/Fort Worth area. (RT 136:17094.)

all areas of all 4 stores. He had keys to access all work areas, including the safe, and had the run of the store. There was about $1 million worth of jewelry in the store. Sometimes Steve Homick carried parcels with jewelry to air express companies. Steve Homick's daughter, Rena, worked in the other Las Vegas Tower of Jewels store. (RT 136:17095-17100, 137:17170-17171, 17176.)

On of Tim Catt's clients was Bobbie Jean Tipton. Ms. Tipton's hairdresser, Rick Gomez, was a friend of Catt's and Catt was introduced to Ms. Tipton at Gomez' shop. Ms. Tipton owned a large quantity of jewelry and began taking her jewelry to Catt to check the prongs, polish the gold, and make sure that no stones were loose. (RT 136:17098-17099.) Ms. Tipton was a multi-millionairess who had inherited Texas oil money. She drove a custom built $85,000 Zimmer automobile and was well known in Las Vegas. (RT 136:17105-17106.)

On one occasion in mid-1985, Catt met Michael Dominguez at the store. Catt received a call from Steve Homick instructing him to remove a gold watch worth $1,000 from the case, clear it for inventory purposes with Jack Weinstein, and give it to Michael Dominguez. Catt checked with Weinstein and he approved.[118] (RT 136:17100-17102, 137:17167.)

In August 1985, Bobbie Jean Tipton brought 50-60 pieces of jewelry into the store to be cleaned and polished by Catt. Catt performed this service for free because Ms. Tipton was a good customer. Since the work was being

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118 Weinstein testified as a defense witness and had no recollection of ever authorizing Tim Catt to give jewelry to Michael Dominguez. (RT 140:17789.)

done for free, it was low priority; Catt worked on it whenever he was not busy, over a two month period. Catt worked on the jewelry in his office, and stored it in the safe when he was doing other tasks. (RT 136:17102-17104.)

Catt recalled 5 or 6 occasions when he was working on the Tipton jewelry and Steve Homick asked questions about it. Steve Homick wanted to know the value of the jewelry and Catt told him it was about $90,000. One particular piece had a 3 karat pear shaped diamond and was worth $30,000. Catt may have also referred to a Bulgari style item of jewelry worth $10,000. Steve Homick also knew Ms. Tipton through her beauty shop, because Homick's wife worked there as a receptionist. (RT 136:17104-17110.) Steve Homick never asked Catt for Ms. Tipton's address or phone number. (RT 137:17177.)

Bobbie Jean Tipton had been married to David Tipton since 1976. They moved to Las Vegas in 1981. Marie Bullock started working as their housekeeper in 1977 when they lived in North Carolina, and she moved with the family to Las Vegas, caring for Mrs. Tipton's four children from a prior marriage. Mrs. Tipton had inherited oil and gas interests from her father and ran that business from an office she maintained in Las Vegas. Typically she would go to her office at 9 or 10 AM and be there until 4 or 5 PM. David Tipton was a real estate broker and normally left for work at 8:30 or 9 AM. (RT 138:17407-17410.) Marie Bullock generally arrived between 8:30 and 9 AM and stayed until sometime between 2 and 4 PM. (RT 138:17414-17415.)

On December 11, 1985, David Tipton left for work at 8:45 AM. Mrs. Tipton wife was still in her nightgown and housecoat when he left. They had tentative plans to meet for lunch. (RT 138:17418.) At 10:30 that morning, United Parcel Services driver Michael Carder delivered some packages to

the Tipton residence. He pulled up, tapped his horn, then proceeded to the door with three packages. He left them near the door and returned to his truck. As he was pulling out, he saw Mrs. Tipton at the door dressed in a white robe. He waved to her as she gathered the packages and went back inside. (RT 140:17816-17818.)

Carder had been to the residence many times and was familiar with the vehicles that parked there. When he arrived that morning, he noticed a Toyota 4 wheel drive pickup with a camper shell parked in the driveway that was not a vehicle he had seen there previously. It caught his attention as he owned a similar truck. The engine was **not** running.[119] (RT 140:17818-17823.)

Patricia Lundy was Bobbie Jean Tipton's secretary and office manager. She typically worked from 10 AM to 2:30 PM. On December 11, 1985, she had a check that needed to be signed by Mrs. Tipton and deposited in the bank by 11 AM.[120] She called Mrs. Tipton at 10:30 AM to ask if she should bring the check by the Tipton residence to be signed, or if Mrs. Tipton was coming to the office soon. Mrs. Tipton said she would be at the

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119 Notably, Carder returned to the same house with more packages the very next day. Finding the police there and learning what had happened on December 11, Carder promptly told the police what he had seen. Thus, his information was provided to the police at a time when it would have still been very fresh in his mind. (RT 140:17830-17831.)

120 The check was for $2,000 and was needed because checks written on Mrs. Tipton's personal account were bouncing. That was something that happened 2 or 3 times in a 3 month period. The bank would call and then they would get a check to the bank right away. (RT 141:18016-18021.)

office eventually, but the bank would have to wait. Ms. Lundy thought Mrs. Tipton sounded strange, but not panicky or upset.[121] The call lasted about three minutes and Ms. Lundy was sure of the time, as she had checked her watch since she was concerned about getting the check to the bank by 11 AM. (RT 141:18005-18011.)

David Tipton called his wife a couple of times that morning, starting at 11 AM, to firm up their lunch plans, but nobody answered. He could not reach her at her office either, so he concluded she must have made other lunch plans. He had lunch on his own and stopped by the house at 1:30 PM to check the mail. When he arrived home, he saw Marie's Mustang in the driveway, as well as a white Toyota pickup truck with its engine running and with a freezer in the back.[122] (RT 138:17419-17422, 17441.)

David used his key to enter the front door, but it did not feel like it had been locked, as it normally would have been. The house seemed normal in the living room and kitchen. In view of the freezer truck in the driveway, he assumed his wife or the maid was in the garage receiving a meat delivery. He checked the garage, found nobody, and then went to his bedroom. He

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121 Ms. Lundy described Mrs. Tipton as sounding not as clear as she normally did. It was Mrs. Tipton's voice, but she was not speaking with her usual mannerisms. This caused Ms. Lundy to ask if she had awakened Mrs. Tipton, but the tone of voice did not cause Ms. Lundy to think there was a problem or to be alarmed or to perceive any danger. (RT 141:18010-18011, 18017-18018.)

122 UPS driver Michael Carder was shown a photo of the truck that was in the driveway when David Tipton returned home and was quite certain that was **not** the white Toyota he had seen earlier that morning. (RT 140:17826-17829.)

encountered the body of a male, shot in the head, on the floor near the bed. He left the bedroom, found a cordless phone, and called the police. He returned to the bedroom while making the call, noticed the light on in the walk-in closet, and discovered the bodies of his wife and Marie Bullock on the floor. He relayed what he had found to the police. (RT 138:17423-17426.)

David returned to the bedroom, noted the safe was open and that jewelry boxes were off the dresser and upside down on the floor. The bedroom had evidently been ransacked. He decided he should not disturb anything and left the room. Police arrived within a couple minutes, followed by paramedics and then by newspersons. (RT 138:17427-17431.)

The first officers to arrive at the scene were Frank Glasper and Allen Wall. They had been assigned that day to operate radar equipment at a school zone on Oquendo and Eastern, only a block away from the Tipton home. Glasper received the call at 1:40 PM and the officers were at the scene in 3 minutes. David Tipton explained his wife and the maid had been shot. He also conveyed his belief they had managed to shoot the perpetrator, a meat delivery man.[123] (RT 138:17385, 17389.)

Debbie Ann Meyers was the wife of James Meyers. James delivered meat and seafood for a local gourmet market. He drove a white Toyota pickup truck. The truck did not have a refrigeration unit; instead, he used Styrofoam containers and dry ice. Around 9 AM on December 11, 1985, she

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123 The prosecution theory at trial was that the meat deliveryman, James Meyers, was not a perpetrator, but a victim who arrive at the scene while the crime was in progress.

helped her husband load quite a bit of meat for the Tiptons, for an upcoming party. She left home with her husband when he headed for the Tipton residence. He dropped her off at her sister's home 3 blocks from the Tiptons. She was supposed to be at her sister's home at 10 AM, but was twenty minutes late. To her knowledge, he had no other planned stops aside from the Tipton residence. When he dropped her off, he said he was going straight to the Tiptons.[124] (RT 141:18028-18037.)

Officer Glasper checked the bedroom and saw the bodies. Coincidentally, he recognized Marie Bullock as a woman he had seen that morning while operating the radar equipment at the school zone. He had noticed a woman driving a Mustang, turning left onto Oquendo. He was about to stop her because of her tinted windows, but then another driver went by doing 65 mph in the 25 mph zone, so the officer went after that person instead. He recognized Marie Bullock as the woman he almost stopped, and he also recognized her car in the driveway. He checked the speeding ticket he had issued to the other driver who distracted him from Ms. Bullock, and that ticket was issued at 10:54 AM. (RT 138:17385-17391.) Officer Glasper secured the home and waited for homicide detectives. (RT 138:17392.)

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124 Debbie Meyers' testimony was presented by the defense. Although the People produced nothing to directly contradict the specific testimony given by Ms. Meyers, they simply refused to believe it because it was contrary to their theory of the case. The prosecutor expressly argued that James Meyers could not possibly have arrived at the Tipton residence prior to 11 AM, because the prosecutor believed the killer did not arrive until shortly after Marie Bullock's 11 AM arrival. (RT 144:18286, 18292.) Indeed, the prosecutor was firmly convinced that Mrs. Tipton and Marie Bullock were both already dead before Meyers arrived. (RT 144:18247.)

Las Vegas Metro Police Department Detective Thomas Dillard and his partner Robert Leonard interrupted their lunch to respond to a call regarding a triple homicide on Oquendo Court. When they arrived, there were already a substantial number of officers present, as well as persons from the news media. The address they responded to was in a neighborhood of substantial custom homes. When the detectives arrived the small white pickup truck in the driveway still had its engine running. (RT 137:17299-17304.)

Inside the home, the belongings appeared in order, except that there was a purse and bag on the floor near the foyer. There were some keys in a clutter near the purse, including one that could open the front door. Officers later learned the purse belonged to Marie Bullock, Mrs. Tipton's maid. They assumed the keys were also Ms. Bullock's. There were some wrapped packages also near the front entrance that appeared to have just been delivered. (RT 137:17305-17306.)

It was almost Christmas and there were many gifts all over the living room. Some were already wrapped and some were not. As the detectives reached the master bedroom area, they observed the deceased male lying on his back just inside the bedroom, with a large caliber bullet wound in the middle of his upper torso chest area. There was also trauma to his head from an apparent small caliber gunshot wound. A tie from a silk robe was draped around his neck.[125] Officers later learned the man was James Myers. (RT 137:17307-17310.)

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125 The matching robe was later found inside the master bedroom closet. (RT 137:17320-17321.)

Inside the bedroom, the officers observed drawers pulled open, jewelry boxes on the bed, and jewelry strewn about. Inside the walk-in closet, they observed the bodies of the two females, both with small caliber bullet wounds to the head. The lid had been removed from the floor safe inside the closet in the area of the two bodies, and the safe was nearly empty, with some items strewn nearby that had apparently come from the safe.[126] This indicated robbery was the likely motive for the killings. Nine .22 caliber bullet casings were recovered from inside the closet. (RT 137:17311-17313, 138:17347, 17355.)

Marie Bullock was still wearing a stocking cap on her head and a heavy suede coat with a fleece lining, indicating she had just come in from the cold weather outside. (RT 137:17318-17319.) It had snowed that morning and it was unusually cold outside, for Las Vegas. (RT 138:17384.)

The detectives found no sign of a forced entry. In the family room, at the opposite end of the structure from the master bedroom, there was an ashtray with a cigarette that had burned down to the filter. (RT 137:17313-17314.)

Autopsies of the victims showed that Bobbie Jean Tipton had 4 close-range .22 caliber bullet wounds to the head. Marie Bullock had 3 similar wounds to the head. James Myers had 2 such wounds to the head, as well as a .38 caliber wound to the chest. (RT 138:17349-17353.) Because Myers

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126 Ms. Tipton's husband later verified that she kept her jewelry in her safe and owned $250,000 worth of jewelry. She also kept some pieces in the safe that were nice-looking, but were not made from real jewels. (RT 138:17412-17413.)

suffered two different sized wounds, officers believed at least two suspects were involved. (RT 138:17502.)

That night, Timothy Catt watched the 11:00 news on television and learned that Ms. Tipton had been murdered.[127] He immediately had a hunch that Steve Homick was involved. The story became front page news in Las Vegas. Steve Homick had stopped working for Tower of Jewels in November 1985, so Catt had very little contact with him between then and January 1986.[128] However, in January 1986, Steve Homick called Catt at night at his home, asked if Catt was alone, and said he would be right over. Ten minutes later, he arrived. This was the only time he had ever come to Catt's home. (RT 136:17111-17114, RT 137:17180, 17273.)

When Steve Homick arrived, he pulled out some jeweler's bags and dumped out a number of pieces of jewelry. Catt recognized all the jewelry as items he had cleaned for Ms. Tipton, including the Bulgari-style piece. Catt did not reveal that he recognized the jewelry. Steve Homick asked him what it was worth. Catt knew that since the jewelry was stolen, it would have to be disassembled to sell, and that would reduce its value, especially for Bulgari-

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127 About a week later, the police came in the Tower of Jewels store with a list of stolen merchandise. (RT 137:17162-17163.)

128 According to Catt, in mid-November 1985 when he noticed Steve Homick had not been around, he asked Tower of Jewels owner Jack Weinstein where Steve was. Weinstein simply replied that Steve was not there any more. (RT 137:17276.) However, Billy Mau, the assistant manager of Tower of Jewels, believed Steve Homick remained as Tower of Jewels' chief of security up until the date of his arrest in March 1986. (RT 139:17620-17624.) Testifying as a defense witness, Jack Weinstein also maintained that Steve Homick had continued to work for him up until the date of his arrest. (RT 140:17793-17795.)

style items where high prices were paid because of the Bulgari name. When Catt told Steve Homick the Bulgari piece was only worth $1,000, Steve Homick became very upset. He smashed his hand into his fist hard, said something like, "You know what happens to rats." He said Larry Ettinger was a rat. He said Catt's girlfriend could be offed, and that rats got their fucking heads blown off. Finally, Steve Homick left with the jewelry and Catt was relieved he was gone. (RT 136:17115-17118.)

Around January 16, 1986, Det. Dillard obtained a court order authorizing the placement of wire intercept equipment on the phone lines of Steven and William Homick. The equipment was installed the next day in a joint effort with FBI agents. A few days later, similar equipment was installed on Michael Dominguez' phone line.[129] (RT 138:17357-17359.)

Later in January 1986, according to Tim Catt, Catt went on a business trip to Los Angeles. Jack Weinstein had offered to open a store there for Catt to run if Catt could find the right location.[130] Catt saw this as a good opportunity to substantially increase his income, because there would be more demand for the kind of jewelry he designed in Los Angeles than there

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129 Soon after the wiretap operation began, officers recorded a phone call from the Steve Homick residence to David Tipton's phone number. The call was answered by David Tipton's answering machine. This was immediately followed by a call to someone else whose number appeared in one of Steve Homick's monthly calendar books just under the phone number for the Tipton residence. The prosecution theory was that the call to the Tipton residence was a misdial by someone who was actually trying to reach the person at the other number. (RT 139:17594-17603.)

130 Testifying as a defense witness, Weinstein contradicted Catt, explaining that Catt was a salesman and not a manager, and insisting he had never offered to help Catt open a store in another city. (RT 140:17792.)

was in Las Vegas. While in Los Angeles, Catt stayed with Michael Champion, who had been a friend since grade school. The first day Catt was there, January 23, 1986, he received a call from Steve Homick. (RT 136:17119-17121.)

Steve Homick wanted to meet Champion and Catt for dinner and they made arrangements to meet the next day. Before dinner, Steve and his brother Jesse arrived at Champion's condo when Catt was there alone. Steve Homick again pulled out a jeweler's bag and asked Catt to look at 4-6 pieces of Ms. Tipton's jewelry. These items were cubic zirconium mounted in gold. To an untrained eye they would look quite genuine, but Steve Homick was saying this was crap. He asked if Ms. Tipton had the real pieces and had phony copies made to wear, like movie stars did. Once again, he started to get upset and loud. Just then, Michael Champion returned home with two friends, a mother and daughter. (RT 136:17122-17126.)

Soon the ladies left and Catt and Champion went to dinner. Steve Homick took Jesse home, then returned and joined the other two at dinner. The Tipton jewelry was not mentioned again during dinner.[131] (RT 136:17127-17128.)

Catt returned to Las Vegas around January 26 or 27. A couple of days later Steve Homick called him at work around 3 or 4 PM and asked Catt to meet him around the corner at a liquor store. Catt had been trying to avoid Steve Homick and had not responded to a number of recent phone messages,

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131 Steve Homick was again under surveillance on the day he met Cat and Champion for dinner. Officers verified that the dinner did occur on January 24, 1986. (RT 139:17731-17744.)

but when Steve Homick caught him on the phone he felt obliged to pacify him, so he complied with the request to meet. (RT 136:17128-17131.)

They talked inside Catt's car and once again Steve Homick seemed all wound up.[132] He would talk normal, then suddenly start screaming and yelling. He said he was having financial problems and had sold his credit cards. He was irate and talking about these fucking rich people. He said, "I ransacked that fuckin' house. She didn't have any money in the fuckin' safe." He also said, "I shot her in the head. I offed her in the head. I dusted her. Wasted her." According to Catt, he used all of those terms. He also said he shot the maid in the head.[133] The doorbell rang and scared the shit out of him. He opened the door and there was a man standing there. He yanked him inside and dusted him. (RT 136:17131-17133.) This was the only occasion that Steve Homick actually admitted to Catt that he had committed the Tipton crimes.[134] (RT 137:17197.)

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132 According to Catt, they met in the parking lot because Steve Homick did not want to come to the store as he had had a falling out with Tower of Jewels owner, Jack Weinstein. (RT 137:17199.) However, Weinstein testified as a defense witness and maintained there was no falling out, or problem of any sort, between him and Steve Homick in late 1985 or early 1986. (RT 140:17788-17789.)

133 On some occasions Catt testified that Steve Homick said the maid was already there when he arrived, but on other occasions he testified that Steve Homick did not say whether the maid was already there. (RT 137:17203-17212.)

134 Catt was certain this conversation occurred after he had met with Steve Homick in Los Angeles. (RT 137:17198.) However, Steve Homick was under surveillance by authorities who witnessed his meeting with Catt in the parking lot. They placed the date of the encounter as January 9, 1986, well before Catt's Los Angeles trip. (RT 139:17567.) That was the

(Continued on next page.)

Catt was shocked and shaken and did not want to hear about this. He said he had to get back to the store, and he left. However, he did not contact the police at all. He learned in March 1986 that Steve Homick had been arrested, and the police subsequently contacted him.[135] The first time he talked to the police he still did not tell them what he knew, but the second time he was interviewed, he did relate all this information.[136] (RT 136:17133-17135.)

On January 29, 1986, Las Vegas police obtained and executed a search warrant for the residence of Ron Bryl, an associate of Steven Homick. (RT 138:17367.) Det. Dillard seized a small cardboard box from the top shelf of a closet in the master bedroom. It was addressed to Arthur Toll in Philadelphia. Toll was also a known associate of Steven Homick. The return address on the box had the name "C. Dietz," and an address the officers recognized as William Homick's. "C. Dietz" was believed to be Charles

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(Continued from last page.)

very day that Neil Woodman had wired $28,000 to Robert Homick. (RT 96:10509-10514.) No witness ever explained why Steve Homick would have felt such extreme financial pressure when he met with Catt if the $28,000 was, as claimed by the prosecution, a payoff to Steve Homick for the Woodman murders.

135 Indeed, Catt's residence was among the many residences searched on March 11, 1986, when the several arrests were made. Police seized some jewelry and also found a stack of fifty $100 bills. (RT 137:17253-17254

136 However, Catt later acknowledged that there were many details included in his testimony that had not been mentioned during any of the police interviews. (RT 137:17256-17258, 17284.) At the time he finally provided information to the police, he knew they still considered him a suspect in the Tipton homicides. (RT 137:17260-17261.)

Dietz. Det. Dillard opened the box and found a small canister that contained a ladies diamond ring with a very large center stone, which Det. Dillard believed was one of the items stolen at the time of the Tipton homicides. Bryl was arrested and kept in custody with a high bail. (RT 138:17367, 17371-17374.)

Shortly after the search and the arrest of Bryl, there was a great increase in activity on the phone lines of Steven Homick which were still being tapped. Det. Dillard believed panic had set in as a result of Bryl's arrest. However, Det. Dillard learned that the ring he had found was not specifically on the list of items stolen from the Tipton residence. Det. Dillard believed the stone in the ring he found had been taken from a different ring that had been on the list of stolen jewelry. (RT 138:17374-17376.)

Det. Dillard decided not to release any information indicating the police had associated the ring with the Tipton crimes. Instead, Dillard contacted Charles Dietz, explained that a ring had been found in a box with his name as a return address, and asked if the ring belonged to him. Dillard did not use his own name as it had been publicized in connection with the Tipton case. He identified himself as Det. Dale Wysocki and said he was a burglary detective trying to return the ring to its rightful owner. Dillard told Dietz he would need a receipt to claim the ring. Dietz responded he had purchased the ring some time ago and did not have a receipt. Eventually Dillard agreed to release the ring if Dietz would obtain an affidavit from somebody else verifying that the ring was his. (RT 138:17377-17379.)

This also led to activity on the phone lines being tapped. Police overheard conversations discussing whether and how Dietz should comply with the police conditions for obtaining the seized ring. (RT 138:17379-

17381.) After several phone conversations on this subject, a decision was made to have Steve Homick's wife, Delores, prepare the affidavit verifying the ring belonged to Dietz. However, before this plan was carried out, Steve Homick canceled it. (RT 138:17448-17449.)

Indeed, in a series of overheard conversations among Steve Homick and his brothers, there was a discussion specifically addressing whether the events surrounding the Dietz package could be some kind of trap. Robert Homick believed that to be the case. (RT 138:17455.)

Dillard explained another important piece of the police strategy. Ron Bryl had been specifically targeted by the police because he was believed to be a weak link. He was being kept in custody on high bail, and that was seen by the police as a direct threat to the Homick brothers. At the very least, the officers hoped that the longer Bryl remained in custody, the more useful conversations would occur on the tapped phone lines, due to concerns that Bryl would decide to cooperate with the authorities to better his own position. According to Det. Dillard, this strategy proved to be correct, as he did overhear significant discussion about how to get Bryl out of custody.[137] (RT 138:17456-17457.)

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137 On the other hand, it is unclear how much of Dillard's perceived success was real and how much was a product of his highly speculative inferences. For example, Dillard overheard Steve Homick refer to bail on three people. Since Dillard was aware of only one person of concern to Steve Homick in custody, but there were three victims in the Tipton case, Det. Dillard interpreted this as a direct reference to the Tipton homicides. (RT 138:17457-17458.) It is not at all clear whether this was an accurate interpretation of what was overheard.

The strategy apparently succeeded further, as Ron Bryl testified as a prosecution witness. Bryl had known Steve Homick since the mid-to-late 1970s, when they both worked as carpenters and became close friends. They were each married and the two couples socialized and visited each other's homes. (RT 139:17699-17700.)

In January 1986, Steve Homick came to Bryl's home on the Monday or Tuesday preceding that January 26, 1986 Superbowl game. Steve showed him a small box with 10-12 pieces of jewelry and wanted Bryl to use his small grinder to remove some markings that Steve thought might be used to identify the jewelry. Steve left several pieces for Bryl to work on and returned several days later with more 10-15 pieces. Steve also arranged for Bryl to meet Steve's daughter Rena, who gave Bryl an insurance flyer that listed jewelry stolen at the time of the Tipton murders. (RT 139:17701-17711.)

After his subsequent arrest, Bryl was shown the same flyer by the Las Vegas police and he identified some items in the flyer as pieces Steve had brought to him. Bryl also said that the box in his closet that contained a ring had been given to him by Steve Homick, just a day or two before the Superbowl game. Steve had asked Bryl to package it and mail it to Art Toll, who Bryl had previously met in Las Vegas. Bryl had taken the box with him to mail one day, but then thought he was being followed, so he returned home and put the box in the closet. Later that same day, the police arrived with the search warrant. Bryl later testified at a Grand Jury proceeding, after

receiving immunity from prosecution for receiving stolen property, and for 2 counts of selling drugs.[138] (RT 139:17713-17727.)

On March 3, 1986, Det. Dillard had a conversation with Steve Homick's daughter, Rena. He asked her to remove the small gold nugget earrings she was wearing, and he later determined they were among the items that had been stolen from the Tiptons. Rena Homick also gave the police a plastic baggie with 22 more pieces of jewelry that were identified as part of the Tipton property. (RT 138:17487-17488.)

Frank Smaka was a 23 year veteran of the Las Vegas Metro Police Department. He met Steve Homick in 1975 or 1976 when he was president of the Las Vegas Handball Club and Steve Homick was a fellow handball player. Steve Homick was 1 of only 15 Class A handball players in Las Vegas. They often played handball together, until around 1982, when Smaka's schedule became more demanding and he gave up handball in order to spend more time with his family. Smaka was also aware of the fact that Steve Homick had knee surgery in 1982. (RT 136:17049-17053, 17083.)

In August 1985, Smaka pulled a muscle and started seeing a chiropractor. Steve Homick was going to the same chiropractor, and they encountered each other at the office around October 1985. Around that same time, Steve Homick called Smaka on the phone, said he was doing security work for the Tower of Jewels jewelry store, and asked Smaka if he could run

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138 Bryl also noted that before he provided any information to the authorities, Det. Dillard had threatened to prosecute him for the Tipton murders. (RT 139:17728.)

a couple of license plate numbers for him. In context, the request did not seem inappropriate, so Smaka agreed. (RT 136:17053-17056.)

However, Smaka forgot to follow through. Eventually Steve called and gave him the numbers again and Smaka did run them, but Steve never called again, so Smaka never passed on the information he received. (RT 136:17056-17062.)

In March 1986, Smaka read about Steve Homick's arrest for the Woodman murders. He also read that Steve Homick was a suspect in the Tipton murders. He found the paper where he had written down the license numbers Steve Homick gave them and the results he received. The two license plates were for a pickup truck and a motor-home, both of which were registered to Bobbie Jean and David Tipton, at 2561 East Oquendo Rd., in Las Vegas.[139] (RT 136:17063-17067.)

Michael Dominguez was also considered by police as a strong suspect in the Tipton murders. (RT 138:17502.) Det. Dillard questioned Dominguez on March 13, 1986 regarding his whereabouts on December 11, 1985. (RT 139:17574.)

In addition to the factual presentation summarized above, documents and testimony was also received that established that on May 12, 1989 Steve Homick was found guilty in a Nevada State court of the murders of Bobbie

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139 The prosecution offered this evidence in an apparent attempt to prove Steve Homick's efforts to learn the address of the Tipton home. However, David Tipton was listed in the Las Vegas phone book, with both his address and phone number plainly available. (RT 145:18415-18417.)

Jean Tipton, Marie Bullock, and James Myers. (RT 138:17489-17490; see also exhibit P-33.)

3. Steve Homick's Known Whereabouts on the Day of the Tipton Murders

Steve Homick had been the subject of periodic FBI surveillance starting in December 1984. He was under such surveillance on December 11, 1985, but it did not begin until 2:20 PM, and then it lasted until midnight. No surveillance ever placed him near the Tipton residence. (RT 139:17671-17676.)

Also, a pen register was used to keep records of all calls made from William Homick's phone, including those made on December 11, 1985. Eight calls had been made from William Homick's phone that morning between 8:35 and 9:15 AM, and two more just after 5 PM, all using the same long distance access number. That same access number was used for nineteen calls from that phone between December 1 and 17, 1985. Four calls made from William Homick's phone on December 13 also used that same access number. One call was made on December 11 at 11:14 AM using a different long distance access number. That different access number was also used on 19 calls from Steven Homick's phone line, made between December 1 and 17, 1985. (RT 139:17666-17667, 141:18112-18117.)

William Homick's residence, was 5-6 miles from the Tipton scene. That could be driven in just over 10 minutes. (RT 138:17495.)

4. Defense Evidence

a. More Information Regarding Steve Homick's Whereabouts on December 11, 1985

On the morning of December 11, 1985, Steve Homick picked up Art Taylor at Taylor's shop and drove him to a bank several blocks away where they cashed a check. Steve was driving Larry Ettinger's Cadillac. They returned to Art's Shop but were interrupted at 10:30 AM when Steve was paged on a beeper and said he had to leave and pick up Larry Ettinger and Susan Hines at an attorney's office. At that time of day it would have taken 15-20 minutes to drive from Taylor's shop to 6th and Bridger. Less than two hours later, Taylor relayed these events to FBI Agent Livingston.[140] (RT 140:17797-17800.)

Attorney Stewart Bell, whose office was located at 6th and Bridger, verified that he had an appointment at his office with his client, Larry Ettinger, at 10 AM on December 11, 1985. Ettinger was accompanied by Susan Hines. The purpose of the meeting was to discuss changes to Ettinger's will. From his billing records, Bell could determine that Ettinger must have arrived some time between 9:45 AM and 10:15 AM, and the meeting lasted at least 23 minutes, but no more than 37 minutes. (RT 140:17837-17845, 17858.)

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140 Taylor specifically recalled that he wanted to call Livingston promptly that day because during his conversation with Steve, Steve had mentioned that an FBI agent named Livingston might be coming to talk to Taylor. That was the first time Steve had ever mentioned Livingston to Taylor. (RT 140:17808-17809.)

Gwendlyn Bechtel was Stewart Bell's office manager. She also recalled seeing Larry Ettinger and his secretary, Susan Hines, at Bell's office on December 11, 1985. Ettinger had a cell phone with him and called or paged someone for a ride. After Ettinger met with Bell, Ettinger and Hines sat in the waiting room and waited for their ride. They did not wait long. (RT 140:17862-17874.)

Susan Hines Ettinger recalled that on the morning of December 11, 1985, Steve Homick came to Larry Ettinger's home about 9 AM. She went with Steve and Larry to a bank to have a cashier's check drawn. Steve drove them in Larry's Cadillac. A copy of the cashier's check was introduced in evidence to establish the December 11, 1985 date. From the bank, they went to attorney Stewart Bell's office, arriving around 9:40 to 9:45 AM for a 10:00 appointment. Steve dropped them off there. They were there about 25 minutes and then called Steve to pick them up.[141] Once Steve picked them up, it took about 15 minutes to get back to Larry's home.[142] After dropping them off there, Steve left.[143] (RT 141:17984-17988.) She next saw Steve later that afternoon, when he came back to Ettinger's house at a time when Michael Dominguez was there waiting for him. (RT 141:17990-17991.)

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141 When she talked to the police about these events on April 1, 1986, when this was fresher in her mind, she said they had been with Stewart Bell for 30-45 minutes. (RT 141:17988-17990.)

142 Ettinger's home was 5.5 miles from Bell's office. (RT 141:18003-18004.)

143 The Tipton residence was 3.7 miles from the Ettinger residence. If Steve Homick had gone to the Tipton residence after leaving the Ettinger residence, it would have taken close to twelve minutes for him to get there. (RT 141:18004-18005.)

b. Another Effort to Obtain Information from Michael Dominguez

Michael Dominguez was called by the defense at the penalty phase and again answered some questions while avoiding or refusing to answer others. He refused to answer questions about stealing Tim Catt's car and former testimony was read in which Dominguez claimed to have wrecked a car owned by Catt after Steve Homick set it up in order for Catt to obtain insurance money. A week later, Dominguez went to the Tower of Jewels and Catt gave him a gold watch and chain worth $1,000. (RT 140:17883-17886.)

A friend of Dominguez, Kelly Danielson, died in "what was called" a boating accident on February 1, 1986.[144] (RT 140:17897-17900.) In prior testimony, Dominguez admitted that he and Danielson had committed some crimes together. When asked if he and Kelly Danielson committed the Tipton murders, Dominguez failed to give any response. (RT 140:17901.)

Dominguez also failed to respond to questions about his activities on December 11, 1985. In prior testimony, he had claimed that he woke up at 8 AM and that he and his girlfriend Tina left his apartment at 9 AM. They went to the El Dorado Club to eat, then went to Dominguez' mother's home to feed her animals, and then went to the Accuracy Gun Shop. In different prior testimony inconsistent with this timing of events, he said he got to Accuracy Gun Shop before it opened at 9 AM, and the only persons there

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144 During the guilt phase of the present trial, in one of his rare moments of actual testimony, Dominguez had acknowledged he had been under investigation for the murder of Kelly Danielson, and conceded that "I feel I was guilty of his death." (RT 88:9300-9302.)

were him and Ricky. However, on another occasion he testified he got there around 11 AM and stayed until noon. He then went back to his mother's house, and then back to his own apartment for lunch. He gave conflicting prior testimony in which his girlfriend Tina either was or was not with him all morning. He was also at Larry Ettinger's house and at Kelly Danielson's house that day. (RT 140:17903-17922.)

Ricky Gray, the manager of the Accuracy Gun Shop sharply contradicted Dominguez, stating Dominguez had not been in the shop at all on December 11, 1985. He remembered this because he worked with Dominguez at a concert in the evening of December 11, 1985, at the National Rodeo Show, and he had not seen Dominguez at all that day prior to the Rodeo Show. (RT 141:17951-17952.) Gray knew Dominguez well, having known him since the 4th grade. (RT 141:17955.)

Manuel Correira and Michael Dominguez were together in the "hole" in the Clark County jail in 1989. Correira read a newspaper article about Steven Homick and the Ninja murders. Correira noticed this because he had previously met Steven Homick when they were in custody together. When Correira mentioned this news article to Dominguez, the latter responded that Steve Homick did not commit the Tipton murders; rather, they were committed by Dominguez and Kelly Danielson, and Steve Homick was not present. Afterward, Dominguez had given Steve Homick Danielson's share of the jewelry from the Tipton home. (RT 141:18076-18080, 18107.)

c. Other Evidence Regarding the Crime Scene on December 11, 1985

Raymond Jackson was employed by the Clark County Parks and Recreation Department and had passed by and noticed the Tipton residence on many occasions. On December 11, 1985, he was at a school directly across from the residence, to repair a break in the sprinkler system. He noticed a small white pickup truck parked in the Tipton driveway between 9:30 and 10 AM. He noticed the commotion at the house later and conveyed his information to the police in the early afternoon. (RT 141:17960-17965.)

James Hampton, Jr., lived in the same neighborhood as the Tiptons and also worked as a builder, constructing a new home near the Tipton residence. On December 11, 1985, between 9:30 and 10:30 AM, he was driving slowly through the area when he noticed a man walking from the cul de sac where the Tipton home was, across some adjoining vacant property. The man appeared to make a point of avoiding eye contact. He was walking briskly and appeared out of place. Hampton's own children attended the nearby school, and he also coached kids at the school, so he took special notice of anybody in the area who seemed out of context. Hampton noticed the commotion at the Tipton residence around 1:30 PM and he told the police about this the following day, giving his name and address. They never contacted him again. Eventually a defense investigator contacted him and showed him a photo. Hampton could not make an identification, but said the photo did resemble the man he had seen. The photo depicted Kelly Danielson. (RT 141:17967-17981, 18051.)

I. A LARGE VARIETY OF SERIOUS ERRORS OCCURRED IN THE PRESENTATION OF TESTIMONY BY MICHAEL DOMINGUEZ, DEPRIVING APPELLANT OF HIS FEDERAL SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND EFFECTIVE CROSS-EXAMINATION, AS WELL AS OTHER CONSTITUTIONAL RIGHTS

A. Factual and Procedural Background Prior to Dominguez' Appearance at the Present Trial

As described in the Statement of the Facts portion of this brief, Michael Dominguez gave extensive pretrial statements to the investigating authorities in which he admitted his own involvement in the Woodman murders while minimizing his culpability in ways that strained credulity. In doing so, he successfully persuaded officials that he had useful information to help secure convictions against Steven Homick and others, while satisfying the condition that he not be the actual shooter. This tightrope act earned him a very favorable plea bargain which resulted in a sentence for him that was to make him eligible for parole after 12-1/2 years. In contrast, Steven Homick eventually received a death sentence and all other alleged participants received sentences of life without the possibility of parole. Dominguez received even more benefits, since he was promised concurrent time for very serious offenses, including other homicides, in at least 3 other states.[145]

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145 When Dominguez' plea was entered on May 9, 1986, the prosecutor expressly stated on the record that an agreement had been worked out between himself, the District Attorney's Office in Clark County, Nevada, and Dominguez' counsel, under which "whatever charges you plead to in Las Vegas, Nevada will run concurrent to whatever time you get in the

(Continued on next page.)

In accordance with his plea bargain, Dominguez testified against the Homick brothers, the Woodman brothers, and Anthony Majoy, in an initial preliminary examination. The Information that resulted from that preliminary examination was eventually ordered dismissed by the Court of Appeal, due to improper prosecutorial withholding of important information that would have heavily impeached another prosecution witness, Stewart Siegel. The case was refiled and Dominguez testified in another preliminary examination, but Steven Homick was not present for that proceeding, since he had been taken to Nevada for trial on other charges. Eventually a third preliminary examination was held, with Steven Homick as the only defendant, but this time Michael Dominguez refused to even be sworn as a witness, and was held in contempt of court. (Supp.CT 2, Vol. 2: 456-461.)

The prosecution originally anticipated Dominguez would give testimony in the separate trial of Stewart Woodman and Anthony Majoy

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California case." (CT 22:6099.) The prosecutor also expressly stated that whatever sentence Dominguez might receive in federal courts in Texas and Hawaii would also run concurrent with the California sentence. (CT 22:6100.) In addition, the prosecutor stated:

> "And lastly, we have made the representation to you that after you clear up this case, the ones in Nevada and any federal matters, **you will be housed in an institution of your choice**, perhaps either the Nevada system or a federal system, and this is being done for your own security to keep you separate and apart from the other co-conspirators in this case." CT 22:6100; emphasis added.)

(which started before and ended after the third preliminary examination referred to in the preceding paragraph), as well as in subsequent related federal trials of these same defendants and others. However, Dominguez became dissatisfied with the government's performance of its side of the plea bargain, and he refused to give the expected testimony at the federal trials or at the separate California trial of Stewart Woodman and Anthony Majoy. (See CT 11:2778-2779, 2787-2789, 22:6123-6144.) When he appeared before the federal court in Nevada and refused to testify there, he expressly stated that the **only reason** he was refusing to testify was because the States of California and Nevada had not fulfilled their promises, made in their plea agreements with him. (CT 22:6139, ll. 17-25.) Dominguez also made it clear this was the same reason he had earlier refused to testify at the Stewart Woodman trial in California. (CT 22:6135, ll. 2-9.)

The government did not seek to abrogate the bargain when Dominguez refused to testify. However, Dominguez himself moved to withdraw the pleas he had entered. Against this backdrop, it was anticipated he would refuse to testify in the present trial, and the prosecution expected to present its case by using former testimony given by Dominguez at the first preliminary examination.

Anticipating such circumstances, the prosecutor filed points and authorities in November, 1989, regarding the possible unavailability of Dominguez as a witness. (CT 11:2777 et seq.) The prosecution argued that if Dominguez refused to testify at the present trial, he should be declared unavailable pursuant to Evidence Code section 240, which would render his prior testimony against the same defendants admissible. (CT 11:2780-2783.)

The initial response from the defense was to file points and authorities arguing that Dominguez' testimony from the first preliminary examination should not be admissible in the present trial. The defense argued that the Court of Appeal had already determined that the first preliminary examination was unfair and led to an invalid commitment. Since the defense had been denied substantial rights at that preliminary examination, there had been no full and fair cross-examination of any of the witnesses, and the defendants had been deprived of their rights to effective assistance of counsel. As a result, any testimony from those witnesses should not come within any exception to the hearsay rule. (See CT 11:2869 et seq.)

Three years later, shortly after the present trial had finally begun, the defense again filed points and authorities reiterating the argument that the fundamental error that occurred at the first preliminary examination infected the testimony of all witnesses, not just Stewart Siegel. Attached as an exhibit to that filing was the Court of Appeal opinion that ordered the dismissal of the initial information.[146] In that opinion, the Court of Appeal ruled that the defendants were denied the effective assistance of counsel when the magistrate conducted an *in camera* hearing without notice to or participation of the defense and ruled at that hearing that prosecution witness Stewart Siegel could not be cross-examined about his career as a paid informant for the FBI. (CT 22:6074-6079.) The Court of Appeal did not then go on to

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146 That opinion was originally certified for publication in the official reports, but was subsequently ordered not to be published. However, that decertification order does not preclude reference to that opinion in subsequent aspects of the same case, pursuant to the principle of law of the case. (See California Rules of Court, Rule 977, subd. (b).)

determine whether the evidence independent of Siegel's testimony was nonetheless sufficient to support the commitment orders. Instead, the Court of Appeal concluded that the deprivation of the right to the effective assistance of counsel rendered the commitment orders invalid. (CT 22:6079-6081.)

In discussing the Court of Appeal opinion in their points and authorities, counsel for Steven Homick noted the Court of Appeal's refusal to salvage the commitment order by looking to see if the remaining evidence, aside from Siegel's tainted testimony, was nonetheless sufficient. (CT 22:6057-6060.) The defense went on to explain, "It would be an absurd result if testimony taken at that preliminary hearing could not be used by a magistrate to hold the defendants to answer but could be used by a jury deciding whether to convict the defendant of a capital offense." (CT 22:6060, ll. 6-9.) The defense went on to offer other examples of circumstances where it had been held that improprieties at a preliminary examination precluded the subsequent use of testimony from that examination as former testimony. (CT 22:6060-6062.)

The defense further argued that the prosecution should not be allowed to make use of Dominguez' former testimony because it was the prosecution's failure to live up to the terms of its bargain that caused Dominguez to subsequently refuse to testify.[147] (CT 22:6062-6063.) Finally, the defense argued that the prosecution had withheld crucial

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147 As noted earlier, Dominguez expressly testified at the federal court proceedings that the **only** reason he was refusing to testify for the prosecution because the states of California and Nevada had not honored their plea bargain agreements. (CT 22:6135, 6139, ll. 17-25.)

evidence at the time of the initial preliminary examination, which precluded any full and fair cross-examination of Dominguez. (CT 22:6063.6064.)

At a discussion of the upcoming appearance of Michael Dominguez, counsel for Steven Homick asked to be considered a party to Dominguez' plea withdrawal proceedings, in order to give the defense some opportunity to examine Dominguez regarding whether his prior testimony had been untrue. The defense also asked to have all of the documents filed by Dominguez in support of his motion to withdraw his plea considered as part of the record for the ruling on the admissibility of his prior testimony. (RT 46:2010-2013.) The prosecutor never objected to these requests, the court never expressly granted or denied them. (RT 46:2019-2023.)[148]

On October 9, 1992, an Evidence Code section 402 hearing was held in regard to Dominguez. The trial court expressed its conclusion that reliability of former testimony is necessarily established as long as there was a right and opportunity to cross-examine at the prior proceeding, with a similar interest and motive. The court expressed concern that there was no independent right to a determination of reliability, even if the defense had new information that would challenge the reliability, that was not available at the time the prior testimony was given. Despite its misgivings, these conclusions led the court to hold that Dominguez prior testimony would be admissible if he became unavailable at the present trial. (RT 69:5695-5697.)

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148 The defense was present at the subsequent hearing on Dominguez' motion for withdrawal of his plea. However, the motion was denied as untimely, and Dominguez had no opportunity to testify in support of his motion, or to be examined by counsel for Steven Homick. (RT 80:7797-7812.)

Dominguez' testimony was discussed again the following day. The defense noted that the reliability issue addressed by the court the preceding day was only one of several separate matters that needed to be resolved. According to the defense, other remaining issues included: 1) whether a prior preliminary examination that was conducted in violation of the defendants' Due Process rights could be considered a prior judicial proceeding; 2) whether Dominguez' unavailability was caused by the actions of the State; 3) whether the State should be permitted to benefit from Dominguez' unavailability if, in fact, it was the actions of the State that caused that unavailability; 4) whether there was a fair opportunity to confront and cross-examine when substantial material evidence was withheld from the defense at the time of the prior testimony; and 5) whether a jury could properly make credibility assessments when former testimony is read in which the witness (whose demeanor cannot be observed by the jury) denied making earlier statements that were then used to impeach. (RT 70:5747-5750.)

The court responded with its conclusion that the Court of Appeal opinion which found problems with the first preliminary examination had nothing at all to do with Dominguez. The defense pointed out its theory was that it should have the opportunity to show that Dominguez' preliminary examination testimony was infected by problems similar to those which caused the Court of Appeal to find fatal problems regarding witness Siegel. The Court concluded these matters were too complex to resolve immediately, so the prosecutor was instructed to avoid reference to expected testimony from Dominguez in his opening statement to the jury. (RT 70:5752-5768.)

Several weeks later, Michael Dominguez' motion to withdraw his guilty plea was heard. The trial court started the discussion by questioning the timeliness of the motion, made more than six years after the plea was entered on May 9, 1986. Dominguez' counsel responded that he had filed his points and authorities five months earlier and the timeliness issue had not been raised until the prosecutor filed points and authorities the day preceding the hearing. Dominguez' counsel also pointed out that Dominguez had written to Judge Candace Cooper in September 1989, expressing dissatisfaction with the government's performance of its plea bargain obligations, and it was only at that point that counsel was appointed to assist Dominguez.[149] Since then, counsel had been in regular communication with his client and had frequent contacts with the prosecutor in an effort to seek an informal resolution of Dominguez' complaints. (RT 80:7797-7802.)

Counsel also noted he had been hampered by the distance from Los Angeles to the prison in which Dominguez was incarcerated, and by the length of the proceedings in the Woodman case. Counsel was concerned that

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[149] In February 1989, Dominguez' parents had written to his original California counsel, Mr. Lloyd, and had expressed concern about Lloyd's representation of their son. They also complained that Dominguez was being kept at the Indian Springs Correctional Center, where he was kept in chains. The parents described Dominguez "protective custody" status as a living nightmare. Protective custody meant he was kept locked in his cell 23 hours each day. He had been denied exercise time or television time, and had no access to newspapers or reading materials.

The letter further noted that Dominguez had been promised he would be placed in a federal facility of his choosing. Furthermore, he had been told he would be eligible for parole in 12-1/2 years, but once he was in prison a counselor had explained that he must serve at least 17 years before he would be eligible for parole. (CT 21:5819-5824.)

withdrawal of Dominguez' plea would leave Dominguez exposed to a possible death sentence, so counsel had many long discussions with Dominguez about that. Only after those discussions was counsel firmly convinced that Dominguez understood the risks involved and still wanted to go forward. (RT 80:7803.)

In response, the prosecutor repeated his timeliness complaint and also argued this was simply a case of buyer's remorse. The court concluded that there had been a substantial delay in seeking relief, even if the court only counted 4 years as delay and set aside 2 years during which informal relief was being sought. The court saw no justification for the delay, since everything Dominguez complained about was known by him since the date of his plea, except for his contentions regarding where he was being housed. Assuming the housing contentions were timely, the court did not see them as sufficient to justify setting aside a plea. The court had also reviewed the overall merits of Dominguez' claims to some extent and saw no basis for relief even if the matter was timely. (RT 80:7805-7812.)

A month after it had previously been discussed, the defense motion to exclude the former testimony of Dominguez was argued further. The defense repeated its claim that the first preliminary examination should be considered an invalid judicial proceeding, so that any testimony given at that proceeding should not be considered former testimony. Counsel for Steven Homick noted this argument was intended to apply to the use of former testimony if Dominguez refused to testify at the present trial.

Counsel argued alternatively that even if Dominguez did testify at the present trial, then these defense claims should still be considered in regard to the admissibility of testimony from the first preliminary examination as prior

inconsistent statements. (RT 84:8795.) The trial court acknowledged the Court of Appeal's unwillingness to disregard the Steward Siegel preliminary examination and determine whether the remaining evidence (including Dominguez' testimony) was sufficient to hold the defendants to answer. However, the trial court still did not see that as recognition that the remaining testimony was tainted. Instead, this was merely a conclusion that the error could not be deemed harmless. The court again denied the defense motion to exclude Dominguez' former testimony. (RT 84:8796-8797.)

Counsel for one of the co-defendants argued that Dominguez' preliminary examination testimony was tainted because essential discovery about Dominguez had been improperly withheld prior to that preliminary examination. This was similar to the issue resolved by the Court of Appeal in favor of the defense in regard to witness Siegel, but that ruling obviated the need for that Court to address the issue in regard to Dominguez. The trial court summarily rejected this position as too speculative, but gave no explanation for its failure to allow the presentation of evidence on this point, in order to resolve that issue without speculation. (RT 84:8798-8799.)

The next day, Dominguez surprised everybody by agreeing to testify. The court noted he would have to answer all questions even if he preferred not to answer some, and he initially said he could not promise that. However, he then did agree that he would answer questions about his other criminal activity. The court also instructed him not to make any reference to the polygraph examination he had taken. (RT 85:8917-8924.)

B. Factual and Procedural Background During Dominguez' Appearance at the Present Trial

On direct examination by the prosecutor, Michael Dominguez initially answered all questions, explaining that he was in custody for first degree murder, after pleading guilty to two counts of murder at the request of his attorneys. He acknowledged stating in court at the time of his plea that he was entering his pleas freely and voluntarily. He also acknowledged summarizing the crimes he had committed. However, he claimed that everything he said in court when he entered his plea was a lie. (RT 85:8925-8928.)

Over the objection of counsel for Steven Homick, the court then allowed the prosecutor to read the unsworn words spoken by Dominguez when he entered his plea, in which Dominguez claimed that Steve Homick recruited him to take part in a contract killing. In that prior statement, Dominguez also had said he went through extensive planning with Robert Homick, Steve Homick, and Anthony Majoy, and he claimed that after the killing he received $5,000 from Steve Homick. (RT 85:8931-8932.)

Next, Dominguez answered questions about the terms of his plea bargain, but he claimed he had not been given enough time to talk to his attorneys before he entered his plea. He also acknowledged giving a videotaped statement to police officers in Las Vegas on March 13, 1986, but he claimed he had been physically forced to give that statement. (RT 85:8936-8940.)

At this point counsel for Steven Homick objected to the prosecutor's use of the transcript of the videotaped interview, as it had not been authenticated. The court ruled that the prosecutor could use the videotaped

statement as a prior inconsistent statement. The court explained the prosecutor should not read directly from that transcript, but he could ask Dominguez questions in the form of "isn't it true..." you said this or that. If Dominguez said no, then the prosecutor could read from the transcript of the videotaped statement in order to refresh Dominguez' recollection. (RT 85:8940-8942.)

Soon after the prosecutor returned to his direct examination, Dominguez stated, "I could answer your questions, but you have got stipulations upon me. I can't tell the jury the truth, so I am stuck." (RT 85:8944.) He then answered some questions about his attorneys at the time of the plea. He then gave responsive answers about knowing Steve Homick since the early or middle 1970s. Then he denied ever meeting Robert Homick, and said he had lied when he testified in May 1986 that he had known Robert Homick for about a year. (RT 85:8946-8949.)

The prosecutor began asking questions about the events of September, 1985, leading up to the killing of the Woodmans. Dominguez' responses quickly degenerated into failures to recall events about which he had given prior testimony or statements, and claims that the prior statements were lies which resulted from coercion. In response, the prosecutor began reading more and more from Dominguez' videotaped statement. (RT 85:8950-8955.)

Counsel for Steven Homick objected, contending the prosecutor was improperly phrasing questions that assumed the truth of a statement Dominguez had just said was not true. The court responded only that the way Dominguez was answering questions, it was difficult to frame a question without having some reference point. (RT 85:8596-8597.)

When the prosecutor went back to questions about Dominguez' travel to Los Angeles just before the Woodman murders, Dominguez again stated he did not recall, and the testimony he gave earlier was merely repetition of what he had been told to say. (RT 85:8958-8962.) When the prosecutor started reading former testimony from the **second** preliminary examination, counsel for Steven Homick questioned the prosecutor's use of a transcript of a proceeding in which Steven Homick did not participate. However, counsel withdrew his concern and acquiesced in the ruling that the transcript could be used as a source of prior inconsistent statements, rather than as former testimony. (RT 85:8964.) Soon afterward, however, counsel complained that the prosecutor was reading selected portions of the various prior statements and testimony while skipping other portions, resulting in a false impression from matters taken completely out of context. (RT 85:8970-8971.)

The prosecutor then continued for a period of time, asking about the things that Dominguez did with Steve or Robert Homick after Dominguez had come to Los Angeles just before the Woodman murders. Again and again, Dominguez answered that he did not remember the events the prosecutor asked about, and that his prior testimony had only been based on what the investigating officer or the original prosecutor had told him to say. The prosecutor read one portion after another from the various prior statements and testimony. (RT 85:8975-8993.)

Eventually one of the defense attorneys objected to a portion of a transcript the prosecutor was about to read, contending that it contained speculation by the witness. The trial court expressed the view that if no

motion to strike was made or granted when the prior testimony occurred, then it could be read now regardless of whether it contained speculation.[150] Counsel wanted to research that matter further, so the court deferred any final ruling. (RT 85:8994-8999.)

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150 The court's position was incorrect. In the context of former testimony, Evidence Code section 1291, subd. (b) expressly provides:

> "(b) The admissibility of former testimony under this section is **subject to the same limitations and objections as though the declarant were testifying at the hearing**, except that former testimony offered under this section is not subject to:
>
> (1) Objections to the form of the question which were not made at the time the former testimony was given.
>
> (2) Objections based on competency or privilege which did not exist at the time the former testimony was given." (Emphasis added.)

The objection to a speculative answer did not come within the exceptions listed in subd. (b)(1) or (2), so the objection was a proper one.

On the other hand, in the context of a prior inconsistent statement, the fact that the statement was made during former testimony means nothing. If the prior inconsistent statement contains inadmissible evidence, there is no reason it should be exempt from any objection that would be proper if the answer was given by the live witness, rather than by his prior statement.

Importantly, that erroneous ruling may well have caused trial counsel to conclude any additional objections made on grounds not made at the time of the former testimony were futile, thereby causing excusable failures to object. This only adds to the impossibility of sorting out what the present trial would have been like if it had not been so affected by repeated erroneous rulings. As will be seen, this is one of many reasons why these errors cannot be deemed harmless.

After further failures to recollect, followed by reading from prior transcripts and statements (RT 85:9000-9007), the prosecutor reached a point where he wanted to play the videotape of a police interview for the jury, to rebut Dominguez' claims he had been coerced. The prosecutor conceded the videotape contained some objectionable portions, but he believed an edited version had been prepared for an earlier proceeding and he wanted to play that in its entirety for the present jury. The jury was sent home for the day and the court and counsel spent half an hour watching part of the tape. One defense attorney stated that large portions of the tape had been deleted in editing, and if the tape was played, he would want those portions included. The court recessed for the weekend and instructed all counsel to review the unedited tape and determine which portions they wanted played. (RT 85:9008-9017.)

The following Monday the defense reported that counsel for the three different defendants were not able to agree on which portions of the videotape should be played. Counsel for Steven Homick objected to the entire tape, while the other defense attorneys wanted to play the tape after deleting references to a polygraph examination and to a delivery of a truckload of cocaine. Counsel for Steven Homick then listed a number of specific objections, including a portion of the interview in which Dominguez speculated that when Steven Homick used the words "after them," he meant "kill them." (RT 86:9019-9023.)

The discussion turned to a portion of the tape in which Dominguez said that even though he had been told he was brought to Los Angeles for a robbery, he figured out the victims (the Woodmans) were to be killed "based on being with Steve and what Steve had done." Believing that Dominguez

was now taking the position that all that was planned was a robbery and nothing more, the judge saw this as impeachment of Dominguez. The judge saw no prejudice whatsoever to Steve Homick since Dominguez was not attributing any statement to Steve Homick, but was only expressing his own thoughts about what was intended.[151] (RT 86:9027-9029.) The judge did agree, at least for the time being, to exclude Dominguez' statement that his nickname for Steve Homick was "Whacker." (RT 86:9030-9031.)

Dominguez resumed the stand, continuing to express a lack of recollection in response to most questions while stating that reviewing the videotape might refresh his recollection and maintaining that he had a script in front of him when he testified in court. The prosecutor continued responding by reading portions he chose from various prior statements and transcripts. (RT 86:9039-9058.) Suddenly, however, Dominguez refused to answer any more questions until he was allowed to speak to an attorney. (RT 86:9059.)

The trial court then engaged in a bizarre discussion with Dominguez, trying to ascertain what it would take to get him to continue "testifying," even though his testimony had been restricted to failures to recall and references to the taped statement. The court offered to let Dominguez review the videotape outside the presence of the jury, but Dominguez balked when he learned an edited version was being prepared for display to the jury. The court explained they only deleted portions which the attorneys agreed should be deleted, but Dominguez responded that **he** did not agree. Dominguez

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151 This ruling was also incorrect, as set forth in detail in Argument VII, subd. F, beginning at p. 415 of this brief.

asked to view another videotape that was made when he drove around Los Angeles with the officers and pointed out various locations to them. (This tape will hereafter be referred to as the "driving tape.") The court recessed and allowed Dominguez to view that tape. (RT 86:9063-9066.)

After Dominguez viewed the driving tape and conferred with his attorney, he complained that a portion of the tape had been deleted. Det. Holder, one of the investigating officers, explained that the original videotape was on a larger sized tape that required a special tape player. The tapes used in court had been copied from the larger tape. Det. Holder had the police department send over the original larger tape and a machine on which it could be played. The court sent the jury home for the day and adjourned so Dominguez could watch more videotapes. (RT 86:9067-9079.)

The next day, Dominguez' attorney reported that **his client no longer wished to testify**. He explained that Dominguez was under indictment in Nevada for contempt, due to his refusal to testify in federal court, and faced a possible 17-year sentence. Dominguez had planned to use these videotapes in his defense, but was unhappy because a key portion had been cut. Dominguez claimed his refusal to testify was based on advice from his Nevada attorney. The court suggested that Dominguez might be more cooperative if he was being questioned by a defense attorney. Dominguez' counsel said **his client was adamant and would not testify even if he was granted immunity**. Dominguez expressed his own desire for the prosecutor to move to have Dominguez' plea withdrawn. (RT 87:9081-9094.)

Dominguez was then questioned by counsel **without the jury being present**. In response to a question from the prosecutor, Dominguez said he had watched the videotapes and they were not complete. Then counsel for

Robert Homick asked some questions and Dominguez gave rambling answers about not testifying because the prosecution had not lived up to its end of the bargain. Dominguez said the only agreement had been that he had to pass a polygraph examination. He took three exams and did not pass any, but took more the next day and finally did pass. (RT 87:9094-9100.)

Under further questioning by various defense counsel outside the presence of the jury, Dominguez repeated his claims that portions of the tapes were cut, that he had been forced at knife point to cooperate in the taped interviews, and that the prosecution had not lived up to the plea bargain. The court expressed frustration that this was going nowhere, and Dominguez responded that he wanted to tell his story to his own jury. Counsel for Steven Homick made his first effort to question Dominguez, but nothing more was accomplished. (RT 87:9101-9120.)

In obvious frustration, the court decided to just go forward in front of the jury, **even though she was confident that Dominguez would start talking about the polygraph examination**. She noted that Dominguez continued to provide some bits of information even while refusing to answer. The judge explained that if Dominguez refused to answer the prosecutor's questions, then she would let the prosecutor impeach Dominguez with the prior transcripts and statements. The court promised to cut Dominguez off if he started discussing polygraph exams. One defense attorney expressed concern about going forward with a witness who said he would not testify. (RT 87:9123-9125.) The judge expressed her opinion, "This will be unique in the annals of the criminal jury trial system." (RT 87:9124.)

Before proceedings with the jury resumed, counsel for Neil Woodman moved for a mistrial. He was concerned that the jury would inevitably feel

that Michael Dominguez bizarre behavior on the stand was an attempt to help the defendants, and that such a mistaken belief by the jury would only prejudice the defendants.[152] Counsel for Neil Woodman was also concerned that reading the former testimony and statements of Dominguez would be very disjointed. He believed it was unfair for Neil Woodman to be "tarred' by Dominguez' actions when everybody agreed that Dominguez and Neil Woodman had never even met each other prior to their arrests. In response, the judge expressed her belief that Dominguez would be just as obstinate with the defense attorneys as he had been with the prosecutor, so the jury would not hold his behavior against the defense.[153] (RT 87:9127-9129.)

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152 Indeed, the trial judge herself seemed to have the unfounded view that Dominguez' intent was to aid the defense. She had earlier expressed her view that he might be more comfortable being questioned by a defense attorney – a view he then rejected. (RT 87:9089-9092.) Shortly before that, when Dominguez objected to the use of a videotape involving him, because portions had been deleted, the judge reassured him that portions were deleted only because the defense attorneys wanted them deleted. Dominguez responded that did not mean he agreed. (RT 86:9063-9066.)

Apparently it did not occur to the judge that Dominguez did not care what would help or hurt the defendants. He may well have been misbehaving simply because he had been denied the benefit of his very favorable plea bargain, or because his original statements were lies used to gain the plea bargain, and he feared that further testimony could lead to a perjury prosecution.

153 This new belief seems unfounded, since the judge herself had apparently felt, only a short while earlier, that Domiinguez intent was to assist the defendants. (See preceding footnote.) The judge only changed her mind based on matters that the jurors did not hear, so they were likely to share the judge's original speculation.

The judge then expressly stated her recognition that by proceeding in this fashion, nobody was stipulating that the procedures being used were appropriate. She viewed the manner in which evidence was being developed as doing the best that could be done in an awkward situation. Dominguez was present, sworn, and seemed to have a lot to say, so **she did not believe she could make a finding that he was unavailable as a witness**. The motion for a mistrial made by Neil Woodman's counsel was denied. Counsel for Robert Homick then joined that motion. The court expressly stated she was assuming that all defendants joined the mistrial motion. (RT 87:9130.)

Counsel for Steven Homick then suggested that the Nevada attorney who supposedly advised Dominguez not to testify should be contacted in an effort to help determine whether Dominguez actually was an unavailable witness or not. Counsel noted that the prosecutor had introduced a number of unsworn prior statements that would have never been admitted if Dominguez had been found unavailable. Counsel was concerned that if Dominguez did become unavailable, then the defense would have no opportunity to cross-examine in regard to those unsworn prior statements, depriving appellant of his federal constitutional rights to confrontation and effective cross-examination.[154] The judge conceded her uncertainty whether a refusal to answer could properly be considered the same as a denial or a failure to recall. The court also recognized the possible problems resulting from reading to the jury from the preliminary examination in which Steven Homick did not participate. The prosecutor responded that he had been

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154 As will be shown, what counsel feared is precisely what followed.

acting in good faith, but to be safe he would stick to the first preliminary exam when Dominguez refused to testify, but would still use other statements when Dominguez gave a response that could be impeached. (RT 87:9130-9133.)

The jury returned and in response to the initial questions by the prosecutor Dominguez testified that he had just viewed some tapes that had been cut and as a result, he had decided not to testify. The prosecutor started reading from prior statements in the driving videotape, even though no testimony had been given which was inconsistent with prior statements. Counsel for Steven Homick objected and moved for a mistrial, contending the prosecutor had just done what he had promised not to do, in reading from an unsworn statement after Dominguez said he would not testify. The prosecutor disagreed, arguing that Dominguez had given some information prior to saying he would not testify. Counsel for Robert Homick suggested the refusal to testify should be deemed a failure to recall, and that the court should find such failures to recall to be deliberately evasive, opening the door to impeachment. The prosecutor joined that request. The court expressed willingness to find that all of Dominguez' failures to recall and refusals to respond to be lies, which would allow all sides to use prior statements to impeach. Counsel for Steven Homick repeated his last objection and again moved for a mistrial. The objection was overruled and the motion for mistrial was denied. (RT 87:9134-9136.)

Once again, proceedings resumed in the presence of the jury. Dominguez sat mute as the prosecutor asked several questions. Finally, the prosecutor simply started reading from the transcript of the first preliminary examination to respond to questions that Dominguez failed to answer. The

court instructed the prosecutor to continue in that fashion whenever Dominguez failed to give any answer. This went on for nearly 10 pages of the transcript, with the prosecutor moving step-by-step through the events as Dominguez had described them at the first preliminary examination. (RT 87:9137-9146.) However, Dominguez suddenly changed his course and responded to a prosecution question by saying, "Concerning the polygraph..." The prosecutor cut him off and moved to strike, but the next several questions were all answered with references to the polygraph examination. (RT 87:9146.)

Counsel for Neil Woodman then moved for a mistrial in view of the witness's silence, and in view of the repeated references to a polygraph examination. Counsel very perceptively explained, "I think we're wandering into a black hole we'll never get out of." (RT 87:9147.) Counsel for Robert Homick joined the mistrial motion and if that was denied, he requested an immediate admonition regarding the polygraph references. Counsel for Steven Homick also joined the mistrial motion. The court shrugged off this mistrial motion, asserting there was no real problem. The court was confident Dominguez would soon get tired of saying "polygraph." The court did not know how to admonish the jury at that point, because Dominguez had given no context to the polygraph references.[155] (RT 87:9147-9148.)

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155 This ruling was inexplicable. The court could have at least admonished the jury that all references to a polygraph exam were not to be considered for any purpose. With no admonition, jurors were reasonably likely to assume that Dominguez had taken and passed a polygraph examination.

As "testimony" resumed once again, Dominguez responded to every question by saying the answers were in the polygraph. The prosecutor ignored that and simply read portions of prior testimony to respond to each question. (RT 87:9149-9152.) Eventually the court broke in and admonished the jury, "Ladies and gentlemen, there is no issue of polygraph in this case although Mr. Dominguez would like to create such an issue." (RT 87:9152) Dominguez responded to that by stating, "I have paperwork that says different." (RT 87:9152.) Soon afterward, the court recessed for lunch, and conceded to counsel "Well, this doesn't seem to be very workable and I'm open to suggestions from counsel." (RT 87:9154.)

Counsel for Neil Woodman again moved for a mistrial, accurately assessing the situation as spiraling out of control. He argued that any factual content in Dominguez' "testimony" was lost in the "cacophony of irrelevancies." (RT 87:9155-9156.) Counsel for Steven Homick joined the mistrial request and added a new complaint: the defense had received no discovery regarding the contempt charges that Dominguez faced in federal court for his prior refusal to testify in the federal trial. The prosecutor stubbornly urged the court to simply plow ahead. (RT 87:9157-9158.)

Counsel for Robert Homick suggested having Dominguez testify while bound and gagged, so he could just nod or shake for yes or no. The court described that as the first suggestion that appealed to her. Soon, the judge noted she was seriously considering striking all of Dominguez' testimony and declaring him unavailable. However, she again expressed some concern that the prosecution had been able to get in so much

information from the unsworn police interviews and the second preliminary examination in which Steven Homick did not participate.[156] The court decided to review the transcript of proceedings with Dominguez up to that point, and then decide what to do next. (RT 87:9159-9162.)

Counsel for Robert Homick stated he would rather continue to muddle through, rather than have Dominguez' testimony stricken. However, counsel for Steven Homick was concerned that Dominguez' behavior would be seen by the jury as consistent with the prosecutor's conspiracy theory, and any defense effort to refute that would be hopeless. (RT 87:9163.)

The judge returned from lunch with a proposed admonition concerning Dominguez' refusals to answer and references to a polygraph examination, but counsel for Steven Homick complained that his client was being denied his federal confrontation rights. He urged the court to find Dominguez unavailable and then to make a determination whether that unavailability was procured by the government's failure to live up to the terms of the plea bargain it had made with Dominguez. The court responded that in reviewing materials in connection with Dominguez' new trial motion, she had already concluded there was no credible evidence that the government had failed to abide by the plea bargain. Thus, **the court saw no basis** to hold the hearing requested by counsel for Steven Homick or **to declare Dominguez unavailable**. (RT 87:9165-9167.)

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156 Thus, by recognizing the problem but failing to strike the testimony, the court appeared to be concerned more with how to salvage the trial, rather than with protecting the constitutional rights of the defendants.

Counsel for Steven Homick responded that at a hearing the defense would present more evidence on the matter than the judge had seen so far. Then, counsel for all three defendants complained that the court's proposed admonition to the jury was inadequate. The court responded by simply seeking input to improve the admonition, while reassuring everybody that such input would not constitute a waiver of any objections to the admonition. (RT 87:9167-9170.)

The prosecutor then sought a clear statement from the defense as to whether they were all asking the court to find Dominguez unavailable. Counsel for Robert Homick and Neil Woodman responded they were not conceding that Dominguez should be removed from the stand and his prior testimony should be read. Counsel for Steven Homick reiterated his belief Steven Homick's confrontation rights were being infringed because of misconduct by the prosecution and he again sought a hearing so he could establish that fact. He believed the prosecution should not be able to profit from its wrongdoing by reading prior testimony and insulating the witness from cross-examination. (RT 87:9173-9175.)

The judge responded that after Dominguez' motion to withdraw his plea had been denied, he was nonetheless willing to testify for a while. That somehow convinced the court that Dominguez' behavior on the stand had nothing to do with his plea bargain. (RT 87:9175.)

The judge had Dominguez returned to the courtroom for a stern lecture. She told Dominguez that every individual refusal to answer would constitute a direct contempt. Such findings would be made silently each time, and not stated in front of the jurors. Each such act of contempt would be punished by a consecutive 5-day jail term. Every mention of the word

polygraph in front of the jury would also result in a 5-day jail term. The jury then returned to the courtroom and was admonished that Dominguez had no privilege to refuse to answer any question. She told the jurors:

> "You are instructed that Mr. Dominguez has no privilege not to answer questions in this case. The court has made a determination that a refusal to answer questions is tantamount to answering 'No' to the attorney's question, and that Mr. Dominguez may be impeached, then, by his prior testimony.
>
> With respect to polygraphs or lie detectors, you are instructed that polygraphs have been proven to be unreliable; therefore, evidence concerning whether a person took or offered to take, or passed or failed a polygraph or a lie detector test is not admissible in any criminal proceeding. Whether one passed or failed a polygraph exam does not mean that that person either lied or told the truth.
>
> Statements concerning any such tests by Mr. Dominguez are irrelevant in this case, and you are instructed to disregard them." (RT 87:9183-9184.)

The prosecutor attempted to resume his direct examination, but before he could complete a sentence, Dominguez interrupted and insisted on clearing up something. The court threatened to find a direct contempt every time he spoke out, but he continued on, stating that the federal judge had said that his polygraph tests were admissible in federal court. The jury was instructed to disregard that. The prosecutor finally was able to ask questions. Dominguez responded to one question after another with references to polygraph exams. This went on for **forty-six** transcript pages, with the prosecutor ignoring the polygraph references and reading the prior testimony he desired in response to each question he asked. (RT 87:9184-9229.)

Finally counsel for Neil Woodman once again moved for a mistrial. He noted there had been **over 60** new mentions of the word "polygraph," and many other answers that were not at all responsive to the questions being asked. He believed Dominguez' "demeanor" had reached a point that what was being said was totally lost. Dominguez' preliminary examination testimony had taken up nine volumes of transcript over 4-1/2 days, and counsel believed there was no way to cover it in this manner without totally overwhelming the jury. In effect, it was the prosecutor and not Dominguez who was testifying. Even the jury was not looking at the witness any longer; instead, they were looking at the prosecutor as if he was the witness. (RT 87:9230-9232.)

The court responded that she was keenly aware of the nature of the testimony. She explained paradoxically:

> "It is looking very much like an unavailable, absent witness whose transcript is being read and I'm deferring - - either denying or deferring consideration of the many motions for mistrial that have been made based on this testimony because my concern is the right of the defendant's confrontation and cross-examination; and I cannot determine that that has been denied.
>
> I don't know how he's going to behave on cross-examination. I'm plowing through with this to keep him available for all of you, certainly. ...
>
> And my concern is that what it seems to be is he is not available for the prosecution.
>
> To the extent that he looks like a witness that this jury is disliking so much they don't look at him, he's a prosecution witness. The prosecution called him and they are stuck with the mess he's making.

> My concern, with respect to all the motions you've made, is what happens when he becomes your witness or when you cross-examine him; and I'm just going to wait and see and I have no way of predicting. I'm not even going to try. But we're this far along and we're in it this deep and there is certainly nothing to be lost by going a couple more days." (RT 87:9232-9233.)

Counsel for Robert Homick then noted that he would need more time to prepare for cross-examination of Dominguez, since it would have to be conducted in a very different manner than that for which he had prepared. Counsel for Steven Homick joined the request for a continuance. He explained that, rather than reading all of Dominguez' prior direct testimony, the prosecutor had been selectively editing it. Impeaching the mass of information that had been presented would be an enormous undertaking. Counsel asked for a week to prepare for cross-examination, but the court offered instead to have a single day away from court. In passing, the court expressly noted that unless the record indicated otherwise, any motion for mistrial by one defendant would be deemed to have been made by all three defendants. (RT 9233-9235.)

As if to prove defense counsel's contention of inevitable juror confusion, the court noted that a note had been received from Juror Susan Hall-Hardwick. The juror asked whether she should consider the information from prior proceedings as evidence. Although she had been listening to Dominguez' "testimony" for several days, she wrote, "I do not understand how I should view this information." (RT 87:9235.) The judge determined she would respond to the note by reading CALJIC 2.13. (RT 87:9235.)

Counsel for Steven Homick noted that this demonstrated the problem that had been created. CALJIC 2.13 dealt with a witness who testified to a lack of recollection, and a situation in which the jury would have to determine whether they believe or disbelieve the claimed inability to recall. Here, Dominguez was not really saying anything about his prior statements, so the instruction did not really apply. The court saw no problem; since she had already told the jury that a refusal to answer was tantamount to answering "No," the instruction did apply. (RT 87:9236.)

Counsel was not satisfied with that response, and argued that it should be up to the jury to determine whether non-responsive answers were equivalent to "no." Only if the jury made that determination would it be proper for the jury to consider prior inconsistent statements. Instead, the Court was arbitrarily deciding those factual questions for the jury. The court saw no other way to deal with the situation, since she had to make that factual determination before the prosecutor could be allowed to impeach the witness. The court questioned whether modifying the instruction would assist the jury, or only add to the confusion. Counsel for Neil Woodman argued that CALJIC 2.13 was intended to be read in conjunction with other instructions, such as CALJIC 2.20. He wanted parts of that instruction read so it would be clear to the jurors that they did not have to believe the prior testimony just because the prosecutor was reading it. At that point the court refused to change anything in the instruction, believing that would only make matters worse. (RT 87:9237-9238.)

The jury returned to the courtroom and the court read the question that one juror had submitted. (RT 87:9239-9240.) The court said the answer was contained in a jury instruction. The court then read to the jury:

> "Evidence that on some former occasion a witness made a statement or statements that were inconsistent or consistent with his testimony in this trial may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts stated by the witness on a former occasion.
>
> If you disbelieve a witness' testimony that he no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him describing that event." (RT 87:9240.)

Questioning by the prosecutor resumed once again. The prosecutor asked a series of questions to which Dominguez gave no response at all. Ignoring his silence, the prosecutor continued in his usual fashion of reading selected prior testimony after asking each question. After a few minutes of that, the court adjourned for the day. (RT 9240-9243.)

After the one-day break for defense counsel to prepare for cross-examination, proceedings resumed. First, an Evidence Code section 402 hearing was held to discuss the problem of impeaching Dominguez with prior crimes in which he claimed Steven Homick had been involved. Everybody agreed the defense should be allowed to impeach Dominguez with the prior crimes, and that there was no basis for admitting the prior crimes against Steven Homick. However, the court recognized that there was a great danger that Dominguez would volunteer information about Steven Homick's alleged involvement. The court did not want to instruct Dominguez to avoid mention of Steven Homick, since that would only encourage him to do so to cause problems. (RT 88:9250-9252.)

The court suggested a stipulation that would inform the jury of the necessary facts. Counsel for Steven Homick was concerned that would

present the facts to the jury in a manner that was weaker than what should occur. The court responded that if counsel wanted to run the risk of having Dominguez blurt out Steven Homick's alleged involvement in other crimes, then she could not protect him from that. Counsel replied that the defense was in an untenable position because the prosecutor chose to call this witness. (RT 88:9253-9255.) The court responded that the prosecution had to call Dominguez: "The reality is he's an important witness in the case. They had to put him on." (RT 88:9256.)

Changing the subject, the prosecutor noted that he still wanted to play the videotape of the police interview for the jury, to demonstrate there was no coercion. Counsel for Steven Homick moved for a mistrial, contending the videotaped interview was a prior statement on which the defense could not cross-examine Dominguez. The court disagreed, concluding Dominguez had effectively denied everything in the tape, making the entire interview fair game for impeachment. The motion for a mistrial was denied. (RT 88:9256-9259.)

Counsel for Robert Homick asked to have the jury admonished that the statements on the videotape were not being introduced for the truth of the matter, but were only to be considered as circumstantial evidence on the issue of whether the statements were coerced. The prosecutor wanted to defer that until it could be determined how much of the contents of the tape were opened up by cross-examination. The court suggested telling the jury to consider the tapes on the coercion issue and for impeachment, while saying nothing either way about whether they could be considered for the truth of the matter. Counsel for Steven Homick urged an instruction that the

statements could not be considered for their truth, but the court declined that request. (RT 88:9264-9265.)

The jury entered the courtroom and the court instructed that the March 13, 1986 videotape of the police interview with Dominguez would be played in full, and that the jury should use it to determine if Dominguez was coerced, and to determine whether it impeached Dominguez in any way. (RT 88:9266.) The entire videotape was then played. During a short break in the playing of the tape, counsel for Steven Homick reiterated his earlier objection to Dominguez' statement on the tape that Steve had told him it was going to be a robbery, but he knew better because "I just know Steve. ... I thought the people were going to get shot and killed." (RT 88:9269.) Counsel also renewed his objection to the passage on the tape where the officers asked Dominguez what the term "after them" meant, and Dominguez replied "Catch up with them, kill them." (RT 88:9269-9270.) This was followed by Dominguez' explanation that when Steve said he had not been able to catch up with them, that meant he had not been able to kill them. Counsel argued this was effectively character evidence, and was also interpretation by Dominguez. The court saw this as the opinion of the witness, and saw no problem with having that opinion expressed. [157] (RT 88:9270.)

After the tape had been played, cross-examination by Attorney White, on behalf of Robert Homick, got underway. Dominguez became somewhat more responsive. He gave direct answers to some questions, but continued to

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157 As noted earlier, this ruling was incorrect, as set forth in detail in Argument VII, subd. F, starting at p. 415 later in this brief.

give unresponsive answers to other questions, often reiterating his claims that many of the things he had said in the tape were lies told under the direction of the interviewing officers. Attorney White began using a technique whereby he read passages from Dominguez' prior testimony and then asked questions about the passage he had read. Attorney White also read passages from prior testimony when Dominguez gave inconsistent answers or claimed a failure of recollection. Being on cross-examination, Attorney White was also able to ask many leading questions, implying many of the facts he had hoped to elicit from Dominguez, even when Dominguez denied the truth of the statements the attorney quoted in his questions. (RT 88:92739356.)

After a three-day weekend, cross-examination by Attorney White continued in much the same fashion. (RT 89:9364-9426.) Attorney White also made extensive use of Dominguez' taped statements, in impeaching Dominguez and in providing the context for leading questions. (RT 89:9426-9470.) During this segment of his testimony, Dominguez candidly admitted, "My whole purpose up here is to get a new trial." (RT 89:9466, ll. 21-22.)

After testimony continued a little longer in similar fashion, a sidebar conference was held and counsel for Steven Homick stated for the record that he did not want anything he did or failed to do to be construed as waiving any confrontation rights. He stated that Dominguez had again become non-responsive. The court initially saw no problem in view of the instruction previously given to the jury, stating that silence by Dominguez was to be taken as tantamount to a denial. But counsel for Steven Homick pointed out that the nature of the examination had changed. Attorney White was not using prior transcripts to impeach testimony; instead he was using it

to frame new questions. In response to counsel's request, the court instructed Dominguez to answer the questions that were posed to him. (RT 89:9488-9489.)

Not surprisingly, Dominguez responded by sitting silently as Attorney White continued his cross-examination. The court repeated that all failures to respond would be deemed denials, making it appropriate to impeach Dominguez with prior statements and testimony. Attorney White was able to effectively imply his theory of the case in leading questions that went unanswered, prompting the prosecutor to complain that he had left a lot of questions hanging, with denials but no impeachment. (RT 89:9492-9494.) In response, the court stated, "I thought Mr. White saved a lot of time by not having to do closing argument." (RT 89:9495, ll. 3-4.)

The next day, it was Steven Homick's turn for cross-examination. Unfortunately, Dominguez started the day by stating he did not want to answer any questions. (RT 90:9501:15-20.) Soon, Dominguez began to remain mute in response to every question. (RT 90:9502, l. 25 et seq.) The court again advised the jury that failures to answer were tantamount to responding negatively to the question. (RT 90:9503.) Counsel for Steven Homick tried using the same technique that counsel for Robert Homick had used throughout his cross-examination, asking leading questions that received no answers. Some of the leading questions were prefaced by reading portions of Dominguez' prior testimony. (RT 90:9503-9511.)

However, before long the prosecutor objected to "isn't it true?" questions that received no answers. The prosecutor argued that counsel was effectively testifying for the witness. Counsel responded that he had evidence to back up what his questions implied. Counsel complained that the

prosecutor was trying to prevent any effective exercise of Steven Homick's confrontation and cross-examination rights. The court warned counsel that he better be prepared to prove the matters he was implying.[158] (RT 90:9510-9513.)

Counsel resumed his questioning, with Dominguez continuing to remain mute in response to each question. Within a few moments, the prosecutor again complained that no effort was being made to prove the facts implied in each question.[159] Counsel explained he did intend to prove what he was implying, and was simply leading up to that. The court then instructed counsel to ask one question at a time, and then prove the facts implied before going on to another question. Counsel for Neil Woodman argued that was too restrictive and the court altered her position to asking about one subject at a time, before proving the facts implied. The court once again stated that she saw no difference between what was occurring and a witness who verbally answered "No" to every question. (RT 90:9514-9520.)

Counsel for Steven Homick expressed continued concern at telling the jury that silence meant, "No." Sometimes the answer could be yes, and it should be left to the jury to interpret what the silence of the witness

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158 The court gave no explanation for failing to give any similar warning to counsel for Robert Homick during his entire cross-examination of Dominguez.

159 This was an odd complaint, since the questions counsel had been asking pertained to tapes that had previously been played in court and matters that had been gone into through reading prior testimony. Thus, the prosecutor knew well that the facts implied up to that time were true.

meant.[160] The court offered the same justification for her position that had been offered all along; this was the only way the court could see that would allow the defense to cross-examine the witness. The court noted that if the answer was "Yes," Dominguez remained free to volunteer that answer. Counsel for Steven Homick restated the concern as being that the jury might conclude they must accept every silent response as a "No" answer. The court inexplicably responded that the jury had been told that Dominguez was saying "No" when he was silent, but the jury remained free to determine that "No" was a true answer.[161] (RT 90:9521-9522.)

The prosecutor returned to his concern about restricting questions to a single topic before producing the evidence to prove the facts implied in the questions. Counsel for Steven Homick noted that in some instances such proof would come from later witnesses rather than from reading Dominguez' prior testimony. The court responded that counsel should make an offer of proof in such circumstances. Counsel for Robert Homick noted that if Dominguez' silence was considered the same as "No," then counsel should be permitted to ask question after question and simply accept "No" after

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160 Indeed, the court never seemed to recognize that virtually any question could be phrased in alternate ways, so that depending on which phrasing was used, an assumed "No" answer could have precisely opposite meanings. On the other hand, if the witness remained mute, it is difficult to see what there was for the jury to interpret to give meaning to the silence.

161 Since the jury had simply been told that the court had determined that whenever Dominguez failed to answer a question, the answer was tantamount to "No," it is not at all clear what basis the jury would have for realizing that the court also expected them to determine whether that court-dictated "No" was true or false.

"No" as the responses. The court responded that it would be improper to ask questions in bad faith. (RT 90:9522-9524.)

Counsel for Steven Homick resumed his efforts to cross-examine the mute witness. Before long, the prosecutor complained once again, this time arguing that when counsel read prior testimony to impeach the assumed "No" responses, he was not reading as much as the prosecutor believed he should be reading. However, the court agreed with counsel's position that counsel could decide how much to read, and if the prosecutor wanted to read more he could do that on re-direct-examination. (RT 90:9525-9536.)

At this point, counsel for Steven Homick renewed his motion for a mistrial. The witness had answered some questions when cross-examined by counsel for Robert Homick, but had stopped giving any answers when Steven Homick's turn for cross-examination arrived. This made it impossible to effectively cross-examine the witness. The court disagreed and denied the motion, expressing the belief that counsel was doing very nicely.[162] Counsel for Neil Woodman joined the mistrial motion. In response, the court again admonished Dominguez that his contempt citations were increasing with each unanswered question. (RT 90:9537-9541.)

Counsel for Steven Homick then noted that Dominguez' failures to respond were apparently due to his expressed concern about his pending federal case for contempt for not answering questions in the previous federal trial. Noting the joint state and federal nature of the investigation of the charges against his client, counsel for Steven Homick asked the court to

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162 The basis for the court's conclusion that cross-examination on behalf of Steven Homick had been going very nicely was not at all apparent.

require the prosecution to contact the United States Attorney and seek use immunity for Dominguez, so he could testify in the present trial with no concern that his testimony would be used against him in a federal trial. Dominguez indicated he might be willing to answer questions if a federal judge granted use immunity. The court recessed the trial to give the prosecutor an opportunity to contact the U.S. Attorney. (RT 90:9542-9545.)

After the recess, the prosecutor reported that he had talked to the U.S. Attorney and had been informed that the immunity process would require an application to officials in Washington, D.C., and the process was quite involved. Furthermore, the prosecutor had been told that it was not the policy of the federal government to grant immunity to federal defendants in order to enable their testimony in a state proceeding. Counsel for Steven Homick then moved for dismissal and argued that his client was being deprived of Due Process of law because the federal government had chosen: 1) to participate in a joint investigation; 2) to give Dominguez immunity from federal prosecution for serious crimes: 3) to turn around and prosecute Dominguez when he refused to testify in federal trials that had not been mentioned during Dominguez' plea agreement; and 4) to then refuse to grant any kind of use immunity to allow Dominguez to testify in the present trial. Counsel argued this constituted a callous manipulation of the system to preclude effective defense cross-examination of Dominguez. The motion to dismiss was summarily denied. (RT 90:9545-9551.)

The attorney who had been appointed to represent Michael Dominguez in connection with his testimony and his motion to withdraw his plea arrived and talked to his client. He informed the court he had advised Dominguez that he had no grounds for refusing to testify. Nonetheless,

Dominguez remained unwilling to answer questions. (RT 90:9565-9566.) Cross-examination of Dominguez by counsel for Steven Homick resumed anyway, with Dominguez continuing to remain silent in response to each question. Portions of a wide variety of prior statements and testimony were read after some of the unanswered questions. (RT 90:9572-9583.)

Before long, the prosecutor complained again that counsel was not reading far enough when he impeached with prior testimony, and that the next few lines after a particular portion contradicted what had been said in the first portion. Counsel again argued that should be left for the prosecutor to use on redirect. However, in contrast to the hands-off attitude of the court during the prosecutor's direct examination, this time the court directed counsel to read the additional portion. The end result was that the defense was required to read what it wanted, plus any question and answer that seemed to contradict that, followed by another question and answer that contradicted the answer just given. (RT 90:9584-9586.) Thus, while the prosecutor had been permitted to present exactly what he had wanted to present through selected portions of Dominguez' prior statements, counsel for Steven Homick was forced to present prior testimony that could only be perceived by the jury as contradictory and confusing.

Cross-examination again went forward with unanswered questions and impeachment by prior statements and testimony. (RT 90:9587-9614.) Eventually, however, the prosecutor broke in and complained that he was not aware of any way that defense counsel would be able to prove facts that had been implied in the last series of unanswered questions. Defense counsel made an offer of proof which the court believed sounded like a fishing expedition. The prosecutor moved to strike the **questions** that had been

asked and left unanswered. Defense counsel offered to strike Dominguez' "testimony" and move for a mistrial, since he was unable to cross-examine the witness. However, the court saw the situation as being no different than it would be if the witness were answering questions. She saw no need to strike anything, since the jury would be instructed at the end of the trial that questions did not constitute evidence. Counsel for Neil Woodman expressed concern about that since the manner in which Dominguez was being cross-examined meant that the questions contained the only meaningful information the jury was receiving. The court acknowledged that problem and conceded she would have to craft some special instruction at the end of the proceedings.[163] (RT 90:9614-9618.)

For the brief remainder of the day, counsel for Steven Homick again resumed asking questions that went unanswered, following some of them with the reading of prior testimony or statements. (RT 90:9618-9632.) After the jury was excused for the day, the very highly experienced counsel for Neil Woodman, Gerald Chaleff, moved for a mistrial, stating, "Today is close to being the most arduous day I have seen in court." Counsel maintained that instructing the jury that "no response" is like saying "No," does not allow for effective cross-examination. In response, the prosecutor

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163 Unfortunately, despite recognizing the problem, the court failed to follow through on her intention to craft a special instruction. The jury was instructed in the standard language of CALJIC 1.02 that "A question is not evidence and may be considered only as it enables you to understand the answer." (SCT 4:933; RT 126:15540, ll. 4-6.) Thus, it is **impossible to know what the jury did with all of the information received through the very numerous questions that went unanswered.**

argued that if the defense was concerned about the lack of cross-examination, the proper course was to move to strike all of Dominguez' "testimony," and ask the court to deem the witness unavailable. Counsel for Neil Woodman responded that it was no longer practical to do that, since the prosecution had already gone through its entire lengthy direct examination. (RT 90:9632-9633.)

In response the judge made clear she would deny either a motion for a mistrial or a motion to strike all of Dominguez' testimony. The judge explained, "I continue to believe that the right of cross-examination is not impaired." (RT 90:9634.) Indeed, the court maintained the defense had the advantage because they were not the party with a loose cannon on the stand.[164] The court maintained that the defense was able to bring in all the impeachment it wanted without having a witness who might respond in a prejudicial manner. (RT 90:9635.) On that note, another trial day ended.

The following day, Dominguez maintained his silence in response to the cross-examination efforts of counsel for Steven Homick. (RT 91:9657-9672.) Defense counsel reached a point where he wanted to establish Dominguez' refusal to testify at Stewart Woodman's trial, arguing it was relevant to show the witness' attitude and bias. The court took judicial notice of the fact that Dominguez was called as a witness in the trial of Stewart Woodman and Anthony Majoy, and he refused to testify over several days, resulting in him being held in contempt. (RT 91:9674-9675.)

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164 This position was indefensible, since jurors would certainly tend to identify Dominguez more with the defendants with the prosecutor, despite the fact that the prosecutor was the one who called him as a witness.

Counsel played a portion of the driving videotape and asked Dominguez what had occurred during a spot in the videotape where it was clear the tape had been turned off momentarily. Dominguez actually responded to the question, maintaining that the tape had been cut. However, Dominguez promptly returned to silent responses to further questions. (RT 91:9686-9690.) For the rest of the morning and beginning of the afternoon, counsel continued playing portions of the driving tape, interrupting regularly to ask questions about portions just played, only to receive no answer at all. (RT 91:9691-9702.)

Soon, Dominguez again answered limited questions pertaining to portions of the driving videotape that had been cut (RT 91:9706-9708), but then quickly returned to silence for another extended period. (RT 91:9709-9739.) Finally, the prosecutor made his familiar objection that when counsel read prior testimony, he was not reading enough of it. The judge agreed that counsel had done nothing misleading. However, she also warned counsel that he was putting the jury to sleep with all the testimony he had been reading back.[165] (RT 91:9739-9742.)

Counsel continued briefly in the same manner, and then the jury was excused for the Thanksgiving weekend. (RT 91:9743-9748.) The court and counsel remained to discuss yet another taped statement that the prosecutor

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165 Of course, boring the jury was impossible to avoid after 10 days of Dominguez' uncooperative stance on the witness stand. This is yet another reason the **prosecutor had an unfair advantage**. Having gone first, he was able to present the information he wanted to the jury before their minds were deadened by endless days of hopeless attempts by various attorneys to extract useful information from the witness.

wanted to play on redirect examination. The prosecutor argued the added tape constituted a prior consistent statement that would rebut any claim of recent fabrication. Counsel for Neil Woodman argued the new tape covered areas that had not yet been covered by anybody. The court overruled any objections, pending an opportunity for her to review the prior transcript. (RT 91:9749-9754.)

After the four day holiday weekend, a more extended discussion occurred regarding the tape that the prosecutor wanted to play as a prior consistent statement. The major portion in dispute pertained to Dominguez' statement that it had taken the victims 12 minutes to die, a matter not covered by any of the previous evidence. The court concluded this was close enough to what had already been proved, and in any event, the judge believed the prosecutor could easily lay a foundation to support admission of this portion. (RT 92:9756-9758.)

Counsel for Robert Homick wanted the jury to hear a portion the prosecutor intended to skip, pertaining to Dominguez' statement that he had read about the Woodman case in the newspapers. Counsel for Steven Homick then stated that he wanted the entire tape out of evidence, but if it was coming in over his objection, then he wanted a portion included which counsel for Neil Woodman did not want included. That portion pertained to a statement by Dominguez that he had made a call without knowing who he was calling, but he found out later it was the Woodman brothers. The court saw that as clear hearsay and ruled it inadmissible. (RT 92:9759-9760.)

In passing, the judge also commented that her reading of Evidence Code section 791 was that there was no longer any need to show recent

fabrication. Instead, once a prior inconsistent statement had been admitted, any earlier consistent statement became admissible. (RT 92:9761.)

Cross-examination by counsel for Steven Homick resumed once more, with Dominguez maintaining silence in response to questions. (RT 92:9763-9766.) However, when counsel started questioning Dominguez about some prior crimes he had committed in Nevada, Dominguez did give responsive answers to counsel's questions. (RT 92:9767-9784.)

During that period of questions with answers, counsel asked Dominguez about a gun found in his female companion's purse when she and Dominguez were stopped together by Nevada police. The gun was a .38 caliber, the same as the gun believed used in the Woodman murders. (RT 92:9779-9781.) Counsel asked Dominguez, "And that was your gun, wasn't it?" Dominguez responded, "I had received it from the defendant, yes." (RT 92:9781.)

Soon afterward, outside the presence of the jury, counsel for Steven Homick moved to have the statement about getting the gun from the defendant stricken. However, he wanted that done outside the presence of the jury. He argued the statement was not responsive to the question. He conceded Dominguez had not specified which defendant he meant, but counsel feared that any effort to discuss that in front of the witness would only lead him to say something even more prejudicial. The prosecutor argued that the objection was too late. He also claimed he had seen Dominguez gesture toward Steven Homick while making the statement, and the prosecutor wanted to follow up on that on redirect examination. The prosecutor argued that was fair because he believed that counsel for Steven

Homick had been implying that the gun in question was the same gun that was used to kill the Woodmans. (RT 92:9785-9787.)

The judge saw no problem with the prosecutor questioning Dominguez about where he got the gun, but she agreed to review the transcript and make a determination whether the statement was not responsive to the question. The judge added that even if the answer was non-responsive, that could become moot since the prosecutor could still ask Dominguez where he obtained the gun. Counsel for Steven Homick objected to any such question because the defense had been given no materials in discovery that indicated Dominguez had ever claimed the gun was obtained from Steven Homick. Counsel also based his objection on Evidence Code section 352, arguing it was improper to allow the prosecutor to take advantage of a prosecution witness who was prone to blurting out prejudicial information. The judge disagreed, seeing this simply as something more for the defense to impeach. Counsel then questioned the relevance of this area and the judge responded that if the gun was used in the murder, it was certainly relevant. Counsel pointed out that Dominguez had testified the gun was not used in the murder. The judge then reviewed the transcript and concluded that Dominguez' answer had been responsive, so the motion to strike was denied.[166] (RT 92:9787-9792.)

At this point, the prosecutor began his redirect examination of Dominguez. Dominguez answered some of the questions, but more often he

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166 The judge did not explain her conclusion that the answer was responsive. Since the question was "And that was your gun, wasn't it?" (RT 92:9781), it would appear that a responsive answer would have been a simple "yes" or "no."

responded by saying, "No comment," and sometimes he simply remained mute. The prosecutor returned to his former procedure of reading from prior transcripts when the witness failed to answer questions. (RT 92:9797-9807.) This continued briefly, and then the prosecutor played the additional tape recording of a March 26, 1986 interview of Dominguez. (RT 92:9807-9808.) The prosecutor concluded his redirect examination, and that was followed by very brief re-cross examination by counsel for Steven Homick (RT 92:9811-9814), and very brief further redirect examination by the prosecutor, dealing only with the subject of the knife which Dominguez claimed had been held to his throat by an officer during the taped statement of March 26, 1986 interview. (RT 92:9814-9815.)

Two days after the conclusion of Dominguez' "testimony," counsel for Steven Homick moved to strike the entire testimony of Michael Dominguez. Counsel noted that Dominguez had answered most of the questions asked by counsel for Robert Homick, but there were no answers at all to most of the questions asked on behalf of Steven Homick. Only a few questions about Dominguez' prior crimes were answered. As a result, Steven Homick was denied his confrontation rights. (RT 94:10163-10164.)

In response, the Court conceded the testimony of Dominguez had been unique. However, the Court also believed there had been a wealth of material that did get before the jury, to impeach Dominguez. The judge believed that Dominguez' credibility was, in fact, substantially impeached. The jury had received much information about his biases, his motives, and his credibility in general. The motion to strike was denied. (RT 94:10164-10165.)

C. Introduction to Legal Arguments

As shown above, the efforts to extract testimony from Michael Dominguez were exceptionally arduous and probably unprecedented. It seems clear the trial court started out in a sincere effort to make the best of a difficult situation. However, as the questioning of Dominguez progressed and his manner of responding changed, the difficult situation became increasingly more difficult. It is apparent that the trial court soon realized it was sinking deeper and deeper into an uncertain course. It is also apparent that the trial court eventually concluded it had gone so far down one path that it was better to continue along that path rather than attempt to turn back. It is the contention of Steven Homick that the trial court made the wrong decision in determining to stick to the path that had been chosen and in failing to recognize that the only proper course was to strike Dominguez' testimony. As a result of that decision Steven Homick was deprived of his federal Fifth, Sixth, Eighth, and Fourteenth amendment rights to due process of law, to a fair jury trial, to confrontation of the witnesses against him, to effective cross-examination, and to reliable fact-finding supporting a capital verdict and sentence.

The input of Michael Dominguez was absolutely crucial to the prosecution case. He was the only testifying witness who claimed to have been directly involved in the events at and near the scene of the murders. His original statements, if true, went far beyond anything Stewart Woodman was able to relate, in specifying who did what in the planning and execution of the Woodman murders. The trial court expressly recognized that the prosecution had to call Dominguez: "The reality is he's an important witness

in the case. They had to put him on." (RT 88:9256.) The prosecution also obviously recognized its great need for Dominguez, as demonstrated by the very lenient plea bargain given to a man who admitted his involvement in these murders, who had a long record of violent crimes, and who was allowed to assure concurrent sentencing on other pending serious charges, including other homicides, in at least three other states.

Dominguez was also crucially important in regard to the penalty determination for Steven Homick. It was Dominguez who portrayed Steven Homick as the leader of the conspirators and the actual shooter of the Woodmans. There was no physical evidence whatsoever to corroborate the claim that Steven Homick was the actual shooter, and there was substantial evidence to support a conclusion that it was Dominguez, rather than Steven Homick, who was the actual shooter - a fact which, even if true, Dominguez could never admit without losing all the benefits of his plea agreement. Certainly if the jury concluded Steven Homick, rather than Dominguez, was the actual shooter, the likelihood of a death verdict would be substantially increased. On the other hand, if the jury concluded Dominguez was the actual shooter, their awareness of his lenient sentence would have substantially decreased the likelihood that the jury would agree to a death verdict for Steven Homick.

Reliance on a witness such as Dominguez, in light of the highly unusual manner in which his testimony was presented, should never be permitted, especially in a capital case. Here, in addition to all the problems that arose in the misguided the effort to extract testimony from Dominguez, there were other substantial reasons to distrust him as a witness. The same trial court that recognized the importance of Dominguez' testimony also

recognized that his credibility had been drawn into very serious question in a wide variety of ways. (RT 94:10164-10165.) Indeed, the jury knew he had multiple prior felony convictions, a widespread reputation for being untrustworthy and willing to do whatever was necessary to benefit himself, and that he had only cooperated with the authorities when given a highly beneficial plea bargain that also left him unable to admit he was the actual shooter even if that was the truth.

If we could conclude that the jury recognized Dominguez' deficiencies as a witness and clearly disregarded Dominguez' original version of what occurred, then perhaps the error in failing to strike his testimony (and the "impeaching" prior statements) could be overlooked as harmless. Unfortunately, that conclusion is not a reasonable one. Something caused the jury to convict Steven Homick of first degree murder and to reach a death verdict even though the jury knew Dominguez would soon be eligible for parole, that Stewart Woodman had avoided the death penalty, that Neil Woodman had not yet even been convicted, and that Robert Homick had not been included in the penalty trial. Moreover, the jury clearly had doubts about Stewart Woodman's testimony, as shown by their inability to reach a unanimous verdict as to Neil Woodman. Thus, it seems unavoidable to conclude that the jury must have accepted at least some portion of Dominguez' prior statements.

Not only was it error not to strike Michael Dominguez' prior statements and testimony, but the manner in which the prior statements and testimony were presented to the jury made it impossible for the jury to perform its fact-finding duties in any rational manner. While the jury may have known there was considerable reason to distrust Dominguez, they could

not make a reasonable determination **when** to distrust him. On the stand, they saw a man they must have despised, but the information he directly conveyed while on the stand was not very helpful to the prosecution or to any of the defendants. They knew of many statements he had made during prior police interviews and in prior testimony. The prior police interviews were statements that were received without any contemporaneous cross-examination, but many of those statements were presented on videotapes and repeated in the reassuring voice of the prosecutor and hence were likely to have carried the greatest influence.

Indeed, the videotapes were especially prejudicial, since they seemed to convey the only meaningful opportunity for the jurors to observe Dominguez' own demeanor while giving responsive answers to question after question. However, this was completely unfair as it amounted to direct examination with **no cross-examination** on behalf of Steven Homick.

In regard to the former testimony that was read to the jury under the guise of prior inconsistent statements, it was not admissible here as former testimony because no finding of unavailability was ever made. It will also be shown in the argument following this one that no such finding could have been made. But even if that aspect of these arguments could be rejected, the fact remains that the jury heard Dominguez' former testimony in a very different manner from the way former testimony is normally presented. Instead of hearing a coherent direct examination followed by a coherent cross-examination, the jury heard selected bits and pieces, often taken out of context and punctuated with other prior statements from police interrogations or other proceedings. The end result of day after day of such confusing evidence, frequently interrupted by the need for discussion

between court and counsel over how to manage the various turns and twists in Dominguez' behavior, could have only been confusion. The jury could not realistically make reasoned choices over what facts to accept and what facts to distrust.[167] Instead, the jury inevitably must have relied on impressions. Thus, the only thing the jury could grab onto was that fact that the prosecutor was utterly convinced that Dominguez' initial version of the events was the correct one. Forcing a jury to latch onto such a conclusion as the only practical alternative to giving up in frustrated confusion does not constitute a fair trial in accordance with due process of law.

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167 Indeed, as noted earlier, one juror sent the court a note stating, "I do not understand how I should view this information." (RT 87:9235.) The judge determined she would respond to the note by reading CALJIC 2.13. (RT 87:9235.) Unfortunately, that instruction pertained only to a witness who testified to a lack of recollection, leaving the jury to determine whether they believed or disbelieved the claimed inability to recall. Since that is not what occurred here, that instruction would not have helped the confused jurors determine how to evaluate the information they received in regard to Dominguez.

1. The Trial Court Committed State Law Error and State and Federal Constitutional Error By Permitting Dominguez' Refusals to Answer Questions to Serve as a Basis for the Prosecution's Introduction of Prior "Inconsistent" Statements and Then Refusing to Strike Dominguez' Testimony When His Refusal to Answer Questions Continued Through Appellant's Attempts to Cross-Examine Him

a. The Court Erred in Permitting Direct Examination to Continue After Dominguez Began Refusing to Answer Questions

The only basis relied on by the trial court for the admission of prior statements made by Michael Dominguez was the prior inconsistent statement exception to the hearsay rule. Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."[168] Thus, to be admissible,

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168 Section 770, referred to in section 1235, provides:

"Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

(Continued on next page.)

the prior statements must have been **inconsistent** with **testimony** given by the witness.

As set forth in the detailed factual summary above, midway through the prosecutor's direct examination Dominguez began refusing to respond to any questions. The court allowed the prosecutor to continue to ask question after question, and to read prior statements by Dominguez after the witness stood mute. These failures to answer were treated as if they were inconsistent with Dominguez' prior statements. (See, for example, RT 87:9137-9146.)

This position was squarely rejected by this Court's decision in *People* v. *Rojas* (1975) 15 Cal.3d 540. In *Rojas*, a witness testified against the defendant, under a grant of immunity, at a preliminary examination and at a trial that ended in a hung jury. At the retrial, the witness refused to testify, claiming he had been threatened. The prosecutor sought to have the witness declared unavailable, so the prior preliminary examination and first trial testimony could be read to the jury. The witness was held in contempt, but continued to refuse to testify.

Unlike *Rojas*, the present prosecutor never sought a finding of unavailability, and no such finding was ever made. But before turning to the unavailability issue in *Rojas*, this Court discussed a related point that is fully pertinent to the present case. One ground on which the trial court allowed the prior testimony was that the witness' refusal to testify constituted a denial of

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(Continued from last page.)

(b) The witness has not been excused from giving further testimony in the action."

his former testimony. Therefore, the trial court reasoned, the prior testimony was admissible under the prior inconsistent statement exception to the hearsay rule. (*Id.*, at p. 547-548.) This Court explained:

> "We think it is clear that the testimony was not admissible under section 1235. The statute provides: 'Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony *at the hearing* and is offered in compliance with Section 770.' (Italics added.) '"The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.' (§ 145.) Accordingly, whether Navarrette's refusal to testify at all is in effect a "statement" inconsistent with earlier statements is irrelevant in view of the fact that Navarrette did not testify at the hearing at which the question of admissibility of the testimony arose." (*People* v. *Rojas, supra,* 15 Cal.3d at 548.)

Similarly here, once Dominguez began refusing to answer questions, there was no further testimony at the present proceeding. Without testimony, no purportedly prior inconsistent statements could be offered under Evidence Code section 1235. Thus, the trial court erred in allowing the prosecutor to continue asking questions, and to read prior statements when the witness gave no answer. This resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fundamentally fair jury trial in accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witness, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Lankford v. Idaho* (1991) 500 U.S. 110; *Chambers v. Mississippi*

(1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S.14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

b. The Error in Permitting Direct Examination to Continue After Dominguez Began Refusing to Answer Questions Was Seriously Exacerbated by the Court's Arbitrary Use of the Complete Fiction That Every Failure to Answer was a Negative Answer that Would Allow the Prosecutor to Impeach with Prior Inconsistent Statements

As shown in the preceding subdivision, once Dominguez began refusing to answer questions, it was improper to allow Dominguez to continue testifying at all. In this subdivision, it will be shown that the Court's error was further exacerbated when the court went beyond the fiction of treating a refusal to answer as being inconsistent with prior testimony, and instead engaged in the entirely unprecedented fiction of treating every refusal to answer as if it was an answer of "No." Later in this argument, it will also be shown that even if the trial court's decision to go forward with

this clearly uncooperative witness could be upheld, then at the very least his testimony should have been stricken when he refused to submit himself to meaningful cross-examination by counsel for Steven Homick. Thus, had the trial court ruled properly, there would have been no "testimony" with which any proffered statements could have been inconsistent.

Having made the wrong decision in allowing the bizarre and improper direct examination of Michael Dominguez to continue even after he made it clear he would not answer further questions, the trial court sank deeper into the quicksand it had created. The court apparently recognized that nothing would be accomplished by allowing Dominguez to simply sit silently while the prosecutor asked questions that would have no meaning without an answer. However, instead of recognizing that problem as a sure sign that the court was embarking on the wrong course, the court instead began to make up new rules to accommodate the unprecedented examination. The court simply declared that Dominguez' failures to respond meant "No." The court further instructed counsel that if there were prior statements inconsistent with a "No" answer, those prior statements could be used to impeach the fictional "No."

The trial court's declaration had no support in logic or experience. A refusal to answer a question no more implies a "no" than a "yes." Further, an attorney who knows the witness being examined is going to stay silent in response to every question can easily manipulate the situation to produce any desired result. Any question that might be truthfully be answered with a "No" can be rephrased so a "No" answer has the opposite meaning. For example, if the prosecutor asked Dominguez "Did you remain in Las Vegas during all of September 1985," the prosecutor would expect a "No" answer.

If he received one, he would have no prior inconsistent statements to offer as actual evidence. But the question could be rephrased to ask "Did you leave Las Vegas during September 1985?" Then Dominguez' silent response would be construed as a "No" that would become inconsistent with his prior statements. By simply phrasing the question to assure the desired result, the prosecutor was free to offer **any prior statements Dominguez ever made** that might be helpful in the presentation of the case.

Thus, the fiction of treating a refusal to answer as a "No" was logically unfounded and, in reality, left the situation no different than it had been when Dominguez began refusing to answer questions. As shown in the preceding subdivision, this Court in *Rojas* squarely rejected the use of prior inconsistent statements in such circumstances.

The trial court's illogical solution also runs directly counter to *People* v. *Rios* (1985) 163 Cal.App.3d 652. In *Rios* an immunized accomplice testified against the defendant. The prosecutor needed to corroborate the accomplice testimony. To do so, he offered the prior statements that two other witnesses had made to the police. Both of those witnesses refused to answer any questions in court, even though they knew they had no privilege and that they faced contempt findings. (*Id.*, at p. 859-860.) The trial court ruled that the refusals to testify constituted either an evasion or an implied denial of their earlier statements, rendering those earlier statements admissible as prior inconsistent statements. (*Id*, at p. 860.) That was essentially the very same fiction employed by the present trial court.

The Court of Appeal soundly condemned this procedure and found a serious violation of the 6th amendment right to confrontation. In an extended discussion that applies directly to the present context, the court explained:

"Here the trial court admitted in evidence the out-of-court statements of Torres and Carrillo pursuant to Evidence Code section 1235. Under this exception to the hearsay rule, a court may allow earlier statements of a witness in evidence to prove the truth of their content where they are inconsistent with matters to which the witness testifies at trial. [Footnote omitted.] The inconsistency may either be express or implied, and will be deemed implied where the court finds a witness falsely claiming failure to remember facts in order to deliberately avoid testifying as to those facts. [Citations omitted.] However, because the Legislature retained the requirement the witness' testimony be inconsistent with a prior statement when it enacted Evidence Code section 1235, a prior statement is not admissible where the record shows no reasonable basis for concluding the witness' responses are evasive and untruthful. [Citations omitted.] While our Supreme Court has not elucidated what kind of record is necessary to support a finding of evasiveness [Citation omitted], the appellate courts have consistently applied the rule set forth in *People* v. *Sam* there is no 'testimony' from which an inconsistency with any earlier statement may be implied when the witness honestly has no recollection of the facts. We find the same result is required where a witness gives no testimony and refuses to answer all questions. (See *People* v. *Harris* (1969) 270 Cal.App.2d 863, 866-869.)

We conclude there is no relevant legal difference between the situation where the stonewalling witness refuses to answer any questions and the situation where the witness totally recalls no facts, for purposes of determining inconsistency under Evidence Code section 1235. In both situations there is simply no 'statement' in the record which is

inconsistent, or for that matter consistent, with prior statements; there is no 'express testimony' at all from which to infer or deduce implied inconsistency. (*People* v. *Shape* (1975) 49 Cal.App.3d 343, 354; *People* v. *Sam*, *supra*, at pp. 208-210; *People* v. *Harris*, *supra*, at pp. 866-869.)

Section 1235, by its express terms, requires a witness give testimony from which an inconsistency, express or implied, may be determined. Where, as here, the witnesses give no testimony, there is no evidence to support a finding of inconsistency. Section 1235 simply does not apply.

Assuming arguendo the statements are properly admissible under section 1235, **we find the admission of a prior statement made by a witness who stonewalls at trial and refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness.** [Footnote omitted.] [Citations omitted.]

As discussed above, *People* v. *Green*, supra, 3 Cal.3d 981 at page 989, following *California* v. *Green*, *supra*, teaches that prior statements may be admissible at trial and not violate confrontation rights if the declarant/witness is under oath to insure reliability, **is exposed to cross-examination**, and is before the trier of fact to weigh the declarant/witness' demeanor. **The principal consideration in this analysis is the extent to which the declarant/witness is available to testify and be subject to cross-examination.** (*United States* v. *Rogers* (8th Cir. 1976) 549 F.2d 490, 500.) [Footnote omitted.] The goal of cross-examination is to draw out 'discre[di]ting demeanor to be viewed by the factfinder.' (*Ohio*

v. *Roberts* (1980) 448 U.S. 56, 63, fn. 6 [65 L.Ed.2d 597, 606, 100 S.Ct. 2531].) However, the United States Supreme Court has never intimated cross-examination is the only means by which statements may be qualified for admission under the confrontation clause. Surrounding circumstances may give assurance of reliability to statements not subject at the time to cross-examination and provide the jury with factors for judging the credibility of the witness and the truthfulness of the testimony. (*United States* v. *West* (4th Cir. 1978) 574 F.2d 1131, 1137 [50 A.L.R. Fed. 833].)

Nevertheless, we do not find such circumstances here. While both Torres and Carrillo took the stand, **there was no opportunity to contemporaneously cross-examine when the prior statements were made or the ability to meaningfully cross-examine Torres and Carrillo at trial**. Observing the demeanor of a totally recalcitrant witness when questioned about matters he refuses to answer 'is as meaningless as attempting to gain information as to the truth of the unknown facts from his responses. Even *California* v. *Green's* holding rests on the assumption a meaningful trial confrontation will provide "most of the lost protections [of contemporaneous cross-examination such as oath, observance of demeanor and cross examination]." (Id, at p. 158. ...)' (*People* v. *Simmons* (1981) 123 Cal.App.3d 677, 681 [177 Cal.Rptr. 17].) There was no evidence presented from which the jury could evaluate the circumstances surrounding the making of the previous statements by Torres and Carrillo; no way to test the truth of the statement itself. 'Nor was the opportunity to cross-examine the law enforcement officers adequate to redress this denial of the essential right secured by the Confrontation Clause.' (*Douglas* v. *Alabama*, *supra*, 380 U.S. 415, 419-420 [13 L.Ed.2d 934,

> 938].) **On this record the jury had no basis for evaluating the truth of the prior statements.** (*California* v. *Green*, *supra*, 399 U.S. 149.) Torres' and Carrillo's statements are thus inadmissible because admissibility would deny Rios his constitutional right to confrontation and cross-examination. The court prejudicially erred in admitting the statements under Evidence Code section 1235. (*Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065].)" (*People* v. *Rios*, *supra*, 163 Cal.App.3d at 863-866, emphasis added.)

Rios was distinguished in *In re Deon D.* (1989) 208 Cal.App.3d 953. In that case, the witness was called by the prosecutor, selectively answered some questions, and then refused to answer others. The trial court admitted prior statements the witness had made to police, finding those statements inconsistent with the witness' current posture of refusing to be a snitch. (*Id.*, at 959.) In finding that the defense was not denied a meaningful opportunity to cross-examine the witness, the court noted that defense counsel had made no attempt to question the witness about his statement.[169] "One who does not attempt to exercise his right of confrontation cannot successfully claim a deprivation of that right." (*Id.*, at 964.)

The *Deon D.* Court added, "Whether appellant would have been deprived of his right of confrontation had he attempted to question Tyrone and had the latter refused to answer his questions is an issue we need not, and do not, decide." (*Id.*, at 964.) In the present case, counsel for Steven Homick did attempt at length to cross-examine Dominguez, and Dominguez

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169 The witness had selectively answered some questions asked by the prosecutor and refused to answer others, but the defense attorney had not even tried to ask any questions.

did refuse to answer almost every question. Thus, the present case is controlled by *Rios*, and not by *Deon D.*

A further problem was expressly noted by the defense. Even if it could ever be somehow proper to construe silence as a negative answer to any question, no matter how the attorney asking the question chose to phrase it, then it was still a factual issue as to whether such a meaning should be given to any particular non-response. Counsel correctly argued that the court had usurped the jury's fact-finding responsibility on this matter. (RT 87:9237-9238.)

By engaging in this unfounded fiction, the court created testimony out of thin air. There was no way to confront and cross-examine testimony that never really occurred. There was no way for jurors to make sense out of what was happening before them, as amply demonstrated by the question from a juror who candidly acknowledged she did not understand how to treat the information being received. (RT 87:9235.) This fiction, both in and of itself and in combination with the many other errors identified in this argument, resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fundamentally fair jury trial in accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witness, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Lankford v. Idaho* (1991) 500 U.S. 110; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S.14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575

(conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

c. Even If It Was Proper to Allow the Dominguez Testimony Up to the Point of the Attempted Cross-Examination on Behalf of Steven Homick, Once Dominguez Stopped Answering Questions Altogether All of His Testimony Should Have Been Stricken

As explained in the preceding section of this argument, after a witness has testified on direct examination and then refuses to answer all questions on cross-examination, the proper course is to strike all of the previous answers. During the cross-examination by counsel for Robert Homick, Dominguez did answer some questions, albeit in a totally non-responsive fashion. But even if those partial answers mean that application of this principle can somehow be avoided in regard to Robert Homick's cross-examination, the same cannot be said for the cross-examination on behalf of Steven Homick. By that point Dominguez was refusing to answer every question. Thus, Steven Homick had no meaningful cross-examination of this crucial prosecution witness.

Counsel for Steven Homick was not even permitted to use the same tactic that counsel for Robert Homick had used. Soon after counsel attempted to use leading questions in the same manner as counsel for Robert Homick, he was stopped by the objections of the prosecutor and the rulings of the court. (RT 90:9510-9513, 9522-9524.) Steven Homick does not

contend on appeal that the court erred in insisting that leading questions on cross-examination of Dominguez should be limited to matters that counsel was prepared to prove. Nonetheless, the point is that once again Steven Homick was prejudiced by the unfair advantage given to Robert Homick and to the prosecutor.

Thus, the only proper course was to strike all of Dominguez' testimony. (*People* v. *Rios*, *supra*, 163 Cal.App.3d at 863-866; *Gallaher* v. *Superior Court* (1980) 103 Cal.App.3d 666, 673.) Defense counsel brought that to the court's attention, but the court steadfastly refused to take such action, coming instead to the astonishing conclusion that there had been no impairment of the right to cross-examine Dominguez. (RT 90:9634.)

It is not hard to understand the court's reluctance to strike all of Dominguez' testimony. By this point, the jury had spent so much time listening to improper "testimony" and improper impeachment that it was not possible to simply instruct them to disregard everything they had heard over the preceding 10 days. Instead, the only realistic course at that point would have been to grant the motion for mistrial that counsel for Steven Homick made, based on the deprivation of any meaningful cross-examination. (RT 90:9537-9541.)

Counsel for Steven Homick also put forth a meritorious argument in his subsequent motion for dismissal, when he explained that Steven Homick had been denied due process of law by the combination of a joint state and federal investigation, state and federal immunity and leniency extended to Dominguez in order to obtain his statements, prosecution of Dominguez when he subsequently refused to testify in federal trials after the prosecution failed to uphold its end of the plea bargain agreements, and the adamant

refusal of the federal government to grant immunity from federal contempt charges so that Dominguez would be available to testify at the present trial. (RT 90:9545-9551.) Even if dismissal was too strong a remedy for this situation, these factors at least strengthened the need for a mistrial after the court's determination to proceed led to the very black hole that had been predicted by defense counsel.

The trial court was also seriously mistaken in the conclusion that the Dominguez debacle worked to the advantage of the defense. The court's reason was that it was not the defense that had a loose cannon on the stand, and that the defense was able to present all impeachment without having a witness who might respond in a prejudicial manner. (RT 90:9635.) Perhaps once he became silent, the defense could assume he would not respond in a prejudicial manner, but the court conveniently overlooked the fact that Dominguez had already made some 95 mentions of his alleged polygraph examination.

Furthermore, any impeachment came in a disjointed and confusing manner, leaving the jury with no reasonable basis to rationally determine which parts of Dominguez' prior statements should or should not be believed. Also, the fact that Dominguez was called by the prosecution certainly did not mean that the jury would blame the prosecution for his misbehavior. Instead, as regularly noted by the defense attorneys, the jury was much more likely to hold it against the defense because the prosecution theory was that Dominguez was engaged in a deadly conspiracy with each of the defendants. Without doubt, the jury was much more likely to identify Dominguez with the other defendants, rather than with the prosecution.

In sum, these comments by the trial court can only be seen as a desperate attempt to make a record in favor of upholding the fairness of a procedure that the judge herself recognized was unprecedented and out of control. However, as was said by a federal district court in a very different context, "death penalty cases are inappropriate vehicles for experimentation with new procedures, ..." (*State* v. *Lambright* (Ariz. 1983) 673 P.2d 1, 8.)

d. Even if There Was Any Proper Basis to Attempt the Dominguez Testimony in the Manner in Which It Proceeded, the Subsequent Motion to Strike His Testimony Should Have Been Granted

Two days after the completion of Dominguez' testimony, counsel for Steven Homick again moved to strike all of Dominguez' testimony. Counsel argued that Dominguez had answered most questions asked on behalf of Robert Homick, but had answered almost no questions asked on behalf of Steven Homick, resulting in a deprivation of Steven Homick's confrontation rights. (RT 94:10163-10164.)

Even if there was any basis for denying earlier requests for relief on the ground that the judge wanted to wait to see how Dominguez reacted to further attempts to cross-examine him, that could no longer be a concern once Dominguez had finished testifying. By that point it was clear that Steven Homick had been denied any meaningful cross-examination, and that nothing would change that fact.

The court's response was again inadequate to address the massive problem that had been created by allowing the Dominguez testimony to go forward. The court simply saw no problem because Dominguez' credibility had been substantially impeached. (RT 94:10164-10165.) With this simplistic response, the court failed to give any meaningful consideration to the important federal constitutional rights that are supposed to be granted automatically to every criminal defendant. Here, Steven Homick was not just any criminal defendant; he was faced with, and eventually did receive, a sentence of death.

Suppose a prosecutor simply read into the record a detailed statement that a witness had made without being under oath and without any cross-examination. Suppose the evidence also showed that the witness who made that statement was a lying, dishonest, and disreputable person. Would that be enough to overcome the constitutional violations involved in reading blatant hearsay? Of course not. Effectively, that is precisely what happened in the present case, except that here the prior statements of Dominguez were presented in bits and pieces, in an even more chaotic and confusing manner.

The proper remedy, as shown in preceding sections of this argument, was to recognize that Steven Homick had been denied any meaningful cross-examination, and to strike all of Michael Dominguez' testimony:

> "We observe further that when, due to any reason for which he is not accountable, one criminally accused is denied his right of cross-examination, "'he is entitled to have the direct testimony stricken from the record." (*People* v. *Manchetti* (1946) 29 Cal.2d 452, 461; see also *People* v. *Barthel* (1962) 231 Cal.App.2d 827, 834; *People* v. *Abner* (1962) 209 Cal.App.2d 484, 489-490; *Witkin*, Cal. Evidence (2d ed.

> 1966) Introduction of Evidence at Trial, § 1199, pp. 1107-1108.)" (*Gallaher* v. *Superior Court, supra,* 103 Cal.App.3d 666, 673.)

"And where a party cannot cross-examine a witness because of the witness' refusal to answer the trial court may strike out the direct examination. (*People* v. *McGowan* (1926) 80 Cal.App. 293; and see *Witkin*, Cal. Evidence, § 624, p. 672.) The trial judge has some discretion in determining how much of the direct testimony should be stricken. (*People* v. *Robinson* (1961) 196 Cal.App.2d 384, 391" (*People* v. *Abner*, 209 Cal.App.2d 484, 489-490.)

Robinson, cited in *Abner*, quoted from Wigmore's expression of the general rule on the subject:

> "'(2) Where the witness, after his examination in chief on the stand, has refused to submit to cross-examination, the opportunity of thus probing and testing his statements has substantially failed, and his direct testimony should be struck out. On the circumstances of the case, the refusal or evasion of answers to one or more questions only need not lead to this result. [Emphasis added.] ...
>
> Courts treat this situation with varying degrees of strictness. It should be left to the determination of the trial judge, regard being had chiefly to the motive of the witness and the materiality of the answer.' (5 Wigmore, Evidence [3d ed.] p. 112.)" (*People* v. *Robinson, supra,* 196 Cal.App.2d at 390.)

The *Robinson* Court went on to conclude that in the case before it, the witness in question had been fully cross-examined and had merely refused to answer one question regarding the name of another person allegedly involved in a criminal enterprise. *Robinson* concluded that in such

circumstances it was sufficient to strike out only a portion of the testimony directly related to the question that was not answered. However, it was not necessary there to strike the entire testimony of the witness. (*People* v. *Robinson, supra,* 196 Cal.App.2d at 390-391.)

In the present case, in contrast, by the time it was Steven Homick's turn for cross-examination, Dominguez gave answers to a very few peripheral questions, and refused to give any answer at all to the vast majority of questions. Here, cross-examination was thwarted in any meaningful fashion. Under these extreme circumstances, the only proper course was to strike all of Dominguez' direct examination. The trial court's failure to do so resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witness, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Lankford v. Idaho* (1991) 500 U.S. 110; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S.14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

2. The Erroneous Admission of Prior Statements Fictitiously Deemed Inconsistent With Meaningless Refusals to Respond Was Seriously Exacerbated by Additional Errors Exposing the Jury to Repeated Improper References to a Polygraph Exam and Overemphasizing Dominguez' Statements Through Repetition

a. The Error in Permitting Direct Examination to Continue After Dominguez Began Refusing to Answer Questions Was Further Exacerbated by Dominguez' Repeated References to a Polygraph Examination, Which the Judge Herself Had Admitted She Knew Would Occur

As shown above, after Dominguez had consulted with his counsel and his counsel reported to the court that Dominguez would not testify further despite the threat of contempt citations, the proper course was to grant a mistrial or to at least preclude further testimony by Dominguez and strike the testimony that had been given without cross-examination. Instead, the trial court insisted on descending further into the black hole it had entered. The judge listened to Dominguez make repeated references to a polygraph examination in a proceeding outside the presence of the jury. (RT 87:9096-9100.) Nonetheless, the court remained determined to press forward with direct examination of Dominguez in front of the jury. Counsel for Neil Woodman expressly warned, "he's going to keep throwing in this polygraph if he can." The judge replied, "I know he is." (RT 87:9123, ll. 22-24.) The judge promised to try to cut Dominguez off if he started discussing

polygraph examinations, but she candidly admitted she did not expect to be able to control him. (RT 87:6124-9126.)

In front of the jury, Dominguez initially refused to give any responses to the prosecutor's questions. Before long, however, he did exactly what the defense had warned he would do, and what the judge had admitted she expected. Dominguez began answering question after question with references to a polygraph examination. (RT 87:9146.) The same attorney who had warned the judge this would happen promptly moved for a mistrial, warning further, "I think we're wandering into a black hole we'll never get out of." (RT 87:9147.) Counsel for Steven Homick joined in that request for a mistrial. Apparently convinced that a black hole was somehow better than a mistrial, the court claimed the polygraph references did not constitute a problem because Dominguez would eventually get tired of them. She simultaneously conceded she did not know how she could improve the situation with an admonition. (RT 87:9148.)

The judge was wrong again; Dominguez did not tire of referring to the polygraph examination. The judge conceded "this doesn't seem to be very workable..." (RT 87:9154.) Nonetheless, she acquiesced to the prosecutor's dogged desire to continue. Defense counsel complained correctly that the matter was "spiraling ... out of control..." (RT 87:9155) and that anything factual was being "lost in the cacophony of irrelevancies ..." (RT 87:9156.) At one point after the trip down the black hole had continued, the court conceded she had counted at least **95 separate occasions** in which Dominguez had referred to a polygraph examination. (RT 88:9260.)

Thus, the court had ample warning that Dominguez would infect the proceedings with improper references to a polygraph examination. The court admitted before it happened that she knew it was coming, yet she chose to proceed. The court admitted beforehand that she knew she would be unable to control Dominguez, and she was quite correct on that point. As a result of the court's unwarranted and unreasonable determination to go forward in the face of certain chaos, the jury was literally flooded with highly prejudicial and irrelevant responses from Dominguez.

The legislature has determined that polygraph examinations are so unreliable that Evidence Code section 351.1 was added to the Evidence Code. subd. (a) provides:

> "(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

In upholding the validity of this preclusion of polygraph evidence, one California court has noted: "it appears to be the majority view that either polygraphs are inherently unreliable or the little probative value garnered from the tests is outweighed by the **prejudice and confusion** entailed in their introduction. (See *State* v. *Dean* (1981) 103 Wis.2d 228.)" (*In re Aontae* D. (1994) 25 Cal.App.4th 167, 175, fn. 7; emphasis added.)

This Court summarized its view on the reliability of polygraph examinations in *People* v. *Espinoza* (1992) 3 Cal.4th 806, 817:

> "In precluding the use of polygraph results in criminal proceedings, unless stipulated to, Evidence Code section 351.1 codifies a rule that this court adopted more than 30 years ago in *People* v. *Jones* (1959) 52 Cal.2d 636, 653, in which we said that polygraph test results 'do not scientifically prove the truth or falsity of the answers given during such tests.' Subsequent to *Jones*, in *People* v. *Thornton* (1974) 11 Cal.3d 738, 764, we upheld the exclusion of evidence of a suspect's willingness to submit to a polygraph examination, rejecting the defense argument likening such willingness to a '"badge of innocence."' As we explained: '[B]ecause lie detector tests themselves are not considered reliable enough to have probative value, "a suspect's willingness or unwillingness to take such a test is likewise without enough probative value to justify its admission. The suspect may refuse to take the test, not because he fears that it will reveal consciousness of guilt, but because it may record as a lie what is in fact the truth. A guilty suspect, on the other hand, may be willing to hazard the test in the hope that it will erroneously record innocence, knowing that even if it does not the results cannot be used as evidence against him."' (Ibid.)"

The United States Supreme Court has also recognized the continuing controversy over the reliability of polygraph exams: "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. (Citations.)" (*United States* v. *Scheffer* (1998) 523 U.S. 303, 118 S.Ct. 1261.)

Another court, discussing the Legislature's concerns when enacting section 351.1, explained:

> "Staff comments on the bill prepared by the Assembly Committee on Criminal Law and Public Safety noted that a number of variables contributed to reliability problems with the polygraph, including the lack of standardization in the administration of the tests, the lack of standards for licensing examiners and the lack of a means of testing for accuracy, other than confessions, which may themselves be unreliable." (*People* v. *Kegler* (1987) 197 Cal.App.3rd 72, 89.)

In sum, polygraph examinations are uniformly recognized by the courts to be unreliable. Even simple references to willingness to take a polygraph exam have been recognized as highly prejudicial. Here, an admonition was eventually given (RT 87:9183-9184), but earlier **the judge herself had expressed doubt that any admonition could be very helpful in the unusual circumstances** of Dominguez' testimony. (RT 87:9148.)

Furthermore, since the judge knew this was coming and proceeded anyway, over express defense objection, any doubts about prejudice should be resolved in favor of the defense. The scores of polygraph references were inherently prejudicial and served to further enhance the overall impact of the prejudicial irrelevancies and circus-like chaos that resulted from the improper manner in which the prosecution was permitted to present the Dominguez evidence. It must have been clear to the jury that the prosecutor believed Dominguez, so the jury could only assume that the polygraph supported the truth of Dominguez' original statements, incriminating Steven Homick.

This constituted yet another violation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confrontation of the witnesses against him, to effective cross-examination, and to reliable fact-finding underlying capital guilt and penalty verdicts. (*Lankford v. Idaho* (1991) 500 U.S. 110; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S.14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

b. After the Prosecutor Had Read Extensive Portions of Dominguez' Prior Videotaped Statements to Police Officers, It Was Improper to Also Allow the Prosecutor to Play the Entire Videotape

As set forth in the factual summary earlier in this argument, the prosecutor read many portions of the transcript of Dominguez' March 13, 1986 interview with the police. Then, when the prosecutor completed his direct examination of Dominguez, he was permitted to play the entire videotape of that same interview. The interview had lasted 1 hour and thirty-five minutes. (RT 119:14595-14596.)

In *People* v. *Stevenson* (1978) 79 Cal.App.3d 976, 990, the court considered the propriety of passing out to the jurors a transcript of preliminary examination testimony so the jurors could follow along while the former testimony was read. Copies were collected immediately after the reading of the testimony, so they were not available to the jurors during deliberations. The court concluded this was improper as it unduly emphasized the testimony of the deceased witnesses. The court noted a similar rule applied in regard to past recollection recorded evidence; such a writing could be read into evidence but could not be received in evidence unless offered by the adverse party. The reason for that rule was also to avoid undue emphasis.

Pursuant to Evidence Code section 250,[170] the videotape of the interview constituted a writing, so the rationale of *Stevenson* applies fully. Indeed, here, the undue emphasis was much worse than in *Stevenson*. Having heard the prosecutor read extensively from the transcript of the police interview, the jurors then heard all the same evidence over again in a videotaped presentation. This is comparable to reading it twice, which certainly results in more emphasis that reading it once while the jury follows in a written transcript.

Inexplicably, the defense failed to object to the playing of the videotape on this particular ground. Even if that is deemed to be a waiver of

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170 "'Writing' means handwriting, typewriting, printing, photostating, photographing, and **every other means of recording** upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof." (Emphasis added.)

this specific aspect of the overall problem, the fact remains that the rationale of Stevenson demonstrates the great prejudice that resulted from this repetition of the evidence that never should have been allowed in the first place. Furthermore, as noted in an earlier subdivision of this argument, the videotape gave the jury its only apparent opportunity to assess the demeanor of Dominguez while he was giving meaningful responses to questions, but that was grossly unfair because it amounted to direct examination without the benefit of cross-examination. Thus, the erroneous admission of purported prior inconsistent statements, and/or the erroneous refusal to strike Dominguez' testimony, was rendered even more prejudicial by the repetition through videotapes.

The error was compounded further during the prosecutor's argument to the jury, at the end of the guilt trial. The prosecutor apparently believed this tape was so important to his case that he **again** played the **entire** hour-and-a-half long videotape for the jury during the argument. (RT 127:15840, 15847, 15849.) Thus, the jury first heard the prosecutor read back extensive portions of the lengthy interview, then heard it again while watching a lengthy videotape during trial, and then heard it a third time while watching the same videotape once more during argument.

As an independent basis for the contention that the prosecutor should not have been permitted to play the videotape in full, the court was simply wrong in concluding that Dominguez had effectively denied everything in the videotape. (RT 88:9258-9259.) At most, Dominguez may have denied some matters covered in the hour-and-a-half long taped interview, but it cannot be said that he denied **everything** said during that interview. (See

People v. Hefner (1981) 127 Cal.App.3d 88, re: impropriety full prior statement where only part of it is inconsistent.)

Thus, the most damaging evidence the prosecutor possessed was improperly presented to the jury and then improperly repeated for added emphasis.[171] This, too, resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witness, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Lankford v. Idaho* (1991) 500 U.S. 110; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S.14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

The errors in the presentation of Dominguez' prior statements, and the subsequent refusal to strike them, cannot be deemed harmless. Dominguez' testimony filled crucial gaps in the prosecution case, constituting the only direct evidence placing Steve Homick at the scene of

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171 Indeed, as will be seen in the next argument in this brief, the videotape was repeated yet again, in its entirety, during the prosecutor's closing argument to the jury.

the murders and painting him as the mastermind and actual shooter. To make matters worse, the repeated references to a polygraph examination and the undue repetition of Dominguez' statements resulting from playing the lengthy videotape twice after reading most of its contents all served to increase the danger that the jurors would credit the prior statements. It cannot be said beyond a reasonable doubt that the extensive prior statements of Dominguez, admitted without meaningful confrontation, did not contribute to the jury's verdict. *(Chapman v. California* (1967) 386 U.S. 18, 24.)

Even if the errors could be deemed harmless in regard to the guilt verdicts, they were nonetheless prejudicial in regard to penalty. No other evidence supported a conclusion that Steve Homick was the triggerman. Indeed, the witness descriptions that were available seemed far more consistent with Dominguez being the triggerman. Without Dominguez' prior statements, there was "a reasonable (i.e., realistic) possibility" that the jury would have concluded that Dominguez was the actual shooter, and that Steven Homick would have received a more favorable penalty result. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

II. NO FINDING WAS EVER MADE THAT MICHAEL DOMINGUEZ WAS UNAVAILABLE AS A WITNESS, NOR COULD SUCH A FINDING HAVE PROPERLY BEEN MADE, AND EVEN IF ONE COULD HAVE BEEN MADE, STEVE HOMICK STILL SUFFERED SERIOUS PREJUDICE

1. Introduction

If a witness is unavailable within the meaning of Evidence Code section 1291, then the former testimony exception to the hearsay rule may apply. subd. (a)(2) of section 1291 provides:

> "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
>
> (1) ...
>
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

Thus, for Dominguez' testimony at earlier preliminary examinations to be admissible against Steven Homick, Dominguez would have to have been found "unavailable," and the former testimony would have to have been given at a proceeding at which Steven Homick was a party. Therefore, under the former testimony provisions, the various statements made by Dominguez to police or prosecutors could not have been admitted, even when they were videotaped. Also, testimony given by Dominguez during the second preliminary examination in September and October 1988 could not have

been admitted, since Steven Homick was not a party to those proceedings.[172] Thus, the only prior statements that could have possibly been offered as former testimony were the statements made by Dominguez at the first preliminary examination.

Any attempt to portray the errors in the presentation of Dominguez' prior statements (see preceding arguments) as harmless, on the ground that a small portion of those statements could have been admitted anyway under the former testimony hearsay exception, must fail. First, even the testimony given by Dominguez at the preliminary examination in which Steve Homick was present was inadmissible in the present trial, since no finding of unavailability was ever sought or made. Indeed, as shown in the factual review introducing the previous argument in this brief, the trial court expressly stated that she did not have any basis to make such a finding. (RT 87:9167.) Furthermore, as will be shown, even if such a finding had been sought by the prosecutor, it could not have been made on the present record.

2. Additional Factual and Procedural Background

The defense argued below that Dominguez should not be found unavailable within the meaning of Evidence Code section 1291 because it was the prosecution itself that created that unavailability. (CT 22:6062.) That occurred when the prosecution obtained the original testimony by making a plea agreement with Dominguez which it later failed to honor. That, in turn,

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172 While Steven Homick was a party at the third preliminary examination, Dominguez refused to testify at that hearing, so there was no testimony from that proceeding that could be offered as former testimony.

was the direct cause of Dominguez' misbehavior on the stand and eventual refusal to answer questions. It is important to note that the trial court never resolved this issue below.

The plea bargain made with Michael Dominguez was expressly placed on the record at the time of his guilty plea on May 9, 1986. During the entry of the plea, he was expressly told that "as part of your plea bargain, you have been advised that you will be called as a witness to testify against the other co-conspirators in this case." (Supp. CT 12, Vol. 1:246.) After the plea was entered, the prosecutor stated that pursuant to the plea bargain he had made other representations that he wished to place on the record. (Supp. CT 12, Vol. 1:248.) The prosecutor then discussed other charges against Dominguez in Nevada, Texas, Hawaii, and in the federal court system, all of which would result in sentences to be served concurrently with the California sentence. (Supp. CT 12, Vol. 1:248-249.) Finally, the prosecutor stated:

> "And lastly, we have made the representation to you that after you clear up this case, the ones in Nevada and any federal matters, **you will be housed in an institution of your choice**, perhaps either the Nevada system or a federal system, and this is being done for your own security to keep you separate and apart from the other co-conspirators in this case.
>
> Is that your understanding of what we have promised?
>
> A. Yes.
>
> B. Q. And is that what you requested?
>
> A. Yes." (Supp. CT 12, Vol. 1:249; emphasis added.)

Thus, regardless of whether it was a wise promise to make, the prosecution clearly promised Dominguez that he would be housed in the institution of his choice. Relying on that promise, Dominguez initially kept his end of the bargain, testifying at the first preliminary examination for five court days, from May 19 to May 27, 1986. (Supp. CT 5, Vol. 4:932-Vol. 7:1763.) He testified again at the second preliminary examination for 2 court days, on September 20 and 27, 1988. (CT 2:503-645.) Dominguez was, in fact, housed in a Nevada prison from mid-1986 until his September 1988 testimony, except for a stay at Chino, California while he testified in the May 1986 preliminary examination. (CT 3:585.)

Dominguez continued to cooperate with the authorities in April 1989 when he testified at a Nevada state trial regarding the Tipton murders in Las Vegas (described in the penalty phase portion of the statement of the facts earlier in this brief). (CT 22:6103; see also RT 140:17884, where Dominguez was again uncooperative in the present penalty trial, and his prior statements made at the Nevada state trial were admitted.) Later in 1989, however, Dominguez refused to testify at Stewart Woodman's separate trial, and then at Steve Homick's third preliminary examination. (CT 11:2777; SCT 2-2:459.) Late in 1990, he again refused to testify in related proceedings in federal court. (CT 22:6123 *et. seq.*) Notably, he stated on the record at that time that the **only** reason he refused to cooperate in the Stewart Woodman state trial, or in the federal trial, was because the authorities had failed to honor his plea agreement. (CT 22:6135, 6139.)

During the penalty phase of the present trial, Dominguez stated that when he had been promised he could serve his sentence in the prison of his

choice, he believed he would he housed in a "cushy federal country club prison." However, "[i]t did not work out that way." (RT 88:9317.)

Shortly before the start of the present trial, Dominguez filed a motion to vacate his plea in the present case. (Exhibit 1041.) Among the grounds set forth in that motion, Dominguez expressly contended that, as part of his plea agreement, he had been promised that he would be housed in the institution of his choice, and that promise had not been kept. (Exhibit 1041, p. 2-3.) An attachment to that motion, a letter from Michael Dominguez' parents to Dominguez' Nevada trial lawyer, expressly noted that he had been promised housing at the institution of his choice, and instead had been housed at various facilities not of his choosing, at which he had been treated poorly. (Exhibit 1041, attached exhibit 4; see also CT 21:5819-5822)

Before Dominguez was called as a witness in the present trial, a hearing was held on his motion to vacate his plea. However, the trial court never permitted the presentation of testimony. Instead, the court found the motion untimely and refused to hear any supporting evidence. (RT 80:7808-7812.) The court did add a comment that every claim Dominguez had made was known to him at the time he entered the plea, except for the claim regarding where he had been housed. However, that was summarily dismissed as an insufficient ground for setting aside a plea. (RT 80:7811.)

3. The Failure to Keep the Promise That Dominguez Would Be Housed in the Institution of His Choice Caused Him to Stop Co-operating with the Prosecution, So Any "Unavailability" of Dominguez As a Witness Was the Fault of the People and Should Not Be Permitted to Support Any Attempt to Offer Former Testimony

It is important to note that for the purpose of the present argument it makes no difference whether the trial court was right or wrong in finding Dominguez' motion untimely, or whether the trial court was right or wrong in stating that any broken promise regarding where Dominguez was to serve his sentence was an insufficient basis for vacating a plea. The validity of Dominguez' plea is **not** at issue in this argument. Instead, the only issue here, assuming arguendo that a witness's refusal to testify can render the witness unavailable within the meaning of Evidence Code section 1291, is whether such a result should be deemed to have occurred in the present case and to have thereby justified admission into evidence of Dominguez' former testimony at the first preliminary examination. Appellant submits that such a result should not occur in the present circumstances, because any unavailability was the fault of the People.

In *People v. Louis* (1986) 42 Cal.3d 969, a crucial prosecution witness who testified at a preliminary examination and at the trial of co-defendants was then released on his own recognizance for the weekend before his own sentencing. Although there were many reasons to expect that the witness would abscond, the prosecutor simply gave the witness a subpoena to testify at the defendant's upcoming trial, but did not bother to even seek an address where the witness would be staying. To the surprise of nobody, the witness failed to appear at his own sentencing. An immediate search for the witness

ensued, but was fruitless. At the defendant's trial, the witness was found unavailable and his former testimony was admitted in evidence.

This Court concluded that the "due diligence" requirement of Evidence Code section 1291 required the People to take reasonable means to prevent the witness from becoming absent. This Court concluded the prosecution knew that it was likely the witness would disappear, and could have taken steps such as getting more information about the witness' plans, or could have kept him under surveillance, or could have refrained from arguing in favor of the "own recognizance" release in the first place. This Court concluded that the prosecutor's only concern was having evidence against the defendant, not keeping the witness available for the trial. Thus, the People failed to show due diligence and the former testimony should not have been admitted. (*People v. Louis, supra,* 42 Cal.3d at pp. 988-993.)

Similarly in the present case, the prosecutor was satisfied to have the former testimony of Dominguez to use against the defendants, and took no steps to gain Dominguez' continued compliance. Indisputably, Dominguez had been promised that he would be housed in the institution of his choice. Dominguez contended that promise had not been kept, and no evidence was ever offered to counter that claim. No evidence was ever offered to show that the People made any effort to respond to Dominguez' grievances. When he moved to vacate his plea, the People's response was that his motion was untimely and should not even be heard. (RT 80:7805-7806.) Thus, here as in *Louis*, the prosecutor cared only about having evidence to use against the defendants, not about their federal constitutional right to confront and cross-examine the witnesses against them. Here, the prosecution was allowed to make rash promises to gain the cooperation and the guilty plea of Michael

Dominguez, and then renege on its promises once it had gained useful information and testimony from Dominguez.

Any effort by the People to use Dominguez' former testimony after their own actions of reneging on the promises made to him would be even more unfair when we consider the lopsided advantage the People had in this case. Nobody can dispute the fact that Dominguez was a very unsavory character. By his own admission, he was a murderer and a wiling participant in numerous serious felonies in at least four different states. His behavior on the witness stand in the present case demonstrates beyond dispute that he had no respect for the oath he had taken or for the court or any of the parties. Faced with charges that could have resulted in his own death, or incarceration for life without parole, he was clearly a person who would happily sell his testimony to the highest bidder.

Strangely, we have a system of justice that allows the prosecutor to bid for testimony, no matter how unsavory the potential witness might be. The prosecution may freely promise the potential witness his very life, and a likelihood of freedom while he is still young enough to enjoy it, as was promised in the present case. Here, the prosecution even tied that promise to a requirement that Dominguez supply a convincing statement that incriminated the defendants, but that denied his own direct involvement in the actual shootings that occurred here. (But see Argument III, *infra.*) The defense, on the other hand, has no opportunity to offer a potential witness anything at all in regard to the charges pending against the witness. Indeed, if the defense were to promise a witness anything at all in return for helpful testimony, the defense would no doubt be charged with felony bribing of a witness. (See Penal Code section 137, subd. (a).)

It will be assumed, for the sake of argument, that it would be a pointless effort to argue that a system which grants such one-sided power to induce testimony to the prosecution in a death penalty case violates fundamental fairness and due process of law. However, it is at least reasonable to argue that once the prosecution has made such a bargain it must keep its promises or else forego any contention that the witness' resulting failure to continue cooperating renders him unavailable within the meaning of Penal Code section 1291.

Another analogous case is *People v. Giles* (2007) 40 Cal.4th 833 (cert. grntd. 1/11/08). There, the prosecution sought to introduce the statement of a witness that incriminated the defendant. Since the defendant was on trial for killing that witness, the witness was not available for confrontation. This Court concluded that as long as the prosecution could show by a preponderance of the evidence that the unavailability of the witness resulted from the actions of the defendant, the statement could be admitted. The basic principle was that a defendant who caused the unavailability of the witness should not be able to benefit from that act by precluding the use of that witness' statement. (Similarly, see *People v. Zambrano* (2007) 41 Cal.4th 1082; *Reynolds v. United States* (1878) 98 U.S. 145, 158–159.)

Applying that principle to the present case, it was shown unequivocally that the prosecution had promised Dominguez he would be housed in the prison of his choice, in return for his cooperation. There was undisputed evidence that promise was not kept, leading to Dominguez' refusal to continue cooperating. Thus, on the present state of the evidence, it

was shown by at least a preponderance that Dominguez' unavailability was caused by the People.[173] The People should not be permitted to benefit by such actions, by making use of Dominguez' prior testimony on the ground that he was unavailable as a witness. To permit the People to do so would be to unfairly deprive Steven Homick of his federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witness, and to reliable fact-finding underlying capital guilt verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Lankford v. Idaho* (1991) 500 U.S. 110; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S.14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

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173 Of course, respondent might choose to argue that any deficiency in the evidentiary support for a ruling that Dominguez' former testimony was admissible under section 1235 was a direct result of the trial court's failure to allow the presentation of evidence on that issue. However, such an argument does nothing to detract from Mr. Homick's position that the present record does not support a finding that Dominguez was unavailable, and that the prosecution ad exercised due diligence to make him available.

4. Even If the Present Record Could Support a Finding of Unavailability That Was Not the Fault of the People, Appellant Was Still Prejudiced by the Additional Admission of Many Purported Prior Inconsistent Statements that Did Not Constitute Former Testimony

It has been shown in the present argument and in the preceding argument that the trial court never found Michael Dominguez to be an unavailable witness, and never admitted any of his previous statements under the prior testimony hearsay exception in Evidence Code section 1235. Instead, the trial court relied solely on the prior inconsistent statement exception in Evidence Code section 1291. It was shown in the preceding argument that most of the prior statements that were admitted did not qualify as statements inconsistent with any testimony given by Dominguez in the present proceeding, and even if some did qualify, they should have been stricken when Dominguez refused to allow himself to be cross-examined by counsel for Steven Homick.

Even if such a finding of unavailability had been made below, it was shown in the preceding section of this argument that any such ruling would have been erroneous. That follows because, on the state of the evidence before the trial court, any unavailability of Dominguez was caused by the People, as a result of the failure to honor the terms of the plea bargain under which the prior testimony had been obtained.[174]

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174 The argument that follows the present argument demonstrates an additional, although unrelated, reason why even Dominguez' prior testimony at a preliminary examination in which Steve Homick participated

(Continued on next page.)

If it is somehow possible to reject all of that and conclude on the present record that Dominguez was unavailable and that his prior testimony was admissible, the fact remains that much more than his prior testimony was admitted. The prosecutor was also allowed to use extensive prior statements Dominguez had made to the police, where no cross-examination at all had occurred. The prosecutor was also allowed to use extensive prior statements Dominguez had made during other court proceedings in which Steven Homick did not participate, and where Dominguez was subject to cross-examination only by attorneys for parties who had interests and motives distinctly different from those of Steven Homick.

The most obvious source of prejudice came from the admission of lengthy videotapes of Dominguez' prior statements to the police. As noted earlier, these videotapes constituted the only opportunity the jury had to observe the demeanor of Michael Dominguez while he was appearing cooperative and responding in a seemingly appropriate manner to questions about the present crimes and the events leading up to them. These videotapes would have been far more persuasive to the jury than prior testimony read from the transcript of the one preliminary examination at which Steven Homick did participate. Also, these lengthy, coherent videotapes would have been far more persuasive than the disjointed bits and pieces of prior statements and prior testimony that counsel for Steven Homick was able to get into the record at the present trial. Indeed, as shown in Argument I,

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(Continued from last page.)

should not have been admissible under the former testimony provisions of the Evidence Code.

section C-2-b, starting at p. 233 of this brief, *supra*, the prosecutor placed so much importance on one hour-and-a-half-long videotape that he played it for the jury in its entirety after the jury had heard the same words read as prior inconsistent statements, and then the prosecutor played the entire videotape all over again during closing argument to the jury. Having gone to such lengths to put this inadmissible matter before the jury over and over again, the People should not be heard to claim that this was harmless.

Another important reason why Steven Homick was prejudiced resulted from the manner in which Domiguez' prior statements were presented to the jury. In the typical case where an uncooperative witness is expressly and correctly found unavailable, the former testimony is read to the jury in its entirety, or at least in large, coherent blocks. Here, instead, the former testimony was read in bits and pieces as counsel asked individual questions, received negative or silent responses, and then read portions inconsistent with the imaginary denials.

While this problem affected the People as well as Steven Homick, it was far worse for Mr. Homick. First, while counsel for Steven Homick was asking Dominguez questions and reading prior statements, the prosecutor repeatedly objected and contended that counsel was taking matters out of context, or reading portions of statements without reading what the prosecutor believed was enough, or was implying matters that he could not prove. (See description at pp. 192-202 of this brief, *supra*.) This happened so often that one or more jurors would likely have felt that the defense was unfairly taking matters out of context. But the second, and most important reason the defense was at a disadvantage was that the prosecutor was able to supplement his readings with lengthy videotapes that were far more coherent

than the jumbled bits and pieces of read testimony. These videotapes were tantamount to direct examination without cross-examination, so they were of little or no benefit to the defense, while they were of great benefit to the prosecution. Thus, the prosecutor had dramatic and coherent videotapes while the defense was left with choppy bits and pieces of incoherent prior statements.

It bears repeating that Dominguez was an important prosecution witness whose credibility was inherently suspect. By far the most harmful (if believed) prosecution evidence against Steven Homick came from Dominguez and Stewart Woodman. But we know the jury had doubts about Stewart Woodman's testimony, because they were unable to reach a unanimous verdict in regard to Neil Woodman. While the jurors had good reasons to distrust Dominguez, we have no basis for concluding with any confidence that they did distrust him. Since the prosecution was given such an unfair advantage in the way Dominguez' version of the events was presented, the errors must be deemed prejudicial.

Clearly, the denial of confrontation, and other federal constitutional violations that occurred in regard to the improper admission of all of Dominguez' prior statements that were not accompanied by cross-examination on behalf of Steven Homick, must be measured by the strict standard set forth *Chapman v. California* (1967) 386 U.S. 18, 24. Thus, in measuring the harm caused by these federal constitutional violations, the erroneous rulings must be deemed prejudicial unless they can be declared harmless beyond a reasonable doubt. "To say that an error did not 'contribute' to the ensuing verdict" is "to find that error unimportant in relation to everything else the jury considered on the issue in question, as

revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. at pp. 1893]; accord, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-280 [113 S.Ct. at p. 2080-2082].)

The question that must be asked is "whether the ... verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279 [113 S.Ct. at p. 2081].) Because of the importance of Dominguez' prior statements to the prosecution case, and the unfair and unprecedented manner in which they were presented, it cannot be said here that the errors did not influence the verdicts, even if there could have been a valid ruling below that Dominguez was unavailable and his former testimony was admissible.

III. THE AGREEMENT MADE BETWEEN THE PROSECUTION AND WITNESS MICHAEL DOMINGUEZ DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO EFFECTIVE CROSS-EXAMINATION, BECAUSE DOMINGUEZ COULD ONLY OBTAIN THE BENEFITS OF HIS BARGAIN IF HIS TESTIMONY MATCHED SPECIFIC STATEMENTS HE HAD ALREADY GIVEN TO THE AUTHORITIES

A. Introduction

In *People* v. *Medina* (1974) 41 Cal.App.3d 438, accomplices to a first degree murder were granted immunity in return for testimony consistent with statements they had already given to the authorities. The *Medina* court recognized that these witnesses would realize that any deviation in their testimony would abrogate the agreement, subjecting them to prosecution for first-degree murder and thereby placing them "in a position of dire peril." The court found that a fair trial was denied when crucial prosecution witnesses had been placed under such "a strong compulsion to testify in a particular fashion." (*Medina*, *supra*, 44 Cal.App.3d at p. 455.) The result was viewed as a denial of the fundamental federal constitutional rights to a fair trial and to meaningful cross-examination.[175] (*Id.*, at p. 456.)

Astonishingly, a dozen years after the *Medina* principle had been firmly established, the prosecution in the present case did **exactly** what was

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175 In addition to these federal 6th and 14th Amendment violations expressly recognized in *Medina*, appellant also relies on the federal 5th and 8th Amendment rights to Due Process of Law and to reliable fact-finding in capital cases.

forbidden in *Medina*. The precise agreement made with Michael Dominguez clearly put him in a position in which any material deviation in his testimony, as compared to his earlier statements to the authorities, would directly abrogate the bargain and subject him to prosecution for capital murder.

B. Factual Background

Shortly before any arrests were made for the Woodman murders, Michael Dominguez had been arrested on unrelated felonies in the state of Nevada. He was also on parole in Nevada at the time of that arrest, so he faced a parole violation as well as the new charges. At the time of his arrest, he feared that the authorities might discover his involvement in the Woodman murders, and his involvement in a shooting and an arson in the state of Hawaii. When he learned soon afterward that the Woodman brothers and the Homick brothers had been arrested, and that he had been indicted along with them for the murders of the Woodman parents, Michael Dominguez' first thought was that he needed to cut a deal. He instructed his Nevada lawyer to arrange a meeting with the authorities. On March 12, 1986, ten days after Dominguez' arrest and one day after the Homick and Woodman arrests, Michael Dominguez met with officers from Los Angeles and Las Vegas, as well as agents from the Federal Bureau of Investigation. (RT 88:9275-9277, 9281-9283.)

Dominguez was also aware of the fact he was suspected of serious crimes in the state of Texas, of the Tipton triple homicide in Nevada, and of at least one or two other homicides in Nevada. He knew he faced potential

death sentences in both California and Nevada. (RT 88:9288, 9293-9296, 9300-9302, 9305.) Thus, he had a very powerful incentive to reach an agreement with the authorities. He quickly did so, achieving a bargain that not only avoided any death sentence, but would also leave him eligible for parole in California in 12-1/2 years. He was led to believe that a parole that early was not merely a theoretical possibility, but was a strong likelihood. He was also assured that Nevada officials would seek a similar disposition for any Nevada crimes.[176] In return for this remarkable degree of leniency, Dominguez simply had to cooperate with the authorities. He was also told at the outset that he would only be given this deal if he was not the actual shooter in either the Nevada murders or the California murders. (RT 70:5752-5754; 88:9308-9310; 9332-9334. 90:9575-9576; 119:14604-14607; DEATH PENALTY. Supp. 4-1:48.)

After giving a series of statements to the authorities, Dominguez entered his guilty plea in California on May 9, 1986. (RT 90:9532.) In the course of entering that plea, the following interchange occurred on the record, between Dominguez and Deputy District Attorney John Krayniak:

> "Q Now, also as part of your plea bargain, you have been advised that you will be called as a witness to testify against the other co-conspirators in this case.

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176 Subsequently, Dominguez was formally promised that any sentence in Nevada, Texas, or Hawaii would run concurrently with his California sentence. He was also told he could choose the prison in which he would serve his sentence. Although in the long run that did not work out as he anticipated, when he made his agreement Dominguez expected to serve his time in a "cushy" federal prison. (88:9317-9318, CT 22:6099-6100.)

A Right.

Q Okay. Do you agree to do that?

A Right.

Q You have also been advised that the People expect your testimony to be truthful and honest and accurate.

Do you understand that?

A Right.

Q **If the District Attorney's Office or myself find out that you've lied in any material way or that you commit perjury when you do testify, then all of our agreements will be declared null and void.** That means your plea agreement that you've worked out would be set aside and you would be brought back to Municipal Court to have a preliminary hearing on these charges. Do you understand that?

A Right." (CT 22:6097, l. 17-6098, l. 5; emphasis added.)

Just before Dominguez "testified" before the jury, when the court instructed him not to mention the fact he had taken a polygraph exam, Dominguez responded that the police had told him that passing a polygraph examination was a condition of the plea agreement. (RT 85:8923.) Later, while testifying in front of the jury, former testimony was read in which Dominguez noted that he had just listened to the tapes of his original statement to the police. He did that in order to keep his story straight, because he knew that after he testified, the prosecutor would determine whether he would get to keep his deal. (RT 90:9583.)

C. Procedural Background

At the outset of the trial proceedings, soon after the alternate jurors were sworn, the court and counsel discussed the upcoming testimony of Michael Dominguez. Counsel for Steven Homick noted that Dominguez' plea bargain may have violated the Due Process rights of the defendants. Counsel for Robert Homick explained the problem more fully, noting that Dominguez was told that the very favorable plea agreement hinged on Dominguez not being the shooter in the California or Nevada cases. Defense counsel also noted this information had been withheld from the defense at the time Dominguez testified at the preliminary examination. Counsel for Neil Woodman noted that the full information about Dominguez' plea bargain had been made available to the defense only in the last two months. The court then determined that the prosecutor should not refer to expected testimony from Dominguez in his opening statement, and that the issues involving Dominguez' testimony would be resolved later. (RT 70:5749, 5752-5756, 5759, 5764.)

A month later, the issue was discussed further. Counsel for Robert Homick urged that *Medina* was violated by the fact the plea bargain was contingent on Dominguez not being the shooter. Counsel summarized the very substantial evidence that indicated that Dominguez, in fact, was the shooter. (RT 84:8769-8770.) Counsel for Steven Homick joined in the argument, expressly quoting the part of the plea agreement set forth above, in which the prosecutor stated that any agreement would be abrogated if Dominguez had lied in any material way, or if he committed perjury when he testified. (RT 84:8772-8773.) Counsel argued that under the express terms of

the agreement, if Dominguez were to testify that he was the shooter, that would necessarily be deemed a lie and result in vacating the plea agreement. (RT 84:8773-8774.)

The court expressed the belief that it was reasonable for the prosecutor to want to condition leniency on Dominguez not being the trigger-man. She tentatively believed the agreement was valid because there were many other facts as to which Dominguez was not bound. (RT 84:8777.) The judge took the matter under submission. (RT 84:8794.) Subsequently, the court denied the motion to exclude Dominguez' testimony, finding that the agreement complied with the requirements of *Medina*. (RT 84:8814-8816.)

Paradoxically, in a subsequent discussion of guilt phase instructions regarding factors the jury should consider in assessing the credibility of Michael Dominguez, the court expressly acknowledged a difficulty with Dominguez' plea agreement. The court referred to a similar case in which witnesses promised to tell the truth, "and what the truth then becomes is defined as a statement consistent with what they told the police and the prosecutor before." (RT 122:14976, ll. 25-28.) The court still did not see that as a *Medina* violation, but did view it as a factor for the jury to consider. (RT 122:14977.)

D. The Provision That the Agreement Was Abrogated if Dominguez Had Lied or Subsequently Committed Perjury Renders This Case Indistinguishable from *Medina*

In *Medina*, the critical element of the immunity agreements with three admitted accomplices was language stating that immunity was

> "subject to the conditions that the witness **not materially or substantially change her testimony from her tape-recorded statement already given to the law enforcement officers** on May 10, 1972, and not resort to silence, whether or not under order of contempt, nor feign lapse of memory to at least that much given in the aforementioned tape-recorded statement, for otherwise this order of immunity will be void and of no effect." (*People* v. *Medina*, *supra*, 41 Cal.App.3d at p. 450.)

The *Medina* Court agreed with the claim of the defendants in *Medina* that this agreement denied them

> "any effective cross-examination of the witnesses, thereby depriving them of the fundamental right to a fair trial." (*People* v. *Medina*, *supra*, 41 Cal.App.3d at p. 450.)

The Court explained:

> "The effect of the condition appended to the immunity orders of each of the principal prosecution witnesses, therefore, was that each of said witnesses was thereby placed by the court in a position of dire peril. If his testimony "materially or substantially" differed from the prior recorded statement he became liable to prosecution for first degree murder and, having disclosed his participation, stood little chance of escaping conviction." (*People* v. *Medina*, *supra*, 41 Cal.App.3d at p. 452.)

The *Medina* Court turned to an earlier decision. *People* v. *Green*, 102 Cal.App.2d 831, 837-838, which in turn relied on a Canadian decision to explain the problem in greater detail:

> "'The British Columbia Court of Appeal considered essentially the same grave question in Rex v. Robinson, 30 B.C. 369, 70 D.L.R., 755. The accomplice who was about to give his testimony after having made a statement to the police was informed by the court, that in accordance with the practice, he would be examined under an understanding that if he gave his evidence in an unexceptionable manner he would be recommended for a pardon. The reviewing court was of the opinion that the trial judge in the course of the examination gave the witness to understand that when his evidence was reviewed in considering a recommendation for a pardon, it would be expected that his testimony at the trial would be in conformity with the statements he had made to the police. The judgment was reversed. In the course of a clearly reasoned analysis of the situation it was said (pp. 761-762): "It is obvious that if the witness did get the impression from the Court that unless he told the same story to the Court as he did to the police, he would be executed, then his testimony was tainted beyond redemption and could not, in a legal sense, be weighed by the jury, because the witness was no longer a free agent and **there was no standard by which his veracity could be tested or estimated**. This is not merely a matter going to the credibility of the witness, but something fundamentally deeper, viz., that by the action of the Court itself **the witness was fettered in his testimony and put in so dire a position that the value of his evidence was not capable of appraisement**, the situation being reduced to this, essentially, that while at the outset he was adjured to give his evidence freely

> and fully, yet later on he was warned that if it was not the same as he had already told the police he would be executed. Such a warning defeated the first object of justice, because **what the witness should from first to last have understood was that, at all hazards, he was to tell the truth then in the witness box, however false may have been what he had said before in the police station.** It is this element of uncertainty and the impossibility of determining the extent of it that makes this case so peculiar and unsatisfactory, and it cannot properly, in my opinion, be viewed as a question of credibility for the jury but one of frustration of their right to pass upon credibility. ..."'" (*People* v. *Medina*, *supra*, 41 Cal.App.3d at p. 453-454.)

Summarizing its conclusion, *Medina* explained: "a defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." (*People* v. *Medina*, *supra*, 41 Cal.3d at p. 455.) The *Medina* Court concluded that a proper immunity agreement "could be conditioned on 'the accomplices testifying fully and fairly as to their knowledge of the facts out of which the charges arose.'" (*People* v. *Medina*, *supra*, 41 Cal.App.3d at p. 456.) An agreement became invalid if it went further and conditioned immunity on the witness testifying in a certain way. (*Id.*)

The *Medina* Court found it unnecessary to determine if the violation of the federal constitutional right of meaningful cross-examination and the right to a fair trial were so fundamental that they required reversal per se. Instead, the Court simply noted that even under the standard set forth in *Chapman* v. *California* (1967) 386 U.S. 18, 23, 17 L.Ed.2d 705, 710, 87 S.Ct. 824, the error could not be found harmless beyond a reasonable doubt

under the circumstances before the Court. (*People* v. *Medina*, *supra*, 41 Cal.App./3d at p. 456.) The case was remanded for possible retrial, with the Court noting that the prosecution could amend its bargain with the accomplices to free them from the need to give specific testimony. However, if this was done, the testimony previously given under the compulsion of the improper condition could not be used against the defendants in any fashion:

> "To fully protect defendants, it is also necessary to ensure that the testimony heretofore given by these witnesses under the effect of these orders shall not be used against them. This requires that such testimony shall be inadmissible against defendants, either as direct testimony or as evidence to contradict or impeach the witnesses' future testimony. The only exception to this shall be that if defendants choose to use any part of it, such further portion as is reasonably necessary to explain the portion used shall be admissible." (*People* v. *Medina*, *supra*, 41 Cal.App.3d at p. 464.)

Application of these principles to the present case is straightforward. Here, the key provision in the leniency agreement was, "If the District Attorney's Office or myself find out that you've lied in any material way or that you commit perjury when you do testify, then all of our agreements will be declared null and void." (CT 22:6097-6098.) Under this provision, the agreement would be abrogated under two possible circumstances. The first was if Dominguez had already lied in any material way in the statements he had given to the authorities in his attempt to persuade them he possessed information worth the leniency he sought. The second way in which the agreement could be abrogated was if he committed perjury in his future testimony.

Under these circumstances, any material deviation from the original statements would necessarily violate one or the other of these possible abrogating conditions. If testimony materially deviated from the earlier statements, then either Dominguez lied in the earlier statements, or he would be committing perjury in his testimony. The prosecution would not even be required to determine whether it was the earlier statement that was false or the subsequent testimony that was false; as long as there was a material deviation, then one or the other was false and the agreement would be abrogated, leaving Dominguez to face potential death sentences in at least two different states.

The impropriety of the present agreement for testimony is even more apparent when contrasting these circumstances to those in the subtly, but crucially, different agreements at issue in *People v. Boyer* (2006) 38 Cal.4th 412, 454-457. There, witness Kennedy promised to testify truthfully, but the agreement also stated that " '"the witness has represented that [his] testimony . . . will be in substance as follows: Consistent with ... [prior taped statements, transcripts of which are attached]...' " (*Id*, at p. 455.) This Court found no *Medina* violation, explaining:

> "The grant of immunity to Kennedy, by its terms, was based on his truthful testimony, which Kennedy himself 'represented' would be in accordance with his prior statements. Thus, the agreement simply reflected the parties' mutual understanding that the prior statements were the truth, not that Kennedy must testify consistently with those statements regardless of their truth." (*Id,* at p. 456.)

Thus, in *Boyer,* the agreement only called for the truth and added a notation that the witness had **previously** made the representation that his prior

statements had been the truth. In such circumstances, in the event the witness had, in fact, lied during his previous statements, he was free to testify differently at trial. Such different testimony would have no doubt surprised the prosecutor and would have indicated that the witness's representations about his prior statements were false, but if the truth was told at trial, then the technical terms of the plea agreement would have been satisfied.

On the other hand, in the present case, the actual terms of the agreement included an express provision stating that if Dominguez had lied previously, his plea bargain would be null and void. Thus, if the truth was different from Dominguez' prior statements, and if Dominguez told the truth in his testimony, he would have nonetheless been in violation of the express terms of the plea agreement and would have forfeited the benefits f his bargain. That is precisely what *Medina* sought to preclude – no matter what is done to satisfy the prosecutor that a witness's original statements are true, a valid agreement must still allow for the possibility that the original statements were not true, and must allow the witness to give different testimony and maintain the benefits of the bargain, so long as the actual testimony is true.

More troubling, but still distinguishable, is *People v. Gurule* (2002) 28 Cal.4th 557, 615-617. There, the terms of the agreement specified that if new evidence was obtained proving that the witness, rather than the defendant on trial, was the actual killer, then the witness would lose the benefits of the bargain. This Court conceded that such an agreement "probably resulted in some pressure on Garrison not to testify that he-and not defendant-actually stabbed the victim, ..." (*Id,* at p. 617.) On the surface, this appears to ignore the possibility that the witness really was the actual

this appears to ignore the possibility that the witness really was the actual killer, but would lose the benefits of the bargain if he simply told the truth at trial, while retaining them if he continued to lie.

On the other hand, *Gurule* falls into a special category of *Medina* cases, in which there is some constraint on the testimony the witness can give, but the constraints still leave room for various different versions of what happened which could still exonerate the defendant and allow the witness to retain his bargain, as long as the testimony was truthful and did not make the witness the actual killer. Assuming such a rule withstands analysis (but see the analysis in the following section of this argument), the present case does not fall within that category. Here, **any** testimony that tended to exonerate Steve Homick, even if truthful, would have necessarily violated the plea agreement since such testimony, if truthful, would mean Dominguez had lied in his earlier statements.

In sum, while the prosecution may be permitted to bargain for the truth, there is no justification whatsoever for allowing the prosecution to bargain for lies. *Medina* must be seen as precluding the prosecutor from eliminating all possible risk when dealing with a witness who trades testimony for leniency. It is obvious that some potential witnesses will be willing to lie in order to gain leniency. If they do, public policy demands that they remain free to tell the truth at trial without losing the benefits of their bargain. If the prosecutor does not have some solid basis for trusting in the honesty of a potential witness, then the prosecutor has no business asking a jury to rely on such a witness to prove the guilt of the accused beyond a reasonable doubt.

It is true that despite the provisions that placed Dominguez at great peril if his testimony deviated from his earlier statements, Dominguez was not, as it turned out, deterred from saying whatever he desired in his trial "testimony." (See Argument I, earlier in this brief analyzing the nature of that "testimony.") However, in direct violation of the principles set forth in *People* v. *Medina*, *supra*, 41 Cal.App.3d at p. 464, the earlier statements and testimony that did result from the compulsion of the invalid agreement were admitted and became the heart of the prosecution case against Steven Homick.

Without the testimony of Michael Dominguez and Stewart Woodman, the case against Steven Homick was exceedingly thin and could have easily left a jury unable to conclude that Steven Homick's guilt had been proven beyond a reasonable doubt. A reasonable jury might well have rejected all or much of Stewart Woodman's testimony in view of the many different reasons shown to support the conclusion that Stewart Woodman was a thoroughly amoral person whose oath as a witness meant nothing. Indeed, the fact that the present jury was unable to convict Neil Woodman of any crime demonstrates unequivocally that this jury did not trust Stewart Woodman's version of the events. It is, therefore, impossible to exclude the possibility that the jury depended heavily on the former statements and testimony of Michael Dominguez to convict Steven Homick. Thus, even if the *Chapman* harmless error standard applies in these circumstances, rather than a per se reversal standard, it is impossible to conclude that the invalid leniency agreement and the improper admission of Dominguez' prior testimony and statements were harmless beyond a reasonable doubt.

E. The *Medina* Principles Were Separately Violated By Conditioning Dominguez' Leniency Agreement on Dominguez Not Being the Actual Shooter in the Woodman or Tipton Murders

Another troublesome aspect of the leniency agreement with Michael Dominguez was that it was conditioned on him not being the actual shooter in the Woodman or Tipton crimes. Once again, this was not an agreement requiring Dominguez to tell the truth; rather, it was an agreement requiring Dominguez to specifically deny that he had personally shot any of the victims. Just as in *Medina,* "'" the witness was fettered in his testimony and put in so dire a position that the value of his evidence was not capable of appraisement."'" (*People* v. *Medina*, *supra*, 41 Cal.App.3d at p. 453-454.)

To make matters worse, the evidence in the present case strongly indicated that Dominguez **was**, in fact, the actual shooter in at least the Woodman killings. Although the prosecution theory was that Steven Homick was the actual shooter, any objective view of the totality of the evidence leads to the conclusion that a much stronger case was made that Dominguez, rather than Steven Homick, was the shooter.

Thus, the one witness who saw the apparent killer fleeing from the scene gave a detailed description that fit Dominguez in every detail, and that was not even close to Steven Homick, Robert Homick, or Anthony Majoy.[177] Also, that witness described an athletic ability demonstrated

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177 Witness Rodger Backman told the police the man he saw was 5'8" to 5'9", absolutely not 6 feet tall, 160 pounds, early to mid twenties, dark or olive-complected, possibly Asian or Hispanic. (RT 85:8836, 8878-8879, 8900.) Michael Dominguez was Hispanic, 5'10" tall, weighed 175,

(Continued on next page.)

when the fleeing suspect effortlessly leaped on and over a shoulder high wall from an uneven surface, in one swift motion. (RT 85:8825-8832, 8967-8872.) That may have been something Steven Homick could have done years earlier, but was not very likely in the physical condition he was in at the time of the killings.

Undisputed evidence established he had recently undergone knee surgery. At the time of the Woodman killings, he was under the continuing care of the doctor who had treated his knee. According to prosecution witness Art Taylor, Steven Homick was in constant pain in 1985 (the year of the Woodman double homicide), due to his bad knees. (RT 83:8532-8533, 8550.) On the other hand, in his daring flight from officers during an airport transportation, Dominguez clearly demonstrated he still possessed the kind of athletic ability possessed by the suspect who fled from the garage where the Woodmans were shot. (RT 89:9392-9393.) Also, police acknowledged they had no physical evidence whatsoever to show that Steven Homick had ever been inside the underground garage on the day of the shootings. (RT 115:13893.)

It also seems highly improbable that Dominguez would have been brought to Los Angeles from Las Vegas and paid $5,000 to simply sit on a

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and in 1985 he would have been 26 years old. (RT 85:8947, 89:9390-9391, 9394-9395.) On the other hand, Steven Homick was 6'2" tall and 45 years old in 1985. (RT 110:13045.) Backman viewed photographs of the Homick brothers, Dominguez, and Majoy and concluded Dominguez most closely resembled the man he saw, having the same skin color and build. Dominguez also had the same slanted eyes, which was the feature Backman most vividly recalled. (RT 85:8891-8892, 8905-8906.)

bus bench and watch for an elderly couple in a distinctive sports car. Indeed, the prosecution theory and Dominguez' own statements both placed Anthony Majoy among the conspirators at the scene of the murder, yet provided no clue as to what his purpose was in the conspiracy. Majoy was the oldest of the group. Robert Homick was also supposed to be at the scene. He was always described as a very large person. (See, for example, RT 93:9882.) Thus, the other three people who Dominguez placed at the murder scene were each far more logical candidates for the role of a lookout at the bus bench, while Dominguez himself was the only logical candidate to be the shooter. Further supporting that conclusion was the testimony of officers familiar with Dominguez, and admissions of Dominguez himself, establishing without contradiction that he had long been a consistently violent person who would not hesitate to take the life of another person if it suited his purposes. (RT 112:13376-13379, 13390-13391.)

People v. *Knox* (1979) 95 Cal.App.3d 420 was the first post-*Medina* case to consider the situation of a crime partner who was given immunity, provided he was not the trigger man. The defendant argued that this violated *Medina* by coercing the witness to deny responsibility for the killing. The Court of Appeal was able to distinguish *Medina* because there was no evidence that the crime partner was present at the time of the killing, and even the defendant so testified. Thus, he could not have been the trigger man, so any compulsion to deny being the trigger man could not have resulted in an unfair trial. In contrast, in the present case, as shown above, the evidence that Dominguez was the trigger man was far stronger than the evidence that Steven Homick or any other person was the trigger man. Thus, nothing in *Knox* detracts from Steven Homick's present contention.

This Court addressed a situation comparable to the present one in *People* v. *Sully* (1991) 53 Cal.3d 1195, 1215-1218. There, the witness entered into a plea bargain agreement in which she agreed to testify truthfully against Sully. The witness was also required to submit to and pass a polygraph examination, while specifically stating that she was not physically involved in the deaths at issue, nor did she encourage them.

Focusing on the polygraph requirement, this Court found no *Medina* violation, explaining:

> "The polygraph condition did not dictate Livingston's testimony. **On its face, it merely required her to show in a polygraph examination that she was not involved in the murders.** She was not committed to a script. She remained free to testify as she desired, without having to subscribe to any particular version of events. For example, **she remained free to testify, without violating the condition, that defendant did not commit the murders or that someone else, including herself, was responsible.** As such, the condition itself did not compel Livingston to testify in any particular manner, any more than, for example, the fact that she had given previous statements to the effect that defendant, and not she, had killed the victims." (*People* v. *Sully*, *supra*, 53 Cal.3d 1195, 1217; emphasis added.)

Thus, on its face, as the Court noted, the agreement in *Sully* was not directly conditioned on the witness not being physically involved in the killing. Rather, the condition was simply that she pass a polygraph exam while so stating. If she failed the polygraph exam, the deal would be abrogated at its inception and she would not have testified against Sully as a witness granted leniency. If she passed the polygraph exam while stating

truthfully that she was not directly involved, then consistent testimony at trial would be truthful testimony, and not a mere product of compulsion. If she passed the polygraph exam while **falsely** stating she was not physically involved, then she would have still satisfied the polygraph exam condition, but would remain free to testify truthfully, even if the truth was different from statements she made during the polygraph exam.[178]

In contrast, in the present case, the polygraph examination that Dominguez was required to take was a completely separate condition from the requirement that he not be the shooter. In the present case, Dominguez remained under full compulsion to testify that he was not the shooter, no matter how false that testimony might be, or his highly favorable plea bargain would have been subject to immediate abrogation.

On the other hand, if the passage quoted above from *Sully* means that there is no *Medina* violation as long as a witness is not committed to a fully-detailed script, but instead has some options available, even though they are limited, then such a position cannot withstand analysis and Steven Homick strongly urges this Court to reconsider this position.

For example, suppose the plea agreement in *Sully* had been that the witness was to testify truthfully, and that while testifying truthfully, the witness would **not** testify that she was physically involved in the shooting or

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178 It is well known that polygraph exams are generally considered to be unreliable. (See Evidence Code section 351.1; see also *United States* v. *Scheffer* (1998) 523 U.S. 303, 118 S.Ct. 1261., *People* v. *Espinoza* (1992) 3 Cal.4th 806, 817, *People* v. *Kegler* (1987) 197 Cal.App.3rd 72, 89, and *In re Aontae* D. (1994) 25 Cal.App.4th 167, 175, fn. 7.) Thus, there is no necessary inconsistency in passing a polygraph exam with one statement, and then testifying truthfully to the opposite.

that she had encouraged the shooting. Surely such an agreement would violate due process and deny adequate confrontation and cross-examination. Yet, just as in the actual *Sully* case, the witness would not be restricted to a script, and would remain free to testify the defendant did not commit the murders, or that somebody else did.

The fact that a witness retains some freedom to choose between different versions of what **might** have happened is not sufficient. A witness must remain free to testify truthfully to whatever **did** happen, regardless of whether that testimony is what the prosecutor expects or desires. Just as a plea bargain or immunity agreement cannot dictate specific answers that must be given, it cannot dictate specific answers that must **not** be given. This becomes clear when looking at one possible scenario based on the present case. Dominguez, like the witness in *Sully*, did not have a script and remained free to testify to a variety of versions of what did occur. However, Dominguez did not remain free to admit that he was the shooter. That was a very crucial issue in the present case, at least in regard to the penalty phase. If Dominguez had admitted he was the one who had shot both Woodman victims, the jury might well have been reluctant to impose a sentence of death on a non-shooter, knowing that the actual shooter received a sentence that rendered him eligible for parole after only twelve-and-one-half years.

There is another reason why *Sully* should not defeat the present argument. The ultimate conclusion in *Sully* was that there was no improper coercion **and** there was ample corroboration of the statement in question. That combination allowed this Court to conclude there was no denial of a fair trial. (*People* v. *Sully*, *supra*, 53 Cal.3d 1195, 1217-1218.) In the present case, the corroboration of Dominguez was far from ample, and came mainly

from Stewart Woodman, who was also deeply involved in the criminal activity and who testified under his own grant of leniency. Even more importantly, in regard to the key issue of the identity of the shooter, there was no meaningful corroboration at all of Dominguez' required claim that it was not Dominguez himself, but was instead Steven Homick.

F. Conclusion

Thus, *Medina* was violated in two separate ways. Michael Dominguez' prior testimony and statements were a crucial part of the prosecution case, and they were obtained under an agreement that absolutely required Dominguez to give testimony that could not deviate materially from the original statements. Moreover, Dominguez was told what he had to say during the statements and testimony - that he was not the shooter. That provision was especially unconscionable, as the prosecutor had no legitimate means whatsoever to justify a conclusion that Steven Homick was the shooter and Michael Dominguez was not. Thus, this was not a good faith provision, but was instead a provision designed to callously save face for a prosecutor who chose to deal with the devil, and to artificially strengthen the case against Steven Homick.

Under these circumstances, Steven Homick has been denied his federal 5th, 6th, 8th, and 14th Amendment rights to due process of law, to a fair jury trial, to effective cross-examination of the witnesses against him, and to reliable fact-finding underlying a capital conviction and death sentence. (*Washington v. Texas* (1967) 388 U.S.14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th

Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.) The prosecution relied heavily on Dominguez' tainted prior testimony and had little credible evidence to corroborate it. Under these circumstances, the error cannot be deemed harmless.

IV. THE TRIAL COURT ERRED IN PRECLUDING EVIDENCE STRONGLY SUPPORTING STEVEN HOMICK'S DEFENSE, MERELY BECAUSE IT WAS POTENTIALLY HARMFUL TO ROBERT HOMICK

A. Factual and Procedural Background

Before Rick Wilson testified about various incidents he witnessed and statements he heard while he was one of the top managers at Manchester Products, counsel for Robert Homick brought up an area of concern. In November 1983, a can of oil was thrown through a window in the home of Robert Richardson, who then lived in a suburb of Kansas City, Missouri. After the can was thrown through the window, Richardson received a phone call in which he was threatened with further harm if he did not stop doing certain things in regard to Manchester Products. Rick Wilson had stated in an interview that Stewart Woodman told him that Robert Homick was the person responsible for this incident. The defense had only recently learned the prosecutor wanted to elicit testimony about this incident. The defense needed more time to investigate the matter. (RT 75:6892-6894.)

The prosecutor agreed to avoid reference to this incident in his initial questioning of Rick Wilson, and to delay calling Robert Richardson as a witness. (RT 75:6895.)

The Missouri incident was discussed further about two weeks later. The prosecutor explained the event in greater detail. Richardson had been an employee of Manchester Products. A dispute arose over $1,350 in expense money that he claimed he was owed. He either quit or was fired from his position with Manchester on October 22, 1983. On November 1, 1983, there was a crash through a storm window at his home. The next morning he

received a threatening phone call which was recorded by his telephone answering machine. The police were called and they overheard another threatening phone call that was received while they were at Richardson's home. One of the threatening phone calls was preserved on tape. Detective Dillard was prepared to testify that the voice on the tape was that of Robert Homick. (RT 78:7522-7523.)

In the phone call, Richardson was threatened with further harm if he did not stop calling Ann Heke, another Manchester Product salesperson with whom Richardson had been in a dispute regarding sales territory. Richardson was told that if he did not stop calling Heke, the next item to come through his window would be a bomb. Ultimately, there was a lawsuit by Richardson against Manchester Products regarding the disputed $1,350. (RT 78:7522-7524.)

The prosecutor argued that this was another instance of the Woodmans using violence in response to a financial threat. Also, this was another example of the use of the Homick brothers as problem solvers for the Woodmans. At this point, the court saw only marginal relevance, since only $1,350 was involved.[179] The court saw this more as character evidence against Robert Homick rather than being an activity in furtherance of the conspiracy. The court also saw this as cumulative in regard to its use to establish the relationship between the Woodman brothers and the Homicks. (RT 78:7524-7526.)

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179 The court did not explain how the amount of money involved would have any impact on the relevance of the incident.

The matter came up again two months later, when Stewart Woodman was undergoing cross-examination by counsel for Steven Homick. Although the court had precluded the prosecutor from eliciting testimony about the Missouri incident, counsel for Steven Homick wanted to go into the matter. Counsel argued that it would support Steven Homick's defense by showing that Stewart Woodman used Robert Homick, not Steven Homick, when Stewart needed force used to accomplish his ends. Counsel also argued this would rebut Stewart Woodman's testimony that he did not want Robert Homick involved in the murder conspiracy because Robert was such a klutz. (RT 106:12263-12264.)

The Court conceded the matter was relevant in Steven Homick's defense, but found the relevance outweighed by the negative character evidence that would prejudice Robert Homick, and by the fact that Stewart Woodman's credibility had already been challenged substantially. (RT 106:12265.) Counsel for Steven Homick then renewed his motion for a severance, arguing this incident did not just go to Stewart Woodman's credibility, but also went directly to Steven Homick's culpability. Counsel conceded that other evidence showed that Stewart Woodman used Robert Homick to steal cars in order to gain insurance money, but this incident was different in that it showed Stewart Woodman using Robert Homick to perform violent acts. The motion for severance was summarily denied. (RT 106:12265-12267.)

Later that same day, the court changed its position. The court concluded it would be unfair to allow counsel for Robert Homick to argue that Stewart Woodman would not have hired Robert Homick to do the murders since he thought Robert Homick was a klutz, in light of the court

having precluded contrary evidence. If counsel for Robert Homick wanted to make such an argument, the court would allow it. However, then the court would also allow the excluded evidence about sending Robert Homick to Missouri. (RT 106:12312.)

Counsel for Robert Homick verified he did want to argue that Stewart would not have hired Robert Homick for the murders because he believed Robert was a klutz. Indeed, counsel described that as the strongest argument he had. If the Missouri episode was brought out, then Robert Homick would want to counter with conflicting evidence about the Missouri incident. Counsel argued it was very unfair to put him in the position of making a choice when either choice was prejudicial. Counsel argued the evidence would show that Stewart Woodman did not send Robert Homick to Missouri to do violence, only to talk to Richardson; whatever Robert Homick actually did was his own idea. (RT 106:12313-12314.)

The court asked whether there was any evidence that Robert Homick acted at the express direction of Stewart Woodman. The prosecutor and counsel for Steven Homick both argued it was logical that Robert Homick was getting his directions from somewhere, especially when all the incidents were considered together. The court saw great significance in the interplay of who hired who to do what. (RT 106:12315-12317.)

Counsel for Robert Homick noted there were witnesses in Missouri who may or may not still exist, and complained of the difficulty of a long distance investigation at this late date. The court reiterated that they had the option of making either choice. If they needed time, she would give it to them. At this point, counsel for Robert Homick moved for a severance, to avoid fundamental unfairness. Counsel argued severance had been denied

earlier based on a conclusion that no prejudicial evidence would come in as a result of antagonistic defenses. Now the court was reneging. (RT 106:12317-12319.)

At this point, the prosecutor switched sides and argued there was already enough evidence for Steven Homick's counsel to make the argument they wanted, based on the Soft Light incident. Therefore, the Missouri incident should be kept out. However, the court was not persuaded to alter her position that Robert Homick's counsel should choose to make its argument and allow the evidence of the Missouri incident, or forego its argument and keep out the Missouri incident. Also, counsel for Steven Homick noted that the Soft Light incident was effectively neutralized by counsel for Robert Homick's cross-examination of Tracey Swartz Hebard and of Officer Carl Clohn, who responded to Soft Light when Ms. Hebard called the police.[180] In contrast, there was a tape that left no ambiguity as to the nature of the threat in the Missouri incident, making it much stronger than the Soft Light incident. Everybody agreed something was thrown through a window, and there was a threat on an answering machine in a voice that had been identified as that of Robert Homick. (RT 106:12320-12322.)

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180 When the police received the initial call from Tracey Hebard, their notes did not refer to any report of a threat. That is something a responding officer would definitely want to know, so if a threat had been mentioned, it would have been noted. After the police responded to the Soft-Light scene, no official report was ever written, indicating the responding officer concluded no criminal activity had occurred. (RT 72:6117-6118, 6123-6127.) Thus, considerable doubt was cast on the version of these events described by Ms. Hebard in her trial testimony.

Counsel for Steven Homick added that Stewart Woodman knew it was Robert Homick and would so testify, so much of what counsel for Robert Homick was describing as rebuttal evidence would be unnecessary. The prosecutor agreed that if Stewart Woodman heard the tape he would say it was Robert Homick's voice. The court then deferred any ruling, as she wanted to consider the matter further. (RT 106:12323-12324.)

Later that same day, the Missouri incident came up for further discussion. Counsel for Steven Homick reiterated that after a can of oil was thrown through the window, there was a call saying there would be a bomb the next time. Counsel explained that Stewart Woodman was expected to testify that he believed the man in Missouri was crazy and was a dangerous threat to Manchester Products. Despite that, he still chose to send Robert Homick to deal with the man. (RT 106:12348-12349.)

Counsel for Robert Homick suggested a "compromise." He proposed that Steven Homick should be allowed to present evidence about the Missouri incident if there was a penalty trial. Then he could argue that Robert Homick was more involved than Steven Homick, so Steven should not receive a death sentence. Not surprisingly, counsel for Steven Homick expressed his preference for being able to make a stronger guilt phase argument that his client was not involved in the murders. The court again deferred any ruling so she could consider the matter further. (RT 106:12350-12351.)

That afternoon, the court once again reversed her position. The court saw Steven Homick as having an interest in presenting all available evidence regarding the relationship between Robert Homick and Stewart Woodman. She saw Robert Homick's interest as avoiding something the jury would see

as negative character evidence. The judge now felt that the short time available for Robert Homick's counsel to investigate the Missouri incident had become a factor against admitting the evidence. The judge also believed there would be an undue consumption of time, and that the evidence would be complex. The judge concluded she would allow Robert Homick's attorneys to make the argument that Stewart would not have hired him to commit the murders since Stewart thought he was a klutz. At the same time, Steven Homick would not be permitted to elicit evidence of the Missouri incident. The court saw no unfairness to Steven Homick as he still had other evidence to support the arguments he wanted to make to the jury. (RT 106:12354-12355.)

Counsel for Steven Homick reminded the court that among the reasons he wanted to elicit this evidence was to impeach Stewart Woodman's claim that he would not have wanted to hire Robert Homick to commit the murders because Robert was a klutz. In addition, he wanted to show that Stewart Woodman would turn to Robert Homick to physically threaten people. Indeed, this incident along with other incidents would demonstrate that **whenever** Stewart Woodman needed a "strong-arm type guy," he turned to Robert Homick and not Steven Homick. (RT 106:12355-12356.) The court was not swayed. Ignoring the impeachment of the Soft Light incident, the court expressed her belief that it was sufficient to support all of the arguments that counsel desired to make. (RT 106:12356.)

The next day, counsel for Steven Homick asked the court to reconsider her ruling regarding the Missouri incident. Counsel pointed to the cross-examination of Stewart Woodman by counsel for Robert Homick, which had occurred after the ruling the preceding day. Counsel argued it had

become clear that, in effect, there were now two prosecution teams against Steven Homick. Both the prosecutor and counsel for Robert Homick were repeatedly asking questions designed to portray Robert Homick as a klutz. Thus, the Missouri incident had become more important than ever, to show a common plan or scheme by Stewart Woodman. Counsel noted that the Missouri incident occurred much earlier than the Soft Light incident, in 1982 or 1983. Stewart Woodman sent Robert Homick out of state to deal with a person Stewart believed was crazy, in any way that Robert Homick saw fit. Stewart Woodman soon learned precisely how Robert Homick chose to deal with the incident, and that did not deter Stewart from using the services of Robert Homick on several subsequent occasions. That would greatly impeach Stewart Woodman's claim that he believed Robert Homick was such a klutz he should not be involved in any murder plot. (RT 107:12553-12556.)

Counsel argued this evidence was crucial to Steven Homick's defense and would clearly be admissible in a separate trial. A limiting instruction could be given to dissuade the jury from using this against Robert Homick as negative character evidence. The court stated that she could "certainly understand the relevance..." (RT 107:12557.) However, the court had not heard anything to change her opinion that the Missouri incident would be cumulative. The court believed that the notion that Stewart Woodman would not use Robert Homick for a serious crime had already been substantially impeached. (RT 107:12557-12558.)

Counsel for Steven Homick once again renewed his motion for a mistrial and a severance. Both motions were summarily denied. (RT 107:12558-12559.)

Almost two months later, counsel for Steven Homick once again argued for admission of evidence of the Missouri incident, in light of the evidence adverse to Steven Homick which had been presented during Robert Homick's defense. Counsel listed a number of items that had been allowed in evidence to assist Robert Homick, but were detrimental to Steven Homick. These included Art Taylor's testimony about Steven Homick's alleged drug dealing activities (discussed in detail in Argument V, subd. B, starting at p. 295 in this brief), the playing of a tape recording to impeach Det. Holder which referred to the triple murder investigation in Las Vegas (discussed in detail in Argument V, subd. E, starting at p. 317 in this brief), and the testimony from Steven and Robert Homick's sister that painted Robert Homick as an unwitting pawn of Steven Homick (discussed in detail in Argument V, subd. D, starting at p. 313 in this brief). All of these items of evidence were allowed in to provide minor assistance to Robert Homick's defense, while seriously prejudicing Steven Homick with improper negative character evidence. (RT 120:14839-14840.)

The court responded that the reference to the triple homicide investigation in Las Vegas could not prejudice Steven Homick because his name was never mentioned in connection with that incident. The court was convinced that if anybody's character was lessened by that evidence, it was that of Michael Dominguez and only Michael Dominguez. The court again saw no reason to alter her previous ruling. (RT 120:12840-12842.) Once again, counsel renewed the motions for mistrial and severance, and once again they were summarily denied. (RT 120:12842.)

Counsel for Steven Homick pressed forward, arguing that the reference to the triple murder investigation involving Dominguez prejudiced

Steven Homick because Dominguez' plea bargain was conditioned on Dominguez not being the actual killer in **any** of the cases for which he was being investigated. Clearly the authorities believed somebody else was the actual shooter in a triple murder in Las Vegas. The jury had heard much about the relationship between Steven Homick and Michael Dominguez, they knew Steve Homick lived in Las Vegas, and they knew that Los Angeles Police Department Detectives Holder and Crotsley were present when Dominguez was interviewed about the triple murder case. In this context, the jury would have certainly assumed Steven Homick was the suspected shooter in the triple homicide. (RT 120:14843-14845.)

The court saw no prejudice to Steven Homick whatsoever. The court conceded for the record that when a tape recording had been played in front of the jury, there was language at the beginning of the tape in which officers explained they were talking to Dominguez about a triple murder in Las Vegas. Nonetheless, the court saw **nothing** "that would even, under rank speculation, tie that into any defendant in this case; ..." (RT 120:14846.)

B. Despite Multiple Rulings Allowing Evidence Offered by Co-Defendants that Was Inadmissible Against Steven Homick, the Trial Court Refused to Admit Highly Relevant Evidence Offered by Steven Homick, Only Because It Might Prejudice a Co-Defendant

The court's unreasonable conclusion that Steven Homick could not have been prejudiced by the triple homicide reference is discussed in detail at pp. 322-323 in this brief. The relevance to the present argument is simply that there were several instances in which Steven Homick suffered serious

prejudice so that evidence which would have never been admitted against him in a separate trial was admitted to advance the interests of Robert Homick. If the rulings admitting such evidence were somehow appropriate, then fundamental fairness demanded that the same standard be applied when Steven Homick sought the admission of evidence that would have been admitted on his behalf in a separate trial, but which could have caused some harm to Robert Homick. Indeed, the trial court's failure to accord Steven Homick the benefit of the same generous evidentiary standard accorded his antagonistic codefendant was itself a violation of Steven Homick's right to due process and equal protection of the law. [181]

Another way to approach this problem is to recognize that error was committed at the outset, when the repeated motions for severance of parties were denied. Had a severance been granted, the court would not have faced repeated problems of balancing the interests of one defendant against another. Indeed, the trial judge herself noted on one occasion, "This is another one of those situations where we seem to be carving out new rules because we have these unsevered defendants with conflicting positions; and so I don't know about rules of evidence either. I'm just talking about what

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[181] The Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense (*Wardius v. Oregon* (1973) 412 U.S. 470, 475), and here, vis-à-vis Steven Homick, counsel for Robert Homick acted like a second prosecutor. The impact and unfairness were no different than if the prosecution had been accorded the benefit of a different and more generous evidentiary standard than Steven Homick. (See also *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection].)

seems fair to me." (RT 117:14213.) On another occasion, she noted, "I spend more time on this tightrope in this trial than anything else,..." (RT 120:14685.)

While the court may have believed it was just trying to be fair to both parties, the rules of evidence point to a very different path than the use of Evidence Code section 352 in the situation presented here. As explained succinctly in *People* v. *Greenberger* (1997) 58 Cal.App.4th 298, 351, "in a joint criminal trial, if admission of evidence of significant probative value to one defendant would be substantially prejudicial to a codefendant the remedy is not exclusion of the evidence but rather a limiting instruction or severance. (*People* v. *Reeder* (1978) 82 Cal.App.3d 543, 553.)"

Indeed, the discussion in *Reeder*, referred to by *Greenberger*, is particularly applicable to the present case:

> "It is to be noted in the case at bench that the excluded evidence proffered by defendant was asserted to be unduly prejudicial to codefendant Contreras -- not to the prosecution. The Attorney General correctly points out that the application of Evidence Code section 352 is not limited by its terms to a dispute between plaintiff and defendant but may become applicable between parties on the same side of an action when their interests are adverse to each other. Unquestionably, therefore, in the case at bench, if the jury were to use the proffered evidence for its truth, it would tend to prove that Contreras possessed a character trait or propensity for selling and furnishing heroin to others, and that, in conformity with his propensity or character trait, he committed the crime charged of selling heroin to Cineceros on the occasion in question. Such use of the proffered evidence of the specific instances of

> acts by Contreras would run afoul of the proscription set forth in Evidence Code section 1101, subdivision (a), that evidence 'of a person's character or a trait of his character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on a specified occasion,' with certain exceptions admittedly not applicable here.
>
> In the case at bench, we thus have a situation in which evidence, proffered by defendant, is of significant probative value to defendant's defense but does carry a danger of substantial prejudice to the codefendant Contreras. Is this a situation in which the trial court is justified in exercising a discretion under Evidence Code section 352 to exclude evidence of significant value to defendant because of the danger of substantial prejudice to a codefendant? We think not. The trial court has before it another alternative which we shall discuss in the next part of this opinion." (*People* v. *Reeder*, *supra*, 82 Cal.App.3d at 553-554.)

As promised, the next section of *Reeder* explained the proper alternatives the court possessed:

> "Defendant contends that it was error for the trial court to conduct a joint trial involving defendant Reeder and codefendant Contreras. We consider this contention in the context of the problem created by defendant's proffered evidence in his behalf and the trial court's ruling excluding such evidence.
>
> Penal Code section 1098 provides, in pertinent part for our purposes, that '[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders

separate trials.' In *People* v. *Aranda* (1965) 63 Cal.2d 518, 530, footnote 9, the court points out that the various practical reasons which underlie the basic premise of Penal Code section 1098 'must be subordinated when they run counter to the need to insure fair trials and to protect fundamental constitutional rights.'

The adversary interests of defendant and codefendant Contreras in the case at bench stand out with such bold luminosity that the principle set forth in *People* v. *Floyd* (1970) 1 Cal.3d 694, 720, cannot be escaped: 'To hold that the interests of codefendants in a joint trial ... are identical is to defy reality. Frequently, as in the instant case, one defendant attempts to show that he is less, or his codefendant more, blameworthy ...'

In the case at bench, when defendant proffered evidence in his defense that created a risk of prejudice to codefendant Contreras, it was error for the court to continue the joint trial and exclude defendant's proffered evidence--thus denying to defendant his right to have admitted, in his behalf, evidence of significant probative value to support his defense of innocence. Even though such evidence presented a danger of prejudice to codefendant Contreras by the jury's possible misuse of such evidence, this is not a ground for excluding such. Such a situation is contemplated by Evidence Code section 355 which provides: 'When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.'

The case at bench, therefore, does not present the usual *Aranda* problem in a joint trial of a codefendant's hearsay statement that

> implicates defendant. Here, defendant's proffered evidence concerns alleged misconduct and reports of alleged misconduct of the codefendant toward defendant's family members--providing defendant with information, whether true or false, which tends to negate defendant's guilt of the charged offense. It was the codefendant Contreras who was endangered by defendant's proffered evidence and who was entitled to the protection offered by Code section 355 of requesting an instruction limiting the use of defendant's evidence to its relevant admissible purpose. It was up to codefendant Contreras to move for a mistrial and a separate trial if he felt the danger of prejudice to him could not be alleviated or eliminated by a limiting instruction--that the jury would misuse the evidence and determine that Contreras had a bad character or a propensity for narcotic violations which would lead to the inference that he committed the offenses charged against him." (*People* v. *Reeder*, *supra*, 82 Cal.App.3d at 554-555.)

Similarly in the present case, the court was obligated to admit the evidence of the Missouri incident, since it would have substantially strengthened Steven Homick's defense. The court should have crafted a limiting instruction to prevent the jury from misusing this evidence against Robert Homick, as negative character evidence. Indeed, as shown in many other portions of this brief, the court was quite free in the use of limiting instructions to attempt to protect Steven Homick from all manner of extremely prejudicial evidence that was desired by the prosecution or by another defendant. On the other hand, if no adequate limiting instruction could be given, then it was time to recognize and correct the original error in denying the many motions to sever the defendants.

Here, the trial court expressly agreed the evidence was relevant for Steven Homick's defense, and it clearly had significant probative value in supporting that defense. The court employed the Evidence Code 352 analysis precluded in *Reeder*, finding the relevance was outweighed by the negative character evidence that would prejudice Robert Homick. (RT 106:12265; see also RT 107:12557.) Subsequently, the court recognized it would be unfair to preclude this evidence but still allow Robert Homick to argue that Stewart Woodman believed he was a klutz and would not have hired him to commit a murder. (RT 106:12312.) Unfortunately, the court changed positions yet again, going back to the precluded Evidence Code section 352 analysis and concluding Steven Homick's interests were adequately served by other facts already in evidence, concerning wrongdoing by Robert Homick at the behest of Stewart Woodman. (RT 106:12354-12355.)

Even if an Evidence Code section 352 analysis was somehow appropriate in these circumstances, the court was seriously mistaken in the conclusion that the evidence of the Missouri incident would be cumulative. The incidents in which Robert Homick stole automobiles for Stewart Woodman were much weaker in that they involved no threats or violence against other persons. The Soft-Lite incident did involve threats of violence, but was hotly contested. Testimony from police officers substantially contradicted the claims of Tracy Swartz Hebard that any threats occurred. On the other hand, the Missouri incident was very strong, with Robert Homick's threatening words preserved on tape and therefore

indisputable.[182] "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value." (*People* v. *Mattson* (1990) 50 Cal.3d 826, 871; see also *People* v. *Filson* (1994) 22 Cal.App.4th 1841, 1851. See also *People* v. *Keith* (1981) 118 Cal.App.3d 973, 980, finding an abuse of discretion in using Evidence Code section 352 to keep out defense evidence that "... would not have been cumulative since it would have emanated from somewhat less suspect sources.")

In sum, the trial court erred in performing an Evidence Code section 352 analysis at all, and it separately abused its discretion in the section 352 analysis it did perform. This resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to present all relevant evidence of significant probative value in his favor (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [18 L.Ed.2d 1019, 87 S.Ct. 1920]; *People v. Babbitt* (1988) 45 Cal.3rd 660, 684-685; *People* v. *Jennings* (1991) 53 Cal.3d 334), and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 (recognizing that 6th and 14th Amendments guarantee to criminal defendants "a meaningful opportunity to present a complete defense"); *Holmes v. South Carolina* (2006) 547 U.S.

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182 The threats of counsel for Robert Homick to find other witnesses to contest underlying facts were obviously hollow. No matter how crazy or unreasonable Robert Richardson might have been, nothing could justify Robert Homick throwing a can of oil through the window of a home, then calling to say that next time it would be a bomb through the window. Robert Homick's counsel never explained how any other evidence he may have wanted to produce would be relevant to any disputed matter.

319, 331 (same); *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

In view of the constitutional violations that occurred here, the applicable prejudice standard is the one set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. Here, it is impossible to conclude beyond a reasonable doubt that the excluded evidence would have had no impact on the verdict. Evidence against Steven Homick came almost entirely from witnesses of very dubious credibility, such as Stewart Woodman and Michael Dominguez. In contrast, the evidence incriminating Robert Homick included the uncontested facts that he was around the corner from the Woodman residence moments before the murder occurred and that he received a wire transfer of $28,000 from Neil Woodman soon after the Woodman brothers received the insurance proceeds for the death of their mother.

Robert Homick's defense was to paint his brother as the mastermind and himself as a bumbling fool who was duped by his brother. Steve Homick's defense was that the evidence against him was not credible, but the undisputed evidence against his brother showed that he was the one the Woodman brothers turned to for illegal solutions to their problems, along with the facts noted above, placing Robert near the scene of the murders and in receipt of an apparent payment for the murders. In these circumstances, the precluded evidence would have added great strength to the argument that Robert's services to the Woodman's were not only illegal, but included violence. At the same time, this would have seriously weakened Stewart

Woodman's claim that Robert was a klutz who Stewart believed should not be involved in the planned murders.

In sum, this was non-cumulative evidence that would have strongly supported an important aspect of Steve Homick's defense. In view of the credibility problems in the evidence against Steve Homick, this solid support for Steve Homick's defense had a very reasonable likelihood of impacting the verdict, meeting even the less rigorous standard of error for non-constitutional error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) But this was constitutional error, and it cannot be said that the error was harmless beyond a reasonable doubt.

V. IN A NUMBER OF INSTANCES, STEVEN HOMICK WAS PREJUDICED BY EVIDENCE ELICITED BY CO-DEFENDANTS, WHICH WOULD NOT HAVE BEEN ADMITTED IN A SEPARATE TRIAL AND SHOULD NOT HAVE BEEN ADMITTED IN THE PROCEEDINGS BELOW

A. Introduction

In the preceding two arguments a great variety of instances were shown in which the prosecution was allowed to elicit evidence which was very harmful to Steven Homick, but which was not properly admissible against him. In the present argument it will be shown that the serious character assassination and other prejudice suffered by Steven Homick was further exacerbated by the efforts of his co-defendants. and a series of related erroneous evidentiary rulings by the trial court.

Evidence improperly admitted at the instance of one or another codefendant included evidence suggesting that Steven Homick had been a drug dealer for a number of years, that Steven Homick was so wily a manipulator of others that he had manipulated an honest street-savvy attorney and former police officer into lending him what may have been the murder weapon, that Steven Homick had long dominated his younger brother and codefendant Robert Homick and routinely gotten Robert to do whatever he (Steven) ordered, and that Steven Homick was a suspect in a triple murder in Las Vegas, Nevada. The introduction of this evidence, viewed separately, and even more clearly when considered cumulatively, deprived Steven Homick of his rights to due process, to a fair trial by jury, to confront the witnesses against him, to equal protection of the law, and to

reliable, individualized capital guilt and sentencing determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

B. Testimony by Art Taylor Regarding Steven Homick's Alleged Activities as a Drug Dealer

Before presenting the testimony of Art Taylor, the prosecutor assured the trial court he did not intend to elicit any information about Art Taylor's career as a paid informant for the FBI, nor did he intend to elicit any testimony about Taylor's allegations that Steve Homick was running a mail order drug dealing business. (RT 82:8272.) Thus, the prosecutor obviously recognized that the drug dealing allegations had no relevance to proof of the present offenses.

However, counsel for Robert Homick had a different agenda. He stated he intended to seek to impeach Taylor with the evidence of his career as a paid informant. Once that area was opened up, he expected it would be impossible to avoid Taylor's expected claim that he only started working for the FBI when he became offended at Steven Homick's drug dealing activities. Counsel for Neil Woodman objected to any such evidence, explaining that the worse Steven Homick looked, the worse that Neil Woodman would look for hiring him for various tasks for Manchester Products.[183] (RT 82:8273-8274.)

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183 Counsel for Robert Homick responded that Neil Woodman had nothing to lose if Art Taylor's credibility went unchallenged, apparently since Taylor's testimony would only incriminate the Homick brothers and not the Woodman brothers. (RT 82:8274.) Of course, it could also be said that Robert Homick had everything to gain by painting his brother as the evil

(Continued on next page.)

Counsel for Steven Homick expressed understandable concern about evidence that his client was a drug dealer, but also believed it would be unfair to insulate Taylor from cross-examination about his status as a paid informant and his prior history with the FBI. He proposed a fair compromise: all defendants should be allowed to cross-examine Taylor about his informant status and about his drug dealing accusations, but he should not be allowed to mention that it was Steven Homick who was the subject of his prior FBI activities or who was allegedly involved in the drug dealing. Steven Homick's identity in this regard was not important in the impeachment of Taylor, so this would be fair to all defendants and the prosecution without unduly prejudicing Steven Homick. (RT 82:8274-8276.)

The court appeared receptive to this compromise suggestion, but counsel for Robert Homick protested that this would frustrate his desire to impeach Taylor. Pressed for an explanation as to how his efforts would be compromised by the procedure suggested by Steven Homick's counsel, he simply responded he did not want to reveal his strategy in front of the prosecutor. Finally he noted that there was additional evidence inconsistent with Taylor's claim that he became an informant because of Steven Homick's drug dealing activities, and he wanted to use that to further

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(Continued from last page.)

head of a drug-dealing business. Robert's defense depended greatly on blaming his brother for everything and minimizing his own involvement in any activities allegedly connected to the murder of the Woodmans.

These are all reasons why it was improper to deny the motion to sever the defendants, because of inconsistent defenses. That error will be addressed in another argument in this brief.

impeach the expected explanation Taylor would give to try to avoid the initial impeachment. (RT 82:8276-8278.)

The court correctly responded that there was so much other impeachment of Taylor available that this particular line of questioning would hardly be needed. But the prosecutor complained it would be unfair to portray Taylor as a drug informant without revealing to the jury that it was Steven Homick who caused him to enlist in such activities.[184] Counsel for Robert Homick reiterated the desire to show that Taylor's true motives for going to the FBI were not what Taylor claimed they were. (RT 82:8278-8283.)

The court then concluded the prosecutor should not go into drug dealing allegations on direct examination. However, she concluded that Robert Homick would not be able to fully and fairly impeach Taylor without getting into the drug allegations. The Court failed to explain how this conclusion could be reconciled with her earlier recognition of the fact that there was so much evidence available to impeach Taylor that this particular area would hardly be important. Indeed, the Court recognized that the drug dealing allegations would be very harmful to Steven Homick, but she now concluded that any such prejudice would be offset by the impeachment of

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184 The prosecutor did not explain why this would be unfair. Certainly if a major prosecution witness was a paid drug informant, it was reasonable to present that information to the jury. The details regarding whose activities led to that role did not reduce the impeachment value, nor did they do anything else to properly prove the actual present charges. Thus, it was the prosecutor who wanted to play unfairly, by either portraying Taylor as a more credible person than he was, or by improperly prejudicing Steven Homick with irrelevant allegations of drug dealing.

Taylor. Thus, having first concluded the impeachment was relatively unimportant, she suddenly and without explanation found it so helpful to the defense that it would offset the prejudice that would flow from allegations that Steven Homick was a drug dealer. Finally, the judge agreed to give a limiting instruction that the drug dealing evidence was not to be considered as character evidence, or to indicate he was a person likely to commit crimes. (RT 8283-8284.)

At this point, counsel for Neil Woodman was so dissatisfied he renewed his motion for severance. Counsel for Steven Homick joined that request, seeking a severance from both co-defendants, or at least from Robert Homick. Both motions were summarily denied. (RT 82:8285.)

Soon afterward, the prosecutor stated that if the drug dealing evidence was going to be elicited, he wanted to be the one to elicit it. Without explaining her turnabout in this regard, the judge readily agreed the prosecutor could do that. Counsel for Steven Homick renewed his objection to all of this and expressed his belief that no admonition could cure the very substantial prejudice his client would suffer. (RT 82:8287-8290.)

Taylor then testified to the following facts on direct examination by the prosecutor: He and Steven Homick had been friends for years, they talked on the phone almost every day, and when Steve was in Las Vegas he came into Art's shop almost every day. (RT 82:8299-8302. 8306, 8310.) Steve Homick used Taylor's shop to send and receive packages related to a vitamin business. Taylor learned some of the packages contained illegal drugs. He was offended because he had given his daughter one such package to take to the post office. Taylor contacted the FBI around 1983 and began supplying regular information about Homick's activities. (RT 82:8361-

8368.) The FBI paid Taylor approximately $10,000 between 1983 and early 1986. (RT 82:8369.) This was all repeated on cross-examination by counsel for Robert Homick. (RT 82:8420-8422; 8425-8427, 8434-8435, 8437.)

At the conclusion of the testimony, the jury was instructed that the testimony about drug dealing by Steven Homick, if believed, could only be used for determining whether it impeached the credibility of Art Taylor, and could not be used to show Steven Homick was a person of bad character or was predisposed to commit crimes. The jury was also told that no evidence indicated Neil Woodman knew about any such drug dealing, so it could not be used against him. (RT 82:8452.) That testimony was given on November 9, 1992. Nearly **four months later**, on March 2, 1993, FBI Agent Livingston was asked about the initial recruitment of Art Taylor, on redirect examination by the prosecutor. Livingston described his introduction to Taylor in early 1985, after Taylor had already been supplying information to another FBI agent. Livingston testified that Taylor had told him he was opposed to narcotics, that he had discovered that Steven Homick was involved in narcotics activities with which Taylor wanted nothing to do, and that he had approached the FBI and had begun providing information about the activities of Steven Homick. (RT 119:14537.)

Counsel for Steven Homick objected to this testimony by Agent Livingston and moved for a mistrial, obviously believing there was no legitimate reason for the prosecutor to be reiterating this prejudicial information. The court denied a mistrial, noting that this was all information the jury had heard before. Counsel asked for an admonition that the evidence could not be used to establish bad character. The court refused, noting only

that she had already given such an admonition when this information had first been presented to the jury. (RT 119:14539-14540.)

Serious prejudicial errors were committed in the admission and handling of testimony about alleged drug dealing by Steven Homick. Nobody ever contended this evidence had any relevance at all in proving the offenses charged against the three defendants. The prosecutor readily agreed at the outset to not elicit any such evidence. When counsel for Steven Homick proposed impeaching Taylor with evidence of his activities as a paid FBI informant, while not revealing that Steven Homick was allegedly involved in the drug dealing which Taylor claimed was the impetus for those activities, the judge initially responded favorably and the prosecutor never voiced any objection. Thus, it was only because counsel for Robert Homick insisted on bringing out allegations that Steven Homick was a drug dealer that the jury ever heard such information at all.

It is well known that evidence that a defendant had committed other serious crimes, aside from those presently charged against him, carries a particularly high danger of prejudice. As this Court has explained:

> "The admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact. This court has repeatedly warned that the admissibility of this type of evidence must be 'scrutinized with great care.' '[A] closely reasoned analysis' of the pertinent factors must be undertaken before a determination can be made of its admissibility." (*People* v. *Thompson* (1980) 27 Cal.3d 303, 314.; footnotes with citations omitted.)

"As Wigmore notes, admission of this evidence produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.' (1 Wigmore, Evidence, § 194, p. 650.) It breeds a 'tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offences. ...' (Ibid.) Moreover, 'the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor.' (Note (1964) 78 Harv.L.Rev. 426, 436.) 'We have thus reached the conclusion that the risk of convicting the innocent ... is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty.' (Citation omitted.)

Even if evidence of other crimes is relevant under a theory of admissibility that does not rely on proving disposition, it can be highly prejudicial. 'Regardless of its probative value, evidence of other crimes always involves the risk of serious prejudice. ...' (*People* v. *Griffin* (1967) 66 Cal.2d 459, 466.) Therefore, the law places other restrictions on its admissibility. If evidence is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity. (Citations omitted.) Further, under Evidence Code section 352, the probative value of this evidence must outweigh its prejudicial effect. (Citations omitted.) Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence should be excluded. (Citation omitted.)" (*People* v. *Thompson, supra,* 27 Cal.3d at 317-318.; footnotes omitted. See also *People* v. *Williams* (1988) 44 Cal.3d 883, 904-905, reiterating these principles.)

These principles were violated in several respects. The trial court did not closely scrutinize various factors. Instead, the court over-emphasized the importance of this evidence to Robert Homick moments after noting the evidence was not very important. With the same flawed reasoning, the court summarily dismissed the danger of prejudice to Steven Homick by simply noting it would be offset by the impeachment of Art Taylor, even though the court had just recognized that there was ample other evidence to impeach Taylor. Furthermore, at a very minimum, even if the trial court was correct in believing there was some relevance Art Taylor's explanation why he first got involved in informing for the FBI, nobody ever explained why it was necessary to identify Steven Homick as the alleged drug dealer who caused Taylor's daughter to unwittingly carry drugs to the post office. Taylor could have just as well told his story of why he first went to the FBI without referring to the name of that alleged drug dealer. There was no relevance to the identity of that person, except as **improper** character evidence.

The danger of prejudice was especially high because the jury did not hear any other proper evidence of prior serious crimes by Steven Homick. (Compare *People* v. *Hamilton* (1985) 41 Cal.3d 408, 426-427, where improper other crimes evidence was found harmless because there was other proper evidence of at least two prior and one pending felony.) Moreover, since Taylor started his informant activities in early 1983 and testified that he saw Steven Homick almost daily in the 1983-1985 timeframe, it would have been obvious to the jury that Steven Homick had never been arrested or punished for the alleged drug dealing activities. (Compare *People* v. *Falsetta* (1999) 21 Cal.4th 903, 917: "... the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual convictions and a prison

term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses.") Also, the totality of the evidence before the jury made it clear that the FBI had been closely monitoring Steven Homick's activities over a substantial period of time as a result of Taylor's drug dealing allegations, so the jury could only conclude that the FBI must have suspected very serious and large-scale drug dealing by Steven Homick, rather than relatively minor sales activities.

The court's lack of sensitivity to the problem was made most clear when the court refused to take the fifteen seconds necessary to admonish the jury, as requested by counsel, after FBI Agent Livingston reiterated the drug dealing allegations originally made by Taylor. The denial of the request for an admonition was based solely on the unrealistic view that the admonition given **four months earlier**, when Taylor testified, was sufficient. In fact, the opposite was true, since the original admonition was not even adequate to overcome the prejudicial impact of Taylor's testimony given close in time to the admonition. When jurors is trying to determine whether a defendant is guilty of a double homicide, it cannot realistically be expected that they will be able to disregard information that the FBI was also investigating the same defendant for running a drug dealing operation.

As shown in the preceding argument in this brief, the proper standard for balancing conflicting interests among co-defendants is set forth in *People* v. *Greenberger* (1997) 58 Cal.App.4th 298, 351: "... in a joint criminal trial, if admission of evidence of significant probative value to one defendant would be substantially prejudicial to a codefendant the remedy is not

exclusion of the evidence but rather a limiting instruction or severance. (*People* v. *Reeder* (1978) 82 Cal.App.3d 543, 553.)" As shown above, this evidence was **not** of significant probative value to Robert Homick, so exclusion was an appropriate remedy.

The admission of evidence of Steven Homick's alleged drug dealing violated longstanding state law governing the admission of other crimes evidence and fundamental fairness and a limiting instruction could not have cured the harm, so the proper remedy under *Reeder* and *Greenberger* was a severance. Alternatively, even if a limiting instruction could have mitigated the harm in this instance, **none was given** when the evidence came in a second time four months later, because the court expressly refused the request by counsel for Steven Homick. Finally, if section 352 did apply instead of *Reeder* and *Greenberger* (because the evidence did not have significant probative value for Robert Homick), it was violated here because the any slight probative value was heavily outweighed by the risk of great prejudice to Steven Homick.

As a result of this serious error, both standing alone and when considered cumulatively with the many other errors that unfairly damaged his character, Steven Homick' was deprived of his federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392,

402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

C. Testimony That Attorney Max Herman Would Not Have Given a Gun to Steven Homick If He Realized It Would Be Used in a Crime

Michael Dominguez, in his prior statements and former testimony, claimed that on the day preceding the Woodman murders, he accompanied Steven Homick on a visit to the law offices of Max Herman. Steven Homick emerged from his meeting with Attorney Herman carrying a gun case he had not possessed when they arrived. Later, Dominguez saw a gun in that case. (RT 85:8960-8962, 8975-8983.)

Robert Homick called retired Superior Court Judge Clarence Stromwell as a witness. Judge Stromwell had been a judge for 25 years and a police officer for 20 years before that. While a police officer, Max Herman was his good friend and partner for 17 years, and they remained friends when they both became attorneys, until Max Herman's death. As police officers, they both dealt frequently with street people. (RT 116:13963-13968.)

When Robert Homick's counsel began asking Judge Stromwell whether Max Herman would have given a gun to Steven Homick and Michael Dominguez, counsel for Steven Homick objected. At bench, he elaborated, complaining that Robert Homick was trying to sneak in bad character evidence, painting his brother as a con artist. Counsel for Robert Homick conceded that his purpose was to show that Steven Homick had the

ability to manipulate influential street-savvy people, just as he had manipulated Robert Homick. (RT 116:13968-13969.)

The court then articulated the belief that the evidence would be admissible in support of Robert Homick's defense, which involved showing that his brother Steven Homick could be deceptive, could take advantage of people, and could use people in a manner that left them not realizing the purpose for which they had been used. The judge believed that if the evidence had such a legitimate purpose, it could not be precluded just because it also had the effect of showing bad character in regard to Steven Homick. While the testimony was not admissible for the purpose of showing bad character, that additional consequence did not make the evidence inadmissible for its intended purpose. (RT 116:13970.)

Counsel for Steven Homick then added Evidence Code section 352 as a basis for his objection. He noted that the court had previously used that section to preclude evidence of a Missouri incident that was damaging to Robert Homick, even though it would have strongly supported the legitimate defense of Steven Homick.[185] The court responded that the Missouri incident was different because it was merely cumulative and because the present evidence had stronger relevancy. With that explanation, the court

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185 See Argument IV, subd. B, starting at p. 284 in this brief, discussing the erroneous preclusion of evidence that the Woodman brother hired Robert Homick to perform acts of violence on their behalf, against Robert Richardson.

overruled the present Evidence Code section 352 objection.[186] (RT 116:13971.)

Judge Stromwell was then permitted to testify that Max Herman was an unquestionably honest person who would not have involved himself in any way in the commission of a crime. He would not have given a gun to Steven Homick if he had any suspicion that the gun was to be used for any unlawful purpose. Judge Stromwell also believed that Max Herman was not someone who could be easily manipulated. (RT 116:13972-13973.)

In his final argument to the jury, counsel for Robert Homick fully exploited this evidence:

> "You heard in this trial the testimony regarding Max Herman. Max Herman gave Steven Homick the murder weapon in this case. You heard about Max Herman.
>
> In 1985, on September 25th, or September 24th, Max Herman was an attorney. But before that, Max Herman was a police officer. Judge Clarence Stromwell came to court and testified about Max Herman. He said they had been partners together for 17 years, and they were together on the Hat Squad homicide detectives. There were only 4 of them in the whole squad, and 3 of them went on to law school, and 2 of those went on to become judges.
>
> He said Max Herman is a man streetwise and savvy, extremely honest, and not easily manipulated, and a good judge of character. He would not have given someone a gun if he thought that person was going to use it in a

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186 As shown in Argument X-x, the precluded evidence of the Missouri incident was actually not at all cumulative and was far more relevant than the present evidence.

> crime, yet he gave Steven Homick the murder weapon the day before the murders.
>
> What does that tell you? That Steve Homick was very effective as a user of people. He could fool people. Max Herman trusted him enough to give him what turned out to be the murder weapon." (RT 129:16060.)

At this point, after the third time that counsel said that Max Herman had given Steven Homick the murder weapon, the court interrupted to admonish the jury that there had been no evidence in the trial identifying any specific gun as being the murder weapon. Barely deterred, counsel continued his argument, conceding that the jury would have to determine whether the gun from Max Herman was the murder weapon and arguing that was the reasonable inference. (RT 129:16060-16061.) Counsel then continued:

> "And, again, the point is, that if that gun was the murder weapon, it was given to him by a man named Max Herman, who was a former police officer, who is not easily manipulated, who is a good judge of character, yet look at what happens here." (RT 129:16061.)

Counsel then proceeded to argue that Steven Homick had used Robert Homick the same way he had used Max Herman, getting assistance in a crime without revealing anything about the crime. (RT 129:16061-16069.)

The rationale underlying the court's decision to admit this testimony was flawed in several respects:

1. The manner in which Judge Stromwell's opinions about Max Herman were utilized by Robert Homick were improper. In a proper context, it would have been proper for Judge Stromwell to express his opinion that Max Herman was an honest person. However, subject to exceptions inapplicable in the present case,

"evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evidence Code section 1101.) Thus, it was improper to admit Judge Stromwell's opinion of Max Herman's character trait of honesty when the **only** purpose of eliciting such evidence was to prove conduct on a specified occasion - that Max Herman did not give a gun to Steven Homick on September 24, 1985 with knowledge that the gun was going to be used in a crime.

2. Pursuant to Evidence Code section 1105, "Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom." However, Judge Stromwell was not in any position to testify to Max Herman's habits or customs at his law office in 1985. Judge Stromwell and Max Herman had been partners as police officers some 20 to 40 years before the Woodmans were murdered. (RT 116:13963-13966.) Judge Stromwell began his service on the bench in 1967. (RT 116:13963.) After that, he and Max Herman "maintained a relationship." (RT 116:13966, ll. 23-24.) After 1967, Judge Stromwell visited Max Herman's law office only on **rare** occasions. (RT 116:13973, ll. 24-26.) Judge Stromwell had **never** been to Max Herman's law office in Glendale, where he worked for 5 or 6 years before his death around mid-1990, and where he was allegedly visited by Steven Homick. (RT 116:13973-13974.) Thus, while Judge Stromwell

may have been familiar with Max Herman's reputation for honesty, he was in no position describe Max Herman's habits and customs with visitors to his law office in 1985.

3. Even if the testimony was somehow admissible for the purpose for which it was used, the probative value was exceedingly low. First, as the judge recognized during argument, there never was any evidence that the gun allegedly obtained from Max Herman ever was used in any crime. Second, for the reasons set forth above, Judge Stromwell could do little more than guess whether, and under what circumstances, Max Herman would have given a gun to Steven Homick. Even if we speculate to the extent of assuming that Max Herman did give a gun to Steven Homick without knowing the true purpose for the gun, we still have no idea whatsoever what Steven Homick might have said to Max Herman, or what kind of relationship they had, or even who owned the gun. There is simply not enough information on which to base an inference that Steven Homick must have performed a masterful manipulation of the street-savvy Max Herman. It takes an even greater leap of the imagination to get from there to the completed untethered inference that this somehow proves that Steven Homick manipulated his own brother into helping to kill the Woodmans without the brother even realizing there was going to be a killing.

4. Furthermore, the only evidence that Steven Homick ever obtained a gun from Max Herman came from the former testimony and prior statements of Michael Dominguez. If the jury chose to rely

on Dominguez, then they could only conclude that Robert Homick participated in the Woodman murders with full knowledge of what he was doing. If they disbelieved Dominguez, then there was no reason for them to believe the portion in which Dominguez claimed that Steven Homick obtained a gun from Max Herman at all. Similarly, if the jury believed Stewart Woodman, then once again they could only conclude that Robert Homick participated with full knowledge. There is no actual evidence to support a scenario in which Robert Homick participated in the murder conspiracy without knowing the purpose of his efforts.

5. Having denied a severance of parties with thoroughly inconsistent defenses, it was incumbent on the court to carefully weigh the interests of each defendant in making evidentiary rulings. Instead, the judge openly concluded that if something helped Robert Homick's defense it must be admitted, and the fact that it unfairly harmed Steven Homick (by constituting negative character evidence) was irrelevant. Thus, the judge misapplied the *Reeder-Greenberger* standard, since it only applies when the evidence has significant probative value, which it lacked here. Furthermore, if that standard did apply, severance was mandated since no limiting instruction could cure the harm, and no proper one was ever given. Alternatively, if Evidence Code section 352 applied here, it was not utilized by the court.

6. Exacerbating her reliance in this instance on an erroneous and unreasonable standard, i.e., that if evidence is helpful in any way to a defendant's defense it must come in regardless of its

prejudicial impact on a codefendant, the court then failed to apply any standard evenhandedly. As shown in Argument IV, subd. B, starting at p. 284 in this brief, the judge was quite willing to keep out legitimate evidence important to the defense of Steven Homick, simply because it constituted negative character evidence about Robert Homick. This failure to apply the same legal standard to Steven Homick as was applied to his antagonistic codefendant was itself fundamentally unfair and a violation Steven's Homick's rights to due process and equal protection of the law under the Fourteenth Amendment. (See *Wardius v. Oregon, supra,* 412 U.S. at 475; and *Lindsay v. Normet, supra,* 405 U.S. at 77.)

7. If the judge did make the effort to balance Robert Homick's needs against Steven Homick's interests, the result was still unreasonable and an abuse of discretion, assuming discretion existed. Again, comparing this ruling to the one discussed in Argument IV, subd. B, starting at p. 284 in this brief, regarding the Missouri incident, that excluded evidence was not at all cumulative and had much greater probative value that the testimony of Judge Stromwell.

8. In the event Evidence Code section 352 did apply in these circumstances, a proper balance of probative value versus prejudicial impact should have resulted in excluding Judge Stromwell's testimony. As shown above, the probative value was minimal at best, and could not have outweighed the prejudice suffered by Steven Homick.

Thus, once again Steven Homick was forced to endure an unfair attack on his character, this time portraying him as an evil, deceptive manipulator. Even if this incident, standing alone, was not sufficiently prejudicial to justify a reversal of the judgment, it is one more error that should be considered along with all the other erroneous evidentiary rulings that, cumulatively, rendered Steven Homick's trial unfair.

D. Testimony by Steven Homick's Sister Regarding the Relationship Between Robert and Steven Homick

In similar fashion to the Judge Stromwell testimony discussed in the preceding section of this argument, counsel for Steven Homick objected to Robert Homick calling Helen Copitka as a witness. Counsel argued that Robert Homick was again seeking to unfairly smuggle in negative character evidence regarding Steven Homick. Helen Copitka was the sister of both Robert and Steven Homick. Counsel for Robert Homick explained that his defense theory was that Steven Homick requested Robert Homick to do things and Robert did them without awareness of the reasons Steven wanted them done. Ms. Copitka would give testimony that would show it was common for Steven to give orders that Robert would follow without question. (RT 117:14171-14174.)

Counsel for Steven Homick responded that Miss Copitka had not lived anywhere near either of her brothers for over 20 years; she lived in Ohio and then Texas while her brothers lived in Los Angeles and Las Vegas. The court dismissed that, believing that inter-familial relationships established at an early age tend to continue. (RT 117:14174.)

Counsel also returned to the Missouri incident involving Robert Richardson, discussed in Argument IV, subd. B, starting at p. 284 of this brief, since that would be an example of a violent criminal act performed by Robert Homick for the Woodman brothers, with no evidence of involvement by or encouragement from Steven Homick. If Robert Homick's defense was that he only acted on orders from his brother without awareness of the goal, then there was more probative value than ever in the Missouri incident, where Robert Homick acted at the direction of Stewart Woodman and clearly did know what he was doing. Also, counsel desired to ask Ms. Copitka whether the Missouri incident would change her opinion about the relationship between her brothers. (RT 117:14174-14176.)

The court did not respond at all to the contention that admissibility of the Missouri incident should be reconsidered because this testimony would make that incident even more relevant than it appeared when the court disallowed it. The court did respond to the other portion of counsel's argument. The court saw no need to cross-examine Ms. Copitka about the incident since her testimony would be limited to the relationship between the brothers, and would not be addressing anything involving other persons. (RT 117:14176-14177.)

As described in more detail in the Statement of Facts portion of this brief, Ms. Copitka was then permitted to testify that her parents had to spend much of their time caring for another child who had serious medical problems, leaving Steven to often fulfill the role of a parent to his brother Robert, who was eleven years his junior. It became common for Steven to tell Robert what to do and when to do it. Steven regularly issued orders to Robert, who idolized and trusted him, and did his best to please him. Steven

had an outgoing personality and was a leader, while Robert was very shy and withdrawn and was a follower. In her contacts with Steven and Robert as adults, Ms. Copitka did not detect any change in the relationship between her brothers. (RT 117:14198-14210.)

However, Ms. Copitka conceded that since 1971, she had only seen her brothers at occasional family gatherings, either in Las Vegas where their brother William also lived, or in Ohio where they all grew up. She saw her brothers during a one-week Christmas visit to Las Vegas in 1978 or 1979, and then did not see them again until a 4 or 5 day visit for a graduation in 1982 or 1983. Following that visit, she did not see them again until after they were arrested. (RT 117:14222-14228.)

This testimony suffered from some of the same problems discussed above in regard to the Judge Stromwell testimony:

1. The probative value of Ms. Copitka's testimony was slight at best, and not sufficient to constitute the significant probative value needed to meet the *Reeder/Greenberger* standard. When the Woodmans were murdered, the Homick brothers were no longer children with the older brother in a surrogate parent role. By then, Robert Homick was 35 years old, a graduate of the UCLA Law School, and a member of the State Bar of California. Ms. Copitka saw her brothers only rarely after Robert turned 18 and moved to California. Thus, she had no meaningful personal knowledge of the relationship between Steven and Robert after the brothers were both adults. She only saw the brothers together at occasional family-gatherings for a few days at a time, once every several years. It is a well-known fact of human nature that when family

members who have lived apart get together for occasional family affairs, they tend to revert to their family relationships even when that is very different from their normal adult roles. Ms. Copitka's experiences with her brothers tell us nothing meaningful about what role either of them may or may not have played in the conspiracy to murder the Woodmans. If this evidence had any probative value at all, it was clearly outweighed by its prejudicial impact as to Steven Homick, and accordingly should have been excluded.

2. While counsel for Robert Homick stated that the theory of Robert's defense was that Steven Homick requested Robert Homick to do things and Robert did them without awareness of the reasons Steven wanted them done, this was nothing more than an imaginative theory devoid of any support in the evidence presented. There was simply no evidence at all that Steven Homick ever requested Robert Homick to do anything that might have pertained to a murder conspiracy, without Robert being aware of the reasons for the request. Without some minimal evidence of any such activity in connection with the alleged murder conspiracy, the boyhood relationship between the brothers was simply irrelevant to any issue actually in dispute.

3. If Robert Homick's boyhood behavior of following instructions from his brother without question was somehow relevant to any disputed issue in the case, then it was at least equally relevant that Robert Homick performed violent criminal actions, with full knowledge of what he was doing, at the direction of Stewart

Woodman and without any involvement by Steven Homick. Thus, the ruling to allow this evidence simply cannot be reconciled with the ruling precluding evidence of the Missouri incident involving Robert Richardson. In other words, it was an abuse of discretion and a denial of fundamental fairness, due process and equal protection of the law under the Fourteenth Amendment to allow evidence that helped Robert Homick even though it unfairly hurt Steven Homick, while disallowing evidence that legitimately supported Steven Homick's defense, simply because it might harm Robert Homick.

4. The error in admitting this evidence was seriously exacerbated when counsel for Robert Homick strenuously argued his unsupported theory to the jury, to the further detriment of Steven Homick.

Thus, this constitutes one more incident of unfair character assassination against Steven Homick, to be considered in combination with the many other such instances. Furthermore, this is one more example of how Steven Homick was unfairly prejudiced by the denial of his many motions to sever his trial from that of his brother.

E. Improper References to the Triple Murder Investigation in Las Vegas

Detective Holder was one of the main investigating officers for the Woodman murder case. He and Detective Crotsley first interviewed Michael Dominguez, in Las Vegas, on March 13, 1986 from 4:35 PM until 6:10 PM. Thirty-two minutes later, Dominguez was interviewed again, by Las Vegas

Detectives Dillard and Leonard. When he was examined by counsel for Robert Homick, Det. Holder testified that prior the time of his initial interview of Michael Dominguez, nobody from Los Angeles had any discussion with Dominguez about any possible plea bargain in return for assistance. Holder conceded he had probably had a telephone discussion earlier that day with Deputy District Attorney Krayniak, who was then in charge of the Woodman murder case, but Holder was certain that any discussion with Krayniak at that time was only in the most general terms, since Holder did not have any idea yet how helpful Dominguez might be. Holder also denied that there was any discussion of a plea agreement during his interview of Dominguez, or in the 32 minutes between the two interviews. Specifically, Holder did not believe there was any discussion before the second interview about the possibility of Dominguez serving as little as eight-to-fifteen years in custody, or about any deal being conditioned on Dominguez not being the shooter in any of the murders under investigation. (RT 119:14590-14597.)

Counsel for Robert Homick then wanted to play the beginning of a tape recording of the second interview with Dominguez. The judge reviewed a transcript of that portion of the tape and verified that before the interview about the Las Vegas murders began, and while Det. Holder was still present, there was a reference to a tentative agreement with Dominguez that would involve concurrent time for the Los Angeles and Las Vegas murders, with a possible plea to second degree murder in California. The court agreed this would impeach Det. Holder's testimony. The prosecutor complained that he

would not be able to question Holder further about this matter without making reference to the Tipton triple murder case.[187] The court disagreed, concluding that the prosecutor could simply refer to the investigation of "another crime" in Las Vegas, without referring to the Tipton case or to Steven Homick. (RT 119:14598-14601.)

Back in the presence of the jury, counsel for Robert Homick then played the tape recording of the beginning of the second interview, to impeach Det. Holder. However, instead of simply describing the tape as the beginning of the second interview about other crimes in Las Vegas, counsel started playing from the beginning of the tape, including an introductory portion in which officers explained they were talking to Dominguez about a **triple murder** in Las Vegas. (RT 119:14603; see also RT 120:14846 and Exhibit 810.) After listening to the tape, Det. Holder was forced to concede it did appear that he and counsel for Michael Dominguez must have already tentatively agreed upon a sentence disposition in return for Dominguez' co-operation. However, Holder continued to insist he did not recall such a discussion and he would not have had the authority to make such an agreement.[188] (RT 119:14603-14608.)

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187 Steven Homick had been convicted of three murders in the Tipton case in Las Vegas. Evidence about those murders was introduced in the penalty phase of the present case, but was never admitted during the guilt trial.

188 Indeed, Holder specifically conceded he sat at the interview and did nothing to interrupt counsel for Michael Dominguez as he described a tentative agreement with the Los Angeles Police Department under which Dominguez would receive a sentence which would result in release on parole 8 to 12 or 15 years down the road. Holder conceded he must have discussed

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At bench, the prosecutor again expressed concern about continuing with this line of questioning, as it would unavoidably get into the Tipton murder case. The court concluded that counsel had adequately made his point, and directed him to move on to another subject. (RT 119:14609-14610.)

Subsequently, when the prosecutor examined Det. Holder, he made no effort to follow the court's instructions about referring to the Tipton case only as another crime in Las Vegas. Instead, the prosecutor re-emphasized what the jury had already heard on tape, asking the detective about the second interview that "pertained to a triple homicide that detectives Dillard and Leonard were investigating." (RT 119:14647, ll. 12-13.)

The next day, counsel for Steven Homick moved for a mistrial, arguing that the reference to the triple murder investigation involving Michael Dominguez caused incurable prejudice to Steven Homick. The deal that Dominguez had made to obtain leniency in return for his co-operation was conditioned on Dominguez not being the actual killer in **any** of the cases for which he was being investigated. Obviously, law enforcement believed somebody other than Michael Dominguez was the actual shooter in a triple homicide in Las Vegas. The jury knew that Steven Homick lived in Las Vegas and was being investigated for other crimes there. The jury had heard

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that with the attorney. Holder thought he might have been in contact with Deputy District Attorney Krayniak during the 32 minutes between the 2 interviews, although Holder did not believe that even Krayniak could have approved such a disposition without getting approval from his own supervisor. (RT 119:14605-14608.)

much about the relationship between Steven Homick and Michael Dominguez. The jury knew that Detectives Holder and Crotsley stayed in the room when Dominguez was interviewed about the triple homicide investigation. In light of all this, the jury would have undoubtedly assumed that Steven Homick was the suspected shooter in the triple homicide. (RT 120:14843-14845.)

Despite this strong argument, the court saw no prejudice to Steven Homick whatsoever from the triple murder reference. The court conceded for the record that when the tape recording had been played in front of the jury, there was language at the beginning of the tape in which officers explained they were talking to Dominguez about a triple murder in Las Vegas. Nonetheless, the court saw **nothing** "that would even, under rank speculation, tie that into any defendant in this case; ..." (RT 120:14846.)

As will be explained, the references to the triple homicide in Las Vegas were completely unnecessary, highly improper, and seriously prejudicial to Steven Homick. The court's conclusion that even rank speculation would not have led to any negative implications about Steven Homick was unfounded and unreasonable.

The record does not make clear whether the court and all counsel realized before counsel for Robert Homick played the tape that he intended to include the reference to the triple homicide. It would appear that this was not realized in advance, since there would have certainly been an objection and discussion about such an intention. Indeed, this occurred immediately after the court had instructed the prosecutor to refer to the matter as simply "another crime" in Las Vegas.

There was no legitimate benefit to Robert Homick, and no other necessity to include that portion of the tape.[189] The purpose for which the tape was played was to impeach Det. Holder's testimony that there had not yet been any discussion of a potential leniency agreement between Los Angeles authorities and Michael Dominguez. Counsel could have easily established through Det. Holder or by stipulation with other counsel that the taped excerpt where the tentative agreement with Dominguez was set forth occurred at the very beginning of the second interview on March 13, 1986. Then the portion of the tape describing the tentative agreement could have been played, without playing the introduction that referred to the triple homicide. It is simply inexcusable that the jury was informed that the subject of the second portion of the interview was a triple homicide. Similarly, there was no need for the prosecutor to echo the reference to the triple homicide. He had been expressly told to refer only to "another crime," and that could have been easily accomplished without compromising any legitimate interest of the prosecutor.

Although the trial court professed to see no possible prejudice to Steven Homick because his name was never mentioned in connection with the triple homicide, that conclusion was simplistic and unreasonable. Clearly, **somebody** aside from Dominguez was suspected of involvement in the triple homicide. Indeed, as counsel explained, in light of the plea agreement in which Dominguez could not be the actual shooter in **any** of the murders under investigation, it was clear that somebody other than

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189 Therefore, once more, the *Reeder/Greenberger* rule was inapplicable.

Dominguez was suspected of being the actual shooter. The jury had been listening to months of testimony designed to convince them that Steven Homick had hired Dominguez to assist in the Woodman murders, so Steven Homick would be the first person the jurors would think of as they inevitably wondered who was the actual shooter in the triple homicide in Las Vegas.

The jury had a wide variety of factors to support the inevitable initial suspicion that Steven Homick was the suspected shooter. The jury knew that the officers investigating the Woodman murders stayed for the interview about the triple homicide. The jury knew that Las Vegas officers had been investigating other crimes for which they believed Steven Homick was responsible. The jury knew that Steven Homick lived in Las Vegas, and that he had been taken to Las Vegas to stand trial on other charges. Moreover, despite the proper objection by counsel for Steven Homick, the jury had earlier heard the full tape of the initial part of the March 13, 1986 interview with Dominguez wherein he said that when Steven Homick hired him to assist in a robbery in Los Angeles, Dominguez expected that the victims would be killed simply because, "I just know Steve." (RT 88:9269.) On that same tape, Dominguez also said his belief the victims were to be killed was "based on being with Steve and what Steve had done." (RT 86:9028-9029.) (See more detailed discussion of this error in Argument VII, subd. F, starting at p. 415 in this brief.) These statements implied Dominguez was claiming there were other occasions when Steven Homick had killed people. The knowledge that the police were investigating Dominguez for a triple murder in which they apparently accepted Dominguez' claim he was not the shooter added corroboration to Dominguez' implication that Steven Homick had killed others.

It is true that counsel for Steven Homick failed to object to the reference to the triple homicide at the time it occurred. As explained above, that was apparently because counsel did not expect that portion of the tape to be played. Once it was played, an objection would have only highlighted the matter, doing far more harm then good. Once the jury heard Michael Dominguez' attorney on tape referring to the investigation of a triple homicide in Las Vegas, there was no way the jury could have been expected to disregard such a sensational revelation. Indeed, if Steven Homick's counsel had made such an objection in front of the jury, that would have removed any need for the jury to speculate whether Steven Homick was the suspected shooter. Why would Steven Homick's counsel be concerned about such a statement unless their client was the suspected shooter?

Thus, a prompt objection would have been futile. Counsel did bring the matter up the next day and a mistrial was sought. Under the circumstances, this should be sufficient to preserve the issue for appeal. In any event, even if this Court were to find a waiver of the issue as an independent error, it would still remain as one more instance in which Steven Homick was seriously prejudiced by the denial of his motion for severance from his co-defendants, an issue that was repeatedly preserved.

The prejudice from this incident was extreme. Instead of viewing Steven Homick as a suspect in a two murders on a single occasion, the jury inevitably viewed him as a suspect in five murders on two separate occasions in two different states. Combined with other improper evidence, discussed above, that the FBI had been investigating Steven Homick for several years for selling drugs, the jury must have begun to view Steven Homick as Public Enemy Number One. As a result, the likelihood was great that Steven

Homick was convicted based on negative innuendo about his character, rather than the evidence. Thus, Steven Homick was deprived of his federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witness, and to reliable fact-finding underlying capital guilt verdicts.

VI. A WIDE VARIETY OF HEARSAY STATEMENTS WERE IMPROPERLY ADMITTED PURSUANT TO THE CO-CONSPIRATOR HEARSAY EXCEPTION EVEN THOUGH THEY WERE NEITHER MADE DURING THE CONSPIRACY NOR IN FURTHERANCE OF THE CONSPIRACY

A. Introductory Summary

During the course of the prosecution's presentation of its case, the trial court repeatedly misapplied the co-conspirator exception to the hearsay rule. The court did so by ignoring the actual evidence as to the starting date of the alleged conspiracy and/or ignoring or misconstruing the requirement that the proffered statement has been made in furtherance of the conspiracy. As a result the court erroneously admitted a mass of inflammatory hearsay, including evidence that Robert Homick issued a death threat against a Manchester Products customer in the course of attempting to collect a debt, and evidence that one or both of the Woodman brothers made statements indicating that if someone annoys you, you can hire a hit man to stop him; that if friend and customer Jack Ridout needed his estranged wife killed they could have that done for him and that Steven Homick was their collections man; that if they needed anything done, their boy in Vegas could do it for them, that Steven Homick was their boy in Vegas and was a heavy guy, and, indeed, was tougher than the Mafia. The introduction of this evidence, which was relied upon in closing argument by the prosecutor, deprived appellant Steven Homick of his rights to due process, to a fair trial by jury, to confront the witnesses against him, and to reliable, individualized capital guilt and sentencing determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

B. Factual Introduction Regarding When the Alleged Conspiracy Began

The Amended Information filed June 1, 1990 alleged a conspiracy to commit murder which occurred between April 1, 1982 and January 10, 1986. Thirty-four overt acts were listed. The first three overt acts specified dates in 1982 and 1983, as follows: Overt Act Number 1 alleged that in April 1982, the Woodman brothers received a phone call from Joey Gambino suggesting they should talk to Steven Homick as he could solve their problems. Overt Act Number 2 alleged that in May 1982, the Woodman brothers and Steven Homick met and discussed a plan to kill the Woodman parents. Overt Act Number 3 alleged that on April 18, 1983, Stewart Woodman instructed Prudential Life Insurance not to cancel the $500,000 life insurance policy on the life of Vera Woodman. (SCT 1:42-44.)

The next 2 overt acts spanned several years. Overt Act number 4 alleged that during the years from 1982 through 1985, the Woodman brothers made cash payments to Robert Homick. Overt Act Number 5 alleged that during the years from 1983 through 1985, the Woodman brothers directed the continued payments of premiums for the life insurance policy on Vera Woodman. (SCT 1:44.) All 29 remaining overt acts alleged events that occurred between June 1985 and January, 1986. (SCT 1:44-51.)

The evidence produced by the prosecution came nowhere near supporting the dates alleged in the Information. Regarding overt acts number 1 and 2, Stewart Woodman testified that the conversation in which Gambino urged him to call Steve Homick to solve his problems occurred in June 1983, not in April 1982. No other prosecution evidence supported the inference that this conversation occurred at any time other than when Stewart

Woodman said it occurred.[190] (RT 102:11684-11685, 103:11908, 105:12184-12185.)

There is no evidence whatsoever that the alleged first conversation in which the Woodman brothers discussed the killings with Steven Homick (overt act number 2) occurred before the alleged Gambino conversation. Stewart Woodman placed the date of the first conversation with Steven Homick around October 1983. (RT 102:11684-11687, 103:11705-11708.) The prosecution produced no evidence whatsoever that Steven Homick was involved in any conspiracy to murder until this conversation occurred.

Stewart Woodman expressly testified that he told the prosecutor that the conspiracy began with this phone call in June 1983, and that he never told the prosecutor this call had occurred in April 1982. (RT 105:12184-12185.) This, of course, would have come as no surprise to the prosecutor, in view of the extensive statement taken from Stewart Woodman when he made his bargain with the authorities well before the present trial started. Also, Stewart Woodman had testified fully about these same events at a federal trial that occurred well before the present trial began.[191]

Thus, the prosecutor must have known before the present trial had even begun that he had no evidence whatsoever that any conspiracy existed before June 1983, or that Steven Homick was part of any conspiracy before

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190 Joey Gambino testified as a defense witness and maintained this conversation never occurred at all. (RT 109:12797.)

191 As noted earlier in this brief, the federal trial involved racketeering and conspiracy charges against the present defendants and others, based on the present charges and additional allegations of criminal conduct in other states.

October 1983. Indeed, The alleged June 1983 conversation with Gambino was vague and almost innocuous, including no mention at all as to how Steven Homick would solve the Woodman brothers' problems. Furthermore, no agreement was made at that time. Stewart Woodman merely testified that after the Gambino suggestion he discussed possibilities with his brother Neil, and the only decision they reached was to discuss the matter further with Steven Homick and see what he would say he could do. (RT 102:11687.) Thus, there was no evidence that any 2 people had reached any agreement to commit murder prior to the alleged October 1983 meeting.

As for overt act number 3, the April 18, 1983 letter to Prudential Insurance telling Prudential not to cancel the life insurance policy on Vera Woodman, there was no evidence whatsoever supporting any inference that letter had anything at all to do with any conspiracy to murder. As shown above, there is no evidence that anybody had even discussed or considered murder as early as April 1983, and there was no evidence that any conspiracy had yet begun.

Indeed, Stewart Woodman steadfastly maintained that the $500,000 insurance policy never had anything to do with the alleged murder plans. Stewart testified he had told the prosecutor the insurance policy had nothing to do with the killings. (RT 105:12187.) To the contrary, testimony by Manchester Product's Controller Steven Strawn established that it was a good business investment to keep the policy in force. (RT 77:7210.) Much other testimony, summarized in the statement of the facts section of this brief, established that the Woodman brothers were also motivated to maintain the insurance policy by a simple desire to aggravate their parents and Muriel Jackson.

In sum, no evidence established that the insurance policy was ever a motivating factor in any conspiracy to kill. Also, even if it did become a consideration at some later point, there is certainly no evidence that it was a motivating factor when the letter was written in April 1983. This same rationale also takes care of overt act number 5. The fact that a payment on the insurance premium was made in 1983 does nothing to advance the date on which the conspiracy to murder may have begun.

As for overt act number 4, alleging payments to Robert Homick as early as 1982, no evidence indicated that any early payments had anything to do with a conspiracy to murder. Instead, the evidence clearly established that money frequently changed hands between Stewart Woodman and Robert Homick as a result of their daily betting on football games. Other evidence established some payments from Manchester Products to Robert Homick for collection services rendered. Other evidence indicated Robert Homick may have been involved with the Woodman brothers in efforts to defraud the company that insured the Woodman brothers' automobiles, but once again there was no evidence those activities had anything to do with any conspiracy to murder. Thus, as with the life insurance payments, any payments made to Robert Homick do nothing to advance the date on which the conspiracy to murder may have begun.

In sum, there is no evidence to support a finding of the existence of a conspiracy to kill the Woodman parents until some time after the alleged conversation with Gambino in June 1983 – on whatever subsequent date it was that the Woodman brothers went from considering whatever Gambino was suggesting and reached an agreement that they would have their parents killed.

C. General Legal Principles Regarding the Co-Conspirator Hearsay Exception

Evidence Code section 1233 provides:

> "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
>
> (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
>
> (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

In *People* v. *Saling* (1972) 7 Cal.3d 844, this Court analyzed the co-conspirator hearsay exception in some detail. This Court noted that "a conspirator's statements are admissible against his coconspirator only when made during the conspiracy and in furtherance thereof."[192] (*Id.*, at 852.) The

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192 The elements needed to bring this hearsay exception into play were described in more detail in a subsequent decision:

> "...three preliminary facts are required to be established under section 1223 if evidence of the declaration of a coconspirator is to be admissible: (1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the

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first question addressed in *Saling* was how to determine when a conspiracy has ended. "The conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated." (*Id.*, at 852.) However, in the particular conspiracy at issue in *Saling*, the money offered by one conspirator to the defendant and to another conspirator, for killing the wife of the first conspirator, motivated the latter two to participate in the crime. Since the transfer of the money was one of the principle objectives of the conspiracy, the conspiracy did not end until the payment was completed. Under that rationale, the alleged conspiracy in the present case lasted at least until Neil Woodman transferred $28,000 to Robert Homick by wire in January 1986.

Saling did consider further, however, how long a conspiracy continues to exist. Other statements admitted in *Saling* were made not only after the murder had occurred, but also after the payment had been made to the defendant and his partner in carrying out the murder. Although the statements in question "concerned the method by which detection and punishment were to be avoided..." (*Id.*, at 853), that was not dispositive

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> party against whom the evidence is offered was participating or would later participate in the conspiracy. Section 1223 permits none of these facts to be established through the evidence of the declaration itself, save insofar as the content of the evidence must be considered in determining whether the declaration was in furtherance of what is established prima facie by independent evidence to have been the object of the conspiracy." (*People* v. *Leach* (1975) 15 Cal.3d 419, 430, fn. 10.)

since the United States Supreme Court, in *Krulewitch* v. *United States* (1949) 336 U.S. 440, 93 L.Ed. 790, 69 S.Ct. 716, had already rejected the argument that "even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective." (Id. at p. 443, 93 L.Ed. at p. 794.)

The *Saling* Court next considered an alternative theory offered by the prosecution – that there was a separate conspiracy to collect the insurance proceeds, and those proceeds had not yet been paid when the statements in issue were made. However, this Court was unable to find any evidence to support the existence of that separate conspiracy. That defeated the alternative theory, because, "Before evidence of the acts and declarations of an alleged coconspirator is admissible against the other conspirators prima facie evidence of the conspiracy must be proved. (Evid. Code, § 403; *People* v. *Steccone* (1950) 36 Cal.2d 234, 238.)" (*People* v. *Saling*, *supra*, at 854.) In similar fashion in the present case, statements allegedly made in an effort to conceal the crime, made after the wire transfer from Neil Woodman to Robert Homick, would not have been made during the existence of the conspiracy.

The *Saling* analysis of the end point of a conspiracy was explored further in *People* v. *Leach* (1975) 15 Cal.3d 419, holding:

> "... if hearsay evidence of the declarations of coconspirators uttered after the attainment or abandonment of the principal objective of a conspiracy is to be admitted for the truth of the matters asserted on the ground that the declarations were made during and in furtherance of a 'continuing' conspiracy, there must be

> adduced otherwise admissible evidence which is sufficient to establish prima facie, **independently of the hearsay evidence in issue**, that the conspiracy continued in existence through the time the declarations were made." (*Id.*, at 423-424; emphasis added.)

Leach summarized *Saling* at some length, and then stressed that "*Saling* did not purport to declare that all conspiracies in which one conspirator is hired by another are to be deemed as a matter of law to continue until the hireling is paid to his satisfaction." (*People* v. *Leach, supra, 15* Cal.3d at 432.)

Explaining its intent to construe *Saling* narrowly, this Court explained:

> "To be sure, one element was that neither Carnes, the testifying witness, nor Saling, the defendant against whom the evidence was offered, had been paid in full at the time of Jurgenson's declaration. However, our holding was **also expressly premised on the facts** that Murphy's offer of money had been the motivation for the participation of both Saling and Carnes, and that **the declaration had occurred 'only three days after the murder.'** (7 Cal.3d at p. 852.) Nor did we intimate in any way that the 'particular circumstances' which might keep a conspiracy alive after the commission of the crime which was its principal objective could be gleaned from the very evidence of a coconspirator's statement sought to be so admitted under the coconspirator exception." (*People* v. *Leach, supra,* 15 Cal.3d at 432; emphasis added.)

Saling was found inapplicable to the facts of *Leach*, because the only evidence that one of the conspirators was still awaiting payment came in the very hearsay statement that was proffered under the co-conspirator hearsay

exception. In a statement very relevant to the present case, the *Leach* Court also explained,

> "... the mere fact that the principal in a murder-for-hire plot was the beneficiary of insurance on the life of the victim falls short of establishing prima facie the existence of an insurance conspiracy concurrently with the murder conspiracy. Indeed, we held in *Saling* that even the fact that such insurance was fraudulently obtained through the beneficiary's forgery of the insured's application does not transform the fact that such insurance was in force at the time of the insured's murder into prima facie proof of an insurance conspiracy. (7 Cal.3d at pp. 854-855.) It necessarily follows from the reasoning of *Saling* that the same result must obtain when the record reflects in addition nothing more than that the insurance in force was in due course actually collected by the murderous beneficiary." (*People* v. *Leach, supra, 15* Cal.3d at 434.)

Leach elaborated further, on this point, explaining that:

> "... consciousness of the existence of the insurance and expectation of being paid out of its proceeds falls short of establishing, even prima facie, that the conspiracy between Leach and the Kramers was directed towards the successful collection of the insurance. The objective of the conspiracy was to kill Howard Kramer, not to collect insurance, and Leach cared not a whit whence his remuneration came, be it by insurance fraud, bank robbery, or dope peddling."[193] (*Id.*, at 435.)

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193 A case standing in sharp contrast to *Leach* and to the present case is *People* v. *Hardy* (1992) 2 Cal.4th 86, where this Court did find

(Continued on next page.)

This Court then went on to re-emphasize the need to enforce the general rule against the admission of hearsay, by construing the co-conspirator exception narrowly:

> "...we see no basis for 'further breach of the general rule against the admission of hearsay evidence' (*People* v. *Saling*, *supra*, 7 Cal.3d at p. 853). We accordingly decline to treat a conspiracy to commit a particular criminal offense as necessarily entailing a second conspiracy to collect the insurance proceeds which will be paid as a matter of course upon the successful commission of the contemplated offense. '[T]he looseness and pliability of the doctrine [of conspiracy] present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular

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substantial evidence to support the conclusion that there was an ongoing conspiracy to defraud an insurance company, in addition to killing the victim. In *Hardy*, the defendant who hired another to kill his wife had taken out a large insurance policy on his wife's life. Experts testified that the high premiums made the insurance policy an unwise investment. The killing occurred shortly before a very sizeable premium was due, and the husband who hired the killer had expressed the need for the killing to occur prior to the date the next premium was due. (*Id.*, at 141.)

In contrast, in the present case the insurance policy had been in force long before there was any alleged thought of killing the victim. Here, the only testimony on the subject was that it made good business sense to maintain the insurance policy even after Mrs. Woodman was no longer a part owner of the corporation. Here, there was no evidence at all that collecting the insurance proceeds was a motivating factor in the murders. Indeed, the only evidence on that point was prosecution witness Stewart Woodman's strong denial that the insurance proceeds had anything at all to do with the decision to have his mother killed. (RT 102:11666-11669; 103:11910, 11912-11913.)

case.' (Citations omitted.)" (*People* v. *Leach, supra, 15* Cal.3d at 435.)

Leach next stressed the need to show by independent evidence not only that a conspiracy continued to exist after attainment of the primary goal, but also that such a conspiracy was still in existence at the time the proffered hearsay statement was uttered.[194] (*Id.*, at 435-436.) By parity of reasoning, it is not sufficient in the present case to show that certain statements were made prior to the attainment of the alleged goal of killing the Woodman parents. It must also be shown by independent evidence that, at the time such statements were made, the declarant was already participating in a conspiracy that was already in existence.

People v. *Perez* (1978) 83 Cal.App.3d 718 contains a rare, but brief, discussion of the issue of whether a hearsay statement by an alleged co-conspirator was made **before** the conspiracy began. In *Perez*, police informant Ramos went to Lopez to buy drugs. Lopez and Ramos drove to a location where Lopez told Ramos he was looking for a car, apparently belonging to Perez. The Court of Appeal indicated this was an implied statement that Lopez was looking for Perez in order to buy drugs from Perez. (*Id.*, at 725-726.)

Addressing another issue later in the opinion, the Court of Appeal found that subsequently, after Lopez did make contact with Perez, there was evidence of a conspiracy that allowed subsequent statements to be admitted

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194 *Leach* squarely rejected the proposition "...that once there is independent evidence that one conspirator was induced to enter the conspiracy by a promise of payment, then as a matter of law the conspiracy is to be deemed continuing until such time as other evidence indicates payment has been received." (*People* v. *Leach, supra, 15* Cal.3d at 436.)

under the co-conspirator hearsay exception.(*Id.*, at 726-730.) However, as to the earlier statements while looking for Perez, the Court explained:

> "...at the time Lopez made these two statements to Rosemarie, no evidence had been offered, nor was any evidence subsequently offered, to establish that at the time of the making of the statements, defendant and Lopez were engaged in any conspiracy to commit a crime of selling heroin to make evidence of the statements of Lopez admissible against defendant under the hearsay exception for the admission of a coconspirator..." (*Id.*, at 718.)

As will be shown, the same is true in regard to a number of the statements admitted in the present case.

People v. *Hardy, supra*, 2 Cal.4th 86 at p. 146-147, recognized an important distinction in regard to what type of statements can be considered to be "in furtherance" of a conspiracy. *Hardy* recognized that in the typical case, the conspiracy ends when the criminal objective has been achieved. Thus, statements after a killing are generally not in furtherance of a conspiracy to kill. However, as discussed above, *Hardy* had substantial evidence, absent from the present case, that there was a separate ongoing conspiracy to obtain insurance proceeds, and the post-killing statements at issue in *Hardy*, regarding co-ordinating alibis, were made in furtherance of that conspiracy. (*Id.*, at 146-147.)

However, *Hardy* did find error in regard to one statement: "Reilly's gratuitous ramblings to James and Sonja Sportsman about Cliff Morgan's desire to find a hit man cannot be deemed 'in furtherance of' the conspiracy." (*Id.*, at 147.) As will be shown, similar "gratuitous ramblings"

which were not "in furtherance" of any conspiracy were erroneously admitted in the present case.

In *People* v. *Morales* (1989) 48 Cal.3d 527, this Court made further observations about the co-conspirator hearsay exception that are very relevant to the present case:

> "Defendant properly disputes the applicability of the coconspirator's exception. Subdivision (a) of section 1223 of the Evidence Code requires that '[t]he statement was made by the declarant [Ortega] while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy.' Yet no evidence was offered to show that Ortega was conspiring with anyone to kill either Blythe or Winchell at the time of his conversation with Salaices, five months prior to Winchell's murder. (See *People* v. *Irwin* (1888) 77 Cal. 494, 504-505.) **We agree with defendant that, in the absence of proof of an ongoing conspiracy at the time Ortega's statement was made, section 1223 was inapplicable. (It is also doubtful that the statement to Salaices was 'in furtherance' of any conspiracy, rather than mere boasting to a girlfriend.)** (*People* v. *Morales, supra,* 48 Cal.3d at 551-552; emphasis added.)

As will be shown, a number of statements were admitted in the present case which were both prior to the time at which any showing was made that a conspiracy had begun, and/or which were mere boasting rather than in furtherance of any conspiracy, even if a conspiracy was already in existence.

In *People* v. *Roberts* (1992) 2 Cal.4th 271, this Court made clear that even when it is shown that a conspiracy is in existence, statements by one conspirator about the crime are not necessarily "in furtherance" of the

conspiracy. In *Roberts*, two witnesses described a conversation in which one conspirator said he was going with the defendant to resolve a dispute, and that he knew he had to be there even though he did not want to be there. This Court explained:

> "There was a showing that defendant and Menefield were in agreement and that Menefield made his statement in preparation for the next morning's assault. But the record does not reveal that the statements were made in furtherance of the conspiracy's objective (see Evid. Code, § 1223)-Menefield was not asking Rooks or Long for help. We conclude that the implied finding is not supported by substantial evidence." (*Id.*, at 303-304.)

As will be shown, in a number of instances the prosecutor argued that even if some statements were not made in furtherance of any conspiracy, they were nonetheless relevant for some other purpose, such as to prove the relationship between the parties who did eventually enter into a conspiracy. The inapplicability of such a theory will be illustrated by contrast to a case where this Court did uphold use of statements for a similar purpose.

In *People* v. *Noguera* (1992) 4 Cal.4th 599, 624-625, this Court dealt with the statements of an alleged co-conspirator after a murder, in which she gave false information to the police about the killing in order to throw them off the trail. This Court recognized that the prosecution position was that the statements were false, so the prosecution was obviously not offering them to prove the truth of the matter stated. However, the statements were found to be relevant for a non-hearsay purpose – showing the existence of a conspiracy by evidence of a "preconceived plan by defendant and Dominique to murder Jovita and plant a false trail of evidence indicating a

burglary and rape gone awry." (*Id.*, at 625.) In contrast, statements offered in the present case for the purpose of establishing a relationship or for similar purposes **were** fully dependent on the truth of the matter stated. Thus, no matter what their purpose, such statements remained as hearsay and required a valid hearsay exception to justify their admission.

Finally, in a recent opinion, the Court of Appeal analyzed in considerable detail the standard of proof applicable to the foundational requirements for the admission of a statement offered under the co-conspirator hearsay exception. (See *People* v. *Herrera* (2000) 83 Cal.App.4th 911, 58-63.) *Herrera* concluded:

> "In order for a declaration to be admissible under the conconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility of a conconspirator's statement under Evidence Code section 1223 simply means that a reasonable jury could find it more likely than not that the conspiracy existed at the time the statement was made." (*Id.*, at 63.)

As will be shown, this standard was not met in a number of instances.

D. Procedural Background

On the first court day after the regular jurors were sworn, counsel for Steven Homick notified the court he wanted to have Evidence Code section 402 hearings with regard to a number of hearsay statements he expected the prosecution to offer against Steven Homick. Counsel cited as an example an

alleged statement by Neil Woodman to others, to the effect that if they wanted anything done of a rough type, his boys in Las Vegas could take care of it. Counsel argued that was hearsay as to Steve Homick and not in furtherance of any conspiracy. (RT 68:5539-5540.)

The prosecutor responded with several arguments. First, the planned statements by Neil Woodman did not refer to Steven Homick by name, although they did refer to his boys in Vegas. Second, there would be similar statements by Stewart Woodman, who would be testifying and therefore available for cross-examination. In response to a defense argument that this would also constitute improper character evidence, the prosecutor countered that it was relevant to show the relationship between the co-conspirators. (RT 68:5541-5543.)

Defense counsel replied that statements that did not refer to Steven Homick by name, but only to "boys in Vegas" were not relevant to the present case. Counsel for Neil Woodman added his own objection to an alleged statement by Neil Woodman regarding a magazine story about how to hire someone to kill another person. The judge tendered an initial opinion that these alleged statements appeared to come within the prosecution's proper proof of a conspiracy, although the judge conceded she did not yet have enough information to make a ruling. (RT 68:5544-5547.)

Neil Woodman's counsel also objected to any use by the prosecution of statements made by Neil Woodman during his testimony at his related federal trial. Counsel for Steven Homick also objected to prosecution use of Neil Woodman's federal testimony, on the ground that Steven Homick's defense attorneys in the federal trial did not have an effective and adequate

opportunity for cross-examination, and/or were ineffective for failing to cross-examine Neil Woodman. (RT 68:5549-5550.)

The prosecutor returned to his argument that he needed to establish the relationship between the Woodmans and the Homicks, by showing that the Homicks acted as musclemen, or hatchet men, for the Woodmans. Counsel for Robert Homick objected to evidence of alleged other criminal activities, such as Robert Homick's staged theft of vehicles belonging to the Woodmans, so they could collect insurance money. Counsel saw such alleged crimes as irrelevant to the present charges of murder and conspiracy to murder. The prosecutor responded once again that such evidence would establish the relationship between the Homicks and the Woodmans. (RT 68:5551-5555.)

Robert Homick's counsel pressed his argument further, noting there was no dispute about the fact that there was a relationship between Robert Homick and the Woodman brothers. There was no dispute about the fact that Robert Homick did some debt collection work for the Woodmans. However, alleged threats made by Robert Homick during those debt collection activities would constitute bad character evidence. Counsel for Robert Homick also stressed the importance of not lumping the Homick brothers together, arguing that statements about who was the muscle man for the Woodmans referred only to Steven Homick and not to Robert. (RT 68:5557-5558.)

The prosecutor detailed his view that evidence of threats and violence to collect debts was an essential aspect of the relationship between the Homicks and the Woodmans. The judge agreed that all of these incidents were relevant to prove the relationships between the participants in the

alleged conspiracy. With that proper purpose, the judge saw no evidentiary issue just because the proof of the relationships also involved evidence of bad character. The judge would take these incidents one by one as they arose during the trial, and make individual determinations regarding what was or was not in furtherance of the conspiracy, since that might be a close question for some of the alleged statements. (RT 68:5559-5562.)

Counsel for Robert Homick added Evidence Code section 352 as a basis for his objection to alleged threats by Robert Homick during debt collection activities. Counsel argued such threats were highly prejudicial as character evidence and had little probative value in regard to the present charges. The judge belittled this concern and overruled the Evidence Code section 352 objection with the internally inconsistent conclusion that a threat to "snuff out a life" sounded to her like humorous puffing by a debt collector.[195] (RT 68:5562-5564.)

Thus, in several instances, a statement made prior to the inception of any conspiracy was admitted for the purpose of showing motive or relationships. The prosecutor and the court obviously believed that if a relevant basis for such statements could be found, then they were admissible. What they lost sight of, however, was that if the co-conspirator hearsay

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195 If, in fact, the judge believed this was humorous puffing and not a credible threat, then the alleged statement had no relevance at all for the only purpose for which the prosecution was offering the statement. The prosecutor obviously believed that the alleged statement would show that Robert Homick acted as a violent muscleman for the Woodman brothers. If it only showed humorous puffing during legitimate debt collection activities, then it had no relevance to anything the prosecutor was seeking to prove.

exception was not available, then mere relevance was not enough to allow admission of a statement. Rather, it was also necessary to either find another hearsay exception, or to find that the statement was being admitted for a non-hearsay purpose.

E. The Trial Court Erred in Rulings on a Number of Specific Statements That Were Either Made Before Any Conspiracy Existed or Were Not in Furtherance of Any Conspiracy, or Both

1. Rulings Involving the Alleged Death Threat Made by Robert Homick to Jack Swartz

After brief discussion of alleged threats made by Robert Homick during debt collection activities, a more thorough Evidence Code section 402 hearing was held on the prosecution's desire to present testimony to show that Robert Homick went to Soft-Lite, a business owned by Jack Swartz, and stated that if Swartz did not pay the money owed to Manchester Products, he would kill Swartz for Stewart Woodman. The prosecution reiterated its argument that this incident was relevant to show the nature of the relationship between Robert Homick and the Woodmans. (RT 69:5698-5699.)

Counsel for Robert Homick argued there was no evidence that the alleged statement was made on behalf of Stewart Woodman, since the latter had testified at the federal trial that he did not send Robert Homick to threaten Swartz, and any threat that might have been made was Robert Homick's own idea. The judge did not directly address that point. Instead, she simply noted that verbal threats were not illegal, so the special concerns

regarding the prejudicial impact of other crimes evidence did not apply. Inconsistently, the judge ruled the alleged statement was probative of Robert Homick's willingness to break the law, and therefore had probative value that outweighed any prejudice.[196] The court added that this ruling was for the purpose of guiding counsel in their opening statements, and was subject to reconsideration during the trial. (RT 69:5700-5702.)

After opening statements, the very first witness the prosecution called was Tracey Swartz Hebard, daughter of Jack Swartz. Just before she was took the stand, a further section 402 hearing was held. Counsel for Steven Homick again objected to her testimony about the incident involving Robert Homick at Soft-Lite, contending it had nothing to do with any conspiracy involving the deaths of the Woodman parents. Counsel argued this evidence was not only irrelevant, but was also highly inflammatory other crimes evidence and should be precluded under Evidence Code section 352, even if there was any relevance. (RT 71:5911-5912.)

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196 To the extent the statement was probative of a willingness to break the law, it certainly did carry the same prejudicial impact that other crimes evidence would carry, so the court was mistaken in dismissing the danger of any prejudicial impact. Furthermore, to the extent the evidence was to be utilized to demonstrate a willingness to break the law, it was being improperly utilized as propensity evidence, precluded by Evidence Code section 1101.

Indeed, in every criminal case the prosecution would benefit from being able to prove that the defendant had previously exhibited a willingness to break the law. The best way to prove that would be to prove that on prior occasions the defendant did break the law. Such a simplistic approach ignores many well-established rules of evidence.

This time, the court ruled that the incident was admissible as part of the prosecution effort to establish the existence of the conspiracy. The proffered evidence would show conduct by the conspirators that demonstrated their relationship to one another during the years leading up to the murder. (RT 71:5912-5914.)

This ruling was also flawed. The incident was not relevant to establish any conspiracy to murder, since it had nothing whatsoever to do with the Woodman parents. It is true that the incident showed something about the relationship between Robert Homick and the Woodman brothers, but there is no rule of law that says that in proving a conspiracy to commit one specific crime, the prosecution can show every prior bad act ever committed by any two alleged members of the conspiracy acting together. Furthermore, no basis was ever shown as to why this evidence would be admissible against Steven Homick, even if it was admissible against any other alleged conspirators.

Counsel for Steven Homick recognized that latter problem and expressly argued to the trial court that Steven Homick was not involved in this incident at all; counsel requested an instruction limiting this evidence only to the parties involved, and expressly specifying that Steven Homick was not one of those parties. The court refused to give such an instruction at the outset, stating instead that at the conclusion of the witness' testimony, if it was apparent that the testimony bore no relationship to Steven Homick, then the court would give a limiting instruction. (RT 71:5913.)

The witness was then permitted to testify to the incident. As described more fully in the Statement of the Facts at the outset of this brief, she testified that on June 9, 1984, Robert Homick arrived at Soft-Lite and told

Jack Swartz he had been sent by Manchester Products because Swartz owed Manchester a great deal of money. According to Ms. Swartz, Robert Homick also said that if Jack Swartz did not pay Stewart Woodman promptly, he (Robert Homick) would come back and break Swartz' legs or snuff out his life. (RT 71:5923-5929.)

As contended by counsel for Steven Homick, this testimony did nothing whatsoever to indicate that Steven Homick had any connection to the incident. Nonetheless, the trial judge did not follow through on her earlier assurance that a limiting instruction would be given if the evidence showed no involvement by Steven Homick.

Although it is true that this incident was more harmful to Robert Homick than to Steven Homick, there was nonetheless some prejudice to Steven Homick. Since Steven and Robert Homick were brothers, there was an inevitable tendency for any evidence harmful to one of them to also be considered by the jury as harmful to the other. That is why the limiting instruction requested by counsel was so important, but the judge failed to give it. Thus, evidence which should not have come in at all was used to tarnish Robert Homick and inevitably harmed Steven Homick also. Alternatively, if the evidence was properly admitted against Robert Homick, there was still error in failing to admonish the jury that it could not be used against Steven Homick.

Robert Homick's statement, not in furtherance of any conspiracy involving Steven Homick, was used to harm both Homick brothers. Prejudice from this incident alone may not have been sufficient to require reversal of the judgment against Steven Homick, but when considered in combination with the many other similar errors, the cumulative prejudice did

deprive Steven Homick of his federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

2. The Woodman Brothers' Alleged Statements That If They Needed Anything Done, Their Boy in Vegas Could Do It, That Steven Homick Was Their Boy in Vegas, and That Steven Homick Was Tougher Than the Mafia

Before former Manchester Products employee Cathy Clemente testified, another Evidence Code section 402 hearing was held. Counsel for Steven Homick expressly objected to anticipated testimony regarding statements allegedly made by Stewart Woodman. The alleged statements were to the effect that Steven Homick was Stewart's man in Vegas, and if

there was anything you wanted done Steve was the man to do it. Counsel argued this should not be admitted against Steven Homick because it occurred in 1982 or 1983, before any conspiracy had begun, and the statements were not made in the presence of Steven Homick. (RT 72:6038-6039.)

The court overruled the objection "for reasons previously filling the record, ..." (RT 72:6039, ll. 5-7.) In further discussion, the court made clear her view that this statement was made in furtherance of the conspiracy, negating any hearsay objection. (RT 72:6041.)

The discussion turned to another alleged statement by Stewart Woodman to the effect that if you think the Mafia is tough, we have our own people. Counsel for Steven Homick again argued this was not in furtherance of any conspiracy. (RT 71:6110-6111.) Counsel also argued that the anticipated testimony was thoroughly inconsistent with Stewart Woodman's own testimony that would establish that no such statements could have been made during the time period that Cathy Clemente worked at Manchester Products. Anything Cathy Clemente could have heard would have been well before any conspiracy had begun. (RT 72:6145-6147.)

The judge dismissed this complaint, stating that the prosecution contended that the conspiracy had begun in 1981. Counsel agreed that was what the prosecutor was contending, but maintained that the prosecution knew that could not be proved. Counsel for Neil Woodman specifically contended that witness Clemente was fired in April 1983, and there would be no evidence whatsoever of any activity pertaining to the conspiracy until well after that date. Counsel added that the prosecution seemed to entertain the erroneously overbroad belief that every time somebody mentioned

Steven Homick's name, that was enough to render the statement in furtherance of the conspiracy. (RT 72:6147-6149.)

The Court turned to the prosecutor for a response, noting that if what the defense attorneys said was true, then she has been interpreting the conspiracy too broadly in her rulings, allowing in statements she assumed occurred during the conspiracy.[197] The prosecutor responded the Information pled that Overt Act Number 2 (regarding the initial meeting and agreement to kill the parents) occurred in 1982. Counsel for Neil Woodman

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197 The Court's full statements disclosed further fallacies in her reasoning. The Court explained:

> "Allowing in hearsay testimony, it may be a statement of one defendant, but it's certainly hearsay as to the other 2, I am allowing it in, and have not been giving limiting instructions to the jury, because I have been finding that it's not hearsay, because it comes within the conspiracy exception to the hearsay rule.
>
> It only comes within that exception if the statements were made during the period of the conspiracy. And I am concerned, based on what counsel is arguing to me, that I have too broad a concept of the period of the conspiracy." (RT 72:6153, ll. 8-19.)

As shown in rulings already discussed in this argument, and to be discussed later in this argument, the trial court's concern was limited to whether hearsay statements were made during the period in which the conspiracy existed. If the court found that criteria met, then the court uncritically, and often mistakenly, accepted every prosecution contention that the statement in question was necessarily made in furtherance of the conspiracy.

agreed that was what the Information pled, but the fact remained there would be no evidence to support the occurrence of such a meeting prior to 1983. (RT 72:6153-6154.)

The court noted that conflicting evidence as to the date the conspiracy began did not make evidence inadmissible. Counsel responded that there was no conflict at all. The **only** evidence regarding the date of the alleged meeting and agreement was from Stewart Woodman, and he had testified in federal court that was in 1983. The prosecutor weakly stated he thought the date was 1982, but he acknowledged he did not doubt the contention being made by counsel. Instead, the prosecutor switched back to his usual alternate theory of admissibility – he claimed to have the right to show the relationships between the conspirators even if that involved events which occurred before the conspiracy had begun. (RT 72:6154-6155.)

The Court responded with comments that seemed to recognize the key fallacy in the prosecutor's thinking. She agreed that evidence of the relationships between the alleged conspirators was relevant, but when that evidence was in the form of hearsay statements, there was no exception for statements showing relationships. As an example, she noted that if one of the Woodman brothers described Steve Homick as "our man in Vegas," that was hearsay as to Steven Homick unless it was said in furtherance of a conspiracy that was already in existence. (RT 72:6157.)

The prosecutor responded with yet another novel theory. He argued these statements were not hearsay at all, but were instead statements of identification. The judge recognized flaws in this argument. (RT 72:6157-6158.)

Meanwhile, counsel for Neil Woodman brought up another serious problem. In pretrial motions to sever the trials of the various defendants, defense counsel had regularly pointed to the various statements that would be admissible against one defendant but not against others. In arguing against a severance, the prosecutor had strongly promised that any statement that was not admissible against all defendants would simply not be used. (RT 72:6158-6159; for an example of the prosecutor's earlier representations, see RT A-1:A-180, ll. 12-15; RT 43:1823, ll. 11-14: "There is a conspiracy count in this case, I believe that all of the statements that I would seek to introduce would be within the meaning of the conspiracy exception to the hearsay rule and would be admissible." Se also RT 43:1824, ll. 20-1825, l. 4: "If we seek to introduce a statement, and the defense objects 'Hearsay,' or that it's *Aranda Bruton*, and the court will decide either it is or it's admissible under the hearsay exception, the conspiracy exception to the hearsay rule, then it comes in or it doesn't come in. ... [¶] It is my position that no statement which would be a ground for severance will be introduced. [¶] And if the court finds that through the trial, then the court would rule it's inadmissible based on my representation now.")

The Court simply ignored this serious problem. Instead, the Court changed the subject and pressed the prosecutor to come up with a realistic starting date for the conspiracy.[198] The court deferred resolution of this matter until the next break in testimony. (RT 72:6159.)

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198 Even in this effort, the court made clear that if there was conflicting evidence as to a starting date, the court would not hold the prosecutor to a later date but would instead go with an earlier date. Thus, the court was repeatedly willing to defer to the prosecution to decide the starting

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At the next discussion of this subject, counsel for Neil Woodman argued that the earliest starting date for the conspiracy should be the date of the Monte Carlo theft incident (June 16, 1983) or the Rolls Royce theft incident (November 7, 1983).[199] Counsel also noted that Stewart Woodman had testified at the federal trial that the alleged conversation with Joey Gambino, in which Gambino suggested Stewart should talk to Steven Homick about resolving his problems with his parents, occurred in mi-1983 or the fall of 1983, after Manchester Products had made its move to the new plant on Prairie Street.[200] (RT 72:6212-6215.)

(Continued from last page.)

date, rather than considering the evidence and determining the foundational fact as to whether a reasonable jury could find that the earlier date, rather than the later date, was more likely correct. (RT 72:6159, ll. 7-12.)

199 Even this was too generous to the prosecution, since there is no evidence whatsoever that either of those incidents were in any way in furtherance of the conspiracy to murder the Woodman parents. Indeed, the uncontradicted testimony of Stewart Woodman was that only Robert Homick, and not Steven Homick was involved in the two theft incidents. (RT 103:11809-11816, 11857.) Stewart Woodman also testified without contradiction that when there eventually was any discussion with Steven Homick about killing the Woodman parents, Stewart insisted that he did **not** want Robert Homick to be involved in the murder effort. (RT 103:11710, 104:11943-11944.) Thus, it is unequivocally clear that the theft incidents involving Robert Homick had no connection at all to the alleged subsequent conversations with Steven Homick about killing the Woodman parents.

200 This also appears to be too early a starting date. There was no evidence whatsoever that Gambino specified how Steven Homick might resolve the problems between the Woodman brothers and their parents. Certainly no agreement to do anything was reached during this conversation. Thus, the inception of the conspiracy should be placed at a date no earlier than the time that Stewart Woodman claimed the Woodman brothers met with Steven Homick and specifically discussed the possibility of having their

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The prosecutor stuck to an argument that never was supported by the evidence. He claimed incorrectly that Stewart Woodman's testimony indicated that he first met Steven Homick following the suggestion by Joey Gambino that Steven Homick could resolve the problem with the parents. The prosecutor also claimed he had witnesses to testify that Steven Homick was seen at the Manchester plant as early as 1980 or 1981. The prosecutor's position was that if Steven Homick was involved with the Woodmans in 1980 or 1981, and the Woodmans did not meet him until after the phone conversation with Joey Gambino, then the phone call with Gambino must have occurred years earlier than Stewart believed it occurred.[201] (RT 72:6216-6218.)

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parents killed. There is no evidence whatsoever that any two people had reached an agreement to have the parents murdered prior to that conversation.

201 The actual evidence was quite different then the prosecutor's representation. Stewart Woodman testified that Joey Gambino introduced him to Steven Homick in Las Vegas around 1980, under circumstances that had nothing at all to do with the phone conversation in which Gambino said that Steven Homick could solve the Woodmans' problems. That meeting, and the initial relationship between the Woodmans and the Homick brothers focused on nothing more sinister than gambling on football games. (RT 102:11678-11680.)

Thus, no evidence was ever produced that indicated that any dealings between either Woodman brother and either Homick brother had anything to do with any conspiracy against the Woodman parents, until the alleged meeting with Steven Homick after the mid-to-late 1983 phone conversation with Joey Gambino.

The discussion between court and counsel continued to diverge from any realistic starting date for the conspiracy to murder. Counsel for Neil Woodman pointed out that the upcoming witness, Cathy Clemente, left Manchester Products April 13, 1983. The prosecutor responded that even that should be close enough. The Court seemed to agree, explaining that if the Monte Carlo theft occurred in June 1983, it obviously required some planning, which would push the starting date of the conspiracy closer to April 1983.[202] Counsel for Steven Homick responded that there was no evidence that his client had any involvement in the Monte Carlo theft, so there was no showing that he was involved in any conspiracy as early as June 1983. At that point in the discussion, the court deferred the matter until the following day. (RT 72:6219-6222.)

The discussion continued once again the next day. The court had read Stewart Woodman's federal testimony, which placed the visit from Steven Homick following the call from Joey Gambino around October 1983. The court had also researched conspiracy law and concluded that any conspiracies to commit other criminal acts were separate from the present conspiracy to murder. Thus, the court correctly concluded that the beginning

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202 The court's reasoning in this respect suffered from numerous flaws. First, the Monte Carlo theft had nothing whatsoever to do with any conspiracy to murder the Woodman parents. Second, there was no evidence that the Monte Carlo theft required any extended planning. Third, the standard for admissibility is whether a reasonable jury could find the foundational facts by a preponderance standard. Instead, the court seemed to be operating under a standard that would allow admission if there was any speculative theory, no matter how weakly supported, which might conceivably place the start of the conspiracy at an earlier date.

of the conspiracy to murder must be placed in the Fall of 1983, and any earlier statements would be admissible only against the declarant, as an admission against a party, and against others who were present when the statement was made, as an adoptive admission. (RT 73:6270-6274.)

Initially, the court saw the alleged statements about Steven Homick being "my man in Vegas," and about these guys as being tougher than the Mafia, as adoptive admissions by Steven Homick. The prosecutor then conceded it was not clear whether Steven Homick was in a position to hear these statements when they were made, but the prosecutor continued to maintain these statements were not hearsay at all, but were simply statements of identification. The prosecutor saw these as operative facts that constituted circumstantial evidence of the conspiracy. Surprisingly, even though the court had just agreed that no conspiracy to murder existed until months after the alleged statement, the court agreed with the prosecutor's argument that "This is my man, he will do whatever, these people are tough," may well constitute an operative fact of the conspiracy. The court added an unclear reference to the state of mind hearsay exception.[203] (RT 73:6274-6279.)

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203 Whatever the court had in mind was left unexplained. Since the court and prosecutor had just agreed that there was no evidence of any conspiracy to murder prior to October 1983, it seems impossible for statements made prior to that date to somehow be an operative fact of that conspiracy. If the statements were admitted to prove that Steve Homick was Stewart's man in Vegas, then they were hearsay being used improperly to prove the truth of the matter. If the statements were used to show Stewart's state of mind, then they were admissible only against Stewart, who was not on trial, and were not admissible against Steven Homick.

Counsel for Steven Homick responded that case law mandated establishment of the conspiracy by independent evidence, not by statements of an alleged co-conspirator outside the presence of the defendant. Any statement that Stewart Woodman may have made to Cathy Clemente outside the presence of Steven Homick may have shown Stewart's state of mind, but not Steven Homick's. The court responded with a reference to a case indicating that acts and declarations constituting the agreement are admissible as part of the transaction. Counsel for Steven Homick correctly responded that the statements under discussion were not part of any agreement. Furthermore, counsel offered to stipulate that the Woodman brothers and the Homick brothers all knew each other. In any event, counsel also noted that Stewart Woodman would testify that an agreement to murder eventually did exist, so the vague and unrelated statements allegedly heard by Cathy Clemente had little, if any, probative value to weigh against their very strong prejudicial impact of referring to Steve Homick as tougher than the Mafia. (RT 73:6279-6283.) The court responded cryptically, "I am nowhere near a 352 analysis." (RT 73:6283, ll. 26-27.)

Returning to the analysis that was being considered, the court concluded that the statements in issue preceded any conspiracy and were not operative facts, so they would be admissible only against the declarant, and against Steven Homick if he was within earshot. Totally ignoring the prosecutor's repeated promise not to utilize any statements which were found to be inadmissible hearsay as to any defendant, the Court determined

that a limiting instruction would sufficiently protect Robert Homick.[204] (RT 73:6284-6285.)

The prosecutor conferred with his upcoming witness and reported back that she would testify that Neil Woodman was present when Stewart made the statements, but the Steven Homick was out the door and not within earshot. Nonetheless, the prosecutor remained determined to use these statements against Steven Homick. He turned to yet another theory, claiming that the conspiracy had been in progress when the Woodman brothers wrote letters in March 1983 refusing to cancel the insurance policy on Vera Woodman's life. Cathy Clemente did not leave Manchester until April, 1983, so she could have heard the statements after the March 1983 letters. (RT 73:6378-6379.)

Counsel for Robert Homick noted the annual insurance premium had been paid in October 1982, so it would be foolish to cancel the policy prior to the October 1983 due date. He also argued that this was only evidence of the hatred the brothers had toward their parents, but there was no conspiracy to murder until after Joey Gambino's conversation with Stewart Woodman. Nonetheless, the Court was persuaded the statements in issue were evidence of a conspiracy. Counsel for Steven Homick reminded the court that Stewart Woodman had always taken the position that the insurance had nothing to do with the murders. Further, counsel added correctly that even if there was any evidence of a conspiracy in effect at the time Cathy Clemente heard the

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204 Indeed, since the prosecutor had used that promise to avoid a severance, neither the prosecutor nor the court should have been permitted to renege on that promise in the middle of trial.

statements, the fact remained that making the statements in the presence of Cathy Clemente did nothing whatsoever to further the conspiracy. (RT 73:6380-6383.)

Apparently determined to find some way to allow the statements to be admitted against Steven Homick, the court totally changed her position once again. Now the court concluded these statements were operative facts establishing the conspiracy and could be admitted as long as they were made during the conspiracy. The court saw the letters to the insurance company as circumstantial evidence of a conspiracy between the Woodman brothers,[205] although she conceded there was still no evidence to tie that conspiracy to the Homicks at the time Clemente heard the statements. (RT 73:6383.) Reaching far into the speculative realm, the prosecutor countered that the statements Clemente heard implied there had been a meeting behind closed doors at which Steven Homick agreed to do something illegal for the Woodman brothers, establishing there was a conspiracy at that time. Counsel for Neil Woodman reminded everybody that so far there was no evidence as to when Clemente actually heard the statements in issue. (RT 73:6384-6387.) Finally the judge concluded that nothing more could be resolved without taking testimony from Cathy Clemente outside the presence of the jury. (RT 73:6389.)

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205 The court subsequently explained that she saw a distinction between merely continuing to pay premiums on the one hand, versus refusing to cancel the policy when you know you no longer have an insurable interest and you know that the insured wants the policy cancelled. (RT 73:6388.)

Ms. Clemente then testified that she saw Steven Homick at Manchester Products about a month before her April 1983 departure from the company. Steven Homick and both Woodman brothers met in Stewart's office for 30-60 minutes and then Steven Homick left. Stewart Woodman asked Ms. Clemente if she knew who that was. When she said "No," Stewart said, "That's Steve. That's our man in Vegas." Stewart also said, "If you want anything done, he's the man to do it." Neil Woodman was within earshot and added, "If you think the Mafia is tough, he is tougher." That was the only time Ms. Clemente recalled seeing Steven Homick at the plant. (RT 73:6391-6395.)

On cross-examination, still outside of the presence of the jury, Ms. Clemente explained further that the first time she was ever interviewed by the police about these events was five years later, in 1988. She also recalled that on this same occasion Stewart Woodman said that Homick had brought a large amount of money to pay Stewart for his gambling wins.[206] She also

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206 Throughout the trial, there was much testimony about the gambling relationship between Stewart Woodman and **Robert** Homick. (See Statement of Facts, *supra*, at pp. 39-44.) It was Robert Homick who often came to the plant to give Stewart money or to receive money, related to their gambling. There was no evidence at all that Steve Homick ever delivered gambling winnings to the Woodmans.

Furthermore, there was evidence that Stewart Woodman had a bookie named Steve, who was somebody other than Steven Homick. (RT 75:7027.) If anybody brought Stewart a large sum of money that he had won in gambling, it would almost certainly have been his bookie. No other evidence indicated any reason at all why Steven Homick would have delivered a large sum of gambling winnings to Stewart Woodman.

Indeed, Cathy Clemente also testified that a man who identified himself as Steve called Manchester Products frequently, would

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acknowledged that she originally told the police that the statements in question were made in conversations that did not occur on the same day that Steven Homick was at the plant, but she reiterated that her present recollection was that they did occur on the same day he was at the plant. Then she conceded she was really not at all sure when the statements were made. (RT 73:6397-6408.)

The court then proceeded to collect together all of the weakest and most speculative conclusions that could possibly be drawn from the testimony. The court concluded the statements in question were made some time between April 1982 and April 1983. The court dismissed every inconsistency and concluded the statements were made while the conspiracy was in existence, at least between the Woodmans and Steven Homick. The court now believed the conspiracy started in the early months of 1983. Thus, the testimony would be admitted against Neil Woodman and Steven Homick, and a limiting instruction would be given to protect Robert Homick. Counsel for Neil Woodman pointed out that the prosecutor had the burden of establishing the statements were made after the conspiracy had

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never give her a company name, and always asked to be put through to Stewart. Stewart always took those calls when he was present. If he was not present, only then would Neil take the call. (RT 73:6395-6396.) However, any inference that the caller was Steven Homick was thoroughly inconsistent with all other evidence, which indicated that Steven Homick's relationship was mainly with Neil, rather than Stewart. It was Robert Homick, not Steven, who called Stewart frequently. If the frequent caller known to Ms. Clemente really was named Steve, he must have been Stewart's bookie (also named Steve) and not Steven Homick. (RT 73:6423-6425, 6431, 6442, 76:7027.)

begun, but the judge simply responded that the record and her ruling were clear. (RT 73:6416-6417.)

Putting aside the many changes that had occurred as the court altered her analyses to fit the changing facts, there remain several serious fallacies in the court's ultimate ruling:

1. If the statements were made some time between April 1982 and April 1983, and the conspiracy began in early 1983, then it cannot be said it is more likely than not that the statements were made after the conspiracy began.

2. There is simply no evidence at all that the idea of murdering the Woodman parents had occurred to anybody as early as April 1983. The judge gave no explanation at all for her unfounded conclusion that the conspiracy began in early 1983, and this was thoroughly contradicted by the court's own earlier conclusions, described above. (See page 356, *supra*.) While the court may have had every right to alter earlier tentative conclusions, the fact remains that she gave detailed analyses of the earlier correct conclusions and no explanation whatsoever of any basis for the marked turnabout.

3. Even if there was any conspiracy in existence at the time the statements were made, there is no conceivable way that such statements made by the Woodman brothers to a receptionist, who was fired soon afterward, did anything at all to further whatever conspiracy may have been in existence. There is certainly no evidence that Cathy Clemente played any role in any conspiracy, or that there was any conspiracy-furthering benefit intended or achieved by imparting to her the information contained in the

alleged statements. Instead, this is simply one more example among many in which the Woodman brothers could not control their mouths. Rather than furthering any conspiracy, these statements were comparable to the "mere boasting" that was not in furtherance of any conspiracy in *People* v. *Morales, supra,* 48 Cal.3d at 552, discussed above.

4. Whatever unspoken rationale the court may have had in mind, it was clear that the court failed to employ the correct standard, requiring evidence from which a jury could reasonably find each foundational fact (that the statements were made after the conspiracy had begun, that the statements were in furtherance of the conspiracy) was more likely than not true. Instead, the court consistently seemed to believe that if there was any remotely conceivable possibility that the foundational facts existed, no matter how improbable or speculative, that was sufficient.

Cathy Clemente then repeated her testimony in front of the jury, describing the three statements regarding Steven Homick being Stewart's man in Vegas, being the man to do anything that needed to be done, and being tougher than the Mafia. However, she added further information which made it even less likely that the man she saw at the plant was Steven Homick. She described his car as an old rusty blue Buick or Chevrolet, and she identified **Robert** Homick's car as looking like the car she saw. (RT 73:6428.) No other witness ever described Steven Homick using Robert's car. Instead, when Steven Homick came to Los Angeles, he always drove a clean late-model rental car. (See, for example, RT 82:8250, 8252, 8263-8265.) Ms. Clemente also described the man she saw as disheveled, like he

had just woke up, wearing a T-shirt and jeans, with uncombed hair. (RT 73:6445.) This was a description commonly used for Robert Homick but never for Steven Homick. She also added that the man she saw at the plant appeared to have the same voice as the man who often called Stewart and identified himself as Steve. (RT 73:6456.) As discussed above, that man was certainly Stewart's bookie, and not Steven Homick.

Despite this added evidence that the person Cathy Clemente had seen at the plant was not Steven Homick at all, when her testimony concluded the judge admonished the jury that the incident described by Clement contained no mention of Robert Homick; the only people involved in that testimony were Steve Homick and the Woodmans. She soon added that the statements were not to be considered as evidence against Robert Homick. (RT 73:9459, 6461-A.) Thus, even though the description of the person and the car fit Robert Homick rather than Steven Homick, the judge precluded the jury from reaching such a factual conclusion. Instead, she essentially told the jury that, as a matter of law, the person the Woodmans were referring to was Steven Homick. Even aside from the improper admission of this testimony in the first place, this unwarranted restriction usurped the role of the jury and resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fundamentally fair jury trial in accordance with due process of law, to confront the witnesses against him, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.)

In his subsequent arguments to the jury, the prosecutor took full advantage of this improperly admitted testimony. At one point he argued, "And remember the statements that Neil Woodman made about Steven Homick? He's my guy in Vegas. You think the Mafia is tough? Steve. Words to that effect. That was his guy." (RT 132:16580, ll. 17-20.) Later, the prosecutor returned to this argument: "Well, this is the guy he relies on. Well, his own words he tells you, you think the Mafia's tough – referring to Steve Homick – my guy. Anything I want illegal. Steve Homick will do it." (RT 132:16648, ll. 4-8.)

Steven Homick was highly prejudiced by this improper hearsay evidence. There was a strong implication, fully exploited by the prosecutor, that Steven Homick would perform any illegal act the Woodman brothers wanted. Connecting any criminal defendant to the Mafia, in a case where there was no evidence at all of Mafia involvement, would be highly prejudicial, but here the claim was that Steven Homick was even worse than the Mafia.

In *People* v. *Perez* (1981) 114 Cal.App.3d 470, the Court of Appeal concluded that evidence of membership in a street gang had so little probative value in the circumstances of that case that it should have been excluded pursuant to Evidence Code section 352, and its improper admission was so prejudicial that it deprived the defendant of a fair trial. (See also *People* v. *Cardenas* (1982) 31 Cal.3d 897, 905.)

Here, the evidence had no proper basis for admission against Steven Homick. Evidence of membership in the Mafia would clearly be even more prejudicial than evidence of membership in a street gang. Here, the improper evidence was that Steven Homick was even **worse** than the Mafia, making it

even more prejudicial than Mafia membership would be. It is difficult to imagine more negative and prejudicial character evidence. This, too, resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

The errors already discussed in this subdivision were further exacerbated when the prosecution was allowed to present very similar alleged statements through yet another hearsay-reciting witness, Rick Wilson. Counsel for Steven Homick expressly objected to such testimony as improper character evidence, not in furtherance of any conspiracy, and unnecessary to establish a relationship between Steven Homick and the Woodman brothers, since the relationship had already been established by other evidence. (RT 75:6896-6897.) After hearing from the witness outside the presence of the jury, the court overruled all objections, noting simply that

the witness was specific about the dates and the statements were in furtherance of the conspiracy. (RT 75:6914-6915.)

Wilson was then allowed to testify that Neil Woodman often made comments to the effect that Steven Homick could get anything done of an illegal nature for the Woodman brothers.[207] (RT 75:6964.) Wilson did not put these alleged statements in a specific time frame. However, in his earlier testimony outside the presence of the jury, he had said the statements occurred many times during 1984 and 1985. (RT 75:6903.) While it may have been proper for the judge to rely on that testimony to conclude that Wilson heard such statements during the period that the conspiracy existed, another serious problem remains with regard to the court's ruling.

That problem is the same as one of the problems already discussed, in regard to the ruling pertaining to witness Cathy Clemente. There was simply no explanation for the conclusion that the statements were in furtherance of any conspiracy. There was also no evidence that would support such a conclusion. Rick Wilson was never a part of any conspiracy to kill the Woodman parents, and informing him that Steven Homick could do anything illegal which the Woodmans wanted done did nothing to help the Woodmans accomplish their desire to have their parents killed. Once again,

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[207] Wilson was quite certain he had relayed this particular statement to the police by the second time he was interviewed, on November 5, 1985. On that date, the police specifically asked Wilson about Steven Homick. However, after reviewing reports, Wilson acknowledged that none of the various reports that officers wrote about interviews with Wilson contained any reference to such statements about Steven Homick. (RT 75:6992-6994.)

this constituted foolish bragging by Neil Woodman and had nothing to do with furthering any goals of any conspiracy to murder the Woodman parents.

This improperly admitted testimony added heavily to the prejudice that resulted form Cathy Clemente's testimony. First, by echoing Ms. Clemente's testimony, Wilson re-emphasized it for the jury. Furthermore, while Ms. Clemente's testimony had implied that Steve Homick would do things of an illegal nature, it did not expressly state that. Wilson's version did expressly state that Steven Homick would do anything of an illegal nature. This was negative character evidence that carried an extremely prejudicial impact. Thus, once again, all of the federal constitutional rights discussed above were violated and the prejudicial impact was even worse than that which had already occurred as a result of Ms. Clemente's testimony.

3. Magazine Article about Hiring a Hit Man, Displayed by Neil Woodman in Front of Gloria Karns

Before Vera Woodman's sister, Gloria Karns, was called as a witness, counsel for Steven Homick objected to expected testimony regarding an incident in which Neil Woodman displayed a magazine article about hiring a hit man. The court responded that the incident was relevant because it involved a family member and referred to hiring people to solve problems. Counsel alternatively requested a limiting instruction to protect Steven Homick from this hearsay, since this was not in furtherance of any conspiracy to kill the Woodman parents. Apparently because the prosecutor represented that this statements occurred during 1984, while the conspiracy

to murder was in progress, the court ruled against any limiting instruction. (RT 72:6032-6037.)

Gloria Karns was then allowed to testify before the jury about a February 1984 incident when she was at her attorney's office for a deposition in connection with her pending lawsuit against Manchester Products. At one point while Ms. Karns was in a conference room with only a court reporter, Neil Woodman, and Neil's attorney, Neil referred to an issue of the Los Angeles magazine lying on a table. Neil turned the magazine toward Ms. Karns, opening it to a story about hit men entitled "This Gun for Hire." Speaking to his attorney in a voice loud enough for Ms. Karns to hear, Neil said "When somebody annoys you, you can look in a magazine and find someone to stop them annoying you." (RT 72:6161-6166, 6183.)

Once again, the court appears to have relied on the serious misconception that any statement made by one of the alleged conspirators during the period the conspiracy was in existence was necessarily a statement in furtherance of the conspiracy. As shown earlier in this argument, the principles of law governing the admission of con-conspirator hearsay statements make it clear that being in furtherance of a conspiracy is an independent element that must be shown in addition to establishing that a proffered statement occurred during the period of a conspiracy. Once again, the court offered no explanation for a conclusion the alleged statement was in furtherance of any conspiracy. Once again, no evidence would support such a conclusion. The co-conspirator hearsay exception was inapplicable, and there was no other basis for admitting the statement against Steven Homick.

The statement constitutes another example of Neil Woodman's misguided and tasteless efforts to be funny. The only apparent goal was to annoy Gloria Karns, not to further any conspiracy to kill Neil's parents. Neil Woodman's statement was inadmissible against Steven Homick, and the refusal to give the requested limiting instruction was error. This is one more incident that should be considered in determining the overall prejudicial impact of the admission of a number of hearsay statements that did not meet the requirements of the co-conspirator hearsay exception.

4. The Woodman Brothers' Alleged Statements to Jack Ridout That If Ridout Needed His Estranged Wife Killed, They Could Have That Done for Him, and That Steven Homick Was Their Collections Man

The prosecutor planned to elicit testimony from Jack Ridout that in late 1985 or early 1986, he mentioned to Neil Woodman that he was experiencing difficulties with his wife from whom he had separated and was in the process of divorcing. Neil allegedly responded that if Ridout needed it, they could arrange to have her "hit." Counsel for Neil Woodman objected to this as improper hearsay evidence, and as possibly outside the time frame of the conspiracy. Counsel for Steven Homick joined the objection, expressly arguing that any such statement would not have been in furtherance of the conspiracy. Counsel was concerned about the inference that Steven Homick was the person who could accomplish a "hit" on Ridout's wife. Counsel also objected to another alleged statement by Stewart Woodman, who apparently

told Ridout, while slamming his fist into his other hand, that Steven Homick was their collections man. (RT 75:6797-6802.)

The prosecutor argued that the statement about having Ridout's wife hit constituted an admission by Neil Woodman, illustrating how he thought that problems should be solved.[208] The prosecutor clearly acknowledged he was **not** seeking admission of this statement against either Homick brother. However, as to the statement about collections, the prosecutor believed it occurred during the period of the conspiracy and showed the nature and extent of the relationship. (RT 75:6802-6804.)

The court ruled that the statement about having Ridout's wife "hit" made no reference to either Homick, so they could suffer no prejudice. She proposed to admit this statement against Neil Woodman and give a limiting instruction to protect the Homicks. The court initially acknowledged problems with admitting the statement about Steven Homick being a collections man for the Woodmans, as that did not appear to be in furtherance of the specific conspiracy to murder the Woodman parents.[209] However, the court quickly changed her mind and adopted a wildly

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208 To the extent the statement would be used to show how Neil Woodman believed problems should be solved, it was improper propensity evidence, precluded by Evidence Code section 1101. Counsel for Neil Woodman expressly noted this problem. (RT 75:6804.)

209 This was one of the rare occasions when the court appeared to recognize the need to find that a statement made by a conspirator during the pendency of a conspiracy **also** had to be in furtherance of the conspiracy, in order to be admitted under the co-conspirator hearsay exception. Nonetheless, as will be seen, the Court continued to misconstrue the concept of a statement being "in furtherance" of a conspiracy.

speculative and convoluted theory that being a collections man for difficult accounts could include committing a murder in order to collect insurance. If the jury were to accept such a meaning, then the statement would be one in furtherance of the conspiracy.[210] (RT 75:6805-6808.)

Counsel for Steven Homick responded that an insurance policy was not an account receivable. The prosecutor responded that the Woodman brothers treated their insurance policies as accounts receivable. Apparently accepting that dubious theory, the court insisted that she was not broadening the scope of the conspiracy, and was still very clear that the only conspiracy at issue was a conspiracy to commit murder. Nonetheless, she ruled the alleged statement was in furtherance of that conspiracy. (RT 75:6508-6810.) She believed it

> "can be reasonably argued to the jury that a statement, 'This is my collections man for difficult accounts,' is "in furtherance of the conspiracy to commit a murder in order to collect money for the company, either from accounts receivable or insurance policy." (RT 75:6810, l. 25-6811, l. 2.)

Thus, this statement would be admitted against all of the defendants, with no limiting instruction. (RT 75:6811.)

Returning to the statement about having Ridout's wife hit, counsel added an Evidence Code section 352 ground to the list of objections to its

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210 Thus, shortly after seeming to recognize the separate need for a statement to be in furtherance of a conspiracy, the judge appears to have returned to her prior erroneous belief that **any** statement that could be seen as pertaining to any aspect of the conspiracy was automatically in furtherance of the conspiracy.

admissibility against Steven Homick, since the potential for prejudice was great and there was minimal probative value in light of other evidence establishing the relationship between Steven Homick and the Woodman brothers. The court summarily rejected this argument. (RT 75:6811-6812.)

Ridout was then permitted to testify to the statements. He explained he and Stewart Woodman became very close friends. (RT 75:6817-6818.) Once in late 1984, he was at the plant and conversation turned to his estranged wife. It was well-known he had been having a 2 year court battle with her over custody of their child. Neil Woodman made an off-the-cuff statement that Ridout did not have to worry, since Neil could have her hit and all of Ridout's problems would be over. Counsel for Steven Homick again objected to the hearsay, but that was overruled. Furthermore, the court expressly declined to give a limiting instruction at that point. (RT 75:6821-6823.)

Ridout also explained that he briefly met Steve Homick one time at Manchester Products in late 1984 or 1985, and on one later occasion in Las Vegas. Stewart Woodman told Ridout that he used Steven Homick for collections. He referred to one particular problem collection and said that when he sent Steve, the debt was paid promptly. (RT 75:6826-6828, 6872.)

After Ridout's testimony was completed, more than fifty transcript pages after the testimony about Neil Woodman saying they could have Ridout's wife hit, the court finally instructed the jury that this statement was admitted against Neil Woodman only and was not to be considered against either of the Homick brothers. (RT 75:6877-6878. No limiting instruction was ever given in regard to the statement about using Steven Homick for collections.

Once more, in admitting these statements the court committed multiple errors. In regard to the statement about being able to have Ridout's wife hit:

1. Since the prosecutor acknowledged that he was not seeking admission of this statement against either of the Homick brothers, and the court agreed it was not admissible against them, the statement should not have been admitted at all. As explained above in detail, in seeking to avoid a severance of parties the prosecutor had expressly agreed not to seek admission at all of any statement that was found to be hearsay and admissible against one or more, but not all, of the defendants. Having avoided the severance with that agreement, the prosecutor should have been estopped from reneging mid-trial.

2. The statement should not have even been admitted against Neil Woodman in any event. The prosecutor's own rationale made clear he sought admission of the statement in order to prove conduct on one occasion (hiring a hit man to kill his parents) by evidence of Neil Woodman's character, as shown by another specific instance of conduct (suggesting to Jack Ridout that he hire a hit man to kill his wife). This directly violated Evidence Code section 1101, subd. (a). Furthermore, this statement did not constitute an admission by Neil Woodman that he had ever hired a hit man to solve his own family problems. Thus, the statement was irrelevant for any valid purpose and should not have been admitted at all. If it had not been admitted against Neil Woodman, there would have been no need to give an eventual limiting instruction

and Steven Homick would not have had to endure the inevitable prejudice caused by the statement.

3. The conclusion that there could be no prejudice to Steven Homick because his name was not mentioned in connection with this statement was simplistic and unrealistic. It was unreasonable and an abuse of discretion to consider only the bare statement and not the context it which it was presented to the jury. The entire theme of the prosecution case was that the Woodman brothers hired Steven Homick to "hit" their parents. When the jury was told that Neil Woodman told a friend that the Woodman brothers could solve the friend's problem with an estranged wife by having her hit, the jury could not help but infer that Neil Woodman meant that he could arrange to have Steven Homick carry out that hit.

4. Even if the statement was properly admissible against Neil Woodman at all, it was an abuse of discretion to overrule the separate Evidence Code section 352 objection. The statement added little to the other evidence against Neil Woodman, but was highly prejudicial to all three defendants in its improper implications.

5. The limiting instruction that was eventually given could not be effective to make the jury disregard such an extremely prejudicial statement. Indeed, the admonition probably only emphasized to the jury that Neil Woodman's alleged hearsay statement impliedly referred to the Homick brothers.

6. Even if there was any possibility that an admonition could cure the harm, that possibility was negated by the inexplicable refusal to

give a **prompt** admonition, as expressly requested by counsel for Steven Homick. This Court has recognized that the effectiveness of an admonition can often depend on how promptly it is given. (*People* v. *Hogan* (1982) 31 Cal.3d 815, 847.) By refusing, in the presence of the jury, to give the requested admonition, the court strongly signaled that it was permissible for the jury to consider this statement against Steven Homick. By the time an admonition was given, more than **fifty** transcript pages later, it was too late to undo the damage that had been done.

In regard to the statement about Steven Homick being the Woodmans' collections man:

1. As the court initially recognized, the alleged statements by Stewart Woodman that Steven Homick was the collections person for the Woodman brothers, or that he had succeeded in obtaining prompt payment of a difficult account, were not in furtherance of any conspiracy to murder. Jack Ridout was not involved in that conspiracy, and making that statement to him did nothing to help achieve the alleged goal of any such conspiracy. Once again, this was an instance of idle boasting, not a statement in furtherance of any conspiracy. (See *People* v. *Morales, supra,* 48 Cal.3d at 551-552.)

2. The court's theory that being a collections man for difficult accounts could include committing a murder in order to collect insurance was a speculative and unwarranted stretch of the imagination.

3. Even if there was any validity to the theory that collecting difficult accounts included committing murder to collect insurance, the fact remains the alleged statements still did nothing to further any conspiratorial goals. The statements would still remain idle boasting.

4. The alleged statements were prejudicial, further repeating and re-emphasizing the substantial improper character evidence regarding Steven Homick.

In sum, the court once again stretched the co-conspirator hearsay exception far beyond its intended application, and committed other errors that resulted in exposing the jury to an endless parade of character assassination. Two more very prejudicial statements must be added to the long list of improper evidence that resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

5. Neil Woodman's Post-Arrest Call to Steve Strawn Regarding Cards Under a Desk

Steve Strawn testified that hours after Neil Woodman was arrested, Neil called and made sure that the police had completed their search of Manchester Products. Neil then asked Strawn to find and destroy business cards that were folded up and hidden under one of the legs of Neil's desk. Strawn did as he was asked, but later told the police about it and testified that the cards he destroyed were business cards containing Steven Homick's name.[211] (RT 77:7175-7181, 7262.)

The prosecutor offered this as evidence of an admission of guilt by Neil Woodman. Counsel for Steven Homick objected, contending this was hearsay as to Steven Homick and that its admission in evidence would violate *People* v. *Aranda* (1965) 63 Cal.2d 518. (RT 77:7141-7144.) The Court agreed this constituted an admission by Neil Woodman, but initially did not see how this incriminated Steven Homick at all. Counsel argued that the implication was that Neil was admitting some wrongdoing that involved Steven Homick. Counsel argued that if this was added to all the other prejudicial material that had been allowed in against Steven Homick, then no admonition could cure the harm. Counsel added that Steven Homick's name on the cards was the only aspect that gave any meaning to Neil Woodman's purported admission. (RT 77:7147-7151.)

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211 The jury was instructed that evidence concerning Neil Woodman's telephone instructions to Steve Strawn was to be considered only as to Neil Woodman, and that it could not be considered in any fashion against Steven Homick, (RT 77:7357.)

The Court concluded there was an indirect implication regarding Steven Homick, but not a direct one. Therefore, the court believed, a limiting instruction would cure any potential harm to Steven Homick. (RT 77:7151; see also RT 77:7229-7230, where the court stated that if there was a direct implication against Steven Homick, then it could not be admitted in evidence.) The testimony by Strawn was permitted. Afterward, the court admonished the jury that Neil Woodman's instructions to Steve Strawn could only be used in regard to Neil Woodman, and not against Steven Homick. (RT 77:7357.)

Once again, multiple errors were committed:

1. Since the court agreed this was not admissible against Steven Homick, this is one more item that should have automatically been kept out of evidence altogether, pursuant to the prosecutor's earlier representation that once the court ruled that proffered testimony was hearsay as to one or more defendants, the prosecutor would not make use of it at all.
2. Defense counsel was correct in asserting that no admonition could cure the harm to Steven Homick. The cumulative impact of this hearsay implication that Steven Homick was involved in wrongdoing with Neil Woodman, along with all the other improper character assassination evidence that had been erroneously admitted, was simply too much to overcome with an admonition.
3. Even if an effective admonition was possible, the one that was given was inadequate. The jury was simply told it could not use the testimony about Neil's instructions to Steve Strawn against

Steven Homick. That left the jury free to consider hearsay implications of Neil Woodman's initial conduct in hiding the cards under the desk in the first place.

Thus, this constitutes one more item to consider in assessing the cumulative prejudicial impact against Steven Homick.

6. Steve Strawn's Testimony That Neil Woodman Referred to Steven Homick as a Heavy Guy

Another matter discussed before Steve Strawn testified was testimony the prosecutor desired to elicit regarding the fact that when he was introduced to the Homicks in 1982 they were described by the Woodmans as "bad guys or heavy-type people." (RT 77:7166.) The court agreed the statement was made before any conspiracy had begun and did not come within any hearsay exception. (RT 77:7167.) The prosecutor then expressly agreed to instruct the witness not to refer to that matter in his testimony. (RT 77:7167, ll. 21-22.)

On cross-examination by counsel for Steven Homick, Strawn testified that Stewart Woodman often ridiculed Neil Woodman's relationship with Steven Homick. (RT 77:7313-7314.) On redirect-examination, the prosecutor asked Strawn to give an example of what he meant by that. In response, Strawn said that Stewart had made statements that Steven Homick's visits to the Manchester plant were a waste of time, and that Neil discredited himself when he referred to Steven Homick in front of other people as a "heavy guy..." (RT 77:7330-7331.)

At the next break in the proceedings, counsel for Steven Homick noted that this testimony violated the earlier ruling and the instruction to the prosecutor to tell the witness not to say that. Counsel expressed his intent to seek a mistrial as a result of this improper testimony. (RT 77:7344.) Although relatively minor in comparison to the other errors set forth in this argument, this constitutes one more instance of inflammatory and prejudicial hearsay evidence being introduced as part of the prosecution's case.

The individual and cumulative impact of the many items of improper evidence described in this argument deprived Steven Homick of his federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

VII. IN A NUMBER OF OTHER INSTANCES, EVIDENCE OFFERED BY THE PROSECUTION WAS IMPROPERLY ADMITTED AGAINST STEVEN HOMICK

A. Introduction

In the preceding argument it was shown that many highly prejudicial hearsay statements were improperly admitted against Steven Homick under an erroneous interpretation of the co-conspirator hearsay exception. Also, as shown in that same argument other highly prejudicial statements that were hearsay as to Steven Homick were admitted only against a co-defendant, but limiting instructions were inadequate to avoid prejudice to Steven Homick, and such admission was inconsistent with the prosecutor's pre-trial representation that if the Court found hearsay statements to be inadmissible against one defendant, they would simply not be offered against any of the defendants. In Argument V, *supra*, it was shown that additional evidence was admitted on behalf of co-defendants, even though it was inadmissible against Steve Homick and carried great potential for prejudice that was not, or could not, be prevented by admonitions.

In the present argument, it will be shown that there were also a number of instances of improper evidence admitted against Steven Homick as a result of other types of evidentiary errors. This argument and the preceding arguments are connected, in that together they resulted in an unusually large number of instances of different types of highly prejudicial negative information about Steven Homick being improperly disclosed to the jury. The end result was a character assassination so thorough that Steven Homick was deprived of his federal 5th, 6th, 8th, and 14th amendment rights to

a fair jury trial in accordance with due process of law, to confront the witnesses against him, and to reliable fact-finding underlying capital guilt and penalty phase verdicts.

B. Testimony by Art Taylor That Steven Homick Carried a Firearm

Before Art Taylor testified, counsel for Steven Homick objected to any testimony about Steven Homick carrying a firearm. The prosecutor wanted to elicit testimony that Steven Homick normally carried a revolver. The prosecutor's theory was that one witness would testify that he heard 5 shots at the crime scene and believed they were fired from a revolver. The court overruled any objection, concluding that access to or possession of a weapon of the type used in the offense was highly relevant.[212] (RT 82:8293-8294.)

Taylor then testified to his friendship with Steven Homick. He said he saw Homick almost daily in the 1983-1985 time frame, and that Homick usually carried a briefcase. Taylor added that sometimes Homick opened the briefcase in the shop, and it usually contained a silver revolver. (RT 82:8310-8315.)

The court's ruling in this regard was inconsistent with basic legal principles governing the admission of evidence that the defendant owned a

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212 In a similar earlier discussion, the judge had expressed her view even more strongly: "I think certainly access to a weapon, possession of a weapon by someone who is charged with having shot someone is certainly probative and relevant to the People's case." (RT 79:7543, ll. 1-4.)

dangerous weapon. In *People* v. *Riser* (1956) 47 Cal.2d 566, two brothers were charged with the murder of two robbery victims who had been shot. An expert testified they were killed with a Smith and Wesson .38 Special revolver. Less than two weeks later, .38 caliber ammunition was found in the car of one brother, and when the other brother was arrested, he had a loaded Colt .38 revolver in his possession. (*Id.*, at 576.)

This Court upheld admission of evidence that some of the shells were of the same type as the shells used in the murder and that spectroscopic analysis showed they were probably poured from the same batch of lead. (*Id.*, at 576-577.) This Court also upheld admission of possession of a holster that had once held a Smith and Wesson .38 Special revolver, finding relevance because that was precisely the kind of gun used in the murders. (*Id.*, at 577.) However, in regard to actual guns that were apparently not the murder weapon, this Court concluded, "it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*Id.*, at 577.)

This Court in *Riser* also noted:

> "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon." (*Id.*, at 577.)

The issue, therefore, is just how broad a meaning should be given to the phrase "could have been the weapons employed..."

More recently, this Court concluded that *Riser* allowed admission of evidence that the defendant possessed a gun which a witness testified looked like the murder weapon. (*People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1047.)

In *People* v. *Webb* (1993) 6 Cal.4th 494, Webb's home was searched the day after a murder, but for reasons unconnected with the murder. A .38 Special firearm was found, but was inadvertently left behind by the police. Webb's girlfriend contacted him and informed him the police had discovered the gun but left it behind. Webb instructed her to get rid of the gun. She tried to destroy the gun, but only damaged it and eventually the police regained custody of it and it was admitted in evidence at Webb's trial for the murder offense. (*Id.*, at p. 519.)

On appeal, Webb argued it was an abuse of discretion to admit the gun because it had not been shown that it was, in fact, the murder weapon. This Court rejected that argument, but did not simply say it was admissible because it might possibly have been the murder weapon. Instead, this Court explained:

> "... ample evidence established that the Rainwaters were killed with special .38-caliber bullets, that defendant had access to the same bullets and to Sharon's .38-caliber revolver shortly before the murders, and that he attempted through Sharon to destroy the gun afterwards. Recovery of the deteriorated gun from a remote location specified by Sharon corroborated her testimony that she disposed of the weapon at defendant's direction. The gun, expert ballistics testimony, and Sharon's account tended to confirm the inference that the gun found at Ragged Point was used to kill the Rainwaters and that defendant was involved in the crimes. We conclude the trial court did not abuse its

> discretion in determining that the probative value of the gun substantially outweighed any prejudicial impact." (*Id.*, at 520.)

Thus, relevance in *Webb* was based on a combination of factors. Both the admitted gun and the murder weapon were .38 caliber. Soon after the crime the defendant tried to have the weapon destroyed.

These cases indicate that before evidence of a gun connected to the defendant is admissible, something more must be shown beyond the fact that a gun was used in the charged crime. Admission has been upheld where the gun is the same caliber as the murder weapon, or where the gun looked like the murder weapon. In the present case, in contrast, the only common feature is that the gun connected to Steven Homick was a revolver and a non-expert witness who heard the fatal shots believed they sounded like they were fired from a revolver. Even assuming this was sufficient to establish that the murder weapon was a revolver, the fact remains that the great majority of handguns are revolvers. Revolvers are so common that possession of a revolver is meaningless as a basis of an inference that the possessor is guilty of any particular crime that was committed with a revolver.

Court of Appeal cases in analogous contexts are consistent with this conclusion. For example, in *People* v. *Pitts* (1990) 23 Cal.App.3d 606, several defendants were tried together in charges stemming from a conspiracy to commit child molestation. Testimony indicated some acts of molestation were photographed. Photographic equipment belonging to one of the defendants was seized and was admitted against all of the defendants. The Court of Appeal found error, because none of the equipment was distinctive enough to support the inference that equipment used by one conspirator on one occasion was the same as the equipment used by other

conspirators on other occasions. (*Id.*, at 835-837.) Similarly in the present case, a revolver, in and of itself, is not at all distinctive and does not support an inference it was the particular revolver used to commit a crime.

More recently, in *People* v. *Archer* (2000) 82 Cal.App.4th 1380, the defendant was convicted of stabbing the victim. Nine knives were recovered from the defendant's home and storage locker and were all admitted in evidence. The Court of Appeal concluded that only two of the knives were at all relevant. One was described by a witness as being like the weapon used and another had traces of blood. The rest were irrelevant as there was no issue regarding the defendant having access to knives. The excess knives were prejudicial because they did show that the defendant was predisposed to surround himself with deadly weapons, a fact of "'...*no relevant* consequence...". (*Id.*, at 1392-1393.) In the present case, nobody described the particular revolver allegedly seen in Steven Homick's briefcase as anything like the murder weapon.

Another useful analogy is presented in *People* v. *Hall* (1986) 41 Cal.3d 826, and subsequent cases applying its rule. In *Hall*, this Court held that if a defendant attempts to raise a reasonable doubt as to his guilt of a crime by attempting to show that the crime could have been committed by another person, then the applicable evidentiary standard is the same analysis that is always performed under Evidence Code section 352. But this Court added:

> "...evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking

> the third person to the actual perpetration of the crime." (*Id.*, at 833.)

Similarly, if more than a mere possibility is insufficient to justify admission of evidence that would be utilized to raise a reasonable doubt of guilt, then at least as much must be required to justify admission of evidence being used to prove guilt beyond a reasonable doubt. Thus, a mere possibility that a revolver possessed by the defendant might have been used in a murder is insufficient; there must be direct or circumstantial evidence linking that particular revolver to the murder.[213]

In any event, in the present case the prosecutor also presented testimony by Michael Dominguez that on the day before the Woodmans were murdered, Dominguez accompanied Steven Homick to Max Herman's law office, from which Steven Homick emerged with a gun case that contained a revolver. (RT 85:8960-8962, 8975-8983.) It was obviously the prosecutor's belief that this was the murder weapon; otherwise there would

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213 An indication of just how strongly a third party must be connected to a crime to support admission of third party evidence is presented in *People* v. *Kaurish* (1990) 52 Cal.3d 648. There, the defendant was convicted of sexually molesting and killing the daughter of his estranged wife. He offered evidence that the mother and daughter had stolen property from the third party a week or two before the murder and had bragged about it, and that the third party, who had a history of child molestation, had vowed to get even with both of them. (*Id.*, at 684-685.) This Court applied *Hall* and found an inadequate showing to require admission of this evidence. (*People* v. *Kaurish*, *supra*, 52 Cal.3d at 685.)

If such evidence is insufficient to help raise a reasonable doubt as to the guilt of the charged defendant, then certainly proof of guilt beyond a reasonable doubt must require something more closely connecting a gun to a crime than the mere fact that it was a revolver before it can be introduced into evidence against a defendant.

have been no relevance in this aspect of Michael Dominguez' testimony. But if the prosecutor believed that Steven Homick obtained the murder weapon from Max Herman the day before the murder, then he could not have believed the gun Art Taylor had previously seen in Steven Homick's briefcase was the murder weapon. Thus, even under the most narrow reading of *Riser*, any speculative inference that the gun in the briefcase was the murder weapon was inconsistent with the prosecution theory of the crime, and evidence pertaining to that gun should not have been admitted.

This evidence might not have been sufficiently prejudicial in and of itself to necessitate a reversal, but it should be considered in connection with all of the other improperly admitted prejudicial evidence.

C. Robert Homick's Alleged Statement That It Was Just a Coincidence That He Was Parked Outside the Woodman Residence on June 22, 1985

Overwhelming evidence established that on June 22, 1985, Robert Homick spent several hours parked in front of the building in which Gerald and Vera Woodman resided. As explained more fully in the Statement of the Facts portion of this brief (see pp. 52-54, *supra*), David Miller and Eric Grant noticed Robert Homick in his older car, thought it was unusual for a stranger to be parked there for hours, and reported the incident to the police. They identified Robert Homick as the man, they identified his car, and Eric walked by the car and wrote down the license plate number. Two officers who responded to the call talked to Robert Homick, who identified himself and showed them his driver's license. They made a written record of the incident.

Nobody could reasonably dispute the fact that this incident occurred, and nobody ever tried. June 22, 1985 was also Gerald and Vera Woodman's 45th wedding anniversary, an occasion on which they would normally leave their apartments together to go out to dinner with their family. (RT 79:7547-7548, 7555.) There was no evidence at all that Steven Homick was anywhere near Los Angeles on that date. Notations his monthly calendar book indicated he was in Tucson, Arizona at a handball tournament. (RT 110:13058-13059; 13739-13740.) Counsel for Steven Homick wanted the jury to infer that Robert Homick had plans to kill the Woodman parents that day, but did not complete the task. Since Steven Homick was apparently out of town that day, that would support the inference that it was Robert Homick, rather than Steven Homick, who was hired by the Woodmans to kill their parents.

Before Stewart Woodman testified for the prosecution, counsel for Steven Homick brought up an alleged incident that occurred in the jail in which Robert Homick told Stewart Woodman it was just a coincidence that he had been parked by the Woodman residence on June 22, 1985, and that he had been there on earlier and later occasions. Counsel pointed out that even if that statement were admissible against Robert Homick as an admission of a party, it would not be admissible against anybody else. The court agreed with that, since the hearsay statement occurred after the conspiracy had concluded. (RT 102:11535.)

Counsel for Steven Homick moved for exclusion of the statement even against Robert Homick. If the statement was admitted at all, it would be very harmful to Steven Homick's theory of the case because the statement was exculpatory to Robert Homick to the extent it indicated his presence at

the Woodman residence on June 22, 1985 was a mere coincidence, rather than being part of an attempt to kill the Woodmans while leaving for or returning from their customary anniversary dinner. The court summarily overruled the objection, telling the prosecutor it was unnecessary for him to even argue the point. Steven Homick's motions for a severance and/or a mistrial, due to that ruling, were also summarily denied. (RT 102:11535-11537.)

The matter was discussed again the following week. Counsel for Steven Homick renewed his argument that this was a self-serving exculpatory statement as to Robert Homick, and was made after the conspiracy ended. The prosecutor responded that he wanted to elicit the statement to show that Robert Homick was conducting surveillance of the murder victims. The court responded simplistically and unrealistically that Steven Homick was not mentioned in the statement, so he could not be affected by it. (RT 107:12476-12478.)

Counsel for Steven Homick explained his theory more fully. In his view, Robert Homick's presence at that location on June 22 was incriminating as to Robert Homick and exonerating as to Steven Homick, since he was not in Los Angeles that day. But Robert Homick's self-serving hearsay claim that his presence that day was just a coincidence negated the aspect that served to exonerate Steven Homick. (RT 107:12478.)

The prosecutor reiterated his desire to show a pattern of surveillance. Counsel for Steven Homick offered to stipulate to the portions of the statement that said Robert Homick was there that day, prior to that day, and after that day. Counsel merely wanted to delete the self-serving aspect

contained in the "just a coincidence" portion of the statement, which was hearsay and inadmissible against Steven Homick. (RT 107:12479-12480.)

Without explaining her rationale, the court merely responded that she disagreed with almost every argument counsel had just made. She again overruled the objection. (RT 107:12480.) Stewart Woodman then testified that after he learned from his attorney that Robert Homick had been seen outside the Woodman residence on their anniversary, Robert said it was just a coincidence he had been there that day. He added that he had also been there before and after that day. (RT 107:12481-12482.)

Multiple errors occurred in the court's handling of this matter:

1. The only explanation the court ever gave for her ruling was that the statement did not mention Steven Homick, so it could not affect him. This showed great insensitivity to the problems inherent in a joint trial of three defendants with widely varying defenses. By this point in the trial, it was obvious that each of the Homick brothers wanted the jury to believe it was only the other Homick brother involved in any conspiracy with the Woodmans. This was a realistic contention on behalf of Steven Homick, as the prosecution evidence strongly showed that it was Robert Homick who was so close to Stewart Woodman that they talked to each other daily and saw each other almost as often. It was Robert Homick the Woodmans sent to exert pressure on customers who were behind in paying their accounts. It was Robert Homick they turned to when they wanted the Monte Carlo or the Rolls Royce stolen for insurance money. It was Robert Homick who received all of the money the Woodmans allegedly paid for the murder of their parents. It was Robert Homick who purchased and

who was found in possession of the bolt cutters used to gain entry to the Woodman garage. It was Robert Homick who was parked in front of the Woodman residence for hours on their anniversary, and who was involved in an accident around the corner from the Woodman residence just two or three hours before the murders occurred. Thus, any self-serving hearsay statements which in any way tended to minimize the significance of Robert Homick being parked outside the Woodman residence on their anniversary clearly and unquestionably harmed the legitimate interests of Steven Homick. The failure to recognize this at all should be enough to demonstrate the erroneous reasoning of the court.

2. The evidence was of minimal importance to the prosecution case. Even without the statement, the prosecutor had unimpeachable proof that Robert Homick spent hours parked outside the Woodman residence on the date of their anniversary, and that he had an auto accident around the corner from their residence the night they were murdered, and that his bedroom contained the bolt cutters used to gain entry to the scene of the murders. The statement that Robert Homick was near the Woodman residence on other occasions added nothing of significance to the prosecution case against him.

3. No consideration was given to the offer by Steven Homick's counsel to stipulate that Robert Homick had admitted being at the Woodman residence on June 22, 1985 and on other occasions before and after that date. Such a stipulation would have given the prosecution everything it claimed it wanted to prove, while not prejudicing anybody. In Argument VIII, later in this brief it will be shown that it

was error to force Steven Homick to stand trial with two co-defendants with widely conflicting defenses. But if that was somehow not error, then at the very least more sensitivity was required when it would have been so simple to avoid unfair prejudice to Steven Homick while satisfying the legitimate needs of everybody else.

4. While the self-serving hearsay aspect of Robert Homick's statement, which occurred after the latest conceivable date of the conspiracy, was clearly inadmissible against Steven Homick, no limiting instruction was ever given. It is not likely one could have been fashioned which would have adequately protected Steven Homick's interests, but no attempt was even made.

Thus, to the extent discretion might have been involved in the court's ruling, it was clearly abused. In combination with all of the other evidentiary errors, the result was the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65

L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

D. Testimony by an FBI Agent That He Believed Michael Dominguez Was Telling the Truth

Counsel for Robert Homick called FBI Special Agent Joseph Gersky as a witness. Gersky was an FBI polygraph examiner who had administered an examination to Michael Dominguez as part of the negotiation process before Dominguez' highly favorable plea bargain was finalized. All parties agreed that any polygraph results were not admissible and that the witness should not be identified as a polygraph examiner. Counsel for Robert Homick merely wanted to examine Agent Gersky about some of the statements that Dominguez made while being interviewed by Gersky.

Robert Homick's counsel brought out the fact that during the first part of the interview, Dominguez told Gersky that he did not know who was present when the Woodmans were shot, and he did not know who else was involved aside from Steven Homick. (RT 116:14084.) At that point the following interchange occurred:

> "Q. Now, there was another interview, or questioning, or second part of it, a short time later, is that right?
>
> A. An hour or so later.
>
> Q. That's part of your standard technique?
>
> A. Well, because in this case I didn't believe what he said the first time, yes." (RT 116:14084-14085.)

The direct examination continued in a normal fashion, bringing out the fact that in the second part of the interview Dominguez admitted that he had initially withheld some information about the shooting. Counsel then went into the episode where Dominguez claimed that he went with Steven Homick to attorney Max Herman's law office, where Steven Homick acquired a firearm. (RT 116:14085.)

At this point the testimony was interrupted for a sidebar discussion regarding the admissibility of various prior consistent and inconsistent statements made by Dominguez. After that discussion, the prosecutor noted that the witness had testified that he did not believe Dominguez' initial statements, so he questioned Dominguez further. In light of that testimony, the prosecutor wanted to ask the witness on cross-examination whether he believed Dominguez' later statements. The prosecutor expected an affirmative answer to that question. Before defense counsel had any chance to respond, the court stated, "I agree. I think that question is appropriate." (RT 116:14093.)

Counsel for Steven Homick immediately objected to any testimony by the Agent that he believed Dominguez' later statements. The court responded that once the witness had testified that he did not believe what Dominguez said initially, the jury was entitled to hear his opinion about Dominguez' subsequent veracity. Counsel responded that the witness was never asked whether he believed or disbelieved Dominguez; rather, the witness volunteered that information in responding to a perfectly innocent question. Furthermore, the expression of disbelief went to one narrow and specific area of questioning. Counsel feared that in response the prosecutor would go through a considerable amount of information covered in the second part of

the interview, and then elicit the opinion that the Special Agent believed all that information was true. (RT 116:14094.)

The court professed to see no problem with the prosecutor being allowed to ask a single question, "After you finished talking to him the second time, did you believe him then?" (RT 116:14095, ll. 1-3.) Counsel for Steven Homick reiterated that such a single question would encompass a substantial number of statements that the prosecutor would cover first. Counsel reminded the court that the original purpose in calling the witness was to simply bring out the fact that in his initial statements, Dominguez had failed to mention Robert Homick at all. Instead, the prosecutor would now use the FBI Special Agent to repeat once more all of Dominguez later statements, and then express an opinion about the truthfulness of those statements. (RT 116:14095-14096.)

The court then asked the prosecutor to explain his own intentions more fully. Just as defense counsel had predicted, the prosecutor expressed his view that he should be permitted to cover all of the prior consistent statements contained in the documents the Special Agent had used to refresh his recollection, and then ask the witness if he believed all of those statements. (RT 116:14096-14097.) The Court then seemed to agree with defense counsel that it was not appropriate to take a witness who was called to give limited testimony in favor of Robert Homick and use him instead to give extensive testimony against Steven Homick. Counsel for Robert Homick joined in objecting to eliciting the witness's opinion about Dominguez' truthfulness, since that opinion would essentially be based on the polygraph exam the witness had administered. (RT 116:14097-14099.)

The court then ruled that the prosecutor could bring out the fact that there had been a second series of questions and that at the end of those questions, the witness believed Dominguez. However, the prosecutor would be precluded from going into the content of those questions. Counsel for Steven Homick asked how he could cross-examine after such testimony, without getting into the fact that the basis for the witness's belief was a polygraph examination. Furthermore, the defense efforts to gain discovery of the charts that resulted from the polygraph examination had been defeated by the refusal of the federal government to turn over such information, so the defense had been deprived of any opportunity to have its own experts examine the charts.[214] (RT 116:14100.)

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214 In response to the initial discovery motion for polygraph charts, the prosecutor first reported that no such documents existed. (RT 19:829.) In a later discovery hearing, the prosecutor took the position that the polygraph examiner's conclusions were inadmissible, so any charts supporting that position were irrelevant. Defense counsel explained he wanted the charts for possible impeachment. The prosecutor then responded that he did not have the graphs, charts or tapes from the polygraph and did not know where he might obtain them. The court then ordered the prosecutor to make inquiry of the FBI for the tapes, charts, and graphs and to ask that they be turned over. (RT 66:5285-5289.)

The prosecutor made the inquiries as directed and later reported back that FBI Agent Dennis Arnold, who had replaced Agent Gersky, had advised him that a brief written report about the Dominguez polygraph examination would be prepared, but no video or audio tape of the actual exam had been made. According to the prosecutor, (RT 68:5490-5491.) Agent Arnold also advised him:

> "And, further, that the chart is not released by the federal government. They do not and will not release that chart.
>
> The information that has been provided is the information that they will release. So their

(Continued on next page.)

The court dismissed that problem, noting simply that the jury did not know the witness was a polygraph examiner. Furthermore, the court believed the fact that the witness believed Dominguez was a matter of minor importance. The judge repeated that she was only allowing the question to be asked "simply because he did testify that he hadn't believed him in the first instance." (RT 116:14100-14101.)

Subsequently, on redirect examination by the prosecutor, the following interchange occurred:

> "Q. You indicated there were two parts to this interview; the first interview and second interview?
>
> A. Yeah. It was all in the same room over about a 3- or 4-hour period, and, yes, there was 2 parts.
>
> Q. An after the second interview, the second part of the interview, you believed Michael Dominguez, didn't you?
>
> A. Yes, I did." (RT 116:14115, ll. 2-11.)

Once again, there were multiple flaws in the manner in which the court handled this situation:

1. When a police officer has interviewed a suspect, the officer's personal opinion regarding whether the answers given were true or false is inadmissible. Even a psychological or psychiatric expert witness is not permitted to testify that specific statements made by

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(Continued from last page.)

> position at this point is they will not give that information up, any further than has already been disclosed." (RT 68:5491, ll. 5-12.)

a witness are true or false. (*People* v. *Ainsworth* (1988) 45 Cal.3d 984, 1012: "We agree that, in such cases, where the sole purpose of the psychiatric examination and testimony relates to the credibility of a witness, the psychiatrist may not testify to the ultimate question of whether the witness is telling the truth on a particular occasion." See also *People* v. *Castro* (1994) 30 Cal.App.4th 390, 395-396.) Here, the witness was not even such an expert, but was instead an FBI Agent. In *People* v. *Sergill* (1982) 138 Cal.App.3d 34, the trial court allowed a police officer to testify to his belief a witness was telling the truth when she talked to him. The trial court found the officer to be an expert in assessing the veracity of those who report crimes to the police. Soundly rejecting the admissibility of such testimony with a detailed rationale directly applicable to the present circumstances, the reviewing court explained:

> "We find no authority to support the proposition that the veracity of those who report crimes to the police is a matter sufficiently beyond common experience to require the testimony of an expert. Moreover, even if this were a proper subject for expert testimony, nothing in this record establishes the qualifications of these officers as experts. The mere fact that they had taken numerous reports during their careers does not qualify them as experts in judging truthfulness. (Evid. Code, § 720, subd. (a).)
>
> Nor was this testimony admissible as the opinion testimony of a lay witness. A lay witness may testify in the form of an opinion only when he cannot adequately describe his observations

without using opinion wording. (Jefferson, Cal. Evidence Benchbook (1972) § 29.1, pp. 495-496.) 'Whenever feasible "concluding" should be left to the jury; however, when the details observed, even though recalled, are "too complex or too subtle" for concrete description by the witness, he may state his general impression. [Citation.]' (*People* v. *Hurlic* (1971) 14 Cal.App.3d 122, 127.) Both these officers were able to describe their interviews with the girl in concrete detail and their opinions or conclusions as to her truthfulness were not 'helpful to a clear understanding of [their] testimony.' (Evid. Code, § 800, subd. (b).)

We also conclude that this opinion testimony was inadmissible because it was not relevant. (Evid. Code, § 351.) ...

This opinion testimony did not fall within any of the categories listed in Evidence Code section 780, which enumerates the most common factors bearing on the question of credibility. (See Cal. Law Revision Com. com. to Evid. Code, § 780, 29B West's Ann. Evid. Code (1966 ed.) p. 280; Deering's Ann. Cal. Evid. Code (1966 ed.) p. 196.) As we have stated, these officers neither knew the child, nor knew her reputation for truthfulness. (See *People* v. *Mendoza*, supra, 37 Cal.App.3d 717, 724.) Instead, their conclusions that she was telling the truth were based on their own self-proclaimed expertise in assessing victim veracity, but the record is devoid of any evidence to establish their qualifications in this regard. We conclude that the officers' opinions on the child's truthfulness during their limited contacts with her did not have a reasonable tendency to prove or disprove her credibility and were therefore not relevant." (*People* v. *Sergill*, *supra*, 138 Cal.App.3d at 39-40.)

This Court addressed a similar situation in *People* v. *Melton* (1988) 44 Cal.3d 713, 744-745, citing *Sergill* with approval and explaining:

> "Lay opinion about the veracity of particular statements by another is inadmissible on that issue. As the Court of Appeal recently explained (*People* v. *Sergill* (1982) 138 Cal.App.3d 34, 39-40), the reasons are several. With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding (Evid. Code, §§ 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' (*id.*, § 800, subd. (b)), *i.e.*, where the concrete observations on which the opinion is based cannot otherwise be conveyed. (*People* v. *Hurlic* (1971) 14 Cal.App.3d 122, 127; see Jefferson, Cal. Evidence Benchbook (1972) § 29.1, pp. 495-496.) Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code, § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (id., § 780, subds. (a)-(k)). Thus, such an opinion has no 'tendency in reason' to disprove the veracity of the statements. (Id., §§ 210, 350.)
>
> The instant record does not establish that Carpenter is an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations. He knew nothing of Boyd's reputation for

> veracity. He was able to describe his interviews with Boyd in detail, leaving the factfinder free to decide Boyd's credibility for itself, based on such factors as his demeanor and motives, his background, his consistent or inconsistent statements on other occasions, and whether his statements to Carpenter had the essential 'ring of truth.' The trial court thus erred insofar as it admitted Carpenter's testimony to indicate his assessment of Boyd's credibility."

2. In concluding that the witness should be allowed to testify that he did believe Dominguez in the second part of the interview simply because the witness had already testified to his disbelief in the first part of the interview, the court seriously misconstrued the initial testimony. The purpose of the initial testimony was **not** to express an opinion as to the believability of Dominguez. Indeed, the question was asked by Robert Homick's counsel after a description of Dominguez' initial claim that he did not know who else was involved in the conspiracy aside from Steven Homick. Robert Homick's attorney was obviously pleased with that part of Dominguez' statement to the FBI agent. Thus, counsel would not have wanted to elicit the agent's opinion that he disbelieved that part of Dominguez' statement. Indeed, the question that was asked does not appear designed to elicit any such opinion. Counsel merely asked whether the second interview was part of the Agent's standard interviewing technique. The obviously unanticipated answer was that the second interview occurred because the agent did not believe Dominguez during the first interview. Thus, the relevance of the answer was in explaining

why the second interview occurred, not in the expression of an inadmissible opinion regarding the veracity of the witness.

3. If the prosecutor wanted to avoid having the juror interpret the initial answer as an expression of opinion about Dominguez' credibility, the proper remedy was to seek a limiting instruction. (*People* v. *Hart* (1999) 20 Cal.4th 546, 653, fn. 40; *People* v. *Daniels* (1991) 52 Cal.3d 815, 884; *People* v. *Von Villas* (1992) 11 Cal.App.4th 175, 246.) Such an instruction would have told the jury that the answer was relevant only to explain why there was a second interview, and should not be considered as evidence pertaining to Dominguez' credibility. By choosing not to seek such a limiting instruction, the prosecutor waived any right to relief. No authority suggests that failing to seek a limiting instruction somehow gave the prosecutor the right to respond instead by intentionally eliciting an improper opinion about Dominguez' credibility in the second part of the interview. Unlike the initial answer, the opinion that the prosecutor was allowed to elicit served no proper purpose whatsoever. It was clearly elicited **only** for the improper purpose of informing the jury that the Agent personally believed Dominguez during the second part of the interview. Since the statement that the agent disbelieved Dominguez in the first part of the interview had an arguably proper purpose (explaining the reason for a second interview), the improper aspect of expressing a personal opinion on the truthfulness of the witness was a collateral matter. In effect, the court's ruling improperly allowed impeachment on a collateral

matter. (Compare *People* v. *Valentine* (1988) 207 Cal.App.3d 697, 704-706, accepting the contention that "improperly allowed cross-examination cannot lay a foundation for the introduction of inadmissible matters in rebuttal." (*Id.*, at 704.) Indeed, in language closely analogous to the present circumstance, it has been explained:

> "Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called 'open the gates' argument is a popular fallacy. 'Questions designed to elicit testimony which is irrelevant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject.' (27 Cal.Jur. p. 74). 'It is a settled rule that cross-examination as to matters irrelevant to the issue may and should be excluded--even though, in some cases, testimony relative thereto was elicited upon direct examination--and that a party may not, under the guise of cross-examination, introduce evidence that is not competent within the meaning of the established rules.' (27 Cal.Jur. p. 106)." (*People* v. *McDaniel* (1943) 59 Cal.App.2d 672, 677.)

4. Even if there was some sort of theory of reciprocity which could overcome the normal rules of evidence, there was no need for any reciprocity here. As explained above, the prosecution **benefited** from the agent's opinion that he disbelieved the first part of Dominguez' statement. Obviously, the initial claim by Dominguez

that he did not know who else was involved in the conspiracy was inconsistent with the prosecution theory at trial. For that reason, it is not surprising that the prosecutor made a tactical decision not to object to the initial opinion. Thus, by letting the prosecutor achieve "balance" by eliciting the second opinion, the court actually allowed the prosecutor to have the advantage both times. The jury was informed that the very experienced FBI Agent personally disbelieved Dominguez when he said he did not know who else was involved in the conspiracy, and then personally believed Dominguez when he gave a more complete second statement.

5. The court's gratuitous conclusion that the jury would pay little attention to the witness's opinion about Dominguez' credibility was unrealistic and unreasonable.[215] The jury had just been told that the Agent had retired after twenty years of experience with the FBI, and that he had received training in interrogating suspects. (RT 116:14080.) **Earlier that same day**, the jury had heard the testimony of retired Superior Court Judge Clarence A. Stromwell, who had been a judge for over 25 years after being a police officer for 21 years.[216] (RT 116: 13963-13964.) During his testimony,

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215 Indeed, if the court really believed the FBI agent's opinion was unimportant, then there was no reason to use the first opinion as an excuse for allowing the prosecutor to elicit the second opinion.

216 Judge Stromwell had given testimony about his good friend Max Herman, the attorney who was visited by Steven Homick while Michael Dominguez sat in the waiting room.

Judge Stromwell expressed the opinion that experienced police officers develop certain instincts that make them better judges of a person's character than a non-officer would be. (RT 116:13976-13977.) Combining that testimony with Agent Gersky's expressed personal opinion about the truth of Dominguez' latter statements, there was a great danger that the jury would be unduly influenced.

6. Aside from the inadmissibility of a police officer or FBI Agent's personal opinion about when a witness is or is not telling the truth, the present problem is even worse. This was not just an experienced FBI Agent expressing the conclusion of an experienced investigator about the veracity of a person being interviewed. As pointed out by defense counsel below, this particular Agent's opinion was obviously based on the polygraph examination he had given to Dominguez. Such conclusions based on polygraph examinations are considered unreliable. (*United States* v. *Scheffer* (1998) 523 U.S. 103, 118 S.Ct. 1261, *People* v. *Espinoza* (1992) 3 Cal.4th 806, 817, Evidence Code section 351.1, *People* v. *Kegler* (1987) 197 Cal.App.3rd 72, 89, *In re Aontae* D. (1994) 25 Cal.App.4th 167, 175, fn. 7.) While it is true that the jury was not told that the basis of the agent's conclusion was a polygraph examination, the fact remains that the jury was allowed to hear an opinion that was based on a factor that courts have long considered unreliable. Thus, this was not merely an improper opinion; it was also an unreliable opinion.

7. Merely keeping from the jury the fact that the opinion was based on an unreliable polygraph examination may well have made the

problem worse, not better. The defense was precluded from adequately cross-examining the witness and demonstrating to the jury that the Agent's opinion was based on a technique considered to be unreliable.

8. The defense was further disadvantaged by the denial of discovery of the charts generated during the polygraph examination. As explained fully by counsel below, the defense was deprived of any opportunity to have an independent expert examine the charts. Thus, the defense was not even allowed to determine whether the Agent had interpreted the results of the polygraph examination in a manner consistent with standard protocols for such interpretation.

9. While the jury wasn't explicitly told what Dominguez said during that second interview, it must have been clear to the jury that whatever he said was harmful to the defendants. The jury knew that soon after this interview the plea agreement with Dominguez was finalized, so it must have been apparent that his responses were similar to what he said in his earlier taped interviews with police investigators. Thus, the clear message to the jury was that the twenty-year veteran of the FBI who appeared before them personally believed Dominguez when he made the same basic statement that was the centerpiece of the prosecution case, i.e., that he was recruited and paid by Steven Homick, who ran the murder conspiracy.

The danger of prejudice from this improper opinion was great. In *People* v. *Sergill*, *supra*, 138 Cal.App.3d 34, discussed above in regard to the

inadmissibility of an officer's opinion that a witness was truthful, the reviewing Court found the error prejudicial based on a combination of the improper testimony and the trial court's comment that the officer "was especially qualified to render his opinion as to whether a person reporting a crime was telling the truth." (*Id.*, at 141.) In the present case, the trial judge did not make such a comment, but as explained above, another Superior Court judge with 25 years experience on the bench and 20 years experience as a police officer said almost exactly the same thing in testimony given earlier on the very same day as Agent Gersky's testimony.

Michael Dominguez and Stewart Woodman were by far the most important prosecution witnesses in the present case. The jury obviously distrusted Stewart Woodman, as demonstrated by their failure to convict Neil Woodman. Thus, the jury must have chosen to credit Michael Dominguez' prior statements and prior testimony, despite the many reasons to distrust any words that were ever spoken by Dominguez. The jury was very likely to be swayed by the testimony of a Special Agent of the Federal Bureau of Investigation, especially one with 20 years of experience. Indeed, aside from the respect that would be given by the typical juror to any Special Agent of the FBI, another key factor was that in the circumstances of the present case an FBI agent would be viewed as especially objective, since he was not directly involved in the presentation of the case in any role comparable to that of the investigating officers from the Los Angeles Police Department.

The jury itself faced very difficult credibility determinations regarding Dominguez, a crucial prosecution witness. Obviously he did not make a good impression during his appearance on the witness stand.

However, most of what he said directly on the witness stand was irrelevant to the issues in the case. The important aspects of Dominguez' "testimony" came in the form of prior statements and prior testimony. Much of that came before the jury as words read by someone else, giving the jurors no opportunity to assess demeanor. Although some prior statements came in the form of videotaped interviews, even then the jurors could not directly assess Dominguez' demeanor in the way they could with a typical in-person witness. In such circumstances, the temptation to defer to the assessment of a twenty year veteran of the FBI who did observe Dominguez directly when he made his statements would have been irresistible.

In sum, this is another error which, standing alone and/or in combination with the many other evidentiary errors, resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witness, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

E. Testimony by an FBI Agent That Steven Homick Was Notorious

As shown in the preceding section of this argument, Steven Homick was seriously prejudiced by Agent Gersky's improperly admitted testimony that he personally believed Michael Dominguez was telling the truth. The improper impact of Agent Gersky's testimony was heightened moments later when he improperly expressed his very negative opinion about Steven Homick's character.

Immediately after Agent Gersky expressed his opinion that Michael Dominguez was telling the truth, the prosecutor ended his cross-examination and redirect examination by counsel for Robert Homick began. Counsel's initial series of questions pertained to the information about the case that had been given to Agent Gersky by other officers before he started interviewing Dominguez. The agent first acknowledged that he did not recall whether he was aware of the arrests of Stewart Woodman, Neil Woodman, or Robert Homick, before his interview with Dominguez. Then the following exchange occurred:

> "Q. Were you aware that Steven Homick was arrested on March 11th of 1986?
>
> A. Well, I knew Steven Homick had been arrested, because he was a notorious person." (RT 116:14116, ll. 24-28.)

Counsel for Steven Homick immediately moved to strike the last response. That motion was granted and the jury was told to disregard the last portion of the answer. Counsel added that he wanted to pursue the matter further during the next opportunity outside the presence of the jury. (RT 116:14116-14117.)

When that opportunity came, counsel moved for a mistrial, contending that the admonition was inadequate to prevent the harm. Counsel argued:

> "You can't call somebody notorious, as Mr. Gersky, a former F.B.I. agent did during his testimony, and then just tell the jury, forget about it." (RT 116:14146-14147.)

The motion for a mistrial was summarily denied.[217] (RT 116:14147.) Two days later, counsel renewed the motion for a mistrial, stressing the fact that a highly experienced FBI agent should certainly know better than to make such a statement in front of a jury. Thus, while such a statement by a lay witness might be excusable, it should not be excused in this situation. Counsel also stressed the combined effect of this statement along with other improper evidence, such as the hearsay statement by Neil Woodman that Steven Homick was tougher than the Mafia. (RT 118:14448-14449.)

The court agreed that the statement by Agent Gersky "at the very least, irresponsible if not outrageous ..." (RT 118:14450, l. 3.) The court added: "... it's always shocking when somebody in law enforcement who has testified for years and knows better blurts something out like that." (RT 118:14450, ll. 4-6.) Nonetheless, the court did not believe the remark was so

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217 Although the present argument focuses on the erroneous admission of evidence offered by the prosecution, this particular subdivision deals with testimony elicited by counsel for a co-defendant. However, since this error is so closely connected to other improper testimony of this same witness, set forth in the preceding subdivision, it is included here, rather than in the separate argument pertaining to evidence elicited on behalf of the co-defendants.

damaging as to warrant a mistrial. The court added, "I certainly concur in your analysis of the irresponsibility of that witness in making the statements." (RT 118:14450, ll. 14-16.)

According to Webster's New World Dictionary of the English Language, "notorious" means "well-known; publicly discussed." It also means "widely, but unfavorably known or talked about." The jury knew that Agent Gersky had been assigned to the Las Vegas, Nevada office of the FBI. (RT 116:14080, ll. 5-8.) The jury heard many references to the fact that Steven Homick lived in Las Vegas. Thus, the jury could only conclude that Steven Homick was well-known and widely discussed by all FBI agents in Las Vegas, in an unfavorable manner.

Even if this had been the only unfavorable information about Steven Homick that the jury was told to disregard or to use only for a limited purpose, it would be unrealistic to believe the jury could just forget the fact that an FBI Agent had such a negative view of the defendant whose fate was in their hands. But this was not the only such improper information that unfairly impacted the jury's information about Steven Homick's character. As shown in this and other arguments in this brief, the jury was repeatedly exposed to improper and highly prejudicial innuendoes and hearsay statements pertaining directly to Steven Homick's character. Arguably alone, and certainly in combination with the many other evidentiary errors, the result was the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, and to reliable fact-finding underlying capital guilt and penalty phase verdicts. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865;

Spencer v. Texas (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

F. Evidence That Michael Dominguez Was of the Opinion That Steven Homick Intended to Kill the Woodmans

As described at p. 173 in Argument I, in this brief pertaining to the manner in which the prosecution was permitted to elicit former testimony and prior statements of Michael Dominguez, counsel for Steven Homick objected to two portions of a taped interview by the police. In one of these portions, Dominguez stated that even though he was asked by Steven Homick to come to Los Angeles to participate in a robbery, Dominguez expected the victims were to be killed, "based on being with Steve and what Steve had done," (RT 86:9028-9029) and because "I just know Steve. ... I thought the people were going to get shot and killed." (RT 88:9269.)

The judge ruled this was admissible because Dominguez was taking the position in court that all that had been planned was a robbery. Therefore, the taped statements that he knew there would be a murder were prior inconsistent statements. The judge saw no prejudice to Steven Homick since Dominguez was not attributing any statement to Steven Homick, but was

only expressing his own thoughts about what was intended. (RT 86:9027-9029.)

Counsel also objected to the passage on the tape where the officers asked Dominguez what the term "after them" meant, and Dominguez replied "Catch up with them, kill them." (RT 86:9019-9023) This was followed by Dominguez' explanation that when Steve said he had not been able to catch up with them, that meant he had not been able to kill them. Counsel argued these statements constituted character evidence, and interpretation by Dominguez. The court concluded these opinions of the witness were admissible. (RT 88:9270.)

These rulings were incorrect. First, the court's conclusion that Dominguez was taking the position in court that all that was planned was a robbery was inaccurate. Dominguez had merely been giving non-responsive answers in which he claimed his prior statements had been coerced. He was not taking a position one way or the other as to whether he went to Los Angeles to participate in only a robbery or in something more.

In any event, Dominguez' own prior opinion about what somebody else may have intended was not relevant to any disputed issue. All that Dominguez could properly testify to was his personal knowledge (as opposed to speculative belief) of what was intended by his alleged co-conspirators: "'[a] lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording. [Citation.]' (*People* v. *Sergill* (1982) 138 Cal.App.3d 34, 40; see 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Expert and Lay Opinion Testimony, § 29.1, p. 976.) Where the witness can adequately describe his observations, his opinion or conclusion is inadmissible because it is not

helpful to a clear understanding of his testimony. (*People v. Sergill, supra*, 138 Cal.App.3d at p. 40.)" (*People v. Miron* (1989) 210 Cal.App.3d 580, 583.) Here, Dominguez should have been limited to describing what he personally observed and what he heard his alleged co-conspirators actually say.

As a result of this incorrect ruling, the jury received highly improper character evidence. Dominguez' answer could only be viewed by the jury as being based on a claim of prior knowledge that Steven Homick was a violent man who had killed before and who would have planned to kill the victims of any robbery he committed. No conceivable basis was ever offered for the admission of such character evidence. This was a direct violation of Evidence Code section 1101, subd. (a): "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

As shown in Argument V, subd. E, starting at p. 317 in this brief, other evidence was improperly admitted which implied that Steven Homick was under investigation for a triple homicide in Las Vegas, in which Dominguez also had some involvement. Once the jury was exposed to both that improper evidence and the evidence described in this subdivision, the cumulative impact was devastating. As a result, Steven Homick was likely to be convicted on the basis of innuendos about the type of person he was, rather than on the proper evidence in the present case. This deprived him of his federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in

accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witnesses, and to reliable fact-finding underlying capital guilt verdicts. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

G. Conclusion

Robert Homick's defense was that he was the innocent dupe of Steven. Steven's defense was that it was Robert (not Steven) with whom the Woodman brothers had conspired to kill the Woodman parents. Here, once again, inadmissible evidence came in which improperly bolstered Robert's defense and undercut Steven's. This included hearsay evidence providing an exculpatory explanation for evidence indicating that Robert on his own (without Steven's involvement) was parked outside the Woodman parents' residence for hours apparently waiting for them to appear. This also included evidence improperly suggesting that Steven Homick was a dangerous and nefarious person, known to carry a silver revolver, that Michael Dominguez believed that if Steven Homick was planning a robbery the victims would be shot to death, and that an experienced FBI agent thought of Steven Homick

as "notorious" and personally believed Dominguez' statements that Steven Homick was the leader of the murder conspiracy. But for the erroneous admission of this evidence, and similar erroneously admitted evidence described in Arguments V, VI, and VII, it is reasonably probably that Steven Homick would not have been convicted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) All the more clearly, there is no basis for concluding beyond a reasonable doubt that the improperly admitted evidence did not contribute to the verdicts. *(Chapman v. California* (1967) 386 U.S. 18, 24.)

VIII. IN LIGHT OF THE COMBINATION OF CIRCUMSTANCES, THE DENIAL OF THE MOTION TO SEVER THE DEFENDANTS FOR TRIAL WAS ERRONEOUS

A. Introduction

Originally, six defendants were charged with the murders of Gerald and Vera Woodman and the conspiracy to commit those murders. One defendant, Michael Dominguez, promptly made a deal to testify against the other co-defendants in return for an exceptionally lenient plea bargain which covered the present two murders, at least three more murders in Nevada, and serious crimes in several other states.

The remaining five defendants were in very different circumstances. According to the prosecution theory of the case, two defendants, Stewart and Neil Woodman, were wealthy businessmen who hired others to kill their parents. Steven Homick was allegedly the person they hired. His brother, Robert Homick, was allegedly very involved in planning and carrying out the murders. Anthony Majoy was totally unknown to the Woodmans. He was an alleged associate of the Homick brothers. According to the heavily impeached pretrial statements of Michael Dominguez, Majoy was present with the Homick brothers the night that the murders occurred, but even after all evidence was completed at the present trial, Majoy's precise role in the events remained thoroughly uncertain.

All defendants began seeking separate trials early in the proceedings. Eventually, a partial severance was ordered, with Stewart Woodman and Anthony Majoy tried together in a first trial. The three remaining defendants continued to seek severances from one another, without success. Eventually,

Steven Homick went to trial together with his brother Robert, and with Neil Woodman.[218] The results of their trial demonstrated the significant differences in the evidence against them. Steven Homick was convicted and sentenced to death. Robert Homick was convicted, but sentenced to life without the possibility of parole, and the jury was unable to reach a unanimous verdict with regard to Neil Woodman.[219]

As will be shown in this argument and in several other arguments in this brief pertaining to various evidentiary issues, Steven Homick's defense was quite different from, and greatly conflicted with, the defenses of Robert Homick and Neil Woodman. The trial was marked by numerous difficult evidentiary dilemmas, as various defendants sought evidence that was helpful to their defense, though harmful to the defense of their co-defendants, and often inadmissible against the co-defendants. The trial court regularly acknowledged that, because of the joint trial, it was forced to

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218 Neil Woodman did not testify and presented very little evidence on his own behalf. He apparently relied on the lack of direct evidence of his involvement in anything more serious than hating his father. The most damaging evidence against Neil came from his brother, Stewart, whose credibility was diminished by his life-saving bargain with the prosecution. Neil also presented the testimony of a rabbi who said Stewart had always maintained innocence, and became a prosecution witness only because the guilty verdict against him left him scared he would receive a death sentence and never see his children again. (See Statement of the Facts, pp. 132-133, *supra.*)

219 Thus, Neil Woodman gained his separate trial when he was retried alone, convicted, and sentenced to life without parole.

confront evidentiary dilemmas for which the case law provided no clear guidance.[220]

It will be shown herein that it should have been sufficiently clear before the trial began that a joint trial was unrealistic. Thus the court erred in denying the pretrial severance motions. As the trial progressed and specific evidentiary issues were examined in more detail as they arose, it became even clearer that it was impossible to provide a fair trial for each defendant in a joint trial. Severance motions were repeatedly renewed, accompanied with motions for mistrial. Unfortunately, as it became clearer and clearer that a severance should have been granted, it also became more obvious that the trial court had become unreasonably committed to the wrong path it had chosen at the outset. Understandably concerned about the waste of scarce judicial resources if a mistrial was declared in the middle of a very long and complex trial, the Court instead repeatedly chose to go forward, usually denying renewed severance motions in a summary fashion. These rulings were also erroneous.

In the alternative, looking back on the trial as a whole, it is very clear that Steven Homick could not and did not receive a fair trial as a result of being forced to stand trial with two co-defendants. Extremely damaging evidence which would not have been admitted against him in a separate trial was repeatedly allowed in because it aided a co-defendant. Simultaneously,

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220 In fact, as has repeated been shown in this brief, the case law usually did provide clear guidance that was inconsistent with the trial court's rulings. Nonetheless, the fact that a very experienced trial judge made so many erroneous rulings demonstrates the complexity of the evidentiary problems that developed in a trial with such deeply conflicting interests.

extremely important evidence which would have legitimately supported his defense and which would have certainly been permitted in a separate trial, was excluded, only because it harmed the interests of a co-defendant. At the same time, numerous evidentiary mistakes were made when the prosecutor flagrantly violated his pretrial promises and regularly offered evidence admissible against one defendant but not against others. This problem was greatly exacerbated by the trial court's serious misunderstanding of the rules regarding the admission of hearsay statements in furtherance of a conspiracy. One mistaken ruling after another allowed the prosecutor to bolster his case with highly prejudicial evidence that should never have been permitted against Steven Homick.

As a result, by the time the trial had ended, the jury heard evidence it would never have heard in a separate trial, portraying Steven Homick as a drug dealer, a notorious criminal wanted by the FBI and under investigation for unknown other crimes which apparently included other murders, and a member of the Mafia or something even worse. Steven Homick's character was destroyed so thoroughly and so unfairly that it is likely a jury would have convicted him of any crime charged against him, with little regard to the actual evidence. The trial was so permeated with unfairness that it failed to meet the requirements of federal due process, within the meaning of the 5th and 14th amendments. Thus, even if the rulings on the repeated motions to sever can somehow be upheld in light of the facts known when the rulings were made, the judgment must still be reversed as a result of the denial of due process which is apparent in an after-the-fact examination of the circumstances of this joint trial.

B. Procedural and Factual Background

On March 6, 1989, while Steven Homick was still in Nevada for trial on a separate matter, the Court heard argument on a Motion for Severance that pertained only to the Woodman brothers, Anthony Majoy, and Robert Homick. This argument concentrated on the problems involved in a joint trial of co-defendants, especially when they were close relatives, in a capital penalty phase.[221] However, other issues were also covered. The prosecution expressly addressed a number of hearsay statements by individual defendants that had been identified as possible problems if they were offered against other defendants. The prosecutor expressed his belief that the specific statements that had been identified could be effectively sanitized, so they would incriminate only the declarant. The prosecutor added his promise that if the court disagreed and concluded the statements could not be effectively sanitized, then the prosecution would simply not offer them at all in a joint trial.[222] (RT A-1:A-180, ll. 11-15; see also RT A-1:A-181, ll. 9-12.)

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221 The penalty phase aspects of the various severance motions need not be addressed on appeal. As will be seen, the court did grant the request for separate penalty trials for Neil and Stewart Woodman. Later, a similar request was granted for Robert and Steven Homick, whereupon the prosecutor promptly announced he would not seek a death sentence against Robert Homick. The jury was unable to reach any unanimous guilt verdict as to Neil Woodman, so he was retried separately. Thus, Steven Homick was tried alone at his penalty trial.

222 The particular statements discussed by the prosecutor were never offered during the trial. However, as has previously been seen, other statements were offered and admitted even though they incriminated Steven

(Continued on next page.)

The court ruled that there should be a severance. Two separate trials would be held, one for the Woodman brothers and one for Robert Homick and Anthony Majoy. The Woodman brothers would be tried first, and two separate juries would be impaneled, so that each brother would be assured of receiving individualized consideration. (RT A-1:A-195 to A-199.) The court stressed that the penalty phase problems were the main concern, but that problems that would occur in the guilt phase were also a factor. (RT A-1:A-195, ll. 16-26.) As to any remaining *Aranda* problems, the court agreed with the prosecution analysis, that statements would be redacted if feasible, and "If that appears to be inappropriate, then we will simply disallow those statements." (RT A-1:A-197, ll. 2-3.)

However, the court soon realized that this ruling left complex speedy trial issues unresolved. Neither Anthony Majoy nor Stewart Woodman was willing to waive time, while counsel for their respective co-defendants were expressing the need for more time to prepare and to resolve their own scheduling conflicts. Considering the schedules of all counsel, the court concluded it would be best to have one trial with Anthony Majoy and Stewart Woodman, and then try the remaining defendants subsequently. (RT A-1:A-208.)

On January 19, 1990, Neil Woodman and Robert Homick were assigned to a new judge for trial, Judge Williams. (RT A-1:A-255 to A-257 and A-260.) Counsel for Neil Woodman promptly made an oral motion for a

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(Continued from last page.)

Homick and were inadmissible against him. (See Arguments V, VI, and VII, *supra*.)

severance from Robert Homick. Counsel for Robert Homick joined in that motion. Although Steven Homick had not yet been joined with these two defendants, the prosecutor **conceded** that, because of problems with hearsay statements the prosecution wanted to use, "I would agree with the statements to this extent, that with respect to Steve Homick and the other two defendants, I believe there are grounds to sever that case, Steve Homick's case from Robert Homick's and Neil Woodman's." (RT A-1:A-265, ll. 8-12.) However, the prosecutor argued against any severance of Robert Homick from Anthony Majoy. The prosecutor also argued that, rather than hold a separate trial for Steven Homick, he should be tried with the other two defendants, but a separate jury should be impaneled to hear Steven Homick's case. (RT A-1:A-265.)

Counsel for Neil Woodman then noted that there was a further unresolved issue regarding a number of wiretaps conducted by the FBI. Counsel argued the prosecutor should be required to designate the specific wiretap statements he planned to introduce out of the 6,000 pages of wiretap transcripts that had been supplied to counsel. Specific *Aranda* problems could not be addressed until the prosecutor made such a designation. The prosecutor agreed to furnish that information, but needed some more time before he would be able to do so. (RT A-1:A-266 to A-267.) The discussion then turned to other subjects and to the scheduling of further hearings.

On March 20, 1990, two months after conceding that Steven Homick would have to be tried separately (or with a separate jury), the prosecution altered its strategy and retracted its concession. Having decided not to offer the testimony of Steward Siegel, the prosecution no longer saw any need for separate juries or separate trials. (RT 1:28.)

Robert Homick filed a motion for a severance from Neil Woodman on March 21, 1990. Argument supporting the motion contended the two defendants would have mutually exclusive defenses.[223] (CT 11:2959-2963.)

On August 21, 1990, when it was looking like it might be impossible to ever have all of the assigned defense attorneys free to go to trial at the same time, the judge to whom the case was then assigned for trial informally noted his particular predisposition against granting severance motions: "Nobody likes severance less than I do." (RT 5:240, ll. 5-6.) However, the judge also conceded that granting a severance could be less expensive than replacing appointed counsel with different counsel who would have to redo everything that had already been done. (RT 5:240.)

On October 26, 1990, Robert Homick's motion to sever and Neil Woodman's motion for separate trials were both argued. At this point, Robert Homick was seeking a severance from Neil Woodman, while Neil Woodman was seeking a separate trial from everybody else. Simultaneously, the prosecution was seeking a joinder of Steven Homick with Robert Homick and Neil Woodman. (RT 9-10:391-395.) Counsel for Neil Woodman began the argument. This time the argument focused on the problem of antagonistic defenses. Counsel noted the already completed Stewart Woodman/Anthony Majoy trial and stated he expected the upcoming trial to be similar in that each defendant would be trying to prove

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223 When this motion was filed, Steven Homick's case had still not been joined with that of his co-defendants. Thus, severance from Steven Homick was not yet at issue, even though the arguments offered would have applied equally as to him.

that other defendants were the guilty parties, or were more culpable. (RT 9-10:396-397.)

Co-counsel for Neil Woodman noted that the prosecutor had still not kept his promise, made nine months earlier, to identify which wiretapped statements he planned to introduce at trial. The court and prosecutor simply responded that the problem need not be addressed as the prosecutor had given his commitment not to utilize any evidence that would present *Aranda/Bruton* problems.[224] (RT 9-10:400-401.) Counsel for Neil Woodman also noted he had requested an *in camera* hearing to present specific facts regarding the antagonistic and conflicting defenses he anticipated. However, the court responded simply, "I don't think that will be necessary." (RT 9-10:405-406.)

Counsel for Robert Homick echoed the need for an *in camera* hearing, to make an adequate record. (RT 9-10:406, ll. 19-24.) He also expressed the concern that his client might choose to exercise his right to remain silent at trial, and that co-defendants would be likely to comment on

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224 This demonstrates clearly why the defense should not be held responsible for any failure to show in pretrial motions the specific prejudicial impact that would occur at a joint trial. As has been shown, the trial featured many instances in which the prosecution broke its vow and did introduce hearsay statements that harmed Steven Homick even though they were inadmissible against him. All defendants were entitled to rely on the repeated assurances by the court and the prosecutor that this would not happen, and to a large degree, the prosecution left the defense in the dark as to which hearsay statements might be offered. Thus, in pretrial motions, the defense could do little more than make general predictions of the kinds of problems that could, and eventually did, occur.

that in ways that the prosecution would be precluded from doing. (RT 9-10:406-407.)

In regard to the prosecution motion to join Steven Homick for trial with the other two defendants, counsel for Steven Homick simply joined the remarks that had been made by other defense counsel, thereby demonstrating their opposition to the joinder motion.[225] (RT 9-10:410.) However, counsel also gave examples of possible problems with prior testimony by Michael Dominguez given at the preliminary examination that did not include Steven Homick. Counsel feared that the co-defendants might want to make affirmative use of some of that testimony if Dominguez refused to testify and was found unavailable, to the extent it supported their defenses, even though it would be prejudicial and inadmissible against Steven Homick. (RT 9-10:410-413.)

Other counsel reiterated their desire for an *in camera* hearing to present more specific details regarding anticipated conflicting defenses. The trial court responded this time by assuring counsel the court accepted their arguments at face value and would therefore assume, for the sake of argument, that the defenses would be "inconsistent and intensely in conflict. [§] I will assume for purposes of any ruling I must make that it is the heart of the defense case is effort to establish that the guilt, if any, attaches to a co-defendant." (RT 9-10:414, ll. 3-12.) Counsel nonetheless pressed for *in camera* hearings, and the court continued to express its strong dislike of such

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225 Counsel subsequently stated that Steven Homick adopted everything in the points and authorities that had been filed by his co-defendants. (RT 9-10:413, ll. 14-15.)

hearings. The court simply stated it would assume that very –strong conflicts existed, but the court did not believe that conflicting defenses mandated a severance. (RT 9-10:414.) [226]

A few minutes later, the court changed its position and decided it would permit brief *in camera* hearings. (RT 9-10:417-418.) Counsel for Steven Homick declined the opportunity to be heard *in camera* (RT 9-10:423), but Neil Woodman and Robert Homick did each have separate brief *in camera* hearings. (See 10/26/90 sealed RT 9-10:424-433.) Following the *in camera* hearings, the court stated that the hearings hadd involved matters that should not be disclosed, but the court remained persuaded that all three defendants should be tried together. Robert Homick's and Neil Woodman's motions to sever were denied. The prosecution's motion for joinder of Steven Homick, Robert Homick, and Neil Woodman was granted. (RT 9-10:434; CT 13:3408.)

On November 7, 1990, Robert Homick filed another motion for separate trials, this time seeking a severance from his brother, Steven Homick. Much of the argument pertained to the problem of jointly trying siblings in the penalty phase of a capital trial. However, Robert Homick also argued for a severance based on the principles set forth in *People* v. *Aranda* (1966) 63 Cal.2d 518, since it was expected that the prosecution would offer hearsay statements admissible only against the defendant who made the

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226 As will be shown later in this arguments, "conflicting defenses" is a recognized factor that does indicate a need for a severance. (*People* v. *Massie* (1967) 66 Cal.2d 899, 916-917, *People* v. *Boyde* (1988) 46 Cal.3d 212, 232.)

statements, and not against Robert Homick. However, the specific examples set forth in the written motion pertained to alleged jailhouse informants who were never offered as prosecution witnesses, so that aspect of the motion need not be addressed on appeal. (CT 13:3438-3508.)

Several months later, on February 4, 1991, one of Neil Woodman's defense attorneys reminded the court "There is still a motion to sever floating around." The court immediately responded, "That will be denied." Counsel asked that the record reflect that the motion was denied before the court ever heard the grounds for it. The court then agreed to hear the matter. (RT 16:699.) Counsel then noted that it was actually the two Homick brothers who had expressed a desire to be heard in regard to a letter from Neil Woodman that had been introduced in a Las Vegas trial. (RT 9-10:700.) The prosecutor described the letter as containing statements which could be considered incriminating against Steven and/or Robert Homick. (RT 16:701-702.)

The prosecutor expressed his intention to offer the letter in evidence, but only to the extent it would not violate any defendant's rights under the *Aranda* and *Bruton* cases. If the court were to conclude there was an *Aranda/Bruton* problem, then the prosecution would not offer the letter. However, the prosecution stated its own innovative position on the matter: Neil Woodman had testified in the Las Vegas trial where the letter was offered and had been subjected to cross-examination by the other defendants. In light of this, the prosecution believed the defendants' confrontation rights had already been fully satisfied. Therefore, the prosecution believed the hearsay letter could be admitted against all defendants, regardless of whether

Neil Woodman testified at the present trial. (RT 16:702-703.) The discussion was then dropped.

Six months later, on August 8, 1991, the court was no closer to setting an actual trial date. Although Neil Woodman had long been refusing to waive time, his trial had been continued many times over his objection just to keep him with the two co-defendants, whose appointed attorneys were involved in one major trial after another and were never all available at the same time to try the instant case. (See general discussion at RT 24:1060-1075.) Eventually the judge, who had repeatedly made clear his distaste for a severance, conceded that "Sometimes severance is in the expeditious interest of justice."[227] (RT 24:1076, ll. 3-4.)

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227 Steven Homick had agreed to a series of time waivers, so his speedy trial rights were not directly violated, although he had little practical choice since his appointed attorneys were in high demand and time waivers were necessary to allow them to handle other obligations and still have some amount of time to prepare for the instant trial. While Neil Woodman's speedy trial rights were regularly asserted and routinely sacrificed by the court in order to avoid a severance, Steven Homick cannot claim he was directly prejudiced by any violation of Neil Woodman's speedy trial rights.

Nonetheless, the serious speedy trial problems that continued to plague the court should not be ignored in analyzing the present denial of severance issue. The prosecution position in repeatedly opposing severance rested almost entirely on the claim that joint trials promoted judicial economy. But to whatever extent judicial economy may be a factor in the equation, it must be balanced against other costs and negative consequences to the judicial system that follow from a perceived need to try three defendants together in a complex capital case, including denying a defendant who is prepared for trial an opportunity for a speedy resolution of the charges against him.

Less than two weeks later, on August 20, 1991, the same judge expressed his frustration again, but also expressed a renewed determination that no severance would occur in this case. The judge stated:

> "...I was holding fast to two principles. And those two principles are the same as I announced to you last time."
>
> One of them is I am not going to violate any attorney-client relationships. I'm not going to fire any lawyers, a (sic) least not on the present facts.
>
> And, secondly, I'm not going to sever the case, defendants or charges. And that those principles, I thought, were probably, respectively, most important to both the defense and the prosecution. And that to the extent that there is any bright line in the rulings made by this court, they are driven by the priority I have assigned to those principles.
>
> That means that speedy trial is sometimes subordinated to those concerns for one or more defendants." (RT 25:1119, ll. 4-19.)

After further discussion, the judge concluded that January or February 1992 appeared to be the earliest the trial might get underway.

Five months later, January arrived with a realistic trial date still no closer. Nonetheless, on January 17, 1992, the court again reiterated its determination:

> "The record is clear what I have tried to do here. And that is to try and draw some bright lines in my rulings.
>
> We have been caught between the proverbial rock and a hard place in terms of what to do here.
>
> I know that matters not to Mr. Woodman who has been insisting on his right to speedy trial

since at least over a year. And I am content to leave it with the appellate court on that issue.

I am mandated on one point not to sever the cases. I'm mandated on another point to, to respect the integrity of the right to counsel of all parties and, therefore, not to fire lawyers.

And I have decided to respect those two principles as bright lines in this case.

That has required me to subordinate the speedy trial right to trial of your client. I have acknowledged that's what I have done. If I have erred, so be it." (RT 32:1378, ll. 2-20.)

More than two months later, on March 25, 1992, the court noted that Neil Woodman had filed another motion for severance. (RT 40:1612-1613.) Backing down from his "bright-line" position, the court now stated that he expected to start hearing trial motions in June, and then go directly into trial, but if there was a new need to delay the trial substantially longer than that, then the court was not unalterably opposed to considering a severance. (RT 40:1624-1625.) Counsel for Robert Homick noted that a joint trial in federal court in Nevada, on charges related to these same events, had resulted in a substantial amount of testimony that pertained to the Homick brothers and not to the case against Neil Woodman. (RT 40:1626.) However, once again, the court denied any severance. (RT 40:1629.)

On May 29, 1992, the case was transferred from Judge Williams to Judge Ouderkirk for trial. (RT 42:1768.)

On June 5, 1992, the court noted it had set a hearing for June 19 on any further motions for severance. Counsel for Neil Woodman assured the court he would be filing a motion to sever to be heard that date, and he expected both other defendants would also. The court asked for an update on the prosecution's present position in regard to any need for severance based

on *Aranda/Bruton* grounds. (RT 43:1822-1823.) The prosecution reiterated its firm position:

> "It's my position not to introduce any statements which would be a violation of *Aranda Bruton.* There is a conspiracy count in this case, I believe that all of the statements that I would seek to introduce would be within the meaning of the conspiracy exception to the hearsay rule and would be admissible. It's not my intention to introduce any statement on *Aranda Bruton* issues." (RT 43:1823:ll. 9-16.)

Counsel for Steven Homick expressed concern that disagreements were certain to arise between the defense and the prosecution, regarding whether particular statements did or did not come within the coconspirator hearsay exception. Counsel indicated there would have to be a hearing before trial to determine which statements were going to be ruled admissible or inadmissible, so the prosecution could make a final determination whether it would want to proceed jointly or separately.

In response, the prosecution stated strongly that there was no need for any pre-trial hearing to resolve admissibility of any hearsay statements. The prosecutor explained unequivocally:

> "If I can point out, it's my position that this need not be done before trial. It's my position, and I am stating here, we do not seek to introduce any statement in violation of *Aranda Bruton* during the trial.
>
> If we seek to introduce a statement and the defense objects 'hearsay,' or that it's *Aranda Bruton*, and the court will decide either it is or it's admissible under the hearsay exception, the conspiracy exception to the hearsay rule, then it comes in or it doesn't come in.

> I don't see why we need to lay out to the court everything that is going to be introduced in the case. It is my position that no statement which would be a ground for severance will be introduced.
>
> And if the court finds that through the trial, then the court would rule it's inadmissible based on my representation now." (RT 43:1824, l. 15-1825, l. 4.)

The court appeared to find this fully acceptable, noting: "That is the way I have seen it done on other cases." (RT 43:1825, ll: 6-7.) Counsel for Steven Homick then expressed concern that once the trial was underway, the prosecution would not be held to its representations. (RT 43:1825-1826.) Counsel for Neil Woodman sought clarification as to whether the prosecution would be foregoing any statement with *Aranda/Bruton* problems, or whether they would still attempt to redact statements to get around such problems. The prosecutor gave his assurance that statements would either be cleaned up to the point they were admissible under *Aranda/Bruton*, or, if they could not be cleaned up, they would not be used at all. The court made clear its understanding that the prosecution was taking the risk that there would be some statements he would be able to use in separate trials, but would simply not be permitted to use in a joint trial. (RT 43:1826-1827.) The court again expressed its belief that with such an understanding, there was no need to litigate the admissibility of particular statements in a pre-trial motion to sever.[228] (RT 43:1827, ll. 5-7.)

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228 This exchange was the strongest statement yet of the positions of the prosecutor and the court that there was simply no reason to determine in advance of trial which statements the prosecution would offer or how the

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On June 18, 1992, Steven Homick filed a motion to sever his case from that of Robert Homick and Neil Woodman. Alternatively, the motion sought separate juries for each defendant if there was a joint trial. Parts of this motion were directed at the penalty phase and need not be reviewed on appeal. Other parts of the motion argued inconsistent defenses and also

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court would rule on those statements. Appellant agrees that such a procedure is efficient, in that it allows the resolution of evidentiary disputes to occur one-by-one as they arise, when the court would have more information with which to make a proper ruling.

However, as will be shown later in this argument, where the court and the prosecution rely on such a procedure at the trial level, it would not be fair to penalize the defense on appeal by arguing that the pretrial severance motions were properly denied based on the limited information available to the court when the motions were decided. (See *People* v. *Turner* (1984) 37 Cal.3d 302, 312.) The defense was reasonably entitled to rely on the positions taken by the court and prosecutor, and to assume that no statements would be introduced at trial that were admissible against one defendant and not admissible against another. As will be seen, the prosecutor violated his agreement. Rather than make any effort at all to enforce the agreement, the court allowed in highly prejudicial statements inadmissible against Steven Homick, and occasionally attempting to ameliorate the impact with ineffective limiting instructions.

In view of the defense requests to resolve such issues in advance as part of the severance motions, and the trial court's unwillingness to do so, the defense should be permitted to argue on appeal that the after-the-fact failure to hold the prosecution to its promises should not preclude the reviewing court from considering the actual trial rulings in assessing the propriety of the earlier denials of motions to sever. The trial court had clear warning that there would be numerous disputes over statements, and the court and prosecution chose to proceed anyway rather than sever the cases. Any difficulties that arise on appeal as a result of the procedure knowingly chosen by the court and prosecution below should lead to resolving uncertainties about the after-the-fact impact of the denial of severance against the People, and not against the defense.

raised *Aranda* problems regarding hearsay statements the prosecutor was expected to offer. A specific example of the hearsay problem was offered in the form of a copy of a letter from Neil Woodman to Stewart Woodman, which was seen by the prosecution as incriminating Neil Woodman, and, with some interpretation of vague references, possibly the Homick brothers.[229] (CT 18:4874-4935.)

On July 6, 1992, the prosecution filed its opposition to a Motion to Sever that had been filed by Neil Woodman. The People argued simply that claims of prejudice were speculative and did not outweigh the judicial economy of avoiding multiple complex trials. (CT 18:4955-4963.) A very similar opposition to a Robert Homick severance motion was filed the next day. (CT 18:5031-5037.)

On July 6, 1992, the prosecution also filed its Opposition to Defendant Steven Homick's Motion to Sever. (CT 18:4993-5005.) The People saw no reason to fear any *Aranda* problem, since they had "repeatedly stated in open court that the prosecution will not seek to introduce evidence which in the opinion of the trial court would constitute *Aranda-Burton* (sic) error." (CT 18:4995, ll. 7-9.) The People also repeated the argument that any possibility of conflicting defenses was speculative and was outweighed by the need for judicial economy. (CT 18:4997, ll. 2-4.) Notably, the prosecution did not address Steven Homick's alternative request for separate juries, in the event of a joint trial.

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229 This particular letter was also never offered in the present trial, although other notes from Neil to Stewart, also seen as incriminating by the prosecution, were offered. (See note at CT 19:4934-4935.)

Also on July 6, 1992, Robert Homick filed a motion for Reconsideration of Severance and/or separate juries from Steven Homick. This motion was directed only at penalty phase issues and need not be considered on appeal. (CT 18:4970-4992.)

On July 9, 1992, Judge Ouderkirk recused himself and the case was once again re-assigned for trial. Judge Florence-Marie Cooper became the new judge and remained throughout the trial. (RT 44:1865, 1867-1.)

On July 30, 1992, Steven Homick filed a Supplemental Memorandum of Points and Authorities in Support of Motion to Sever and/or Have Separate Juries. (CT 19:5251-5256.) Included was an argument that the trial court should promptly address and determine possible issues regarding whether hearsay statements would be admitted against all defendants as statements in furtherance of the conspiracy, or whether they would be ruled admissible only against the declarant, so that they would create *Aranda* error if admitted against other defendants. (CT 19:5254-5256.)

On August 3, 1992, the various pending severance motions were argued before Judge Cooper. The court started the discussion by noting she had read the pleadings and her initial reaction was that she saw no basis for any severance in regard to the guilt phase. Her only concern was whether there should be two separate juries so that the two Homick brothers would not have a single jury deciding their respective penalties. (RT 46:1899.) After a witness was presented in regard to the penalty phase severance issues, *in camera* hearings were held separately for Steven Homick and for Robert Homick, regarding witnesses who would be unwilling or reluctant to

testify for either brother if they were tried together. (See sealed RT 46:1944-1966.)[230] Following the *ex parte* hearings, the court granted the request for separate juries for the penalty trial, one jury for Steven Homick and one jury for both Robert Homick and Neil Woodman. The prosecutor immediately announced that he would no longer be seeking a death verdict against Robert Homick, thereby eliminating the need for two juries. (RT 46:1966.)

Counsel for Neil Woodman then pressed his argument for a severance, or at least for a separate jury for Neil Woodman. (RT 46:1966-1967.) He referred to the potential *Aranda* problems based on a note written by Neil Woodman, with incriminating references to "Mr. S," who arguably was Steven Homick. He also repeated earlier concerns about the wiretap evidence the prosecution was expected to introduce. (RT 46:1969-1971.)

Once again, the prosecutor stated a clear and specific position:

> "My position with respect to the *Aranda-Bruton* issues has been spelled out in the motions; and it has been indicated to all the prior judges in this matter and, that is, we will seek to introduce statements in evidence that we believe are admissible in the case to the extent that they come in under the hearsay exception, the conspiracy exception or are not hearsay but it has always been our position that we want to maintain a joint trial here and that, as Judge Williams understood it and Judge Ouderkirk, that if we at anytime during the trial seek to admit a statement that the court believes is not admissible and it's an *Aranda* violation, then it will not be

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230 As noted previously, the penalty phase severance issues are moot, since Steven Homick was tried alone in his penalty trial. Thus, there is no need for Respondent to receive a copy of the sealed transcripts.)

> admissible and that's the guidelines we are operating under.
>
> And I thought I had made that clear a number of times in the past; that if the court determines that a statement we seek to admit is not admissible, that essentially is our loss." (RT 46:1971, ll. 3-20.)

The court stated "Okay," in apparent acceptance of this position, and the prosecutor continued:

> "**And we have made that election. We would prefer to keep the defendants joined as opposed to introducing statements that would be admissible against one defendant but not all.**" (Emphasis added; RT 46:1971, ll. 22-25.)

The court then stated, "That's clear. Thank you." (RT 46:1971, l. 26.)

Counsel for Neil Woodman stated he understood the prosecutor's position and then turned away from hearsay problems, to arguments why there should be a separate trial or separate juries at the penalty phase. (RT 46:1971-1978.) Counsel for Steven Homick then argued his severance motion, apparently accepting the representations that would avoid any possible hearsay problems, and speaking instead about potential penalty phase problems if Neil Woodman and Steven Homick were tried jointly. (RT 46:1979.) The prosecutor confined his argument to penalty phase matters. (RT 46:1979-1982.) After rebuttal by counsel for Neil Woodman (RT 46:1982-1985), counsel for Steven Homick added his concern that the prosecutor was seeking to avoid pretrial determination of *Aranda/Bruton* matters so that the defense would be forced to object in front of the jury when the prosecutor sought admission of hearsay statements. (RT 46:1985-1986.)

The court then ruled that any differences in the culpability of the various defendants were not a basis for severance or for separate juries. Neil Woodman's severance motion was denied. (RT 46:1986-1988.) However, the judge also expressed her encouragement to the parties to litigate as many *Aranda* issues as they could during in limine motions prior to the start of the trial. (RT 46:1988.)

Soon after opening statements to the jury concluded, counsel for Steven Homick again renewed his severance motion, in light of the conflicting defenses indicated in the opening statement by counsel for Robert Homick. (RT 71:5911.) The unmistakable implication of that opening statement had been that Steven Homick was guilty of conspiring with the Woodman brothers to murder their parents, and anything Robert did that furthered that plot was done without knowledge of the goal of the conspirators.[231] Nonetheless, the court dismissed this summarily, denying

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231 In his opening statement counsel for Robert Homick told the jury it should be careful to consider the Homick brothers separately, despite expected prosecutorial attempts to lump them together. (RT 71: 5897.) Counsel stressed that when Steven Homick was hired to provide security for a Woodman Bar Mitzvah, or to set up the devices used for eavesdropping on auditors at Manchester Products, Robert Homick was not involved. (RT 71:5899-5900.) Counsel also stressed statements by the Woodmans about their man in Vegas and about the things that Steve could do for them. (RT 71:5900.)

Counsel explained the evidence would show that when the Woodmans wanted their parents killed, it was Steven Homick they talked to, and not Robert. Indeed, they told Steven they did not want Robert involved. (RT 71:5900.) Noting various actions taken by Robert Homick close to the time of the homicide, counsel noted the jury would have to determine whether he did or did not have knowledge at the time that a murder would occur. (RT 71:5901-5904.)

(Continued on next page.)

the motion because the opening statements merely reiterated what she had heard before. (RT 71:5911.)

Throughout the trial, Steven Homick was repeatedly prejudiced by evidence that was admitted because of the joint nature of the trial, which would not have been admitted against him if he had a separate trial. The prosecutor was allowed to ignore his repeated pretrial agreement to forego the use of any statement which was determined to be inadmissible hearsay against any of the defendants. The court regularly admitted hearsay statements another evidence, highly prejudicial toward Steven Homick and inadmissible against him, occasionally attempting to ameliorate the prejudice by giving limiting instructions. Steven Homick was prejudiced even further by rulings disallowing evidence he could have presented in a separate trial, but was not allowed to present here due to prejudice to co-defendants. These numerous errors are discussed in detail in separate arguments in this brief pertaining to: 1) erroneous rulings regarding hearsay statements offered by the prosecution and regarding the scope of the coconspirator hearsay exception; 2) other improper evidence offered by the prosecution; 3) improper evidence elicited by co-defendants; and 4) the improper preclusion of evidence regarding Robert Homick's involvement in an incident in

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(Continued from last page.)

Summing up, counsel explained, "The evidence will show that he did certain things for certain people. But the evidence will show he did not know those things were done to aid in a murder plot." (RT 71:5906, ll. 14-17.) Counsel added that Joey Gambino told the Woodman brothers to talk to Steven Homick, and they then did discuss the murder of their parents with Steven Homick, without Robert being present. After that meeting, an agreement to kill the parents was made. (RT 71:5906-5907.)

Missouri. As set forth in the various discussions of those errors, Steven Homick's request for a severance was repeatedly renewed after many of these individual errors, and was repeatedly denied in summary fashion.

As noted, those errors are set forth in detail in several other arguments in this brief. However, in order to fully appreciate the magnitude of the cumulative prejudice, it is helpful to briefly list them:

1. The jury heard evidence that Robert Homick threatened violence against Jack Swartz, even though the statements were hearsay, not if furtherance of the alleged conspiracy to murder the Woodmans, and were not admissible against Steven Homick. An admonition was requested, but none was given.

2. The jury heard evidence that Stewart Woodman and/or Neil Woodman had stated that Steven Homick was their man in Vegas, that if they needed anything done, Steven Homick could do it, and that he was tougher than the Mafia. This was all hearsay, not in furtherance of the alleged conspiracy, and not admissible against Steven Homick. Steven Homick was further prejudiced when the court expressly instructed the jury these statements referred to Steven Homick and not to Robert Homick, despite the fact that substantial evidence supported a conclusion that Cathy Clemente, the witness who claimed she heard these statements, was mistaken in her belief that these statements referred to Steven Homick rather than Robert Homick.

3. The jury heard similar evidence that Neil Woodman often stated that Steven Homick could get anything done of an illegal nature, for the Woodman brothers, upon request. This was also hearsay, not in

furtherance of the alleged conspiracy, and inadmissible against Steven Homick.

4. The jury heard evidence that Neil Woodman displayed a magazine to Gloria Karns and referred to an article about hit men, while stating that when somebody annoyed him he could look in magazine and find someone to stop them. This was hearsay, not in furtherance of the aalleged conspiracy, and inadmissible against Steven Homick. A limiting instruction was expressly requested and was refused.

5. The jury heard evidence that Neil Woodman told Jack Ridout that he could have Ridout's estranged wife "hit" if she was a problem. This was hearsay, not in furtherance of the conspiracy, and inadmissible against Steven Homick, but the implication was clear that the hit man Neil Woodman had in mind was Steven Homick. The prosecutor expressly conceded this was not admissible against Steven Homick. The court refused to give a limiting instruction when the evidence was introduced, and did not give one until 50 more transcript pages of testimony had been heard by the jury.

6. The jury heard evidence that Neil Woodman also told Jack Ridout that Steven Homick was the Woodman's collections man. This was hearsay, not in furtherance of the alleged conspiracy, and inadmissible against Steven Homick, but the implication was clear that the hit man Neil Woodman had in mind was Steven Homick. No limiting instruction was given.

7. The jury heard evidence that soon after he was arrested, Neil Woodman called Steve Strawn and asked him to destroy folded up cards hidden under a leg of Neil's desk. The cards contained Steven

Homick's name. The court agreed this was inadmissible against Steven Homick, but admitted the evidence anyway while telling the jury to use this against Neil Woodman, but not against Steven Homick.

8. The jury heard evidence that Neil Woodman referred to Steven Homick as a "heavy guy." The court had ruled this was inadmissible against any defendant, but the prosecutor managed to bring it out anyway.

9. The jury heard evidence that after his arrest, Robert Homick claimed that his presence in front of the Woodman parents' residence on their wedding anniversary in June 1985 was just a coincidence. This was self-serving hearsay that weakened the theory of the Steve Homick defense that Robert Homick's presence on the Woodman anniversary was part of an attempt to carry out the murder plan at a time when Steven Homick was not in Los Angeles. That theory supported an implication that Steven Homick was not involved in the murder plot.

10. The jury heard testimony that an FBI agent believed Michael Dominguez was telling the truth when he told police that Steven Homick was the leader of the murder plot. This evidence was only allowed in because Robert Homick's counsel had first brought out the fact that Dominguez had first said that he did not know who was involved aside from Steven Homick, and the FBI agent then added that he did not believe Dominguez when he said that.

11. The jury heard testimony that the same FBI agent considered Steven Homick to be notorious. This was also brought out during examination by counsel for Robert Homick.

12. The jury heard testimony from Art Taylor that Steven Homick had been a drug dealer for several years prior to the Woodman murders. This was brought out by counsel for Robert Homick after the prosecutor had agreed he had no basis for bringing out these allegations.

13. The jury heard evidence that Max Herman, a street savvy attorney and former police officer, would not have given a gun to Steven Homick unless Homick had manipulated and deceived him in regard to the purpose for the weapon. This was brought out by counsel for Robert Homick, as support for the contention that Robert had been duped by Steven Homick..

14. The jury heard evidence from Steven Homick's own sister, painting him as a controlling older brother who issued orders that Robert Homick followed without question. This witness was presented on behalf of Robert Homick, to support his theory that any acts he performed that aided the murder plot were performed without knowledge of the purpose of the acts.

15. The jury heard evidence that Michael Dominguez was suspected of involvement in a triple murder in Las Vegas, but that someone else was believed to have been the actual shooter. This was brought out by counsel for Robert Homick. The clear implication was that Steven Homick was the suspected actual shooter in the triple homicide.

16. The jury was **not** allowed to hear strong evidence that Stewart Woodman sent Robert Homick to Missouri to intimidate a former Manchester Products employee, and that Robert Homick threw an oil can through the front window of the former employee's home, and

then called him and said that next time it would be a bomb coming through his window. This would have been the strongest evidence presented to show that when Stewart Woodman wanted a violent and illegal act performed, he turned to Robert Homick rather than Steven Homick. The court agreed this was relevant to Steven Homick's defense, but disallowed it anyway simply because it was prejudicial to Robert Homick.

In sum, the jury that was charged with determining whether Steven Homick was guilty of the murders of the Woodman parents was exposed to much adverse information about him that they should not have heard, and would not have heard if he had been tried separately. Based on the information they should not have heard, they likely viewed Steven Homick as a drug dealing contract killer, suspected of being the shooter in a triple murder in Las Vegas, viewed as notorious by agents of the FBI, seen by his acquaintances as being tougher than the Mafia and able to accomplish any goal no matter how illegal, capable of manipulating and deceiving experienced lawyers who had also worked for decades as police officers, with a loyal brother who would follow any of his directions without question.

The severance issue was brought up one last time in Steven Homick's unsuccessful Penal Code section 1181 motion for a new trial, filed January 14, 1994. (SCT 7:1894-1922.) In this motion, the Steven Homick defense repeated its claim that Steven Homick was prejudiced by adverse character evidence admitted on behalf of Robert Homick, and by the preclusion of evidence Steven Homick offered, simply because it was prejudicial to co-defendants. (SCT 7:1920-1921.) That motion was also denied.

C. In Light of All of These Circumstance, the Court Erred in Denying the Motions to Sever Steven Homick's Case from that of His Two Co-Defendants

1. Applicable Legal Principles

In *People* v. *Boyde* (1988) 46 Cal.3d 212, 231-232, this Court explained:

> "The California Penal Code provides for joint trials of defendants jointly charged with criminal offenses. 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. ...' (§ 1098.) The Legislature has in this manner expressed a preference for joint trials. (See *People* v. *Lara* (1967) 67 Cal.2d 365, 394; *People* v. *Isenor* (1971) 17 Cal.App.3d 324, 330-331.) The statute nevertheless permits the trial court to order separate trials, and the decision to do so is one 'largely within the discretion of the trial court.' (*People* v. *Turner* (1984) 37 Cal.3d 302, 312); *People* v. *Graham* (1969) 71 Cal.2d 303, 330.) Whether denial of a motion to sever constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion to sever. (*People* v. *Turner*, *supra*, 37 Cal.3d at p. 312.)"

However, appellate review is not limited to just the question of whether the trial court abused its discretion based on the information before it at the time of the motion and ruling. A reviewing court must also determine if the resulting trial was fair. As explained in *People* v. *Greenberger* (1997) 58 Cal.App. 4th 298, 342-343:

> "'After trial, of course, the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law.' (*People* v. *Turner* (1984) 37 Cal.3d 302, 313.) The appellate court looks 'to the evidence actually introduced at trial' in making this latter determination. (*People* v. *Bean* (1988) 46 Cal.3d 919, 940.)"

Although it is difficult to pinpoint the precise difference between a reviewing court's approach to the abuse of discretion standard based on information before the trial court at the time of its ruling, and the after-the-fact gross unfairness/due process standard, unique procedural factors in the present case should result in applying the more favorable abuse of discretion standard to all aspects of the present claim. First, the motion to sever was repeated many times throughout the trial proceedings. By the time of the later renewals of the motion, all of the facts relied on herein were known to the trial court, which continued to deny severance.

Second, it was the actions of the prosecution which prevented the defense from putting all facts before the trial court at the time of pretrial motions to sever. As described in the procedural background section of this argument, the defense repeatedly sought to obtain specification from the prosecutor regarding the precise statements the prosecutor hoped to have admitted in evidence. The prosecutor avoided such specificity by repeatedly promising, with the clear concurrence of the court, that there would simply be no problem because no statements would be offered unless they were admissible against all defendants. The defense was entitled to rely on this representation and could not have anticipated in advance that the trial court

would make many erroneous rulings as to which statements should be admitted as statements in furtherance of the conspiracy. Similarly, the defense could not have anticipated that the court would repeatedly allow the prosecutor to flagrantly violate his earlier promises, and that the court would allow in many statements not admissible against Steven Homick, using occasional limiting instructions to attempt to ameliorate the prejudice rather than keeping out the statements altogether as originally promised.

In these circumstances, there is only one fair approach on appeal to the statements heard by the jury despite being inadmissible against Steven Homick. That is, all of them should be considered to be within the range of evidence the trial court knew or should have known would come before the present jury. Indeed, this seemed to be precisely the approach adopted by the court below, in denying severance motions by dismissing specific problems as simply repeating what had already been considered by the court in its earlier denials. Thus, while the defense did not specifically describe in advance many of the precise statements that later caused problems, that was only because the prosecution and the court made it impossible to do so. That lack of pretrial specificity apparently did not create any problems for the court in the rulings it made.

On the other hand, if there is any basis for disagreeing with this analysis, then at the very least Steven Homick remains entitled to a review of the totality of the facts based on the gross unfairness/due process standard.

Boyde also set forth factors to be considered in determining whether a severance should have been granted:

> "... [G]rounds which may justify a severance were summarized in *People* v. *Massie*

> (1967) 66 Cal.2d 899: (1) Where there is an extrajudicial statement made by one defendant which incriminates another defendant and which cannot adequately be edited to excise the portions incriminating the latter; (2) where there may be prejudicial association with codefendants; (3) where there may be likely confusion from evidence on multiple counts; (4) where there may be conflicting defenses; and (5) where there is a possibility that in a separate trial the codefendant may give exonerating testimony. (*People* v. *Massie*, *supra*, 66 Cal.2d at pp. 916-917.)" (*People* v. *Boyde, supra,* 46 Cal.3d at 232.)

Aside from the five listed factors, federal 5th, 6th, 8th, and 14th amendment requirements of a fair trial in accordance with due process of law, and reliable fact-finding in capital cases, should also weigh in favor of a severance. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978). The fact that the trial resulted in a sentence of death should also be weighed in determining whether a severance should have been granted. It is well-established that a death sentence is a significant factor to weigh in connection with a change of venue motion (*Martinez* v. *Superior Court* (1981) 29 Cal.3d 574, 582-584), and it should be equally important here. The need for reliable fact-finding is at its height in a capital case, and it is especially important for the reviewing court to be alert to the danger that a conviction and death sentence resulted from any unfairness caused by being tried jointly with co-defendants, rather than from the actual evidence against the particular defendant. (See *Williams v. Superior Court* (1984) 36 Cal.3d 441, 455 (addressing a motion to sever counts and noting, "since one of the charged crimes is a capital offense,

carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case.")

2. Application of the Controlling Legal Principles to the Present Circumstances

a. Statements by One Defendant Inadmissible Against Other Defendants

Turning to the traditional five factors set forth in *Boyde* and *Massie*, it has been shown in detail in the preceding section of this argument, along with the several other evidentiary arguments elsewhere in this brief referred to in the preceding section, that many extra-judicial statements made by co-defendants were introduced even though they could not be – and were not – edited to excise portions that were devastatingly prejudicial to Steven Homick.[232] Thus, this factor must count very heavily in favor of finding an abuse of discretion, and/or gross unfairness, in denial of the motion for severance. Indeed, in *People* v. *Greenberger* (1997) 58 Cal.App.4th 298, 351, it was expressly recognized that "in a joint criminal trial, if admission of evidence of significant probative value to one defendant would be substantially prejudicial to a codefendant the remedy is not exclusion of the evidence but rather a limiting instruction or severance. (*People* v. *Reeder* (1978) 82 Cal.App.3d 543, 553.)" Here, limiting instructions were only

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232 See items 1 through 9, listed above, at pages 444 to 446.

rarely given, and then only under circumstances where it was unrealistic to expect a jury to be able to apply them.

b. Prejudicial Association with Co-Defendants

Regarding the second factor, this trial was also seriously marked by prejudicial association with co-defendants. First, the jury would have almost certainly considered Steven Homick and his brother together in many respects, rather than being able to judge each of them individually. The case against Robert Homick was much stronger than the case against Steven Homick. Indisputable evidence showed that Robert Homick was in a minor car accident around the corner from the Woodman residence shortly before they were murdered, and that he received a wire transfer of $28,000 from Neil Woodman soon after the Woodman brothers collected the insurance proceeds. In contrast, the case against Steven Homick depended almost entirely on the testimony of Stewart Woodman and Michael Dominguez, both of whom were shown to be despicable liars who gained much from their willingness to testify in accordance with the theory of the authorities.

Indeed, the jurors must have had substantial doubts about the testimony of Stewart Woodman, as evidenced by their inability to reach a unanimous verdict in regard to Neil Woodman. That those doubts did not stop the jury from convicting Robert Homick was almost certainly a result of the wire transfer and Robert Homick's indisputable presence close to the murder scene shortly before the murders occurred. That the jury convicted Steven Homick despite the jury's obvious failure to trust Stewart Woodman and the many reasons to doubt Michael Dominguez certainly suggests that

Steven Homick was severely prejudiced by the jury's connecting him with his brother, as well as by the array of improper evidence that was admitted as a result of the joinder.

Steven Homick was also prejudiced by his association with Neil Woodman as a co-defendant. Indeed, most of the evidence presented at this very long trial had little direct bearing on Steven Homick, and was instead directed mainly at showing year after year of hateful statements and actions by the Woodman brothers toward their parents, and month after month of financial mismanagement by the brothers as they systematically looted their company of its needed cash. While some such evidence might have been relevant to show motive in a separate trial of Steven Homick alone, it would have been far less extensive than the evidence that was presented against co-defendant Neil Woodman.

c. Danger of Confusion

Regarding the third *Boyde/Massie* factor (danger of confusion from evidence on multiple counts), it is true that the number of counts would have been the same in a separate trial. However, there was still a serious element of potential confusion caused by the joinder with Neil Woodman. As shown in the discussion of the second factor, much of the evidence that was introduced against Neil Woodman would not have been introduced at a separate trial for Steven Homick. Thus, a separate trial would have been much shorter and it would have thereby been less confusing for the jury to recall the relevant evidence and give it the weight it merited.

d. Conflicting Defenses

The fourth factor, conflicting defenses, has assumed a mysterious position in the case law. Case after case refers to it as a legitimate factor. Indeed, if the goal is a fair trial for both defendants, it is probably the most important factor. Yet no case ever finds conflicting defenses that should have resulted in a severance. Indeed, the factor is rejected in a wide variety of instances in which one would be hard pressed to dispute the label "conflicting defenses."[233] It therefore remains unclear what this factor means, but if it is to ever have any meaning at all, the present case is one that should certainly qualify. This is demonstrated by **contrasting** the present case with the reasons given for rejecting a "conflicting defenses" claim in *People* v. *Boyde*, *supra*, 46 Cal.4th at pp. 232-234.

In *Boyde*, one defendant gave up his right to a jury trial and was tried by the court. Thus, both were tried together, but the jury would only decide Boyde's fate. Boyde sought a severance based on inconsistent defenses, and argued on appeal that "each attempted to place primary responsibility on the

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233 There are some cases which acknowledge conflicting defenses and then state that conflicting defenses **alone** do not **mandate** a severance. (See, for example, *United States* v. *Becker* (4th Cir. 1978) 585 F.2d 703, 707; *People* v. *Wallace* (1992) 9 Cal.App.4th 1515, 1519; *People* v. *Morganti* (1996) 43 Cal.App.4th 643, 672 and 674.) Those cases then appear to be considered as if they held that conflicting defenses is not a reason for granting a severance. The flaw is that while conflicting defenses alone may not mandate a severance in a particular case, it remains a factor to consider in every case. Conflicting defenses, combined with other factors, or even standing alone in some circumstances, can still mandate a severance in a particular case, even if not every variation of conflicting defenses standing alone would mandate a severance in every case.

other for the robbery and murder." (*Id.*, at p. 232.) In rejecting the appellate claim, this Court explained:

> "Although the defense positions might be characterized as antagonistic on the issue of the identity of the actual killer, it was undisputed that each defendant participated in the incident. Ellison's testimony -- while critical as a percipient witness in placing the gun in Boyde's hand -- only corroborated the other details of the offense established by Boyde's own extrajudicial statements and physical evidence presented by the prosecution. Ellison did not present the kind of extensive evidence against Boyde which would have turned the trial into more of a contest between the defendants than between the prosecution and either of them, and his counsel made no arguments to the Boyde jury. No evidence inadmissible as to Boyde was introduced as a result of the joint trial; Boyde himself introduced Ellison's extrajudicial statements, and Ellison was available and fully cross-examined. (Citation omitted.)" (*People* v. *Boyde, supra*, 46 Cal.4th 212, 233-234.)

The present case is different on virtually every factor noted in *Boyde*:

1. In *Boyde*, it was undisputed that each defendant participated in the crimes and the issue was simply who bore primary responsibility. Here the jury could have easily come to a variety of different conclusions about the three co-defendants. The jury could have concluded that Neil Woodman was guilty of conspiring with his brother to have their parents killed, but still found a reasonable doubt as to whether either of the Homick brothers were involved in the murders. Or, the jury could have concluded that the Homick brothers were involved, but had a reasonable doubt about Neil Woodman's involvement. (Indeed, the failure to

unanimously agree on a verdict as to Neil demonstrates that at least some jurors were of this view.) The jury might also have concluded that Robert Homick was involved, based on his presence at the murder scene the night of the crimes and his receipt of a large sum of money from Neil Woodman, but still had a reasonable doubt whether Steven Homick was involved. Finally, the jury could have accepted the contentions of Robert Homick's counsel and concluded that Steven Homick was responsible for the murders, but Robert Homick was an unwitting dupe who aided the conspiracy without knowledge of its goal. (See *People* v. *Pinholster* (1992) 1 Cal.4th 865, 933-934, recognizing the greater danger of prejudice when one defendant is able to incriminate the other while still maintaining his own innocence.)

2. In *Boyde*, the co-defendant's testimony simply corroborated what Boyde had admitted out of court and what was shown by ample physical evidence. Here, there was no physical evidence at all tying Steven Homick to the homicides. Steven Homick made no incriminating admissions himself, in or out of court, except for statements attributed to him by Stewart Woodman and Michael Dominguez, who were both witnesses of highly questionable credibility, Here, neither co-defendant testified against Steven Homick, but counsel for Robert Homick did present substantial evidence and argument directed at showing that Steven Homick was guilty and Robert Homick was not.

3. In *Boyde*, the co-defendant "did not present the kind of extensive evidence against Boyde which would have turned the trial into more of a contest between the defendants than between the prosecution and either of them, and his counsel made no arguments to the Boyde jury." (*People*

v. *Boyde, supra*, 46 Cal.4th 212, 233-234.) Here, as noted in the preceding paragraph and as explained in detail in the background section of this argument, much of the effort of Robert Homick's counsel was directed at bringing out facts and presenting argument that tended to exonerate Robert while incriminating Steven. Worse yet, much of what was brought out to support Robert Homick's defense was not even admissible against Steven Homick, but was nonetheless heard by Steven Homick's jury.[234] Here, Robert Homick's guilt was determined by the same jury as Steven Homick's, and Robert's attorney presented vigorous argument to that jury which was damaging to Steven Homick.

4. In *Boyde*, no evidence inadmissible against Boyde was introduced as a result of the joint trial. Here, in stark contrast, Steven Homick was repeatedly prejudiced by evidence introduced for or against his co-defendants, even though not properly admissible against him. (See the preceding section of this argument, and in particular, items 1-15 listed at pages 444-447,) In many respects, this trial did become a contest between the brothers. Robert Homick did do much harm to his brother that the prosecutor could not have done in a separate trial.

5. In *Boyde*, co-defendant Ellison was available and was fully cross-examined. In the present case, neither co-defendant testified. Thus, Steven Homick's jury heard many statements attributed to Neil Woodman and to Robert Homick, but Steven Homick had no opportunity to confront and cross-examine either of them.

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234 See items 12-15, listed above, at page 447.

In short, the case against Steven Homick in a separate trial would have been very different from what occurred in the present trial. The issues would have been greatly simplified, leaving the jury with only the need to decide whether Steven Homick's guilt had been proved beyond a reasonable doubt by the self-serving testimony of two unusually disreputable witnesses: 1) Stewart Woodman, who admitted a life time of lying and cheating, directed at his family, his creditors, his business, and the Internal Revenue Service, and who admitted he had his parents killed and then turned on his brother to save his own life; and 2) Michael Dominguez, who received an extremely lenient plea bargain that covered the present case as well as numerous additional serious crimes, including other murders in several different states, and who had a solid reputation as a person who would do anything he had to do to protect his own self-interest. If the jury could have concentrated only on whether the testimony of these two witnesses and the relatively small corroborating information, proved beyond a reasonable doubt that Steven Homick was the person who killed the Woodman parents, the jury might well have found a reasonable doubt. Instead, the jury was heavily distracted with the need to simultaneously resolve the very different cases against Neil Woodman and Robert Homick, and with the impossible task of trying to ignore the endless prejudicial information about Steven Homick which they never would have heard in a separate trial.

As shown in the preceding paragraph, the case against Steven Homick has to be considered close. While it may be possible to ignore the conflicting defense factor in cases where the evidence of guilt is overwhelming, it should not be ignored in a case where a sentence of death has been imposed on a defendant who, in a separate trial, might well have been acquitted.

Another case that rejected a conflicting defense claim, but that contains important contrasts to the present situation, is *People* v. *Hardy* (1992) 2 Cal.4th 86. In that case, *ex parte* hearings were held so each of three defendants could reveal their defenses to the court in advance. The prosecution theory was that Morgan solicited Reilly to kill Morgan's wife, and Reilly brought in Hardy to actually carry out the murder. Morgan's defense was that Reilly and an unknown third person killed Morgan's wife pursuant to an effort to blackmail Morgan. Reilly claimed he withdrew from the conspiracy. Hardy claimed he was not involved, and Morgan and Reilly must have committed the crime. (*Id.*, at pp. 167-168.)

This Court explained:

> "Moreover, although it appears no California case has discussed at length what constitutes an 'antagonistic defense,' the federal courts have almost uniformly construed that doctrine very narrowly. Thus, '[a]ntagonistic defenses do not per se require severance, even if the defendants are hostile or attempt to cast the blame on each other.' (*United States* v. *Becker* (4th Cir. 1978) 585 F.2d 703, 707, cert. den. 439 U.S. 1080 [59 L.Ed.2d 50, 99 S.Ct. 862].) 'Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' (*United States* v. *Davis* (1st Cir. 1980) 623 F.2d 188, 194-195; see also, *United States* v. *Ehrlichman* (D.C.Cir. 1976) 546 F.2d 910, 929 [39 A.L.R.Fed. 604], cert. den. 429 U.S. 1120 [51 L.Ed.2d 570, 97 S.Ct. 1155].) Stated another way, ' **"mutual antagonism" only exists where the acceptance of one party's defense will preclude the acquittal of the**

> **other.'** (*United States* v. *Ziperstein* (7th Cir. 1979) 601 F.2d 281, 285, cert. den. 444 U.S. 1031 [62 L.Ed.2d 667, 100 S.Ct. 701]; see generally, 1 Wright, *Federal Practice and Procedure: Criminal* (2d ed. 1982) § 223, pp. 799-802 & fn. 15, and cases cited.)" (Emphasis added; *People* v. *Hardy, supra*, 2 Cal.4th 86, 168.)

Applying that test, *Hardy* found no truly antagonistic defenses in the situation presented there. If the jury believed Morgan, he was not present and did not know whether Reilly did or did not withdraw, and he claimed he never knew who the third person was. If the jury believed Reilly withdrew, then he would not have known who did commit the crime. If the jury believed Hardy, then he was not involved and had no knowledge of who was. (*Id.*, at p. 168-169.)

Here, in contrast, if a trier of fact believed the theory offered in Robert Homick's defense, then Steven Homick was necessarily guilty. Robert Homick's defense was that he merely performed acts at the direction of his revered older brother, without questioning the purpose of those acts. That defense necessarily implies that it was Steven Homick who was responsible for killing the Woodmans.

This Court in *Hardy* also relied on the fact that the evidence that would have been presented in separate trials would have been essentially the same as the evidence in the joint trial. (*Id.*, at p. 169.) As shown above, that was **not** the case here. Highly prejudicial information about Steven Homick that was inadmissible against him, but was admitted against his co-defendants, would not have been presented in a separate trial. Highly prejudicial information about Steven Homick that was elicited by co-defendants would not have been presented at a separate trial. Extensive and

confusing evidence about Neil Woodman would have been irrelevant in a separate trial against Steven Homick. Important evidence that would have supported Steven Homick's defense, and which was disallowed because it would have prejudiced Robert Homick, would have been admitted in a separate trial.

Indeed, *Hardy* distinguished two federal cases (*Panzavecchia* v. *Wainwright* (5th Cir. 1981) 658 F.2d 337, and *Abbott* v. *Wainwright* (5th Cir. 1980) 616 F.2d 889, which both found fundamentally unfair trials in violation of the federal constitution, when failure to grant a severance resulted in demonstrably different evidence than would have been presented in a separate trial. "In *Panzavecchia*, *supra*, 658 F.2d 337, ... the prejudice flowed from the fact that the joint trial enabled the jury to learn about a prior felony conviction that would have been inadmissible in a separate trial." (*People* v. *Hardy, supra*, 2 Cal.4th 86, 170.) In the present case, the jury improperly heard evidence that Steven Homick was a notorious drug dealing contract killer, who was tougher than the Mafia and who was suspected of being the shooter in a separate triple homicide in another state. Thus, in the present case, unlike *Hardy*, the erroneous denial of the severance motion resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fundamentally fair trial by jury, in accordance with due process of law, and to reliable fact-finding. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415

U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

Moreover, a close analysis of what the jury had to do in the present case demonstrates that this was precisely the kind of case in which conflicting defenses result in an inherently unfair trial, and should have led to a severance. Here, the theory of Robert Homick's defense was that he was the unwitting dupe of his older brother, who was the true guilty party. The theory of Steven Homick's defense was that his involvement in the murder was not adequately proved, but that other evidence indicated that 1) it was Robert Homick who the Woodmans turned to when they wanted unlawful violent acts committed, 2) it was Robert Homick who was indisputably near the murder scene shortly before the murders occurred, and 3) and it was Robert Homick who received the payoff from the Woodman brothers.

In separate trials, a jury considering only the charges against Steven Homick would have merely had to decide whether his guilt had been proved beyond a reasonable doubt. If a jury determined that the proof of Steven Homick's connection to the murders was simply too weak, especially when contrasted to the greater proof of Robert Homick's connection, then Steven Homick would have been acquitted. Similarly, in a separate trial for Robert Homick, a jury would have had to decide only whether Robert Homick's guilt had been proved beyond a reasonable doubt, or whether his defense – that he was an unwitting dupe of his older brother – was sufficient to raise a reasonable doubt as to Robert's guilt.

In contrast, in a joint trial, the jury was presented with an intellectually impossible task. The jury had to decide whether Steven Homick's claim that the evidence pointed toward Robert Homick rather than himself raised a reasonable doubt as to Steven's guilt. Such a determination would necessitate considering whether the Steven Homick defense theory - that it was Robert and not Steven who was responsible for the murders - was reasonably consistent with all of the circumstantial evidence. However, the jury was simultaneously deciding Robert Homick's guilt, and applying a "beyond a reasonable doubt" standard in **Robert's** favor, at the same time that it was supposed to be applying such a standard in Steven's favor. Thus, rather than considering whether evidence of Robert's responsibility was reasonably consistent with the evidence, the jury would inevitably view the issue as whether Robert's responsibility had been proved beyond a reasonable doubt. A jury applying such a standard would necessarily deprive Steven Homick of a fair determination as to whether Steven's defense raised a reasonable doubt.

In other words, a jury trying Steven Homick alone might have had a reasonable doubt whether his guilt was proved, while feeling that Robert Homick was probably involved. A jury trying Robert alone might have had a reasonable doubt whether his guilt was proved, while feeling that Steven Homick was the likely mastermind. In a joint trial, an uncertain jury would be extremely reluctant to acquit **both** Homick brothers, and might well have voted to convict both based on uncertain evidence, rather than finding both not guilty.

Perhaps a jury composed of experienced attorneys could comprehend the manner in which deliberations should proceed when each defendant's

guilt hinged on an assessment of a co-defendant's guilt, and it is necessary to simultaneously apply opposite standards to seemingly identical questions. Indeed, while such a jury of attorneys might be able to comprehend what they should be doing, actually achieving it would still remain difficult. For a lay jury, that task would have been impossible.

To make matters worse, no instructions were given to the present jury to fully explain the impact of the need for simultaneously applying opposite standards, even though this was a principle closely and openly connected with the facts of this case. (See *People* v. *Sedeno* (1974) 10 Cal.3d 703, 715: "'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]")

Of course, it is not surprising that instructions covering this problem were absent from the present court's instructions to the jury. It would simply be impossible to formulate comprehensible instructions that would convey the requisite mental gymnastics to a lay jury. Indeed, in the analogous context of a proposal to have the same jury determine the cases against jointly tried defendants by means of separate deliberations, one after another:

> "... federal appellate courts have reversed convictions of defendants whose guilt has been determined in a bifurcated trial, concluding that it may be practically impossible for a jury to determine one defendant's guilt without impermissibly prejudging the guilt of another defendant jointly tried. (See, e.g., *United States*

> *v. McIver* (11th Cir. 1982) 688 F.2d 726, 729-730.)" (*People* v. *Fletcher* (1996) 13 Cal.4th 451, 468, fn. 5)

If separate consideration is a practical impossibility when a jury addresses multiple defendants one at a time, it follows that it is at least as difficult, if not more so, when multiple defendants are addressed simultaneously. As explained above, in the present trial there was a very real possibility that jurors could conclude that at least one Homick brother was responsible for the murders, but be uncertain which one, or whether both were involved. Left without a clear rationale for convicting one while acquitting the other, such a jury would be understandably reluctant to acquit both brothers. On the other hand, the same jury, deciding the fate of only one brother rather than both, would have been reasonably likely to acquit the one.

In *Boyde*, discussed above, there was no problem because one defendant was being tried by the court while the other defendant was being tried by the jury. The jury only had to be concerned with one defendant and did not have to face the conflicting standards problem discussed above.[235] Similarly, in *Hardy*, also described above, whether the jury accepted or

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235 One solution in the present case that would have provided a safeguard comparable to that in *Boyde*, while still giving the prosecution most of the resource-saving advantages of a joint trial, would have been to provide a separate jury to decide only Steven Homick's case, while one or two other juries decided the cases against the co-defendants. Such a procedure was sanctioned in *People* v. *Wardlow* (1981) 118 Cal.App.3d 375, and later approved by this Court in *People* v. *Harris* (1989) 47 Cal.3d 1047, 1075. Such a remedy was requested by Steven Homick below, as an alternative form of relief, as set forth in the procedural background section of this argument. However, the trial court never squarely addressed that potential remedy separately from the remedy of a full severance.

rejected the defenses offered by the other two co-defendants had no impact on their assessment of the strength of the case against Hardy,

Appellant recognizes that the guilty verdict in regard to Robert Homick demonstrates that this was not a case in which the jury had a reasonable doubt as to Robert Homick's guilt and incorrectly applied that doubt against Steven Homick. However, this does not detract from the analysis just set forth. That analysis is based on the conclusion that any jury trying to simultaneously decide the guilt of two defendants who persuasively place the blame on each other will inevitably become confused, raising the grave danger of unjust verdicts reached out of frustration or confusion, rather then based on a reasoned analysis of the evidence against a single defendant at a time. Indeed, a similar problem regarding irreconcilable defenses, also applicable here, was recognized in *United States* v. *Davis, supra,* 623 F.2d 188, 194-195, as contained in the quotation above by this Court in *People* v. *Hardy, supra*, 2 Cal.4th 86, 168: "...the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Indeed, the jury's inability to reach a unanimous verdict as to Neil Woodman demonstrated the jury's great distrust of the testimony of Stewart Woodman, the centerpiece of the prosecution case. At the same time, the jury knew that Stewart Woodman had pled guilty to the crimes, satisfying any belief that at least one of the Woodman brothers must have been guilty. But when it came to the Homick brothers, there was no satisfactory result for jurors who believed at least one of them must be guilty, but were uncertain which one. Such an impossible dilemma provides the most plausible explanation for the conviction of both Homick brothers while not convicting Neil Woodman.

e. Complications Resulting from a Joint Trial

The last factor set forth in *Boyde*, above, whether there is a possibility that in a separate trial the codefendant may give exonerating testimony, is not at issue in the present case. However, one more factor, not yet recognized in the cases, but suggested in the procedural background section of this argument, should be considered. That is, the denial of severance in the present case resulted in predictable complications that required substantial time and effort by court and counsel to resolve. Of course, while court and counsel were sidetracked by one complex evidentiary issue after another, the jury, witnesses, and other court personnel, had to sit by idly. It is often claimed that a major factor in favor of a consolidated trial is to preserve scarce judicial resources. Indeed, that was the only significant factor ever put forward by the prosecution below. If that is a proper factor in favor of consolidation, then the extra complications caused by a joint trial must be considered as a factor pointing toward severance.

Here, as discussed in the background portion of this argument, the refusal to sever the defendants resulted in numerous debates about the unavoidable infringement of the speedy trial rights of various defendants, who were ready to proceed to trial but were forced to wait, over objection, until counsel for a co-defendant would be prepared or until all six defense attorneys were free at the same time for a very lengthy trial. Aside from that problem, the trial court itself acknowledged in regard to the need to balance the conflicting rights of the three co-defendants, "I spend more time on this tightrope in this trial than anything else,..." (RT 120:14685.) In a similar vein, the court noted, "This is another one of those situations where we seem

to be carving out new rules because we have these unsevered defendants with conflicting positions; and so I don't know about rules of evidence either. I'm just talking about what seems fair to me." (RT 117:14213.) This recognition by the trial court, combined with the lengthy procedural summary set forth earlier in this argument, demonstrates that an unprecedented amount of scarce judicial resources were consumed by the need to sort out numerous complex evidentiary issues, most of which would have been very simple to resolve in the context of an individual trial.

f. Other Relevant Factors

Aside from the *Boyde* analysis, this Court in *People v. Coffman* (2004) 34 Cal.4th 1, 40, after quoting the *Massie* factors, quoted from and commented on *Zafiro v. United State*s (1993) 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317, as follows:

> "Another helpful mode of analysis of severance claims appears in *Zafiro v. United States, supra,* 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317. There, the high court, ruling on a claim of improper denial of severance under rule 14 of the Federal Rules of Criminal Procedure, observed that severance may be called for when 'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' (*Zafiro, supra,* at p. 539, 113 S.Ct. 933; see Fed. Rules Crim.Proc., rule 14, 18 U.S.C.) The high court noted that less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice. (*Zafiro, supra,* at p. 539, 113 S.Ct. 933.)"

In the present case, as shown above, the joint trial did compromise specific trial rights, including the denial of the right to present a complete defense (6th and 14th Amendments), by virtue of the improper exclusion of the Missouri incident, and the denial of the right to confrontation, by virtue of the admission of inadmissible codefendant hearsay and the lack of appropriate limiting instructions. Also, as shown above, the joint trial in the present case did prevent the jury from making a reliable judgment about the guilt or innocence of Steven Homick.

Indeed, the High Court in *Zafiro* continued on with more language directly applicable to the present case. After the language quoted above in *Coffman*, the High Court gave more specific examples of the types of cases where prejudice was more likely:

> "For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. See *Kotteakos v. United States*, 328 U.S. 750, 774-775 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. See *Bruton v. United States*, 391 U.S. 123 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, e.g., *Tifford v. Wainwright*, 588 F.2d 954 (CA5 1979) (per curiam)." (*Zafiro, supra,* at p. 539.)

Each of these examples cited in *Zafiro* was strongly seen in the present case. The evidence here demonstrated a great deal of wrongdoing by the

Woodman brothers, and some by Robert Homick, that had nothing at all to do with Steven Homick. Here, three defendants were tried together in a very complex trial with markedly different degrees of culpability between Steven Homick and his brother, as well as between Steven Homick and Neil Woodman. Here, evidence that was arguably probative only against a co-defendant was routinely admitted despite great prejudice to Steven Homick. Here, the precluded Missouri incident constituted important exculpatory evidence for Steven Homick, but was disallowed only because of the potential prejudice against Robert Homick. Once again, **all** relevant factor point strongly in favor of the need for a severance here.

D. The Errors in the Present Case Were Prejudicial

Finally, the erroneous denials of the various severance motions were prejudicial, under either the abuse of discretion standard or the federal due process standard. Under the abuse of discretion standard, even based only on the facts known at the time of the original severance motion, it has been shown both that the trial court did abuse its discretion, and that there was a reasonable probability of a more favorable result for Steven Homick in a separate trial. (*People v. Coffman* (2004) 34 Cal.4th 1, 41.)[236] Each Homick

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236 Strangely, after stating this traditional and long-accepted test of prejudice, *Coffman* on the next page went on to state a conflicting and plainly erroneous standard, citing only an Alabama case: "When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. (*Ex parte Hardy* (Ala. 2000) 804 So. 2d 298, 305.)" (*Coffman, supra,* at p. 42.)

(Continued on next page.)

brother wanted to convince the jury that it was the other brother who was responsible for the death of the elder Woodmans. In a separate trial, Steve Homick would have still been able to show that Robert Homick was the one who staked out the elder Woodmans' residence on a day when it would have

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(Continued from last page.)

While not actually stated as a standard of prejudice, this statement seems to suggest that a reviewing court could find harmless error (or even no error) simply by pointing to sufficient independent evidence against the appellant. The obvious flaw in such an analysis lies in the statement that "...it is not the conflict **alone** that demonstrates his or her guilt..." (*Id.*, emphsis added.) While it may be true in some cases that it is not the conflict alone that leads to the guilty verdict, the real issue is whether there is a reasonable probability that the conflict contributed to the verdict.

Moreover, the *Coffman* statement erroneously conflates prejudice with sufficiency of the evidence. "Sufficient independent evidence" is what is necessary to sustain a conviction on appeal. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 61 L.Ed.2d 560, 573; *People v. Johnson* (1980) 26 Cal.3d 557.) If that was also the standard for when an error is prejudicial and merits relief, then there would be no point in raising any issues on appeal except for sufficiency of the evidence. That is, if the evidence were sufficient to sustain an appeal, any error would be harmless. To state such a standard demonstrates its absurdity, yet that is what the *Coffman* language suggests.

The United States Supreme Court has expressly recognized this distinction. In construing a federal rule which found non-constitutional error harmless unless it affected substantial rights, the High Court explained: "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is, rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." (*Kotteakos v. United States* (1946) 328 U.S. 750, 765.)

In sum, the present issue is not simply whether there was sufficient evidence to uphold the verdicts. Instead, the issue is whether there was a reasonable probability of a more favorable result for Steven Homick in a separate trial.

been known they would go out for dinner, that he was very near that same residence within a short time before the murders, and that he received a large payment from the Woodmans immediately after they received the insurance proceeds. Steve Homick would have also been able to provide the jury with important evidence he was not allowed to use in the joint trial – the fact that Stewart Woodman turned to Robert Homick not just for collection assistance, but also for violent acts against a former employee who had made his way to Stewart Woodman's enemies list.

Aside from strengthening the case against Robert Homick, a separate trial would have benefitted Steven Homick by providing him with a jury not exposed to the many hearsay statements, inadmissible against him, but which painted him as a drug-dealing person who had murdered others, who was considered notorious by FBI agents, and who was reputed to be tougher than the Mafia and able to achieve any illegal goal. A separate jury would also not have had to listen to nearly as much testimony about the Woodman brothers and their family relationships, most of which had little or no relevance to the issue of the guilt or innocence of Steven Homick.

Also, as argued above, under the particular circumstances of the present case, with repeated motions for severance and with a judge and prosecutor who actively deprived the defense of any opportunity to make a stronger showing at the time of the original severance motion, the abuse of discretion standard should encompass all of the trial evidence as well the evidence known at the time of the original motion to sever. That additional information caused the trial judge to openly admit that she had entered uncharted territory and had to practically make up new rules of evidence as

the trial progressed. Thus, the abuse of discretion became even clearer, as did the prejudicial impact of the joint trial.

Last, applying the federal due process standard to the totality of the trial that resulted, it cannot be said beyond a reasonable doubt that Steven Homick's trial was a fundamentally fair one. He was prevented from utilizing relevant evidence that was crucial to support his defense, and he was repeatedly slurred with evidence offered by co-defendants that would have been inadmissible against him in a separate trial. Those differences carried a strong likelihood of impacting the verdict, since the major prosecution evidence against Steven Homick came from one witness we know the jury found unpersuasive, and another witness who was shown to be unusually unreliable.

IX. STEVEN HOMICK'S CALIFORNIA STATUTORY AND CONSTITUTIONAL RIGHTS AND FEDERAL DUE PROCESS RIGHTS WERE VIOLATED BY PROSECUTING HIM FOR AND CONVICTING HIM OF TWO MURDERS WHEN HE HAD ALREADY BEEN CONVICTED IN A FEDERAL COURT (AND SENTENCED TO LIFE IN PRISON) FOR INTERSTATE TRAVEL FOR THE PURPOSE OF COMMITTING THE SAME TWO MURDERS, AND FOR RACKETEERING, BASED ON PREDICATE OFFENSES THAT AGAIN INCLUDED THE SAME TWO MURDERS

A. Introduction

Before Steven Homick was tried and convicted in California for the murders of Gerald and Vera Woodman, he had been convicted and sentenced in a federal district court for a number of crimes that were based on the same series of activities that formed the basis of the California charges. One federal crime for which he was convicted included interstate travel with intent that murder be committed in violation of the Penal Code of California, for the receipt of money, resulting in the deaths of Gerald and Vera Woodman. (18 USC 1952A.) Another federal crime for which he was convicted was participation in a racketeering enterprise consisting of criminal offenses against the laws of several states, including the murders of Gerald and Vera Woodman in violation of California Penal Code section 187. (18 USC 1961 (4).)

In *People v. Belcher* (1974) 11 Cal.3d 91, 96-97, this Court explained:

> "... prosecution and conviction for the same act by both state and federal governments are not barred by the constitutional protection against double jeopardy. (Citations omitted.) This rule, however, does not preclude a state from providing greater double jeopardy protection than the United States Supreme Court has determined to be available under the Fifth Amendment of the United States Constitution. (*Curry v. Superior Court* (1970) 2

> Cal.3d 707, 716.) Accordingly, a number of states have adopted statutes which provide at least some protection against successive prosecutions in different jurisdictions for offenses arising out of the same act. (Model Pen. Code, § 1.11, com., p. 61 (Tent. Draft No. 5, 1956) [list of state statutes].)
>
> The relevant statute in California is Penal Code section 656, which provides: 'Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.' "

A related provision, Penal Code section 793, provides:

> "When an act charged as a public offense is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this State."

In *People v. Comingore* (1977) 20 Cal.3d 142, 148, this Court noted the similarities of these two sections, found no legal significance in the different wording, and suggested that section 793 applied to bar the institution of a criminal prosecution, while section 656 would be available to bar a conviction after a criminal prosecution had already been instituted.

As will be shown, the only point at issue in this argument is whether the California murder charges were based upon the same act as the federal offenses for which Steven Homick had already been convicted.

B. Factual and Procedural Background

In the present case, on October 1, 1991, a written former judgment plea was filed on behalf of Neil Woodman. (SCT 2-5:1141.) A handwritten notation states

"Joined in by other defendants." Attached was a copy of the federal indictment, filed March 16, 1989, alleging in Count I that Steven Homick and others participated in a racketeering enterprise consisting of criminal offenses against the laws of several states, including the murders of Gerald and Vera Woodman in violation of California Penal Code section 187 (18 USC 1961 (4)), and in Count XI that Steven Homick and others engaged in interstate travel with intent that murder be committed in violation of the Penal Code of California, for the receipt of money, resulting in the deaths of Gerald and Vera Woodman. (18 USC 1952A.) (SCT 2-5:1143-1150, 1157-1158.)

The pertinent language of Count I, described in the preceding paragraph, was that Steven Homick:

> "... did unlawfully, willfully, and knowingly conduct and participate directly and indirectly, in the conduct of the affairs of said enterprise through a pattern of racketeering activity (predicate acts) as defined by Title 18, United States Code, Section 1961(a). The pattern of racketeering activity consisted of criminal offenses against the United States and criminal offenses against the laws of several states as set forth below.
>
> RACKETEERING ACTS
>
> ...
>
> 7. Woodman Murders (Aiding and Abetting) –
>
> Predicate Act III
>
> a. ... on or about September 25, 1985, ... STEVEN MICHAEL HOMICK, ... did unlawfully, willfully, and knowingly aid, abet, counsel, command, induce and procure the killing of Gerald Woodman with malice aforethought in violation of California Penal Code, Section 187.
>
> b. ... on or about September 25, 1985, ... STEVEN MICHAEL HOMICK, ... did unlawfully, willfully, and knowingly aid, abet, counsel, command, induce and procure the killing of Vera Woodman with malice aforethought in violation

of California Penal Code, Section 187." (SCT 2-5:1144-1147.)

The pertinent language of Count XI, described above, was that Steven Homick:

> "... on or about September 23 through September 25, 1985, ... did travel ... in interstate commerce ... with the intent that a murder be committed in violation of the Penal Code of California, said murder to be committed in consideration for the receipt of and for a promise and agreement of money; which travel resulted in the deaths of Vera and Gerald Woodman.
>
> All in violation of Title 18, United States Code, Section 1952A." (SCT 2-5:1157-11158.)

On October 4, 1991, a separate written former judgment and once in jeopardy plea was filed on behalf of Steven Homick. (CT 14 3667-3668.) Points and authorities in support of Steven Homick's former judgment plea were filed separately on November 22, 1991. (CT 14:3809-3820.) Attached as an exhibit were a number of the instructions read to the jury during the federal trial, including one defining the elements of murder within the meaning of California Penal Code section 187. (CT 14:3836-3838.) Also attached was a portion of the transcript of the sentencing proceedings, and a copy of the judgment, showing that Steven Homick was sentenced to life imprisonment for Count 11, the count pertaining to interstate travel resulting in the deaths of Vera and Gerald Woodman. (CT 14:3845, 3849-3852.)

The points and authorities in support of Steven Homick's former judgment plea contained a quotation from the lodged transcript of the federal trial setting forth the federal prosecutor's theory of his case, as explained in his opening statement to the jury:

> "And essentially what Count XI allege[s] is that Steve Homick ... murdered – in other words,

they intentionally took the lives of Gerald and Vera Woodman on September 25, 1985." (CT 14:3810.)

On October 11, 1991, the People filed an opposition to Neil Woodman's former judgment plea. (SCT 2-5:1171-1175.) When the matter was argued on January 17, 1992, the prosecutor stated that his opposition applied to all three defendants. (RT 32:1359.) A transcript of the trial proceedings in federal case number CRS-89-052-LDG was provided to the trial court and judicial notice was taken of those proceedings. (RT 32:1359-1360.) The matter was argued, and denied. (RT 32:1361-1370.)

Over a year later, on February 25, 1993, in the middle of the guilt trial, the trial court stated that an aspect of the former judgment plea had not yet been resolved. (RT 117:14345-14346.) The next day, the matter was argued further and denied again. (RT 118:14355-14382.) However, the judge acknowledged that the issue was troublesome. (RT 118:14382.)

C. Appellate Interpretation of the Governing California Statutory Provisions Took a Wrong Turn, Resulting in Confusing and Mistaken Rules that Need Clarification By this Court

The "same act" aspect of California's former judgment provisions was first interpreted in *People v. Candelaria* (1956) 139 Cal.App.2d 432. There, the defendant was convicted of robbery after previously being convicted in federal court of robbery of a national bank. On appeal, he argued that the only difference between the two charges was that the federal offense had the added element of involvement of national bank funds that were federally insured. The Court of Appeal noted an absence of California precedent on the "same act" issue, and

briefly summarized cases from other states that had statutes similar to California's Penal Code section 656. The Court of Appeal concluded:

> "The only additional element involved in the federal prosecution was that the money belonged to a national bank whose deposits were federally insured. That additional element, regarding the status of title to or insurance on the money, pertained to the matter of jurisdiction of the federal court, and it did not pertain to any activity on the part of defendant in committing the robbery. The physical act or conduct of defendant in taking the money was the same whether the robbery be considered as a federal offense or a state offense. All the acts constituting the state offense were included in the federal offense and were necessary to constitute the federal offense. It is clear that, within the meaning of said section 656, the federal conviction was 'founded upon the act' in respect to which the defendant was tried in the present case. It appears, as a matter of law, that the previous federal conviction is a sufficient defense in the present case." (*People v. Candelaria, supra,* 139 Cal.App.2d at p. 440.)

Similarly here, the additional element of interstate travel pertained to federal jurisdiction, although it did arguably also pertain to activity by Steven Homick. However, it is difficult to see why it should matter if the federal offense requires proof of the California offense **plus** some additional element. As *Candelaria* also noted in the language just quoted, "All the acts constituting the state offense were included in the federal offense and were necessary to constitute the federal offense." That was also true in the present case, as made especially clear by the prosecutor's description of his theory of the case. As long as that much is true, Steven Homick has already been convicted and punished for the same acts upon which the California prosecution was founded, even if his federal conviction was also based on additional acts. As will be seen, later cases will shed more light, as well as more confusion, on the determination of whether it is only extra

California elements, or only extra federal elements, that matters in regard to the application of section 656, or whether both matter and California defendants are protected from double prosecution only if the state and federal offenses are virtually identical.

Furthermore, since Steven Homick lived in the state of Nevada, if he had a desire to murder the Woodmans he could not have accomplished that goal without crossing a state line and entering California, where the Woodman's lived. Thus, that act was essential to the commission of the California crime, even though it was not a statutory element of the California crime. In any event, no rational basis appears for considering that additional federal requirement as any more determinative than the federally-insured-national-bank-funds requirement that differentiated the state and federal prosecutions in *Candelaria*. In both cases, the essential underlying crimes were the state crimes - the robbery in *Candelaria* and the murders in the present case; the additional federal elements in both cases pertained to federal jurisdiction.

On remand in *Candelaria*, faced with the inability to proceed on the robbery charge, the People instead charged the defendant with burglary. Following conviction, he appealed again, arguing that the burglary offense was also barred, since it arose out of the same acts as the federal bank robbery. This time the Court of Appeal rebuffed the argument. First, the Court rejected both state and federal constitutional double jeopardy contentions:

> "In the case before us the defendant was charged with burglary, and not robbery, and the two offenses are very different in many respects. The federal government charged the defendant with robbery, which crime has many elements, such as a forcible taking, which are not associated with the crime of burglary. In the burglary case the essence of the offense is that the defendant enter the bank with

> the intention to steal, which element is not at all necessarily associated with robbery. All of the elements of the one crime are not included in the other.
>
> It is of no comfort to the defendant that both crimes arose from the same series of acts, because double jeopardy will not lie unless all of the elements of the one crime are included in the other. (*Citations.*)" (*People v. Candelaria* (1957) 153 Cal.App.2d 879, 883-884 (*Candelaria* II).)

Then the Court of Appeal very quickly disposed of a separate Penal Code section 656 contention:

> "Neither are the provisions of section 656 of the Penal Code of any assistance to the defendant in this proceeding, for that section provides, in effect, that the federal prosecution for robbery is a bar to a further prosecution for the robbery, but not otherwise. The 'act' spoken of in the statute must be 'the same act.' The burglary act complained of in the present case, that is, the entering of the building with the intent to commit a theft, is not the same act complained of in the federal court, namely, that he pointed a gun at the teller and by force and fear compelled her to deliver over to him certain monies." (*People v. Candelaria* II, *supra*, 153 Cal.App.2d at p. 884.)

Here, by analogy, section 656 should apply: The murders complained of in the present case, that is, coming to California in order to fire a gun at Gerald and Vera Woodman and cause their deaths, **were** within the same acts complained of in the federal court, namely, crossing the Nevada/California state line with intent to murder Gerald and Vera Woodman by firing a gun at them, resulting in their deaths.

The "same act" issue first reached this Court in *People v. Belcher, supra*, discussed briefly at the outset of this argument. In *Belcher*, the defendant had been charged in federal court with assault with a deadly weapon upon a federal officer,

based on pointing a firearm at a federal narcotics agent who was operating undercover and seeking to purchase drugs. The defendant allegedly took federal funds from the agent, as well as the agent's own wallet. However, the defendant was acquitted in federal court. He was subsequently convicted in state court of assault with a deadly weapon and robbery. This Court discussed the *Candelaria* cases and concluded:

> "These two cases -- both involving the same defendant and transaction but charging separate offenses -- clearly demonstrate the meaning to be given to the terms 'act or omission' as they are used in section 656. Under this section, a defendant may not be convicted after a prior acquittal or conviction in another jurisdiction **if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution** (*People v. Candelaria, supra,* 139 Cal.App.2d 432, 440); however, a conviction in this state is not barred where the offense committed is not the same act but involves an element not present in the prior prosecution. (*People v. Candelaria, supra*, 153 Cal.App.2d 879, 884.)" (*People v. Belcher, supra,* 11 Cal.3d at p. 99; emphasis added.)

Thus, *Belcher* required the acts necessary for the California offense to be included within the acts necessary to prove the federal offense, but not vice versa. Applying this test, the *Belcher* Court concluded the state conviction for assault with a deadly weapon must be reversed because proof of the same act was required in both jurisdictions. (*Id*, at p. 99.)

This Court rejected the contention that the added federal element – that the assault was made upon a federal officer – precluded application of section 656. Citing *Caldelaria*, this Court noted that the proof of the federal crime "required proof of no additional act on the part of defendant; it merely required proof of the status of the victim for jurisdictional purposes." (*People v. Belcher, supra,* 11

Cal.3d at p. 100.) Thus, *Belcher* and *Candelaria* both found that additional federal jurisdictional elements did not preclude reliance on section 656. That same rationale should apply to the federal jurisdictional element here – crossing a state line.

It is true that both *Belcher* and *Candelaria* mentioned the fact that the federal jurisdictional elements at issue in those cases did not involve acts on the part of the defendant. However, neither of those cases had to decide whether the result would be any different if the federal jurisdictional elements did involve an act by the defendant, as opposed to the status of the victim or the federal nature of funds or a bank in a robbery case. The Court's discussion in *Belcher* of section 654, however, certainly indicated that it would not be any different and that all that matters is whether the acts constituting the California offense were encompassed by the federal offense: "a defendant *may not be convicted* after a prior acquittal or conviction in another jurisdiction if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution." (Id. at 99 [emphasis added].) In any event, as noted earlier, the present federal jurisdictional act of crossing a state line was required for the present state offenses and was proved in the present trial, since Steven Homick lived in Nevada and necessarily crossed a state line if he was guilty of the murders of the Woodmans in California.

Belcher went on to conclude that, applying the same standard to the robbery count, section 656 did not bar the state prosecution because robbery required "proof of an important additional act by defendant – the 'taking of personal property in the possession of another' (§ 211) – that need not be proved to establish the federal offense of assault with a deadly weapon upon a federal officer." (*People v. Belcher, supra,* 11 Cal.3d at p. 100.) That poses no problem in the present case

as the California murder charges here did not require proof of any additional acts beyond what was proved to establish the federal offense.

The "same act" issue came before this Court once again in *People v. Comingore* (1977) 20 Cal.3d 142. There, the defendant was convicted in Oregon for unauthorized use of a vehicle and was later charged in California with grand theft auto (Penal Code § 487, subd. 3) and unlawful driving or taking of an automobile (Vehicle Code § 10851). The evidence indicated he had taken the victim's car in California without authorization, and then drove it to Oregon where he was apprehended. The California court found the new charges barred and dismissed them.

On the People's appeal, this Court noted *Belcher* was controlling and began the discussion by summarizing *Belcher* in some detail. (*People v. Comingore, supra,* 20 Cal.3d at pp. 145-146.) Relying on *Belcher* and *Candelaria*, this Court concluded that both new California charges were barred even though they each contained an intent element (to deprive the owner of his vehicle, either temporarily or permanently) not contained in the Oregon charge. As in *Belcher* and *Candelaria*, such an added element did not change the fact that all the offenses were based on the same act, or that all of the acts necessary to constitute the California offenses were contained in the Oregon crime. (*People v. Comingore, supra,* 20 Cal.3d at pp. 146-148.) While the different intent was an element of the California crimes, it was not an element of an "act" within the meaning of sections 656 and 753. (*Id,* at p. 148-149.) As shown above in the discussions of *Belcher* and *Candelaria*, the crossing of a state line in the present case should be treated the same way as the added elements of intent or the federal nature of a bank.

Notably, *Belcher and Candelaria* both involved prior federal convictions for crimes that contained added elements that were not present in the California

charges, but the California crimes were barred nonetheless. In *Comingore*, on the other hand, it was the California crimes that had added elements. This distinction was never discussed in *Comingore*. Nevertheless, the *Comingore* conclusion, and its express reliance on *Belcher* and *Candelaria*, indicates that the application of the California bar against repeated prosecutions looks to the underlying acts that constitute the crime, rather than strictly looking at the statutory elements of the crime, no matter whether it is the California crime or the foreign crime that contains added technical or mental state elements. And, as noted above, the Court's language in *Belcher* indicates that what is determinative is whether the acts constituting the California crime were necessary to prove the foreign crime.

In *People v. Walker* (1981) 123 Cal.App.3d 981, the evidence showed that the defendant committed a robbery of an American Express office in California, gaining possession of a bundle of traveler's checks. He was apprehended in Nevada in possession of the checks and was convicted there of possession of stolen property. He was then convicted of robbery in California and claimed on appeal that the Nevada conviction precluded the California prosecution. The Court of Appeal rejected this claim, concluding that the evidence used to establish the Nevada offense of possession of stolen property did not include the same acts (taking by force or fear) needed to prove the California robbery. (*Id*, at pp. 986-987.) In contrast, it has been shown above that the evidence used by the federal government to prove the federal crimes in the present case **did** include evidence of the commission of the California murders.

In *People v. Brown* (1988) 204 Cal.App.3d 1444, five people in Nevada met and conspired to rob a jewelry store in California. They were arrested soon after entering the store, with the intent to steal. They were first convicted in federal court of conspiracy to transport stolen property in interstate commerce, and were

subsequently convicted in California of burglary. This case appears simple enough and, under the prior cases discussed above, should have been resolved by merely looking to the conduct used to establish the federal offense and determining whether it included the actual felonious entry in California, or consisted only of the agreement in Nevada, plus some overt act short of the felonious entry. If the former was true, the California burglary should have been barred, but if the latter were true, then the burglary would not have been barred.

Instead, the *Brown* Court concluded that the earlier cases left an ambiguous rule, which the *Brown* Court chose to clarify by inferring conclusions that had never been made or implied:

> "... the *Belcher* court ruled that, under section 656, 'a defendant may not be convicted after a prior acquittal or conviction in another jurisdiction if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution [citation]; however, a conviction in this state is not barred where the offense committed is not the same act but involves an element not present in the prior prosecution." (*Belcher, supra*, 11 Cal.3d at p. 99, followed in *Comingore, supra*, 20 Cal.3d at p. 146.)
>
> Although unclear, this language could suggest that the bar of section 656 would apply where all acts constituting the state offense were necessary to prove the prior federal offense even though the acts might not be sufficient to prove the federal offense. Put differently, the bar of section 656 could apply even though the federal prosecution required proof of an act not at issue in the state prosecution.
>
> However, after stating the rule quoted above, the *Belcher* opinion immediately addresses the Attorney General's argument that section 656 could not apply because the acts constituting the state prosecution were not sufficient to prove the prior federal offense: 'The Attorney General argues,

however, that the federal offense requires proof of an additional element which is not required under the state offense -- that is, that the assault was made upon a federal officer. Therefore, it is urged, the acquittal in the federal court does not preclude, under the aforementioned test, a subsequent state conviction for simple assault with a deadly weapon.

'A similar argument was rejected in *People v. Candelaria, supra,* 139 Cal. App.2d at page 440. As the court there stated, "[t]he only additional element involved in the federal prosecution was that the money belonged to a national bank whose deposits were federally insured. That additional element, regarding the status of title to or insurance on the money, pertained to the matter of jurisdiction of the federal court, and it did not pertain to any activity on the part of defendant in committing the robbery. The physical act or conduct of defendant in taking the money was the same whether the robbery be considered as a federal offense or a state offense." Similarly, in this case, conviction of the federal offense required proof of no additional act on the part of defendant; it merely required proof of the status of the victim for jurisdictional purposes. Thus, under the test outlined above, section 656 is a sufficient defense to the charge of assault with a deadly weapon upon Officer Johnson set forth in the third count of the amended information.' (*Belcher, supra,* 11 Cal.3d, at pp. 99-100, fns. omitted.)

This discussion in *Belcher*, echoing that in the first *Candelaria* case, plainly assumes that had the prior federal prosecution required proof of an act not required in the state prosecution, section 656 would have been inapplicable. Otherwise, the court would have dismissed the Attorney General's argument as irrelevant. Moreover, in *Comingore, supra,* 20 Cal.3d at page 147, the court reiterated Belcher's analysis of the Attorney General's argument. We therefore infer from these discussions that under section 656 a prior prosecution has been 'founded upon the act or omission in respect to which [a defendant] is on trial' only where the acts necessary to prove the serial

> offenses are the same." (*People v. Brown, supra*, 204 Cal.App.3d at pp. 1449-1450.)

This analysis in *Brown* was flawed.[237] It makes more sense to accept the interpretation that the *Brown* Court initially conceded was possibly what had been meant in *Belcher*:

> "...that the bar of section 656 would apply where all acts constituting the state offense were necessary to prove the prior federal offense even though the acts might not be sufficient to prove the federal offense. Put differently, the bar of section 656 could apply even though the federal prosecution required proof of an act not at issue in the state prosecution." (*Id*, at p. 1449.)

That is certainly the plain meaning of this Court's language in Belcher and it sets forth a rule that makes perfect sense, given the interests that section 656 is designed to protect.[238] *Belcher's* holding may not have rested upon or required such a rule, and so *Belcher*'s language may technically be dicta. It was simply unnecessary to go that far in either *Belcher* or *Candelaria*, because in both cases the situation at hand could be more simply resolved by the sensible conclusion that additional federal jurisdictional elements that did not amount to acts did not preclude the application of section 656.

Thus, the discussion in *Belcher* simply resolved the issue faced by the Court, and did not amount to an adoption of a rule contrary to the Court's own

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237 One of the three Justices assigned to the *Brown* panel also found the majority analysis flawed, dissenting from the majority's entire discussion of the section 656 issue. (*Id*, at pp. 1452-1454.)

238 The policy rationale underlying section 656 will be discussed further in a separate subdivision, later in this argument.

language – i.e., a rule that the California bar applies only where neither the California crime nor the foreign crime requires any acts not required by the other.

The *Brown* Court, after announcing this new rule never set forth in the prior cases it discussed, promptly became lost in conceptual inconsistencies. The very next paragraph in *Brown* states:

> "We also think this construction of the statute produces a just result. Unlike section 793, which bars serial prosecutions, section 656 bars only serial convictions. (*Comingore, supra*, 20 Cal.3d at p. 148.) The apparent fairness rationale of section 656 lies in its prohibition upon multiple convictions for the same wrongful conduct. This rationale has no validity where successive convictions are premised on different wrongful acts. If the prior federal conviction was premised upon a separate act not necessary to obtain the California conviction, then defendants were not serially convicted for the same wrongful conduct." (*People v. Brown, supra*, 204 Cal.App.3d at p. 1450.)

But this Court itself plainly had already rejected any distinction between sections 656 and 793 that would result in different policy conclusions. In *People v. Comingore, supra,* 20 Cal.3d at p. 148, this Court expressly found no legal significance in the differences in the wording of sections 656 and 793. Furthermore, there is nothing "just" in limiting section 656 so narrowly. If proof of the foreign crime includes all the acts necessary to constitute the California crime, then conviction of the foreign crime, followed by a California conviction, **would** amount to serial convictions for the same wrongful conduct.

The cases preceding *Brown*, discussed above, do not support a restrictive rule based on a comparison of abstract elements of California and foreign crimes, looking for identity of elements before applying a bar. Instead, they look to the actual evidence utilized to prove the foreign and California crimes. If proof of the

foreign crime did, in fact, encompass proof of the acts that constituted the California crime, then the bar applies. The key language of section 656 – "... founded upon the act or omission in respect to which he is on trial ..." – refers to the underlying act or omission, not the particular crime, so the most appropriate test is to look at the facts that were actually used to prove the federal and state offenses, rather than the abstract elements of the statute or pleading.

Indeed, after muddying the waters by trying to set forth a rule unsupported by prior cases, *Brown* then moved closer to a more traditional analysis, explaining that the gist of a conspiracy offense is the agreement, while the California offense of burglary is based on the felonious entry regardless of whether there was a prior agreement. Although the *Brown* Court did not discuss whether the actual proof of the federal crime included proof of the completed burglary in California, it did set forth the parallel discussion in the opposite direction, noting there was ample proof of the California burglary without resort to any evidence of what had occurred in Nevada. (*Id*, at pp. 1450-1451.) However, the *Brown* Court noted that the trial court had stated it had considered the transcript of the federal trial. Since the trial court rejected the application of section 656, the Court of Appeal presumed that the California conviction was based on acts different from the acts that supported the federal conviction. (*Id*, at p. 1451.) That conclusion was enough to support the result reached in *Brown* without the need to invent an unsupported rule. But under that rationale, the result would differ in the present case, because the transcript of the federal trial demonstrated that the evidence used to prove the California murders consisted of the same acts that were shown by the evidence used to prove the federal crimes.

The next case to consider was *People v. Gofman* (2002) 97 Cal.App.4th 965. There, six persons were accused of staging automobile collisions in order to

defraud insurance companies with false claims. They were first convicted in federal court for mail fraud and conspiracy to commit mail fraud offenses. They, along with a number of others, were then indicted in California on a variety of offenses that all related to the same staged accidents that had been alleged in the federal proceeding, plus two additional ones. (*Id*, at pp. 967-971.) The trial court dismissed a number of state counts pursuant to section 656, and the People appealed, "contending that each of the federal counts differs sufficiently from the state counts so that section 656 is not applicable." (*Id*, at p. 971.).

Gofman first summarized the two *Candelaria* opinions, as well as *Belcher*. (*People v. Gofman, supra,* 97 Cal.App.4th at pp. 971-973.) From there, the *Gofman* court turned to an analysis of the crime of conspiracy, finding that the gist of that crime is the unlawful agreement and not the overt act.

The *Gofman* Court then concluded the trial court had incorrectly dismissed state conspiracy counts against two defendants, because those defendants had not been convicted of conspiracy in federal court. Instead they had only been convicted of substantive crimes, such as mail fraud. However, the *Gofman* Court upheld the dismissal of a number of California conspiracy counts charged against persons who had been convicted of conspiracy in federal court, "because each of these counts relate to an accident forming the basis for the federal conspiracy count to which each of these respondents pled guilty." (*Id*, at p. 974.) The *Gofman* Court expressly recognized that the federal conspiracy crimes contained the added element of utilization of the United States mail in order to defraud, but as in *Candelaria* and *Belcher*, such a jurisdictional element did not preclude application of section 656. Similarly in the present case, the federal jurisdictional element of crossing a state line should not preclude the application of section 656.

Gofman went on to find error in dismissing two other state conspiracy counts that involved two auto accidents that were not involved in the federal charges. (*Id*, at p. 974.) This makes sense, since those state crimes punished new acts that were not at all included in the federal charges.

Importantly, the *Gofman* Court also found no error in dismissing seven more state counts that charged the substantive crimes of insurance fraud, false and fraudulent insurance claims, and grand theft. These dismissals all involved defendants who had been convicted in federal court of mail fraud, involving presentation of settlement checks for the same auto accidents that formed the basis of the state charges. The Court explained:

> "That each respondent was charged with more than one substantive state offense does not alter the fact that each charge relates to the same 'acts'—that Gofman and Palacios successfully made claim against three insurance carriers for three separate staged accidents. The basis for the federal charges of mail fraud in each count was presentation of the settlement check, the final act of the fraud or grand theft alleged in the federal indictment. The fact that the mail was used to effectuate the fraud or grand theft is merely one additional act that formed the jurisdictional basis for the federal counts." (*People v. Gofman, supra,* 97 Cal.App.4th at p. 976.)

Thus, while *Gofman* quoted portions of *Brown* (*People v. Gofman, supra,* 97 Cal.App.4th at p. 973), it did not utilize the flawed analysis set forth in *Brown.* Instead, it utilized the analysis approved in *Candelaria* and *Belcher*, looking to the actual underlying acts rather than technical statutory elements. All of those cases, other than *Brown*, recognized that extra federal elements that were necessary to establish federal jurisdiction did not preclude the application of section 656. *Gofman* expressly applied this last principle even when the added federal jurisdictional element consisted of an act (using the mail), rather than a status.

Gofman, therefore, makes it clearer than ever that the federal jurisdictional element in the present case (crossing a state line) does not change the fact that the proof of the federal offense here was based on the same acts that constituted the California murders.

The final stop in this tour of cases fleshing out the meaning of Penal Code section 656 is *People v. Friedman* (2003) 111 Cal.App.4th 824. *Friedman* involved a group of men who planned in New York to kidnap a victim in California to hold for ransom. When the actual kidnapping occurred, an innocent bystander was also taken. When efforts to obtain money failed, the two victims were both killed. The defendants were convicted in federal court of crossing a state line with intent to commit extortion, resulting in the deaths of the two victims. The defendants were subsequently charged in California with two counts of murder and two counts of kidnap for ransom. The California counts were dismissed per Penal Code section 656, and the People appealed.

Thus, *Friedman* is close to the present case in that both involve a federal crime of interstate travel for the purpose of committing a violent crime. However, *Friedman* sheds little light on how the present case should be resolved, because it followed the flawed analysis set forth in *Brown*, discussed above. Notably, however, *Friedman* started its discussion with language from the code commissioners comment accompanying section 656 when the Penal Code was adopted in 1872:

> "This section is intended to apply in cases where the foreign acquittal or conviction took place in respect to the particular act or omission charged against the accused upon the trial in this State, and is not restricted to cases where the accused was tried abroad under the same or facts constituting the same charge." (Code commrs. note foll. Ann. Pen. Code, § 656 (1st ed. 1872, Haymond & Burch, commrs.

annotators) p. 141.)" (*People v. Friedman, supra,* 111 Cal.App.4th at p. 830.)

Contradicting the *Brown* analysis, this language appears to greatly clarify the intent underlying section 656 – it is the act or omission that matters when comparing the California and foreign crimes, not the technical elements of the charge that was pled.

The *Friedman* Court then engaged in the usual review of the two *Candelaria* cases, *Belcher*, and *Comingore. Friedman* quoted the language in *Comingore* and *Belcher* stating that " ' "*a conviction in this state is not barred where the offense committed is not the same act but involves an element not present in the prior prosecution. [Citation.]*" ' (*People v. Comingore, supra,* 20 Cal.3d at p. 146, original italics, quoting People v. Belcher, supra, 11 Cal.3d at p. 99.)" (*People v. Friedman, supra,* 111 Cal.App.4th at p. 832.) Once again, it must be remembered that nothing in *Comingore* or *Belcher* stated this rule in reverse – that the bar would not apply if it was the prior prosecution that involved an element not present in the California crime. Indeed, both *Candelaria* and Belcher **did** involve prior federal convictions that included jurisdictional elements not found in the California crimes.

Nonetheless, *Friedman* then quoted at length from *Brown*, accepting its flawed rationale without new analysis. (*People v. Friedman, supra,* 111 Cal.App.4th at pp. 832-833.) As a result, when the *Friedman* Court finished its review of earlier cases and sought to apply them to the facts before it, the Court again quoted the *Belcher* language saying that the state and foreign acts are not the same when the state offense contains an element not present in the prior case. (*People v. Friedman, supra,* 111 Cal.App.4th at p. 836.) But this was followed immediately by the flawed language from *Brown* that turned the rule upside-down,

finding state and foreign convictions are not based on the same act if the prior federal offense was premised on an act not necessary for the California crime.

Friedman then applied the rule in both directions. First, applying *Belcher* directly, the *Friedman* Court found section 656 inapplicable because the California crimes required completion of the murder and the kidnap for ransom, while the federal crime only required intent to commit extortion, not the completion of a murder. Thus, even if *Friedman* is correctly decided, it does not control the present case since here, the resulting deaths were essential elements of the federal crimes, and the actual evidence used to prove the federal crimes included evidence that the murders were completed. Indeed, the *Friedman* Court expressly noted, "Further, in this case, the jury in the federal prosecution was not even instructed on the elements of murder. (*U.S. v. Friedman, supra*, 300 F.3d at pp. 127-128.)" (*People v. Friedman, supra,* 111 Cal.App.4th at p. 837.) In contrast, as shown earlier in this argument, the jury in the prior federal prosecution here was expressly instructed on the elements of a California murder, and the proof of the federal offense was based on the theory that two completed murders were committed by the defendants. (See CT 14:3810, 3836-3838.)

Friedman did not stop there, but instead continued on to apply the flawed *Brown* analysis, finding that the federal offense required interstate travel, which was not required for the state crimes of murder or kidnap for ransom. (*People v. Friedman, supra,* 111 Cal.App.4th at p. 837.) However, as shown above, under a correct analysis the federal jurisdictional requirement of interstate travel would not impede the application of section 656, just as the federal jurisdictional requirement of utilizing the mail did not preclude application of section 656 in *Gofman.* Strangely, in reaching its flawed conclusion, *Friedman* even cited *Gofman,*

apparently without recognition of the fact that *Gofman* concluded precisely the opposite of *Friedman* on this point.[239]

In sum, *Brown* and *Friedman* must be considered as aberrations that lost track of the correct interpretation of the "same act" requirement of section 656. All of the other cases, including the ones decided by this Court, utilized an interpretation that points directly to the application of section 656 in the present case.

D. Policy Rationales Underlying the Application of the Prohibition Against Double Jeopardy Also Strongly Support the Interpretation that Favors Steven Homick's Position

The policy rationales underlying the federal preclusion against being placed twice in jeopardy are well-established:

> "... the notion 'deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' (*Green v. United States* (1957) 355 U.S. 184, 187-188, quoted in *Gomez v. Superior Court* (1958) 50 Cal.2d 640, 644 and *Curry v. Superior Court* (1970) 2 Cal.3d 707, 717.)

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239 Although this Court denied the Petition for Review in *Friedman*, Justices Kennard and Werdeger were of the opinion that review should have been granted. (*People v. Friedman, supra,* 111 Cal.App.4th at p. 838.)

In addition:

> "Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged. See, e.g., *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (noting that the Double Jeopardy Clause 'prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at, conviction'); *Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (the State conceded that, after the defendant was acquitted in one trial, the prosecutor did, at a subsequent trial, 'what every good attorney would do -- he refined his presentation in light of the turn of events at the first trial'); *Hoag v. New Jersey*, 356 U.S. 464 (1958) (after an alleged robber was acquitted, the State altered its presentation of proof in a subsequent, related trial -- calling only the witness who had testified most favorably in the first trial -- and obtained a conviction). Even when a State can bring multiple charges against an individual ..., a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding." (*Grady v. Corbin*, 495 U.S. 508, 518-519.)

All of these concerns are at issue in the present circumstances, where Steven Homick was first put through the ordeal of a very lengthy federal trial based on the very same acts that were at issue in the subsequent state trial for murder. The nature of these concerns makes it clear that the appropriate aspect of the California and foreign crimes to analyze is the underlying conduct, not the technical legal elements.

Notably, the California statutory provisions set forth in Penal Code sections 656 and 793 are intended to provide **even broader protection** for individuals than the protection provided by the federal constitution. (*People v. Belcher, supra,* 11 Cal.3d at p. 97.) In addition, California has its own constitutional prohibition

against double jeopardy, that should also be construed more broadly than the federal constitutional provision. *People v. Batts* (2003) 30 Cal.4th 660, 692, fn. omitted, explained:

> "... that 'cogent reasons . . . exist' for construing the double jeopardy clause of the state Constitution differently from its federal counterpart (*[People v.]Monge* [(1997)] 16 Cal.4th 826, 844) and that a broader test is required in order to more fully protect double jeopardy interests guaranteed under our state Constitution."

This Court has not yet construed the extent to which the California Constitution's double jeopardy provisions operate in the context of a state prosecution following a foreign prosecution for the same conduct, but if it is to provide greater protection than the federal double jeopardy provision, then it should protect Steven Homick in the present circumstances.

This Court has expressly recognized the need for avoiding grudging or narrow interpretations of California's double jeopardy protections:

> " 'If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance,' " (*Gomez v. Superior Court* (1958) 50 Cal.2d 640, 649, quoting *Green v. United States* (1957) 355 U.S. 184, 229, and holding that double jeopardy barred a second trial on a grand theft charge following a conviction for petty theft and implied acquittal on the greater charge.)

The same principles should apply to statutory provisions that protect against serial prosecutions. A technical application, such as that adopted in *Brown* and *Friedman* would be precisely such a narrow and grudging application that would also deprive Penal Code sections 656 and 793 of much of their significance. If the basic conduct at issue is the same in each jurisdiction, then the protection against serial prosecution should apply, regardless of the existence of additional technical

jurisdictional elements present in one jurisdiction and not the other. Here, it is obvious that the life sentence Steven Homick received in federal court was based on the conduct involved in murdering the Woodmans, not on the fact that a state line was crossed. The federal prosecutor's own statement of the theory of his case made clear that conduct was the basis of the federal prosecution. To give proper meaning to Penal Code sections 656 and 793, such a federal prosecution and conviction should foreclose an additional California prosecution for that same conduct.

E. The Arbitrary Deprivation of a State-Created Right Also Results in a Violation of Federal Fifth and Fourteenth Amendment Due Process Rights

The claim set forth in the preceding sections of this argument emanate from California's state constitutional double jeopardy provisions and from its Penal Code sections 656 and 793. However, even though not based directly on the federal constitution, these state-created rights amount to an entitlement to benefits that cannot be arbitrarily denied without violating the federal Fifth and Fourteenth Amendment rights to Due Process of law. (*Hicks v. Oklahoma* (1980) 447 U.S.343, 346.) The adoption of a narrow and grudging interpretation of California's protection against serial prosecutions would be inconsistent with *Belcher* and *Comingore* and would therefore be arbitrary.

Furthermore, if this Court were to adopt a narrower interpretation than that set forth in *Belcher* and *Comingore,* any retroactive application of such a new interpretation would result in depriving Steven Homick of a defense that was available at the time the present crimes occurred. That, in turn, would also result in a violation of the federal Fifth and Fourteenth Amendment Due Process clauses.

(*Marks v. United States* (1977) 430 U.S. 188, 191; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353-354.)

X. THE TRIAL COURT ABUSED ITS DISCRETION AND DEPRIVED STEVEN HOMICK OF A FUNDAMENTALLY FAIR TRIAL BY DENYING THE DEFENSE REQUEST TO REOPEN THE EVIDENTIARY PORTION OF THE TRIAL, OR GRANT OTHER APPROPRIATE RELIEF

A. Introduction

In previous testimony of Michael Dominguez, provided to the jury under the inaccurate guise of prior inconsistent statements (see Argument __, above), Dominguez claimed that after he flew with Steven Homick from Las Vegas to Burbank on the day before the Woodman murders, he and Steven Homick drove to the office of an attorney named Max Herman. Steve Homick met privately with Max Herman, and emerged with a black gun case. According to Dominguez, the next day, when he was in a rental car with Steven Homick he saw that the gun case contained a revolver. (RT 85:8976-8981.)

With no additional evidence to back him up, the prosecutor in closing argument to the jury stated unequivocally that the gun that Steven Homick received from Max Herman was used to commit the Woodman murders. (RT 127:15730.) Counsel for Robert Homick made a similar argument. (RT 129:16060-16061.)

As will be explained in more detail in the next section of this argument, with citations to the record, no gun was ever recovered that was determined to be the murder weapon. Max Herman was interviewed by the police and gave a detailed description of the gun he turned over to Steven Homick, but he died before ever testifying. On March 11, 1986, a gun was seized during a search of Robert Homick's apartment, but forensic testing

showed that it could not have fired the bullets that were removed from the bodies of the murder victims, and this gun was never mentioned to the jury.

After all sides had rested in the guilt phase of the trial, but before instructions or argument to the jury, counsel for Steven Homick realized that the gun seized from Robert Homick's apartment perfectly matched the description of the gun Max Herman had given to Steven Homick. Counsel acknowledged it was negligent on his part that he had not discovered this similarity sooner, but he believed (correctly) that the prosecution would argue the Max Herman gun was the murder weapon, which would be very harmful to Steven Homick. He sought some form of relief to offset the inference he was confident would be suggested, proposing reopening of the evidence, a stipulation about the matter, a mistrial, or any other appropriate relief. No relief was given.

Counsel conceded that with Max Herman deceased, there was no way the defense could positively establish that the gun Max Herman gave to Steven Homick was the same gun found in Robert Homick's apartment and determined not to be the murder weapon. However, counsel clearly and repeatedly explained his valid theory of relevance. The description given by Max Herman closely matched the seized gun. The police interviewed Max Herman only two days before they received the report stating that the seized gun was not the murder weapon. When the police interviewed Max Herman, he told them that Steven Homick had given him a serial number that matched the gun Max Herman obtained for Steven Homick, but during the tape-recorded interview the police never asked Max Herman if he still had that serial number. Also, there was no indication in any police report that the

officers ever showed Max Herman the seized gun, or any photograph of it, and asked him if that was the same gun he had given to Steven Homick.

Those lapses in the police investigation could have been proven and would have cast doubt on any theory that the investigating officers believed the gun supplied by Max Herman was the murder weapon. Even more importantly, this would have supported a strong inference that police negligence had deprived Steven Homick of crucial evidence that could have offset the very damaging arguments, made by the prosecutor and by counsel for Robert Homick, that Steven Homick had possessed the murder weapon shortly before the murders occurred.

B. Factual and Procedural Background

Max Herman had been a well-known Los Angeles police officer before he became an attorney and he had a solid reputation. He died before the present trial, and never gave any testimony about this event. (RT 96:10385, 10390-10391.) A retired Los Angeles County Superior Court judge, who had also worked with Max Herman when they were both police officers, testified that Max Herman was an unquestionably honest person who would never have given a gun to Steve Homick to use in a crime. (RT 115:13972-13973, 13976-13977.) However, according to Michael Dominguez, Steven Homick obtained a gun from Max Herman on September 24, 1985, the day before the Woodman murders. (RT 85:8976-8981.)

On March 4, 1993, the evidentiary portion of the guilt trial ended. (RT 121:14956.) On the next court day, March 10, 1993, a lengthy instruction

conference was held. (RT 122:14960-15107.) The instruction conference continued the following day. (RT 123:15115-15159.) Next, there was a lengthy review of the various trial exhibits, and determinations were made which would be admitted in evidence. (RT 123:15160-15238.) Instructions and exhibits were discussed again on the next court day, March 15, 1993. (RT 124:15239-15243, 15244-15428.) Exhibits were reviewed and discussed again on the following day. (RT 125:15429-15503.)

The next day, March 17, 1993, began with an *ex parte* hearing between the trial court and the Steven Homick defense team. (RT 126:15507.) Counsel for Steven Homick informed the court that he wished to request reopening of the defense evidence in order to present important new information. Counsel made an extensive offer of proof, explaining he had met with Steven Homick at the jail the preceding day and had learned for the first time that the .357 revolver found during a search of Robert Homick's residence on March 11, 1986 was the same gun that Steven Homick had received from Max Herman in 1985. (RT 126:15507-15508.)

Counsel explained that the gun that had been seized from Robert Homick's residence had been tested forensically and compared to the bullets found in Mr. and Mrs. Woodman and in the car in which they were killed. It had been conclusively determined that the gun from Robert Homick's residence could not have been the murder weapon.[240] (RT 126:15508; see also Supp. CT 14, vol. 4:856-861.).) Counsel did not recall Steven Homick

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240 Testimony earlier in the trial had also established that all of the bullets recovered from the Woodman parents had been fired from a single gun. (RT 100:11125-11138, 11231, 108:12621-12622, 12625-12632.)

ever previously mentioning the fact that the gun obtained from Max Herman was the same one that had been seized in Robert Homick's residence. However, counsel added that Steven Homick believed he had told counsel about this earlier. (RT 126:15508.)

Counsel explained that before Max Herman had died, he had been interviewed and had described the gun he gave to Steve Homick.[241] That description matched the gun found in Robert Homick's residence.[242] Steve Homick had explained to counsel that he had owned a gun that he had loaned to Eddie Benson, who died before returning the gun. Steve Homick had gone to Max Herman with the serial number of the gun and had asked him to try to retrieve it from Eddie Benson's widow. Max Herman did obtain the gun from the widow and returned it to Steve.[243] Counsel also noted he had not yet been able to obtain any record of the serial number that Steve Homick had given to Max Herman. (RT 126:15509-15510.)

Counsel acknowledged that he could have asked his client more about the gun earlier, or he could have asked the police if they ever obtained a

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241 The description that Max Herman gave to the officers who interviewed him on April 15, 1986 was a .357 blue steel revolver with a four-inch barrel and what he thought were brown plastic grips. (Supp CT 14, Vol. 4:865.

242 The gun seized from Robert Homick's apartment was described in the police property report as "Smith and Wesson '19' 4" blue steel revolver brn wood grips." (Supp. CT 14, Vol. 4:857.) When it was tested by a police forensics expert on April 17, 1986, it was described in his report as, "Revolver, 'Smith & Wesson', model 19, 357 magnum cal, 4" bbl, 6-shot, blue steel, ..." (Supp CT 14, Vol. 4:859.)

243 This was fully consistent with the information Max Herman had given to the police. (Supp. CT 14, Vol. 4:864-865.)

serial number from Max Herman, or if they ever showed Max Herman the gun found at Robert Homick's residence. (RT 126:15515.) The trial court noted that the gun recovered from Robert Homick's residence had never been mentioned to the jury. (RT 126:15517.) As an alternative to reopening the evidence, counsel proposed a stipulation that would describe the gun, state that it was discovered during one of the March 11, 1986 searches, that it had a serial number, that it had been test-fired, that it was not the murder weapon, that Max Herman described a similar weapon to the police as the one he gave to Steven Homick, and that the officers never showed the seized gun to Max Herman and never asked him if he still had the serial number of the gun he gave to Steven Homick.[244] (RT 126:15517-15518.)

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244 The handwritten proposed stipulation read in full as follows:

"It is hereby stipulated that during one of the March 11, 1986 searches related to this case, a Smith & Wesson, model 19, .357 magnum caliber (sic), 4 inch blue steel, 6 shot revolver, with brown wood grips was recovered. There was a serial number on this gun. That gun was test fired on April 17, 1986 & determined not to be the murder weapon. On April 15, 1986, Detectives Crotsley & Holder spoke to Max Herman. He told them that he had given a .357 Magnum, blue steel revolver with a 4" barrel he thought brown plastic grip (sic) to Steve Homick in 1985. Steve Homick had supplied him with the serial number of the gun sometime prior to Mr. Herman giving it to him. The serial number on the gun that he gave Steve Homick matched the serial number that Steve Homick had given him.

Detectives Crotsley & Holder did not ask Mr. Herman for the serial number & never showed him the .357 magnum that was recovered

(Continued on next page.)

The trial court stated she was not inclined to reopen the evidence at this stage, but that a stipulation would be an appropriate solution. (RT 126:15519.) At this point, the prosecutor joined the discussion. The trial court summarized the *ex parte* discussion and suggested a stipulation that referred to the weapon, but did not mention that it had been found in Robert Homick's apartment. The judge also described a taped statement of the police interview of Max Herman in which Mr. Herman said that Steven Homick had called him, said that Eddie Benson had a gun that belonged to him, gave him a serial number, and described the gun as a .357. Max Herman then called Eddie Benson's widow who found the gun and turned it over to Max Herman, who then gave it to Steve Homick. (RT 126:15520-15522.) Defense counsel added that the gun had been test-fired and was determined to not be the murder weapon. (RT 126:15523.)

The prosecutor queried how the defense would have been able to prove these matters, even if they had been brought up before the close of evidence. Defense counsel explained the evidence would not have been offered for the truth of the matter, but to show the failure of the police to perform any follow-up investigation. Counsel reiterated that the gun fond in Robert Homick's apartment matched the description of the gun Steve Homick received from Max Herman, but the police never took the gun to Max Herman to ask if it was the same gun. Co-counsel for Steven Homick added that even if the defense could not have gotten this evidence admitted

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(Continued from last page.)

> on March 11, 1986, to see if he could identify it as the gun he had given Steven Homick." (CT Supp. 14, Vol. 4:862-863.)

(due to the death of Max Herman), then at the least the prosecutor should not be permitted to make an argument contrary to the known facts. (RT 126:15525.)

At this point, defense counsel conceded there was a puzzling discrepancy in the serial numbers of the tested gun, known not to be the murder weapon, and the gun recovered from Robert Homick's apartment. While police reports regarding the tested gun and the seized gun used the identical property number, one listed the gun as having a serial number of K-318119, while the other listed the serial number as 83811-A. (RT 126:15526; see also CT supp. 14, Vol. 4:857, 859.) The trial court then concluded the evidence was less significant than she had thought, since it was not clear whether the gun seized from Robert Homick's residence (matching the description of the gun obtained from Max Herman) was the same gun that had been test-fired and eliminated as the murder weapon. (RT 126:15525-15529, esp. at p. 15528, ll. 16-21.)

The judge concluded that the defense request to reopen the evidence should be denied, and that there should be no stipulation regarding the gun. Counsel for Steven Homick requested as an alternative that a brief continuance be granted so the defense could have the gun seized from Robert Homick's apartment tested by an expert to determine conclusively whether it could have been the murder weapon. The judge denied even that limited relief, but did agree to receive as exhibits five documents offered by defense counsel - 3 pages from a March 11, 1986 police report regarding the search of Robert Homick's apartment, an April 9, 1986 Los Angeles Police Department Firearms report, a 2 page April 17, 1986 Los Angeles Police Department Firearms report, a 2 page summary of a police interview of Max

Herman April 15, 1986, and a 2 page proposed stipulation. (RT 126:15531-15532; see Supp. CT 14, Vol. 4:855-867.)

Soon afterward, the trial court read instructions to the jury. (RT 126:15566-15601.) Then the prosecutor began his closing argument to the jury. (RT 126:15607-15694.) The following day, counsel for Steven Homick started the session by asking to have the gun seized from Robert Homick's apartment brought to court and marked as an exhibit, so it would be safe pending any appeal. (RT 127(15696.) After a few other matters were discussed, the prosecutor resumed his closing argument. (RT 127:15701 *et seq.*) During this argument, the prosecutor squarely stated to the jury that the gun Steven Homick obtained from Max Herman was used to murder the Woodmans. (RT 127:15730.)

Before the prosecutor's closing argument was completed, a discussion was held outside the presence of the jury. Counsel for Steven Homick explained that the gun seized from Robert Homick's apartment and the property envelope were now in the courtroom. Notations on the property envelope, including the serial number, made it clear that the gun seized from Robert Homick's apartment was the very same gun that had been test-fired and positively determined not to be the murder weapon. (RT 127:15795.) Thus, the only concern raised by the court in the earlier discussion (see CT 126:15528, ll. 16-21) had been resolved. Based on this, counsel renewed his requests from the preceding day and asked the court to take some action to redress the situation. (RT 127:15795.)

The judge explained she had already been made aware of this development and had drafted a proposed stipulation.[245] Co-counsel for Steven Homick expressed concern that the court's proposed stipulation would state that Steven Homick had received a gun from Max Herman, which he believed was stronger than the evidence had shown. The court expressed a willingness to modify the language. Co-counsel also expressed concern about notations he had discovered in one of Steven Homick's monthly calendars, referring to the serial number of the seized gun. Since it was now clear that this serial number did not relate to the homicides in any way, counsel believed these pages should be redacted from the calendars admitted into evidence.[246] (RT 127:15796-15798.)

At this point, counsel for Neil Woodman objected to the proposed stipulation because he feared the jury would speculate that the gun was found in a search of Neil Woodman's home. (RT 127:15798.) The judge saw no basis for fearing such speculation, but she did want to keep any stipulation as "vague and indirect as possible, so I am not pointing fingers at any particular defendant, and if I start excluding defendants, then I am

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245 The stipulation proposed by the trial court is not in the record on appeal. After the trial court had denied appellant's request to have it included, appellate counsel again in a motion filed in this Court on May 18, 2004 (page 11, item 4 and page 13, item D). On July 14, 2004, this Court issued an order directing the trial court to determine whether the proposed stipulation, if it existed, had been included in the record on appeal, and, if not, to include it. The trial court was never able to locate the proposed stipulation.

246 Subsequently, the trial court did agree to redact those pages. (RT 127:15807-15809.)

pointing fingers by exclusion." (RT 127:15799.) The judge soon added, "I may hear so many objections that I won't do any of this,..." (RT 127:15799.)

Counsel for Robert Homick immediately added another objection, fearing that the jury would speculate that the gun came from Robert Homick's house, even though no such evidence had been presented. Also, he also saw little or no probative value in the stipulation as presently worded. (RT 127:15799-15800.) Counsel for Steven Homick agreed there was no probative value remaining in the stipulation proposed by the judge, and instead asked for the stipulation that the defense had proposed earlier. The prosecutor then questioned why a stipulation should even be considered if everyone was objecting to it, and he added his own objection since he also saw no probative value in a stipulation that merely said that a gun with an undisclosed origin had been eliminated as the murder weapon. (RT 127:15799-15801.)

The prosecutor went on to note that there was still not necessarily any connection between the seized gun and the gun that Max Herman gave to Steven Homick. (RT 127:15801.) Counsel for Steven Homick acknowledged that problem, but explained that was precisely why he had asked the court to direct the prosecutor to ask the investigating officers whether they had ever asked Max Herman for the serial number that he clearly had possessed, according to their own interview of him. If they had not even bothered to ask Max Herman for that serial number, that fact should be made known to the jury. Also, the description of the gun Max Herman obtained for Steven Homick perfectly matched the description of the gun found in Robert Homick's apartment, but the police apparently never bothered to show the

gun to Max Herman to see if he could identify it as the one he recovered for Steven Homick. (RT 127:15801-15802.) Counsel added that those defects in the police investigation would be highly relevant even if it could not ever be proved that the seized gun was the same gun that Steven Homick obtained from Max Herman. (RT 127:15802-15803.)

The prosecutor then asked why this had not been brought up earlier, when the officers had testified. Trial counsel reiterated that there was a combination of newly discovered evidence and negligence on his own part in not bringing it up earlier. Counsel explained he wanted to reopen the evidence, but felt that the prosecution might prefer a stipulation, since the jury would be given a number of other stipulations and one more stipulation would be less highlighted than a reopening of the evidence. (RT 127:15803-15804.)

The judge noted the investigating officers could be asked the questions counsel had posed, but she saw no likelihood they would supply any more information than was already known. The judge then concluded there was no basis to preclude the prosecution from arguing that the gun Max Herman provided could have been the murder weapon. The judge also saw no basis for questioning the officers further about the matter. The judge saw nothing sufficiently significant to justify taking any action other than to leave the evidence in its present state. (RT 127:15804-15805.)

Defense counsel made one last effort to persuade the judge. He explained again it was highly unusual that the officers did not ask Max Herman about the serial number and did not show him the gun seized from Robert Homick's apartment, since it was only two days after they talked to Max Herman that they determined the seized gun was not the murder

weapon. (RT 127:15805-15806.) Counsel reiterated that the gun Steve Homick obtained from Max Herman was so significant that the jury should be told that the officers had seized a gun with an identical description, but had failed to show it to Max Herman. (RT 127:15806-15807.) The court again disagreed, stating she would have the prosecutors ask the officers about the gun, but she denied the request for any instruction or admonition, and denied the request to reopen the evidence. (RT 127:15807.) The judge also denied the defense motion for a mistrial. (RT 127:15809-15810.)

Two court days later, counsel for Steven Homick submitted two more supporting exhibits, consisting of tape recordings of the police interviews of Max Herman and of Eddie Benson's widow. (RT 129:15965-15966.) Later that same day, counsel for Robert Homick stated squarely, in closing argument to the jury, that Max Herman had given Steven Homick the murder weapon. Counsel repeated that a second time and the trial court interrupted him, noting that she had asked the trial attorneys to avoid objecting during argument, but she wanted to remind the jury there had been no evidence tying any particular weapon to the murders. However, she added that it was up to the jurors to draw whatever inferences they believed were reasonable, based on the evidence. (RT 129:16060-16061.) Counsel for Robert Homick then continued his same argument, amending it to state that it was reasonable to infer that the gun obtained from Max Herman was the murder weapon, and it was up to the jury to determine whether that inference should be drawn. (RT 129:16061.)

C. Under These Unique Circumstances, By Failing to Provide Any Relief Whatsoever, the Trial Court Deprived Steven Homick of a Fundamentally Fair Jury Trial

Throughout the events detailed above, counsel for Steven Homick asked for various alternative forms of relief – reopening of the evidence, a stipulation to convey undisputed facts, an order precluding the prosecutor from arguing contrary to the known facts, a mistrial, or some other appropriate relief. The trial court initially seemed inclined to grant relief when she believed it was clear that the seized gun had been eliminated as the murder weapon. However, once the initial discrepancy in serial numbers was discussed, she changed her mind. Later, when the serial number discrepancy was fully resolved, she failed to acknowledge the significance of the information about the seized gun, even without conclusive proof that it was the gun obtained from Max Herman.

Nonetheless, relevance and importance are clear. In the end the prosecutor was able to assert to the jury that the gun Steve Homick obtained from Max Herman on September 24, 1985, was, in fact, used to kill the two victims the following day. Counsel for Robert Homick was able to make similar assertions, couched in terms of a reasonable inference rather than an established fact, with the judge's tacit approval of the assertion that such an inference was a reasonable one the jurors could make. If the jurors accepted this as an established fact, or even merely as a reasonable inference, then Steven Homick was seriously harmed in at least two different ways. First, it tied Steven Homick more closely to the murders than would be the case without the gun evidence, and secondly, it increased the chance that jurors

would conclude Steve Homick was the triggerman, a crucial factor that may well explain why Steven Homick was the only one of the six alleged conspirators to receive a death sentence.

Offsetting the prejudicial impact of this inference was an important matter for the defense. Had defense counsel focused sooner on the nearly identical descriptions of the seized gun and the gun described by Max Herman, then the investigating officers would have surely been asked during their testimony whether they had ever showed Max Herman the seized gun or whether they had ever asked Max Herman if he still retained any written record of the serial number Steven Homick had given to him, which he had compared to the gun before he turned it over to Steven Homick. It is also clear that both questions would have been answered in the negative; otherwise the detailed police interview of Max Herman would have surely contained such information, regardless of whether Max Herman could or could not identify the gun, or whether he did or did not still have a record of the serial number. (See Supp C.T. 14, Vol. 4:864-865.)

Thus, properly developed, the evidence would have allowed the defense to seriously weaken whatever inference the jury might draw regarding the weapon supplied by Max Herman. It was highly speculative in the first place to draw a conclusion that the supplied gun was the murder weapon. Adding in the fact that a virtually identical gun, determined to not be the murder weapon, was found in a search related to this case would have greatly reduced the strength of any inference against Steven Homick. Furthermore, if the defense had been able to argue that the investigating officers should have shown Max Herman the seized gun, or should have asked if he still had a record of its serial number, then it would have been

much more likely that jurors would have given Steven Homick the benefit of the reasonable doubt about whether the gun received from Max Herman had anything to do with the murders.

Steven Homick's position can be stated simply. In light of the substantial prejudice resulting from the manner in which the prosecutor and counsel for Robert Homick capitalized on the gun evidence, and the information made known to the court when counsel for Steven Homick requested some form of relief, the failure to provide any relief at all was an abuse of discretion that took on federal constitutional dimensions because the overall impact was to deprive Steven Homick of his federal 5th, 6th, and 14th Amendment rights to present a defense and to a fundamentally fair jury trial, in accordance with due process of law. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Holmes v. South Carolina* (2006) 547 U.S. 319, 331.)

1. The Late Nature of the Request for Relief Does Not Excuse the Trial Court's Failure to Grant Some Form of Relief

The trial court never ruled that the defense request for relief was waived due to its tardiness. Instead, the court ruled only that the matter raised was not as significant as defense counsel believed it was. Thus, it

would not be proper for this Court on appeal to make any finding of tardiness that was never made below.

Even if the trial court had relied on tardiness, such a conclusion would have been improper. Counsel's undisputed explanation to the court made clear that there was no tactical basis for failing to ask the investigating officers about the similarities between the seized gun and the gun described by Max Herman when those officers testified. Thus, defense counsel either made an excusable mistake in failing to take note of the similarities in the mountain of paperwork received during the years of preparation for this trial, or defense counsel failed to perform their duties reasonably and that failure prejudiced Steven Homick. If the mistake was excusable, then some form of relief should clearly have been granted. On the other hand, if the mistake was not excusable, then Steven Homick was deprived of his federal 6th and 14th Amendment guaranty of the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668.) Thus, either way, relief was required.

2. The Option of Granting a Mistrial Was the Appropriate Remedy, Unless a Lesser Remedy Would Have Been Sufficient

A mistrial so close to the end of a long and complex trial involving multiple defendants would have been a drastic outcome. However, the execution of Steven Homick after a fundamentally unfair trial would be even more drastic and unacceptable. Moreover, the problem raised by defense counsel only impacted Steven Homick and not his two co-defendants, so a mistrial could have been granted as to Steve Homick only, and the trial could

have continued to completion with regard to the other defendants. Any retrial of Steven Homick alone would not have been nearly as complicated as the present three-defendant trial. Importantly, as shown in Arguments IV, V, and VI in this brief, Steven Homick had already been prejudiced on a number of occasions due to the trial court's refusal to grant a severance of the co-defendants. Thus, a mistrial was not an unreasonable solution unless a lesser remedy would have been sufficient.

"A motion for mistrial is addressed to the sound discretion of the trial court. It may properly be refused where the court is satisfied that no injustice has resulted or will result from the occurrence of which complaint is made." (*People v. Ward* (1968) 266 Cal.App.2d 241, 249.) In the present case, as shown above, serious injustice did result from rulings that allowed the prosecutor and counsel for a co-defendant to argue that Steven Homick obtained the murder weapon the day before the murders occurred, without allowing the defense to offset this with evidence that would have greatly reduced the likelihood of the jury making the inference the prosecutor and co-defendant's counsel desired.

In *People v. Wright* (1985) 39 Cal.3d 576, 589-591, the defense learned that the prosecution had failed to disclose interviews with a prosecution witness that contained significant elements that were inconsistent with the witness' trial testimony. This discovery did not occur until **after** counsel's closing arguments and after the jury had been instructed, making it even later in the proceedings than the problem that developed in the present case. This Court upheld the denial of the defense motion for mistrial, but did so because prejudice had been avoided by lesser forms of relief. The trial court explained the problem to the jurors. Pursuant

to stipulation, the jurors were informed of the contrary statements contained in the police interviews of the witness. The defense was given an opportunity to recall the witness for further cross-examination, but chose to rely instead only on the stipulation. Both sides were permitted to present additional argument to the jury regarding the new evidence.

Such relief avoided prejudice in *Wright* and probably could have done the same in the present case, as explained in the remaining sections of this argument. Absent such relief, however, there was serious prejudice to Steven Homick. In light of that serious prejudice, the present trial court erred in denying the motion for a mistrial – the only other means of avoiding the resulting deprivation of the right to a fundamentally fair trial by jury.

3. Reopening the Evidence

The standards governing a request to reopen the evidence were set forth concisely in *People v. Frohner* (1976) 65 Cal.App.3d 94, 110:

> "We, of course, recognize the rule ... that the decision to permit a party to reopen its case is 'almost wholly within the discretion of the trial judge ... [whose] ruling must stand in the absence of a clear showing of an abuse of discretion.' (*People v. Kohn*, 258 Cal.App.2d 368, 377.) In *People v. Newton*, 8 Cal.App.3d 359, 383, 384, in which the court held that the trial court had abused its discretion in not permitting the defendant to reopen his case after jury deliberations had begun, the court noted the factors to be considered in reviewing the exercise of the trial court's discretion: the stage the proceedings have reached when the motion is made; the diligence shown by the moving party in discovering the new evidence; the prospect

> that the jury would accord it undue emphasis; and the significance of the evidence. (*Id.*, at p. 383.)"

While the trial court discretion may be wide, it is not unlimited, since cases have found abuses of discretion in denials of motions to reopen. (See, *e.g.*, *People v. Frohner*, *supra*, 65 Cal.App.3d 94; *People v. Newton, supra*, 8 Cal.App.3d 359.)

Turning to the first of the four factors identified in the governing cases, it must be kept in mind that a request to reopen would never become an issue until after the evidentiary portion of the trial has closed. In the present case, the request came after discussions between the court and counsel about instructions and exhibits, but before any closing arguments and before any instructions to the jury. Thus, the request here came at a relatively early stage within the range when such requests might be made. In *People v. Newton, supra,* 8 Cal.App.3d at pp. 382-384, an abuse of discretion was found even though the request did not come until after the arguments and instructions had been completed, and the jury was in the middle of deliberations. In *People v. Frohner*, *supra*, 65 Cal.App.3d at pp. 109-111, an abuse of discretion was found even though the request did not come until the end of jury deliberations, just before the delivery of the verdict. (See also *People v. Christensen* (1890) 85 Cal. 568, 570; *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 319; *Annot.*, 87 ALR2d 849, 851 *et seq.*)

Indeed, in *People v. Carter* (1957) 48 Cal.2d 737, 757, this Court found an abuse of discretion using language that could as easily describe the present case: "... argument had not begun and the jury had not been instructed, and it does not appear that granting defendant's request would have entailed any great inconvenience." *Carter* went on to note that, "[i]n a

trial that had already consumed 13 days, it was not unreasonable to request an extension of a few hours to put before the jury evidence that in justice should have been considered, ..." (*Id.*) In the present case, the evidentiary portion of the guilt trial had lasted **five months,** seventy percent of which had been spent on prosecution witnesses, and less than two weeks of which had been spent on witnesses called on behalf of Steven Homick. Thus, it was surely reasonable to request a brief reopening to put before the jury the additional facts at issue. All information sought by the defense could have been obtained in brief additional testimony by one or both of the readily available investigating officers. Furthermore, it is not at all apparent what significant additional information could have been sought by the prosecution or the co-defendants, in response to the information the defense sought.

In regard to the second factor, the moving party's diligence in discovering the new evidence, the present trial court never faulted defense counsel for not realizing sooner that the seized gun and the gun described by Max Herman were virtually identical. Also, as shown earlier in this argument, where the life of the defendant is at stake, it would not be appropriate to penalize him even if it could be determined that his court-appointed counsel was negligent in not discovering the evidence sooner.

The third factor, the danger of undue emphasis by the jury, is another factor that will exist in virtually every case in which there is a request to reopen. In the present case, defense counsel noted that it had already been agreed that the jury would receive a series of evidentiary stipulations, and suggested that this matter be handled by one more stipulation that would be read along with the rest, minimizing any danger of undue emphasis. (See RT

127:15803-15804, discussed above.) Thus, respondent should not be heard to complain on the ground of undue emphasis.

The fourth factor, the significance of the evidence, cuts strongly in favor of the request to reopen. As shown earlier in this argument, the evidence at issue was highly relevant and offered the defense the only realistic means of offsetting the very harmful inference that the prosecutor and counsel for Robert Homick urged the jurors to draw. Also, in connection with the significance of the evidence factor, the fact that this was a death penalty prosecution should add strongly to the weight of the factor in favor of Steven Homick. With so much at stake for the defense, trial courts should give every benefit of any doubt to the defense when weighing the significance of evidence proffered by the defense.

Indeed, the seriousness of the charge was expressly recognized as a factor to be considered in *People v. Carter*, *supra*, 48 Cal.2d at p. 757. *Carter* also noted that the closeness of the case should be considered when assigning weight to the significance of the evidence. (*Id.*) That is, evidence that might seem less significant when the proof of guilt is overwhelming can be very significant in a trial where the case is close. In the present case, the proof of Steven Homick's guilt rested almost entirely on evidence from Michael Dominguez and Stewart Woodman. Dominguez was such an obvious liar that it was difficult for anybody to know which of his various statements should or should not be believed. Stewart Woodman was clearly distrusted by this very jury, since that is the only explanation for the failure to reach a unanimous verdict in regard to Neil Woodman. These and many other reasons why this must be deemed a close case will be discussed in

more detail in a later argument in this brief, explaining why any of the errors that occurred must be deemed prejudicial. (See Argument XII, *infra*.)

In sum, the court certainly had the discretion to allow the defense to reopen the evidence, and there is no compelling reason not to have done so. Considering the seriousness of the charge, the importance of the evidence at issue, and the overall closeness of the case, it was an abuse of discretion to deny the request. Once again, that abuse of discretion took on constitutional dimensions because the result was to deprive Steven Homick of his federal Fifth, Sixth, and Fourteenth Amendment rights to a fundamentally fair trial by jury, and of the right to present a defense. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Taylor v. Illinois* (1988) 484 U.S. 400; *Lankford v. Idaho* (1991) 500 U.S. 110; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Holmes v. South Carolina* (2006) 547 U.S. 319, 331.)

4. Stipulation

Another option suggested by defense counsel was to cover the matter by reading a stipulation to the jury. This would have resulted in the least inconvenience or consumption of time. Also, since agreement had been reached on a series of other stipulations that had not yet been read to the jury, this would have minimized any danger that the jury would give undue emphasis to the matter. (See RT 127:15803-15804, discussed above.) Thus, a stipulation may well have been the best solution available.

"... '[t]he general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. [Citations.]' (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007; see also *People v. Garceau* (1993) 6 Cal.4th 140, 182.)" (*People v. Arias* (1996) 13 Cal.4th 92, 131.) Here, the effect would have only been to fairly offset speculative prosecution inferences, not to deprive the prosecution of anything to which it was entitled. Thus, it would have been reasonable for the trial court to have forced the prosecutor and co-defendants to accept the proffered stipulation. As shown above, some form of relief was called for in these circumstances.

On the other hand, even if consent by the other parties had been a prerequisite to any stipulation, there would have still been no problem. It has been shown above that the trial court possessed the power, and even the duty, to grant a mistrial or allow the defense to reopen the evidence, unless another form of relief would have adequately resolved the problem. Thus, the trial court could have easily advised the prosecutor and co-defendants that it would have to grant a mistrial as to Steven Homick, or allow reopening of the evidence, unless all parties agreed to a stipulation. Undoubtedly, such a ruling would have resulted in agreement to a reasonable stipulation that would have fairly resolved the problem. Even if, for some reason, no agreement resulted, then the argument in favor of granting the request to reopen the evidence would have been even stronger.

The stipulation originally proposed by counsel for Steven Homick was fair and reasonable, and needed only a minor grammatical

correction.[247] (See footnote 244 at p. 508, *supra.*) Under these circumstances, it was an abuse of discretion to refuse to require the other parties to accept such a stipulation as an alternative to more drastic relief, such as reopening the evidence or granting a mistrial as to Steven Homick. As in previous sections of this argument, that abuse of discretion took on constitutional dimensions because the result was to deprive Steven Homick of his federal Fifth, Sixth, and Fourteenth Amendment rights to a fundamentally fair trial by jury, and of the right to present a defense. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Taylor v. Illinois* (1988) 484 U.S. 400; *Lankford v. Idaho* (1991) 500 U.S. 110; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Holmes v. South Carolina* (2006) 547 U.S. 319, 331.)

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247 It should be noted that when the stipulation was initially proposed, defense counsel conceded that the last sentence of the stipulation was based on his assumption, since the investigating officers had not yet been asked the specific questions. (CT 126:15524, ll. 20-22.) However, as noted earlier, the answers assumed by defense counsel were almost certainly correct, since any contrary information would have been included in the detailed interview of Max Herman. (See Supp. CT 14, Vol. 4:864-865.) The prosecutor could have easily contacted one or both officers and asked them about this (CT 126:15524, ll. 13-16), and never provided any contrary information.

5. Prejudice to Co-Defendants

As set forth in preceding sections of this argument, the trial judge never disputed the fairness of the stipulation proposed by counsel for Steven Homick. Although she later proposed a different stipulation, she did not explain why she felt that was necessary, and all parties agreed the one she proposed was so diluted that it conveyed no information of probative value. The prosecutor also never questioned the fairness of the proffered stipulation; his only complaint was that the stipulation the judge proposed had no probative value and should not be considered since everybody was opposed to it. (RT 127:15799-15801.)

Thus, the only objections to the fairness of the stipulation proposed by Steven Homick came from counsel for the two co-defendants, each of whom expressed fear that the jury would speculate that the seized gun had been found in the residence of their client. (RT 127:15798-15800.) Such fear was completely unfounded, since the stipulation would not have disclosed where the gun had been found, other than that it was found in a search connected to this case. That language would have covered all the defendants, including the other two who were tried separately, and would have given the jury no basis at all to tie the gun to any particular defendant. Furthermore, the stipulation would have made clear that wherever that gun had been found, it was **not** the murder weapon. Thus, any conceivable prejudice to any defendant would have been far smaller than the unfair prejudice suffered by Steven Homick, when jurors were told to infer that the actual murder

weapon had been in his possession the day before the murders, without offsetting information that would have provided a fairer context.[248]

Thus, neither co-defendant had any legitimate reason to complain. Obviously, they sought only to maintain the unfair benefit of having the jury infer that Steven Homick had acquired the murder weapon, with no offsetting evidence to weaken that inference. On the other hand, even if there was any legitimate basis for one of the co-defendants to object to any of the forms of relief sought by Steven Homick, that would simply present one more instance of irreconcilable defenses, adding more strength to the argument elsewhere in this brief regarding the erroneous refusal to grant a severance of parties. (See Argument VIII, *supra*.)

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248 In any event, even a stipulation that would have truthfully told the jurors that the tested gun had been seized from Robert Homick's residence would have been appropriate if one had been sought. If it was reasonable for the prosecutor and counsel for Robert Homick to ask the jury to infer that the gun Steve Homick obtained from Max Herman was the murder weapon, it would have certainly been reasonable to inform the jury that a gun perfectly matching the description of that gun was found in Robert Homick's residence.

XI. THE TRIAL COURT'S INSTRUCTION REGARDING THE PRIOR FEDERAL TRIAL IMPROPERLY IMPLIED THAT THE PRESENT DEFENDANTS HAD ALREADY BEEN CONVICTED OF CRIMES RELATED TO THE PRESENT CRIMES

While prosecution witness Art Taylor was being cross-examined by counsel for Robert Homick, counsel made reference in two questions to Taylor's prior federal court testimony. (RT 82:8445, l. 23; 8447, l.15.) After the second such reference, counsel for Stewart Woodman asked for a bench discussion. At bench, the court noted the mentions of the federal trial, even though everybody had previously been careful to avoid referring to it. Counsel for Steven Homick moved for a mistrial, noting he had waited to object in order to avoid drawing further attention to the matter in front of the jury. Counsel for Neil Woodman joined the motion, which was denied. (RT 82:8447-8448.)

Just before Stewart Woodman was to testify, the trial court proposed a jury instruction regarding the federal trial. Counsel for Neil Woodman objected to language that referred to the federal trial on the same charges, expressing fear the jurors would speculate about the outcome of that prior trial. He conceded the jury would learn from impeaching cross-examination that Stewart Woodman had testified previously, but there was no need for the jury to know any details about the nature of the prior proceeding. Counsel for Steven Homick objected to any mention of the fact that Anthony Majoy had been convicted. The court agreed to drop the reference to Anthony Majoy. All counsel then accepted the proposed instruction, subject to a possible revision that counsel for Stewart Woodman planned to draft. (RT 102:11484-11488.)

Soon afterward, the court read the following statement to the jury:

> "Mr. Woodman is presently in custody and he'll be brought into court accompanied by marshals.
>
> Before he testifies, I want to give you some information about some background in this case.
>
> After the defendants were arrested for the murders charged in this case, a severance was ordered by the court. The trial of Stewart Woodman was severed from the trial of the three defendants who are presently on trial here. He was tried before a jury in 1989 and 1990 and was convicted of the murders.
>
> Before the commencement of the penalty phase of that trial, Stewart Woodman entered into an agreement with the prosecution whereby he promised to testify against the remaining defendants in this trial and the prosecution agreed not to seek the death penalty against him but to accede to his being sentenced to life in prison without the possibility of parole.
>
> Thereafter, federal authorities filed charges against **all the defendants** charging them with interstate transportation **to commit these same murders** which is a federal offense.
>
> Stewart Woodman entered into an agreement with the federal authorities in that case. He was allowed to plead guilty to the federal charges in exchange for his testimony against the remaining defendants in the federal court.
>
> **All defendants** were tried in federal court in 1991 and **Stewart Woodman testified against them in those proceedings.**" (RT 102:11538-11539; emphasis added.)

Steven Homick asserts that this statement - especially the emphasized portions - unmistakably implied that he and his co-defendants had previously been convicted in federal court of charges closely tied to the present charges.

After all, lay jurors would wonder, if Stewart Woodman had testified in the federal trial and the defendants had been acquitted, why would they be pursued again in state court? Furthermore, at the very least, this implied that the United States Attorney's Office had also believed that the defendants were all guilty, and that Stewart Woodman was a credible witness. Courts have long recognized that it is highly prejudicial for a jury to learn that a person on trial has previously been charged with or convicted of a crime. (*People v. Ozuna* (1963) 213 Cal.App.2d 338, 341-342; *People v. Roof* (1963) 216 Cal.App.2d 222, 225-226.) Here, the apparent prior conviction revealed to the jury was so closely connected to the present charges that guilt of the federal charges could only mean guilt of the state charges. At a minimum, knowledge of the apparent federal convictions must have diminished the present jurors' feelings of responsibility, making it easier for them to endorse a guilt finding already made by another jury.

Even assuming a proper admonition could have mitigated the harm, none was given here. Indeed, the judge expressly recognized the danger and considered adding a sentence that would have told the jury not to be concerned with the results of the federal proceedings, but she apparently decided that would only exacerbate the danger by calling even more attention to it. (RT 102:11485, ll. 22-26.)

Although there was no objection below to the court's ultimate statement about the federal trial, the court's statement was the functional

equivalent of an instruction.[249] Instructions that affect the substantial rights of a defendant may be challenged on appeal even when there was no objection below. (Penal Code section 1259: "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.") Certainly an instruction that is likely to reduce the jurors' personal sense of responsibility for a guilty verdict affects the substantial rights of the defendant.

This prejudicial instruction resulted in the deprivation of a fundamentally fair jury trial in accordance with due process of law, and rendered the resulting verdicts unreliable, in violation of Steven Homick's federal 5th, 6th, 8th, and 14th Amendment rights. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

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249 Indeed, while instructions customarily occur shortly before the jury begins its deliberations, a judge may instruct the jury at any time during the trial. (*People v. Valenzuela* (1977) 76 Cal.App.3d 218, 221.)

XII. INDIVIDUALLY AND/OR COLLECTIVELY, THE ERRORS THAT OCCURRED DURING THE GUILT PHASE TRIAL UNDERMINED APPELLANT'S CONSTITUTIONAL RIGHTS AND WERE PREJUDICIAL

A. Introduction

In a number of arguments, Steven Homick has shown particular reasons why a particular error was prejudicial, with specific citations to federal constitutional bases, whenever applicable. In this argument, a number of broader factors and principles that apply to **each** of the errors and to the federal constitutional prejudice analyses urged in this brief, are set forth. In other words, this argument will focus on the assessment of the facts and the general principles of law that lead to the conclusion that the errors that occurred in this trial, considered individually, and all the more clearly when considered collectively, deprived Steven Homick of fundamental constitutional rights and cannot be deemed harmless.

A major factor that should influence the assessment of the prejudicial impact of any of the errors that occurred in this case is the closeness of the evidence in regard to the precise degree of involvement that Steven Homick may have had in the events that directly culminated in the murders of the Woodman parents. If the prior statements of prosecution witness Michael Dominguez, and the present testimony of Stewart Woodman were both fully believed by the jury, then the case against Steven Homick was strong. But, as will be shown, there were very strong reasons to disbelieve both of these witnesses, and we know for certain that Stewart Woodman's testimony was rejected, at least in substantial portions. If the jury distrusted both of these witnesses, as reasonable jurors surely could have done, then all that is shown

is that Steven Homick had some involvement with the Woodmans in providing security against the sometimes irrational actions of their father. The case becomes much stronger against Robert Homick, who was used much more frequently by the Woodman brothers, and it becomes much less clear how involved Steven Homick might have been.

As noted, federal constitutional violations have been identified in regard to every error set forth in this brief, thereby calling for the use of the very stringent standard of error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. However, even if this Court disagrees and chooses to apply the less stringent standard *People v. Watson* (1956) 46 Cal.2d 818 to some of the errors identified in this brief, the closeness of the case remains a crucially important factor in assessing prejudice. In other words, the closeness of the case makes it impossible to declare any meaningful error harmless under **either** standard.

In addition to the evidentiary weaknesses, other well-established principles also lead to the conclusion that this was a close case, and/or that any errors that occurred were especially likely to have had an impact on the outcome of the case.

B. The Evidence of Guilt Was Weak, and the Present Case Must be Seen as Close

No challenge is made to the sufficiency of the evidence to convict in this case, because if the jury chose to believe Stewart Woodman, and accepted the former statements of Michael Dominguez, then there was sufficient evidence to satisfy the current standard of appellate review. However, both of these key witnesses admitted their own intimate

involvement in the crimes, traded their cooperation for substantial benefits, and both were shown to be thoroughly despicable and untrustworthy in almost every aspect of their lives.

By his own admission, as set forth thoroughly in the statement of facts at the outset of this brief, with full citations to the record, Stewart Woodman turned against the father who set him up in business, borrowed money from relatives and refused to pay them back, lied to banks to obtain large loans, eavesdropped on bank examiners in order to cover up his lies, juggled his books to avoid paying income taxes, sent thugs to intimidate customers who questioned their bills, had cars burned in order to fraudulently collect insurance proceeds, hired others to kill his parents, had his mother killed along with his father only to make it less obvious that he was responsible, convinced most of his friends and co-workers that he was distraught at the death of his parents, collected insurance money for a death he had caused, lied to his rabbi, and finally turned on his own brother and partner-in-crime in order to save his own life.

Most importantly, the very same jury that convicted Steve Homick was unable to reach a unanimous verdict in regard to Neil Woodman. It would be impossible to believe the testimony of Stewart Woodman and still have doubts about the guilt of Neil Woodman. Thus, it is clear that at least some members of the jury had substantial doubts about major portions of Stewart Woodman's testimony.

Michael Dominguez must be considered even less trustworthy than Stewart Woodman. By his own admission, his adult life had been devoted to drug abuse, guns, and crime in general. He had been involved in arson and other murders aside from the present case. When offered money to assist in

killings, he did not hesitate to accept. Already in custody for a parole violation and other crimes when news broke regarding the arrests in the Woodman case, he did not hesitate to contact the authorities to do whatever was necessary to minimize his own exposure for crimes he believed could result in a death sentence for himself in two or more different states. He was given an unusually generous plea bargain as long as he was not the actual shooter, and he so testified even though all the evidence pointed far more strongly to him as the shooter rather than any of the other persons accused of being involved in the crimes. Even the trial judge was skeptical of this claim, noting there was evidence suggesting that Dominguez was the actual shooter. (RT 148: 18677.)

After saving his own life with his plea bargain, he almost succeeded once in escaping from custody at one point, and he later proceeded to renege on the agreement, making a mockery of the present trial by giving some blatantly false answers under oath, giving responses that were intentionally prejudicial and non-responsive, and finally refusing to answer questions at all. Thus, the jury was left to rely on former statements and testimony without the benefit of viewing demeanor, and videotaped statements without the benefit of cross-examination. According to a Nevada police officer who had known Michael Dominguez for many years and had investigated approximately 25 different felonies involving Dominguez, it would be foolhardy to ever believe what Dominguez had to say about anything, if his self-interest was at stake. The officer added that he would absolutely not believe Dominguez when testifying under oath, he had no doubt that Dominguez would lie to save himself or to better his circumstances,

Dominguez had no conscience whatsoever, and he would sell out anybody to further his own interests. (RT 112:13376-13379, 13390-13391.)

Furthermore, to any extent either of these two key prosecution witnesses might have been perceived by the jury as persuasive, that still might not have been a product of truthful testimony. This Court has expressly recognized that one of the great dangers of accomplice testimony is that the possession of detailed knowledge about a crime allows such witnesses to **sound convincing even while giving false testimony**. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 967.) Also, this Court has recognized that "It is not unusual for an accomplice to falsely incriminate innocent persons to seek revenge or to protect friends who actually committed the crime with him." (*In re Miguel L.* (1982) 32 Cal.3d 100, 109.)

If the jury did reject both Stewart Woodman and Michael Dominguez, the evidence regarding the murders becomes highly circumstantial and ambiguous. By frequency of contact, it was Robert Homick, not Steven, who was closer to the Woodman brothers. It was Robert Homick who the Woodman brothers turned to when they wanted a customer intimidated or a car burned for insurance proceeds. It was Robert Homick whose car was seen parked in front of the Woodman residence for a number of hours on a date three months before the murders, which happened to be the Woodman's 45th wedding anniversary, a date when their sons would have expected them to go out to dinner. This may well have been the original intended murder date, thwarted because Gerald Woodman was ill. There was no evidence Steven Homick was in Los Angeles that day, and notations in his monthly calendar indicated he was in Tucson, Arizona. (RT 110:13058-13059; 13739-13740.)

There was evidence from a paid FBI informant (trying to get out of his own problems with the Internal Revenue Service) that Steven Homick had borrowed some walkie-talkie radios in the weeks before the Woodman murders, but if Michael Dominguez is disregarded, there is no other evidence such radios were utilized in the Woodman murders. Indeed, when a new battery for a radio was needed the day before the murders, it was Robert Homick who was identified as the purchaser. Steven Homick also made some flights between Las Vegas and Los Angeles around the time of the murders, but if Dominguez and Stewart Woodman are disregarded, little is known about Steven Homick's activities while in Los Angeles at that time. However, undisputed evidence established that Robert Homick was involved in a minor automobile accident around the corner from the Woodman parent's residence (where they were killed), hours before the murders.

Highly ambiguous activities in monthly calendar books kept by Steven Homick could be interpreted to indicate he was involved in some kinds of surveillance activities pertaining to Gerald and Wayne Woodman some seven months prior to the murders. Finally, when the alleged payoff for the murders was made by the Woodman brothers, bank records established it was wired to Robert Homick, not Steven. (RT 96:10509-10514.)

Defense witnesses testified that Steven Homick was in Las Vegas on the day of the Woodman murders. (RT 109:12762-12767, 12773, 12776-12777; 109:12864-12866.) In sum, if jurors had doubts about both Dominguez and Stewart Woodman, they were left with a highly ambiguous circumstantial case against Steven Homick, along with difficult credibility issues to resolve. This Court has expressly recognized that difficult credibility questions are a major ingredient of close cases. (*People v.*

Anderson (1978) 20 Cal.3d 647, 651; *People v. Taylor* (1982) 31 Cal.3d 488, 500-501.)

> "Where the evidence, though sufficient to sustain the verdict, is extremely close, 'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial.' " (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494; *People v. Briggs* (1962) 58 Cal.2d 385, 407.)

C. Other General Principles of Law Indicate That Errors in the Present Case Were Likely to Be Prejudicial

In *People v. Adams* (1939) 14 Cal.2d 154, 167, this Court recognized that where the nature of the alleged crimes is particularly inflammatory, average jurors would tend to convict anybody accused, and the burden of proof was likely to be placed erroneously on the defendant instead of on the prosecution. While *Adams* involved a charge of child molestation, the present crime was also very inflammatory. Here, two elderly victims were killed on their most important religious holiday, purportedly by men hired by the unusually greedy sons of the victims. Thus, the following observation made in *Adams* should be equally applicable here:

> "Errors committed either by the prosecution or the court in the course of the trial, which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse effect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved." (*Adams, supra*, 14 Cal.2d at 168.)

Another important factor in determining prejudice is that in a number of instances Steven Homick was prejudiced by rulings that favored the interests of his co-defendants over his interests. (See Arguments IV, V, and VIII, earlier in this brief.) Thus, the jury was exposed to a variety of evidence that was inadmissible against Steven Homick. In Argument --, *supra*, it was shown that a proper remedy should have been a severance of parties. However, if that form of relief is denied, then at the very least this Court should engage in an especially thorough appellate review in order to assure that prejudicial evidence admitted on behalf of co-defendants did not result in an unfair trial for Steven Homick. In other words, Steven Homick already had a strike against him as a result of evidence that would not have been admitted if he had been tried alone.[250] When we add to that the prejudicial impact of any other errors this Court finds, then the prejudicial impact of those errors should be deemed greater than would result from similar errors in a trial free from prejudicial co-defendant evidence.

Also, Mr. Homick never testified in his own behalf. The jury:

> "will expect the defendant to present all the evidence he can to escape conviction, and it will naturally infer that his failure to explain or deny evidence against him when the facts are

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250 Put differently, the trial court below did not dispute the fact that some evidence admitted on behalf of a co-defendant was harmful to Steven Homick. The court simply concluded that any such harm was outweighed by the competing interests of the co-defendants. But even if this Court concludes that the trial court evidentiary rulings and the denial of severance were proper decisions, the prejudicial impact to Steven Homick remains and should be considered along with the prejudicial impact of any other errors this Court finds.

> peculiarly within his knowledge arises from his inability to do so. 'Such an inference is natural and irresistible. It will be drawn by honest jurymen, and no instruction will prevent it.' [Citation.]" (*People v. Modesto* (1965) 62 Cal.2d 436, 452.)

This was one more strike against Mr. Homick, providing another reason why even slight prejudice would be enough to tip the scale against him in the eyes of the jury. Here, it has been shown that the prejudicial impact of the trial court errors was not small and must be considered prejudicial.

D. All Instances In Which This Court Finds Guilt Phase Error, But Finds the Error Harmless When Considered Individually, Must Also Be Assessed Together to Determine Whether Their Cumulative Impact Was Prejudicial

Many of the serious errors urged in this brief are sufficiently important as to justify reversal in and of themselves. These errors, individually, and all the more clearly when viewed cumulatively, deprived Mr. Homick of due process, of a fair trial, of the right to present a defense and to confront the evidence against him, of a fair and impartial jury, and of fair and reliable guilt and penalty determinations in violation of his rights under the 5th, 6th, 8th and 14th Amendments. However, if this Court finds more than one error, but concludes that each error, standing alone, can be deemed harmless despite the factors discussed above, then this Court must also consider the cumulative effect of the errors. (*Williams v. Taylor* (2000) 529 U.S. 362, 399; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Duran* (1976) 16 Cal.3d 282; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36

Cal.2d 222, 233; *People v. Williams* (1971) 22 Cal. App.3d 34, 40; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 386-387; and *People v. Cruz* (1978) 83 Cal.App.3d 308, 334.) Indeed, federal 5th, 8th, and 14th amendment due process and reliability concerns mandate meaningful appellate review in capital cases. (See *Parker v. Dugger* (1991) 498 U.S. 308, 321.) Absent a consideration of the cumulative impact of errors, meaningful appellate review would not be possible.

In other words, in some situations an error can be found to be sufficiently minor so that a more favorable result on a retrial is unlikely. However, if there is a series of errors that would **all** be corrected at a retrial, it becomes much more difficult to conclude that the trial under review was fairly and constitutionally conducted and that a different result is unlikely.

In the present case the nature of the errors set forth in Arguments I and III, earlier in this brief, greatly hampered the ability of the jury to fairly evaluate the evidence of former statements made by Michael Dominguez. This was extremely crucial prosecution evidence. "An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376." Similarly, Argument X, *supra*, demonstrated that the prosecution was improperly allowed to argue that Steven Homick obtained the murder weapon the day before the crimes were committed, while the defense was not given the opportunity to offset that with evidence that would have shown that it was very unlikely that the gun in question actually was the murder weapon. This is another reason for applying the principle just quoted from *McDonald.*

Cumulatively, the guilt phase errors resulted in the deprivation of a fundamentally fair trial by an impartial jury, in accordance with federal 5th, 6th, and 14th Amendment and state constitutional guaranties of due process of law.[251] Furthermore, as a result of the errors shown, the ability of the jury to fairly resolve the disputed facts was inadequate to assure the degree of reliability needed to satisfy the federal 8th and 14th Amendments, in the case of a guilt judgment used to support a death sentence. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280.) In light of the serious weaknesses in the prosecution case against Steven Homick, the likelihood of a more favorable verdict absent the errors was very substantial. Thus, none of the errors can be deemed harmless, and together they present a strong case for finding prejudice.

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251 Every error set forth in this brief implicated federal due process and other federal constitutional concerns. Specific citations relating the particular type of error at issue to federal due process and other constitutional concerns are contained within each such argument.

XIII. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT STEVEN HOMICK HAD BEEN CONVICTED OF THE TIPTON MURDERS AS CIRCUMSTANTIAL EVIDENCE THAT HE HAD COMMITTED THOSE VIOLENT CRIMES, AND HAVING ALLOWED THE CONVICTION INTO EVIDENCE, FURTHER ERRED BY PROVIDING THE JURY NO GUIDANCE AS TO HOW TO DETERMINE ITS PROBATIVE SIGNIFICANCE AND BY FAILING TO INSTRUCT THAT FOR PURPOSES OF THE "PRIOR FELONY CONVICTION" SENTENCING FACTOR, STEVEN HOMICK HAD NO PRIOR CONVICTIONS

A. Introduction

The prosecution evidence in aggravation at the penalty trial consisted almost entirely of evidence that Steven Homick had murdered three persons in Nevada in a crime referred to as the Tipton murders. This evidence was offered to prove the "other violent criminality" aggravating factor recognized in Penal Code section 190.3, subd. (b).

Prior to the present penalty trial, Steven Homick had been convicted of the Tipton murders in a Nevada jury trial. However, the Tipton murders had been committed in December, 1985, two-and-one-half months after the Woodman murders. The conviction for the Tipton murders did not occur until July 17, 1989 (CT 24:6576), almost 4 years after the Woodman murders occurred. Because of this, the conviction did not qualify under the prior felony conviction aggravating factor, set forth in Penal Code section 190.3, subd. (c). (See *People* v. *Balderas* (1985) 41 Cal.3d 144, 201-204, limiting the prior felony conviction aggravating factor to convictions that occurred prior to the commission of the capital murder at issue.) In contrast, the "other violent criminality" aggravating factor can apply regardless of whether that conduct came before or after the present crime. (*People* v.

Hovey (1988) 44 Cal.3d 543, 577-579; *People* v. *Karis* (1988) 46 Cal.3d 612, 641, fn. 20.)

As will be shown, the prosecution was permitted to introduce evidence of the prior Nevada conviction. This was **not** offered to prove a prior felony conviction. Instead, it was offered solely as circumstantial evidence which, according to the prosecution theory, tended to prove that Steven Homick had, in fact, committed the acts that constituted other violent criminality. Steven Homick contends it was improper to allow evidence of the Nevada conviction to be considered by the jury. As will be seen, several years after the present trial, dicta in a concurring opinion joined by a majority of this Court resolved this question against the position taken herein by Steven Homick. (*People* v. *Ray* (1996) 13 Cal.4th 313, 363-369, concurring opinion of Chief Justice George.) However, as will also be shown, aside from being dicta, that concurring opinion seriously misread the legislative history on which it relied, seriously overstated the significance of every case on which it relied, seriously erred in the manner in which it purported to distinguish clearly controlling authority, and failed to consider insurmountable problems that result from the conclusion it reached.

Alternatively, even if it was somehow proper to allow the evidence, the trial court erred by failing to provide guidance in the instructions as to the manner in which the jury could use this information. Furthermore, if it was somehow proper to allow evidence of the Nevada conviction, it will be shown in the next argument in this brief that the trial court erred by failing to allow a full and fair hearing into the constitutional validity of the Nevada conviction.

B. Factual and Procedural Background

On April 30, 1993, counsel for Steven Homick filed a Motion to Exclude Evidence of Subsequent State of Nevada Conviction. (CT 24:6574-6577.) That motion included a very brief argument that relied on the holding in *Balderas*, referred to above. On May 3, 1993, counsel filed supplemental points and authorities. (CT 24:6578-6579A.) The additional argument was made that the verdict of the Nevada jury was hearsay, to the extent that it might be used to prove that the underlying crimes were committed by the person convicted. (CT 24:6579A.)

Also on May 3, 1993, the matter was discussed in court. The prosecutor made clear he was not contending that the Nevada convictions could be used to support the prior felony conviction aggravating factor. Instead, he argued the convictions simply constituted proof that Steven Homick had engaged in the underlying conduct. (RT 134:16908-16913.) The court took the matter under submission. (RT 134:16914.)

On May 5, 1993, the prosecution filed responding points and authorities. (CT 24:6601-6602.) The prosecution contended that *People* v. *Kelly* (1992) 1 Cal.4th 495, 550 and *People* v. *Webster* (1991) 54 Cal.3d 411, 454 allowed the admission of a conviction as proof of the defendant's involvement in the underlying conduct.[252] (CT 24:6602.)

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252 As will be shown in the next section of this argument, reliance on those cases was seriously misplaced. *Webster* involved a prior conviction that resulted from a guilty plea. The defendant's guilty plea constitutes an admission that comes within the recognized hearsay exception for admissions by a party. In the present case, the Nevada conviction at issue resulted from a jury verdict. There is no hearsay exception that allows the

(Continued on next page.)

Also on May 5, 1993, the matter was discussed further in court. The trial court had reviewed recent cases and expressed the opinion that they supported the defense view that admission of the fact of conviction constituted error. The prosecutor disagreed, saying that the error in those cases resulted from instructing the jury that there had been a prior felony conviction. Here, the prosecutor was requesting the court to expressly instruct that there had been **no** prior felony convictions.[253] The court then changed her mind and agreed with the prosecutor that the fact of the conviction was admissible as proof of participation in the crime. (RT 135:16956-16960.)

Counsel for Steven Homick then countered with the argument that *People* v. *Wheeler* (1992) 4 Cal.4th 284, established that a prior conviction constituted hearsay when offered to prove the underlying conduct. Counsel also argued that even if the evidence was not hearsay, it should be excluded pursuant to Evidence Code section 352. Counsel explained that the present jury would hear more and different evidence about the conduct, and could not know how much weight to give to the Nevada jury's conclusion without knowing exactly what evidence had been presented to that jury. (RT 135:16961-16965.) The trial court incorrectly rejected that argument as

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(Continued from last page.)

opinion of 12 jurors in another case to be used to prove the defendant was involved in the conduct that led to the conviction. *Kelly* is easily distinguishable from the present case for a variety of reasons that will be discussed in the next section of this argument.

253 As will be shown, however, the Court refused to instruct in this manner, even though urged to do so by the prosecutor.

equally applicable whenever a prosecutor seeks to prove a prior conviction.[254] (RT 135:16966-16967.)

Counsel's efforts to explain the flaw in the court's reasoning were unavailing, as the court turned instead to the question of how to instruct the jury in regard to the use of the prior conviction. Counsel again tried to return to the merits, arguing that the cases relied on by the court and the prosecutor involved guilty pleas, where the plea was an admission. The court summarily rejected that correct argument as a distinction without a difference. (RT 135:16967-16970.) The defense motion to exclude evidence of the Nevada prior conviction was denied. (RT 135:16972.)

Soon after the ruling, counsel reminded the court he had also objected on Evidence Code section 352 grounds, which the court had failed to address. The court summarily rejected that argument, concluding that arguments of counsel and instructions would overcome any confusion, and that the probative value of the evidence outweighed any prejudice. The court gave no explanation of what the probative value of the conviction by a different jury that heard different evidence might be. (RT 135:16976.) Interestingly, the court's summary conclusion that instructions would easily avoid any possible jury confusion was disproved by the fact that no such instruction was ever given.

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254 The flaw in the court's conclusion is obvious. When the conviction itself is relevant, then proof that another jury convicted is not only relevant, but determinative. However, when only the conduct is relevant, the issue is very different and the fact that another jury convicted the defendant on different evidence is meaningless.

Confusion reigned again when instructions were discussed further on the next court day. The prosecutor stated it was fine with him to instruct the jury that the Nevada conviction could not be considered a prior conviction. The judge responded that she was **not** willing to affirmatively instruct the jury that there were no prior felony convictions, since that would be inconsistent with using the Nevada conviction to prove the facts of the Tipton crimes.[255] (RT 144:18218-18219.)

When the jury was instructed, nothing was included to make clear that the Nevada conviction did not constitute a prior felony conviction within the meaning of the prior felony conviction sentencing factor upon which they were instructed. Also, nothing was included that gave the jury any clue as to how they should make use of the Nevada conviction in determining whether the underlying conduct had been proved true beyond a reasonable doubt. (See SCT 5:1356-1380.) The danger that the jury might misuse the Nevada conviction to support the prior felony conviction aggravating factor was somewhat ameliorated by amending CALJIC 8.85 to delete the word "presence" in reference to prior felony convictions. Thus, the jury was instructed that among the factors to be considered in deciding penalty were

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255 This, of course, was a misstatement of the applicable law. The Nevada conviction may have been a conviction, but it was not a **prior** conviction within the meaning of the aggravating factors. However, since even the judge was confused on this point, it seems inevitable that the jurors would have problems making the proper distinctions.

the presence or absence of other violent criminal activity, and the absence of any prior felony conviction.[256] (SCT 5:1359-1360.)

In his penalty phase argument to the jury, the prosecutor referred to the conviction and witnesses that proved Steven Homick committed the Tipton murders. (RT 144:18245, ll. 10-13.) Later, in summarizing the aggravating factors he believed had been shown, the prosecutor referred to the Tipton murders and noted there was a document in evidence that proved the convictions. (RT 144:18272, ll. 14-22.) Subsequently, the prosecutor referred to the factor regarding the absence of prior felony convictions. He stated, "Prior means prior to the date of the Woodman crimes. There is none and that's a mitigating factor."[257] (RT 144:18296, ll. 12-13.)

In the defense penalty phase argument, counsel tried to explain some aspects of the defense evidence that the present jury heard, which the jury in Nevada had not heard.[258] (RT 145:18428-18429.) Counsel then made a

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256 Unfortunately, this instruction still left the jury free to believe that the Nevada conviction did constitute a prior felony conviction, thereby precluding the use of the absence of prior felony convictions as a mitigating factor.

257 However, the defense had requested a jury instruction stating, "You are instructed that Steven Homick had no felony convictions before the crimes for which he was tried in the instant case. The absence of any such felony convictions is a mitigating factor." That instruction had been refused by the court. (SCT 4:1100.)

258 This was feasible to a limited extent because when some witnesses testified in the present penalty phase they were asked whether they had been called as witnesses in the Nevada trial and they responded negatively. (See, e.g., RT 140:17802, 141:17972.) However, the present jury still had no way of knowing just what evidence was, in fact, presented to the Nevada jury.

clumsy effort to convey what counsel had previously and correctly argued would be too confusing to understand:

> "It's very hard to stand up here and to tell jurors that they should not give any weight to a conviction of an individual that was attained in another state; that that conviction was introduced as part of the evidence for you to consider as to whether or not the prosecution here had proven Steven Homick's guilt of the Tipton murders beyond a reasonable doubt.
>
> You were not told that that in and of itself establishes that they have. You were told that was part of the evidence and, hopefully, you have seen why based upon the evidence that has been presented to you here in Los Angeles, evidence that was not presented in Las Vegas.
>
> Hopefully, you have seen why you should not rely upon that Las Vegas conviction as a reason to believe that Steve Homick committed the Tipton murders." (RT 145:18429, l.25-18430, l. 12.)

C. The Fact That a Different Jury, Hearing Different Evidence, Had Found Steven Homick Guilty of the Tipton Murders Was Improperly Admitted to Prove His Involvement in the Tipton Crimes

Evidence Code section 787 provides, "Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." The sole exception in section 788 which creates an

exception to both section 787 and the hearsay rule,[259] allowing the proof of a prior felony conviction to attack the credibility of a witness. In *People* v. *Wheeler* (1992) 4 Cal.4th 284, this Court held that a 1982 amendment to Cal. Const., art. I, § 28, subd. (d) had abrogated statutory restrictions on the use of specific acts, other than felonies, to impeach the veracity of a witness.[260]

Thus, for the first time witnesses could be impeached with prior misdemeanors, as long as they were relevant to show dishonesty or moral turpitude. However, unlike prior felony convictions expressly made admissible by Evidence Code section 788, prior misdemeanor **convictions** had not been made admissible by article 1, section 28, subd. (d). Instead, as *Wheeler* concluded, "if past **criminal conduct** amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion, as 'relevant' evidence under section 28(d)." (*People* v. *Wheeler, supra,* 4 Cal.4th at p. 295; emphasis added.)

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259 "Under Section 787, evidence of specific instances of a witness' conduct is inadmissible for the purpose of attacking or supporting his credibility. Section 788 states an exception to this general rule where the evidence of the witness' misconduct consists of his conviction of a felony. A judgment of conviction that is offered to prove that the person adjudged guilty committed the crime is hearsay. See Evidence Code §§ 1200 and 1300 and the Comments thereto. But the hearsay objection to the evidence specified in Section 788 is overcome by the declaration in the section that such evidence "may be shown" for the purpose of attacking a witness' credibility. (Evid. Code section 788; COMMENT--SENATE COMMITTEE ON JUDICIARY.)

260 Section 28 (d), known as the Truth-in-Evidence Law, provides in pertinent part that "relevant evidence shall not be excluded in any criminal proceeding..."

Wheeler also addressed a question highly relevant to the present case – whether a prior misdemeanor conviction could be admitted as evidence proving the prior conduct. This Court first recognized that a judgment constitutes hearsay:

> "In general, a statement offered for its truth, and made other than by a witness testifying at the hearing, is inadmissible hearsay. (Evid. Code, § 1200.) As the California Law Revision Commission (Commission) has explained, '[a]nalytically, a judgment that is offered to prove the matters determined by the judgment is hearsay evidence. [Citations.] It is in substance a statement of the court that determined the previous action [i.e., other than by a testifying witness] ... that is offered "to prove the truth of the matter stated." [Citation.] Therefore, unless an exception to the hearsay rule is provided, a judgment would be inadmissible if offered in a subsequent action to prove the matters determined.' (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 1300, pp. 342-343.)" (*People* v. *Wheeler, supra,* 4 Cal.4th at p. 297-298.)

Noting Evidence Code section 788 provided a hearsay exception to prove felony convictions used to impeach credibility, this Court then explained:

> "No similar statutory exception exists for the use of misdemeanor convictions. Hence, California decisions preceding Proposition 8 recognized that misdemeanor convictions are inadmissible hearsay when offered to prove the underlying criminal conduct. (E.g., *People* v. *James* (1969) 274 Cal.App.2d 608, 612; *Rousseau* v. *West Coast House Movers* (1967) 256 Cal.App.2d 878, 888; cf. *People* v. *Ferguson* (1982) 129 Cal.App.3d 1014, 1024)

> Nothing in Proposition 8 changes the long-established understanding that a misdemeanor conviction comes within the statutory rule of inadmissible hearsay (Evid. Code, § 1200) when offered for the truth of the charge. On the contrary, though section 28(d) states a general rule that relevant evidence is admissible in criminal proceedings, the section expressly preserves 'any existing statutory rule of evidence relating to ... hearsay ....' There can be no doubt that the hearsay objection to use of misdemeanor convictions remains valid." (*People* v. *Wheeler, supra,* 4 Cal.4th at p. 298-299.)

Wheeler's references to misdemeanor convictions cannot be read to **limit** *Wheeler*'s rationale to misdemeanor convictions. Instead, *Wheeler* referred to misdemeanor convictions simply because they were all that was at issue in that case. The fact that the *Wheeler* rationale applies more broadly to the use of misdemeanor **or** felony convictions offered to prove underlying conduct is made clear by the rationale set forth in *People* v. *James, supra,* 274 Cal.App.2d at p. 612, one of the cases relied on in *Wheeler*. In *James*, the defendant was convicted of pimping, and one element was proof that the female involved was a prostitute. Evidence was offered that she had been convicted of prostitution. In finding error in the admission of such evidence, the court explained:

> "The convictions were offered and were admitted to prove the truth of the matter stated that Burns was a convicted prostitute. The records of the convictions were hearsay, and inadmissible unless otherwise provided by law. (Evid. Code, § 1200.)
>
> Evidence Code, section 1300 provides [an] exception to the hearsay rule in connection

> with judgments of convictions. It reads: '**Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action** to prove any fact essential to the judgment unless the judgment was based on a plea of nolo contendere.'
>
> Section 1300 does not apply where, as here, the judgments relate to crimes punishable as misdemeanors and are offered in a criminal, rather than civil, action. The Law Revision Commission comment to section 1300 states: 'The exception does not, however, apply in criminal actions. Thus, Section 1300 does not permit the judgment to be used in a criminal action as evidence of the identity of the person who committed the crime or as evidence that the crime was committed.'" (Emphasis added.)

The present trial court did not discuss *Wheeler*, even though it was cited by the defense. Instead, the Court relied on this Court's decisions in *People* v. *Kelly*, *supra,* 1 Cal.4th at p. 550 and *People* v. *Webster, supra,* 54 Cal.3d at p. 454. Since those cases are in the same context as the present case – using prior convictions to prove underlying conduct in a capital penalty trial, it is important to analyze them closely to reconcile their conclusions with *Wheeler*.[261]

Webster involved a trial that occurred before *Balderas* made it clear that a conviction suffered after a capital crime is not a *prior* conviction for the purpose of the prior felony conviction aggravating factor. Thus, in Webster's trial, the fact of the prior conviction was erroneously introduced to

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261 Of course, both cases were decided before *Wheeler*, so this Court had no occasion to address the application of *Wheeler* when they were decided.

prove the prior felony conviction aggravating factor. This Court first noted that no objection was made below, and that there were even tactical reasons for stipulating to the conviction in order to avoid evidence of the facts underlying the conviction. Thus any issue was waived in that case. The Court went on to address the merits nonetheless, noting:

> "... the ... robbery conviction, **based on defendant's guilty plea**, was admissible under factor (b) as proof of his participation in the underlying violent criminal activity. (See, e.g., *People* v. *Hayes*, *supra*, 52 Cal.3d 577, 632-633 [juvenile adjudication for violent criminality]; *People* v. *Lucky* (1988) 45 Cal.3d 259, 294-295 [same].) Such proof was significant considering the victim's failure to identify defendant at the penalty trial." (*Webster, supra,* 54 Cal.3d at p. 454, emphasis added.)

No hearsay issue was raised or discussed in *Webster*,[262] but it is evident why not. Since the prior conviction was the result of a guilty plea, there is an applicable hearsay exception. Pursuant to Evidence Code section 1220, a statement by a party opponent is admissible against that party. Thus, Webster's earlier admission of his guilt of the prior robbery was admissible. No similar hearsay exception is available in the present case.

Webster relied on *Hayes* and *Lucky*. In *Hayes,* the defendant complained that a prior juvenile adjudication for voluntary manslaughter was improperly used in aggravation, since juvenile adjudications did not constitute felony convictions. This Court agreed with that, but found the

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262 Thus, *Webster* did not **reject** the hearsay issue raised in the present case. "Cases are not authority for propositions they do not consider." (*People* v. *Martinez* (2000) 20 Cal.4th 106, 118.)

adjudication admissible to prove the underlying violent conduct. Once again, the hearsay issue was not raised or discussed. Once again, as in *Webster,* the prior adjudication was based on the defendant's prior "**admission** in juvenile court proceedings." (*Hayes, supra*, 52 Cal.3d at p. 632.) *Lucky* involved a similar situation as in *Hayes*, also had no discussion of the hearsay issue, and also was based on a juvenile adjudication that had been based on an **admission**. (*Lucky, supra*, at p. 294.)

Another reason that *Webster* was very different than the present case is that in *Webster*, the proof of the prior robbery included testimony from the victim and from defendant's crime partner, as well as a "**videotape** of the robbery..." (*Webster. supra*, at p. 427; emphasis added.) Thus, it appears unlikely that defendant's involvement in the robbery could be seriously disputed. Indeed, in the description of the penalty phase evidence, there is no indication the defendant offered any evidence to dispute his thoroughly established involvement in the robbery. (*Id*, at p. 427-428.) Thus, even if evidence of the prior conviction had been admitted erroneously, it would have had no impact on the jury's determination of the proof of the prior conduct. In contrast, Steven Homick's involvement in the Tipton crimes was hotly contested in the present penalty trial, and the evidence against him was weak at best. It consisted only of his after-the-fact possession of property stolen in the crime, and of statements attributed to him by persons whose credibility was highly suspect. As will be shown in more detail, in the present case the erroneous admission of the Nevada conviction was by far the strongest evidence the prosecution had, and could easily have made all the difference between one or more jurors finding that the Nevada conduct had or had not been proved beyond a reasonable doubt.

In *Kelly*, the other case relied on by the present trial court, the application to the present case was even weaker than in *Webster*. The issue actually raised in *Kelly* was that instructions wrongly indicated that convictions for other crimes had occurred prior to the capital murders, when, in fact, they had occurred afterward. This Court conceded some ambiguity in the instructions, but found no harm because the evidence made it clear that the other crimes had occurred after the present murder. This Court then went on to note:

> "Error of a different kind was committed, however. A felony conviction is admissible as an aggravating factor only if it was entered before the capital crime. (*People* v. *Webster*, *supra*, 54 Cal.3d at p. 453; *People* v. *Balderas* (1985) 41 Cal.3d 144, 201.) Here, the convictions were entered afterwards. Nevertheless, the error was harmless. The convictions and the facts of the underlying crimes were properly considered as evidence of other violent criminal conduct. Once the facts of the Danny O. murder were disclosed, '"[t]he additional fact that defendant was convicted of that offense could have added very little to the total picture considered by the jury ...."' (*People* v. *Webster*, *supra*, 54 Cal.3d at p. 454, quoting *People* v. *Morales*, *supra*, 48 Cal.3d at p. 567, italics in original; see also *People* v. *Ashmus*, *supra*, 54 Cal.3d at p. 999.)

Thus, there is no indication that any issue had even been raised regarding the admissibility of a **conviction** to prove underlying conduct. Instead, this Court simply noted on its own that it was improper for the trial court to allow the jury to consider the prior crimes under both the prior felony conviction aggravating factor and under the other violent criminality aggravating factor. As noted earlier, "Cases are not authority for propositions

they do not consider." (*People* v. *Martinez, supra*, 20 Cal.4th at p. 118.) The only issue actually addressed was whether the error in allowing the subsequent convictions to be used to support the prior felony conviction aggravating factor was prejudicial. It was not, because the underlying facts had been fully proved and the conviction added nothing. In the present case, the underlying conduct was not fully proved; instead, the prosecution case was weak and was hotly contested. In *Kelly*, the description of the penalty phase evidence again indicates that the defense offered nothing to contest the prosecution proof of the other violent criminality.[263] (*Kelly, supra*, 1 Cal.4th at p. 515-516.)

In short, nothing in *Webster* or *Kelly* detracts from this Court's clear conclusion in *Wheeler* that a prior conviction constitutes inadmissible hearsay when offered to prove the truth of the underlying conduct. However, this issue was addressed by this Court in disturbing dicta in a subsequent case, which requires close analysis. In *People* v. *Ray* (1996) 13 Cal.4th 313, in a lead opinion authored by Justice Baxter and joined by 5 other Justices

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263 Indeed, the other violent criminality at issue in *Kelly* had resulted in a separate death judgment in another county. That case was fully addressed by this Court in *People* v. *Kelly* (1990) 51 Cal.3d 931, also referred to as *Kelly I*. (See *Kelly, supra*, 1 Cal.4th at p. 515.) In *Kelly I*, this Court set forth the persuasive prosecution evidence, and then did not indicate that any defense evidence had been presented at all. (*Kelly I, supra*, 51 Cal.3d at p. 940-942.) The opinion also refers to a taped confession that Kelly had made regarding those crimes. (*Kelly I, supra*, 51 Cal.3d at p. 945.) From the opinion as a whole, it is apparent that the defense effort at trial, both in the guilt and penalty phases, was based on evidence of Kelly's severe mental illness, and not on any dispute over his participation in the conduct at issue.

(Chief Justice George, Justices Kennard and Werdegar, and Retired Chief Justice Lucas and Justice Arabian, both sitting by appointment), this Court discussed the prosecution proof of 4 crimes offered in support of the other violent criminality aggravating factor. (*Ray, supra*, 13 Cal.4th at pp. 348-352.) This Court noted, "As to each factor (b) crime, the prosecution relied solely on the judgment of conviction to prove that defendant had in fact committed the underlying violent criminal conduct. In addition, testimonial and photographic evidence established that the victim of the 1984 murder had sustained 66 knife wounds." (*Id*, at p. 349.)

On appeal, *Ray* squarely, but indirectly, raised the problem of using hearsay judgments to prove underlying conduct. Since trial counsel had offered no objection on this ground, the argument on appeal was that trial counsel was ineffective for failing to object to the hearsay below. That claim was rejected because if trial counsel had successfully objected to the proof by prior judgments, then the prosecution would have been free to bring in live witnesses to testify to the graphic details of the prior crimes. Thus, the record on appeal could not negate the possibility that trial counsel had made a reasonable tactical decision that it was better to allow proof by prior judgments, rather than have the jury exposed to graphic details from live witnesses. (*Id*, at p. 349-350.) Appellant has no quarrel with this limited proposition, but it has no impact on the different circumstances in the present case, where trial counsel did object, and where the prosecution did utilize live witnesses with graphic details, in addition to the hearsay judgment.

In the next section of the *Ray* opinion, a separate issue was raised regarding the testimonial and photographic evidence, noted above, showing that the victim of the 1984 murder had been stabbed 66 times. The issue that

was raised was that it was improper to prove such details without proving that the defendant was personally responsible for inflicting the 66 stab wounds, as opposed to being guilty on an aiding and abetting theory. This Court rejected that proposition, finding no requirement that the proof of other violent criminality be limited to violence personally inflicted by the defendant. Rather, the jury was entitled to learn of violent criminality in which the capital defendant had been involved sufficiently to render him criminally liable, regardless of whether he was the perpetrator or an aider and abettor. (*Id*, at p. 350-351.)

In its discussion, this Court noted:

> "As long as penalty jurors are not materially misled about the nature and degree of the defendant's individual culpability, **the prosecution may rely solely on a judgment of conviction to establish his involvement in a joint crime of violence**. (See *People* v. *Hayes* (1990) 52 Cal.3d 577, 632-633 [upholding use of juvenile court records to prove defendant committed manslaughter under factor (b) even though jury never learned whether defendant was the actual perpetrator or an aider and abettor].)" (*Ray*, *supra*, 13 Cal.4th at p. 351, emphasis added.)

As explained earlier in this argument, *Hayes* did not actually reach such a broad conclusion. In any event, in context, this cannot be read as a square holding that a judgment of conviction may be used in all circumstances to establish the truth of the underlying conduct. That was not the issue being addressed in this part of the *Ray* opinion. Rather, this Court was merely saying that the prosecution need not prove all the details, as long as the proof that is provided does not mislead the jury. That is amply demonstrated in the

next two paragraphs of the opinion, in which the Court explains that there was sufficient information before the jury to preclude their having been misled. (*Ray*, *supra*, 13 Cal.4th at pp. 351-352.)

However, the issue that was not directly addressed in the lead opinion, and was totally unnecessary to the decision, was addressed in a concurring opinion authored by Chief Justice George. (See concurring opinion at *Ray*, *supra*, 13 Cal.4th at p. 363-369.) That opinion was joined by the same four justices who had joined in the lead opinion, but was not joined by Justice Baxter, the author of the lead opinion. Since the concurring opinion was endorsed by a majority of this Court, it must be addressed in the present discussion, even though it constitutes dicta and is therefore not controlling.[264]

The concurring opinion first quoted from a 1957 case that noted the broad range of information that was then available to a parole board determining the actual term that was to be served by inmates sentenced

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264 It is also significant that, while the concurring opinion was supported by 5 Justices, only 3 of them are still on this Court. Thus, when confronted with a determination of whether the *Ray* dicta should become a firm holding, it is not at all certain that a majority of this Court would so conclude.

However, it should be mentioned that in *People* v. *Jackson* (1996) 13 Cal.4th 1164, 1234, this Court did cite the *Ray* concurrence as a recent majority conclusion of this Court finding no error in the use of a prior conviction to prove underlying conduct. *Jackson* is distinguishable from the present case since that is another instance where the prior conviction resulted from a guilty plea, so there is an available hearsay exception (admission of a party). In any event, *Jackson* contains no analysis, but simply cites the *Ray* concurrence for its conclusion. As will be shown in this argument, a re-examination of the *Ray* concurrence remains justified for a variety of separate reasons.

under the indeterminate sentence law. (*People* v. *Friend* (1957) 47 Cal.2d 749, 763, fn. 7.) The quoted portion of *Friend* found it anomalous that less information would be available to the sentencer in a capital case at a time when guilt and penalty were decided in a single proceeding. According to the *Ray* concurrence, it was that discussion which led to the enactment of an early version of Penal Code section 190.1, providing for a separate penalty trial in capital cases, and which first set forth provisions allowing the presentation of aggravating and mitigating information in a capital sentencing proceeding. (*Ray*, *supra*, 13 Cal.4th at p. 364.)

The concurring opinion noted that evidence of prior convictions of the defendant could be brought before the sentencer in a capital penalty trial. From this clear proposition, the concurring opinion quoted language from *People* v. *Terry* (1964) 61 Cal.2d 137, 149, and then reached a conclusion that simply does not follow from *Terry*:

> "Thus, for example, in concluding in *People* v. *Terry* (1964) 61 Cal.2d 137, that the prosecution at the penalty phase could not introduce evidence showing simply that in the past an information had been filed charging the defendant with a criminal offense, the court explained: 'Although an information is more probative of guilt than arrest because it proceeds one step further in the criminal process, in neither situation has a jury found beyond reasonable doubt that the defendant has committed the alleged offense. Short of this safeguard the use of incidents in the preliminary stages of the criminal process as evidence to prove that a defendant has committed an alleged criminal act becomes too prejudicial when weighed against its probative value.' (*Id.* at p.

> 149, italics added.) **This reasoning makes it clear, of course, that the court in *Terry* took for granted that the record of a prior conviction, which signified that a jury had found beyond a reasonable doubt that the defendant had committed the alleged offense, was sufficiently reliable to establish the defendant's conduct for purposes of the penalty phase.**" (*Ray*, *supra*, 13 Cal.4th at p. 365, emphasis added.)

In fact, it is not at all fair to conclude that *Terry* took such a proposition for granted. *Terry* simply concluded that, while prior convictions were admissible, prior accusations were not. *Terry*'s reference to accusations being inadequate to prove conduct in no way means that convictions are adequate to prove conduct. Instead, that was simply a statement that an accusation, which was obviously not a conviction, was also insufficient to prove conduct. At best, the language from *Terry* should read as saying that, even **assuming for the sake of argument** that a conviction would be admissible, anything less than a conviction is not admissible. In any event, even if *Terry* did assume a principle that was not essential to its conclusion, that does not make the assumed principle correct. As noted previously, "Cases are not authority for propositions they do not consider." (*People* v. *Martinez, supra*, 20 Cal.4th at p. 118.)

Next, the *Ray* concurrence relied on a **dissenting** opinion in *People* v. *McClellan* (1969) 71 Cal.2d 793, 812. Obviously, a statement in a dissenting opinion, while relevant to a historic development of a legal principle, does not tell us anything meaningful about the view of the majority of the Court. Indeed, the dissenting Justice quoted by the *Ray* concurring opinion was Justice Mosk, who dissented in *Ray* and quite vigorously disagreed with the view ascribed to him by the *Ray* concurring opinion. Thus, the *Ray*

concurrence's interpretation of the idle remark in the *McClellan* dissent never represented the position of a majority of this Court, and was even disavowed by the author of the *McClellan* dissent, who was surely in the best position to interpret his own words.

In any event, the discussion of the *McClellan* dissent was as follows:

> "Justice Mosk's dissenting opinion in *People* v. *McClellan* (1969) 71 Cal.2d 793, 812 makes this point even more explicitly. In *McClellan*, Justice Mosk dissented from the majority's conclusion that when the prosecution, at the penalty phase, introduces evidence that the defendant engaged in prior crimes of which he had not been convicted, the jury must be instructed that it should not consider the prior crimes unless it finds that the crimes have been proven beyond a reasonable doubt. In the course of his dissent, Justice Mosk observed: 'For efficient trial procedure, trial courts and counsel are entitled to know how prior crimes are to be established at the penalty trial; the majority offer little assistance. **Certainly a certified record of conviction will suffice.** But what of proof by, for example, eyewitness testimony [citation] or confession following independent proof of the corpus delicti [citation] or testimony by an accomplice, as in this case? It is clear that the *Terry* opinion ... did not purport to exclude all evidence of prior crimes except formal convictions ....' (71 Cal.2d at p. 818 (dis. opn. of Mosk, J.).)
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> **Thus, a review of this court's decisions establishes beyond question** that, under the initial legislation establishing California's bifurcated capital proceedings, the prosecution, at the penalty phase of a death penalty trial, could rely upon evidence of prior convictions to establish that the defendant had engaged in prior criminal activity. (See generally, Comment, The

California Penalty Trial (1964) 52 Cal.L.Rev. 386, 394-398.)" (*Ray*, *supra*, 13 Cal.4th at p. 365, emphasis added.)

Once again, the conclusion set forth in the last emphasized portion of the *Ray* concurrence goes far beyond what had actually been decided in any decision of this court. Justice Mosk's passing comment in the *McClellan* dissent regarding use of a record of conviction could well have meant nothing more than the established fact that such a record could be used to prove a prior conviction, which has always been deemed admissible because the conviction is relevant to sentencing regardless of proof of the conduct. Certainly that idle comment in a dissenting opinion is not a reasoned analysis of an issue that was not even presented in *McClellan*. The brief discussion of a totally different point in *Terry*, and the disavowed comment of a single dissenting Justice in *McClellan* do not **establish** anything at all in regard to the present question. What little they do say about the present question certainly does not establish **beyond question** a point that was not even at issue in either case. Thus, the *Ray* concurrence relied on extremely thin reeds to reach a conclusion that is actually unsupported.

The *Ray* concurrence next reviewed the changes in the California death penalty law that occurred after *Terry* and *McClellan* were decided. The *Ray* concurrence found great significance in the fact that the first version of the modern California death penalty law, adopted in 1977, provided expressly that prior violent criminal activity was an aggravating factor, but did not expressly provide that prior felony convictions constituted an aggravating factor. It was not until the death penalty law was amended in 1978 that the presence or absence of prior felony convictions was expressly

added to the list of aggravating and mitigating circumstances. (*Ray*, *supra*, 13 Cal.4th at p. 366-367.) The *Ray* concurrence explained:

> "By providing in section 190.3 that '[a]s used in this section, criminal activity does not require a conviction' [], the Legislature made it clear that the prosecution could present evidence of criminal activity by the defendant involving the use or threat of force or violence even if that activity had not resulted in a conviction. At the same time, the Legislature **implicitly confirmed** that when the defendant had been convicted of a crime involving the use or threat of force or violence, the prosecution, of course, could rely upon that conviction to establish 'the presence ... of criminal activity' for purposes of section 190.3, factor (b). Particularly when this language of the 1977 version of section 190.3 is **considered in light of the consistent practice under the prior death penalty law**, I believe it would be absurd to interpret the 1977 statute as precluding the prosecution from relying upon a prior conviction of a crime involving the use or threat of force or violence to prove the presence of other violent criminal activity within the meaning of section 190.3, factor (b), and instead as **requiring the prosecution to try anew every prior violent crime offered in aggravation under factor (b), even when the defendant already had been convicted of the crime**.
>
> Such an interpretation would **fly in the face of past practice and would be quite impractical**, compelling the prosecution to relitigate fully - through the testimony of victims and witnesses and the presentation of physical and documentary evidence - each violent crime of which the defendant already had been convicted, and, at the same time, prohibiting the prosecution from bringing to the jury's attention

> at the penalty phase other violent criminal activity of the defendant that had resulted in a conviction, **whenever the physical evidence or witnesses presented in the earlier proceedings no longer were available**. (As noted, section 190.3, as it read in 1977, contained no separate factor referring explicitly to the defendant's prior 'convictions.') Nothing in the language or history of the 1977 legislation supports the claim that the Legislature intended to impose such limitations with regard to the proof of prior criminal activity of which the defendant had been convicted." (*Ray*, *supra*, 13 Cal.4th at p. 367-368, emphasis added.)

These two paragraphs from the *Ray* concurrence require a number of responses. First, if there truly was such a perceived problem with an interpretation of the 1977 law that precluded any use of prior felony convictions as aggravating evidence in capital penalty trials, then that could simply provide an explanation as to why the statute was amended only a year later to correct such a perceived flaw and to expressly allow the use of prior felony convictions, in and of themselves, as evidence in aggravation. Second, it is far from clear that the 1977 law did preclude the use of prior felony convictions in aggravation. The 1977 version of section 190.3, as quoted in the *Ray* concurrence, did state that evidence could be presented at the penalty trial regarding "**any matter relevant to aggravation**, mitigation, and sentence, including, but **not limited to** ... the presence or absence of other criminal activity by the defendant ..." (*Ray*, *supra*, 13 Cal.4th at p. 367, emphasis added.) Thus, the statute clearly contemplated the admission of more types of evidence than those that were expressly listed. Since prior felony convictions have always been deemed relevant to aggravation of the sentence, it would seem likely they would be deemed to come within the

provision allowing "any matter relevant to aggravation, mitigation, and sentence, ..." Indeed, this Court reached that very conclusion under the 1977 law in regard to an analogous prior juvenile commitment to the California Youth Authority, in *People* v. *Frierson* (1991) 53 Cal.3d 730, 747.[265]

Returning to the emphasized portions of the first of the two paragraphs from the *Ray* concurrence most recently quoted above, it is thus not at all clear how the 1977 version of section 190.3 "implicitly confirmed" the notion that the prosecution could utilize evidence of a prior conviction in order to prove the underlying conduct. Also, as has been shown in this discussion, there is nothing at all to support the conclusion that the consistent practice under the prior death penalty law had permitted the use of the fact of conviction to prove the underlying conduct. Indeed, as just noted, it is far more reasonable to conclude that the legislature implicitly confirmed the consistent practice under the prior law of allowing the proof of prior felony convictions, not to prove underlying conduct, but instead as aggravating factors in and of themselves.

That last conclusion, of course, answers the next dilemma posed in the emphasized portion of the first of the two quoted paragraphs from the *Ray* concurrence, and also answers the impracticality raised in the following paragraph of the *Ray* concurrence quoted above. A proper and practical analysis is as follows: If the prosecution wants to prove the underlying

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265 See also *People v. Boyd* (1985) 38 Cal.3d 762, 773, where the Court explained that under the 1977 law "the jury was free, after considering the listed aggravating and mitigating factors, to consider any other matter it thought relevant to the penalty determination."

conduct of other violent criminal activity, it can always do so by competent evidence of that conduct, regardless of whether that conduct resulted in a felony conviction. If the conduct did result in a felony conviction that occurred prior to the commission of the present capital crime, then that conviction can be introduced as evidence of the prior felony conviction aggravating factor. If the prosecutor wants to prove both the prior felony conviction aggravating factor and the other violent crimes aggravating factor, by showing the conviction and separately proving the underlying conduct, that can also be done. If the prosecutor is unable to prove the underlying conduct, or simply does not wish to go to the trouble of doing so, then the prosecutor can simply show the prior felony conviction and rely on one aggravating factor rather than two.

The kind of problem envisioned in the *Ray* concurrence only arises in extremely limited circumstances, which happen to include the present case. Here, there was a felony conviction, but it occurred **after** the present capital crime, so it was not admissible to support the **prior** felony conviction aggravating factor. Such circumstances will not arise frequently, and when they do, the facts that demonstrate the other violent criminality will have necessarily occurred more recently than the present capital crime. Thus, the problem of reproving old cases where witnesses and/or other evidence are no longer available will be rare or non-existent.

The *Ray* concurrence next went on to cite a great number of cases all claimed to be consistent with the conclusion that convictions are admissible to prove underlying conduct:

> "The conclusion set forth above is consistent with a host of this court's prior

> decisions interpreting and applying the current death penalty law. (See, e.g., *People* v. *Webster* (1991) 54 Cal.3d 411, 454; *People* v. *Frierson* (1991) 53 Cal.3d 730, 747; *People* v. *Daniels* (1991) 52 Cal.3d 815, 880-881; *People* v. *Hayes* (1990) 52 Cal.3d 577, 632-633; *People* v. *Whitt* (1990) 51 Cal.3d 620, 653-654, fn. 26; *People* v. *Lewis* (1990) 50 Cal.3d 262, 280; *People* v. *Lucky* (1988) 45 Cal.3d 259, 295; *People* v. *Melton* (1988) 44 Cal.3d 713, 754-757 & fn. 17; *People* v. *Gates* (1987) 43 Cal.3d 1168, 1201-1202 [failure to give reasonable doubt instruction harmless where defendant had been convicted of other crimes].)" (*Ray*, *supra*, 13 Cal.4th at p. 368-369.)

However, once again, a review of the cited cases shows no support at all for the conclusion of the *Ray* concurrence.[266] *Webster* was already analyzed earlier in this argument and was a case where there was no objection to the prior conviction, there was an obvious tactical reason for not objecting – to keep the underlying facts out - and no hearsay issue had been raised, nor could any be raised since the prior conviction was the result of a guilty plea

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266 Interestingly, in a footnote immediately following the list of citations in the paragraph just quoted, the concurring opinion acknowledges there is a contrary decision from this Court - *People* v. *Champion* (1995) 9 Cal.4th 879, 937, which "indicates that although evidence of a defendant's violent criminal activity underlying a juvenile adjudication of a violent crime is admissible to establish 'criminal activity' under section 190.3, factor (b), the fact of the adjudication itself is inadmissible." (*People* v. *Ray*, *supra*, 13 Cal.4th 313 at 369, fn. 2.) The *Ray* concurrence dismissed this conclusion in *Champion* because it did not consider the legislative history and other cases discussed in the *Ray* concurrence. However, as shown in this argument, a full consideration of such matters would not change the *Champion* conclusion at all. Indeed, none of the cases cited in the *Ray* concurrence contain any meaningful analysis either, so they are no more persuasive than the brief discussion in *Champion*.

and was therefore admissible as a party admission. *Frierson* did state, without analysis, that a prior juvenile adjudication was admissible to prove criminal activity involving force or violence, but cited only *People* v. *Hayes* (1990) 52 Cal.3d 577, 633 and *People* v. *Gallego* (1990) 52 Cal.3d 115, 195 to support its brief statement. *Hayes* was already discussed earlier in this argument and was shown to be much like *Webster*, and therefore equally inapplicable to resolve the issue. Similarly, *Gallego* contained no analysis and simply cited *Lucky*, another case discussed earlier in this argument and shown inapplicable for the same reasons as *Webster* and *Hayes*.

Daniels simply mentions that the prosecution introduced evidence of prior convictions, notes they were crimes of violence, admissible under both factor (b) and factor (c), and then notes in addition that the prosecution was not limited to documentary proof, but could also present evidence of underlying conduct. Nothing in those statements tells us just what was actually done in *Daniels*, and there is certainly no analysis or citations that support the proposition that convictions are admissible to prove conduct. *Hayes*, as noted, has already been discussed in detail above. *Whitt* states without analysis that prior felony convictions are admissible to support both factors (b) and (c), citing only *Melton*. *Melton*, interestingly, quotes *Gates* for the **opposite** concept, that "'[w]hen dealing with violent conduct **it is not the fact of conviction which is probative** in the penalty phase, but rather the conduct of the defendant which gave rise to the offense.'" (*Melton, supra*, 44 Cal.3d at 754, citing *Gates*, *supra*, 43 Cal.3d at 1203, emphasis added.) It is not at all clear how anything in the *Melton* discussion lends any support at all to the conclusion reached in the *Ray* concurrence.

Lewis merely noted that *Melton* said that offenses which qualify under both factor (b) and (c) may be used under both, but said nothing about how they were to be proved. *Lewis* then added that the prosecutor in that case expressly told the jury that the prior convictions were to be considered only as prior convictions and that there was no evidence of other violent criminal activity. *Lucky* and *Melton* have already been analyzed above. Finally, *Gates* did **not** simply hold "failure to give reasonable doubt instruction harmless where defendant had been convicted of other crimes," as stated following the *Gates* citation in the *Ray* concurrence. Rather, *Gates* found the error harmless because the evidence of the other crime presented to the *Gates* jury was overwhelming and was not challenged by any defense evidence. (*Gates*, 43 Cal.3d at 1202.)

Indeed, *Gates* nicely points up a very serious problem that was never addressed at all in the *Ray* concurrence. After noting the overwhelming and uncontested nature of the other crimes evidence presented to the *Gates* jury, this Court noted that Gates had previously been tried for those other violent crimes and the jury had been unable to reach a unanimous verdict. This Court recognized that inability caused no impediment to proving those other violent crimes beyond a reasonable doubt in the capital penalty trial, explaining "Whatever caused the Los Angeles jury to deadlock may have been impeaching evidence that was not presented here." (*Gates*, 43 Cal.3d at 1202.) The present case involves the other side of that coin; Steven Homick's counsel below argued repeatedly that evidence of the Nevada conviction should not be admitted because the present jury had heard substantial defense evidence that had never been presented to the Nevada jury.

That, of course, is the crux of the present problem. The simple fact is that in many, if not most, cases where there is evidence of other violent criminality that resulted in a felony conviction, the evidence will be so strong that there will not be a serious contest of the truth of the asserted underlying conduct. In contrast, in the present case, there was a very serious contest. Evidence presented to the present penalty jury, much of which was **not** presented to the Nevada jury, showed that Steven Homick subsequently possessed jewelry stolen at the time of the Tipton murders, but did not show how he came to possess that property. There was no evidence whatsoever that directly connected Steven Homick to the Tipton murders. There was substantial alibi evidence, supported by multiple witnesses, showing that Steven Homick was far from the murder scene at the time of the murders. The FBI had Steven Homick under surveillance the very day of the murders, starting not long after the murders, and noticed nothing unusual in his behavior. A witness who attributed an inculpatory statement to Steven Homick was impeached in numerous respects. In short, the proof of the Tipton crimes, as heard by the present jury, was extremely close at best. (See pp. 134-158 in the of Statement of Facts, *supra*.)

Just what was the jury supposed to do when it received strongly contested evidence, an instruction that it could not use the other criminal activity in aggravation unless it had been proved beyond a reasonable doubt, and evidence that another jury hearing different evidence had concluded that the defendant was guilty of the very crimes at issue in the current penalty trial? How was the jury to determine how much weight should be accorded to the fact that another jury had already found the defendant guilty? Did that, in and of itself, constitute proof beyond a reasonable doubt that the

defendant did commit the other violent crime? If it did, then what was the purpose of letting the defendant put on evidence to contest the fact? On the other hand, if it did not constitute proof beyond a reasonable doubt in and of itself, then what did it mean? Was it entitled to a little weight or a lot of weight? How could the jury possibly know what meaning to attach to the conclusion reached by a different jury that heard different evidence?

In sum, the present jury could assign weight to the conclusion of the Nevada jury **only** if it knew exactly what the Nevada jury had and had not heard, in comparison to the evidence the present jury heard.[267] Obviously, that was impractical. Without that, the jury had no standards or guidelines or even a clue as to what weight to give to such evidence. In *People* v. *Venegas* (1998) 18 Cal.4th 47, 82, a recent and unanimous decision, this Court recognized the importance of giving a jury sufficient information to allow it to make a reasoned determination of the weight to be accorded to the evidence it receives:

> "A determination that the DNA profile of an evidentiary sample matches the profile of a suspect establishes that the two profiles are consistent, but the determination would be of **little significance** if the evidentiary profile also matched that of many or most other human beings. The **evidentiary weight** of the match

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267 In the present case, the defense did make an effort to identify, through various witnesses, a number of aspects of the present evidence that was not heard by the Nevada jury. (See, e.g., RT 140:17802, 141:17972.) However, it would have been difficult, if not impossible, to do this completely. Moreover, it was patently impossible to inform the present jury of evidence that was heard by the Nevada jury, but was **not** heard by the present jury.

> with the suspect is therefore inversely dependent upon the statistical probability of a similar match with the profile of a person drawn at random from the relevant population." (Emphasis added.)

The same point was made, also in the DNA context, in *People* v. *Wallace* (1993) 14 Cal.App.4th 651, 660, fn. 3:

> "The Attorney General also takes issue with our comment in *Barney* that DNA analysis evidence '**means nothing** without a determination of the statistical significance of a match of DNA patterns.' (*People* v. *Barney*, *supra*, 8 Cal.App.4th at p. 817.) We can only respond by quoting the experts in the NRC report: 'To say that two patterns match, without providing any scientifically valid estimate (or, at least, an upper bound of frequency with which such matches occur by chance, is **meaningless**.' (NRC, *DNA Technology in Forensic Science*, *supra*, at p. 74; see also *People* v. *Axell* (1991) 235 Cal.App.3d 836, 866 ['a match between two DNA samples means little without data on probability'].) Perhaps it is more accurate to state, as we also did in *Barney*, that evidence of a match 'is incomplete without an interpretation of its significance.' (*People* v. *Barney*, *supra*, 8 Cal.App.4th at p. 822.)" (*Wallace*, *supra*, 14 Cal.App.4th at p. 660, fn. 3, emphasis added)

In the same manner, once a jury has heard closely contested evidence concerning a prosecution allegation of prior violent criminal conduct, evidence of a conviction by another jury **means nothing** in regard to the truth of the underlying conduct allegation, without clear knowledge of what evidence was and was not heard by that other jury. Evidence that means nothing has no tendency in reason to prove or disprove any disputed fact,

and is therefore not relevant.[268] Evidence that is not relevant is not admissible.[269] Of course, when evidence of a prior conviction is introduced to establish the prior conviction aggravating factor, the analysis is different. Then, it is the fact of the conviction itself that is relevant.

Alternatively, even if evidence of a conviction by another jury is deemed to have **some** relevance toward proving the underlying conduct, that relevance is slight, at best, when the jury has no basis for determining how much weight should be given to the fact of the other conviction. Pursuant to Evidence Code section 352, that slight relevance would **always** be outweighed by the inevitable danger of confusing the jury with evidence that has little real meaning, but is likely to be seen as important, if not decisive, by lay jurors. Thus, even if it were appropriate to ignore the rules of evidence and permit use of a prior conviction to serve as evidence supporting an allegation of prior violent criminal activity in a penalty trial where the allegation is essentially uncontested, it should never be permitted when the jury is presented with evidence strongly disputing whether the defendant was involved in the underlying conduct.

Of course, the problem is greatly magnified when, as here, the jury is given no guidance whatsoever in the instructions to help determine what they are to do with the evidence that a Nevada jury reached a guilty verdict.

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268 See Evidence Code section 210: "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

269 See Evidence Code section 350: "No evidence is admissible except relevant evidence."

Similarly, any slight relevance is **necessarily** outweighed by the potential prejudice to the defendant, at least in cases like the present one, where the evidence of the Tipton crimes at the penalty trial was extremely close. Faced with such close evidence on such an important matter, a jury would be unreasonably tempted to simply defer to the findings of the Nevada jury, which had already found guilt. Indeed, the present penalty jurors could not have helped but wonder why evidence of the Nevada conviction was revealed to them at all, if it was not to be considered decisive.

In sum, any effort to utilize another jury's guilty verdict as proof of the other violent criminality aggravating factor leads to insurmountable problems **which were not even discussed or acknowledged by the *Ray* concurrence**. This would be reason enough alone for this Court to undertake a serious re-analysis of this important issue. However, as shown above, this is not the only reason for such a re-analysis; it is also evident that **none** of the many cases cited in the *Ray* concurrence actually offer any meaningful support for the conclusions reached in that concurrence.

The final section of the *Ray* concurrence also fails to withstand analysis. In that section, in a single paragraph, the concurring opinion sought to dismiss the significance of this Court's seemingly determinative decision in *Wheeler*:[270]

> "Contrary to defendant's contention, this court's recent decision in *People* v. *Wheeler* (1992) 4 Cal.4th 284 provides no basis for questioning the above authority. Although

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[270] Notably, Chief Justice George, the author of the *Ray* concurrence, had joined the majority opinion in *Wheeler*.

> *Wheeler* observed that, as a general matter, a record of conviction is 'hearsay' when offered as evidence to prove that the underlying criminal conduct was committed (*id.* at p. 298), and our decision applied that general legal principle in resolving the question whether a misdemeanor conviction is admissible for impeachment purposes (*id.* at pp. 299-300), ***Wheeler* did not consider the permissible use of evidence of a prior conviction in a sentencing context, and did not examine the history of the use of prior convictions in California penalty phase proceedings or the language or legislative intent of section 190.3.** Whatever may be true with regard to the limitations on the use of prior convictions in other contexts, I believe it is clear that, under the provisions of the governing death penalty statute, the prosecution may rely upon a prior conviction of a crime involving the use or threat of force or violence to establish the presence of criminal activity involving the use or threat of force or violence for purposes of section 190.3, factor (b)." (*Ray, supra,* 13 Cal.4th at p. 369; emphasis added.)

While it is true that *Wheeler* did not deal with the sentencing context, the *Ray* concurring opinion fails to explain why that should make any difference at all. It is true that in **some** sentencing contexts, certain types of hearsay evidence are permissible (see, for example, *People* v. *Goodner* (1990) 226 Cal.App.3d 609, 615). But that means nothing in the context of a capital penalty trial, where the Eighth and Fourteenth Amendments impose a heightened need for reliability in the jury's sentencing determination. (*Zant v. Stephens* (1983) 462 U.S. 862, 879 (Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination); *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (same); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85 (same).) In the context of a capital penalty trial,

it is clear that the same rules of evidence apply as would apply in the guilt trial. (*People* v. *Edwards* (1991) 54 Cal.3d 787, 838.) Indeed, if a California police officer was called as a witness in a capital penalty trial and testified that a Nevada police officer had told him that he witnessed Steven Homick commit violent criminal conduct, nobody would argue that such evidence was admissible just because this occurred in a sentencing context. There is no more reason to conclude that *Wheele*'s hearsay analysis is somehow inapplicable in a capital penalty trial.

The only other basis given by the *Ray* concurrence for failing to apply *Wheeler* was *Wheeler*'s failure to "examine the history and use of prior convictions in California penalty phase proceedings or the language or legislative intent of section 190.3." However, it has already been shown in this argument that such an examination does not result in any meaningful support for the conclusions reached by the *Ray* concurrence.

In sum, there are at least three very serious flaws with the analysis set forth in the *Ray* concurrence, any one of which should lead this Court to seriously re-examine the matter. First, the *Ray* concurrence does not actually contain any persuasive support in California case law or statutes for its conclusions. Second, the *Ray* concurrence does not contain any persuasive basis for disregarding the clearly inconsistent holding of this Court in *Wheeler*. Third, the *Ray* concurrence does not address at all the very serious problems that result when a capital penalty phase jury is given evidence that another jury found the defendant guilty, but is not given any information that would allow a rational assessment of the amount of weight to give to that evidence, in regard to proving the truth of the underlying conduct allegation. Where that allegation is factually contested, the introduction of such

evidence adds an arbitrary and irrational factor that unfairly weighs against the defendant and undermines the reliability of any finding of factor (b) aggravation and of any ensuing death verdict.

Finally, in addition to all of these problems with the *Ray* concurrence, Justice Mosk's dissent in *Ray* exposes additional flaws. The dissent begins with an even more detailed history of California's death penalty law. An important principle established in the historical overview shown in the dissent is that California has always employed the same rules of evidence in regard to capital penalty proceedings as apply in regard to guilt. Thus, there is no historical basis whatsoever for concluding that hearsay restrictions applicable at a guilt trial are somehow relaxed at a capital penalty proceeding. (*Ray, supra*, 13 Cal. 4th 313 at 370-376.) In particular, the dissent quoted from *People* v. *Nye* (1969) 71 Cal.2d 356, 372: "Objectionable hearsay evidence is no more admissible at the penalty phase than at the guilt phase."[271] This key point, even standing alone, would be enough to make it clear that *Wheeler* must control the present issue. (See also *Crawford v. Washington* (2004) 541 U.S. 36.)

After the historical overview of California's death penalty law, Justice Mosk set forth an incontrovertible step-by-step analysis of the present issue, which makes clear that hearsay is no more admissible at a capital penalty phase than at a guilt trial, and that a prior felony conviction is inadmissible

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271 This passage from *Nye* was also quoted in *People* v. *Edwards* (1991) 54 Cal.3d 787, 838, in regard to the 1978 death penalty law under which the present case was tried.

hearsay when it is offered to prove the defendant actually engaged in the underlying conduct. (*Ray, supra*, 13 Cal.4th 313, 376-377.)

Next, Justice Mosk's dissent discusses some of the cases relied on by the *Ray* concurring opinion, showing how they do not support the conclusions reached in that opinion. (*Ray, supra*, 13 Cal.4th 313, 377-379.) Justice Mosk also explains how the problems feared in the *Ray* concurring opinion are not really problems: If the prosecution prefers not to bring in witnesses to prove the conduct that would support the other violent criminality aggravation factor, it will often be able to utilize a recognized hearsay exception. For example, in many cases the defendant will have made admissions in regard to the prior conduct that can be introduced against him. If witnesses are truly unavailable, their former testimony in the prior proceedings can be admitted in the present penalty trial. Furthermore, a review of the many capital cases actually decided by this Court demonstrates that prosecutors are usually eager to prove the actual conduct with live witnesses, and it is usually the defendant who would prefer proof by documents rather than live witnesses. If there are rare cases where the prosecution is somehow unable to prove the underlying conduct by competent evidence, then the result is only that which is required by the rules of evidence. (*Ray, supra*, 13 Cal.4th 313, 379-380.)

Thus, for all the reasons set forth in Justice Mosk's dissent, plus the reasons set forth above, the conclusion in the *Ray* concurring opinion should simply be recognized as wrong. The trial court erred seriously in allowing the prosecutor to use the fact of the Nevada conviction as evidence that Steven Homick committed the underlying conduct. The fact of the Nevada conviction was not admissible to support the prior felony conviction

aggravating factor, since the conviction did not occur until **after** the present capital crime. Thus, there was no basis at all for the jury to learn of the Nevada conviction.[272]

The prejudicial impact of this error is also clear. As shown earlier in this argument, the evidence against Steven Homick in regard to the Tipton crimes (set forth above in detail in the penalty phase statement of the facts portion of this brief at pp. 134-158), was very close and hotly contested. The jury was given the fact of the Nevada conviction and was given no guidance whatsoever as to how they should assign weight to that fact. Guidance was needed because it would not be at all apparent to the jurors how they should assess appropriate weight to the fact of the conviction, but guidance was impossible because there simply was no way to assign appropriate weight to the conclusions of different jurors who had heard different and unknown evidence. On the other hand, since the jurors were told of the Nevada conviction, they would naturally have believed it meant something, and the logical meaning to lay jurors would have been that it should be considered determinative. Even if that conclusion was not reached, then at the very least it was likely to be a decisive factor in an otherwise close and difficult case.

The Tipton murders formed the heart of the prosecution case in aggravation. No prior felony convictions were shown and no other violent criminal activity was shown. If the jury, relying in part on the Nevada

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272 Recognition that the concurring opinion in *Ray* is wrong is not in any way unfair to the prosecution in the present case, since the trial court made its ruling below well before *Ray* was decided in 1996, and could not have been influenced by that decision.

conviction, concluded the Tipton murders had been proved beyond a reasonable doubt, then they believed Steven Homick was responsible for five murders on two separate occasions in two different states. On the other hand, if the jury had not been told of the Nevada conviction, and had found a reasonable doubt as to the Tipton crimes, as they easily could have, then they would have been determining the sentence for a man convicted of two murders on a single occasion, and who had no other felony convictions or other violent criminality. None of the five alleged co-conspirators received a death sentence for the Woodman crimes, and there is "a reasonable (i.e., realistic) possibility" that, absent the evidence of the Nevada conviction, Steven Homick also would have received a more favorable result. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Certainly there is no basis for concluding beyond a reasonable doubt that the improperly admitted Nevada conviction did not contribute to the jury's penalty verdict. *(Chapman v. California* (1967) 386 U.S. 18, 24.)

This error resulted in the deprivation of Steven Homick's federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial on penalty in accordance with due process of law, to confront the witnesses against him, to effectively cross-examine the witnesses, and to reliable fact-finding underlying capital penalty phase verdicts. (*Crawford v. Washington* (2004) 541 U.S. 36; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois*

(1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

D. Even if The Nevada Conviction Did Not Constitute Inadmissible Hearsay, It Was an Abuse of Discretion to Refuse to Preclude It Pursuant to Evidence Code Section 352

As explained in the factual and procedural summary earlier in this argument, counsel for Steven Homick separately contended that the Nevada prior conviction should be excluded under Evidence Code section 352. Thus, even if this Court follows the *Ray* concurring opinion and finds no hearsay problem, the Evidence Code section 352 problem must still be addressed.

As shown in the preceding section of this argument, the Nevada conviction had little or no probative value because the jury had no conceivable way to determine the appropriate weight that should be attached to that evidence. It was also shown that the danger of confusion was high and the potential for prejudice was even higher. Further, the potential for prejudice extended not only to the jury's crucial determination concerning the accuracy of the Tipton-murders allegation, but also as to Steven Homick's entitlement to mitigation under sentencing factor (b) (the absence of prior felony convictions). The potential distorting impact applied to both sides of the sentencing scale. Thus, even ignoring the hearsay problem, it was an abuse of discretion to overrule the defense Evidence Code section 352 objection, in a case where the actual evidence regarding the Tipton murders was close and hotly contested, and the defendant had no prior

convictions within the meaning of the "prior felony convictions" sentencing factor. That error deprived Steven Homick of his federal 5th, 6th, 8th, and 14th Amendment rights, for all the same reasons set forth in the preceding section, and was prejudicial under both the applicable state-law and federal constitutional standards. (*People v. Brown*, *supra*, 46 Cal.3d at 448; *Chapman v. California*, *supra*, 386 U.S. at 24.)

E. Even If It Was Somehow Proper to Admit the Fact of the Nevada Conviction, the Trial Court Nonetheless Erred in Failing to Instruct the Jury Regarding the Significance of the Nevada Conviction

In the previous sections of this argument, it was contended that the Nevada conviction was inadmissible to prove the underlying conduct for the purpose of the other violent criminality aggravating factor. It was shown that one problem with admitting such evidence was that the jury had no basis whatsoever for determining the appropriate weight to give to the Nevada conviction.

Even if this Court chooses to follow the conclusion reached in the *Ray* concurring opinion, and find that it was proper to admit the fact of the Nevada conviction, the problem of guidance for the jury must still be addressed.

As shown in the factual and procedural background section of this argument, counsel for Steven Homick expressly raised the problem of the need to provide some guidance to the jury regarding what use should be made of the Nevada conviction. (RT 135:16965, 16976.) The Court promised to take care of the problem, but later gave no instruction at all on

the subject. (RT 135:16967-16968, 16976.) Thus, the jury was left with no guidance whatsoever.

"A court must instruct *sua sponte* on general principles of law that are closely and openly connected with the facts presented at trial. (*People* v. *Wickersham* (1982) 32 Cal.3d 307, 323, disapproved on other grounds in *People* v. *Barton* (1995) 12 Cal.4th 186, 200-201.)" (*People* v. *Ervin* (2000) 22 Cal.4th 48, 90.) Certainly the question of how to determine the appropriate weight to assign to the fact that another jury in another state hearing different evidence found Steven Homick guilty of the Tipton murders beyond a reasonable doubt, was closely and openly connected with the presentation of evidence of the Nevada conviction at the present penalty trial. Indeed, here Steven Homick was not merely relying on the trial court's *sua sponte* duty. Here, counsel for Steven Homick expressly brought the problem to the court's attention. (RT 135:16965.)

Even if the *Ray* concurring opinion continues to be followed, the fact remains that it does not address in any way the manner in which a jury must be instructed regarding how to deal with such evidence. In this case, once the trial court allowed the Nevada conviction into evidence, it behooved the court to instruct the jury in language along the following lines:

> As evidence in support of its contention that Steven Homick was culpably involved in the murders of Bobbie Jean Tipton, Marie Bullock and James Myers in Nevada on December 11, 1985 and hence has engaged in other violent criminal activity, the prosecution has introduced evidence that Steven Homick was convicted of those murders in a trial in a Nevada court. You are instructed that the prior conviction is not to be taken by you as conclusively establishing Mr. Homick's guilt of those murders,

> since you may have heard evidence that was not available to the Nevada jury that found him guilty. You are to determine whether Mr. Homick was culpably involved in those murders in light of all the evidence presented to you, including the fact of the Nevada conviction. You should give such weight to the Nevada conviction as you deem appropriate in light of what you know concerning any differences in the evidence presented here and in the Nevada trial. If you do not feel you know enough about the differences between the two trials to make such a determination, you should disregard the fact of the Nevada conviction and decide the matter on the basis of the other evidence presented to you.

There may be other wordings that would have been equally or more apt. But even if this Court were to adopt an appropriate instruction for this situation in future trials, the fact remains that no such instruction was given at Steven Homick's trial. Leaving the jury with no guidance at all inevitably invited the jury to accept the Nevada conviction as determinative, thereby negating Steven Homick's right to have the other violent criminality aggravating factor proved beyond a reasonable doubt. For all the reasons set forth in the preceding sections of this argument, the failure to instruct the jury on how to deal with this evidence was prejudicial error, and deprived Steven Homick of his federal 5th, 6th, 8th, and 14th Amendment rights to a fundamentally fair jury trial in accordance with due process of law, and to a reliable penalty verdict, even if it was proper to admit the evidence in the first place. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410

U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

F. The Court Also Erred in Refusing to Instruct That There Were No Prior Felony Convictions

As shown in the factual and procedural background section of this argument, the defense requested that the jury be instructed that Steven Homick had no prior felony convictions, and that the lack of prior felony convictions was a mitigating factor. The prosecutor agreed that the jury should be instructed that there were no prior felony convictions. The court refused to so instruct, believing such a statement was untrue in light of the evidence of the Nevada conviction.

As discussed above, the court was wrong, since the Nevada conviction was not a **prior** felony conviction. But if the court was confused by such concepts, surely the jury would have been also. The court did amend the standard CALJIC instruction regarding the consideration of the presence or absence of prior felony convictions as evidence in aggravation or mitigation. Instead, the instruction as given referred only to considering the absence of prior felony convictions, and did not mention the presence of such convictions. But based on the instructions that were given, the jury could only conclude (as the judge apparently did) that the Nevada conviction did constitute a prior felony conviction. That would cause the jury to

erroneously fail to consider the absence of prior felony convictions as a mitigating factor.

It is true that the prosecutor, in his penalty phase argument, noted, "Prior means prior to the date of the Woodman crimes. There is none and that's a mitigating factor." (RT 144:18296, ll. 12-13.) However, that brief and mild reference by the prosecutor was not an adequate substitute for proper instructions by the court. The absence of any prior felony convictions was the strongest evidence in mitigation for Steven Homick. Thus, this error must also be deemed prejudicial, and also deprived Steven Homick of his federal 5th, 6th, 8th, and 14th Amendment rights to a fundamentally fair jury trial in accordance with due process of law, his right to have the sentencing body consider and give weight to all available mitigation, and his right to a reliable penalty verdict. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

XIV. THE TRIAL COURT ERRONEOUSLY REFUSED TO ALLOW A FULL CHALLENGE TO THE CONSTITUTIONAL VALIDITY AND RELIABILITY OF THE NEVADA PRIOR CONVICTION

A. Introduction

In the preceding argument, it was contended that the trial court erred in admitting evidence that Steven Homick had been convicted by a Nevada jury of the crimes that were offered in support of the other violent criminality aggravating factor. In the present argument, it will be shown that even if it was proper to admit evidence of a conviction to prove the underlying conduct, the trial court nonetheless erred in refusing the defense request to determine *de novo* the constitutional validity of the Nevada conviction, and further erred in refusing to allow Mr. Homick to make a full showing before the jury concerning the deficiencies in the defense afforded him in the Nevada proceedings.

B. Factual and Procedural Background

On May 5, 1993, after the trial court ruled that the prosecution would be permitted to place documents into evidence that would show that Steven Homick had been convicted of the Tipton murders by a Nevada jury, counsel for Steven Homick sought a continuance to prepare a request for a hearing regarding the constitutional validity of the Nevada conviction. Counsel contended that Steven Homick had been denied his federal 6th Amendment right to the effective assistance of counsel in the Nevada jury trial. The court refused to grant any continuance and initially ruled that she would consider

only a written motion and the transcripts from the Nevada trial. (RT 135:16976-16977.)

Counsel agreed to file a written motion by the end of the week, but the court expressed concern about delaying even that long. The court agreed that the issue was very significant, but she insisted there was no need to file a formal motion. Instead, she needed only enough information to give her some focus.[273] Then she would read the transcripts of the Tipton trial day and night while the instant penalty trial was proceeding.[274] The prosecutor argued that no determination was necessary because the Nevada conviction had already been upheld on an appeal to the Nevada Supreme Court. Counsel for Steven Homick responded that ineffective assistance of counsel had not been raised as an issue on appeal in Nevada, but that it was likely to be raised on post-conviction review. (RT 135:16978-16980.)

Soon afterward, counsel for Steven Homick realized the issue could not be adequately addressed based only on the transcripts of the Nevada trial. His challenge to the effective assistance of counsel during the Nevada trial would be based more on what had **not** been done, rather than on what had been done. Thus, he would need to base the motion on declarations regarding witnesses who were not called by the defense, but who should have been called, such as Raymond Jackson who saw what was apparently the vehicle

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273 Thus, if there were any technical deficiencies in the defense offer, they should be excused. The court made it clear the defense need not be concerned about details, but should instead merely provide a general idea on what the court was to consider.

274 The transcripts of the Nevada trial consisted of sixteen volumes, filling two boxes. (RT 135:16990.)

used by the Tipton killer in the Tipton driveway at a time when Steven Homick had a solid alibi. (RT 135:16987-16988.)

At this point, the trial court asked whether it would be proper for her to question the validity of a conviction that had already been affirmed on appeal in Nevada. She wanted to read the Nevada Supreme Court opinion before deciding whether to proceed further. (RT 135:16993.)

Later that day, defense counsel sought permission to file his motion challenging the Nevada conviction under seal, since it would reveal much of the planned defense to the penalty phase evidence of the Tipton crimes. The judge agreed to first review the motion *in camera*, and make a preliminary determination whether a prima facie showing had been made. Defense counsel agreed that if a prima facie case were found at an *in camera* hearing, then the defense would go forward in a full adversarial hearing. (RT 135:17010-17011.)

The following day, the court announced it had received a handwritten declaration from counsel for Steven Homick, under seal, in support of the challenge to the Nevada conviction.[275] The court had also read the opinion

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275 That declaration contended Raymond Jackson was not called as a witness in the Nevada trial and would have testifiedhe saw a white pickup truck in the Tipton driveway between 9:30 and 10:00 AM on December 11, 1985, at a time when Steven Homick had a strong alibi; that James Hampton did not testify at the Nevada trial and would have testified saw a man who looked like Kelly Danielson acting suspiciously near the Tipton home between 9:30 and 10:30 AM; that neither Art Taylor nor Agent Livingston, who did testify in Nevada, were asked then about Taylor being with Steve Homick on December 11, 1985, around 10:00-10:30 AM as such information was not provided to the Homick defense until after the Nevada

(Continued on next page.)

of the Nevada Supreme Court affirming the Tipton judgment, and portions of the more detailed factual summary in the Appellant's Opening Brief from the Nevada appellate proceedings. The court then stated, "I have considered all of that and the motion is denied." (RT 136:17018.)

Subsequently, the defense alerted the court that it intended to call witnesses to establish before the penalty jury that Steven Homick was denied his right to effective assistance of counsel in the Nevada proceedings. Counsel proposed to call one or more witnesses who would describe what was done by the attorneys representing Steven Homick in the Nevada trial, and explain why they believed an inadequate defense was presented.[276] The prosecutor argued that was a legal issue for the court, rather than a jury issue. The court deferred the matter in order to do some research. (RT 138:17340-17341.) On the following court day, the court ruled that no threshold showing had been made that would justify questioning the effectiveness of Nevada counsel before the present jury. (RT 139:17540-17541.)

After the penalty trial, the issue was raised once again, in the motion for a new trial. (Penal Code section 1381.) The motion for a new trial was filed on January 14, 1994. (See SCT 7:1894 *et seq.*) Forty-two issues were

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(Continued from last page.)

trial; and that cross-examination of Michael Dominguez in Nevada was inadequate. (See SCT 2-6:1491-1505.)

276 Counsel described the proposed witnesses as either expert witnesses or attorneys who were representing Steven Homick on his appeal from the Nevada conviction. Counsel explained he was seeking an initial determination whether such evidence could be presented, before seeking the funds that would be necessary to obtain the witnesses. (RT 138:17340-17341.)

listed. (SCT 7:1898-1907.) Number 38 stated: "The trial court erred when it refused to allow the defense to present evidence to the jury in penalty that the Tipton convictions were obtained in violation of defendant's fundamental constitutional rights to due process and effective assistance of counsel." (SCT 7:1906.) Supplemental Points and Authorities in support of the new trial motion, filed on September 29, 1994, reiterated the argument that Steven Homick had been denied his federal 5th and 14th Amendment rights to equal protection and to due process of law by the refusal to allow a full hearing into the constitutional validity of the Tipton murder conviction. (See SCT 7:2140-2143.)

At the hearing on the motion for a new trial, counsel for Steven Homick referred to Exhibit F, attached to the Supplemental Points and Authorities. He described Exhibit F as a package of exhibits that had been offered in Nevada state habeas corpus proceedings, representing some of the evidence that would have been developed in the present proceeding if the defense had been given a full hearing on the constitutional validity of the Nevada conviction. (RT 148, 18644, 18648.) In denying the motion for a new trial, the Court explained in more detail the rationale that had apparently been the basis for the previous denials of defense requests for a full hearing:

> "As far as the constitutionality of the defendant's prior convictions, defendant contends the court erroneously denied him a hearing on the constitutional validity of his prior conviction.
>
> His conclusion is without merit. Preliminarily, I will state that all the cases cited by the defendant in support of the court's duty to

> inquire into the constitutional validity of a prior where it's requested are cases where the defendant's prior was based on a guilty plea, the validity of which raises legal issues for the court.
>
> Here the validity of the conviction which was suffered following a jury trial was explored during the penalty phase when all the evidence surrounding the convictions was offered to the jury.
>
> The conviction admitted had been affirmed on appeal by the Nevada Supreme Court. This court declined an invitation to revisit the issues that had been resolved by the Nevada Supreme Court and the defendant's motion for a new trial is denied." (RT 148:18662-18663.)

As will be shown, there are a number of flaws in the court's reasoning.

As noted above, Exhibit F attached to the Supplemental Points and Authorities represented part of the showing the defense would have made if a full evidentiary hearing had been permitted. That exhibit consisted of the following documents:

1. Letter dated April 30, 1987 from Clark County, Nevada Chief Deputy District Attorney Teuton to Los Angeles County Deputy District Attorney Krayniak (SCT 7:1941.)
2. Joint Investigative Documents:
   a. Press Release (3/17/89) (SCT 7:1942-1943.)
   b. Letter Dated 1/6/85 – Dillard – Holder (SCT 7:1944-1945.)
   c. FBI Release (7/25/89) (SCT 7:1946.)
3. Letter Dated February 15, 1989, from William H. Smith, Nevada counsel for Steven Homick, to Clark County Nevada Deputy District Attorney Melvin T. Harmon (SCT 7:1947-1950.)

4. Motion to Continue filed in the Nevada trial court by Steven Homick's Nevada defense counsel on March 31, 1989 (with exhibit) (SCT 7:1951-1963.)

5. Report of Las Vegas Detective Karen Good (12/16/85) (SCT 7:1964-1968.)

6. Testimony of Raymond Jackson at Steven Homick's California penalty phase trial (5/17/93) (SCT 7:1969-1974.)

7. Testimony of James Hampton at Steven Homick's California penalty phase trial (5/17/93) (SCT 7:1975-1990.)

8. Testimony of Manuel Correira at Steven Homick's California penalty phase trial (5/19/93) (SCT 7:1991-2026.)

9. Testimony of Art Taylor at Steven Homick's California penalty phase trial (5/13/93) (SCT 7:2027-2044.)

10. Testimony of Special Agent Livingston at Steven Homick's California penalty phase trial (5/11/93) (SCT 7:2045-2074.)

11. Cover Letter and Notes of Special Agent Livingston (5/11/93) (SCT 7:2075-2087.)

To the extent these documents are pertinent to the issue of the effectiveness of Steven Homick's Nevada representation and the reliability of the Nevada conviction, they may be summarized as follows:

The April 30, 1987 letter from Clark County Chief Deputy District Attorney Teuton to Los Angeles County Deputy District Attorney Krayniak contains a candid discussion of the need to get Steven Homick returned to Las Vegas for trial on the Tipton crimes as soon as possible, to minimize the time available for his appointed Nevada counsel to review the extensive

discovery. (SCT 7:1941.) The February 15, 1989 letter, from William H. Smith, Nevada counsel for Steven Homick, to Clark County Nevada Deputy District Attorney Melvin T. Harmon, seeks to resolve outstanding discovery issues and shows that, just two months before the Tipton murder trial began, Steven Homick's Nevada counsel was still struggling to obtain very basic information in discovery. For example, the defense was still seeking transcripts of prior testimony in other proceedings, about the investigation of Steven Homick, by such important witnesses as Las Vegas Detectives Dillard and Leonard, FBI informant Stewart Siegel, Michael Dominguez, and FBI Agent Doherty. The defense was still seeking to obtain such items as statements made by crucial witnesses such as Larry Ettinger, Susan Hines, and Tim Catt, as well as pen registers pertaining to Ettinger, Hines, and William Homick. The defense was also still seeking FBI surveillance reports pertaining to Michael Dominguez and Steven Homick, in the time periods close to the time of the Tipton homicides. (SCT 7:1947-1950.)

The March 31, 1989 Motion to Continue Trial was filed by Steven Homick's Nevada attorneys William H. Smith and Donald J. Green. They noted that the trial was set to begin on April 17, 1989. In a declaration supporting the request for a continuance, counsel noted that on March 16, 1989, Steven Homick had been indicted by a federal grand jury on racketeering charges involving the Tipton murder allegations, among other alleged criminal activity. The declaration went on to explain that contents of the federal indictment demonstrated that a broad federal investigation into

these matters had occurred,[277] and that the Federal Bureau of Investigation had acquired substantial information pertinent to the Tipton crimes. Counsel for Steven Homick were attempting to gain discovery from federal agencies, but the federal agencies were refusing to turn over any of the materials until a later time, when they would be turned over to counsel who would be appointed for Steven Homick in the upcoming federal proceedings.[278] Thus, counsel was seeking a continuance of the Tipton murder trial until after Steven Homick's trial in the federal case, so that full discovery pertaining to the federal investigation would be available. Counsel also noted that Lawrence Ettinger was a key defense alibi witness in regard to the Tipton murders, but that he was likely to be unavailable to testify because he had been among those indicted with Steven Homick on the federal racketeering charges. Counsel closed by stating he did not believe he could provide effective assistance to Steven Homick without receiving full discovery from the Federal officials. (SCT 7:1955-1959.)

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277 See also the 3/17/89 Press Release (SCT 7:1942-1943), and the 7/25/89 FBI Release (SCT 7:1946), further demonstrating that a substantial joint investigation had been undertaken by state and federal officers.

278 See the letter dated March 28, 1989, from United States Department of Justice Attorney-in-charge Terry R. Lord, to Steven Homick's Nevada counsel William H. Smith, stating the federal government's "closed-file" position, and its unwillingness to turn over the discovery that would eventually be made available to federal defense counsel, would remain in effect until after a formal discovery motion by eventual federal counsel. That letter was attached to the motion to continue filed in the Nevada state proceedings. (SCT 7:1961.)

The motion for a continuance was apparently unsuccessful, as the Tipton trial got underway on April 10, 1989, and ended on May 21, 1989. (CT 17:4703, ll. 2-3.)

The December 16, 1985 report of Las Vegas Detective Karen Good contained information regarding potential witnesses to the events at the Tipton residence the morning of the homicides. Included was a reference to Raymond Jackson, who recalled seeing a small white pickup truck parked in the Tipton driveway between 9:30 and 10:00 AM on December 11, 1985, the date of the Tipton murders. (SCT 7:1966.)

The testimony of witnesses Raymond Jackson, James Hampton, Manuel Correira, Art Taylor, and Special Agent Livingston was testimony that had been presented at the present penalty trial. Their testimony was may be summarized as follows:

Raymond Jackson was employed by the Clark County Parks and Recreation Department and had passed by and noticed the Tipton residence on many occasions. The residence caught his attention because it was a nice home and because of the trucks, motorcycles, and four-wheel drive vehicles normally visible there. On December 11, 1985, the day of the Tipton murders, he was at a school directly across from the residence, to repair a break in the sprinkler system. He noticed a small white pickup truck parked in the Tipton driveway between 9:30 and 10 AM. He noticed the commotion at the house later and conveyed his information to the police in the early afternoon. Mr. Jackson had never been called to testify about these matters prior to his appearance at the present penalty phase. (RT 141:17960-17965.)

James Hampton, Jr., lived in the same neighborhood as the Tiptons and also worked as a builder, constructing a new home near the Tipton

residence. On December 11, 1985, between 9:30 and 10:30 AM, he was driving slowly through the area when he noticed a man walking from the cul de sac where the Tipton home was, across some adjoining vacant property. The man appeared to make a point of avoiding eye contact. He was walking briskly and appeared out of place. Hampton's own children attended the nearby school, and he also coached kids at the school, so he took special notice of anybody in the area who seemed out of context. Hampton noticed the commotion at the Tipton residence around 1:30 PM and he told the police about this the following day, giving his name and address. They never contacted him again. Eventually a defense investigator contacted him and showed him a photo. Hampton could not make an identification, but said the photo did resemble the man he had seen. The photo depicted Kelly Danielson. Mr. Hampton had never been called to testify about these matters prior to his appearance at the present penalty phase. (RT 141:17967-17981, 18051.)

Manuel Correira and Michael Dominguez were in custody together in the "hole" in the Clark County jail in 1989. Correira read a newspaper article about Steven Homick and the Ninja murders. Correira noticed this because he had previously met Steven Homick when they were in custody together. When Correira mentioned this news article to Dominguez, the latter responded that Steve Homick did not commit the Tipton murders; rather, they were committed by Dominguez and Kelly Danielson, and Steve Homick was not present. Afterward, Dominguez had given Danielson's share of the jewelry from the Tipton home to Steven Homick. Correira did not believe he had ever before testified in court about his conversations with Dominguez. (RT 141:18076-18080, 18107.)

Art Taylor explained that on the morning of December 11, 1985, Steven Homick picked up Taylor at Taylor's shop and drove him to a bank several blocks away where they cashed a check. Steve was driving Larry Ettinger's Cadillac. They returned to Art's Shop but were interrupted at 10:30 AM when Steve was paged on a beeper and said he had to leave and pick up Larry Ettinger and Susan Hines at an attorney's office. At that time of day it would have taken 15-20 minutes to drive from Taylor's shop to 6th and Bridger. Less than two hours later, Taylor relayed these events to FBI Agent Livingston.[279] Taylor was never called as a witness during the Nevada Tipton trial. (RT 140:17797-17800.)

The testimony of Agent Livingston which was included in the exhibits in support of the new trial motion consisted of two portions, one that occurred outside the presence of the jury (SCT 7:2045-2056), and one that occurred in the presence of the jury. (SCT 7:2057-2074.)

In the portion that occurred in the presence of the jury, Agent Livingston was called by the prosecution and testified that Steven Homick had been the subject of periodic FBI surveillance starting in December 1984. He was under such surveillance on December 11, 1985, the day of the Tipton murders, but it did not begin until 2:20 PM, and then it lasted until midnight. No surveillance ever placed him near the Tipton residence. (RT 139:17671-17676.)

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[279] Taylor specifically recalled that he wanted to call Livingston promptly that day because during his conversation with Steve, Steve had mentioned that an FBI agent named Livingston might be coming to talk to Taylor. That was the first time Steve had ever mentioned Livingston to Taylor. (RT 140:17808-17809.)

On cross-examination, Livingston also explained that a pen register was used to keep records of all calls made from William Homick's phone, including those made on December 11, 1985.[280] (RT 139:17666-17667.)

In the portion of Livingston's testimony that occurred outside the presence of the jury, Livingston described his conversation with Art Taylor on December 11, 1985, at 12:15 PM. Livingston had verified that Taylor had told him on December 11, 1985 that he had seen Steven Homick around 10 AM when they went to a bank together. After they had been together about 30 minutes, Steven Homick received a beep and dropped Taylor off at his shop, leaving from there to pick up Lawrence Ettinger and Susan Hines at an attorney's office. Steven Homick was driving Ettinger's Cadillac. (RT 139:17677-17681.)

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280 Livingston's testimony was supplemented during the penalty trial by other defense evidence that established that the pen registers showed that eight calls had been made from William Homick's phone that morning between 8:35 and 9:15 AM, and two more just after 5 PM, all using the same long distance access number. That same access number was used for nineteen calls from that phone between December 1 and 17, 1985. Four calls made from William Homick's phone on December 13 also used that same access number. One call was made on December 11 at 11:14 AM using a different long distance access number. That different access number was also used on 19 calls from Steven Homick's phone line, made between December 1 and 17, 1985. (RT 141:18112-18117.)

William Homick's residence, was 5-6 miles from the Tipton scene. That could be driven in just over 10 minutes. (RT 138:17495.) The defense contention was that the pen register evidence indicated that the 11:14 AM call on the morning of the Tipton murders was made by Steven Homick while he was at William Homick's home, indicating he could not have been present at the Tipton residence when the murders occurred.

Also outside the presence of the jury, Livingston testified that during the Tipton state trial he had not been asked any questions regarding what Art Taylor had told him about Steven Homick's whereabouts on December 11, 1985. To Livingston's knowledge, none of his notes regarding the December 11, 1985 contact between Steven Homick and Art Taylor had been turned over to any defense attorneys prior to the end of the Nevada Tipton trial. (RT 139:17687-17688.)

C. Steven Homick Was Entitled to a Full Hearing to Contest the Constitutional Validity of the Nevada Murder Conviction

As shown in the factual and procedural summary above, in denying the new trial motion the court indicated her belief that it was not appropriate to question the constitutional validity of a prior conviction that resulted from a jury trial rather than a plea, or that had been affirmed on appeal. As will be shown, the court was wrong in both respects.

In *People* v. *Coffey* (1967) 67 Cal.2d 204, the defendant was charged with various crimes, and the information contained an additional allegation that he had suffered a prior felony conviction in the state of Oklahoma. (*Id.* At p. 208.) The defendant sought a hearing to challenge the constitutional validity of the prior conviction, but the trial court refused to hold any hearing, calling such a request irregular.[281] (*Id*, at pp. 210-211.) The

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281 The basis for the challenge to the validity of the prior conviction was that the conviction resulted from a guilty plea entered by the defendant appearing *in propria persona*. The defendant alleged that when he appeared without counsel, he did not understand his right to counsel and did

(Continued on next page.)

defendant then admitted the truth of the prior conviction, while preserving the right to pursue further remedies in regard to the challenge to the constitutional validity of the conviction. (*Id*, at p. 211.) During the trial proceedings on the substantive charges, the defendant testified and was impeached with the fact he had suffered a prior felony conviction. (*Id.*)

This Court determined that the trial court erred in refusing to hear the pretrial motion to strike the prior conviction. This Court explained:

> "... to the extent that statutory machinery relating to penal status or severity of sanction is activated by the presence of prior convictions, it is imperative that the constitutional basis of such convictions be examined if challenged by proper allegations. (*In re Woods, supra*, 64 Cal.2d 3; cf. *In re Streeter* (1967) 66 Cal.2d 47.) The fact that a prior conviction was sustained in another jurisdiction does not preclude such examination. 'To the extent that any State makes its penal sanctions depend in part on the fact of prior convictions elsewhere, necessarily it must assume the burden of meeting attacks on the constitutionality of such prior convictions.' (*United States* v. *Jackson* (2d Cir. 1957) 250 F.2d 349, 355; see *In re Woods, supra,* 64 Cal.2d 3, 5.)
>
> ... it is clearly in the interest of efficient judicial administration that attacks upon the constitutional basis of prior convictions be disposed of at the earliest possible opportunity, and we are therefore of the view that, if the issue is properly raised at or prior to trial, it must be

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(Continued from last page.)

not clearly, expressly, and intelligently waive that right. (*People* v. *Coffey*, *supra*, 67 Cal.2d at p. 210.)

> determined by the trial court. We are further of the view that the procedure here sought to be utilized, to wit, a motion to strike the prior before trial, is a proper method by which to raise the issue and initiate proceedings to determine the constitutional validity of the prior conviction.
>
> We emphasize, however, that the issue must be raised by means of allegations which, if true, would render the prior conviction devoid of constitutional support. 'One seeking to challenge prior convictions charged against him may do so only through a clear allegation to the effect that, in the proceedings leading to the prior conviction under attack, he *neither was represented by counsel nor waived the right to be so represented.*' (Original italics.) (*People v. Merriam* (1967) 66 Cal.2d 390, 397.)" (*People v. Coffey, supra*, 67 Cal.2d at pp. 214-215.)

This Court made clear that in order to be entitled to a hearing on the validity of a prior conviction, the defendant need only allege facts, which, if proven, would render the conviction invalid. While more must be shown to **prevail** on the motion to strike the prior conviction, the bare allegations were sufficient to compel a hearing. (*Id*, at p. 215-217.)

This Court in *Coffey* went on to explain that the prior conviction had been used in the court below for two purposes – to impeach the credibility of the testifying defendant, and as evidence of motive to assault officers with a firearm when they came to arrest him for a misdemeanor. This Court found it clear that use of an invalid prior conviction to impeach would constitute error. However, in regard to the use of the conviction to show motive for the alleged crime, this Court concluded that the motive would be just as strong whether the prior conviction was valid or invalid. Therefore, evidence of the prior to show motive "would be properly admissible even if the prior

conviction were constitutionally invalid, for the validity or invalidity of the judgment of conviction is not relevant to the question of defendant's attitudes and motives at the time of the incident for which he was on trial in California." (*Id*, at p. 218.)

This distinction makes it clear that in the circumstances of the present case, the use of the Nevada conviction was error if that conviction was invalid. Here, the relevance of the evidence of the prior conviction was tied directly to its validity. If it was obtained as a result of constitutionally deficient representation at the Nevada trial, then it had no tendency in reason to prove that Steven Homick had committed the violent criminal activity that was shown by the Tipton murders.

This Court in *Coffey* went on to make clear that erroneous use of a prior conviction that had been obtained in violation of the federal 6th and 14th Amendment rights to counsel was itself a federal constitutional error. Use of such a prior conviction for any purpose that prejudiced the defendant violates the 14th Amendment due process clause. (*People* v. *Coffey*, *supra*, 67 Cal.2d at p. 218-219.)

Coffey itself dealt with a prior conviction that resulted from a guilty plea by a defendant unrepresented by counsel. The last portion of the language from *Coffey* quoted above appears, on the surface, to support the conclusion of the present trial court that the *Coffey* procedure is limited to attacks on such prior convictions. However, this Court expressly concluded otherwise in *People* v. *Coleman* (1969) 71 Cal.2d 1159, 1169. There, after determining that a conviction had to be reversed for evidentiary error, this Court added:

> "By petition for a writ of habeas corpus filed while this appeal was pending, defendant contends that it was error to admit evidence that he had been convicted of burglary in Virginia, **on the ground that he was denied effective representation of counsel in the Virginia proceedings.** Since defendant did not challenge the validity of his prior conviction at the trial, there is nothing in the record on appeal to support defendant's contention. We issued an order to show cause in the habeas corpus proceeding, however, so that we could determine, if necessary, whether the evidence of the prior conviction vitiated the judgment before us on the automatic appeal. Since the judgment must be reversed on other grounds, **the validity of the prior conviction can be determined on retrial in accord with the procedure set forth in *People* v. *Coffey* (1967) 67 Cal.2d 204, 217-218.**"

Thus, it is clear that this Court contemplated the use of the *Coffey* procedure in cases such as the present one, where the defendant was represented by counsel in the prior proceedings, and now alleges that he was denied effective representation in those proceedings. The point was made even more clearly, and more recently, in *People* v. *Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6:

> "... we have never limited the *Coffey* procedure to constitutional claims raising only simple issues easily determined on the face of the record. For example, we have permitted defendants to raise inadequate assistance of counsel on a *Coffey* motion. (*People* v. *Coleman* (1969) 71 Cal.2d 1159, 1169.)

Coffey and *Sumstine* have been expressly made applicable to death penalty proceedings:

> "We hold that in a capital prosecution, the defendant may challenge the constitutional validity of a prior murder conviction alleged as a prior-murder special circumstance by a pretrial motion to strike the special circumstance allegation, and that the defendant is entitled to an evidentiary hearing on such a motion, conducted pursuant to the procedures set forth in *People* v. *Coffey* (1967) 67 Cal.2d 204, and *People* v. *Sumstine* (1984) 36 Cal.3d 909." (*Curl* v. *Superior Court* (1990) 51 Cal.3d 1292, 1296.)[282]

It is true that the present context differs from *Curl*, but that distinction should make no difference. In *Curl*, the prior was used to directly prove the truth of a prior murder special circumstance. It would seem obvious that the *Curl* rationale would also apply equally to a prior felony conviction offered to directly prove a prior felony conviction aggravating factor. In the present case, the Nevada conviction was not used directly as a special circumstance or an aggravating factor, but was instead used indirectly, as circumstantial evidence to prove other violent crimes, in aggravation of the penalty. But *Coffey* was clear that its rationale applied to such indirect, purely evidentiary usage (e.g., to impeach a witness), as well as to more direct usage. There is no principled basis for allowing collateral attacks on prior convictions used to directly establish a special circumstance or an aggravating factor, but to not allow such anattack when a conviction is used indirectly, as in the

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282 This point was reaffirmed in *People v. Horton* (1995) 11 Cal.4th 1068, which also expressly noted that in this context challenges to the constitutional validity of a prior conviction are "not confined to a claim of *Gideon* error," but may be based upon other types of "*fundamental* constitutional flaws" as well. (Id. at p. 1135; emphasis in original.)

present case. This Court has noted there is a constitutionally mandated need for reliability in capital proceedings.[283] This need for reliability cannot be any less important than the need for reliability in determining that a defendant is eligible for such a sanction. And here, as explained above, if the Nevada conviction was obtained as the result of reliability-subverting constitutional error, i.e., ineffective assistance of counsel, then it was irrelevant when offered as circumstantial evidence of the other violent criminality aggravating factor and threatened to subvert both the fact finding and sentencing selection process.

The other feature of the Nevada conviction noted by the trial court in the present case was that it had already been upheld on appeal by the Nevada Supreme Court. However, that provides no basis at all for insulating such a conviction from a collateral attack when offered in support of a death sentence. Indeed, as just noted, *Curl* openly approved the use of the *Coffey* procedure to challenge a prior murder conviction that resulted from a jury trial, offered in support of the prior murder special circumstance. Certainly

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283 See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1134, where the Court stated as follows:

In focusing upon the capital context presented by the case before us, we are mindful of the United States Supreme Court's repeated admonition that " 'the penalty of death is qualitatively different from a sentence of imprisonment, however long,' " and that, as a result, " 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' " (*Gardner v. Florida* (1977) 430 U.S. 349, 363; (conc. opn. of White, J., italics in original); see *Lankford v. Idaho* (1991) 500 U.S. 110, 125-126; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.)

there will be an appeal in almost every case of a murder conviction following a jury trial. This is precisely what had happened in *People v. Horton, supra*, and this Court expressly found that the prior unsuccessful appeal was no barrier to the defendant's challenge to his prior murder conviction, even though in *Horton* (unlike the present case) the issue was one the appellate court had actually addressed. (*Horton, supra*, at 1139.)

Notably, the fact that a prior conviction withstood appellate review provides no assurance that the defendant received the effective assistance of counsel in the proceedings that resulted in that prior conviction. This Court has often made clear that in many cases it is necessary to go outside the trial record in order to prove an allegation of ineffective assistance of counsel. For example, in *People* v. *Pope* (1979) 23 Cal.3d 412, 426, this Court explained:

> "In some cases, however, the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. fn. 16 (*E.g., People* v. *Miller* (1972) 7 Cal.3d 562, 572-574.) Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.' (*Id.*, at p. 573.) Reversals would be ordered unnecessarily in cases where there were, in fact, good reasons for the aspect of counsel's representation under attack. Indeed, such reasons might lead a new defense counsel on retrial to do exactly what the original counsel did, making manifest the waste of judicial resources caused by reversal on an incomplete record.

> Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus."

In the present case, trial counsel made it clear that the claim of ineffective assistance of counsel was based on the witnesses who were **not** called at the Nevada trial, combined with the failure to provide Nevada counsel adequate time to prepare for trial or adequate access to essential discovery. Those are precisely the types of problems that could not be shown on direct appellate review.

In sum, the procedure set forth in *Coffey* applies to prior convictions utilized in the manner the Nevada conviction was used here. Neither the fact that the prior Nevada conviction for the Tipton murders resulted from a jury trial, nor the fact that it had been affirmed after appellate review by the Nevada Supreme Court, detracts from Steven Homick's right to make use of the *Coffey* procedure to challenge the validity of the Nevada conviction.

D. Under the Unique Circumstances of the Present Case, Steven Homick Also Should Have Been Permitted to Make a Full Showing to the Jury Concerning the Deficient Defense Afforded Him in the Nevada Proceedings, in Order to Provide the Jury with Information Crucial to the Assessment of the Probative Significance of the Nevada Conviction

As set forth in the factual and procedural summary earlier in this argument, counsel for Steven Homick also sought to introduce evidence to the jury concerning the deficient performance by counsel in the Nevada trial that resulted in the Tipton convictions. In *Curl* v. *Superior Court* (1990) 51

Cal.3d 1292, 1301-1302, this Court made clear that in normal circumstances a challenge to the constitutional validity of a prior conviction should be heard by the court and not by the jury. However, the unusual context in which the Nevada conviction was utilized in the present case required that Steven Homick be permitted to present to the jury available evidence showing the inadequacy of the defense afforded him in the Nevada trial.

As shown in detail in the preceding argument in this brief, which challenges the admissibility of a conviction to prove the truth of the underlying charges, the present jury was told of the fact of the conviction and was given no guidance whatsoever regarding how to determine the appropriate weight to assign to that evidence. If Steven Homick's contention that such a problem should have led to finding the fact of the Nevada conviction inadmissible is accepted by this Court, then the present argument is moot. However, if the previous argument is rejected and this Court upholds the admissibility of such evidence for such a purpose, then the problem of how a jury should determine the appropriate weight to assign to such evidence remains and must be confronted.

Appellant would submit that if asking a jury to evaluate alleged deficiencies in the performance of counsel in the prior conviction proceeding is potentially time-consuming or otherwise problematical, this is a reason for not admitting the prior conviction for the purpose it was used in the present case. But if the prior conviction is allowed for such a purpose, then any such concerns do not provide a basis for precluding a jury determination concerning the deficiencies of prior counsel's performance and the impact of those deficiencies on the reliability of the prior conviction. If the jury is allowed to rely on the conviction to conclude that Steven Homick has, in

fact, committed other violent crimes, then the defense must be allowed to rebut with evidence that the prior conviction is not a reliable indication that Steven Homick did commit the other violent crimes.

By analogy, this Court has recognized that when a prior conviction is offered in support of the prior felony conviction aggravating factor, the defendant is permitted to introduce the underlying facts in an effort to demonstrate that the prior crime was less serious than it sounded, and therefore carried a lesser amount of moral culpability. (*People* v. *Frye* (1998) 18 Cal.4th 894, 1013-1017.) This Court explained:

> "The Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' (*Lockett*, *supra*, 438 U.S at p. 604, fn. omitted; see also *Skipper*, *supra*, 476 U.S. at p. 4; *People* v. *Fudge* (1994) 7 Cal.4th 1075, 1117.) The constitutional mandate contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty. (See *Payne*, *supra*, 501 U.S. at pp. 820-821; *People* v. *Whitt* (1990) 51 Cal.3d 620, 647; *cf. Lockett, supra*, 438 U.S. at pp. 602, 604 [noting that concept of individualized sentencing, including the traditionally wide range of factors taken into account by sentencer, ensures a greater degree of reliability in capital sentencing determinations].) **The jury 'must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.'** (*Jurek* v. *Texas* (1976) 428 U.S. 262,

271.)" (*People* v. *Frye, supra*, 18 Cal.4th at p. 1015; emphasis added.)

Here, the Nevada conviction was offered by the prosecution as assertedly strong evidence in support of the hotly contested issue of Steven Homick's guilt of the Tipton murders. Surely evidence that the Nevada conviction was unreliable would be strong evidence in support of a showing why a death sentence should not have been imposed. Evidence that the Nevada conviction resulted from the deprivation of Steven Homick's right to the effective assistance of counsel would have been strong evidence that the conviction was unreliable and should be disregarded by the present jury.

Counsel for Steven Homick were able to make a partial showing, by eliciting from some witnesses the fact that they had not been called to testify at the Nevada trial. But that could only leave the jury wondering about the "rest of the story." Why weren't those witnesses presented? Was evidence presented to the Nevada jury that was not presented to the California jury? With only part of the story before them, the jury was still left in puzzlement as to how to assign appropriate weight to the fact of the Nevada conviction.

However, if the defense had been permitted to make a fuller demonstration of the problems that faced the Nevada defense attorneys, such as the federal government's refusal to release information prior to the federal trial that proved very useful to the California defense attorneys and the Nevada state prosecutor's willful and successful effort to hurry the case to trial to prevent Nevada defense counsel from having an adequate opportunity to review the extensive discovery materials, then the jury could have more fully understood that the Nevada trial might have been an unfair contest. Then the jury would have understood the defense claim that it should

disregard the fact of the Nevada conviction, and instead make its determination on the basis of the remaining evidence offered by both sides.

In sum, if the prosecution was properly allowed to use the fact of the Nevada conviction to prove the underlying conduct, then Steven Homick was entitled to show the jury all relevant evidence why that conviction was unreliable. If that would have unduly prolonged the trial, or if it carried a danger of confusing the jury, the proper remedy was not to allow in the prosecution evidence while disallowing the legitimate defense rebuttal. Instead, the proper remedy was to exclude the prior conviction in the first place, pursuant to Evidence Code section 352, just as the defense requested.

Such a conclusion would not affect most cases in which evidence of a prior conviction is offered. In most cases, it is only the fact of the conviction, and not its validity, that is relevant to any issue the jury must decide. In those cases, it is appropriate to leave issues concerning the reliability and/or constitutional validity of the prior conviction to the court, rather than the jury. However, if the prosecution chooses to use a conviction as circumstantial evidence to prove the truth of the underlying conduct, then the defense must be permitted to counter that by persuading the jury that the prior conviction was not reliable.

By excluding relevant and important evidence bearing on the reliability of the conviction, the trial court violated Steven Homick's rights to confront the evidence against, to present a full defense and present relevant mitigating evidence, to due process and a fair trial, and to a reliable sentencing determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d

1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.) Had this evidence been introduced there is a reasonable possibility that the jury would have recognized the unreliability of the Nevada conviction, concluded that Steven Homick's guilt of the Tipton murders had not been proven, and refrained from returning a sentence of death. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) There is no basis for concluding beyond a reasonable doubt that the trial court's error in excluding this evidence did not contribute to the penalty verdict. *(Chapman v. California* (1967) 386 U.S. 18, 24.)

E. The Defense Offer of Proof Established a Prima Facie Case of Ineffective Assistance of Counsel

As shown above, Steven Homick was entitled to a full hearing on the constitutional validity of the Nevada murder conviction, despite the fact that it resulted from a jury trial, and despite the fact that the conviction had been affirmed on appeal. However, as explained in the procedural summary earlier in this argument, the defense agreed to a procedure where the court would first review matters submitted on an *ex parte* basis, and determine whether a prima facie case had been made. The defense was concerned about

making a full showing because it would give the prosecution discovery (to which it was not otherwise entitled) regarding the defense presentation planned for the penalty trial. Only if the judge found a prima facie case would the defense go forward and make a full showing in an open, adversary setting. (RT 135:17010-17011.)

The trial court found that no prima facie case had been shown, so the defense never did make its full showing. (RT 136:17018.) However, after all the defense evidence had been presented at the penalty trial, the defense did openly reveal its full offer of proof in the exhibits supporting the new trial motion. In this section of this argument, it will be shown that the trial court erred in first finding that there was no prima facie showing in the *ex parte* submission, and erred again in failing to reach the merits of the issue in the context of the new trial motion.

First, it is necessary to define the term "prima facie showing." The best analogy appears to be the showing that is required to obtain an order to show cause after filing a habeas corpus petition. In *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn.4, this Court explained: "Our issuance of an order to show cause returnable before a lower court is an implicit **preliminary determination** that the petitioner has made a **sufficient prima facie statement of specific facts which, if established, entitle him to habeas corpus relief** under existing law." (Citations omitted; emphasis added.)

By analogy, if Steven Homick's showing in the present case contained a statement of specific facts which, if established, entitled him to relief, then the trial court should have found a prima facie case had been made and should have proceeded to a full evidentiary hearing. In making a showing of facts which, if established, would entitle him to relief, Steven

Homick was **not** required to negate in advance all possible rebuttal arguments the prosecution might have been able to make.

For example, in *In re Artis* (1982) 127 Cal.App.3d 699, a habeas corpus petition was filed alleging ineffectiveness of counsel. It was alleged in that petition that counsel failed to conduct a reasonable investigation which would have revealed medical records supporting the claims made by the defendant in his unsuccessful motion to withdraw a guilty plea. The petition also alleged the trial attorney had failed to present other documents pertaining to medication administered in jail, which would also have supported the defendant's basis for withdrawal of his guilty plea. The Court of Appeal discussed trial counsel's duty to investigate. The Court of Appeal noted respondent's claims that trial counsel might have made a reasonable tactical decision not to present the evidence. (*Id*, at p. 701-703.)

The Court explained, "We do not know whether counsel made an investigation, or what excuse he might have for failing to do so or for failing to present evidence of petitioner's mental condition. Those factual determinations will be for the trial court to make." (*Id*, at p. 703.) The Court concluded that a prima facie showing had been made and issued an order to show cause so both sides could present the evidence that would allow the trial court to "determine whether counsel made a reasonable investigation of the medical records, and if he did so, whether he made a reasonable choice not to present them or other evidence of the effect of the medication on petitioner's mental condition at the time of his plea of guilty." (*Id.*)

Thus, in the present case, to make a prima facie showing, the defense was not required to establish that Steven Homick had necessarily been denied the effective assistance of counsel in his Nevada trial. Rather, the

defense merely needed to allege facts which, if proven, would demonstrate an entitlement to relief, absent a sufficient showing by the prosecution that there were proper reasons for Nevada trial counsel's failure to present all the evidence that would have significantly strengthened Steven Homick's defense. Certainly here, given the nature of the evidence Nevada trial counsel failed to present and the difficulty of imagining any plausible tactical reason for having failed to present it, a sufficient showing has been made to establish a prima facie case for relief.

Strickland v. *Washington* (1984) 466 U.S. 668 explained what must be shown to prevail on a claim of ineffective assistance of counsel based on counsel's actual ineffectiveness. First, the High Court noted in basic terms, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Id*, at p. 686.) The Court explained further:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Id*, at p. 687.)

However, a substandard (or deficient) performance by defense counsel is not the **only** way that a defendant can be denied the constitutionally mandated effective assistance of counsel. *Strickland* also expressly recognized that matters quite outside of the control of trial counsel can deprive a defendant of the effective assistance of counsel, even though trial counsel is in no way at fault. For example:

> "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, *e.g., Geders* v. *United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant)." (*Strickland* v. *Washington, supra,* 466 U.S. at p. 686.)

In *Ake* v. *Oklahoma* (1985) 470 U.S. 68, the High Court demonstrated that there is also a due process aspect to problems that can prevent a blameless trial attorney from adequately representing a criminal defendant. There, the High Court determined that the federal constitutional right to due process includes the right of indigents represented by appointed counsel to have access to the tools needed to present an adequate defense. When the services of a psychiatrist are required to adequately represent an indigent criminal defendant, then access to a competent psychiatrist is a necessary aspect of the right to due process of law. (*Id*, at p. 83.) Having found such a right on the basis of due process principles, the High Court declined to

determine whether the 6th Amendment right to the effective assistance of counsel was also implicated. (*Id*, at p. 87, fn. 13.)

California courts have also examined such questions and found the 6th Amendment right to the effective assistance of counsel was violated by problems that were not the fault of trial counsel. In *Little v. Superior Court* (1980) 110 Cal.App.3d 667, 670-672, the Court of Appeal found a denial of the right to effective assistance of counsel when a defendant was forced to proceed while represented by an attorney who had not been given a reasonable amount of time to prepare. (See also *In re Cassandra R.* (1983) 139 Cal.App.3d 670, 675-677.)

The relevance of these principles to the present issue is as follows: Steven Homick made a prima facie showing that he was deprived of his federal constitutional rights to due process of law and/or effective assistance of counsel if he asserted facts which, if true, indicated that the proper functioning of the adversary process was undermined in the Nevada trial, making the Nevada verdict unreliable. That showing is made by allegations that counsel did not present defense witnesses who would have significantly strengthened Steven Homick's defense in the Nevada trial. It is highly improbable that the failure to call such witnesses could have been the product of a reasonable tactical decision. Whether trial counsel might nonetheless have had some legitimate tactical reason for not presenting the witnesses in question is irrelevant to the determination of whether a prima facie case had been made; instead, that is a question to be addressed in an evidentiary hearing **after** a finding of a prima facie case was made. Also, it would make no difference whether the failure to present important witnesses

was due to Nevada counsel's personal failures, or was due to factors outside the control of counsel.

Viewed against these principles, the showing made by the defense below clearly did establish a prima facie case. As set forth in the procedural and factual summary above,[284] the defense showing included the following information: The April 30, 1987 letter from Clark County Chief Deputy District Attorney Teuton to Los Angeles County Deputy District Attorney Krayniak shows a deliberate effort by the Nevada prosecution to force the case to trial without giving the defense an adequate opportunity to obtain or review the extensive discovery in the case. Other documents show that as the trial approached, the defense was still seeking basic documents pertaining to many crucial witnesses. The federal government indicted Steven Homick on closely related charges, just a month before the Nevada state trial was set to begin. The federal government, which had undertaken an extensive investigation of events that included the Tipton murders, refused to allow the defense any access to documents produced in that investigation until a time that would be too late for making use of that information in the Nevada state trial. The Steven Homick defense sought a continuance so it would be able to obtain the federal documents before the Nevada trial, but that continuance was denied.

Either because of Nevada trial counsel's deficiencies, or because federal investigators and Nevada prosecutors failed to supply defense counsel with relevant documents that were eventually supplied to the

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284 See in particular pages 597-598, *supra* (summary of exhibits in support of new trial motion).

California defense attorneys, the evidence presented at the Nevada state trial and at the California penalty trial in regard to the Tipton crimes was very different. In the Nevada trial, Manuel Correira did not testify about the statements made by Michael Dominguez while they were in prison together, in which he said he and Kelly Danielson had committed the Tipton murders. (RT 141:18076-18080, 18107.) James Hampton did not testify about seeing a suspicious person resembling Kelly Danielson near the Tipton residence between 9:30 and 10:30 AM on the day of the murders. (RT 141:17967-17981, 18051.) Art Taylor did not testify that he was with Steven Homick from approximately 10 AM until 10:30 AM, when he left for the office of Larry Ettinger's attorney, located about 15-20 minutes away. FBI Agent Livingston did not testify that that he talked to Art Taylor at 12:15 PM on the day of the murders, and Art Taylor told him then he had been with Steven Homick from 10 AM until 10:30 AM. (RT 140:17797-17800.) Livingston also did not testify that all notes about his contacts with Art Taylor had been withheld from the Nevada defense attorneys until after the Tipton trial. The Nevada jury also never learned of the pen register evidence that indicated Steven Homick made a phone call at 11:14 AM, from the home of his brother William Homick, about ten minutes away from the Tipton Murder scene when the crimes were almost certainly in progress. (RT 139: 17666-17667; 17671-17681; see also Statement of Facts, earlier in this brief, at p. 137-138, describing phone call to Mrs. Tipton at 10:30 AM, when she sounded strange, and at 11:00 AM, when she failed to answer.)

The Nevada jury did hear testimony regarding Steven Homick picking up Lawrence Ettinger and Susan Hines at Ettinger's attorney's office at approximately 10:30 or 10:45 AM the morning of the murders. (RT

140:17797-17800; 141:17984-17988.) However, if that evidence had been combined with all of the evidence the Nevada jury did **not** hear, the case against Steven Homick would have been weakened very substantially. Indeed, the case against Steven Homick was always weak, since there was no evidence at all placing him at the Tipton residence. The case against him consisted of evidence that he later possessed jewelry stolen during the Tipton murders, along with alleged incriminating statements attributed to Steven Homick by a witness who was inconsistent in many respects and who was himself an early suspect in the crimes. If a very strong alibi had been presented, supported by numerous witnesses with no motive to lie in order to assist Steven Homick, then it is reasonably probable a different result would have been reached by the Nevada jury. Adding the additional evidence that incriminated Michael Dominguez and Kelly Danielson would have further strengthened the likelihood that the Nevada jury would have had a reasonable doubt that Steven Homick was responsible for the Tipton murders.

In sum, the absence of all the evidence that was not presented in the Nevada trial undermined the reliability of the Nevada verdict and strongly indicated that the adversary process had not worked in that trial in the manner that it should operate. This problem resulted either from deficient performance by Nevada trial counsel, or from government actions that deprived Nevada counsel of necessary discovery and forced Nevada trial counsel to go to trial before all defense evidence was reasonably available. Alternatively, the problem resulted from a combination of these factors. In any event, there was at least a prima facie showing that in the Nevada Tipton trial, Steven Homick had been deprived of his federal 5th, 6th, 8th, and 14th

amendment rights to a fair jury trial in accordance with due process of law, to the effective assistance of counsel, and to reliable fact-finding underlying capital guilt and penalty phase verdicts.

Steven Homick was entitled to a full hearing on his claim that the Nevada conviction was constitutionally invalid. By denying him that hearing and allowing the prosecution to inform the present penalty jury of the Nevada murder convictions, Steven Homick was once again deprived of his federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the evidence against him, to present a full defense, and to reliable fact-finding underlying capital penalty phase verdicts. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308, 319; *Washington v. Texas* (1967) 388 U.S. 14; *Smith v. Illinois* (1968) 390 U.S. 129; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

F. The Trial Court's Comments When Denying the New Trial Motion Establish That the Wrong Standard Was Utilized Both Then and Also in Denying the Earlier Requests for a Full Hearing

As shown in the preceding section of this argument, the trial court erred in the legal conclusion that no prima facie case of ineffective assistance of counsel in the Nevada trial had been shown. However, the problem in the court's ruling went even deeper than that. Before the trial court made any ruling, she had voiced her concern over the propriety of even questioning a Nevada verdict that had been upheld on appeal by the Nevada Supreme Court. (RT 135:16993.) After reading the opinion of the Nevada Supreme Court, the trial court denied the defense challenge to the Nevada verdict without any explanation. (RT 136:17018.) Thus, it was not clear at that point whether the court considered the matter on the merits and found no prima facie showing had been made, or whether the court simply concluded that it was not proper to question the validity of a conviction that had been affirmed on appeal.

Subsequently, the trial court found that no showing had been made sufficient to justify putting evidence before the jury regarding the validity of the Nevada conviction. (RT 139:17540-17541.) Once again, it was not clear whether the court was finding on the merits that no prima facie case had been shown, or whether the court was simply finding that it would not be proper in any event to present such evidence to a jury.

In denying the motion for a new trial, the trial court set forth a brief procedural history and then explained that the conviction had been affirmed on appeal by the Nevada Supreme Court, that the court had previously

declined an invitation to revisit the validity of the Nevada conviction that had been upheld on appeal, and then the new trial motion was denied. (RT 148:18662-18663.) This explanation demonstrates that the trial court had never reached the merits of the issue regarding whether a prima facie case of ineffective assistance had been shown. Instead, the trial court apparently sidestepped the issue at every stage, out of the mistaken belief that the affirmance on appeal in Nevada precluded her from questioning the validity of the verdict. As has been shown above, that belief was erroneous.

Thus, the trial court never decided the prima-facie-case issue on the merits, and also improperly refused to decide the merits of the challenge to the Nevada conviction in the context of the new trial motion. For these reasons, in addition to all the reasons shown earlier in this argument, Steven Homick was deprived of his federal 5th, 6th, 8th, and 14th amendment rights to a fair jury trial in accordance with due process of law, to confront the evidence against him, to present a full defense, and to reliable fact-finding underlying capital guilt and penalty phase verdicts.

As shown in this argument, the failure to hold a hearing was prejudicial and should therefore result in setting aside the penalty verdict. Had an evidentiary hearing been granted, there is a reasonable possibility that the Nevada conviction would have been excluded, and that the jury, left to consider only the non-hearsay evidence bearing on Steve Homick's guilt or innocence of the Tipton murders, would have concluded that his guilt of those offenses had not been proven beyond a reasonable doubt. Left with no "other violent crimes" aggravation, and the strong mitigating factor of no prior felony convictions, it is also reasonably possible the jury would not have imposed a death sentence. (*People v. Brown* (1988) 46 Cal.3d 432,

448.) Certainly, there is no basis for concluding beyond a reasonable doubt that failing to hold a hearing did not contribute to the ultimate verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

XV. THE TRIAL COURT ERRONEOUSLY PRECLUDED THE DEFENSE FROM MAKING MEANINGFUL INQUIRIES INTO THE ABILITY OF PROSPECTIVE JURORS TO FAIRLY CONSIDER THE OPTION OF A LIFE WITHOUT PAROLE SENTENCE IN THE CASE BEFORE THEM

A. Basic Governing Legal Principles Regarding the Extent to Which Voir Dire in Capital Cases May Include Inquiries That Refer to the Evidence the Jury Will Actually Hear

When selecting a jury in a capital case, courts necessarily have to determine whether prospective jurors can fairly consider both available penalty options – death or life without parole – rather than being committed in advance to always or never selecting one option or the other. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770; *Wainwright v. Witt* (1985) 469 U.S. 412, 83 L.Ed.2d 841, 105 S.Ct. 844.) For a number of years, courts have struggled with the resulting tension between inquiries that are so specific that they ask a juror to prejudge the case they are about to hear, versus questions that are so abstract they fail to provide insight into whether the juror will fairly consider both options in the case that will be presented.

As will be shown, the present record demonstrates the trial court and the prosecutor misunderstood the proper balance that must be drawn. As a result, trial counsel was improperly precluded from asking questions important to a determination of prospective jurors' fitness to serve as penalty phase jurors in the case before them. This case presented an unusual combination of strong mitigating factors and strong aggravating factors. Before the present crimes occurred, Steven Homick was in his mid-forties,

had regularly been employed in responsible positions, and had never been convicted of any crimes. The present penalty trial included no evidence that Mr. Homick had ever committed or attempted to commit any acts of violence prior to the time of the present crimes. On the other hand, several months after the present crimes, but before Mr. Homick was arrested for them, three persons were killed during the commission of a robbery in Las Vegas. After Steven Homick was arrested for the present crimes, but before he was tried for them, he was convicted in Nevada of those three murders. Aside from the circumstances of the present crimes, those three other murders were certain to be the focus of the prosecution's showing in aggravation that would be made during the penalty trial.

In these circumstances, it was important for trial counsel and the trial court to be able to determine whether prospective jurors would be able to fairly consider a sentence of life without parole, or would automatically vote for death regardless of mitigating factors, in a case where the defendant was convicted of two murders and where penalty phase evidence would be presented in an effort to persuade jurors he had also committed three other murders in a separate incident. Early confusion in the governing legal principles apparently originated in *People v. Clark* (1990) 50 Cal.3d 583, 596-597. In *Clark*, the defendant complained that during sequestered death-qualification voir dire, he was not permitted to "determine whether the evidence of serious burn injuries suffered by the victims would cause a jury to automatically vote for the death penalty, ..." (*Id*, at p. 596.) This Court found no error in such a restriction during sequestered death-qualification, since that part of the process "seeks to determine only the views of the prospective jurors about capital punishment in the abstract, ..." (*Id*, at p.

597.) But even *Clark* did not conclude that such questions can never be asked at all.

Indeed, *Clark* also recognized that, "It is true that counsel must be permitted to ask questions of prospective jurors that might lead to challenges for cause. (*People v. Williams* (1981) 29 Cal.3d 392, 407.) The inquiry that defendant sought to make was not relevant to the death qualification process, however." (Emphasis added; *People v. Clark, supra,* 50 Cal.3d 583. 596-597.) But such an inquiry would be fully appropriate and relevant during the general voir dire on all areas of cause challenge. This Court in *Clark* expressly noted:

> "Our examination of the general voir dire conducted after the death qualification of the prospective jurors reveals no attempt to restrict questioning on the jurors' attitudes about arson and burn injuries. In sum, neither the court's ruling nor the ensuing examination of the jurors affords a basis upon which to conclude that defendant's right to a fair and impartial jury was affected in any way by the court's ruling. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086.)" (*People v. Clark, supra,* 50 Cal.3d 583. 597, fn. 3.)

In the present case, the trial court stated in advance that she would permit counsel to conduct individual voir dire during the death qualification process and would also allow the attorneys to simultaneously go beyond death qualification issues and ask general voir dire questions. (RT 45:1877-1878.) Thus, even the *Clark* distinction was inapplicable here and questions regarding death penalty attitudes based on particular aspects of the present case, such as evidence in aggravation that would include the alleged commission of three additional murders, should have been freely permitted.

However, the record demonstrates that the court and the prosecutor misread the case law and concluded that authority precluding questions, during death qualification, on specific aspects of the case, applied to preclude such questions during any portion of the voir dire. As will be shown, the court and prosecutor took the erroneous position that questions about death penalty attitudes during any part of the voir dire must be limited to views on the death penalty in the abstract, and should not include reference to specific aspects of the present case.

Clark was distinguished in *People v. Pinholster* (1992) 1 Cal.4th 865. In *Pinholster*, the defense complained about the removal for cause of jurors who were not automatically opposed to the death penalty in all cases, but who stated in sequestered death qualification voir dire that they would automatically vote against death in a felony-murder case, where burglary was the underlying felony. The defendant complained that this was not a view based on the death penalty in the abstract, but was instead a fact-based view into which inquiry was forbidden. Rejecting this argument, this Court explained:

> "The people of the State of California have determined that burglary-murder is a category of crime for which a defendant may be subject to death, depending on the circumstances. (§ 190.2, subd. (a)(17)(vii).) This prospective juror unequivocally stated his inability to follow the law in this respect. His position was an abstract one regarding the felony-murder special circumstance, not a matter of evaluating the particular facts of this case. Substantial evidence supports the implied determination of the trial court that this prospective juror was not impartial

with respect to the imposition of the death penalty.

...

Defendant objects that fact-based voir dire is impermissible under *Witt*, *supra*, 469 U.S. 412. As we have already noted, we have commented in the past that questions directed to jurors' attitudes towards the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark*, *supra*, 50 Cal.3d at p. 597.) We have also said, however, that 'a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases.' (*People v. Fields*, *supra*, 35 Cal.3d at pp. 357-358.) It was this language upon which the trial court in this case relied in permitting certain questions regarding the prospective jurors' attitudes toward the facts of the case. Here, the questions provided a basis for deciding something about the juror's views in the abstract; not only was each of these two jurors asked his attitude toward a case phrased in terms of the facts of this case, but the answer to these questions led to the ultimate and crucial question whether the juror could vote for the death penalty in any burglary-murder case. This was not a case like *Clark*, *supra*, 50 Cal.3d at page 597, where the questions about juror attitude toward evidence of the victims' burns were more appropriate to general voir dire. Rather, the questions regarding the facts of the particular case led to crucial questions and answers about the jurors' attitudes in the abstract." [*People v. Pinholster*, *supra*, 1 Cal.4th 865, 917-918.)

Putting *Clark* and *Pinholster* together seemed to lead to the conclusion that reference to the specific facts of the case not contained in the pleadings could be precluded during death-qualification voir dire, but should be permitted during general voir dire, and a challenge for cause could properly be supported by a showing that the juror would be biased in light of the specific nature of the present case, even though the juror could be fair and impartial, regarding penalty, in other types of cases.

However, *People v. Cash* (2002) 28 Cal.4th 703, 718-723, a case that was almost identical to the present case, clarified these principles further and appears to have dropped any distinction between death qualification voir dir and general voir dire.[285] In *Cash*, as in the present case, death qualification and general voir dire of each prospective juror was conducted contemporaneously rather than separately. (*People v. Cash*, *supra*, 28 Cal.3d at pp. 718-719.) As this Court summarized:

> "On the second day of voir dire, when defense counsel attempted to ask a prospective juror whether there were 'any particular crimes' or 'any facts' that would cause that juror 'automatically to vote for the death penalty,' the trial court ruled the questions improper because 'we're restricted to this case.' Later, ... [c]ounsel explained that the defense wanted to determine

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285 See also *People v. Zambrano* (2007) 41 Cal.4th 1082, 1120-1123, which discussed *Cash* and made clear that the need to probe the general facts of the case actually before the jury being selected must be probed even during death qualification voir dire. In any event, as in *Cash*, the error in the present case infected the entire voir dire, so the outcome is the same regardless of whether any reason remains to distinguish the general voir dire from the death qualification voir dire.

> whether prospective jurors could return a verdict of life without parole for a defendant who had killed more than one person, ... The trial court replied that because the prior murders were not expressly alleged in the charging document, it would not permit any such questions: 'You cannot ask anything about the facts that are not charged in the Information, period. You can't raise one mitigating factor, nor can [the prosecutor] raise one aggravating [factor] that is not charged in the Information.... You cannot go past the Information.' " (*Id*, at p. 719.)

The defense later submitted points and authorities and asked the court to reconsider. The trial court responded, " 'I am not permitting you to ask them about any specific acts of mitigation or aggravation, as that would in my opinion have them prejudge the evidence.' " (*Id.)* On appeal, the defendant contended that this preclusion "denied him his rights under our federal and state Constitutions to an impartial penalty jury." (*Id.*) This Court fully agreed, stating:

> "Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 852, 83 L.Ed.2d 841].) 'The real question is " ' "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror." ' " ' (*People v. Ochoa* (2001) 26 Cal.4th 398, 431, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1318, quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003.) Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [112 S.Ct. 2222, 2228-2229,

> 119 L.Ed.2d 492]), it is equally true that the 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror." (*Id*, at p. 719-720.)

This Court next described its prior decision in *People v. Kirkpatriack* (1994) 7 Cal.4th 988, explaining:

> "We held: 'A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document.' (*People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1005, italics added; accord, *People v. Ervin* (2000) 22 Cal.4th 48, 70; *People v. Earp* (1999) 20 Cal.4th 826, 853.) Thus, we affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence. (See CALJIC No. 8.85 (2000 rev.) (6th ed. 1996).)" (*People v. Cash*, *supra*, 28 Cal.3d at pp. 720-721.)

B. Applying the Governing Legal Principle to the Present Facts, It Is Clear That the Trial Court Precluded Proper and Essential Voir Dire, Depriving Steven Homick of a Fair Jury Trial and of Due Process of Law

The present voir dire occurred in September 1992, well after *Clark* and *Williams*, but before *Cash* and *Kirkpatrick* were decided. However, *Pinholster* was decided eight-and-one-half months before the present voir dire.[286] Nonetheless, problems developed when the defense sought to voir dire regarding the impact of three other murders, on the fourth day of a voir dire process that lasted fourteen court days (CT 21:5843-5853, 5863, 5865; 22:5866.) Prospective Juror John Ruger was first questioned by the trial court. The court made reference to questionnaire responses in which Mr. Ruger indicated he believed the death penalty was justified for some murders, but not for all murders. (RT 56:3288.) His examples of murders for which the death penalty would be appropriate included particularly gruesome murders or killing somebody just to get ahead in life. (RT 56:3288-3289.) Mr. Ruger said that he could vote for death in such cases. Asked whether he could vote for life without parole in such cases, he responded, "I guess it would depend on the circumstances, ..." (RT 56:3289.)

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286 Of course, the *Cash* holding was applied to *Cash*, whose voir dire took place well before the present voir dire, and should be applied in the present case, which was still pending when *Cash* was decided. Thus, reference to the chronology of various opinions and the present voir dire is not meant to suggest that retroactivity is an issue in this context, but merely to indicate what was available to the trial court at the time of the present voir dire.

The court then referred to the questionnaire again and noted that Mr. Ruger had indicated that the death penalty would not be appropriate in a case where someone killed an abusive father. Mr. Ruger added that life without parole would probably be sufficient for someone who killed another person in a bar fight. (RT 56:3289-3290.) The trial court properly explained that those examples were cases that would probably never get to the point of a death penalty trial in the first place. Instead, the crime had to be a more serious planned, deliberate murder with special circumstances before the jury would even get to the point of choosing between death and life without parole. The court then asked if a case included "a first-degree, premeditated, cold-blooded killing, or two of them or three of them, that you think that ought to be the death penalty." (RT 56: 3291.)

Mr. Ruger responded: "I guess it would depend on the person's background, like if it was the first time he ever did anything wrong. Maybe life without possibility of parole would be sufficient." (*Id.*) Mr. Ruger promptly added, "But if it's continuous." (RT 56:3292.) The trial court apparently interrupted and the following exchange occurred:

> "THE COURT: A series of murders in the past would make a difference to you?"
>
> PROSPECTIVE JUROR RUGER: Right.
>
> THE COURT: So if you heard that this person had not committed any crimes before, that is something you would take into consideration as a mitigating factor?
>
> PROSPECTIVE JUROR RUGER: Right.
>
> THE COURT: So possibly life in prison would be appropriate to you?
>
> PROSPECTIVE JUROR RUGER: Right. (RT 56:3292.)

At this point, it was established that Mr. Ruger could fairly consider life without parole for a convicted murderer who had never done anything else wrong, but that a series of murders would be a different matter. Left completely unresolved was whether Mr. Ruger would automatically vote for death in the case of a convicted murdered who was shown to have committed three other murders on a separate occasion, or whether the prospective juror would still be able to weigh aggravating and mitigating factors and fairly consider life without parole in such a case, which was what the case before him was expected to show. Understandably, trial counsel would be concerned about resolving that glaring ambiguity.

All counsel then conferred with the trial court outside the presence of the prospective juror. Counsel for Steven Homick noted that Mr. Ruger had lived in Las Vegas during the time when the highly publicized Tipton murder trial occurred. Furthermore, the same defendants had been tried in Las Vegas for federal crimes arising out of the same incidents, also during the time Mr. Ruger lived there. In addition, there had been publicity during the federal trial about one more murder, of a person named Godfrey. At the time of the voir dire, the Godfrey murder had also been included in the prosecutor's notice of evidence to be offered in aggravation against Steven Homick.[287] (RT 56:3293-3295; CT 15:4134-4138.) Defense counsel was concerned that Mr. Ruger could have been exposed to publicity about these other murders.

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287 Apparently the prosecutor's purported proof of the Godfrey murder was based on uncorroborated information from Michael Dominguez. By the time Steven Homick's penalty trial occurred, the prosecutor abandoned any effort to present that evidence.

The trial court then returned to the voir dire of Mr. Ruger and asked if he had followed crime news in Las Vegas when he lived there, if he had seen publicity there about any of the present defendants, or if he had heard about the Tipton case. Mr. Ruger answered negatively, and voir dire by the court ended. (RT 56:3295-3296.)

Counsel for Steven Homick then asked Mr. Ruger a series of general voir dire questions, not tied to death penalty attitudes. (RT 56:3297-3300.) Counsel then returned to the death penalty issue, reiterated the previous exchange that had already occurred between the court and the prospective juror, and then posed a hypothetical question based on facts that were expected to be shown in the guilt trial, including a conspiracy to murder more than one person, planned over a period of several months and then carried out, all done for money. Mr. Ruger responded that he could conceive of himself voting for life without parole in such a case. (RT 56:3300-3302.)

Counsel's next question mirrored the one improperly precluded in *Cash*: "If you were to add to that evidence that you heard during the penalty phase, heard evidence about the person and heard evidence that convinced you that the same person had committed four other --" That question was never completed, as the prosecutor interrupted to object on the ground that it called for prejudging the evidence – the very same ground relied on by the mistaken judge in *Cash*. (*People v. Cash*, *supra*, 28 Cal.3d at p. 719.) The trial court immediately sustained the objection without explanation. (RT 56:3302.)

Counsel then tried to reframe the question: "You heard evidence in the penalty phase that convinced you that this person had committed a number --" Again, the question was never completed, as the prosecutor made

the same objection and asked to approach the bench. (*Id.*) At bench, the prosecutor complained that defense counsel was presenting the aggravating evidence and asking the juror for a commitment as to how he would vote. (RT 56:3302-3303.) Counsel for Steven Homck, who had never been permitted to finish his question, disagreed and stated he was simply trying to ask whether, in a case involving additional murders beyond those shown in the guilt trial, the prospective juror would still be able to consider any penalty other than death. (RT 56:3303.) This is precisely what the cases discussed above conclude that counsel should be permitted to ask – to determine whether prospective jurors could fairly consider both available penalties in a case such as the one before them.

Utilizing the same flawed reasoning used by the trial court in *Cash*, the trial court responded that any attempt to describe the aggravating and mitigating factors actually present in the case to be tried would result in asking the juror in advance how he was going to vote in this case. (*Id.*) The judge concluded, "... you've got to really stay away from what you know is going to be presented in the case." (*Id.*) Counsel for Steven Homick again tried to explain that he was not seeking a commitment to any punishment, but was simply trying to determine whether the juror would remain able to consider both penalty options in a case of the sort that was to be presented. (RT 56:3302-3304.) The prosecutor complained of unfairness, since he did not know what mitigating evidence would be presented, so he could not respond by asking the juror about specific mitigating factors. If the juror heard only about aggravating factors, without any mitigating factors, the juror would likely respond that he would vote for death. The court fully agreed with the prosecutor's analysis. (RT 56:3304.)

Counsel then completed his questioning without any further attempt to clarify Mr. Ruger's ability to still consider both penalty options in a case such as the one before him. (RT 56:3306-3310.) Counsel for the co-defendants asked their voir dire questions, again not touching further on the subject precluded by the trial court. (RT 56:3310-3317.) At that point, counsel for Steven Homick challenged Mr. Ruger for cause, contending the prospective juror had indicated he would always vote for death in a case involving a series of murders. The trial court simply responded, "All right. Challenge is noted for the record but denied." (RT 56:3317-3318.)

As it turned out, the prosecutor had unrelated concerns about Mr. Ruger and also challenged him for cause. That challenge was also denied. (RT 56:3318-3319.) Subsequently, the prosecutor exercised a peremptory challenge against Mr. Ruger. (RT 67:5317.) Thus, no issue is raised on appeal regarding the ruling denying the defense challenge for cause. However, a serious problem remains. In light of the extended debate and the clear, though erroneous, conclusion urged by the prosecutor and reached by the trial court, it would have clearly been futile for trial counsel to try to explore this critically important subject with any other prospective jurors during the remaining ten-plus court days of voir dire.

Notably, the fears expressed by the present prosecutor and trial court were completely unjustified. While the prosecutor did not receive notice of expected mitigating evidence, he certainly knew that Steven Homick had no prior felony convictions and that fact would be an important mitigating factor to be urged by the defense. Moreover, even if he sincerely had no idea what mitigating evidence would be offered, he remained free to counter defense counsel's proposed question by asking the juror whether, in a case

such as that described by defense counsel, the juror would be able to keep an open mind and not decide what penalty to vote for until hearing whatever mitigating evidence the defense might offer.

Similarly, the trial court was mistaken in concluding that defense counsel was seeking a commitment as to how the juror would vote in the present case. To the contrary, counsel clearly explained he merely wanted to ask whether the juror would still be able to consider both penalties, even in the circumstances that would be presented during the present guilt and penalty trials. A juror who responded affirmatively would remain free to vote for either penalty, after listening to all mitigating and aggravating evidence and deciding which penalty was appropriate. A juror who responded that, in a case where the defendant was convicted of two murders and was shown to have also committed a number of other murders on a separate occasion, he would always vote for death without regard to whatever mitigating evidence the defense might offer, would have been properly removed for cause under the principles discussed earlier in this argument. In sum, the only commitment sought by defense counsel was the one that the governing law mandates – the ability to hear the evidence that was expected to be offered by the prosecution and still maintain an open mind about the penalty options until after hearing whatever mitigating evidence the defense might offer, along with the arguments of counsel, the instructions by the court, and the views of the other jurors.

People v. Zambrano, supra, 41 Cal.4th at p. 1121-1123 made a distinction between case-specific facts that could cause reasonable prospective jurors to invariably vote for a death sentence, and case-specific facts that would not cause such a response in a reasonable juror. This Court

noted that some facts about the brutality of a murder would affect any reasonable juror, but would not be so inflammatory as to cause an otherwise qualified juror to lose the ability to deliberate fairly on the penalty issue. Limiting references to the latter kinds of specific facts would be within the discretion of the trial court. However, in listing examples of facts that **would** potentially transform otherwise-qualified jurors into jurors who would invariably vote for death regardless of the strength of the mitigating evidence, this Court listed, "... child victim, prior murder, or sexual implications,..." (*Id*, at p. 1122.) While the present case did not involve other murders committed **prior** to the commission of the present murders, it did involve three other murders committed in a completely unrelated incident, two-and-one-half months after the present murders, hundreds of miles away. Clearly, such facts must fall within the category of specific facts that might very well cause an otherwise qualified juror to invariably vote for death, without regard to any mitigating evidence that might be presented. Thus, the preclusion in the present case was a clear abuse of discretion, that took on constitutional proportions by depriving Steven Homick of his federal 5th, 6th, 8th, and 14th amendment rights to a fundamentally fair and unbiased jury trial in accordance with due process of law, and to a reliable penalty verdict. (*Murphy v. Florida* (1975) 421 U.S 794, 44 L.Ed.2d 589, 95 S.Ct. 2031; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392,

402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

The error cannot be deemed harmless. Just as in *Cash*:

> "Here, defendant cannot identify a particular biased juror, but that is because he was denied an adequate voir dire about prior murder, a possibly determinative fact for a juror. By absolutely barring any voir dire beyond facts alleged on the face of the charging document, the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, thereby violating defendant's due process right to an impartial jury. (See *Morgan v. Illinois, supra*, 504 U.S. at p. 739 [112 S.Ct. at p. 2235].) The trial court's restriction of voir dire "leads us to doubt" that defendant "was sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment." (Ibid.)
>
> Because the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the murder charged in this case, it cannot be dismissed as harmless. Thus, we must reverse defendant's judgment of death. (*Morgan v. Illinois, supra*, 504 U.S. at p. 739 [112 S.Ct. at p. 2235].)" (*People v. Cash, supra*, 28 Cal.3d at p. 723.)

XVI. A JUROR WHO REACHED A PROPER CONCLUSION THAT A DEATH SENTENCE WAS INAPPROPRIATE, BASED ON THE EVIDENCE AND THE INSTRUCTIONS, WAS IMPROPERLY DISCHARGED AND REPLACED BY AN ALTERNATE DURING PENALTY PHASE DELIBERATIONS

A. Factual and Procedural Background

Penalty phase deliberations began on June 2, 1993 at 11:17 AM and continued until 4:17 PM, except for a 90 minute recess for lunch. (RT 145:18459, 18464-18465.) The next day, the jury deliberated from 9 AM until 1:45 PM, ending the day early because one juror had a doctor's appointment. (RT 146:18466.) A third day of deliberations began on June 4, 1993 at 9 AM. (RT 146:18467.) At 10:36 AM, the judge received a note from the jury. By 11 AM, it became apparent that all counsel could not be present until the afternoon, so the jury was released early for lunch. (RT 146:18469.) At 2:15 PM, the court and counsel finally convened to discuss the note, which stated, "We have come to a point where a unanimous decision on either of the penalties cannot be made." (RT 146 18468.)

The jury was brought into the courtroom and the foreman, Mr. K.W., explained that 4 or 5 ballots had been taken. At first, the jury was split 7-5 between the two penalty options. On the morning of the second day, the split was 6-2, with 4 jurors undecided. Later that afternoon, the vote was 10-1, with one undecided. By the morning of the third day, nothing had changed, but later that morning the split was 11-1. The court noted there had been movement, and the foreman conceded that the jurors had continued to talk and discuss issues. (RT 146:18469-18471.)

The court expressed the view that there was a lot to talk about, and there had not been that many hours of deliberation. The judge was reluctant to declare a deadlock "because I do see there has been progress." (RT 146:18472.) The court urged the jury to spend some more time, in order to determine if further deliberations would lead to a unanimous verdict. However, the foreperson still believed there was a hopeless deadlock, explaining, "the one has made it clear that they don't see any way that they can change." (RT 146:18473.)

The court asked if everyone felt the same as the foreman. Juror #4, Ms. V.W., said, "I think we should talk a little more." (RT 146:18473.) The court then directed the jury to resume deliberations. (RT 146:18473-18474.)

Later that day, the court received another note, this time from Juror #8, Ms. C.E. In the note, she explained that she believed the death penalty was appropriate if a child is involved or if an adult had been raped or tortured. "Since none of these factors were involved, I cannot vote for the death penalty for Steven Homick." (RT 146:18478.) The judge retrieved the reporter's transcript of the voir dire responses of Ms. C.E. (RT 146:18478-18479.)

In her voir dire responses to the court, Ms. C.E. had explained that she did not believe the death penalty acted as a deterrent, but she felt nonetheless that there were cases where it should be imposed as a punishment. She knew a secretary at her place of employment who had once gone home and discovered her daughter had been raped and murdered. That was very hard on the secretary, and more recently the secretary said that the murderer was back on the streets after serving a fifteen-year sentence. Ms. C.E. believed raping and killing a child was the kind of crime where a death sentence

should be imposed. A year or two earlier, she would have said she could not vote for a death sentence, but she had changed her mind. (RT 146:2848-2850.)

On further voir dire by counsel for Steven Homick, a hypothetical was constructed that was very similar to the evidence expected in the present case. Ms. C.E. responded that in such a case she believed she could consider both penalty options. (RT 146:2854-2855.) On questioning by the prosecutor, she reiterated her belief that the death penalty was not a deterrent, since the number of criminals was not decreasing. If anything, the number had increased. However, she realized something had to be done. She believed that death could still be an appropriate punishment even in a case where no children were involved. (RT 146:2861, 2863.)

The judge believed the present note was inconsistent with Ms. C.E.'s voir dire responses. The judge proposed to ask the juror whether the earlier responses or the note correctly reflected her current views. Counsel for Steven Homick objected, contending that the juror had simply reached a point where she could not vote for death in this case, but was being pressured by other jurors to give some explanation to the court. Counsel also wanted an opportunity to review the voir dire responses more carefully, and sought a continuance until the next court day. Nonetheless, the court wanted to proceed immediately, assuring counsel, "You know me well enough to know I won't coerce this woman." (RT 146:18479-18482.)

Juror C.E. was brought into the courtroom. The court read to her the portions of the voir dire where defense counsel had described a hypothetical case similar to the present case and Ms. C.E. had said she could consider both penalties. The court also read the portion where the prosecutor made

clear that the present case would not involve any child victims. Ms. C.E. said she remembered that. The judge went on to note Ms. C.E. had responded that she would still be able to consider a death sentence, and that a death sentence could be appropriate in cases where children were not involved. Next, the court read the note received from the juror. (RT 146:18482-18486.)

After listening to the judge, Ms. C.E. said that her note and her voir dire responses **both seemed the same to her**. She explained that she had nine more months to think about the matter since the voir dire, adding: "I answered yes, I thought I could, and I did. I thought about it, and I thought, one of the instructions was that if I didn't feel that the crime was bad enough to merit the death penalty, then I could vote for life imprisonment." (RT 146:18486-18487.) She reiterated that even if no child was involved, she could still vote for death if an adult was raped or tortured. But she did not stop there. She explained, "[b]ut -- and it's not just this factor, your Honor. There are several other factors involved." (RT 146:18487.)

The judge **stopped** her from explaining any further, saying her only concern was that the note and the voir dire seemed inconsistent, but the judge conceded that perhaps they were not inconsistent. The juror reiterated she did not believe there was any inconsistency. (RT 18487-18488.) In one last effort to get clarification, the following important exchange occurred:

> "THE COURT: Let me ask one additional question. When you were asked the question that sort of laid out the facts of this case, planning to commit a murder, 2 adults are murdered, plotting to commit a murder for money, and you said you could consider death in that case.
>
> JUROR [C.]E[.][]: yes.

> THE COURT: are you saying that was true?
>
> JUROR [C.]E[.][]: Yes.
>
> THE COURT: **You could consider it, but you have concluded that that's not how you want to vote. But when you said before you could consider it, that was a true statement?**
>
> JUROR [C.]E[.][]: **Yes.**" (RT 146: 18488; emphasis added.)

Juror C.E. soon added, "That's the reason we can't get past this." (RT 146:18488-18489.)

The discussion continued, with no jurors present. Counsel for Steven Homick expressed his belief it was now clear that the juror had concluded a death verdict was not warranted in this case. The court responded, "I am with you." (RT 146:18489.) After further discussion, the court stated, "I don't think I have a record that says she lied to us. I am sure of that." (RT 146:18490.) The judge soon decided to just send everybody home for the weekend and discuss the matter further on Monday. However, she told the prosecutor, "I think it's important to give you my reading on it. And you definitely have the laboring oar, ..." (RT 146:18491.)

On Monday morning, the prosecutor filed points and authorities arguing that Juror C.E. should be replaced. (RT 147:18503-18504; Supp. CT 5:1347-1351) Counsel for Steven Homick responded that the juror was simply making a personal moral decision about the facts of the present case. (RT 147:18493-18497.) Counsel argued that if this juror was to be removed on this showing, then the other eleven jurors, who all stated in voir dire that

they could vote for life without parole in a case like this, and are now voting for death, should all be asked to explain the inconsistency. Counsel made clear he was not seriously seeking such questioning, but he saw that as no less fair than removing Juror C.E. on the present record. (RT 147:18500.)

Defense counsel also reminded the court that when Juror C.E. said that there were other factors involved, the court would not let her describe them. Counsel understood the reluctance to elicit such details from a deliberating juror, but that left a crucial uncertainty in the record since nobody knew what those other factors were. This made it impossible to conclude that the juror was now in a position where she would automatically vote against death without regard to the aggravating factors. (RT 147:18508.)

Greatly contradicting what she had said three days earlier, the judge reached the surprising conclusion that the note received from Juror C.E. was clear, specific, and unambiguous, "unlike her answers to the court's questions on Friday afternoon." (RT 147:18509.) The judge reached the highly speculative and totally unwarranted conclusion that the note reflected the juror's true state of mind, and that after the court read the juror's voir dire responses to the juror, the juror tried to reconcile those responses with the contents of the note. The judge believed Juror C.E. had a specific agenda which, had it been expressed during voir dire, would have resulted in her removal for cause. The judge offered no explanation whatsoever regarding how to reconcile her own conclusions with her flat statement three days earlier that she had no basis to conclude the juror was lying. (RT 147:18509-18510.)

The judge conceded that federal cases had found intolerable juror coercion in requiring further deliberations after learning the numerical breakdown of a deadlocked jury. But the judge believed the juror was impaired under the standard set forth in *Wainwright v. Witt* (1985) 469 U.S. 412, 83 L.Ed.2d 841, 105 S.Ct. 844, and concluded the juror should be replaced even though the judge realized her decision to replace the juror could well have the "direct and immediate" impact of a death verdict for Steven Homick. (RT 147:18510-18511.)

Counsel for Steven Homick moved for a mistrial, highlighting the juror's clear and unequivocal statement that she had answered truthfully when she had stated she could consider a death verdict in a case such as the present one, but after hearing all the evidence she had decided she did not believe a death verdict was appropriate. Counsel reminded the judge that she had agreed with that analysis on the preceding Friday. Removing Juror C.E. now would signal to the other 11 jurors that their position in support of death was valid, and any alternate sent into the jury room now would inevitably be impacted by coercion. (RT 147:18513-18514.) the judge's only response was, "Motion for mistrial is denied." (RT 147:18514.)

After a lunch recess, the judge announced she had received a pleading from Steven Homick's counsel proposing two questions that should be addressed to Juror C.E. (RT 147:18515.) The first question was, "On Friday you said that if an adult was tortured or raped you could vote for the death sentence. You said that was one factor and there were several other factors involved. What were these several other factors?" (RT 147:18519.) The second question was, "Are you saying that the only time you could vote for death on an adult is if he [sic] was tortured or raped." (*Id.*) The judge treated

counsel's questions as a request for reconsideration and summarily denied it. (RT 147:18515.)

Counsel persisted, explaining he felt blind-sided by the court's change of position over the weekend. He reminded the judge that the juror had unequivocally stated that her voir dire responses had been true, but that the juror had now concluded that she did not want to vote for death in this case. He noted the judge had told defense counsel, "I am with you," and had told the prosecutor that he had the laboring oar. (RT 147:18515-18517.) Today, the judge was taking the exact opposite position, which was a complete surprise to counsel. Counsel had never been given a chance to propose questions for the juror to get an even clearer expression of her state of mind. Counsel was confident that the questions he proposed would clarify matters and would establish there was no ground for disqualification. Certainly there could be no harm at this point in asking these questions. (RT 147:18517-18518.) With no explanation at all, the judge denied counsel's request and simply stated, "I am comfortable that the picture is clear,..." (RT 147:18518.)

Juror C.E. was replaced by an alternate, and deliberations resumed. (RT 147:18521-18524.) The jury deliberated the rest of that day and for two more days, before returning a death verdict. (RT 147:18525-18529.)

Subsequently, a new trial motion was filed on behalf of Steven Homick. (SCT 7:1894-1922.) Attached to it was a declaration under penalty of perjury signed by Juror C.E., explaining in more detail what the court would not allow her to explain earlier. The declaration stated:

"1. I was a juror on Steven Homick's case until removed during the penalty deliberations.

2. The note that I wrote to the court during the penalty deliberations was not the first note that I wrote on the subject. The first note had the additional statement that the other jurors believed that it was better to have me replaced with an alternate so that they could reach a verdict. When I read that first note to the other jurors in the jury room, they made me remove the part that I just referred to because they did not like it and said that I could not give it to the Judge with that in it. The idea of writing any note at all to the Judge was not mine, but I was told to write it by one of the other jurors. A great deal of pressure was placed on me to do so during the deliberations. It was under this pressure that I wrote the note and it may not have clearly expressed my position.

3. In no way was I saying in the note nor in court that I believed that I could only vote for the death penalty in a case involving rape, torture, or a child. Quite to the contrary, I believed that Stewart Woodman in this very case deserved death for having his parents killed.

4. I believed that there were a number of reasons that Steven Homick did not deserve death. Some of them involved the circumstances of the crime, such as my belief that Steven Homick was not the shooter. Also important to me was the court's instruction that we could consider as mitigation the fact that deals were made with Stewart Woodman and Michael Dominguez, who I believed was the shooter, to

> receive sentences of less than death.[288] I also thought that Mr. Homick's age at the time he committed the crime was a reason not to impose death. It was my belief that his having lived a law-abiding life for so many years should mitigate his punishment. Additionally, I felt that life without parole was appropriate because I believed that Mr. Homick deserved mercy. Part of my reason for this was that Mr. and Mrs. Woodman were not tortured, but died quickly.
>
> 5. The above are only some of the reasons that I believed death was not the appropriate verdict and some of the things I would have told the court if I had been allowed to explain what I meant when I told the court that there were circumstances involved in my decision.
>
> I declare under penalty of perjury that the foregoing is true and correct." (SCT 7:1933-1934.)

At the hearing on the new trial motion, counsel for Steven Homick sought an evidentiary hearing to fully resolve the issues regarding the removal of Juror C.E. (RT 148:18655.) The trial court saw no basis whatsoever for any further evidentiary hearing, explaining only that she would not inquire into the subjective reasoning processes of a juror. (RT 148:18662.)

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288 The jury had been expressly instructed, "You may consider the sentences received by Stewart Woodman and Michael Dominguez as a mitigating factor." (RT 148:18236)

B. The Facts Before the Trial Court Did Not Support the Removal of Juror C.E.

In *People v. Cleveland* (2001) 25 Cal.4th 466, this Court set forth the governing standards when considering the removal of a juror on the ground of an unwillingness or inability to properly deliberate. At the outset of the discussion, this Court reiterated its earlier holding " ' ... that a juror's inability to perform as a juror " 'must appear in the record as a demonstrable reality.' " [Citation.]' (*People v. Marshall* (1996) 13 Cal.4th 799, 843.)" (*People v. Cleveland, supra,* 25 Cal.4th at p. 474; see also more recently, *People v. (Andre) Wilson* (2008) slip op. at 30 (a trial court's decision to discharge a juror will be upheld "if the record supports the juror's disqualification as a demonstrable reality").)

When such an issue arises, tension can develop between the court's need to gain information about the juror, and the need to assure the privacy of juror deliberations by avoiding intrusive inquiries. At the same time, the restrictions of Evidence Code section 1150[289] do **not** apply in a pre-verdict setting. (*People v. Cleveland, supra,* 25 Cal.4th at pp. 476-477.)

Cleveland went on to cite with approval the Court of Appeal decision in *People v. McNeal* (1979) 90 Cal.App.3d 830. (*People v. Cleveland, supra,*

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289 Evidence Code section 1150, subdivision (a), provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

25 Cal.4th at p. 475.) There, after one juror indicated an impropriety by another juror, defense counsel requested a formal hearing. However, much as in the present case, the trial judge said that he was " 'not going into the facts.' " (*People v. McNeal, supra,* 90 Cal.App.3d at p. 836, italics omitted.) The limited questions the judge did ask resulted in ambiguous and cryptic responses, which the trial court relied on in determining that the juror should remain on the jury. The Court of Appeal found reversible error, concluding, "Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility." (*People v. McNeal, supra,* 90 Cal.App.3d 830, 838; see also *People v. Cleveland, supra,* 25 Cal.4th at p. 477, and *People v. Burgener* (1986) 41 Cal.3d 505, 518: " '[O]nce the court is put on notice of the possibility a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error. [Citation.]' (Id. at p. 520.)" (*People v. Cleveland, supra,* 25 Cal.4th at p. 477.) In the present case, as in *McNeal*, once alerted to the mere *possibility* of an impropriety, the trial court refused to get to the heart of the matter and instead conducted only a superficial examination that left a record that provides no basis for discerning as "a demonstrable reality" that Juror C. E. was unable to properly perform here duties as a juror.

It is important to recognize that in the present case, **not a single juror** accused Juror C.E. of doing anything at all improper. The court received input from only three jurors. The foreman, Mr. K.W., said only that the jury had continued to talk together and discuss issues (RT 146:18471), but one

juror disagreed with the others and was not likely to change her mind. (RT 146:18473.) Juror V.W. added that she believed further deliberations might be helpful. (RT 146:18473.) Juror C.E. herself insisted she was deliberating properly and had simply come to a different conclusion than the other jurors. **No juror** ever stated that Juror C.E. improperly stated a fixed opinion at the outset or refused to consider the views of the other jurors.

Indeed, this important fact stands in sharp contrast to the behavior of the very same jury during the guilt trial of the present case. There, when the jurors were at an impasse, they sent a note to the judge stating that one juror was committed to one way of thinking and was not willing to discuss his reasons. Another note (from a different juror – see RT 133:16735-16737) said the problem juror was unwilling to deliberate, refused to talk about the testimony, and refused to give information on his views. (Supp CT 3:896-897.) That latter note went on to state:

> "We, the jurors, believe that he is not willing to deliberate. This is unfair to the other eleven jurors because we do want to give the defendants a fair trial.
>
> Our issue has nothing to do with being innocent or guilty. We just want all twelve to be able to discuss their views and to deliberate on what we have been provided as evidence." (Supp. CT 3:897.)

Thus, these jurors knew precisely how to report such a problem, but not one of them ever made such allegations in regard to Juror C.E.[290]

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290 Indeed, the problem juror was the guilt phase foreman. (RT 133:16735-16738.) This demonstrates even more clearly that these jurors had no reluctance to report any failure to deliberate properly.

The *Cleveland* Court next discussed federal cases on this issue, starting with *U.S. v Brown* (D.C.Cir. 1987) 823 F.2d 591.[291] There, a recalcitrant juror expressed an inability to agree with the rest of the jury because of the way the law was written and because of the facts. The trial judge believed it would be improper to question the juror further, and discharged him for an inability to follow the law. As this Court explained, the D.C. Circuit felt differently:

> "The court of appeals began its analysis by noting that 'a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence," stating that otherwise 'the right to a unanimous verdict would be illusory.' (*U.S. v. Brown, supra*, 823 F.2d 591, 596.) The court recognized, however, that the reason a request for discharge was made often will be unclear. Agreeing with the trial court that a court may not 'delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations,' the court of appeals observed that 'unless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it.' The court of appeals ultimately established the following rule: '[I]f the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request.' (Ibid.) The court in *Brown* reversed the judgment of conviction, concluding that the

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291 This Court went on to reject the precise standard utilized in the federal cases, but they remain worth noting because this Court did agree with much of the reasoning set forth in those cases.

> record 'indicates a substantial possibility that [the juror] requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction.' (Ibid.)" (*People v. Cleveland, supra,* 25 Cal.4th at p. 482.)

Cleveland went on to discuss other federal cases applying the "any possibility" test, and explaining the importance of maintaining the privacy of jury deliberations. Ultimately, this Court, agreed with the principles, but rejected the "any possibility" test, explaining:

> "We agree with the observations in *Brown, Thomas, and Symington* that a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence. And the court in *Brown* is correct in observing that often the reasons for a request by a juror to be discharged, or the basis for an allegation that a juror refuses or is unable to deliberate, initially will be unclear. We also agree, as noted above, that a court must take care in inquiring into the circumstances that give rise to a request that a juror be discharged, or an allegation that a juror is refusing to deliberate, lest the sanctity of jury deliberations too readily be undermined. But we do not adopt the standard promulgated in *Brown*, and refined in *Thomas* and *Symington*, that restricts a court's authority to inquire into whether a juror is unable or unwilling to deliberate and that precludes dismissal of such a juror whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.' (*U.S. v. Symington, supra*, 195 F.3d 1080, 1087, italics omitted.) Rather, we adhere to established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct 'whatever inquiry is reasonably necessary to

> determine' whether such grounds exist (*People v. Burgener, supra,* 41 Cal.3d 505, 520) and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate. (*People v. Marshall, supra,* 13 Cal.4th 799, 843; *People v. Collins* (1976) 17 Cal.3d 687, 692.)" (*People v. Cleveland, supra,* 25 Cal.4th at p. 483-484.)

Once again, it is important to note that in the present case, neither Juror C.E., nor any other juror ever requested the discharge of Juror C.E. No juror ever said that Juror C.E. was unable or unwilling to deliberate, or that she was not participating in deliberations. Indeed, all indications were to the contrary. Thus, the "demonstrable reality" standard was not met here. At most, further inquiry was needed to determine whether grounds for discharge existed. If further inquiry was unrealistic, the only appropriate options were to leave the juror in place, or declare a mistrial.

Cleveland next set forth guiding principles that are especially applicable to the present case:

> "As discussed above, proper grounds for removing a deliberating juror include refusal to deliberate. A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. The circumstance that a juror does not deliberate well or relies upon faulty logic or

> analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views. (See *People v. Castorena* (1996) 47 Cal.App.4th 1051, 1066-1067.)" (*People v. Cleveland, supra,* 25 Cal.4th at p. 485.)

In the present case, there was no evidence at all that Juror C.E. failed to participate in discussions, failed to listen to the views of others, failed to express her own views, expressed a fixed conclusion at the outset, refused to consider the views of others, separated herself physically, or refused to speak to others. The scant information on these subjects all points to the contrary. Juror C.E. simply participated in reasonable deliberations and reached a point where further discussion would not alter her view of the evidence.

Cleveland found error in that case because the record did not establish a refusal to deliberate as a demonstrable reality. Instead, what was shown at most was an ambiguous circumstance and a juror unable to articulately explain his basis for concluding the evidence was insufficient. In the present case, there is also ambiguity at most, and the juror's attempts to explain herself were cut off by the court. *Cleveland* found the error was necessarily prejudicial, and the same is true here. (*Id*, at p. 486, citing *People v. Hamilton* (1963) 60 Cal.2d 105, 128: "To dismiss her without proper, or any,

cause was tantamount to 'loading' the jury with those who might favor the death penalty. Such, obviously, was prejudicial to appellant.") Such an error necessarily violated Steven Homick's federal 5th, 6th, 8th, and 14th Amendment rights to a fundamentally fair trial by jury in accordance with Due Process of law, and to reliable fact-finding in a capital sentencing proceeding. (*Murphy v. Florida* (1975) 421 U.S 794, 44 L.Ed.2d 589, 95 S.Ct. 2031; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.) Further, it also violated Steven Homick's 5th, 6th, 8th, and 14th Amendment right to have his trial completed by the originally chosen jury absent some manifest necessity precluding that result. (*Crist v. Bretz* (1978) 437 U.S. 28, 35, citing *Wade v. Hunter* (1949) 336 U.S. 684; *Green v. United States* (1957) 355 U.S. 184, 188.)

People v. Barber (2002) 102 Cal.App.4th 145 applied *Cleveland* in a case where the jury was deadlocked 11-1, with 7 jurors saying everybody was deliberating in good faith and 5 jurors saying the lone holdout was not deliberating properly. The latter 5 were interviewed and then the holdout juror was discharged. The Court of Appeal found an inadequate inquiry in only interviewing one side and not the other, leaving the evidence incomplete. (*Id*, at pp. 151-152.) In the present case, the evidence was even more incomplete. The foreperson indicated that the jury had been deliberating properly, but was at a point of deadlock, and another juror said

further deliberations would be helpful. If more information was needed, the trial court had 9 more jurors who were never asked for their view. Also, Juror C.E. made it crystal clear she had more to say, and the court simply refused to hear it.

There is one last important factor to consider. This is not a case where the trial court relied on a juror's demeanor to resolve a factual issue that might appear ambiguous when looking only at a transcript. Here, the words ultimately relied on by the trial judge to support the discharge ruling appeared in a written note. The juror's oral responses, both in the original voir dire and in the brief questioning during penalty deliberations all made clear she could consider death in a case such as the present one. The judge never said she thought the juror was lying, and initially made it clear she did **not** believe there had been any lies. Indeed, as noted above, after Juror C.E. left the mid-deliberation discussion, the judge expressly stated, "I don't think I have a record that says she lied to us. **I am sure of that.**" (RT 146:18490; emphasis added.)

In sum, there was no showing of a "demonstrable reality" that Juror C.E. was unwilling or unable to deliberate properly. At best, there was a speculative possibility, based on an incomplete record.

C. Even if the Limited Facts Known to the Trial Court Could Have Supported Removal of the Juror in the Absence of Other Evidence, the Court Erred in Refusing to Allow the Juror to Explain What Other Factors Affected Her, and in Denying the Request to Pose Two Specific Questions to the Juror

Even if it could be said that the limited facts before the trial court, in the absence of anything additional, could have amounted to a demonstrable reality that the juror was unable or unwilling to deliberate properly, the next question is whether the court had a duty to obtain further information. As made by the case law noted in the preceding section of this argument (i.e., *Cleveland*, *Burgener*, and *McNeal*), the trial court should conduct whatever inquiry is reasonably necessary to resolve whether grounds for discharge exist.

Here, the court had at least three viable options available, but summarily dismissed two and never even considered the third. First, Juror C.E. herself made it as clear as possible that there were other factors influencing her, but the judge refused to let her say anything more. Second, after the judge had completely changed her mind over the weekend and decided she believed there were grounds for discharge, defense counsel expressly asked the court to inquire of Juror C.E. what the other factors were. Third, there were eleven other jurors who could have been asked directly whether Juror C.E. was unable or unwilling to deliberate, or was merely disagreeing with the rest of the jury.

Cleveland is filled with cautionary language against making too detailed an inquiry, as that could invade the sanctity of jury deliberations and

could cause a holdout to feel coerced to go along with the majority. No case makes clear where the line should be drawn. However, the very issue of whether a juror should be discharged for failing to deliberate properly necessarily involves some inquiry into the state of mind of the juror in issue.

Certainly there was no good reason to not at least make inquiry of other jurors. Simple inquiries as to whether the juror in issue has been deliberating properly have been routinely approved in many cases, and would have undoubtedly shed more light on the present circumstances. Indeed, during the guilt phase juror problem mentioned in the previous section of this argument, this same trial judge questioned **seven** of the jurors in detail about the problem guilt-phase juror, and received very illuminating and reasonably consistent responses. (See RT 133:16743-16753, 16777-16803.) Alternatively, asking the question that counsel sought, or allowing the juror to complete her statement at the outset, would not have invaded juror privacy, since Juror C.E. was clearly prepared to volunteer the information.

Thus, even if there was any ambiguity to be resolved, some further inquiry was needed. No explanation was given for the trial court's unwillingness to inquire further, other than the court' own mistaken or unrealistic conclusion that the record was somehow already clear – a conclusion very hard to square with the court's own initial record-based determination that the juror was telling the truth. Without undertaking further inquiry, the evidence was incomplete and the discharge order cannot be upheld.

D. Under All the Circumstances, the Replacement of Juror C.E. While Knowing the Remaining Eleven Jurors All Voted for a Death Verdict Resulted in a Coerced Penalty Verdict

There is yet another very serous problem in the present case. Once Juror C.E. was discharged, the trial court knew that the remaining 11 jurors were ready to vote for a death verdict. Although the judge properly instructed the newly constituted panel to begin deliberations all over, there is no reason to think that any of the original eleven would change his or her position, especially after three days of debate, involving one juror strongly opposed to a death verdict in this case, had only resulted in movement toward a death verdict. Also, the original eleven knew that the lone holdout had been discharged, making it apparent to them that the judge believed a death verdict was appropriate in this case and thereby making it all the more unlikely that any of them would be open to reversing his or her position as to the appropriate sentence. Furthermore, even assuming the one new juror came into deliberations with little or no knowledge of what had transpired, the odds were high that person would soon be told exactly what had transpired.

It has long been recognized that when a jury reports a deadlock, there is great danger when a judge inquires into the numerical breakdown. "Inquiry into the numerical division of the jury after it has failed to reach a verdict has itself been deemed to have a coercive impact. (*Brasfield v. United States* (1926) 272 U.S. 448 [71 L.Ed. 345, 47 S.Ct. 135].)" (*People v. Sellars* (1977) 76 Cal.App.3d 265.)

The trial court in the present case did not initiate any inquiry into the

numerical breakdown. Instead, it was the foreman who volunteered the breakdown and the ensuing discussion made it clear which verdict was supported by the majority. But the coercive impact is no different regardless of whether the trial court inquires into the numerical breakdown or whether that information is volunteered; what matters is that when the court discharged Juror C.E., it knew that the remaining vote was 11-to-0 in favor of death and the remaining jurors knew that the court was aware of this fact.

Such knowledge, *even though acquired inadvertently*, was found to contribute strongly to a coercive atmosphere in *People v. Baumgartner* (1958) 166 Cal.App.3d 103, 108:

> "Coercion is much more apt to exist where, as here, the court in the presence of the whole jury, is informed that the jury stand in a certain numerical status with regard to conviction or acquittal and in this case the situation was that the court was informed in the presence of the jury that they stood 11 to 1 for conviction."

In other words, where the jurors know that the judge realizes they are only 1 vote away from a death verdict, the judge's insistence on further deliberations can only be seen as judicial agreement that a death verdict would be appropriate. This inference becomes all the more compelling – and coercive – when the trial court proceeds to remove the one juror who had been holding out for a life sentence.

This Court has concluded that *Brasfield* is not binding on California, since it states only a rule of federal procedure. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 776-777, fn. 14.) However, even if not binding, *Brasfield* is certainly persuasive in its rationale:

> "We deem it essential to the fair and im-

> partial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned. (*Brasfield, supra*, 272 U.S. at p. 450, 71 L.Ed. at p. 346.)

This Court has continued to feel differently, even in death penalty cases where the trial court learned the verdict was 11-1 in favor of death. (*People v. Sheldon* (1989) 48 Cal.3d 935, 959-960; *People v. Pride* (1992) 3 Cal.4th 195, 265-266; *People v. Johnson* (1992) 3 Cal.4th 1183, 1252-1255.) But this Court has expressly recognized that that there are circumstances where a trial court's words or actions can coerce a holdout juror to vote with the majority. (See *People v. Johnson, supra,* 3 Cal.4th at p. 1255: "Moreover, any such inquiry could in itself have risked pressuring the dissenting juror to conform her vote to that of the majority. (Citation.)") Thus, the danger is recognized, and the only question is when does it become too great to ignore.

Appellant submits that this is a case in which the danger did become too great and requires the setting aside of the verdict. As previously urged in accordance with *Brasfield*, the in-court disclosure of the 11-1 vote for death, followed by instructions to keeps deliberating, was inherently coercive.

When a trial court knows a jury is divided, but also knows that the minority consists of several jurors, a coercive impact may be less likely. When a trial court knows the numerical split, but does not know which way the majority is leaning, there is little danger that the jury will perceive the judge as giving a stamp of approval to a particular outcome. But when the judge knows that the jury is 11-1, and also knows which way the majority are leaning, the potential for a coercive impact becomes substantial.

But even if this Court again declines to embrace the *Brasfield* rationale and find inherent coerciveness in this situation, the present case has a very important difference from the cases in which this Court has upheld death verdicts when deliberations were continued after the judge learned the jury was 11-1 for death. Those cases all involved deadlocked juries that were told to continue deliberating, but with no juror being removed and replaced. In that circumstance, at least it is known that 1 juror still feels strongly that death is not appropriate. With proper instructions, there is at least some reason to believe that juror, who has already stuck to a position disfavored by 11 other jurors, will continue to do so unless honestly persuaded by the force of the arguments of the other jurors.

However, in the present case, **the lone holdout was removed from the picture**. There is much less reason to expect that a new juror, coming into deliberations with eleven people who have already decided that death is appropriate, will withstand the inevitable pressure to go along with the lopsided majority and reach the result unmistakably sanctioned by the judge as appropriate, even if that new juror starts out with any reluctance to vote for death. Certainly the judge's instruction to continue deliberating after voting 11-1 for death, followed by the judge's removal of the lone holdout

for life, would have solidified the positions of the original 11 jurors who had voted for death.

There is another principle that leads to the same result. This trial judge expressly recognized the likelihood that the removal of Juror C.E. and the substitution of an alternate would directly lead to a death verdict for Steven Homick. (RT 147:18510-18511.) Such a conclusion was well-warranted in these circumstances. But Steven Homick had a federal 5th, 6th, and 14th Amendment right to have his fate decided by a jury, not by the judge. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739.) That right to have his sentence determined by a jury, not the judge, was also expressly guaranteed by state statute (Penal Code section 190.4, subds. (b) and (c)), creating an important procedural safeguard and liberty interest protected by the Fourteenth Amendment guarantee of due process. (See, *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 (noting that "state laws which guarantee a criminal defendant procedural rights at sentencing, even if not themselves constitutionally required, may give rise to a liberty interest protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause").)

D. A Penalty Phase Jury That Knows the Trial Judge Believes a Death Verdict is Appropriate Will Inevitably Have Its Own Sense of Responsibility Diminished

Aside from any coercive impact of the jury's knowledge that the judge clearly believed a death verdict was appropriate, such knowledge could also serve to relieve the jury of its own sense of responsibility for the penalty verdict, depriving Steven Homick of his federal 8th and 14th Amendment right to reliable fact-finding in a capital case. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Here, the jury could come to no other conclusion. The jury knew that the judge knew they had been deadlocked 11-1 in favor of death. The jury knew that the one person opposed to death was removed from the jury, ostensibly for failing to deliberate properly. (See RT 147:18521-18522.) The jury knew the judge wanted them to continue deliberating in the hope they could reach a verdict. The jury could not help but assume the judge realized that if any verdict was to be reached in these circumstances, it was all but certain to be a death verdict. Thus, the jury must have interpreted this as meaning the judge had concluded a death sentence would be appropriate in this case.

Caldwell recognized that 8th Amendment reliability requirements mandated that juries treat their decision regarding the appropriateness of a death sentence as an "awesome responsibility." (*Id*, at pp. 328-329.) *Caldwell* found intolerable error when a prosecutor informed a jury that its determination of appropriateness would be reviewed by a state supreme court. Here, the jury was effectively informed that the trial judge, who had

heard the same live witnesses the jury had heard, had already made a determination that death was an appropriate outcome. Knowing that the judge had already reached that conclusion inevitably rendered the jurors' own sense of responsibility far less awesome.

E. Even if the Removal of Juror C.E. Could Be Upheld Based on the Facts Known at the Time of the Removal, the Court Erred in Refusing to Conduct a Further Evidentiary in the Face of Undisputed Evidence that Other Jurors Unduly Coerced Juror C.E., and that the Juror's Reasons for Not Voting for Death Were Based on Her Proper Assessment of the Evidence and Not on Any Disqualifying Refusal to Consider the Option of Death

Finally, even if all of the preceding arguments can be rejected, we must also consider the trial court's response when the issue was raised again in the new trial motion, accompanied by a sworn and undisputed declaration that completely resolved any ambiguities that might have existed at the time Juror C.E. was removed.

The new trial motion argued that the trial court committed fundamental constitutional error when the court "excused juror [C.E.] during penalty deliberations without sufficient cause." (SCT 7:1901-1902.) In support of that contention, and to make the lack of sufficient cause for removal even clearer, the defense motion included the juror's sworn declaration providing the very information the defense had been improperly precluded from eliciting at the time of the removal. (SCT 7:1933-1934.) That declaration was quoted in full earlier in this argument and fully demonstrated that Juror C.E. never meant to convey the impression that she would vote for

a death verdict only in cases involving rape, torture, or a child victim. Instead, that declaration demonstrated that she properly reached a conclusion, based on the evidence and the instructions, that death was not the appropriate verdict for Steven Homick in this case.

The People's only response to this claim and the declaration was to argue that Evidence Code section 1150 precluded any consideration of everything in the declaration aside from the fact that the juror wrote a note to the judge and then changed it after being told to do so by the other jurors. (SCT 7:2120-2121.) The trial judge apparently adopted the People's position, as her only comment was that she was not going to delve into the subjective reasoning processes of jurors. (RT 148:18662.)

However, the restrictions of Evidence Code section 1150 had no application whatsoever in the present context. That section applies only to the effect of mental processes on the determination of the **verdict**. But the issue in this instance was not the determination of the verdict that occurred after Juror C.E. was removed and a newly constituted jury began deliberations anew. Instead, the issue was whether the court had erred in its ruling removing Juror C.E. Nothing in Evidence Code section 1150 precluded the production of evidence that had been improperly precluded earlier, and which established not only clear error, but the constitutional nature of that error and its prejudicial impact.

Nor was there any public policy reason precluding consideration of such. There was no invasion of juror privacy, since the information came voluntarily, not under court-ordered questioning, and the evidence was directly relevant to the issue before the court, i.e., whether the court had erred in discharging Juror C. E. Indeed, if there was any public policy basis

for turning a blind eye to this fundamental error, it would have to be ruled invalid under the federal 8th and 14th Amendment requirements of reliability and meaningful appellate review in capital cases. (*Parker v. Dugger* (1991) 498 U.S. 308, 321; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

Thus, the declaration submitted by Juror C.E. should have been considered by the trial court and must be considered now. If it is accepted at face value, then the trial court's ruling removing the juror was clear prejudicial error. If there could be any proper basis for doubting the truth of the declaration, then the proper course was not to deny the new trial motion, but to hold the evidentiary hearing that was sought by the defense below, but rejected by the People and the trial court. Thus, once again the trial court erred and the penalty verdict must be reversed.

XVII. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT MITIGATING FACTORS COULD ONLY BE CONSIDERED BY JURORS WHO WERE CONVINCED THE FACTORS EXISTED

Under well-established California law, there is no burden of proof on either side in regard to the existence of factors in mitigation of the penalty, or factors in aggravation of the penalty (other than aggravating factors based on prior felony convictions or other violent criminal acts). Each juror is free to give whatever weight s/he deems appropriate to factors in mitigation urged by the defendant. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

Nonetheless, in the present penalty trial, the jury was instructed, "If any juror is **convinced** that such a factor exists, that juror may consider that factor in mitigation . . . " (CST 5:1366; emphasis added.)

Steven Homick asserts that the emphasized portion of that instruction improperly placed a heavy burden of proof on the defense, when no burden of proof at all should have been present. A juror who believed a mitigating factor *probably* existed, or *may* have existed should have been free to give weight to such a factor even if that juror was not *convinced* that the existence of the factor had been proven.

To make matters worse, the problem language came immediately after the jury was instructed on the need to find that any other violent criminal acts had been proved beyond a reasonable doubt. (SCT 5:1365-1366.) In context, the jurors were all but certain to conclude that the same "beyond a reasonable doubt" standard was applicable to factors in mitigation urged by the defense.

Notably, the defense had proposed a proper instruction, but the trial court mistakenly rejected it as redundant. (See Defendant's Proposed Penalty Instruction #12, 3rd paragraph: "A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is." (CST 4:1115, refused at SCT 4:1117 and RT 143:18209.)

In this case, there were strong potential mitigating factors that jurors could have thought may have existed, or probably existed, while not being *convinced* they were mitigating. These included the sentences received by Stewart Woodman and Michael Dominguez (SCT 5:1375) and any lingering doubt as to the guilt of the defendant. (SCT 5:1364.) The "lingering doubt" factor was important to the defense in this case, but was also very possible that at least some jurors would have concluded that lingering doubts may have been present, while not feeling convinced they were present.

This erroneous instruction greatly diminished the likelihood that the jurors would conclude that important mitigating factors were present and that they justified a sentence other than death. This effectively deprived the defense of its federal 5th, 6th, 8th, and 14th Amendment rights to a fundamentally fair jury trial, to present a defense, to have the jury fairly consider all mitigating evidence, and to a reliable penalty verdict. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S.14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019; *Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v.*

Oklahoma (1982) 455 U.S. 104; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

XVIII. A VARIETY OF ADDITIONAL ERRORS AND FLAWS IN THE CALIFORNIA CAPITAL SENTENCING PROCEDURES ALSO MANDATE REVERSAL OF THE DEATH JUDGMENT

In addition to the many errors that have been set forth in this brief, the present death judgment is also flawed because of a number of substantive and procedural defects in the California capital sentencing law. Although many of these points have been rejected by this Court in other cases, they should be reconsidered, and they have not yet been finally determined in the federal courts. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

A. The failure to require the jury to unanimously find that aggravating circumstances relied on were true beyond a reasonable doubt, or to unanimously find that aggravation outweighed mitigation beyond a reasonable doubt, or to unanimously find that death was the appropriate punishment beyond a reasonable doubt, violated 5th, 6th, 8th, and 14th Amendment due process, trial by jury, and reliability requirements. (See *In re Winship* (1970) 397 U.S. 358; *Cunningham v. California* (2007) 549 U.S. __, 127 S.Ct. 856, 166 L.Ed.2d 856; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584, 1428; *Blakely v. Washington* (2004) 542 U.S. 296.) *Ring* held that the Sixth Amendment right to trial by jury applies to all factual determinations necessary to support a death sentence. In California, when a jury returns a verdict finding a defendant guilty of first degree murder, and finding one or more special circumstances true, there are still additional findings that must be made before a death sentence can be imposed. Those findings include: 1) that at least one aggravating factor exists; 2) that the aggravating factor or factors outweigh any mitigating factors; and 3) that death is the appropriate punishment.

(Penal Code section 190.3.) In the present case, the jury was not required to make any of those factual findings beyond a reasonable doubt. The jurors were also not required to agree with one another in determining which aggravating factor or factors existed. Therefore, under *Ring*, the penalty must be reversed. While this Court rejected such an analysis in *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298, it did so by a simplistic conclusion that *Cunningham, supra,* simply extended *Blakely, supra,* and *Apprendi, supra,* to California's Determinate Sentence Law, and said nothing about the death penalty law. However, until *Cunningham* was decided, this Court refused to accept the fact that *Apprendi* and *Blakely* were clear enough to invalidate California's determinate sentence law. (*People v. Black* (2005) 35 Cal. 4th 1238.) The rationale set forth in *Cunningham* in regard to the Determinate Sentence Law undermines the rationale this Court has relied on in regard to the death penalty law. In *Black*, this Court concluded that once a person was convicted of a crime covered by the Determinate Sentence Law, the upper term constituted the maximum sentence and *Apprendi* had no application. (*Black, supra*, at p. 1255-1261.) In *Cunningham*, the High Court rejected such reasoning and concluded that the middle term was the statutory maximum in the absence of additional fact-finding. Relying on the very same reasoning rejected in *Cunningham*, this Court in *Prince, supra,* concluded that death was the maximum sentence permitted for a conviction of capital murder. But just as in *Cunningham*, death is **not** available as a sentence based only on the finding of guilt. Under California's capital sentencing law, death cannot be imposed unless it is determined that aggravating factors exist, that they outweigh mitigating factors, and that death is the appropriate penalty. Certainly the first of those requirements is a

factual determination, and the second requires a weighing of the strength of some factual findings against others. Under *Ring* and *Cunningham*, such factual findings must be made beyond a reasonable doubt, and by a unanimous jury.

B. The failure to require written findings as to the aggravating factors relied on by the jury, to require jury unanimity on all aggravating factors relied on, and the failure to provide a procedure permitting meaningful appellate review of the sentencing decision, violated 5th, 8th, and 14th Amendment due process and reliability requirements. (See *People v. Jackson* (1980) 28 Cal.3d 264, 315-317 (dissenting opn. of Bird, C.J.); but see *People v. Frierson* (1979) 25 Cal.3d 142, 172-188.) Indeed, the legislature has recognized the need for such written findings in regard to the Determinate Sentencing Law, applicable to non-capital felony sentencing. It is arbitrary, irrational, and a denial of equal protection of the laws to fail to also require it in regard to capital sentencing. (California Rules of Court, rule 4.42, subd. (e); *People v. Olivas* (1976) 17 Cal.3d 236, 251; *Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785

C. California's statutory list of special circumstances includes so many different types of murders, and has been interpreted so broadly, that almost every crime that could support a conviction for first degree murder would come within one or more of the special circumstances. Additionally, California's overly broad definitions of felony-murder and murder by lying-in-wait exacerbates the problem by further expanding the range of death-eligible homicides. As a result, California's death penalty law fails to adequately narrow the class of persons who are death-eligible, in violation of the federal Eighth Amendment and article I, section 17 of the California

Constitution. (*Furman v. Georgia* (1972) 408 U.S. 238, 313.)

D. California's failure to require inter-case and intra-case proportionality review violates the federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to be free from arbitrary and/or unreviewable proceedings leading to imposition of a death sentence, and to due process, a fair jury trial, and reliable penalty determinations. (*Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994; *Proffitt v. Florida* (1976) 428 U.S. 242, 259.)

E. California's death penalty law creates an impermissible barrier to consideration of mitigating evidence by precluding reliance on mental or emotional disturbance, or the dominating influence of another unless such factors are "extreme" (§ 190.3, factors (d), (g)) and/or "substantial" (id., factor (g)), in violation of the federal 5th, 6th, 8th, and 14th Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 100 L.Ed.2d 384, 108 S.Ct. 1860; *Lockett v. Ohio* (1978) 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954.) While this Court has held that such excluded mitigating evidence can be considered under other listed mitigating factors, that principle is so counterintuitive that it would not likely be understood by most jurors. Indeed, why did the drafters choose to use such limiting adjectives if not to cause jurors to think their leeway to consider important mitigating evidence was limited?

F. As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The 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, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

G. California grants unlimited discretion to prosecutors to decide when to seek a sentence of death, and when to offer or agree to a plea bargain that precludes a sentence of death. This results in completely different standards from one county to another throughout California, leading to a denial of due process, equal protection, and reliability in capital sentencing, in violation of the federal 5th, 6th, 8th, and 14th Amendments. *Bush* v. *Gore* (2000) 531 U.S. 98, 104-111, found federal equal protection violations where procedures for counting ballots in one county may differ from procedures for counting ballots in another county; surely procedures for determining which murder cases merit seeking a death penalty must also be reasonably uniform from one county to another.

H. Steven Homick was on death row for nearly 57 months before counsel was ever appointed to represent him on his automatic appeal. Based on past history, it is likely to take approximately twelve additional years from the date counsel was appointed until his appeal is decided. The psychological brutality that results from such a prolonged wait under threat

of execution does not comport with "evolving standards of decency that mark the progress of a maturing society" from which the Eighth Amendment draws it meaning. (*Trop v. Dulles* (1958) 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630.) As a result, California's system results in the infliction of cruel and unusual punishment in violation of the federal 8th and 14th Amendment *before* the sentence of death is ever executed. Similarly, Steven Homick has now waited more than thirteen years since he was sentenced, and still has no counsel appointed for state habeas corpus proceedings. Thus, if his case is affirmed on appeal, it will be many more years until his state habeas proceedings will be resolved.

I. The Penal Code section 190.3 factors in aggravation have been applied in such a broad manner that they include virtually every feature of every murder, including those that contradict one another. The result is so arbitrary and contradictory that jurors have inadequate guidance in determining which convicted murderers should live and which should die, in violation of the federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, a fair trial by jury, and a reliable penalty determination. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 100 L.Ed.2d 675, 56 S.Ct. 1853.)

J. The failure to provide for a presumption in favor of life results in a violation of the federal Fifth, Eighth, and Fourteenth Amendment rights to due process and reliable penalty determinations. In guilt determinations, it has long been recognized that the presumption of innocence is necessary to protect the accused and to safeguard against errors in close cases. (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) In a penalty trial, where the stakes are even greater, there must be at least comparable protection against errors in

close cases.

K. Because the California Supreme Court has proven itself unable to review death judgments without being unduly influenced by political pressure, appellant has been denied his federal 5th, 6th, 8th, and 14th amendment rights to due process of law, equal protection of the law, to impartial appellate Justices, to meaningful appellate review, and to reliable determinations in proceedings leading to imposition of a death judgment. (See (See *Parker v. Dugger* (1991) 498 U.S. 308, 321, regarding the need for meaningful appellate review. See *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978, regarding the need for reliable fact-finding; see *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5th Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J. regarding the need for fundamental fairness and impartial decision-making.) In *People v. Kipp* (2001) 26 Cal.4th 1100, 1140-1141, this Court accepted the fact that between 1979 and 1986, the California Supreme Court reversed 95% of the death judgments it reviewed. In 1986, a wide-spread political campaign succeeded in unseating three sitting Justices, largely as a result of the high percentage of death penalty reversals. (See *People v. Cox* (1991) 53 Cal.3d 618, 696.) Immediately, appellate review of death judgments in California went to the opposite extreme. From July 1987 to December 1994, the California Supreme Court affirmed 84% of the death judgments it reviewed,

and between 1990 and 1994, the affirmance rate rose even higher, to 94%.[292] (*Kipp, supra.*) In *Kipp*, this Court simply concluded that any relationship between affirmance of death sentences and retention in office was irrelevant, because there had been no showing that the Court must affirm every death sentence, or that *Kipp*'s own case had been affected. Furthermore, the same problem would infect every California judge, so under the common law rule of necessity, the Supreme Court Justices would not be disqualified. *Kipp*, however, misses the point. If California's death penalty law is so pervaded by politics that most, or even just many instances of appellate review are affected, then meaningful appellate review is impermissibly compromised even if an occasional extreme case results in relief. The appropriate response is to recognize that the death penalty cannot be carried out in California in a manner consistent with the various federal constitutional rights set forth above, and that federal constitutional protections therefore preclude carrying out any death sentences in California. Indeed, if fair appellate review is impossible, this must be considered a structural defect which mandates reversal of the penalty without the need to show prejudice in a given case. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.)

L. The various violations of state and federal law that have been articulated in this argument, and in other arguments in this brief, also constitute violations of international law. The United States Constitution, Article VI, section 1, clause 2 includes all treaties made by the United States

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292. A similar affirmance rate has continued since 1994.

as part of the Supreme Law of the Land, binding judges in every state. (See *Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) Articles 6 and 14 of the International Covenant on Civil and Political Rights require fair and public hearings in the determination of criminal charges, and preclude arbitrary determinations to invoke the sentence of death. Also, Articles 1, 2, and 6 of the American Declaration of the Rights and Duties of Man protect the rights to life, liberty, and security, guaranty equality before the law, and protect the right of due process of law. For all of the reasons set forth in various arguments above, these rights were violated by the various errors that occurred in Steven Homick's trial.

M. International norms of humanity and decency no longer permit use of the death penalty as a regular form of punishment, rendering its continued use in the United States a violation of the Eight and Fourteenth Amendments. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.]; Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org]; 1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997]; *Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

N. To date this Court has considered each of the defects identified above in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. 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) 126 S.Ct. 2516, 2527, fn. 6.)[293] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 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). As noted above, when 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. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing

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[293] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

scheme to achieve a constitutionally acceptable level of reliability. California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty. There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

XIX. GUILT PHASE ERRORS THAT DO NOT RESULT IN REVERSAL OF THE CONVICTIONS MUST ALSO BE CONSIDERED IN THE PENALTY PHASE; ANY SUBSTANTIAL ERROR AT THE PENALTY PHASE MUST BE DEEMED PREJUDICIAL

A. Errors That Were Harmless in the Guilt Phase Might Still Adversely Impact the Penalty Determination

This brief contains a variety of arguments urging this Court to find reversible error during the guilt phase of the trial. Should this Court reject those arguments and hold that the errors committed during the guilt phase were harmless as to the guilt phase determinations, then it would be necessary to give separate consideration to the possibility that a harmless guilt phase error had a prejudicial impact on the penalty determination.

The jury was expressly told that all guilt phase evidence must be considered during the penalty phase: "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, ..." (RT 144:18228.) However, since the nature of the question the jury resolves at the guilt phase is fundamentally different from the question resolved at the penalty phase, the possibility exists that an error might be harmless as to the guilt determination, but still be prejudicial at the penalty phase.

For example, In Arguments V, VI, and VII, *supra*, it was shown that the jury improperly heard evidence suggesting that Steven Homick was a drug dealer, a manipulator, that he routinely carried a gun, that an FBI agent described him as notorious, and that he was tougher than the Mafia. Even if all of these errors could somehow be deemed harmless at the guilt phase,

they still resulted in improper negative character evidence that could have been determinative in the penalty trial.

This Court has expressly recognized the danger that improper character evidence can taint the penalty determination, even in cases where the evidence of guilt is overwhelming. Obviously, the concerns expressed by this Court would have even greater application where the evidence of guilt is much more closely balanced, as in the present case.

> "Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, **particularly** where, as here, the inadmissible evidence and other **errors directly related to the character of appellant**, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error." (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; emphasis added.)

Most importantly, some of these character-related errors could have helped persuade the jurors that it was Steven Homick rather than Michael Dominguez, who was the trigger-man in either the Woodman murders or the Tipton murders, factors which would surely have been influential in causing

the jurors to vote for death instead of life without parole. Notably, even the trial judge recognized the substantial issue regarding who was the trigger-man. At sentencing, the judge expressly conceded there was evidence suggesting Michael Dominguez may have been the actual shooter of the Woodmans "and his identity as the actual shooter of the Tiptons does not require a great stretch of the imagination." (RT 148: 18677.) The jury knew about Dominguez' lenient sentencing that covered the Los Angeles and the Las Vegas crimes, and would have been less likely to punish Steven Homick with death if they had not been inundated with improper character evidence that could have unfairly persuaded them Steven Homick was the trigger-man.

Aside from the obvious prejudicial impact of improper character evidence, there is another, more subtle way in which guilt phase error can be devastating at the penalty phase. This Court has recognized that, at a capital penalty trial, lingering doubts about guilt constitute a proper factor in mitigation of the penalty. (*People v. Hawkins* (1995) 10 Cal.4th 920, 966-968; *People v. Gay* (2008) 42 Cal.4th 1195.) The trial court instructed Steven Homick's jury that lingering doubt of guilt could be considered in mitigation. (Supp. CT 5:1364.) During argument, counsel urged the jury to consider any lingering doubts about guilt in mitigation. (RT 144:18307-18310.)

In view of the closeness of the present case in regard to guilt, this factor was potentially significant in the present penalty phase. By definition, it takes less to raise a lingering doubt than it takes to raise a reasonable doubt. Obviously then, guilt phase errors which might be found harmless under traditional guilt phase tests of prejudice might nonetheless have the

effect of negating a lingering doubt as to guilt.[294] Consequently, such errors may prejudicially impact the penalty determination even if they can be found harmless as to the guilt verdict.

Accordingly, this Court must make a separate assessment of the impact of each guilt phase error, and of the cumulative impact of all guilt phase errors, on the penalty determination.

B. Any Substantial Error Requires Reversal of the Penalty Verdict

Prior to the adoption of California's current death penalty procedures, in which juror discretion is guided by a statutory list of aggravating and mitigating factors, this Court recognized in two key cases that assessment of the impact of an error is more difficult in a penalty trial than in a guilt trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way

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294 In addition to the errors permitting introduction of negative character evidence, there were other guilt phase errors impairing Mr. Homick's ability to advance lingering doubt as mitigation, such as the trial court's erroneous refusal to allow the defense to reopen the evidence to show that the gun Steven Homick received from Max Herman was probably not the murder weapon. (See Argument X, *supra*.)

> or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)
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> .....
>
> ... the jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the [death] penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> We cannot determine if *other* evidence before the jury would neutralize the impact of an error and uphold a verdict.... We are unable to ascertain whether any error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.
>
> Thus, *any* substantial error in the penalty trial may have affected the result; it is "reasonably probable" that in the absence of such error "a result more favorable to the appealing party would have been reached." (Citation.) (*People v. Hines* (1964) 61 Cal.2d 164, 169.)

After some experience implementing the current death penalty law, this Court expressed dissatisfaction with what had come to be known as the *Hamilton/Hines* standard, referring to it as the:

> ... very generous rule of penalty phase prejudice applicable to pre-1972 death penalty statutes. In view of the jury's "absolute" penalty discretion under these laws, any "substantial" penalty phase error was deemed prejudicial and reversible. (Id., at p. 763.) This strict standard of penalty phase reversal no longer applies, however, under the 1977 and 1978 death penalty laws, which include constitutionally sufficient standards to guide jury discretion. (*Robertson*, *supra*, 33 Cal.3d at p. 63 [conc. opn. of Broussard, J.]; see *Davenport*, *supra*, 41 Cal.3d at pp. 280 [plur. opn.] & 295 [conc. & dis. opn. of Broussard, J.].)

While it is true that juries today have more guidance in choosing the penalty than did juries in the days of the death penalty law at issue in *Hamilton* and *Hines*, the fact remains that penalty determinations are still very different from guilt determinations. In the guilt phase, the jury makes inherently factual decisions – exactly what events occurred? What was the defendant's state of mind when they occurred? Which witnesses should be believed? In a penalty phase, juries make similar decisions in some respects, but they also make a highly normative determination when they make the ultimate decision as to whether death or life without parole is the appropriate penalty for a particular crime and offender.

Thus, it is clear that the discretion that a jury possesses in deciding penalty remains much broader than the discretion possessed when determining guilt or innocence. Indeed, the present penalty phase jury was instructed, "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors that you are permitted

to consider." (CALJIC 8.88, at RT 144:18237) No guilt phase jury possesses discretion comparable to that.

In regard to review of the impact of state-law errors on a capital penalty verdict under the modern death penalty law, this Court has modified the *Hamilton/Hines* standard and held that the correct standard is whether there is a reasonable or realistic possibility that the jury would have rendered a different verdict absent the error or errors. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) The particular error under discussion in *Brown* was a failure to instruct on the need to find that prior violent criminality could be considered in aggravation only if found true beyond a reasonable doubt. Because the prior violent criminality was proven overwhelmingly and not refuted by the defense at trial, this Court was able to conclude that the omitted instruction would have made no difference.

However, the *Brown* standard is not so easily applied when a jury hears evidence it should not have heard, or is deprived of evidence it should have received, or when the error at issue impacts on the overall normative decision being made, rather than impacting strictly on a factual decision as in *Brown*. *Brown* did not expressly accept or reject the underlying principles set forth in *Hamilton* and *Hines*. On the other hand, *Brown* did find that other penalty errors, which resulted in the jury hearing arguably improper aggravating evidence, argument, and/or instructions, were also harmless. This result was reached without substantial discussion, and was based on a simple conclusion that the properly admitted aggravating evidence was overwhelming, and that a consideration of all of the instructions and arguments indicated that the jury would not have been confused about proper legal principles. (*People v. Brown*, *supra*, 46 Cal.3d at 449, 451-454, 456.)

It is questionable whether the *Brown* reliance on "overwhelming" aggravation evidence is consistent with the principle that each juror has considerable discretion to determine how much weight should be assigned to each aggravating or mitigating factor. Thus, Steven Homick contends that any substantial error that was not purely technical must be deemed to satisfy the reasonable possibility test set forth in *Brown*.

Indeed, the "reasonable possibility" test was derived from a comment by Justice Broussard in a concurring opinion in which he simultaneously recognized the continued validity of the "any substantial error" test, albeit with a slight modification:

> I am also troubled by the majority's discussion of prejudicial error. The majority quote from cases decided during the 1960's (*People v. Hines* (1964) 61 Cal.2d 164, 169; *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137) which stress the impossibility of determining whether any particular factor may have influenced one of the twelve jurors to vote for the death penalty. That language, however, was prompted by the fact that the jury at the time those cases were decided was required to decide the question of penalty "without benefit of guideposts, standards, or applicable criteria." (*People v. Hines*, *supra*, 61 Cal.2d at p. 168, quoting *People v. Terry* (1964) 61 Cal.2d 137, 154.) It does not apply with equal force to verdicts under the statute with constitutionally sufficient standards to guide jury discretion. **We may still use the "any substantial error" test developed in the cited cases**, but "substantiality" now should imply a careful consideration whether there is any reasonable possibility that an error affected the verdict. (*People v. Robertson* (1982) 33 Cal.3d 21, 63 [conc. opn. of Broussard, J.; emphasis added].)

Moreover, this Court has recognized another context in which the "any substantial error" standard set forth in *Hamilton* and *Hines* applies: "Where the evidence, though sufficient to sustain the verdict, is extremely close, 'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial.' (*People v. Briggs* (1962) 58 Cal.2d 385, 407.)" (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494; see also *People v. Hickman* (1981) 127 Cal.App.3d 365, 373.) As will be shown in the next section of this argument, the present case must be deemed unusually close, especially in regard to the penalty determination.

Furthermore, the United States Supreme Court has expressly recognized the validity of the rationale underlying the conclusion reached in *Hines*, as set forth above:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258, 100 L.Ed.2d 284, 108 S.Ct. 1792.)

In another capital case, the High Court again recognized this principle:

> In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., *Lockett v. Ohio*, 438 U.S. at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty ... is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Andres v. United States*, 333 U.S. 740, 752 (1948) ("That reasonable men

> might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases, doubts such as those presented here should be resolved in favor of the accused"); accord, *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing. (*Mills v. Maryland* (1988) 486 U.S. 367, 377, 100 L.Ed.2d 384, 108 S.Ct. 1860.)

Certainly **any** error that impacts on the reliability of the judgment in a capital case – even if it is purely an error of state law - carries federal 8th Amendment reliability implications. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305, 49 L.Ed.2d 944, 961, 96 S.Ct. 2978.) Furthermore, within the discussion of each error set forth in this brief, it has been shown that there are multiple reasons why the particular error should be considered federal constitutional error. Thus, every error in this case that affected the penalty determination should be reviewed under the federal constitutional standard, set forth in *Chapman v. California* (1967) 386 U.S. 18 [whether the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict].

Of course, the federal *Chapman* standard is also affected by the inescapable fact that the greater discretion in sentence determinations, compared to guilt determinations, makes it far more difficult to confidently determine that an error had no impact on the outcome. For example, in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 86 L.Ed.2d 231, 247, 105 S.Ct. 2633, 2646, a death judgment was reversed when the Court found an error and concluded, "[b]ecause we cannot say that this effort had no effect on the

sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."

C. The Present Penalty Trial Must Be Considered Unusually Close, So No Error That Impacted the Penalty Determination Can Be Deemed Harmless

Whether this Court uses the "no effect" standard, the *Chapman* standard, or *any* other *standard,* it is especially clear in the present case that any guilt or penalty phase error that potentially impacted on the penalty determination must result in reversal of the penalty verdict. Here, there was no evidence that Steven Homick had ever previously been convicted of any felony offense, or had ever committed or attempted to commit any prior criminal acts involving the use or threat to use force or violence. This must be considered a very strong mitigating factor. Here the jury heard none of the "victim impact" evidence commonly received in capital cases.

Indeed, here the prosecution was unable to offer any aggravating evidence at all, except for the circumstances of the crime as shown by the guilt phase evidence, plus evidence regarding the Tipton murders. But the Tipton murder evidence was hotly contested during the penalty trial, and one or more jurors might well have concluded it had not been proved beyond a reasonable doubt. If so, the case in aggravation was much less persuasive, but, as noted above, mitigation was strong.

It is true that the circumstances of the present crime included two homicides of elderly, innocent victims. However, the jury knew that five others had been charged with the very same crimes. The jury had been expressly instructed, "You may consider the sentences received by Stewart

Woodman and Michael Dominguez as a mitigating factor." (RT 148:18236) The jury knew that Michael Dominguez received a prison sentence that allowed for his release on parole in as little as 12-1/2 years. The jury knew that Stewart Woodman avoided the death penalty, even though he admitted callously planning the murder of his own elderly parents and hiring others to do the job for him. The jury also knew that no death penalty was sought for Robert Homick. Furthermore, the same jury had been unable to reach a unanimous verdict in regard to Neil Woodman. These must be deemed powerful facts in favor of a life without parole sentence for Steven Homick, rather than a death sentence.

Another significant factor is that the jury had substantial difficulties in reaching a unanimous penalty verdict, and did so only after the judge erroneously removed a juror during deliberations. (See Argument XVI, *supra*.) Difficulties by a jury in reaching a unanimous verdict is a recognized factor demonstrating that the jury saw a case as close. (*People v. West* (1983) 139 Cal.App.3d 606, 610.)

Also, the trial court instructed the jury that lingering doubt of guilt could be considered in mitigation. (Supp. CT 5:1364.) During argument, counsel urged the jury to consider any lingering doubts about guilt in mitigation. (RT 144:18307-18310.) There is no way to know whether one or more jurors had such a lingering doubt, but the inability to reach a unanimous verdict in regard to Neil Woodman's guilt demonstrates that the jury must have had substantial doubts about the testimony of Stewart Woodman. Under the circumstances of the present trial, any reasonable juror relying on the former statements of Michael Dominguez to convict Steven

Homick should have at least had lingering doubts. Thus, lingering doubt as to guilt should be considered another strong mitigating factor.

In sum, the many unfair attacks on Steven Homick's character, as set forth in various guilt phase arguments, and the impact of other errors, may well have been deciding factors causing the jury to vote for death instead of life without parole. Because of the closeness of the case, the normative decision-making involved in a penalty trial, and the wide discretion left to a penalty jury, no error occurring during or affecting the present penalty trial can be deemed harmless.

CONCLUSION

Numerous serious flaws permeated both the guilt and penalty phases of the present trial. Individually and/or collectively, they rendered both phases fundamentally unfair and unreliable. The guilt verdicts should be reversed. If for any reason they are not, then the penalty verdict should be reversed.

DATED: June ___, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, Ellen I. Cutler, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is P.O. Box 172, Cool, CA 95614-0172.

On June ____, 2008 I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelope in the United States Mail at Cool, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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

Executed this ___ day of June, 2008, at Cool, California.

_____
Ellen I. Cutler