SUPREME COURT COPY

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No. S057156

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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Deputy

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHARLES EDWARD CASE,

Defendant and Appellant.

(Sacramento County Superior Court No. 93F05175)

**APPELLANT'S OPENING BRIEF**

Appeal from the Judgment of the Superior Court
of the State of California for the County of Sacramento

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHARLES EDWARD CASE,<br><br>Defendant and Appellant. | (Sacramento County Superior Court No. 93F05175) |

# APPELLANT'S OPENING BRIEF

## STATEMENT OF APPEALABILITY

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

## STATEMENT OF CASE

On June 23, 1993, Sacramento County District Attorney filed a three-count complaint against appellant, Charles Edward Case. Count I charged the murder of Val Lorraine Manuel. (Pen. Code § 187, subd. (a).) Count II charged the murder of Gary Duane Tudor. (*Ibid.*) Count III charged the robbery of both Manuel and Tudor. (Pen. Code § 211.) In connection with the two murder counts, two special circumstances were

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

alleged: multiple murder within the meaning of section 190.2, subdivision (a)(3), and robbery-murder within the meaning of section 190.2, subdivision (a)(17)(i). The murder counts were each alleged to be serious felonies within the meaning of section 1192.7, subdivision (c)(1), and committed with a firearm within the meaning of section 12022.5, subdivision (a). Count III was alleged to be a serious felony per section 1192.7, subdivision (c)(19). (1 CT 16-18.)[2]

Also on June 23, 1993, appellant was arraigned on the complaint, and the court appointed the Indigent Criminal Defender Program to represent him; that agency assigned attorney Stacy Bogh to appellant's case. (1 CT 1; 1 RT 1-5.) Appellant entered a plea of not guilty on August 19, 1993. (1 RT 13.)

A preliminary hearing was held on October 26, 1993 (1 CT 24-132), and appellant was held to answer on all charges and allegations (1 CT 23). On that same date, the complaint was deemed an information, and appellant entered a plea of not guilty to all charges and denied all allegations. (1 CT 127-129.)

On December 1, 1993, attorney Hayes Gable was appointed as co-counsel for appellant. (1 CT 4.)

Appellant's trial began on March 11, 1996, with in limine motions. (1 CT 195.) On March 25 and 26, 1996, a hearing was held on appellant's motion to exclude his post-arrest statement. (2 CT 421-422.) Jury selection began on March 26, 1996. (2 CT 433.) On May 8, 1996, the jury and six

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[2] Citations to the record are abbreviated as follows: "CT" is used to refer to the clerk's transcript on appeal, "Aug CT" is used to refer to the augmented clerk's transcript and "RT" is used to refer to the reporter's transcript.

alternates were sworn to try the case. (2 CT 457.) On May 9, 1996, the court ruled that appellant's post-arrest statement to law enforcement was admissible for all purposes. (2 CT 459.) On May 13, 1996, the court denied appellant's motion to exclude certain testimony of Mary Webster. (2 CT 462.) On June 5, 1996, the court denied appellant's motion to exclude evidence that appellant had solicited Greg Billingsley and Billy Joe Gentry to participate in other robberies, as well as appellant's motion to exclude the testimony of Ted Voudouris and Brian Lee Curley regarding appellant's pre-offense statements to robbery investigators. (2 CT 485.)

On May 14, 1996, the guilt phase began with opening statements and the prosecution's presentation of its case-in-chief. (2 CT 464.) On June 18, 1996, the prosecution rested. (2 CT 493.) On June 27, 1996, the defense rested and the prosecution presented its case in rebuttal. (2 CT 499.) On July 2, 1996, the information was amended to add an allegation that count III, the robbery charge, was committed with the personal use of a firearm within the meaning of section 12022.5, subdivision (a). (2 CT 501.) On July 2, 3 and 8, 1996, the parties presented closing arguments. (2 CT 501-502.) On July 8, 1996, the jury was instructed and began deliberations; shortly thereafter, the jury asked to see Exhibit 55, the handgun, and that request was granted. (2 CT 572-573.) On July 9, 1996, the jury reached a verdict, finding appellant guilty of all counts and finding all special circumstance and enhancement allegations true. (2 CT 574-579.)

The penalty phase began on July 30, 1996, with in limine motions. (2 CT 580.) On July 31, 1996, the prosecution presented its case in aggravation, and one defense witness testified by telephone. (2 CT 581.) On August 6, 1996, appellant began presenting the remainder of his case in mitigation. (2 CT 585.) On August 8, 1996, the defense rested. (2 CT

587.) On August 12, 1996, the parties presented closing arguments, the jury was instructed and deliberations began. (3 CT 719.) On August 13, 1996, the jury returned a verdict of death. (3 CT 720.)

On October 25, 1996, the court denied appellant's motion to modify the verdict and sentenced appellant to death. With respect to Counts I and II, the murder counts, the court also imposed two consecutive five-year enhancements pursuant to section 12022.5. As to Count III, the court imposed a sentence of three years, plus a four year enhancement pursuant to section 12022.5, all of which were stayed pursuant to section 654. (3 CT 772-773, 785.) The court also imposed a restitution fine of $10,000 and direct victim restitution of $4,000. (3 CT 772-773, 785.) A notice of automatic appeal was filed on November 4, 1996. (3 CT 786.)

## STATEMENT OF FACTS

### A. Guilt Phase

At around 9:20 p.m. on Sunday, June 20, 1993, Father's Day, the bodies of Val Manuel and Gary Tudor were found in the women's restroom at a bar called The Office, in the East Sacramento community of Rancho Cordova. (12 RT 4301-4307, 4319.) Val Manuel had been a bartender at The Office; Gary Tudor was a patron who sometimes helped Manuel close the bar and occasionally tended bar himself. (12 RT 4295; 13 4769-4770.) Each had been shot twice in the head at close range. (12 RT 4407, 4411-4413, 4438-4443.) Neither Tudor nor Manuel had any defensive wounds. (12 RT 4408, 4438.) The front door of the bar was locked, a side door had been propped open with a rock, the lights were on, the television was playing, and the cash register was standing open and contained only pennies. (12 RT 4318, 4355, 4357-4358.) According to the bar's owner,

$320 in bills and coins was missing. (13 RT 4774.)

There were no eyewitnesses to the crime. The day after the murders, appellant's ex-girlfriend, Mary Webster, contacted law enforcement, gave them a blood-stained shirt and boots and said that appellant had come to her residence the previous night wearing those clothes; she also turned in one hundred dollars, which she said appellant had given her at that time. (15 RT 5228; 18 6338, 6344.) She reported that appellant told her that he had shot two black men over a poker game in the Del Paso Heights area of Sacramento. (14 RT 5069-5072.) She provided law enforcement with identifying information regarding appellant (15 RT 5232; 23 Aug CT 6624), who had multiple prior felony convictions for robbery and other crimes (23 RT 7719-7726).[3] Shortly thereafter, sheriff's deputies arrested appellant at Webster's residence and seized a gun which they found in a closet inside the home. (18 RT 6336.) They brought appellant to the station and interrogated him. During the course of the interrogation, appellant made various admissions, including that he was at The Office on the night of the murders until 8:55 p.m. (21 RT 7254), that the bloodstained clothes were his (21 RT 7256) and that the blood was from a shaving accident (21 RT 7256). He stated that the two people were alive when he left the bar. (21 RT 7256.)

The prosecution's case-in-chief at the guilt phase relied heavily on the testimony of Webster, Jerri Baker and Sue Burlingame, all of whom were romantically involved with appellant at the time of the crime. Webster and appellant had previously lived together as boyfriend and girlfriend, but

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[3] Evidence of appellant's prior convictions was not presented to the jury at the guilt phase.

approximately three months before the murders, appellant left her for Jerri Baker, his supervisor at McKenry's, the drapery service and dry cleaners where he worked. (14 RT 4988-4989; 18 RT 6074-6075.) Webster was angry and hurt that appellant had left her for another woman, but was still in love with him and continued to see him whenever he and Baker were fighting. (14 RT 4989-4992; 15 5267-5268.) Appellant lived with Baker at the time of the crime. (18 RT 6075, 6093, 6233.) Sue Burlingame had become romantically involved with appellant one week before the crime. (13 RT 4678-4679, 4749.) Also central to the prosecution's case-in-chief were various statements purportedly made by appellant before the murders and evidence that he had committed acts of violence in the past. (14 RT 4971-4972, 4973-4975, 4981-4986, 4992-4993, 5032, 5044; 15 RT 5273-5315, 5325-5327; 17 RT 5812, 5825-5861, 5868, 5974-5975; 18 RT 6103-6014, 6019-6066.) The defense contended that Webster was a woman scorned and that she and her brother, Stephen Langford, had framed appellant for the murders. (16 RT 5636-5637; 22 RT 7404.)

### 1. On the Day of the Murders, Appellant Went to The Office Bar with Sue Burlingame

On June 20, 1993, the day of the murders, Sue Burlingame was living with her daughter, Stacey Billingsley, and son-in-law, Greg Billingsley, both of whom worked at McKenry's, where appellant worked. (12 RT 4504; 13 RT 4641-4642, 4661, 4669.)[4] On the weekend before, appellant stayed at the Billingsleys' house for a few nights, as he had been had been fighting with his girlfriend, Jerri Baker. (12 RT 4505-4506; 13

[4] To avoid confusion, Stacey and Greg Billingsley are referred to by their first names.

RT 4672, 4678-4679.)[5] During appellant's stay, he and Burlingame became romantically involved. The Sunday before the murders, they had coffee together in the morning and ended up talking with each other all day long. (13 RT 4667.) They talked about playing pool and challenged each other to a match. (13 RT 4679.) That evening, appellant took Burlingame to The Office. (13 RT 4679, 4681.) Appellant said that his ex-wife used to compete in pool tournaments there and he wanted to look for her. (13 RT 4680-4681.) He did not remember the name of the bar, and it took him 45 minutes and several wrong turns before he was able to find it. (13 RT 4681, 4694.) Appellant and Burlingame played pool there until about 1:00 a.m. (13 RT 4681.) The bartender told them that on Sundays, she made cabbage rolls and sold them at the bar. (13 RT 4721.) That night and the next night, appellant spent the night with Burlingame in her room. (13 RT 4678-4679, 4749.)

On the day of the murders, appellant and Burlingame went to The Office together again. (13 RT 4641.) Appellant wanted to get some of the homemade cabbage rolls that the bartender had said she brought on Sundays. (13 RT 4647.) Appellant picked Burlingame up at about 4:00 p.m. (13 RT 4642.) He was driving Jerri Baker's Ford Probe. (12 RT 4517-4518; 13 RT 4643.) Burlingame gave conflicting statements about what appellant was wearing that day. (13 RT 4647-4648, 4730, 4734, 4748; 21 RT 7013.)[6] At The Office, appellant and Burlingame played seven or

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[5] Greg Billingsley thought appellant said he had gotten in a fight with Webster, not with Baker. (RT 4570, 4576.)

[6] At trial, she testified that he was wearing cowboy boots, Levi's and a buttoned up short-sleeved shirt with a collar; the boots and shirt looked

(continued...)

eight games of pool. (13 RT 4650.) There was a football game on television, and the other people in the bar were watching and cheering. (13 RT 4645.) Burlingame had a soda and appellant had a bottle of beer. (13 RT 4650.) They joked around; he kept saying she had to pay for the next game, but then would not let her do so. (13 RT 4651.) Eventually, Burlingame paid for one game because appellant had only a twenty dollar bill, and the bartender could not make that much change. (13 RT 4732.) The bartender had not brought cabbage rolls after all. (13 RT 4655.) At about 6:30 p.m., Burlingame was getting hungry, so she and appellant left the bar. (13 RT 4655.)

After leaving The Office, Burlingame told appellant that she did not want to continue seeing him because he had gotten back together with his girlfriend, Jerri Baker. (13 RT 4656.) Crying, Burlingame told appellant that she did not want him to come back to the Billingsleys' house with her and did not want to sit across the table from him and eat. (13 RT 4656-4657.) At Burlingame's request, appellant dropped her off at the Dairy Queen, a block and a half from the Billingsleys' house. (13 RT 4656.) She got back to the house at about 7:45 or 8:00 p.m. (13 RT 4658.)

Tracy Grimes, a truck driver and long-time patron of The Office, was at the bar on the night of the murders from about 8:30 to 8:40 p.m. (11 RT 4164-4167, 4171.) He went there to pick up some green chili

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[6] (...continued)
like the ones in evidence, except that the boots did not have a stain. (13 RT 4647-4648.) Earlier, she had said that he was wearing a tan, brown and blue western style shirt. (13 RT 4730.) On another occasion, she had said he was wearing a maroon shirt with black and gray stripes. (13 RT 4734; 21 RT 7013.) On yet another occasion, she said he was wearing a bright maroon and grey striped short-sleeved button-front shirt. (13 RT 4748.)

enchiladas that Val Manuel had made. (11 RT 4171.) Manuel was tending bar; Tudor was sitting at the bar. (11 RT 4170.) Both were drinking beer. (11 RT 4172-4173.) Manuel seemed to have had quite a bit to drink. (11 RT 4178.) Grimes identified appellant as one of the people whom he saw there that night. (11 RT 4171.) He had seen appellant there a couple of times in the previous week or two, always by himself. (11 RT 4170-4171, 4206.) Grimes had told appellant's investigator that he had seen appellant in the bar six or eight times before the murders. (20 RT 6906.) Grimes's description of the shirt and shoes that appellant was wearing on the night of the murders varied. (11 RT 4176-4178 [a sport shirt and "roughed up" grayish-brown cowboy boots], 6896 [a pale solid colored shirt in Levi's material and gray cowboy boots], 6920 [gray cowboy boots, no description of shirt].) According to Grimes, appellant went back and forth between the bar and the pool table, where he played pool by himself. (11 RT 4170-4171, 4173.) He seemed to be listening to Grimes's conversations with others; appellant smiled and laughed when they laughed. (11 RT 4191-4192, 4194.) He sometimes shot the cue ball back and forth without breaking the balls. (11 RT 4176-4177.) When he bent down to re-rack the balls, he did so in a peculiar fashion, with one leg off to the side. (11 RT 4177.)

Law enforcement never showed Grimes any photos of possible suspects. (11 RT 4208; 20 RT 6920.) Grimes admitted that between the time of his initial statement and the time of trial, he had seen appellant's photograph in the Sacramento Bee, where he was identified as the suspect in the charged murders. (11 RT 4181, 4208; 24 CT 7129 [Exhibit 39].) Grimes also told appellant's investigator that he knew appellant was the killer because he had learned that they found blood on appellant's hands,

clothes and boots. (20 RT 6904.)

### 2. A Neighbor Heard Gunshots, and the Bodies Were Discovered

Anita Dickinson and her fiancé, Randy Pickens, lived in a trailer behind The Office. (11 RT 4233-4234.) On June 20, 1993, Dickinson spent the evening doing laundry, going back and forth between the trailer and the laundry room, which was in the building that contained the bar. (11 RT 4236-4238.) Sometime between 7:30 and 8:45 p.m., she went into the parking lot behind The Office in order to move Pickens's car into the garage. (11 RT 4240.) It was dusk. (12 RT 4265.) As she was approaching Pickens's car, she heard what sounded like a single gunshot. (11 RT 4240, 4246.) She ducked down in front of her own car, waited for a while, and then hurried back toward the trailer. (11 RT 4246.) As she was struggling to get the gate open between the building and the trailer, she turned around and looked at the cars in the lot. (12 RT 4267.) She saw several vehicles that she recognized, and one small compact two-door car that she had never seen before, parked next to a white Camaro that Pickens's brother had left them. (11 RT 4240-4243, 4263-4264; 12 RT 4270-4271.) While Dickinson was trying to get the gate open, she heard two more shots in close succession. (11 RT 4247-4249.) She opened the gate, ran back into the trailer and told Pickens that she thought someone was shooting in the bar. (11 RT 4249-4250.)

Pickens, who was folding laundry inside the trailer, heard no shots. (20 RT 4278-4279.) After Dickinson told him what she had heard, he went outside and up to the bar's fire exit, and listened through the door for 10-20 seconds; he heard nothing. (20 RT 4281.) He did not hear a car leave. (20 RT 4282.)

At trial, Dickinson described the compact car that she had seen in the parking lot that night as silverish-bluish, a light color, and about half the size of, and lower than, the Camaro. (RT 4268.) It looked like it could seat only two people. (12 RT 4271.) It was small, like a Honda or a Hyundai. (12 RT 4269.) Defense investigator Tony Gane testified that Jerri Baker's Ford Probe was slightly taller than a Camaro. (20 RT 6832.) The Camaro was approximately 20 inches longer and 10 inches wider than the Probe. (20 RT 6823-6824.)

Later that night, after the bodies had been discovered, Dickinson told one of the officers at the scene that she had not noticed any vehicles in the parking lot other than the bartenders' cars and the Camaro. (21 RT 7140-7141.) Pickens told officers that, in addition to the bartenders' cars, he had seen a gray mid-size or compact car in the parking lot that day, and that it left the lot at about 8:00 or 8:30 p.m. (21 RT 7143.)

A few days before Dickinson and Pickens testified at appellant's trial, the prosecutor showed them photographs of a car. (11 RT 4260; 11 RT 4292.) Dickinson testified that the car in the photographs looked like the one that she had seen on the night in question, but she was not sure that it was the same one. (11 RT 4244-4245.) Pickens testified that he had never seen the car in the photographs before the prosecutor had shown them to him. (11 RT 4292-4293.)

At around 9:20 p.m. on the night of the murders, Leslie and Joe Lorman, regular patrons of The Office and close friends of Gary Tudor, stopped at the bar so that Leslie could use the bathroom. (12 RT 4295-4299, 4314-4315, 4320.) The lights were on but the front door was locked. (12 RT 4301, 4316.) They entered through the side door, which had been propped open with a rock. (12 RT 4302, 4318.) Leslie Lorman went to the

women's restroom and there discovered the bodies of Manuel and Tudor. (12 RT 4306-4307.) The Lormans dashed across the street to a pay phone and called 911. (12 RT 4309-4310, 4321.)

### 3. Appellant Came to the Home of Mary Webster, Who Was Still in Love with Him Even Though He Had Left Her for Another Woman

Mary Webster had met appellant one year before the murders, when appellant responded to her ad in the "singles" section of the Sacramento Bee. (14 RT 4959-4961.) About two weeks after appellant and Webster met, Webster invited appellant to move in with her, and he did so. (14 RT 4969.) Webster fell in love with appellant. (14 RT 4985, 4989.) Appellant took Webster to The Office on two occasions, both within the first couple of weeks after they met. (14 RT 4965, 4969.) He told her that his ex-wife used to play pool there and that he used to go to there to watch her. (14 RT 4966-4967.) During the time that appellant and Webster lived together, she lent him money to buy a gun, introduced him to a person who could help him get one and drove him to the place where he made the purchase. (14 RT 4994-4995.) She also helped him buy ammunition. (14 RT 4997; 17 RT 5909.) Any time that appellant was not working, he drank or was drunk. (16 RT 5658.) Several times, parole officers came to Webster's house and poured out appellant's alcohol, but they never arrested him. (16 RT 5661.)

In January of 1993, appellant told Webster that he wanted to move out and date other women. (14 RT 4987.) In March of 1993, appellant moved out of Webster's house and in with Jerri Baker. (14 RT 4988.) Webster continued to see appellant as often as every day, whenever he and Baker were fighting. (14 RT 4990.) Appellant and Webster went on dates

and were sexually intimate. (14 RT 4990-4991.) Webster was still in love with appellant. (14 RT 4992.)

On June 20, 1993, the day of the murders, appellant called Webster at about 4:00 or 4:30 p.m. in the afternoon and said that he was going to come by later. (14 RT 5000-5001; 15 RT 5170.) They had planned to get together that day so that appellant could help her prepare for a meeting she was to have the following day with the Social Security office. (14 RT 5001.) She had cashed two checks for Social Security benefits that she was not entitled to; she wanted appellant to help her get out of paying them back. (14 RT 5156.) Also, for three years, she had been getting paid about $350 a week and had not reported any of it as income. (14 RT 5157.)

On the night of the murders, appellant arrived at Webster's duplex at about 10:00 p.m. (14 RT 5002.) He came in without knocking and gave her a kiss. (14 RT 5003; 15 RT 5171.) Webster's brother, Stephen Langford, was asleep or trying to sleep on the livingroom couch. (14 RT 5003; 15 RT 5168.) Appellant went into Webster's bedroom. (14 RT 5004.) Webster then noticed blood on appellant's shirt and boots. (14 RT 5006; 15 RT 5173.) Appellant took off his shirt and dropped it on the floor. (15 RT 5173.) He went toward the bathroom and took off his boots. (14 RT 5004; 15 RT 5174.) Appellant's arms were "saturated" (14 RT 5008) or "layered" (15 RT 5178) with blood. There was no blood on his blue jeans. (14 RT 5014.) Webster did not ask appellant about the blood because she felt it was none of her business. (14 RT 5008.) She started trying to clean the blood off of the boots with a brush. (14 RT 5006; 15 RT 5175-5176.) Appellant told her it would not come off, so she stopped. (15 RT 5177.) Appellant washed his arms in the bathroom sink. (14 RT 5008.) While he

was washing his arms, he asked her to get rid of the shirt and the boots. (14 RT 5008, 5015; 15 RT 5209.)

Webster testified that appellant had a wad of money sticking out of his pants pocket. (14 RT 5004; 15 RT 5181.) Either before or after he took off his boots, he took the wad out of his pocket, peeled off $125 and gave it to Webster. (14 RT 5004; 15 RT 5179.) He owed her approximately $200 because of a bet that they had made a couple of weeks earlier. (14 RT 5004-5005.) Webster was inconsistent about the amount of money appellant gave her (see 14 RT 5037; 16 RT 5673; 18 RT 6338; 19 RT 6345; 1 CT 85-86; 23 Aug CT 6615) and the denominations of currency in the wad (17 RT 5903 [ones, fives, tens and twenties]; 1 CT 86 [ones, fives and tens]; 23 Aug CT 6615 [ones and fives]).

After appellant gave Webster the money, she went into the kitchen, while appellant stayed in the bathroom and washed up. (14 RT 5009; 15 RT 5177-5178, 5183.) When appellant came out of the bedroom, he was wearing a t-shirt and jeans and was in his stocking feet. (14 RT 5015-5016.) He asked Webster to go to the store for whiskey, Coke and cigarettes, and gave her some more money from the wad in his pocket. (14 RT 5009; 15 RT 5185.) Webster did as appellant requested. (14 RT 5009.) When she left for the store, she saw Jerri Baker's car parked in front of her house. (14 RT 5010.)

After Webster returned from the store, appellant told her that he been in Del Paso Heights, playing cards with some other men. (14 RT 5012.)[7] He said he had won a hand, but two black men would not let him have the

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[7] Webster made inconsistent statements about the number of other men involved in the card game. (See 14 RT 5011 [seven]; 23 Aug CT 6617 [five].)

pot, so he pulled out his gun, fired one round into the table, and then shot the two men twice each. (14 RT 5012; 16 RT 5667.)[8] Webster asked appellant if the men were moving when he left, and he said no. (14 RT 5012.) Webster then asked appellant what he had done for Father's Day. (14 RT 5015.) Appellant told her that Baker had bought him a pair of shorts and that she wanted to go to Reno and get married. (14 RT 5016.)

Appellant asked Webster to get his gun out of Baker's car. (14 RT 5017; 15 RT 5190.) He gave her the car keys, and she retrieved the gun, which was in a closed box on the front seat on the passenger's side of the car. (14 RT 5017; 15 RT 5192.) The car was cluttered with Coke cans. (14 RT 5018; 15 RT 5194.) Webster did not see any blood in the car. (15 RT 5194; 21 RT 7104.) She went back into her house and handed appellant the box with the gun. (15 RT 5195.) Her brother, Stephen Langford, sat up on the couch and said he wanted to look at the gun, but appellant said no. (14 RT 5018; 15 RT 5195-5196; 16 RT 5675.) Appellant took the gun out of the box and unloaded four bullets from it. (14 RT 5018-5019; 17 RT 5912 .) He put the gun and the ammunition back in the box and told Webster to keep it. (14 RT 5019; 17 RT 5910.) Webster put the gun in her closet. (14 RT 5020.)

Webster testified that appellant borrowed a thermal shirt from her, kissed her goodbye and left in his stocking feet at around 11:00 p.m. (14 RT 5016, 5020; 15 RT 5207-5208.) As he was leaving, he whispered in her ear that he would probably get caught because he had left fingerprints, and that she should keep the gun and give it to Bill Williams, a friend who

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[8] She had told detectives that appellant said he had fired seven to nine shots. (20 RT 6979.)

would be getting out of jail in September. (14 RT 5017.) After appellant left, Webster put the bloodstained shirt and boots in a paper bag and tossed it in a dumpster at a nearby apartment building. (14 RT 5021; 15 RT 5209.) She then went back home and went to bed. (14 RT 5021; 15 RT 5209.)

Langford contradicted Webster in several respects. He confirmed that he was at Webster's house on the night of the murders when appellant arrived, but testified that at that time, appellant was wearing ligh-colored pants, a light shirt and cowboy boots. (20 RT 6699.)[9] Two days after the murders, Langford told detectives that he did not see any blood on appellant or his clothes that night. (20 RT 6953.) At trial, he testified that he saw something plastered all over appellant's clothes, but it did not look like blood; he found out later that it was. (20 RT 6699.) Langford confirmed his sister's testimony that appellant told them he had gotten into a fight over a card game in Del Paso Heights and had shot two black men. (20 RT 6701.) Langford had previously told detectives that appellant said the card game was in North Highlands. (20 RT 6956.) Langford said he did not see any money in appellant's possession that night. (20 RT 6957.) Langford made conflicting statements about who brought the gun into the house from the car (20 RT 6704-6705 [Webster], 6955 [appellant]; 21 RT 7043, 7086 [Langford]) and whether he had seen the gun before (20 RT 6703-6704, 6720, 6728, 6959; 21 RT 7046). He testified that when the gun was retrieved from the car, its barrel was still warm. (20 RT 6704.) Defense criminalist Peter Barnett tested the gun to determine the rate at which its barrel cooled off, and found that the barrel returned to room temperature

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[9] In another statement, Langford had said appellant was wearing white pants and a gray and yellow shirt. (21 RT 7086.)

within 15 to 20 minutes after the gun was fired. (19 RT 6414.)

Langford admitted that Webster had written two or three pages of notes regarding what had happened on the night of the murders, that he had read that document before testifying and that he had changed his version of events after reading it. (20 RT 6740-6743.)

#### 4. The Day after the Murders, Webster Turned Appellant In

Webster testified that she got up the next morning, June 21, 1993, at her usual time and headed for work, but on the way there, she stopped and called Detective David Ford. (14 RT 5021, 5023; 15 RT 5213-5214.) Webster knew Ford because he had investigated her for bilking thousands of dollars from a 78-year-old man named Clyde Miller. (14 RT 5069-5072.) Webster had been Miller's caregiver, and ultimately admitted to Ford that she and two other individuals, Dale Michels and Jane Perry, had concocted stories to persuade Miller, a lonely widower, to write them checks or otherwise provide them with large sums of money. (14 RT 5080-5096.) According to Ford, Webster obtained from Miller a gun, $3,500 for a house, $2,000 to pay off a loan, a $13,000 car and three rings, one of which was valued at $8,000. (14 RT 5079-5083, 5094, 5097, 5102, 5104.) Over a two-year period, Webster and Miller made withdrawals on Miller's bank account at least 100 times, often several times a week, until the bank referred the matter to the county conservator. (20 RT 6773-6774, 6790-6792.) A conservatorship was established for Miller's financial affairs, after which Webster attempted to deposit two checks from Miller totaling $8,580. (14 RT 5083.) When she was told that the checks were no longer valid because of the conservatorship, she became verbally abusive toward the deputy public guardian. (20 RT 6772-6777, 6790-6796.) Webster was

never prosecuted. (14 RT 5071.) Webster gave some of the jewelry to Ford and helped him apprehend Michels and Perry. (14 RT 5102, 5113, 5122, 5125-5126.)

On the morning of June 21, 1993, at 7:57 a.m.,Webster called Ford and told him that she had some bloody clothes and boots and a gun. (14 RT 5073-5074, 5110.) She said that her boyfriend, whom she identified as "Charles Casey," had come home the night before wearing the bloody clothes and boots, told her he had shot two people in Del Paso Heights, gave her the gun and told her to keep it, and gave her the bloody clothes and told her to get rid of them. (14 RT 5074-5075, 5108-5110.) She told Ford she had thrown away the bloody clothes, which she identified as a pair of Levi's and a shirt. (14 RT 5076, 5110-5111.) She said she had the gun, which she described as a silver-colored .45 caliber semi-automatic. (14 RT 5073, 5108.) Ford told her to bring everything to him. (14 RT 5075.)

Webster testified that after talking with Ford, she went back to the dumpster, retrieved the clothes and boots and set out for the sheriff's department. (14 RT 5025.) Along the way, she stopped and called her friend, Arlene Eshelman, and told her the same story that she had told Ford. (15 RT 5249.) Eshelman told Webster to turn everything including appellant in to the police. (15 RT 5250.) Webster called Eshelman two or three more times over the course of less than 45 minutes. (15 RT 5246-5247, 5262.) Webster also called Randy Hobson, her former roommate, and told him the story. (15 RT 5273, 5285, 5287.) Hobson advised her to surrender the evidence to the first police officer that she could find. (15 RT 5288.)

At 9:47 a.m., Webster waved down Sacramento Police Officer Dennis Biederman as he drove by her in his patrol car; she asked him if

there had been any shootings in the Del Paso Heights area the night before. (15 RT 5226-5227.) He asked why she wanted to know; she responded that the night before, her boyfriend had come to her house covered in blood and said he had shot and killed two men during a card game in Del Paso Heights. (15 RT 5227, 5231.) She said that he had a .45 caliber revolver with him and the revolver had four empty shells in it. (15 RT 5229-5230, 5237.) She said that her boyfriend had given her the gun, the boots and the shirt and told her to get rid of them, and that she had the shirt and the boots with her. (15 RT 5231, 5234.) Biederman radioed his office and was told that there had been no report of any shooting in Del Paso Heights, but there had been a double homicide in Rancho Cordova. (15 RT 5228.) Biederman and his sergeant escorted Webster to the Sheriff's Department, where they gave detectives Reed and Edwards the shirt and boots that Webster had turned over to them. (14 RT 5028-5030.)

Webster was interviewed by detectives Reed and Edwards. (18 RT 6335.) The interview was tape recorded, and a redacted version of the tape was played for appellant's jury. (18 RT 6341; 23 Aug CT 6611-6649 [Exhibit 94-A (transcript of Exhibit 94)].) During the interview, Reed and Edwards told Webster repeatedly that appellant was lying when he told her he had shot two men in Del Paso Heights. (See, e.g., 23 Aug CT 6631, 6639.) They told her that there had been a double homicide in Rancho Cordova and that appellant committed it. (23 Aug CT 6629, 6636, 6644.) They urged her to give them the gun that appellant had brought to her house. (23 Aug CT 6627, 6628, 6636, 6642.) Webster was resistant to believing that appellant had committed the killings at The Office and to handing over the gun (see, e.g., 23 CT 6620, 6629, 6632-6635), but ultimately she relented (20 RT 6694; 23 CT 6648). She said she would not

testify against appellant, as she was afraid of retaliation. (14 RT 5044.) She called her house to see who was home, expecting it to be her brother or her son. (14 RT 5037-5038.) Appellant answered the phone. (14 RT 5038.) The officers turned on a tape recorder and recorded part of the conversation: appellant asked Webster if she had gotten rid of the "stuff," and Webster responded that she had. (14 RT 5038.) Appellant asked her if she had put it all in one place, and Webster said she had not. (14 RT 5039.)[10] Webster did not tell appellant that she had retrieved the items or that she was at the sheriff's office. (14 RT 5039.)

After the phone conversation, Reed and Edwards went to Webster's house and arrested appellant, who did not resist. (14 RT 5040; 18 RT 6346.) In a bedroom closet, officers found a large box containing a smaller box which, in turn, contained a gun, the magazine from the gun, a box of ammunition and some individual loose rounds. (17 RT 6001-6006; 18 RT 6337.)

On the day that appellant was arrested, Webster found out that appellant had been seeing Baker when Webster and appellant were living together. (16 RT 5637.) One of the deputy sheriffs told Webster that appellant and Baker were fooling around at the cleaners on Saturdays, after Webster dropped him off, and that on Sundays when appellant took Webster's car, he used to pick Baker up and take her on dates. (16 RT 5639.) Webster found out that there were other women also. (16 RT 5639.) On the day of appellant's arrest, his picture appeared on television. (16 RT 5640.) Webster was told that numerous women called the sheriff's

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[10] At trial, Webster denied that when appellant asked if she had gotten rid of the "stuff," he was referring to drugs. (17 RT 5927-5928.)

department, expressing concern and saying that they could not believe it was him. (16 RT 5640-5641.) Webster felt like she had been used. (16 RT 5641.) She was very angry. (21 RT 6982.) The day after appellant's arrest, she told detectives that she was going to get even with appellant for lying to her. (21 RT 6982, 6994.)

### 5. The Crime Scene, Physical and Forensic Evidence

#### a. Manuel and Tudor Were Killed by Close-Range Gunshot Wounds to the Head

The bodies of Manuel and Tudor were found on the floor of the women's restroom at The Office. (12 RT 4343.) Forensic pathologist Gregory Reiber performed autopsies on the bodies. (12 RT 4405.) Tudor had two perforating gunshot wounds to the head. (12 RT 4407, 4409.) One was a contact wound, in which the end of the barrel of the weapon was actually touching the skin. (12 RT 4411.) The other appeared to have been fired with the gun barrel one to six inches from the skin. (12 RT 4413.) Reiber opined that Tudor was either crouched or kneeling when shot. (12 RT 4431.) Manuel also had been shot in the head twice. (12 RT 4438-4439.) One shot was fired at a range of two to four inches; the other at a range of between six inches and two to three feet. (12 RT 4442-4443.) Manuel could have been standing, crouched or kneeling when shot. (RT 4448.) Reiber could not determine the order in which the shots had been fired or whom had been shot first. (RT 4410, 4441, 4480.) Neither Tudor nor Manuel had any defensive wounds. (12 RT 4408, 4438.)

### b. Expended Slugs, Shell Casings and Blood Were on the Restroom Floor, and a Divot Was in the Floor Behind the Bar

Four expended slugs and shell casings and a large amount of blood were found on the floor of the women's restroom. (12 RT 4343-4346, 4852; 14 RT 4890-4896; 15 RT 5381.) One expended casing and three small slug fragments were found on the floor behind the bar, near a divot in the floor. (14 RT 4901-4903, 4928.) Trainee crime scene investigator Darryl Meadows opined that the divot was fresh and that a round had been fired into the floor. (14 RT 4903-4904.)

### c. Unidentified Human Blood Was Found on the Shirt, but Could Not Have Resulted from the Shooting Alone

The shirt that Webster turned in to police was entered into evidence as Exhibit 54-A. (14 RT 5007.) It had short sleeves, was red and black striped and had blood stains on the left front, the left sleeve and the left side of the back, as well as a small amount on the right front. (19 RT 6407, 6488.) Seven samples from the shirt tested positive for human blood. (16 RT 5483-5484.) ABO typing indicated that samples taken from stains on the left front and on the back could have been Manuel's blood, but could not have been appellant's or Tudor's; samples of the stains on the right front could have been Manuel's or Manuel's and Tudor's blood combined, but not appellant's. (16 RT 5485-5486.) No DNA testing was done. (16 RT 5465.) Reiber opined that, even if the shooter fired the gun with his left hand, the blowback would not account for the amount of blood on the left arm and side of the bloody shirt entered into evidence. (13 RT 4434-4435.)

In the opinion of defense criminalist Peter Barnett, the blood on the shirt could not have resulted from the shooting alone. (19 RT 6485-6493.) Some of the stains were transfer stains and some were low or medium velocity, not the kind of stains produced by a gunshot. (19 RT 6493.) A person would not have been layered in blood from his elbows to his hands from conducting the shooting in this case. (19 RT 6515.)

**d. Unidentified Human Blood Was Found Distributed on the Boots in a Pattern That Could Not Be Explained by the Shooting**

The boots that Webster turned in to police were entered into evidence as Exhibit 46. (14 RT 5000.) Criminalist Mary Hansen found human blood stains in five areas on the right boot. (16 RT 5480-5481.) Defense criminalist Barnett observed a large smeared blood stain on the right toe and some smaller spatter on the instep area and on the front edge of the right heel block. (19 RT 6494-6495.) He testified that the stains on the right boot could not be explained by the shooting. (19 RT 6494-6501.)

On the left boot, Hansen found small stains which tested presumptively positive for blood. (16 RT 5483.) Barnett noted spatter along the vertical front edge of the left heel and a few medium velocity spatters from the middle to the outer edge of the left toe. (19 RT 6497.) Barnett found it perplexing that there was a great deal of blood on the right shoe and very little on the left. (19 RT 6500.) In Barnett's opinion, it was possible that someone took the shirt and boots and deliberately put blood on them from the scene. (19 RT 6507.)

### e. Only a Small Amount of Human Blood Was Found in the Ford Probe on the Gear Shift Knob and Steering Wheel

Mary Hansen, criminalist with the Sacramento County crime lab, examined Jerri Baker's Ford Probe and took samples of suspected bloodstains to the laboratory for analysis. Her test results indicated that there was a small amount of human blood on the gear shift knob and on the lower left portion of the steering wheel. (15 RT 5451-5457; 16 RT 5516.) She found no blood on the driver's side seat, the seat belt, the seat adjustment handle, the gas peddle, the exterior door handle, the rear view mirror, the floor area, the hand break or any of the knobs associated with the dashboard, the door and the glove box; she examined the passenger's side as well. (15 RT 5458-5459.) Stains on the interior driver's side door handle, the floor on the driver's side and the passenger's side floor were tested for the presence of blood, and none was found. (15 RT 5460-5461.) Hansen was of the opinion that if a person had gotten in the car wearing the shirt in evidence and the blood on that shirt had been wet, the blood would have transferred to the front seat. (16 RT 5509.)

### f. Appellant's Fingerprints Were Not Found at the Crime Scene or on the Murder Weapon

Officers processed the bar area and the women's restroom for latent fingerprints. (15 RT 5328-5329.) They recovered 16 usable latent prints that were later compared to the known fingerprints of appellant, Webster, Manuel and Tudor. (15 RT 5379, 5397-5398, 5413.) Only one match was found: a latent from the inside of the cash register matched the known prints of Manuel. (15 RT 5397-5398.)

Several latent fingerprints were found on and in the box that

contained the gun. (15 RT 5338-5348.) None matched appellant's known prints; four matched Webster's. (15 RT 5376-5380.) Appellant's prints were not on the gun. (15 RT 5411.)

### g. The Gun Seized from Webster's House Was Identified as the Murder Weapon and as Appellant's Gun, but it Did Not Match the Descriptions of the Gun in Appellant's Possession Before the Murders

Firearms expert Gerald Arase examined and test-fired Exhibit 55, the gun seized from Mary Webster's house. Based on a comparison of rifling characteristics, he opined that the gun was the murder weapon. (16 RT 5554-5559.) Arase found that the magazine held a maximum of seven rounds and that the gun could therefore hold a maximum of eight rounds. (16 RT 5538-5610.) Four areas of the gun tested positive for human blood, but the amounts were too small to permit typing. (16 RT 5477-5479.)

Identification technician Claire Jole cut up Exhibit 76, the cardboard box in which the gun was found, and obtained eight latent prints from it. (15 RT 5358.) Jole saw no blood smears or prints on or inside the box. (15 RT 5358.) Fingerprint examiner Tim Cantrell found that none of the latent prints from the box matched appellant's known fingerprints, but several matched Webster's. (15 RT 5377-5380.) Defense criminalist Peter Barnett testified that if a person's whose hands were bloody enough to transfer blood to the steering wheel and gear shift knob of a car also placed the gun in the cardboard box, there would be blood on the box as well. (20 RT 6669.)

Several witnesses identified Exhibit 55, the gun seized from Webster's house, as appellant's gun. (13 RT 4566-4567; 17 RT 5854; 18

RT 6080.) Jerri Baker testified that appellant kept his gun in the brown Columbia House box in which it was found, and that he generally had it with him when he was home or in the car, but not when he was at work. (18 RT 6081-6082, 6250.) Billy Joe Gentry, who had been convicted of welfare fraud and giving false information to law enforcement and who was an admitted alcoholic who drank both on and off the job (17 RT 5840, 5843-5844), testified that appellant had the gun approximately nine months before the murders, and at that time, it was in a shoe box. (17 RT 5830.) Gentry had been drinking at the time. (17 RT 5844.) Eight to ten weeks before the murders, Greg Billingsley, also a convicted felon (13 RT 4579), borrowed a gun from appellant to take on a camping trip. (12 RT 4512; 13 RT 4566.) Both Greg and Stacey Billingsley testified that the gun they borrowed from appellant appeared to be the same as Exhibit 55, and that at the time they borrowed it, it was in the same box as that in which Exhibit 55 was found. (12 RT 4512-4514, 4541, 4543; 13 RT 4567, 4588, 4687.)

As noted above, on the weekend prior to the killings, appellant stayed with Sue Burlingame and the Billingsleys for several nights. Sometime that weekend, Burlingame was cleaning under the couch and found a cardboard box with "Columbia House" printed on the outside in blue lettering; in the box was a gun and a box of cartridges. (12 RT 4510, 4536; 13 RT 4664, 4686, 4723, 4745.)[11] Greg Billingsley testified that he took the gun to work and gave it back to appellant there. (13 RT 4573-

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[11] Burlingame testified first that she gave the box to her daughter, Stacey (13 RT 4664, 4687, 4725) and later that she gave it to her son-in-law, Greg (13 RT 4726).

4574.)[12] He asked appellant why he had brought the gun to their house. Appellant said it was because he did not like leaving the gun around. (13 RT 4575.) Burlingame and Greg testified that the gun Burlingame found under the couch looked like Exhibit 55, the gun seized from Webster's house. (13 RT 4588, 4702.) However, Burlingame told law enforcement that the gun she found under the couch was silver (17 RT 5877), and told appellant's investigator that it was shiny chrome (20 RT 6913; 21 RT 7022). Greg also told police that the gun found under the couch was silver in color. (21 RT 7061.) Except for some spots where the color was worn down to the metal, Exhibit 55 was black in color. (13 RT 4589; RT 5568, 5854.) Burlingame told law enforcement that the gun she found under the couch had a triangle on the grip (13 RT 4704; 17 RT 5877); the one in evidence did not (13 RT 4703). Burlingame also contradicted herself as to whether the box that she found was the same as the one seized from Webster's house. (See 19 RT 6665; 20 RT 6914; 21 RT 7023.)

### 6. Months Later, Jerri Baker Revealed Statements Appellant Had Made Shortly After the Murders

Jerri Baker testified that from March, 1993, until appellant's arrest, she and appellant were living together as boyfriend and girlfriend. (18 RT 6074.) She let him drive her car, the grey Ford Probe which appeared in the photographs designated as Exhibits 85-A through F. (15 RT 5449-5450; 18 RT 6078-6079.) Appellant worked under Baker's supervision at McKenry's Cleaners. (18 RT 6075.) She was completely in love with him

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[12] Burlingame contradicted this testimony, stating that she saw Greg get the box down from the rafters in the garage and hand it to appellant at the house. (13 RT 4665, 4688.)

(18 RT 6093, 6233) and was opposed to him being in contact with Webster (18 RT 6141). Baker identified Exhibit 55, the gun that had been found at Webster's house, as appellant's gun, and stated that he carried it around in the Columbia House box in which Exhibit 55 was found. (18 RT 6080-6082.)

Baker testified that on the afternoon of the murders, she went shopping with her sister. (18 RT 6086.) When Baker returned, appellant was at the house and was in a hurry to go play pool. (18 RT 6088.) He left at 3:00 or 4:00 p.m. in Baker's car. (18 RT 6089.) He had his gun with him and was wearing jeans, boots, and the shirt which was in evidence – the shirt which Webster had given to the police. (18 RT 6088, 6107, 6252.) Baker had bought that shirt for appellant. (18 RT 6088.)

Appellant came back to Baker's house at 11:30 p.m. with alcohol on his breath. (18 RT 6090.) He told Baker that he had killed two black men over a poker game in Del Paso Heights (18 RT 6092) and had "deep-sixed" the gun and any other items that he may have had (18 RT 6084, 6107). After appellant went to sleep, Baker went through his pants and found $34. (18 RT 6211-6212.)

The next morning, appellant told Baker that he was going to help Webster with her Social Security problems, and that Baker should tell people at work that appellant's mother had fallen ill and he had gone back to Indiana. (18 RT 6094.) He told her he had taken care of his pants. (18 RT 6107.) Webster also called Baker on the phone that day and said she had turned appellant in; Webster told Baker to read the newspaper and said something like, "see what your lover boy is doing now." (18 RT 6097.)

After the murders, Baker talked to law enforcement several times. She visited appellant in the jail twice a week for three or four months and

read the police reports concerning the crimes charged against him. (18 RT 6142-6145, 6209, 6229, 6232.) Eventually, she met someone else and stopped visiting appellant. (18 RT 6299.) Until March of 1994, nine months after the crime, she told law enforcement that on the day of the murders, appellant had been home until 3:30 or 4:00, when he borrowed her car and left in a hurry to go shopping. (18 RT 6196; 20 RT 6929.) She said that he came home at around 10:30 or 11:00 p.m. (18 RT 6197; 20 RT 6929.) She said she did not remember what color shirt or what shoes or boots he had on that day. (18 RT 6199; 20 RT 6930.) She denied having ever seen him with a gun. (18 RT 6200; 20 RT 6931.) She said that he told her his mother was dying and that he was going back to Indiana to see her. (18 RT 6200; 20 RT 6932.) She did not tell them that appellant had said anything about shooting anyone or about a poker game in Del Paso Heights. (18 RT 6099.) She said she had not noticed any stains in her car. (18 RT 6203; 20 RT 6933.) She gave the detectives two wigs and said Webster had given them to appellant after he had moved in with her. (18 RT 6109, 6205; 20 RT 6937.) She said appellant had told her that Webster had bought the wigs for him as a disguise for committing robberies and that Webster had asked him to start doing robberies because she needed money. (18 RT 6110, 6205, 6318.) She said that at the time of the murders, appellant had money, as he had just been paid $500 two days before. (18 RT 6268; 20 RT 6939, 6968.)

In March of 1994, after Baker broke off her relationship with appellant, her version of events changed. She contacted law enforcement and told them she could corroborate everything that Webster had said (18 RT 6209; 20 RT 6963.) She told them that on the night of the murders, appellant came home later than she had previous indicated and made the

statements to which she later testified – i.e., that he had shot two men over a poker game in Del Paso Heights. (18 RT 6209-6210; 20 RT 6941, 6944, 6963.) She told them that after appellant went to sleep that night, she went through his pants pockets and found $40 in bills. (18 RT 6210-6213; 21 RT 6944, 6963.) She also stated that when appellant lived with her, he had a .45 caliber gun that he carried it in a brown cardboard box. (18 RT 6215; 20 RT 6947, 6965.)

In December of 1994, a year and a half after the murders, Baker first told law enforcement that on the morning after the killings at The Office, appellant asked her to wipe down her car, particularly the exterior, the steering wheel, the door panels, the brake, and the console area. (18 RT 6099-6100, 6230-6231.)[13] She also indicated that before she got in the car that day, she cleaned off a "glob" of flesh or brain matter that was on the driver's side door. (18 RT 6096, 6268.) At trial, she said it was at "eye level" on the door panel. (18 RT 6262.) Defense criminalist Peter Barnett testified that he would not expect tissue to transfer to the shooter from a shooting like that which occurred in this case. (29 RT 6535-6536.)

Baker also testified that after she drove to work that day, she wiped out the inside of her car with a solution of ammonia, water and a "prespotting agent." (18 RT 6095, 6265.) She did not wipe off the seat or the seat cushion. (18 RT 6266.) After she wiped the car down, the rag that she was using turned partially green. (18 RT 6096.) She testified that blood turns green in ammonia. (18 RT 6096.) Defense criminalist Peter Barnett testified that blood does not turn green in ammonia. (19 RT 6511-

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[13] At trial, Baker testified that this conversation occurred on the night of the murders and that appellant told her to clean around the driver's seat, door handles, foot pedals and steering wheel. (18 RT 6095, 6261.)

6512.) He experimented by using ammonia to clean some glass plates onto which he had dried some human blood, and the result was a reddish-brown, not a green, solution. (19 RT 6511-6512.)

On rebuttal, Baker testified that, at the prosecutor's request, she conducted an experiment in which she put some of her own blood onto a porcelain cigarette lighter and allowed it to dry, and then wiped it up with a rag onto which she had squirted a solution similar to the one that she used on June 21, 1993. (21 RT 7163-7169.) Afterwards, the rag had turned green. (21 RT 7169.) While on the witness stand, she demonstrated this experiment for the jury and testified that the rag turned an olive drab green. (21 RT 7171-7172.) On cross-examination, she admitted that she had not washed the cigarette lighter before putting blood on it. (21 RT 7169.) She also admitted that she had bought her car from a used car lot and that her brother-in-law had worked on the car. (21 RT 7173-7174.) The evidence showed that several other people, including Laureen Gilmore (Baker's sister), William Riley Gilmore (Baker's brother-in-law), and Brian Gilmore (Baker's nephew), had access to Baker's car and may have driven it in April, May and June, 1993. (21 RT 7146, 7150.) Baker's dogs also rode in the car. (18 RT 6225.)

In February of 1996, over two and half years after the murders, Baker told law enforcement that on the Friday before the murders, appellant had tried to cash his pay check and close out his bank account, but the bank told him that he had to wait 48 hours to get his money. (18 RT 6247.) This testimony was contradicted by Todd Bonner, an employee of appellant's credit union, who testified that appellant cashed his paycheck on Friday, June 18. (20 RT 6785, 6788-6789.)

At trial, Baker testified that she had previously lied to police because

she did not want to be involved and because she loved appellant and did not want to turn him in. (18 RT 6297-6298.) She also admitted that before she changed her version of events, she had read the police reports concerning the killings and had learned that, when appellant was living with her, he had been seeing other women, including Webster and Burlingame. (18 RT 6144-6209.)

### 7. Appellant Had Money at the Time of the Murders

At the time of the murders, appellant had a full-time job as a presser at McKenry's dry cleaners, making about $1300 per month. (12 RT 4527; 18 RT 6148.) He got paid on the 5th and the 20th of every month. (18 RT 6148.) Although the evidence indicated that shortly before the murders, appellant said he was annoyed because the credit union had taken some of his money (12 RT 4524-4525, 4666), the evidence also showed that the credit union cashed his paycheck of $428.53 on June 18, 1993, two days before the crime. (20 RT 6785, 6788-6789.) Burlingame indicated that on the night of the murders, appellant had money and paid for almost everything. (13 RT 4729.) Furthermore, because appellant sometimes worked on Saturdays, he had a key to the cleaners and the combination to the safe, which on a Saturday normally contained about $100 and sometimes as much as $250. (18 RT 6228-6229; 20 RT 6757-6760, 6765, 6768; 21 RT 7260.)

### 8. Before the Murders, Appellant Had Made Various Statements About Hypothetical Robberies and His Prior Crimes

Over appellant's objection, the trial court admitted evidence of a number of statements that appellant was purported to have made at various

times before the murders. Jerri Baker testified that in March or April of 1993, appellant was in her backyard, sitting on the fence, looking depressed. (18 RT 6101-6102, 6220-6221.) Baker asked what was wrong. At first, appellant said nothing, but eventually told her that he wanted to commit robberies, but could not do so because he would go to jail forever it he got caught. (18 RT 6103.) He said if he did commit a robbery, he would have to kill any witness so that he would not go to jail. (18 RT 6104.) According to Baker, it was as if he had an irresistible impulse to commit robberies. (18 RT 6121, 6260, 6292.)

Baker also testified that appellant had offered to kill her ex-husband, who had been puncturing her tires, breaking windows and making threatening phone calls; she reportedly told appellant just to break his kneecaps. (18 RT 6216-6218; 20 RT 6948.) Appellant did not do anything to him. (20 RT 6949.)

In early 1993, appellant was an invited speaker at two gatherings of robbery investigators. According to Deputy Sheriff Theodore Voudouris, appellant agreed "to be interviewed relative to what he had done in the past" (16 RT 5687), to answer questions regarding the robberies for which he had gone to prison in 1979 (16 RT 5698). At one of the gatherings, appellant was asked what he would do if he met resistance during a robbery. (17 RT 5812, 5819.) Appellant answered that he "would take somebody out." (17 RT 5812.) Voudouris testified that appellant was talking about what he would have done in the past. (17 RT 5819.) According to Brian, at the second gathering, appellant was asked "if in the course of a robbery, someone resisted you, what would you have done?" (17 RT 5868.) Appellant answered "that he would blow the person away." (17 RT 5864.) Curley also testified that appellant was talking about what he would have

done in the past. (16 RT 5720.)

Greg Billingsley testified that one to two months prior to the killings at The Office, appellant asked him twice if he wanted to participate in stealing the bank deposit from the Crestview bowling alley, where the two men often bowled together. (17 RT 6020-6021.) In one conversation, appellant asked Billingsley if he wanted to be the driver while he stole the bank deposit from the lady who deposited the money from the bowling alley. (17 RT 6023.) Appellant used the word "job," and may not have use the word "rob," but it was clear to Billingsley that he was asking him if he wanted to assist in a robbery. (17 RT 6023-6024, 6037, 6054-6055.) He did not state a particular date, but indicated it would be a Sunday morning, as that was when the bank deposits were made. (17 RT 6055-6057; 18 RT 6067.) About four or five weeks later, appellant and Billingsley were driving around, looking for Jerri Baker's estranged husband whom they planned to confront. (17 RT 6041, 6049.) Appellant asked Billingsley if he was sure that he did not want to do a job together, and said that all Billingsley had to do was to drive. (17 RT 6025, 6050.) Both conversations occurred after the two men had been drinking. (17 RT 6036-6037; 18 RT 6067.)

On Halloween, 1992, Billy Joe Gentry and his family went to visit appellant and Mary Webster. (17 RT 5833.) Within five or ten minutes of their arrival, Gentry and appellant walked to the store together to buy alcohol. (17 RT 5847.) On the way, appellant asked Gentry if he wanted to earn some extra money by being the driver in a holdup. (17 RT 5834, 5836, 5847.) Gentry declined, and appellant told him not to tell anyone about it. (17 RT 5836.) Gentry admitted that both he and appellant were drinking at the time of this conversation. (17 RT 5834.) Gentry had consumed two 40-

ounce bottles of beer before he had even gotten to appellant and Webster's house. (17 RT 5846.) Gentry was always drinking at that time. (17 RT 5834.) By the time Gentry and his family went home that night, he was so drunk that he rode in the back of the pickup. (17 RT 5848.)

According to Mary Webster, appellant made numerous statements to her about past crimes. He told her that her was a bank robber and an ex-convict. (14 RT 4971, 4992.) He told her stories nightly about crimes he had committed in the past. (14 RT 4973, 4985.) He mentioned that he had "bumped a couple people off" (14 RT 5021), that he had "knocked people off, old people, slapped right –" (14 RT 5032) and that he had gotten rid of a former crime partner who had "snitched him off" (14 RT 5044). He told her that he could thwart identification during bank robberies by wearing fake tattoos, wigs, facial hair and extra clothes. (14 RT 4972-4976.) He bought some of those items and demonstrated to her how to use them. (14 RT 4973-4974, 4976-4978, 5647-5648.) He said he had "layered his clothes" in the past to disguise himself while committing a crime. (16 RT 5648.) He subscribed to a couple of magazines about committing crimes, buying or concealing guns, and doing robberies. (14 RT 4977, 4980; 16 RT 5652.) Around Halloween, 1992, appellant reportedly bought a wig and a moustache and said they were for committing robberies. (14 RT 4976-4979.) He had a couple of other wigs, including a woman's wig with shoulder-length reddish-blond hair that had been Webster's (15 RT 5649; 17 RT 5906-5907), and another wig that he bought (17 RT 5941).

According to Webster, appellant bought a first-aid product called "Nu-skin" and told her that he could put it on his fingertips so there would be no fingerprints. (14 RT 4972; 16 RT 5645.) He claimed to have used it before successfully. (14 RT 4972.) However, defense expert Peter Barnett

experimented with Nu-skin and determined that even with five layers of that product on his fingers, which resulted in a thick gooey mess, his fingerprints still had sufficient ridge detail to be identifiable. (19 RT 6420-6424.) Further, he found that Nu-skin was difficult to remove, and that it remained on the skin for several hours. (19 RT 6430-6431.)

Right after appellant moved in with Webster, he told her that he wanted to buy a gun and wanted to rob some stores and/or banks. (14 RT 4992, 4997.)

### 9. Appellant Had Been Violent Before

In addition to evidence that appellant had admitted committing various prior acts of violence, the jury heard percipient witness testimony that appellant had become physically violent with Greg Nivens, Mary Webster's adult learning-disabled son (17 RT 5982-5983), and Randy Hobson, Webster's roommate at the time (14 RT 4982).

The incident with Nivens occurred one week after appellant moved in with Webster. (14 RT 4981, 4984.) Nivens was partying with his friends and refused to turn down his music. (17 RT 5974-5975; 17 RT 5985-5987.) Nivens had a baseball bat in his hands at the time, and Webster thought he had threatened her with it. (17 RT 5994; 21 RT 7055.) Appellant hit Nivens on the mouth. (14 RT 4981; 17 RT 5974-5975.)

A week after the incident with Nivens, appellant had an altercation with Randy Hobson. (14 RT 4983-4984.) Hobson asked Webster for some money that he believed she owed him. (15 RT 5277-5278.) Appellant hit Hobson in the leg with the side of a fireplace poker, and the two men fought. (15 RT 5278-5279; 17 RT 5958-5959.)

### 10. Appellant Made Incriminating Statements When Interrogated

As part of the prosecution's case in rebuttal, Detective Reed testified that when appellant was interrogated on the day of his arrest, he made the following statements: he knew of the murders at The Office from having watched the news on television that morning (21 RT 7252); on the day of the murders, he was at The Office with a girlfriend named Sue, he took her home at 6:00 or 7:00 p.m. and went back by himself at about 7:30 or 8:00 p.m. (21 RT 7253); he left The Office at about 8:55 p.m., just before the barmaid closed the bar (21 RT 7254); he had driven to The Office in Jerri Baker's Ford Probe, which he parked in the parking lot, in front of a trailer (21 RT 7255); the clothes that the police obtained from Webster were his, and he had gotten blood on them from shaving (21 RT 7256); the reason that he had no marks from shaving was that he healed fast (21 RT 7256).

## B. Penalty Phase

### 1. Evidence in Aggravation

The prosecution's case in aggravation consisted of evidence of the impact that the deaths of Manuel and Tudor had on their families, appellant's felony convictions, the facts and circumstances underlying some of those felony convictions and the impact that those crimes had on their victims.

#### a. Victim Impact Evidence

Lulu Manuel and Elizabeth Tudor testified to the impact that the deaths of Manuel and Tudor had had on their families. Lulu Manuel was married to Ronald Manuel, the oldest of Val Manuel's four sons. (23 RT 7728.) Although he was 50 years old at the time, Ronald became childlike

at the news of his mother's death. (23 RT 7728.) He went inside himself. (23 RT 7732.) He suffered a deep loss that he did not like to talk about. (23 RT 7732.) Lulu and Ronald had to take care of all of the arrangements after Val Manuel died. (23 RT 7731.) They met with detectives and obtained her property. (23 RT 7731.) They went to The Office and picked up her car. (23 RT 7731.) Lulu removed the crime scene tape which had been wrapped around the building and the car. (23 RT 7731.) She looked in the building and saw the plate of food that Val had prepared for Gary Tudor. (23 RT 7731.) In the trunk of Val's car, Ronald found the dishes that she had used to make the enchiladas. (23 RT 7732.)

Ronald's younger brother, Steven, lived with Val Manuel at the time of her death. Steven was drug dependent and unhealthy. (23 RT 7729.) When Val Manuel died, Steven moved in with Lulu and Ronald and became dependent on them. (23 RT 7732.) After Val's death, Lulu had to attempt to fill Val's boots, which were very deep, and become a mother figure to Steven, which was a big burden for her. (23 RT 7732.) Lulu testified that two of her husband's brothers were outspoken about what they would like to see done with appellant, but she did not specify what that was. (23 RT 7733.)

Elizabeth Tudor, Gary Tudor's mother, testified that at the time of his death, Gary was living at home with his parents. (24 RT 7894-7895.) Gary and his parents were very close friends. (24 RT 7895.) Gary had been divorced for about a year. (24 RT 7895.) He had three children. (24 RT 7896.) His death was devastating for both his children and his parents. (24 RT 7896-7897.) At the time of trial, the children were all still in counseling. (24 RT 7896.) As a result of Gary's death, his oldest child, David, 15 years old at the time of trial, was getting an attitude. (24 RT

7897.)

### b. Prior Felony Convictions and the Underlying Circumstances

The prosecution presented evidence that appellant had been convicted of the following felony convictions: In 1958, at the age of 17, appellant was sent to the Indiana State Reformatory for second-degree burglary. (23 RT 7723.) In 1963, he was convicted of burglary in Illinois; in 1965, he was convicted of escape in Illinois; and in 1967, he was convicted of second degree burglary in Indiana. (23 RT 7723; 23 Aug CT 6743.) He was incarcerated for each of those crimes. (23 RT 7723.) In 1975, appellant was convicted of first degree robbery in Sacramento County and was again sentenced to prison. (23 RT 7719-7720) He was released in 1978 and was out of custody for approximately six months before being arrested for multiple crimes which resulted in his 1979 conviction of 27 counts, including robbery, assault with a deadly weapon, oral copulation, rape and attempted rape. (23 RT 7720-7721.) For those crimes, he was sentenced to 33 2/3 years in prison. (23 RT 7721.) He was paroled to Sacramento in 1991 and discharged from parole in April of 1993. (23 RT 7726.)

Dolores Ogburn (a.k.a. Dolores Klein) was a victim of the robbery of which appellant was convicted in 1975. (23 RT 7802; 23 Aug CT 6741.) On August 15, 1974, Ogburn was working as a waitress and cashier at Little Joe's steakhouse in Sacramento when appellant robbed her. (23 RT 7802.) At 4:20 a.m. on that date, appellant threatened Ogburn with a steak knife from the restaurant. (23 RT 7804-7805.) She tried to get away, but he cut her left arm and wrist and hit her in the head with his fist, knocking her to the floor. (23 RT 7805.) He took the money out of the cash drawer. (23

RT 7805-7806.) The cook, Mildred Patterson, came out from the back of the restaurant and told appellant to leave Ogburn alone; appellant threw Patterson against a table, breaking her ribs. (23 RT 7806-7807.)

Sally Ann Strong (a.k.a. Rose Gomez), Bettie Hershey, Virginia Parker, Tennye Pettinato and Patricia Jones were victims of the crimes of which appellant was convicted in 1979. (23 RT 7734; 23 Aug CT 6741-6742.) On August 7, 1978, appellant robbed Strong and Dolores Jean Cook inside Stockmen's, a western store in Sacramento where both Strong and Cook worked. Appellant hit Strong above the eye with a gun, kicked her, forced her to orally copulate him and attempted to rape her. (23 RT 7739-7740, 7745.) He held Cook at gunpoint and made her give him the money in the cash register. (23 RT 7755.) He threatened to come back and kill both women if they identified him. (23 RT 7746.) At the time of the crime, appellant's breath smelled strongly of alcohol. (23 RT 7763.) When law enforcement arrived, Strong was vomiting and shaking. (23 RT 7762.) As a result of the incident, she became unable to be by herself and her marriage fell apart. (23 RT 7749.) For about six months after the incident, Cook could not take a shower when she was home alone. (23 RT 7760.)

Bettie Hershey was working at Groth's shoe store in Sacramento on August 15, 1978, when appellant came into the store and robbed her at gunpoint. (23 RT 7768, 7770.) He raped her and forced her to orally copulate him. (23 RT 7770-7771.) He taped her hands, ankles and mouth and stomped on her face with his boot. (23 RT 7773.) He took her wallet and keys and threatened to kill her children if she called the police. (23 RT 7773.) As a result of this incident, Hershey lost her job, experienced anxiety attacks and claustrophobia, required therapy and for about five years, was unable to work with the public. (23 RT 7775.)

On August 22, 1978, appellant robbed Virginia Parker at her Sacramento flower shop, Morebeck's. (23 RT 7790.) Appellant taped her hands, ankles and mouth. (23 RT 7794.) He hit her in the face and threw her across the room. (23 RT 7794-7795.) He took her rings and her watch. (23 RT 7796.) He touched her under her underpants and threatened to rape her or make her orally copulate him, but did not do so. (23 RT 7796-7797.) He took the money in the cash register. (23 RT 7797.) He threatened to kill her if she screamed. (23 RT 7797.) After the incident, Parker never went to the front of her store without a knife in her hands; she learned to shoot a gun and slept with it under her pillow. (23 RT 7799-7800.)

On August 30, 1978, appellant robbed Tennye Pettinato at gunpoint at her dress shop, Andrea's Casuals, in Sacramento. (24 RT 7884-7888.) He tied her hands and feet with a rope and used a scarf to gag her. (24 RT 7888-7889.) He took her two diamond rings and the cash in the cash drawer. (24 RT 7889-7890.) As a result of the incident, Pettinato never sat in her store with her back to the door again, no longer enjoyed being there and distrusted any man who came in. (24 RT 7892.) She also developed shingles. (24 RT 7893.)

On September 6, 1978, Patricia Jones was working at a dress shop called the Willow Tree in Sacramento when appellant robbed her at gunpoint. (23 RT 7808.) Appellant put a gun in the back of her head, tied her hands and feet, made her orally copulate him and hit both sides of her face with his hands, causing her to hit her head on the door. (23 RT 7812-7814.) He took her wallet and jewelry and the money in the cash drawer. (23 RT 7816.) As a result of the incident, Jones had nightmares and lost trust in strangers. (23 RT 7818.)

### 2. Evidence in Mitigation

In mitigation, appellant presented evidence that he had an extensive history of being institutionalized and had suffered emotional, physical and sexual abuse at the hands of various family members, caretakers and fellow inmates. He presented evidence of the typical living conditions of those serving life in prison without possibility of parole and evidence that he would adjust well and be an asset to the prison if he received that sentence. Testifying on his behalf were: Jerry Stokes and Dode Hall, two of appellant's friends from Indiana; Gretchen White, clinical psychologist; Dennis Barnes and William Mayfield, prisoners with appellant at Folsom State Prison; Eldred Lewis, former prison guard at Folsom State Prison; Amos Griffith, former maintenance man at Folsom State Prison; Challough Randall, formerly a civilian employee at Folsom State Prison; and James Park, prison expert.

#### a. Appellant's Family of Origin and Childhood

Appellant was born on July 19, 1940, in Evansville, Indiana, and grew up in Vincennes, Indiana. (24 RT 8092; 23 Aug CT 6761.) Appellant was the sixth of nine children. (24 RT 8093.) His mother had a third-grade education and had her first child at 17. (24 RT 8092-8093.) His father had a fifth grade education and was a farmer who became a truck driver. (24 RT 8092.)

Appellant and five of his siblings were institutionalized as children. (24 RT 8092.) Although both parents were still living, appellant was sent to a local orphanage at age 12. (24 RT 8119.) Thomas (known as "Wayne") was deaf and was institutionalized at age five. (24 RT 8094.) Richard (known as "Dick"), Virginia (known as "Jennie" or "Ruth") and William

("Bill") had severe seizure disorders; Bill and Dick were sent to an epileptic colony, Dick at age three and Bill at age seven. (24 RT 8095-8096.) Dick, Bill and David had other severe mental health problems including organic brain disorder and psychosis. (24 RT 8095-8096.) David was sent to a state hospital twice before age 11 and then to the same orphanage as appellant. Like appellant, Philip (known as "Joe") was sent to the orphanage at age 12 or 13, then to boys school, then to the reformatory at Pendleton and ultimately to prison. (24 RT 8096.)

Appellant's family was poor. (24 RT 7935.) Appellant's mother worked two jobs: during the week, she cared for elderly institutionalized people; on the weekends, she cleaned houses. (24 RT 8098, 8103.) Appellant's father did not support the family financially. (24 RT 8102.)

Appellant's parents did not get along. His mother was a Jehovah's witness and very religious; his father was an atheist. (23 RT 7833; 24 RT 8099.) When appellant's father was home, he was often drunk. (24 RT 8099.) Appellant's father was a womanizer, which resulted in tremendous physical fights with appellant's mother. (24 RT 8099.) When they fought, appellant's mother bloodied appellant's father's head with a skillet or otherwise drew blood. (24 RT 8100.) The youngest child, David, was reportedly the product of marital rape. (24 RT 8093, 8096.) Appellant's parents divorced when appellant was about 16 years old. (23 Aug CT 6761.)

Appellant's father was inattentive to appellant and all of his siblings except for George Robert (known as "Bob"), who was the oldest and his father's favorite. (24 RT 8102, 8109.) When appellant was five, his father started working as a truck driver and was away from home virtually all of the time. (23 RT 7834; 24 RT 8099.) When he was home, he administered

severe beatings to appellant and his siblings. (25 RT 8180.) He was also reportedly sexually abusive. Jerry Stokes, who knew appellant both when they were children and adults, once looked inside appellant's father's truck which was parked near appellant's house and saw appellant touching his father's penis. (23 RT 7835.)

Appellant idolized his father but tried to avoid him: often when his father was home, appellant ran away. (24 RT 8100-8102.) According to Jerry Stokes, appellant wanted to be a truck driver like his father. At age 13, appellant knew everything about trucks. (23 RT 7834.) However, as Gretchen White explained, appellant's father was a disastrous role model. (24 RT 8109.) At times, appellant and his father were in jail at the same time. On one occasion, police came in contact with appellant's father while looking for appellant. (24 RT 8110.) The father was intoxicated, and when the police told him to go into his house, he replied, "fuck you. I don't have to go anywhere for you bastards." (24 RT 8111.) They arrested him, and he had to be physically forced into the police car. (24 RT 8111.)

Working two jobs, appellant's mother was absent from the home much of the time. (24 RT 8103.) Even when at home, she imposed no rules. (24 RT 8106.) The children came and went as they liked and frequently fought violently amongst themselves. (24 RT 8104, 8106.) Virginia, the oldest girl, was often left in charge of the younger children but was utterly unable to control them. (24 RT 8104.) Bob, the oldest, picked on and pummeled appellant. (24 RT 8104.) Bill was very violent. (25 RT 8181.) Appellant and Joe once got in a serious fight with Bill, and either Joe or appellant hit Bill in the head with a tire iron. (25 RT 8181.)

Appellant's mother used the legal system to control her children's behavior. When they mouthed off at her, she called the police. (24 RT

8106.) When things got more out of control, she had them institutionalized. When appellant was about five, Wayne was sent to a home for the deaf. (24 RT 8105.) Two years later, Bill and Dick were sent to the epilepsy colony. (24 RT 8105.) As White observed, this dynamic eroded any sense of attachment, belonging, stability or cohesion in the family. (24 RT 8105.) The household was chaotic with nobody parenting the children and nobody attaching to them emotionally. (24 RT 8105, 8107.)

**b. Appellant's Institutionalization**

At age 12, appellant was brought before a juvenile court judge, after he had stayed out all night, climbed a tree and refused to come down. (24 RT 8119, 8162.) Appellant admitted that he had broken into a home and stolen some costume jewelry, watches and soda pop, and was committed to the Knox County Children's Home, the local orphanage. (24 RT 8162.)

The Knox County Children's Home was run by a couple named Summers. (23 RT 7829-7830; 24 RT 8117.) Jerry Stokes, who lived in the same dormitory as appellant, testified that children were beaten, whipped, thrown into scalding hot water and scrubbed with a leather strap for transgressions as minor as not eating everything on their plate. (24 RT 8117.) Other forms of punishment included hair pulling, being made to eat without their clothes on, being pushed into sheets soaked with another child's urine and being made to drink Epson salts. (24 RT 8118.) Appellant's brother Joe saw Mrs. Summers slap appellant in the face and saw bruises on appellant's face. (24 RT 8117.) White found that the orphanage was a psychologically damaging place that failed to provide appellant with the attachment, trust, warmth and mutual respect that was missing in his family. (24 RT 8118.)

The Summers' son, Billy Jack, was about 30 or 31 years old at the

time that appellant and Stokes were at the orphanage. (23 RT 7830.) According to Stokes, Billy Jack used to come into the dorm after the kids were in bed and sodomize appellant or make him orally copulate him. (23 RT 7830.) One time, Billy Jack choked appellant while he was sodomizing him. (23 RT 7831.)[14] Billy Jack used to take appellant with him during the day, saying that they were going to pick corn. (23 RT 7870.) Appellant did not want to go. (23 RT 7870.)

Appellant told White that he was not molested at the orphanage. White testified that it was possible that appellant was molested but did not want to say so because it was a deeply humiliating experience. (24 RT 8167-8168, 8170; 25 RT 8206.)

Stokes testified that he and appellant ran away from the orphanage several times. (23 RT 7828.) Records confirm that appellant was charged with running away from the orphanage six times; once, he was also accused of putting his finger in the vagina of a five-year old girl at the orphanage. (25 RT 8172-8173.)

Appellant left the orphanage in 1955 at age 16. (24 RT 8173.) From there, he was sent first to a foster home and then to the Indiana School for Boys. (24 RT 8127, 8173.) He was released in 1956, but three months later, was sent back for auto theft and auto burglary. (24 RT 8173.) He was released from the School for Boys in 1957, but later that year was found to

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[14] When appellant's investigator first talked to Stokes, he did not mention the sexual abuse by Billy Jack or appellant's father. (23 RT 7872-24 RT 7874.) The reason was that Stokes still had bad feelings about appellant for "turning state's evidence" against him, as set forth below. (23 RT 7841, 7847; 23 7872-24 RT 7874.) It was only after a lot of thought and talking with his wife that Stokes decided to reveal the truth. (23 RT 7873; 24 RT 7876.)

have committed petty theft and was sent to the Indiana State Farm for 60 days. (25 RT 8173-8174.)

In 1958, when appellant was 17, he was sent to the Indiana State Reformatory at Pendleton for second degree burglary. (24 RT 8122; 25 RT 8174-8175.) Pendleton was a very dangerous place with all the difficulties of a prison. (24 RT 8122-8123.) White found that at Pendleton, appellant's identity as an outlaw and a felon became consolidated. (24 RT 8123, 8144.) Jerry Stokes was sent to Pendleton in 1961 for stealing gas. (23 RT 7839.) Stokes testified that at Pendleton, appellant was again a victim of rape. (23 RT 7841.) Dode Hall, who was committed to Pendleton in 1960, confirmed that any white inmate at Pendleton either fought or got anally raped. (24 RT 7928, 7930.)

Appellant was released from Pendleton in 1963. (25 RT 8175.) Three months later, he was sent to the Indiana State Farm for three months. (25 RT 8175.) After that, he was out of custody for one month before being sent to the Illinois State Penitentiary at Menard for burglary of a gas station. (25 RT 8175.) In 1965, he escaped, but was returned to prison and remained there until 1967. (23 Aug CT 6743.) In October of that year, he was sentenced to the Illinois State Reformatory for second degree burglary and was not released until November, 1971. (23 RT 7723; 23 Aug CT 6788-6789.) In 1974, he came to California. (24 RT 7933, 7939.)

### c. Appellant's Life in Indiana When Not in Prison

Until 1974, appellant returned to his home town of Vincennes whenever he was not in prison, as did Jerry Stokes. (23 RT 7844-7845.) Appellant and Stokes committed burglaries and theft crimes together, but not violent crimes. (23 RT 7846, 7859.) Stokes did not know of appellant

ever robbing a bank. (23 RT 7846.) They were petty thieves. (23 RT 7859.) Appellant gave the money he stole to his family. (23 RT 7856, 7859.) Stokes believed that appellant stole in order to return to prison. (23 RT 7838.) White found that appellant functioned better in prison, and may have been unconsciously motivated by a need for the structure that prison provided. (24 RT 8126-8128, 8135-8136.)

Although appellant and Stokes did not commit violent crimes together, Stokes knew appellant to be capable of violence when he had been drinking. (23 RT 7836.) White testified that appellant, like his father and brother Joe, was an alcoholic. (24 RT 8129-8130.) Stokes stated that when appellant was sober, he was not violent, but when he drank, he became mean. (23 RT 7836-7838, 7847.) Dode Hall confirmed that appellant drank heavily and that when he had been drinking, he became obnoxious and got into many barroom brawls. 24 RT 7936-7937, 7954.)

When appellant and Stokes were in their 20's, appellant fell in love with an older lady with whom Stokes was having sex for money. (23 RT 7838-7839, 7863.) When Stokes stole the old lady's dog, appellant searched all the farmhouses until he found the dog and gave it back to her. (23 RT 7839, 7852.)

Sometime after the incident with the dog, appellant got arrested for a safe burglary that he, his brother Joe and Stokes had committed together. (23 RT 7849-7850.) In 1972, appellant "turned state's evidence" and told the authorities that his brother and Stokes had participated in the crime; appellant also reported that Stokes and Joe had committed another robbery without him and that Stokes had committed a residential burglary by himself. (23 RT 7841, 7846-7851, 7861.) Stokes was sent to prison and never saw appellant again. (23 RT 7841, 7847.)

In 1974, appellant married a woman named Diane, also from Vincennes, but the marriage did not last. (24 RT 7937-7938; 3 CT 741.) That same year, Dode Hall drove the getaway car for appellant in the armed robbery of a gas station. (24 RT 7932, 7951.) Appellant was apprehended; the authorities gave him the option of leaving the state of Indiana, and so he came to California. (24 RT 7932, 7939-7940.)

### d. Expert's Conclusions Regarding Appellant's Psychological Development

Psychologist Gretchen White identified various factors that shaped appellant's psychological development. (24 RT 8083, 8086.) Two major forces resulted in his inability to function outside of an institution: the problems in his family and his institutionalization. (24 RT 8091-8092.) Raised without adequate adult supervision, he never developed the internal controls needed to curb his own impulses. (24 RT 8128.) Outside of an institutional setting, he moved from impulse to impulse. (24 RT 8128.) His alcoholism exacerbated his impulsiveness and poor judgment. (24 RT 8130, 8139.)

White found that the dearth of acceptance, affection and understanding in appellant's childhood resulted in feelings of rejection, helplessness and inferiority, which in turn produced hostility, aggression and antisocial behavior. (24 RT 8115-8116.) Appellant's anger and resentment were both self-destructive and directed towards others. (24 RT 8129.) Appellant was unable to identify with any authority figure or form close relationships. (24 RT 8115.) He had strong dependency needs and no idea how to maintain himself legitimately in free society. (24 RT 8116.)

### e. Institutional Adjustment

Appellant introduced lay and expert testimony that he was likely to behave well and be productive in prison. Several witnesses testified to appellant's behavior at Folsom State Prison in the 1980's, then a violent place with frequent stabbings, killings and conflicts between black and white inmates (24 RT 8053, 8074.) Two of appellant's fellow-inmates testified that appellant was never in any fight or incident. (24 RT 8060, 8064, 8079.) He worked in the laundry, got along well with others and lived by the rules. (24 RT 8053-8054.) He was not a member of any racial organization or prison gang. (24 RT 8062, 8064.) He went out of his way to help first-timers learn how not to step on toes, break rules or cause riots. (24 RT 8054-8055, 8065, 8076-8077.)

According to both prison staff and civilian employees, appellant was a good worker in the laundry at Old Folsom, where he was a clerk; he got along with others, never caused problems and never was involved in any incidents. (25 RT 8224-8225, 8231, 8234, 8242, 8244, 8246.) Appellant warned Challough Randall, the civilian supervisor of the laundry, if something bad was about to occur. (25 RT 8241.) In 1986, Randall became an instructor in the vocational dry cleaning program at New Folsom Prison and had appellant transferred there because appellant wanted to learn a trade. (25 RT 8242-8243.)

James Park, prison expert and former associate warden at San Quentin State Prison, testified regarding conditions of confinement for those sentenced to life without the possibility of parole (LWOPP). (RT 8261-8281.) Park noted that studies have shown the best predictors of future behavior in prison to be age and prior behavior while incarcerated.

(25 RT 8268, 8279.) At the time of trial, Appellant was in his 50's, and for that reason, likely to be a good prisoner. (25 RT 8279.) His prison records indicated that he had been an outstanding prisoner in the past. (25 RT 8299.) He got along well with staff and inmates, was helpful with new inmates, was an outstanding worker and was of much more than average usefulness. (25 RT 8287.) In the years he had spent in the California Department of Corrections, he had received only one serious rule violation, when marijuana was found in the cell that he shared with another inmate. (25 RT 8288.) He was never involved in any serious fights and had never possessed a weapon. (25 RT 8289.) He was never affiliated with any gang and other than the one write-up for possession of marijuana, had never been involved in drugs. (25 RT 8336.) The fact that he was willing to transfer from Old Folsom to New Folsom, a higher security institution, in order to learn a trade, and the fact that his supervisor requested the transfer, showed that he was an asset. (25 RT 8322-8323.)

Park acknowledged that appellant had never been a good citizen outside prison. (25 RT 8332.) Park, like White, noted that people like appellant can do horrible things on the outside, but nevertheless be model prisoners, because they need the external controls that the prison environment provides. (25 RT 8281.) Park expressed a high degree of confidence that appellant would be a good prisoner and worker if sentenced to LWOPP. (25 RT 8289.)

## ARGUMENTS

## I

## THE ADMISSION OF APPELLANT'S *MIRANDA*-VIOLATIVE AND INVOLUNTARY STATEMENT, OBTAINED BY DELIBERATE DISREGARD OF HIS INVOCATION OF HIS RIGHT TO SILENCE, AS WELL AS THE ADMISSION OF EVIDENCE DISCOVERED AS A RESULT OF APPELLANT'S UNLAWFUL INTERROGATION, REQUIRE REVERSAL

*Miranda v. Arizona* (1966) 384 U.S. 436 established what are now universally familiar procedural safeguards designed to protect suspects from coercion in the context of custodial interrogations. To ensure that statements made in that setting are a product of a person's free will and to protect the Fifth Amendment right against self-incrimination, warnings must be given before questioning begins; once warnings are given, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Id.* at pp. 473-474.) Further, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" (*Michigan v. Mosley* (1975) 423 U.S. 96, 104, fn. omitted.)

Although the dictates of the *Miranda* decision are clear, this Court and lower California courts have repeatedly been confronted with evidence of questioning "outside *Miranda*," where interrogating officers deliberately ignore a suspect's invocation of his rights, often with the admitted purpose of obtaining statements that they suspect will be excluded from the prosecution's case-in-chief under *Miranda*, but that they know will nevertheless be admissible to impeach the defendant's trial testimony pursuant to *Harris v. New York* (1971) 401 U.S. 222, 225-226. (See

*People v. Peevy* (1998) 17 Cal.4th 1184, 1213; see also, e.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 816; *People v. DePriest* (2007) 42 Cal.4th 1, 29-31; *People v. Demetrulias* (2006) 39 Cal.4th 1, 29-30; *People v. Neal* (2003) 31 Cal.4th 63, 80-81; *People v. Bradford* (1997) 14 Cal.4th 1005, 1042; *In re Gilbert E.* (1995) 32 Cal.App.4th 1598, 1602; *People v. Bey* (1993) 21 Cal.App.4th 1623, 1628; *People v. Montano* (1991) 226 Cal.App.3d 914, 932.) This Court has repeatedly stated that "[such] misconduct . . . is 'unethical' and must be 'strongly disapproved.'" (*People v. Neal*, *supra*, 31 Cal.4th at p. 81, citations omitted; see also, e.g., *People v. Jablonski*, *supra*, 37 Cal.4th at p. 816; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1042.) It has observed that "[t]his type of police misconduct is not only nonproductive, . . . but can be counterproductive because in the appropriate case it would compel us to reverse a conviction." (*People v. Jablonski*, *supra*, at p. 816.) Appellant's is that case.

At the beginning of appellant's interrogation, the interrogating officers told appellant that they wanted to talk to him about the double robbery-murder that had occurred the previous night. They informed him of his *Miranda* rights and asked him if he would talk to them. Appellant responded, "No, not about a robbery-murder. Jesus Christ." (1 RT 1232; 11 RT 4067; Exhibit 5 [videotape of interrogation].) Without so much as a pause, the officers continued with the interrogation, initially asking a few diversionary questions, but then returning to the subject of the double robbery-murder. Over the following three hours, they questioned appellant solely on that subject. Appellant ultimately made a number of admissions and provided information which led the detectives to three individuals whom the prosecutor called as witnesses at appellant's trial. (1 RT 1221; 2 RT 1262-1263; Exhibit 5 [Videotape].)

At the hearing on appellant's motion to suppress his statement and the testimony of the three witnesses, the lead interrogating officer admitted that in the interrogation, appellant "made it clear that he did not want to talk about the robbery-homicide." (2 RT 1256.) The officer admitted that the robbery-murder was the sole subject of the interrogation (1 RT 1250) and that it was his habit in general to continue questioning suspects who invoked their right to remain silent, in order to obtain admissions that could later be used to impeach them (2 RT 1254). Nevertheless, the trial court ruled that appellant's statement was admissible for all purposes and allowed the prosecution to call the three witnesses whose testimony appellant argued was fruit of the poisonous tree. (11 RT 4067-4068.)

Appellant's case presents not only a blatant violation of appellant's right to remain silent, but yet another example of deliberate questioning outside *Miranda*, a police practice which strikes at the very core of the *Miranda* decision's purpose and one which the United States Supreme Court has recognized is a "growing trend." (*Missouri v. Seibert* (2004) 542 U.S. 600, 610, fn. 2.) In light of the deterrent value of the fruit of the poisonous tree doctrine, the evidence derivative of law enforcement's deliberate disregard of appellant's *Miranda* rights should have been suppressed. The trial court's admission into evidence of appellant's statement and the testimony of the three witnesses whose identity was learned during appellant's interrogation violated his rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. Reversal is required.

### A. The Trial Court Ruled That Appellant Had Invoked His Right To Remain Silent as to the Subject of the Robbery-Murder, But That His Statement Was Nevertheless Admissible For All Purposes

Prior to trial, appellant's counsel moved to exclude appellant's statement to law enforcement on June 21, 1993, the day of his arrest, as well as the statements and testimony of Susan Burlingame, Stacey Billingsley and Greg Billingsley, whose identities were revealed by appellant during the interrogation. Appellant argued that his arrest was made without probable cause, that his statement was both *Miranda*-violative and involuntary and that the identities of Burlingame and the two Billingsleys were fruit of the poisonous tree. (2 CT 377-391.) The trial court held a hearing on appellant's suppression motion. (1 RT 1159-2 RT 1304.) The evidence presented at the suppression hearing established the following facts.

On the day after the killings at The Office, appellant was arrested and transported to the Sacramento County Sheriff's Department. There, he was placed in an interview room containing a hidden video camera and microphone, handcuffed to the table and interrogated over a period of approximately three hours. (1 RT 1225-1226, 1228-1230.)

Detective Stan Reed was the primary interrogator. (1 RT 1226.) At the outset, Reed told appellant that he wanted to talk to him about the double robbery-murder that had occurred the night before.

> Reed: Sorry we had to meet under such rude circumstances like that but I'm sure you'll understand why. Ah, we're investigating a homicide that occurred out on Jackson Highway and Bradshaw Road. Occurred last night. You may have seen it on the news.

Appellant: Yeah.

Reed: Okay. It's a robbery-murder. Two people were killed out there. In the process this morning of investigating this, we ran into a lady who had some clothing in her possession that had blood on it. And, ah, in the process of asking where it came from, ultimately she told us, reluctantly, but she told us. So that's why we came out to have a talk with you. Ah, we'd like to talk to you about it, but because of the circumstances of the robbery and the murder out there and the bloody clothing and all that, ah, I'm going to have to advise you of rights first. Okay? So you have a right to remain silent. Anything you say can and will be used against you in a court of law. Have the right to an attorney, have him present with you while you're being questioned, if you wish. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. Do you fairly understand each of these rights?

Appellant: Yeah.

Reed: Having those rights in mind, will you talk to me now?

Appellant: No, not about a robbery-murder. Jesus Christ.

(Aug CT of 11/10/09 Appendix A,[15] pp. 1-2; 1 RT 1226; 21 RT 7260-7261;

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[15] An unredacted transcription of the interrogation was provided to the trial court by defense counsel at trial, but was not admitted into evidence or made an exhibit. (21 RT 7199-7103A) On November 10, 2009, after the record on appeal had been certified, this Court granted appellant's motion to augment the record with that transcription, which appellant attached to his motion as Appendix A. The transcription is therefore cited herein as "Aug CT of 11/10/09 Appendix A."

The transcription indicates that when Reed asked appellant if he would talk, appellant answered, "(Unintelligible) robbery-murder. Jesus

(continued...)

Exhibit 5 [videotape of interrogation].)

Immediately after appellant's refusal to talk about the crime under investigation, Detective Reed stated that he would ask appellant for information needed to identify him. (1 RT 1250.) Reed proceeded to ask appellant a handful of general questions about himself: his full name, date of birth, address, phone number, with whom he lived, where he was employed and whether he owned a vehicle; appellant answered the questions posed. (2 RT 1251; Aug CT of 11/10/09 Appendix A, pp. 2-4.) Reed then asked appellant whether he owned any guns; appellant said he did not. (Aug CT of 11/10/09 Appendix A, p. 4.) Reed asked appellant where he had been on the previous night. Appellant said that he had been at The Office bar with his girlfriend until about 9:00 p.m.; the girlfriend's name was Sue; Sue was the mother of Stacey and Gary, and Stacey and Gary worked with appellant at McKenry's dry cleaners. (Aug CT of 11/10/09 Appendix A, p. 4.) Appellant said he knew there had been a homicide at The Office because he had seen it on television that morning. (Aug CT of 11/10/09 Appendix A, p. 5.) Appellant said that he and Sue had gotten to The Office at about 4:00 p.m., that he took her home at around 6:00 or 7:00 p.m. and that he then returned to The Office by himself, arriving at around 7:30 or 8:00 p.m. He played pool until about 8:55 p.m. and then left. (Aug CT of 11/10/09 Appendix A, p. 5.)

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[15] (...continued)
Christ." (Aug CT of 11/10/09 Appendix A, p. 2.) However, on the videotape of the interrogation, appellant's answer is easily heard to be, "No, not about a robbery-murder. Jesus Christ." (Exhibit 5 [videotape of interrogation].) The prosecutor repeatedly represented to the trial court that these were appellant's words (1 RT 1155, 1232), and the trial court so found (11 RT 4067).

Reed asked appellant what had happened at The Office while he was there, who was present, where appellant went after leaving, what kind of cigarettes he smoked, and how much appellant had had to drink. (Aug CT of 11/10/09 Appendix A, pp. 5-10.) He then began ratcheting up the pressure:

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|---|---|
| Reed: | How can we explain the clothing that Mary got from you? |
| Appellant: | I guess you'll have to talk to Mary about that. |
| Reed: | You have no idea what she's talking about? |
| Appellant: | No. |
| Reed: | Clothing, and a pair of boots with the blood on 'em? Is that blood going to match the people over there in the Office bar? |
| Appellant: | I have no idea. |
| Reed: | What about the gun at Mary's house? Is that your gun? |
| Appellant: | No |
| Reed: | Is there any guns at Mary's that should have your fingerprints on 'em? |
| Appellant: | Probably not. |
| Reed: | Probably not? That's kind of like taking a lie detector test and I'll probably pass it. . . . |

(Aug CT of 11/10/09 Appendix A, pp. 11-12.) Reed asked appellant if they would find his fingerprints on the cash register at The Office; appellant answered "no." (Aug CT of 11/10/09 Appendix A, pp. 12-13.) Reed asked if they would find his fingerprints in the women's restroom; appellant answered "I don't think so." (Aug CT of 11/10/09 Appendix A, p. 13.) Reed responded, "Here comes that magic word again. I don't think so." (Aug CT of 11/10/09 Appendix A, p. 13.) Appellant indicated that he had

not been so intoxicated the previous night that he could not remember what had happened, and Reed stated, "If you killed somebody, you'd remember." (Aug CT of 11/10/09 Appendix A, p. 15.)

After a brief discussion about appellant's years in prison (Aug CT of 11/10/09 Appendix A, p. 16), Reed directly confronted appellant with his belief that appellant was the shooter. Reed said, "The fact of the matter is, is – is that everything at this point pretty well, you know, points that you did this." (Aug CT of 11/10/09 Appendix A, p. 17.) Reed then threatened appellant with the death penalty: "It's a robbery-murder. Pretty serious stuff. Could be a capitol [*sic*] case." (Aug CT of 11/10/09 Appendix A, p. 17.) He told appellant that he was convinced the blood on the clothing that Webster had given them would turn out to be the victims', that the "circumstances" pointing to appellant were "just overwhelming," that they had found a .45 automatic "hidden" at Webster's house, that he believed it would test out to be the murder weapon and that appellant's prints would be on it. (Aug CT of 11/10/09 Appendix A, p. 17.) He told appellant that "it's kind of like a snowball in hell theory," and "you're screwed." (Aug CT of 11/10/09 Appendix A, p. 17) He said he had done over 400 murder investigations and to him, it appeared to have been "an execution." (Aug CT of 11/10/09 Appendix A, p. 17.) He remarked that juries have "no mercy" where there has been an execution. (Aug CT of 11/10/09 Appendix A, p. 17.) He asked appellant to give him an explanation that would show that he did not just "march a seventy year old woman and this forty year old man back to a booth and blow their ass away just for grins, and no real reason." (Aug CT of 11/10/09 Appendix A, p. 18.) Appellant responded, "I didn't do it." (Aug CT of 11/10/09 Appendix A, p. 18.)

Reed said, "Well, doesn't look good for you, Casey." (Aug CT of

11/10/09 Appendix A, p. 18.) He stated that an explanation "could be important," and said he would be "real disappointed" if he did not get one. (Aug CT of 11/10/09 Appendix A, p. 18.) Appellant then stated, "Well, the clothes are mine. I got the blood on 'em from shaving. And the people were alive when I left the bar." (Aug CT of 11/10/09 Appendix A, p. 18.) Detective Edwards stated that he did not see any marks on appellant's face from shaving, and appellant responded "I heal fast." (Aug CT of 11/10/09 Appendix A, p. 19.)

Reed and Edwards questioned appellant about the robbery-murder for several minutes more, and appellant continued to deny being involved. (Aug CT of 11/10/09 Appendix A, pp. 18-21) At 2:08 p.m., approximately 25 minutes after the interrogation had begun, the officers left the room, instructing appellant to "give it some thought" and saying that they wanted to "hear the real story." (Aug CT of 11/10/09 Appendix A, p. 21; 2 RT 1257.)

Appellant was left alone in the interrogation room for approximately 45 minutes. (2 RT 1257-1258.) The same two officers returned and resumed the interrogation, initially asking appellant, "Well, have you had some time to think about it? Is there anything you could tell us?" (1 RT 1237; Aug CT of 11/10/09 Appendix A, p. 22.) Appellant again denied killing or robbing anyone and explained why he had gone to Webster's house the previous night and earlier that day. (Aug CT of 11/10/09 Appendix A, pp. 22-23.) The following exchange ensued:

> Reed: Let me see if I understand something. When I advised you of your rights, you just didn't want to talk about the murder and the robbery, but you wanted to talk about your alibi and that sort of thing; is that correct?

Appellant: I don't know if I've got an alibi.

Reed: Well, I mean you were – you wanted to talk about other things. What you meant by not wanting to talk, was you didn't want to talk about a robbery-murder?

Appellant: Well, that's what it is, ain't it?

Reed: Exactly. But you wanted to explain about Mary and this other stuff; is that correct?

Appellant: Well, I've been sitting here thinking about it. I know damn good and well them people were alive when I left there last night, and I ain't robbed nobody.

(Aug CT of 11/10/09 Appendix A, p. 23.) For several minutes thereafter, Reed and Edwards asked additional questions about the events of the previous night, after which they stated that they were booking appellant into custody. (Aug CT of 11/10/09 Appendix A, p. 27) They inventoried the contents of appellant's wallet and left the room. (Aug CT of 11/10/09 Appendix A, pp. 28-29.) Officer Ted Voudouris came into the room and began questioning appellant. (Aug CT of 11/10/09 Appendix A. p. 29.) Voudouris, whom appellant already knew, confirmed that the situation was looking bad for appellant. Referring to the robbery-murder at The Office, Voudouris said that he thought appellant "did it" and urged appellant to admit as much and say what had happened. (Aug CT of 11/10/09 Appendix A, pp. 29-38.) After 12 minutes of interrogation, Officer Voudouris left the room and came back in a few minutes later with Officer Reed. (1 RT 1239; Aug CT of 11/10/09 Appendix A, p. 38.)

Officer Reed revealed to appellant that earlier that same day, he had tape-recorded appellant's telephone conversation with Mary Webster, in which appellant asked Webster if she had gotten rid of "that stuff" and

whether she had "put it all in one place." (Aug CT of 11/10/09 Appendix A. pp. 40-41.) Both Reed and Voudouris indicated repeatedly that they believed appellant had committed the crime. (Aug CT of 11/10/09 Appendix A, pp. 41-42.) Appellant eventually said, "I'm not going to tell you nothing." (Aug CT of 11/10/09 Appendix A, p. 42.) Shortly thereafter, more than three hours after the interrogation had begun, the officers arrested appellant for homicide and ended the interrogation. (Aug CT of 11/10/09 Appendix A, pp. 44-46.) At no time were *Miranda* warnings repeated.

At the suppression hearing, Detective Reed testified that he had gone to talk to appellant about the robbery-homicide and no other subject. (1 RT 1249-1250.) Reed admitted that appellant indicated at the very beginning of the interrogation that he did not want to talk about the robbery-homicide, but Reed continued the interrogation anyway. (1 RT 1249-1250.) Reed admitted that although he told appellant he needed to get some information necessary to identify him, law enforcement had already identified appellant through information obtained from Mary Webster. (1 RT 1250-2 RT 1251.) Reed testified that when he asked appellant whether he owned any guns, that question had nothing to do with identifying him; it had to do with the robbery-murder. (2 RT 1251.)

Detective Reed's stated purpose in conducting the interrogation was "to get admissions that would be held against [appellant] at a later time." (2 RT 1252.) He admitted being aware that a statement found to have been taken in violation of *Miranda* may nevertheless be used for impeachment purposes. (2 RT 1254.) He admitted that, in general, it was his habit to continue questioning individuals who invoked their right to remain silent in order to obtain admissions that could later be used to impeach them. (2 RT

1254.) He admitted that appellant "made it clear that he did not want to talk about the robbery-homicide." (2 RT 1256.) Although Reed admitted that the robbery-homicide was the sole subject of the interrogation, he nevertheless took the position that appellant's refusal to speak on that subject did not constitute an invocation:

> [H]e didn't invoke his right to an attorney. He didn't invoke his right not to talk to me. He just didn't want to talk about a robbery/homicide which, in my experience, that's the case with all these people. That's why they call it an interrogation. In my opinion, we got past that without a problem.

(2 RT 1254-1255.) When asked to confirm that, apart from the pretextual identification questions asked immediately after appellant's invocation, the focus of the entire interrogation was on the double murder at The Office, Reed stated, "I'd say the line of questioning paralleled that, yes." (2 RT 1252.) Reed acknowledged that over an hour into the interrogation, he brought up the subject of appellant's refusal to talk and suggested that appellant had meant to say that he was willing to talk about his "alibi." (2 RT 1258.) Reed acknowledged that appellant had not, in fact, said that he wanted to talk about his alibi. (2 RT 1258-1259.) Indeed, in response to Reed's questioning, appellant had not provided any alibi, but admitted that he was at The Office on the previous night. (Aug CT of 11/30/09 Appendix A, pp. 4-5.) At the suppression hearing, Reed admitted that he attempted to characterize appellant's answers to his questions as a willingness to talk about his "alibi" because he knew that he would later be "sitting here on this stand at this hearing." (2 RT 1259.) Reed suggested that a suspect's refusal to answer questions about a particular crime should not foreclose questioning about his alibi for that crime. (2 RT 1257.)

Reed also testified that prior to the interrogation, he had been

unaware of the existence of Stacey Billingsley, Greg Billingsley and Sue Burlingame. (2 RT 1262-1263.) The parties stipulated that the identities of Stacey and Greg Billingsley were first learned from appellant's interrogation. (1 RT 1221.)

The trial court denied appellant's suppression motion, finding that law enforcement had probable cause for appellant's arrest and that the statement was not coerced. (11 RT 4066-4067.) The court did not articulate any reasoning for either conclusion. The court ruled that appellant's statement was not taken in violation of *Miranda*, stating as follows:

> As I recall the evidence, when he was asked if he wanted to discuss the matter with the sheriff's detectives, he said no, not about a robbery-murder, Jesus Christ. [¶] The Court has reviewed the cases that have been cited by both the People and the defense and finds that *Clark* and *Silva* are on point here. [¶] *Clark* holding that a defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate an interrogation already in progress. [¶] In the *Silva* case, he said I really don't want to talk about that. And that was found not to be an invocation. [¶] Here Mr. Case didn't invoke his right to all subjects, only as to one. The scenario here is similar to the scenario in *People vs. Ashmus*, *A S H M U S*, 1991, 54 Cal.3d, 932. . . . In that case, the defendant evidently sought to alter the course of questioning but didn't attempt to stop it altogether. And that appears to be what the situation was, absent an invocation of the right to remain silent, law enforcement officers may continue interrogation. The Court finds that they did so and they did so in a manner that was acceptable and not in violation of Mr. Case's *Miranda* rights.

(11 RT 4067-4068.) Appellant asked for clarification as to the trial court's view of the portion of the statement which appellant made after the initial interrogators left the room and another interrogator (i.e., Voudouris)

entered. The court stated:

> Actually, the Court's ruling will stand that it was not – none of these statements were taken in violation of his *Miranda* rights since Mr. Case did not effectively invoke them.

(11 RT 4069.) Because the court found no *Miranda* violation, it declined to reach the fruit of the poisonous tree issue. (11 RT 4068.)

Although the court admitted appellant's statement for all purposes, the prosecutor did not present evidence of it during his case-in-chief, but waited until after the close of appellant's case and after all other rebuttal evidence had been presented. Over appellant's objection that the evidence was improper rebuttal (21 RT 7204-7209; see Argument VI, *infra*), detective Reed then testified that appellant had made the following statements during the interrogation: that he knew about the homicide at The Office because he had seen it on the news that morning (21 RT 7252); that on the previous night (the night of the robbery-murder), he was at The Office with his girlfriend Sue, took Sue home at around 6:00 or 7:00 p.m., went back to The Office at about 7:30 or 8:00 p.m. and stayed there playing pool by himself until about 8:55 p.m. (21 RT 7252-7254); that he drove to The Office in Jerri Baker's Ford Probe (21 RT 7255); that when Reed asked him if he could explain the bloody clothing that Webster said she had gotten from him, appellant said, "I guess you'll have to talk to Mary about that;" that he had no idea what Webster was talking about or whether the blood on the clothes would match the people's in The Office (21 RT 7256); that the clothes were his (21 RT 7256); that he had gotten the blood on them from shaving (21 RT 7256); that the people were alive when he left the bar (21 RT 7256); and that the reason that he did not have any marks on his face from shaving was that he "healed fast" (21 RT 7256). This was the last

evidence the jury heard before it began deliberations.

### B. The Officers Violated *Miranda* When They Persisted in Interrogating Appellant after He Had Invoked His Right to Remain Silent and Plainly Stated That He Did Not Want to Talk about the Sole Subject of the Interrogation – the Robbery-Murder

The facts of this case establish a *Miranda* violation. Appellant's interrogators stated clearly at the beginning of the interrogation that they wanted to question appellant about the double robbery-murder that had occurred the previous night. (Aug CT Appendix A, pp. 1-2.) The robbery-murder was the only subject that they presented to him. (1 RT 1249-1250.) Having been read his rights and asked if he would talk to the officers about the robbery-murder, appellant answered, "No, not about a robbery-murder. Jesus Christ." (1 RT 1155, 1232; 11 RT 4067; Aug CT of 11/10/09 Appendix A, p. 2; Exhibit 5.) At that point, the police questioning should have stopped. Appellant unambiguously and unequivocally invoked his Fifth and Fourteenth Amendment right to remain silent as to the sole subject presented to him. Although Detective Reed recognized that appellant did not want to talk about the robbery-murder (2 RT 1255), he nevertheless continued to question him about it. That questioning was prohibited by *Miranda*.

It is axiomatic that a criminal suspect in custody has a Fifth Amendment right to remain silent, and one of the most important safeguards of that right is the right to cut off questioning. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 474.) After a suspect has been advised of his *Miranda* rights,

> [i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the

> interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

(*Id.* at pp. 473-474.) The United States Supreme Court recently reaffirmed that where a suspect makes a "simple, unambiguous statement[]" that he wants to remain silent or does not want to talk with the police, he invokes his right to remain silent and the """"right to cut off questioning."""" (*Berghuis v. Thompkins* (2010) 560 U.S. ___, 130 S.Ct. 2250, 2260, citations omitted.) Where an officer is faced with such an unequivocal and unambiguous invocation of the right to remain silent, "further interrogation must cease." (*Id.* at pp. 2263-2264.)

This Court has long held that "'no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent.'" (*People v. Randall* (1970) 1 Cal.3d 948, 955.) A suspect seeking to invoke his right to silence need not "provide any statement more explicit or more technically-worded than 'I have nothing to say'" (*Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 865) or "I plead the Fifth" (*Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 787 (en banc), cert. denied 129 S.Ct. 344). The inquiry into whether a defendant has invoked *Miranda* rights is an objective one, which asks what "a reasonable officer in light of the circumstances would have understood." (*Davis v. United States* (1994) 512 U.S. 452, 458-459.) On review, this Court reviews independently the trial court's determination of whether the defendant invoked his *Miranda* rights. (*People v. Gonzalez* (2005) 34

Cal.4th 1111, 1125.)

Appellant's invocation of his right to silence – "No, not about a robbery-murder. Jesus Christ." – could hardly have been clearer. As in *Anderson v. Terhune*, "this is not a case where the officers or the court were left scratching their heads as to what [appellant] meant." (*Anderson v. Terhune*, *supra*, 516 F.3d at p. 787.) The officers told appellant what they wanted to talk to him about, and appellant said, "no." His refusal was stated at the beginning of the interrogation, immediately after he was advised of his rights. He used no bywords of equivocation such as "maybe" or "might" or "I think." (See *Arnold v. Runnels*, *supra*, 421 F.3d at pp. 865-866 [distinguishing cases in which the invocation was found ambiguous from cases in which the invocation was found unambiguous].) Appellant had not previously indicated any willingness to talk, nor had he signed any written waiver. By answering as he did, appellant made it crystal clear at the outset that he did not want to talk to the officers about the only subject which they wanted to discuss. As stated by the federal court in *Arnold*, "it is difficult to imagine how much more clearly a layperson like appellant could have expressed his desire to remain silent." (*Id.* at p. 866.)

Officer Reed recognized that appellant was refusing to answer questions about the crime under investigation. At the suppression hearing, Reed testified that appellant "didn't invoke his right not to talk to me. He just didn't want to talk about a robbery homicide." (2 RT 1255.) Reed's claim that he did not recognize appellant's refusal to talk as an invocation is disingenuous at best. As noted above, Reed admitted that the robbery-homicide at The Office was the only subject about which he wanted to interrogate appellant and that appellant stated he did not want to discuss that subject. (1 RT 1249-1250.) The only questions which Reed asked that did

not concern the robbery-murder were pretextual. Reed admitted that when appellant refused to answer questions about the robbery-murder and Reed continued asking him questions purportedly to identify him, Reed, in fact, had already identified appellant. (1 RT 1250-2 RT 1251.) By Reed's own admission at the suppression hearing, the questions that he posed after appellant invoked his right to silence were purely to keep appellant talking so that Reed could eventually bring him back to the subject at hand -- the robbery-murder at The Office – and obtain admissions that could be used against him. (2 RT 1252.) Reed also testified that suspects often state that they don't want to discuss the crime at issue. As Reed said, "that's why they call it an interrogation." (2 RT 1255.) Reed testified that if he just keeps the interrogation going, they "for whatever reason began to talk about it." (2 RT 1256.) Indeed, Reed admitted that it was his *habit* generally to continue questioning after an invocation because of the likelihood that *Miranda*-violative statements will nevertheless be found admissible for impeachment purposes. (2 RT 1254.)

Reed's disingenuousness is further revealed by his attempt, midway through the interrogation, to recharacterize appellant's refusal to talk. Reed asked appellant if, when he said he did not want to talk about a robbery-murder, he really meant that he was willing to discuss his alibi. (Aug CT of 11/10/09 Appendix A, p. 23) At the suppression hearing, Reed admitted that he made that suggestion to appellant because he anticipated having to defend his interrogation conduct in court. (2 RT 1259.) Reed went further and mischaracterized appellant's response to his inquiry about an alibi, testifying that appellant said, "That's what I said, isn't it?" (2 RT 1266.) When confronted with the tape of the interrogation, Reed admitted that appellant said no such thing. (2 RT 1268.) The interrogation exchange was

as follows:

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|---|---|
| Reed: | Let me see if I understand something. When I advised you of your rights, you just didn't want to talk about the murder and the robbery, but you wanted to talk about your alibi and that sort of thing; is that correct? |
| Appellant: | I don't know if I've got an alibi. |
| Reed: | Well, I mean you were – you wanted to talk about other things. What you meant by not wanting to talk, was you didn't want to talk about a robbery-murder? |
| Appellant: | Well, that's what it is, ain't it? |

(Aug CT of 11/10/09 Appendix A, p. 23.)

Reed's insertion of the topic of "alibi" into the interrogation was simply a ruse to continue questioning appellant about the robbery-murder he had refused to discuss. An "alibi" is "a defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time," or "the fact or state of having been elsewhere when an offense was committed." (Black's Law Dictionary (9th Ed. 2009).) By definition, an alibi exists only in relation to, and thus implicitly concerns, a particular crime. Reed's attempt to characterize an alibi as a subject separate from the crime to which it refers is nothing short of specious. The fact that he attempted to recharacterize appellant's invocation in this fashion, both during the interrogation and at the suppression hearing, calls into question Reed's credibility and suggests that he was well aware of the unlawfulness of his conduct. Appellant had clearly invoked his right to remain silent as to the robbery-murder and that was the sole subject under discussion. All questioning should have immediately ceased at that point in time.

The trial court found that appellant invoked his right to remain silent as to only one subject (11 RT 4068), which did not effectively invoke his *Miranda* rights (11 RT 4069). The trial court erred. As set forth above, appellant's refusal from the very outset of the interrogation to discuss the only subject that the officers presented to him was a complete invocation of his rights. Even assuming that the trial court was correct in viewing appellant's invocation as applying only to the subject of the robbery-murder at The Office, that subject was the sole focus of the police investigation and the sole subject presented to appellant during the interrogation. Appellant's subsequent statement was inadmissible because the officers continued questioning him *on that subject*.

Because appellant refused to talk about the only subject presented to him, this is not a selective invocation case. However, even in a selective invocation context, continued interrogation is permissible only to the extent that the suspect's invocation is "scrupulously honored." (*Michigan v. Mosley* (1975) 423 U.S. 96, 103-107 [after defendant stated that he did not want to discuss two particular robberies, continued interrogation was permissible in part because it focused only on an unrelated homicide].) Where a suspect refuses to answer questions as to one or more subjects but not all, questioning must cease in the areas about which the suspect has declined to speak. (*United States v. Soliz* (9th Cir. 1997) 129 F.3d 499, 504 [statements inadmissible when made after defendant stated he would make a statement on the subject of his citizenship but agent continued to question about matters other than citizenship], overruled on other grounds in *United States v. Johnson* (9th Cir. 2001) 256 F.3d 895, 913, fn. 4; *United States v. Lopez-Diaz* (9th Cir. 1980) 630 F.2d 661, 664-665 [statements inadmissible because officer asked questions concerning offenses about which defendant

had refused to talk]; compare *United States v. Thierman* (9th Cir. 1982) 678 F.2d 1331, 1335 [statement admissible because officers abided by limitations which defendant placed on subjects he was willing to discuss].) Indeed, this Court has recognized that in a selective invocation context, it is improper to continue asking questions on the subject about which the defendant has refused to talk. (See, e.g., *People v Clark* (1992) 3 Cal.4th 41, 122 [where defendant agreed to talk without counsel about one murder but not about another unrelated one, it "may not have been appropriate" for police to ask further questions about the latter].)

Appellant unambiguously refused to answer Reed's questions about a robbery-murder, and the robbery-murder was the only subject of the officers' investigation of appellant. Reed admitted both facts. (1 RT 1249-1250; 2 RT 1256.) Appellant's unambiguous refusal to discuss that subject rendered unlawful all subsequent questions related to that subject. With the exception of the few patently pretextual questions immediately following appellant's initial refusal to talk, the officers made no attempt to avoid questions pertaining to the robbery-murder. That crime and the events surrounding it were the focus of virtually all of their questions, and detective Reed admitted that his goal was to obtain damaging admissions regarding that crime. (2 RT 1252.) In short, the officers did not "'scrupulously honor'" appellant's right to cut off questioning on the robbery-murder. (*Michigan v. Mosley, supra*, 423 U.S. at p. 104, quoting *Miranda v. Arizona*, *supra,* 384 U.S. at p. 479.) They did not honor it at all.

One of the main purposes of *Miranda* is to protect a suspect's right to silence by giving him the opportunity to cut off questioning and thereby prevent police from badgering him into making incriminating statements against his will. (See, e.g., *Miranda v. Arizona*, *supra*, 384 U.S. at p. 474

["Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."].) Such badgering is precisely what happened here. Detective Reed continued the interrogation in spite of appellant's clear refusal to talk about the only crime under investigation. Reed's testimony at the suppression hearing makes unmistakably clear that in continuing the interrogation, Reed *intended to overcome appellant's express desire to remain silent.* (See 2 RT 1255 [Reed explains that the point of an interrogation is to get suspects to talk about a crime even when they have stated they do not want to discuss it].) Reed's technique was obviously effective. Appellant succumbed to Reed's persistent questioning and, ultimately, made damaging admissions about the very subject that he said he did not want to discuss. Appellant's statement was obtained in clear violation of the rights that *Miranda* was designed to protect.

In erroneously admitting appellant's statement, the trial court relied on this Court's decisions in *People v. Silva* (1988) 45 Cal.3d 604, *People v. Clark*, *supra*, 3 Cal.4th 41, and *People v. Ashmus*, *supra*, 54 Cal.3d 932. Those authorities are inapposite. In all three cases, the defendant expressly waived his rights, willingly answered questions about the crime under investigation and only later in the interrogation expressed an unwillingness to answer a particular question posed or discuss a particular area of inquiry.

In *Silva*, after being *Mirandized* and expressly waiving his rights, the defendant admitted staying with the codefendant at the time of the homicide, seeing the victims with their trailer, filling his own truck with gas and then pulling off to the side of the road. However, when asked if he had later driven the victim's vehicle, the defendant answered, "I really don't

want to talk about that." (*People v. Silva*, *supra*, 45 Cal.3d at p. 629.) The Court noted that "having obtained the defendant's consent to the questioning," the officer was free to interview the defendant until he exercised his privilege against self-incrimination. (*Id.* at p. 629.) The Court also noted that "[a] defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate 'an interrogation *already in progress*.'" (*Id.* at pp. 629-630, citation omitted, italics added.) It explained that when the defendant balked at being asked if he had driven the victim's vehicle, he "was not even intimating that he wished to terminate the interrogation," and therefore the continued questioning was permissible. (*Id.* at p. 630.) The scenario presented in *Silva* was totally unlike that presented here, where there was no express waiver, the interview was not already in progress, and at the very outset, appellant strongly, clearly and unambiguously refused to discuss the entire subject of the robbery-murder at The Office.

In *Clark*, after expressly waiving his right to remain silent, the defendant talked freely about the crime in question. It was only when law enforcement began to question him about an *unrelated killing* that the defendant said, "I know about that. And I'm not going to . . . talk any further about it without an attorney and that – . . . . That's a whole different ball game." (*People v. Clark*, *supra*, 3 Cal.4th at p. 122.) The officers did not ask any further questions about the unrelated killing, and none of the defendant's statements in that regard resulted in any charges. (*Ibid.*) The Court found that the defendant had not completely refused to talk without an attorney, but "he indicated he would not talk about one limited subject-unrelated to the offenses here charged-without an attorney present." (*Ibid.*) As in *Silva*, the Court noted that when "'an interrogation is already in

progress,'" the defendant may indicate an unwillingness to discuss certain subjects. (*Ibid.*) The officers had honored the defendant's refusal to discuss the other unrelated crime. (*Ibid.*) The Court held that the defendant's unwillingness to discuss that crime without counsel "did not prevent further questions on subjects about which defendant was willing to talk.. . . . Defendant did not invoke the right as to all subjects, only as to one." (*Ibid.*)

Appellant's case is not at all similar to *Clark*. To be sure, as in *Clark*, the trial court found that appellant "did not invoke the his right to all subjects, only as to one." (11 RT 4067.) However, unlike in *Clark*, the subject as to which appellant invoked his rights was the *only* subject presented. Further, when the defendant in *Clark* invoked his right to counsel as to the unrelated crime, the interrogating officers stopped questioning him on that subject and none of his statements regarding that crime were used against him. In stark contrast, appellant's interrogators asked numerous questions concerning the robbery-murder which appellant already had refused to discuss, and his subsequent statement was used in obtaining the convictions and death sentence.

In *Ashmus*, the defendant expressly waived his rights and answered a number of questions about the scene of the crime. It was only when the interrogating officer told the defendant that someone had seen a little girl standing next to the defendant that the defendant interrupted and said, "You're gonna try to con-, now I ain't saying no more" and "don't say no more." (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 968.) The Court found that "within their context," the defendant's words indicated that he had only "sought to alter the course of the questioning," but "did not attempt to stop it altogether." (*Id.* at pp. 970-971.) By contrast, appellant never waived his

rights, and at the outset, and unlike Ashmus's defensive, inarticulate and ambiguous resistance to a particular question posed in the middle of the interrogation, appellant manifested a clear, firm, comprehensive refusal to discuss the entire subject-matter of the interrogation at the very outset.

In contrast to *Silva*, *Clark* and *Ashmus*, appellant never waived his rights. He did not simply refuse to discuss only a subset of the officers' questions or a subject matter unrelated to the main focus of the interrogation. Rather, immediately after he was read his rights, appellant unambiguously and unequivocally refused to discuss the only subject about which the officers sought to question him. The officers knew that he did not want to talk about it, but they continued questioning him *on that subject*. The decisions relied on by the trial court lend no support to its ruling that appellant's invocation of his rights with respect to the robbery-murder did not effectively cut off the ensuing questioning which pertained to that very same subject.

Nor do this Court's other decisions rejecting claimed invocations of the right to remain silent support the trial court's ruling in this case. In other decisions, the defendant expressly waived the right to remain silent at the outset (see, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 534-536 [no invocation where defendant initially waived his rights and answered questions, but when officer suggested that he had fought with victim, said, "I think it's about time for me to stop talking"]; *People v. Rundle* (2008) 43 Cal.4th 76, 116-117 [no invocation where defendant had waived rights and confessed to murder before saying that he wanted to stop the interview because he had a headache]; *People v. Martinez* (2010) 47 Cal.4th 911, 949-952 [no invocation where defendant expressly waived rights and answered questions, was confronted with inconsistencies in his statements

and after being told they would take a break, said "I don't want to talk any more right now"]) or did not clearly and unequivocally invocation of the right to remain silent (see, e.g., *People v. Jennings* (1988) 46 Cal.3d 963, 977-979 [defendant's statement that he wasn't going to say any more indicated only momentary frustration and animosity toward one interrogator who defendant believed was misconstruing his statements]; *People v. Musselwhite* (1998) [defendant's statement, "I don't want to talk about this," was a response to being pressed on whether he had been in the apartment complex where the victim's body was found on the day of her murder, not a request to terminate the interrogation]; *People v. Johnson* (1993) 6 Cal.4th 1, 26-28 [no invocation where defendant said "No tape recorder. I don't want to incriminate myself," but was then advised of rights and expressly waived them without qualification]). By contrast, appellant clearly and unequivocally invoked the right to remain silent as to the robbery-murder, as both the trial court and the interrogating officer recognized. The continued questioning concerned that very subject, and that subject was the only subject under discussion. Therefore, whether the invocation is viewed as complete or partial, the continued interrogation violated appellant's Fifth and Fourteenth Amendment right to remain silent.

Finally, the fact that the prosecutor presented appellant's statement as part of his case in rebuttal rather than in his case-in-chief does not diminish the error. Appellant did not testify. Although a defendant's unlawfully-obtained statements are admissible to impeach the defendant if and when he testifies, the high court has refused to expand that limited exception to the exclusionary rule, and has expressly held that such evidence may not be used to impeach witnesses other than the defendant. (*James v. Illinois* (1990) 493 U.S. 307, 319-320; *United States v. Havens*

(1980) 446 U.S. 620, 627-628; *Oregon v. Hass* (1975) 420 U.S. 714, 723-724; *Harris v. New York*, *supra*, 401 U.S. at p. 226.) This Court has applied the same rule. (See *People v. Boyer* (2006) 38 Cal.4th 412, 462.) Appellant is aware of no decision that has treated *Miranda*-violative statements admitted as rebuttal when the defendant has not testified differently than *Miranda*-violative statements admitted in the prosecution's case-in-chief. Moreover, the high court's reasons for not extending the impeachment exception to defense witnesses other than the defendant apply just as forcefully to the prosecutor's use of *Miranda*-violative statements in rebuttal: expanding the exception would chill defendants from presenting witnesses who would otherwise offer probative evidence, would "significantly enhance the expected value to the prosecution of illegally obtained evidence" and would encourage police misconduct. (*James v. Illinois*, *supra*, 493 U.S. at pp. 314-319.)

In summary, appellant's interrogators told him at the outset that they wanted to discuss the robbery-murder that had occurred the night before, and that was the only subject of the interrogation. When the officers advised appellant of his *Miranda* rights and asked him if he would talk to them, appellant responded, "No, not about a robbery-murder. Jesus Christ." Appellant's response was a clear, unambiguous and unequivocal refusal to talk about the subject which the officers wanted to discuss. The lead interrogating officer recognized and the trial court found that appellant did not want to talk about that subject. (1 RT 1250; 11 RT 4068.) Appellant's statement cannot reasonably be construed as a refusal to discuss only a subset of the officers' questions, as only the robbery-murder was under investigation and that was the subject which appellant refused to discuss. In context, any reasonable police officer would have understood that

appellant's statement constituted an invocation of the right to remain silent. The officers here simply ignored it. Their continued questioning of appellant cannot be justified on any grounds. Appellant's statement was taken in violation of his *Miranda* rights under the Fifth and Fourteenth Amendments, and the use of his statement against him at trial was unconstitutional.

### C. Appellant's Statement Was the Product of Psychological Coercion and Was Involuntary

The Fifth Amendment guarantees a person's right to remain silent "unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." (*Malloy v. Hogan* (1964) 378 U.S. 1, 8 [holding the Fifth Amendment applicable to the states through the Fourteenth Amendment].) If a statement is the product of coercive police activity, it is involuntary and subject to exclusion at trial. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167; *Mincey v. Arizona* (1978) 437 U.S. 385, 398.) This Court reviews independently a trial court's determination of voluntariness. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093.)

Under both state and federal Constitutions, courts apply a "totality of circumstances" test to determine the voluntariness of a confession. (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *People v. Neal*, *supra*, 31 Cal.4th 63, 79.) It is the prosecutor's burden to prove by a preponderance of the evidence that statements obtained from the suspect were voluntary. (*People v. Williams* (1997) 16 Cal.4th 634, 659, citing *Lego v. Twomey* (1972) 404 U.S. 477, 489.) The prosecutor in appellant's case failed to meet that burden, and the trial court erred in ruling to the contrary. (See 11 RT 4067.) Appellant's statement was the involuntary product of improper police coercion and should have been suppressed.

In *Miranda*, the Supreme Court acknowledged that "inherently compelling pressures" are present whenever a person suspected of a crime is interrogated in custody, pressures which "work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 467.) In addition to those inherent pressures, other factors short of brutality may work to compromise the free will of the accused. Interrogation tactics need not be violent or physical to be coercive. "Psychological coercion is equally likely to result in involuntary statements, and thus is also forbidden." (*Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 416 (en banc).)

A violation of the procedures required by *Miranda*, even a simple failure to warn, raises a presumption of coercion. (*United States v. Patane* (2004) 542 U.S. 630, 639; *Oregon v. Elstad* (1985) 470 U.S. 298, 306-307 & fn.1.) Although this Court has held that an interrogator's deliberate disregard of an invocation of *Miranda* rights is not per se coercive (*People v. Bradford*, *supra*, 14 Cal.4th at pp. 1039-1040), it has also held that where an interrogating officer disregards the defendant's invocation of *Miranda* rights and continues the interrogation in spite of it, that fact weighs heavily against the voluntariness of the defendant's subsequent statement (*People v. Neal*, *supra*, 31 Cal.4th at pp. 81-82 [although defendant was vulnerable, detention conditions were harsh and officers made threats and promises, circumstance weighing "most heavily against the voluntariness" was continued interrogation after repeated invocations]).[16] Where the police

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[16] Some members of this Court have suggested that the holding in *Bradford* should be limited to its facts and that continuing an interrogation after the suspect invokes his rights may in other circumstances be inherently (continued...)

continue questioning after the defendant has invoked his rights, the message is that his rights will not be honored until he provides a "statement of some sort." (*People v. Neal*, *supra*, 31 Cal.4th at p. 82.) By not honoring a suspect's right to cut off questioning, the police take unfair advantage of the "compelling pressures that weigh upon a person in custody, pressures that can break a person's free will and cause the person to talk involuntarily." (*Miranda*, *supra*, 384 U.S. at p. 467.)

Here, appellant clearly and emphatically stated to his interrogators that he did not want to talk about the robbery-murder at hand. Nevertheless, the officers continued to interrogate him, handcuffed him to the table (1 RT 1228-1229), without even a pause or an acknowledgment that he had refused to speak to them on that subject. The lead investigating officer recognized that appellant had declined to speak about the crime at issue. (2 RT 1255.) The officers' conduct communicated to appellant that they would not take "no" for an answer.

A statement is also involuntary when it has been "extracted by any sort of threats . . ." (*Hutto v. Ross* (1976) 429 U.S. 28, 30.) Officials may not extract a confession "by any sort of threats or violence, nor . . . by any direct or implied promises, however slight, nor by the exertion of any improper influence." (*Bram v. United States* (1897) 168 U.S. 532, 542-43, quoted in *Malloy*, *supra*, 378 U.S. at p. 7.) "[I]n carrying out their interrogations the police must also avoid threats of punishment for the

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[16] (...continued)
coercive. (See *People v. Storm* (2002) 28 Cal.4th 1007, 1045 (dis. opn. of Chin, J., joined by George, C.J.) ["I seriously question *Bradford*'s suggestion that, following *Elstad*, continued interrogation after invocation of right to counsel is not 'inherently' coercive. [Citation.]")

suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession." (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

In an attempt to elicit a confession from appellant, Detective Reed told appellant that he could be subject to the death penalty. (Aug CT of 11/10/09 Appendix A, p. 17 ["Could be a capitol [*sic*] case."]) He implied that appellant had no chance of escaping conviction. (Aug CT of 11/10/09 Appendix A, p. 17 ["[I]n my opinion, Casey is – it's kind of like a snowball in hell theory. You're – you're screwed . . . ."]) He told appellant that it appeared to him to have been "an execution" and that juries "have no mercy" when that is the case (Aug CT of 11/10/09 Appendix A, p. 17), that it "doesn't look good" (Aug CT of 11/10/09 Appendix A, pp. 18, 38) and "it looks real bad" (Aug CT of 11/10/09 Appendix A, pp, 29, 31). Voudouris told appellant, "I think you'd be a whole hell of a lot better off if you just said, hey, and said, 'Got me.'" (Aug CT of 11/10/09 Appendix A, p. 30.) Reed said, "There's got to be more to the story. . . . [T]he jury likes explanations for things. Sometimes it can benefit you in the long run." (Aug CT of 11/10/09 Appendix A, p. 40.) Later, Reed remarked, "I think that if there's more to the story than just marching two people into a bathroom and blowing them away cold bloodily [*sic*], that it can't help but benefit you." (Aug CT of 11/10/09 Appendix A, p. 41.) These statements effectively communicated to appellant that if he did not cooperate, he would be subject to the death penalty, but if he confessed or provided some explanation, he would receive more lenient treatment.

Individually, the detectives' implied promise that if appellant told what happened he could improve his prospects and the thinly-veiled threat of the death penalty if he did not tell his side of the story may not, standing

alone, have rendered appellant's statement involuntary. (See *People v. Holloway*, *supra*, 33 Cal.4th at p. 115 [confession must result directly from the threat in order for threat to render it involuntary].) However, together with the officers' disregard for appellant's invocation of his right to remain silent, the factors coalesced to a create coercive effect. The officers' strategy was effective: appellant answered their questions despite his clearly stated desire not to talk to them about the crime that they were investigating. Their tactics succeeded in insidiously overcoming his will and cajoling him into talking about that very subject. For the foregoing reasons, his statement was involuntary and inadmissible for any purpose.

### D. The Testimony of Greg Billingsley, Stacey Billingsley, and Sue Burlingame Was Also Inadmissible

Because of law enforcement's misconduct during appellant's interrogation, not only appellant's statement, but also the evidence obtained as a result of that statement was inadmissible. A byproduct of appellant's interrogation was the testimony of prosecution witnesses Greg Billingsley, Stacey Billingsley and Sue Burlingame; law enforcement officers had no information about those witnesses until appellant provided it. (1 RT 1221; 2 RT 1262-1263.) Whether this Court should find appellant's statement involuntary or *Miranda*-violative but voluntary, the trial court erred in denying appellant's motion to suppress the testimony of those three witnesses. That evidence was derivative of police coercion and of an interrogation technique deliberately designed to thwart *Miranda*'s protections, and it would not inevitably have otherwise been discovered.

### 1. The Evidence Was Obtained as a Result of Appellant's Involuntary Statement and Was Therefore Inadmissible

As set forth in Section C above, appellant's statement was obtained through the use of coercion and was involuntary. The Supreme Court recently reaffirmed the long-standing principle that "'those subjected to coercive police interrogations have an automatic protection from the use of their involuntary statements (*or evidence derived from their statements*) in any subsequent criminal trial.'" (*United State v. Patane*, *supra*, 542 U.S. at p. 650, quoting *Chavez v. Martinez* (2003) 538 U.S. 760, 769, italics added; *cf. Oregon v. Elstad*, *supra*, 470 U.S. at p. 307 [fruits of an involuntary statement must "be discarded as inherently tainted"].) Therefore, both the statement itself and all evidence derived from it were inadmissible for any purpose, and the trial court's denial of appellant's motion to suppress the testimony of Sue Burlingame, Stacey Billingsley and Greg Billingsley was error.

### 2. The Evidence Should Have Been Suppressed Because it Was Derivative of an Interrogation Strategy of Deliberately Ignoring Appellant's Invocation of His Rights in Order to Circumvent *Miranda*

This Court repeatedly has been confronted with the fact that some law enforcement officers employ a deliberate interrogation tactic of questioning "outside *Miranda*" and repeatedly has condemned such tactics. (See cases cited at pp. 52-53, *ante*.) The United States Supreme Court, too, has noted the growing trend of police training programs that "advise officers to omit *Miranda* warnings altogether" or, as occurred in this case, "to continue questioning after the suspect invokes his rights." (*Missouri v.*

*Seibert*, *supra*, 542 U.S. at p. 610, fn. 2.) Despite judicial disapproval of such misconduct, the deliberate, tactical disregard of *Miranda* persists. Without a remedy that imposes consequences for such police misconduct, it is likely to continue, making *Miranda*'s right to remain silent "obeyed in name but not in fact." (*People v. Storm*, *supra*, 28 Cal.4th at p. 1040 (dis. opn. of George, C.J.) This case presents the Court with an opportunity to craft, and this case warrants, that remedy.

If appellant's statement is found to have been voluntary, this Court should hold that derivative evidence, whether it be physical evidence or the testimony of a witness, is inadmissible where it is obtained as a result of a custodial interrogation in which the interrogating officers, for the purpose of evading *Miranda*'s safeguards, deliberately ignore the suspect's invocation of the right to remain silent. Neither this Court nor the United States Supreme Court has decided this issue. The remedy appellant seeks would further the deterrence rationale underlying the high court's decisions regarding the application of the fruit of the poisonous tree doctrine in the context of *Miranda* violations and would create a much-needed disincentive for law enforcement to employ interrogation techniques designed to thwart *Miranda*'s purpose. Because appellant's interrogators, as an investigative strategy, deliberately ignored appellant's invocation of the right to remain silent, knowing that *Miranda*-violative statements would be admissible for impeachment purposes, the evidence derived from appellant's statement should have been suppressed.

This Court has discussed, but has not decided, whether the fruit of the poisonous tree doctrine applies to nontestimonial evidence derivative of a *Miranda* violation. In *People v. Davis* (2009) 46 Cal.4th 539, the Court stated that the doctrine does not apply to physical evidence seized as a result

of a "noncoercive" *Miranda* violation. (*Id.* at p. 598.) That statement, however, was dictum, as the Court found that *Miranda* had not been violated. Under the rescue doctrine, police had not violated the defendant's rights by reinitiating contact after he invoked the right to counsel; the defendant's subsequent confession also was admissible because it was preceded by additional *Miranda* warnings and an express waiver of rights. (*Id.* at pp. 595-597.) Importantly, *Davis* did not involve interrogation tactics deliberately designed to thwart the purpose of *Miranda*.

Nor is the proposed remedy inconsistent with this Court's decisions rejecting claims that a defendant's *own statement* was inadmissible as the tainted product of a previous *Miranda*-violative but voluntary statement. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 637-639 [non-deliberate failure to warn did not taint subsequent interview initiated by defendant]; *People v. Storm*, *supra*, 28 Cal.4th 1007, 1035-1036 [statement taken in disregard of defendant's request for counsel, where violation was not a deliberate police stratagem, did not taint subsequent interview conducted after two-day break in custody]; *People v. Bradford*, *supra*, 14 Cal.4th 1005, 1038-1040, 1042, 1043 [statement taken in deliberate disregard of defendant's previous request for counsel but not "calculated to undermine" the exercise of free will did not taint subsequent interrogation initiated by defendant].) Indeed, in *Storm*, the Court took pains to note the absence of any indication of "ruse or pretext to avoid the strictures of *Miranda* and *Edwards*" (*id.* at p. 1013) or evidence of any deliberate police misconduct or subterfuge (*id.* at pp. 1025-1026, 1027, 1038). Thus, none of these decisions concerns evidence derivative of a deliberate interrogation strategy or practice of ignoring the suspect's invocation of rights in order to circumvent *Miranda*.

Similarly, the United States Supreme Court has not decided this issue. The high court has addressed and declined to apply the fruit of the poisonous tree doctrine in the context of *Miranda* violations in three decisions, all involving non-deliberate failures to provide *Miranda* warnings. (See *United States v. Patane* ("*Patane*"), *supra*, 542 U.S. at p. 639 [gun located and seized as a result of voluntary statement made without complete *Miranda* advisement was not inadmissible, where failure to warn was non-deliberate and resulted from defendant interrupting interrogating officer]; *Oregon v. Elstad* ("*Elstad*"), *supra*, 470 U.S. at p. 307 [brief crime scene questioning without *Miranda* warnings did not warrant suppression of subsequent confession obtained at police station after *Miranda* warnings had been given, where failure to warn was an oversight and no invocation of rights had been ignored]; *Michigan v. Tucker* ("*Tucker*") (1974) 417 U.S. 433, 452 [testimony of witness whose identity was revealed by defendant in statement obtained without *Miranda* advisement was admissible, where interrogation occurred before *Miranda* decision and failure to warn was in good faith, not willful or negligent].) Each of these decisions involved a non-deliberate failure to warn and did not foreclose the view that a deliberate violation, particularly one in which police ignore an invocation, would warrant suppression.

In *Tucker*, the court indicated that if police had violated *Miranda* willfully, the deterrent purpose of the exclusionary rule might be served by exclusion, as it would instill in interrogating officers "a greater degree of care toward the rights of an accused." (*Tucker*, *supra*, 417 U.S. at p. 447.) In *Elstad*, the majority opinion noted that no "deliberate means calculated to break the suspect's will" (*Elstad*, 470 U.S. at p. 312) or "deliberately coercive or improper tactics" (*id.* at p. 314) were involved, and expressly

distinguished cases "concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation. [Citations.]" (*Id.* at p. 313, fn. 3.) In *Patane*, Justice Thomas questioned whether a deliberate failure to warn should be treated differently (*id.* at p. 641), but Justice Kennedy, whose opinion set forth the plurality's ruling, found it unnecessary to decide that question (*id.* at p. 645 (conc. opn. of Kennedy, J.)), and the four dissenting justices clearly favored suppression of any deliberate *Miranda* violation (*id.* at p. 646 (dis. opn. of Souter, J.) [physical evidence derivative of any *Miranda* violation should be suppressed]; (*id.* at p. 648 (dis. opn. of Breyer, J.) [evidence derivative of a *Miranda* violation should be suppressed unless police acted in good faith]).

The high court's concern with tactics deliberately designed to circumvent the protections afforded by *Miranda* was made explicit in *Missouri v. Seibert*, *supra*, 542 U.S. 600, where a plurality of the court held that a statement obtained by use of a question-first technique was tainted by the previous deliberate failure to warn and was therefore inadmissible. The lead opinion condemned the technique as "a police strategy adapted to undermine the *Miranda* warnings" (*id.* at p. 616, fn. omitted). Justice Kennedy's plurality opinion emphasized that the interrogation technique was "designed to circumvent [*Miranda*]" (*id.* at p. 618 (conc. opn. of Kennedy, J.), and involved "an intentional misrepresentation of the protection that *Miranda* offers . . ." (*id.* at pp. 621-622), "used in a calculated way to undermine the *Miranda* warning" (*id.* at p. 622).

The high court's decisions regarding evidence derivative of *Miranda* violations consistently turn on the degree to which the need for deterrence and concerns about trustworthiness are implicated. In cases involving

inadvertent or good faith *Miranda* violations, neither goal would be served by excluding derivative evidence. In *Tucker*, the court noted the deterrent purpose of suppression would be served only if the police misconduct was "willful, or at the very least negligent" (*Tucker*, 417 U.S. at p. 447) and considered the interest in preventing the presentation of untrustworthy evidence (*id.* at p. 448). In *Elstad*, the majority found that "the absence of any coercion or improper tactics undercuts the twin rationales -- trustworthiness and deterrence – for a broader rule." (*Elstad*, 470 U.S. at p. 308.) In *Patane*, Justice Thomas found that a blanket suppression rule was not justified by the interest in deterrence or trustworthiness (*Patane*, 542 U.S. at pp. 639-640), and Justice Kennedy considered whether suppression could be "justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation" (*id.* at p. 645 (conc. opn. of Kennedy, J.)). Similarly, in *Seibert*, where the violation was deliberate, the goal of deterring police attempts to evade *Miranda* informed the decision. The lead opinion found that the question-first tactic "threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted" (*Seibert*, *supra*, 542 U.S. at p. 617) and found that suppression was warranted so that "[s]trategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what [*Dickerson v. United States* (2000) 530 U.S. 428] held Congress could not do by statute" (*Seibert*, *supra*, at p. 617). Although the trustworthiness rationale is not implicated by the use of evidence derived from the *Miranda* violation in this case, the need for deterrence of police practices deliberately designed to circumvent *Miranda* is so strong that it alone justifies the suppression rule proposed here.

The decision in *People v. Peevy*, *supra*, 17 Cal.4th 1184, does not

preclude the remedy appellant seeks. The Court there refused to sanction a calculated *Miranda* violation – deliberately ignoring the defendant's request for counsel – by barring use of his statement for impeachment purposes. *Peevy* relied heavily on *Harris v. New York*, *supra*, 401 U.S. at pp. 224, 226, and *Oregon v. Hass*, *supra*, 420 U.S. at p. 722, which had permitted impeachment of defendants with *Miranda*-violative statements. As this Court explained, the high court had to strike "a balance between the need to deter police misconduct and the need to expose defendants who perjure themselves at trial" (*Peevy*, *supra*, at p. 1194), and rejected an exclusionary remedy which, whether for negligent or deliberate *Miranda* violations, would turn police misconduct into a shield for a defendant's perjury (*id.* at pp. 1194-1199). The rule proposed here, by contrast, would not allow for perjurious testimony or otherwise undermine any trustworthiness concerns, and thus the concerns that governed the Court's decision in *Peevy* do not apply. Further, the interest served by a rule suppressing witness testimony derived from a deliberate *Miranda* violation is more compelling than that served by the rule proposed in *Peevy* because a defendant facing impeachment with his *Miranda*-violative statement can avoid the latter exploitation of the police illegality by choosing not to testify, whereas he is powerless to prevent the prosecutor's use of other types of derivative evidence unless it is suppressed.

To be sure, the exclusion of evidence derivative of police misconduct, whether the misconduct is inadvertent, negligent or deliberate, does not directly implicate the Fifth Amendment's core protection against compelled self-incrimination. However, where law enforcement officers deliberately devise and employ a strategy for avoiding the procedures designed to safeguard that core protection, and there is no countervailing

concern with the defendant presenting unchecked purposeful perjury, the interest in deterring *Miranda* violations warrants suppression.

In appellant's case, the lead interrogating officer admitted that it was his *practice* to continue interrogating a suspect who invoked his rights because the suspect's desire not to talk is often overborne by continued questioning and that his aim in employing this strategy was to obtain investigative leads and impeachment material. (2 RT 1254.) Now, more than ten years after *Peevy*, it is more apparent than ever that this practice of deliberately ignoring a suspect's invocation of his rights and flouting *Miranda*'s clear requirements are typical of a widespread trend in police interrogation practices. Statements of disapproval, even from the highest courts of the state and nation, have been ineffectual at curbing such practices. Without the imposition of some material, negative consequence for such deliberate misconduct, such techniques for circumventing *Miranda* will continue. The violation here was no simple failure to abide by *Miranda*'s prophylactic procedures. It was a calculated violation of appellant's invocation of his rights. There is a "'qualitative difference' between mere failure to give *Miranda* warnings and failure to honor them once the suspect has attempted to assert them." (*People v. Storm*, *supra*, 28 Cal.4th at p. 1045 (dis. opn. of Chin, J., joined by George, C.J.), quoting *State v. Hartley* (1986) 103 N.J. 252 [522 A.2d 80, 90-91].) Where evidence obtained as a result of such deliberate misconduct is not suppressed, police officers "have carte blanche" to ignore *Miranda* and useable evidence to gain by simply ignoring a suspect's invocation of his rights and continuing with the interrogation until they obtain the information that they seek. (See *People v. Storm*, *supra*, 28 Cal.4th at p. 1046.) For the foregoing reasons, this Court should hold that evidence

derivative of a calculated and deliberate strategy of ignoring a suspect's invocation of his *Miranda* rights is inadmissible in the suspect's ensuing criminal trial, and that the trial court erred in denying appellant's motion to suppress the testimony of Greg Billingsley, Stacey Billingsley, and Sue Burlingame.

### 3. The Evidence Would Not Inevitably Have Been Discovered

The "inevitable discovery" exception to the exclusionary rule permits admission of illegally obtained evidence where "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." (*Nix v. Williams* (1984) 467 U.S. 431, 444; *People v. Robles* (2000) 23 Cal.4th 789, 800-801; *People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 682.) This exception does not apply to the testimony of Sue Burlingame and Greg and Stacey Billingsley.

The burden is on the prosecution to establish that evidence, although illegally obtained, is nevertheless admissible under the inevitable discovery doctrine. (*Nix v. Williams*, *supra*, 467 U.S. at p. 444; *People v. Robles*, *supra*, 23 Cal.4th at pp. 800-801.) The showing must be based not on speculation but on "demonstrated historical facts capable of ready verification or impeachment." (*Nix v. Williams*, *supra*, 467 U.S. at 444-45, fn. 5; *People v. Hughston* (2008) 168 Cal.App.4th 1062.) This Court has held that to establish inevitable discovery, the prosecution must show a reasonable probability that the evidence would have been procured by lawful means. (*People v. Boyer* (1989) 48 Cal.3d 247, 278, overruled on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

While not controlling, Ninth Circuit law is instructive. Whereas

other circuits require that the evidence would have been obtained through some investigation that had been initiated prior to and independent of the illegality, the Ninth Circuit has found that the government can meet its burden by establishing that the police would inevitably have uncovered the evidence by following routine procedures. (*United States v Ramirez-Sandoval* (9th Cir. 1989) 872 F.2d 1392, 1399.) Nevertheless, it is not enough for the government simply to assert that it would have found the evidence; it must present facts, not simply speculation, to support such a claim. (*Id.* at p. 1400 [evidence was insufficient to show that in the absence of the illegal search, the officer would have spoken to the undocumented aliens in the back of the illegally seized van].) The prosecution did not establish such facts in this case.

At the suppression hearing, detective Edwards testified that Mary Webster had provided the name and location of appellant's employer and had told them that on the evening of the killings, appellant had been driving Jerri Baker's car. (1 RT 1219.) Edwards stated that, based on that information, in the normal course of his investigation as a homicide detective, he would "contact the place of employment and talk with her for a little bit of background and his activities." (1 RT 1219.) He also stated he would attempt to contact other employees who knew the defendant and might know his activities. (1 RT 1220.) This bald assertion is not sufficient to prove inevitable discovery.

The evidence presented at trial shows that although Edwards and Reed contacted Baker, she told them nothing that would have led them to the Billingsleys or Sue Burlingame. She told them that she had never seen appellant with a gun (18 RT 6200), she did not remember what color shirt appellant was wearing on the previous day (18 RT 6199) and appellant had

told her his mother was ill and he was going to visit her (18 RT 6201).[17] There was no evidence that the detectives asked Baker for the names of other employees of McKenry's or asked her to identify anyone there who would have known of appellant's activities or background. They did not ask her any question that, if answered, would have led them to Stacey or Greg Billingsley or Sue Burlingame, nor did the evidence indicate that she would have provided them with such information had they asked. The evidence failed to show that any representative of law enforcement ever went to McKenry's or attempted to speak to any employee of that business other than those whose names appellant had provided. Reed remembered speaking to the owner, Chuck McKenry, by phone, but did not indicate what they had discussed; Reed never went to McKenry's and did not remember anyone else doing so at his direction. (2 RT 1271-1272.) There was no evidence that Mr. McKenry knew anything about appellant's activities or relationships with other employees.[18] McKenry's had 25 employees. (2 RT 1303.) Reed admitted that he was speculating when he said that if appellant had not provided the information about Burlingame and her daughter, he would have contacted people at McKenry's to find out

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[17] This evidence was presented at trial, after the trial court had denied appellant's motion to suppress appellant's interrogation statement and its fruits. This Court may consider facts in the record in reviewing the question of inevitable discovery. (See, e.g., *People v. Boyer*, *supra*, 48 Cal.3d at pp. 277-279 [witness's trial testimony considered in determining whether evidence would inevitably have been discovered].)

[18] Jean McKenry testified for the defense regarding appellant's access to the safe when he worked on Saturdays and the fact that he had worked on the day before the killings, a Saturday; she made no mention of Greg or Stacey Billingsley, and there is no evidence that she knew that appellant had become friends with them. (20 RT 6757-6770.)

more about appellant. (2 RT 1273.)

Nor is there any evidence to support a finding that Webster or Baker would have led police to any of those witnesses. There is no indication that either of them knew that appellant socialized with the Billingsleys. Webster did not know of Burlingame until someone from law enforcement told her. (16 RT 5639-5640.) Baker did not know that appellant had seen Burlingame on the day of the killings and did not know of appellant's interest in Burlingame until she read the police reports.[19] (18 RT 6146.) Further, Baker was generally uncooperative with law enforcement until many months after the killings, when she and appellant ended their relationship. (18 RT 6098-6100, 6234.)

Unlike other cases in which this Court has found that unlawfully obtained evidence would inevitably have been discovered, the evidence does not indicate that any of the witnesses otherwise known to law enforcement would have led them to those individuals. (See *People v. Boyer*, *supra*, 48 Cal.3d 247, 277-279 [witness would have been discovered because defendant's girlfriend knew that defendant had been with the witness on the day of the killings, and police were pursuing a broad-based investigation of every person who might possibly be involved]; *People v.*

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[19] On the day of the killings, appellant told Baker he was going to play pool, but he did not tell her he was going with anyone. (18 RT 6240.) Although appellant had previously told Baker he had taken Burlingame out to play pool (18 RT 6326), there is no evidence that Baker had reason to believe Burlingame knew of appellant's activities on the day of the killings. Reed testified that he asked Baker if she knew Sue Burlingame; she then identified Burlingame as the mother of two people who worked at the cleaners. (18 RT 6934.) However, there is no reason to believe that if she had not been specifically asked about Burlingame, she would have given law enforcement information suggesting a reason to contact them.

*Carpenter* (1999) 21 Cal.4th 1016, 1039 [employee of optometrist's office would have been discovered because officer had previously visited optometrist's office and had already decided to return for further investigation.].) As detective Reed admitted at the suppression hearing, he was "just speculating" that he would have contacted the owner of McKenry's Cleaners and would have become aware of other people who knew appellant. (2 RT 1273.) In sum, it is utter speculation that if appellant had not provided law enforcement with information about the Billingsleys and Sue Burlingame, they would nevertheless have identified and interviewed those witnesses. The testimony of Greg Billingsley, Stacey Billingsley and Sue Burlingame was not admissible under the inevitable discovery doctrine.

### E. The Unconstitutional Admission of Appellant's Statement Was Prejudicial

The erroneous failure to suppress a defendant's confession or admission is reversible error unless the prosecution can show that the admission of the defendant's statement is harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312; *Chapman v. California* (1967) 386 U.S. 18, 23; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) Under *Chapman*, the question is "not whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 87.) Put another way, the court must look to "the basis on which the jury *actually rested* its verdict. [Citation.] The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been

rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Although the prosecution did not introduce appellant's statement in its case-in-chief, there can be no doubt that it contributed to the jury's verdict, particularly in light of its last-minute admission. Given that the constitutionality of the statement had been litigated before opening statements, the prosecutor's decision to save the evidence until rebuttal was unquestionably strategic. Although his reasons for adopting that strategy are unknown, his timing suggests two possibilities: He may have been concerned about the lawfulness of the statement and risking reversal on appeal by introducing it, but after hearing the defense case, he may have worried that the jury was entertaining doubts of appellant's guilt and therefore used it in spite of the risk. Alternatively, he may have planned from the start of trial to hold the statement until the end of his rebuttal, in order to maximize the statement's dramatic effect.

To appreciate the importance of appellant's *Miranda*-violative statements to the prosecution's ability to secure convictions in this case, one need look no further than the prosecutor's closing argument, which made repeated references to appellant's statement that the blood on the shirt came from a shaving injury (see, e.g., 22 RT 7331, 7333-7334, 7376, 7572), appellant's admission that the clothes in evidence were his (see, e.g., 22 RT 7331; 23 RT 7572, 7573, 7602) and his admission that he was at The Office at 8:55 p.m. on the night of the killings (see, e.g., 22 RT 7308, 7309, 7318-7319, 7375; 23 RT 7600). Those three portions of appellant's statement were on the list of the key pieces of evidence which the prosecutor argued

established appellant's guilt. (22 RT 7318, 7331.)[20]

Without appellant's unlawfully obtained post-arrest statement and the testimony obtained as a result of that statement, the evidence of appellant's guilt was marked by significant gaps and inconsistencies. The prosecution's star witness, Mary Webster, told a dramatic tale – that on the night of the murders, appellant appeared at her home with the gun used in those crimes, wearing the bloodstained shirt and boots that were in evidence, and saying that he had shot two men over a poker game. The prosecution presented extensive testimony concerning appellant's bad character, including evidence that he was a robber who had stated a willingness to kill in order to avoid returning to prison. As appellant shows elsewhere in this pleading, much of that evidence was inadmissible. (See Arguments II, III and IV, *infra*.) Further, upon close inspection, the evidence actually connecting appellant to the crimes was, in fact, quite problematic.

### 1. There Was Room for Doubt That Appellant Was Wearing the Bloodstained Shirt and Boots on the Night of the Murders

The central factual issue in dispute in the case was the identity of the

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[20] During closing argument, the prosecutor showed the jury a list that was apparently entitled, "How Many Different Ways Can We Prove the Defendant is Guilty?" (22 RT 7318.) That list was not marked or retained by the court as an exhibit, and subsequent attempts to settle the record on appeal for its content were unsuccessful. (27 RT 8543; 30 Aug CT 8283.) However, many of the items on the list can be gleaned from the reporter's transcript of the prosecutor's argument. (See, e.g., 22 RT 7318 [first item was that defendant told Reed and Edwards he was at The Office until 8:55 p.m. on the night of the murders], 7331 [sixth item was defendant's statement that the clothes and boots were his; seventh item was defendant's falsehood that the blood on the clothes and the boots was from shaving].)

killer. One of the most critical questions was whether on the night of the killings appellant was wearing the bloodstained shirt and boots that Webster had given to law enforcement the day after the killings.[21] The bloodstained shirt was a short-sleeved, buttoned-down, dark-pink-and-black striped shirt with a collar. (See 25 Aug CT 7292-7297 [Exhibits EE-1 through EE-6 (photos of shirt)].) The bloodstained boots were tan suede with a rough textured appearance. (See 25 Aug CT 7253-7256 [Exhibits DD-1 through DD-4 (photos of boots).]) The evidence regarding whether appellant was wearing those items on the night of June 20, 1993, was shaky at best.

Although Tracy Grimes testified on direct examination that appellant was wearing a sport shirt and "roughed up" grayish-brown cowboy boots resembling those that Webster had turned in to the police (11 RT 4167, 4176-4178), before trial, Grimes told defense investigator Tony Gane that appellant was wearing a pale solid-colored Levi's shirt (20 RT 6896-6897). He told both the sheriff's department and Gane that the boots were gray, not grayish-brown, and until trial, mentioned nothing about the boots being "roughed up" or "roughed out." (20 RT 6896.)

Although Sue Burlingame testified that on the afternoon of the killings, appellant was wearing Levi's, a short-sleeved, buttoned-up shirt that looked like the bloodstained shirt and boots that looked like the bloodstained boots (13 RT 4641, 4647-4648), she told investigator Gane that appellant was wearing a tan, brown and blue western-style long-sleeved shirt, black jeans and brown cowboy boots that day (21 RT 7015-7016). Although she told officers appellant had been wearing a light maroon,

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[21] The shirt itself was entered into evidence as Exhibit 54-A, the left boot as Exhibit 46-A and the right boot as Exhibit 46-B. (Exhibit Index, p. 75.)

short-sleeved shirt, button-front, blue jeans, tan leather boots with a rough-out style (17 RT 5879), she told Gane she had been confused at the time of that statement. (21 RT 7013.)[22]

Jerri Baker, with whom appellant was living at the time of the crime, testified at trial that the blood-stained shirt in evidence was the shirt appellant was wearing on the afternoon of the killings.[23] (18 RT 6088-6089, 6295.) However, prior to trial, she had said she did not know what color shirt appellant was wearing when he left home that day. (18 RT 6198-6199.) When confronted at trial with this inconsistency, Baker claimed that she had lied when she initially spoke to the detectives. (18 RT 6276.) However, it was at least as likely that her initial statement was more accurate than her trial testimony, as in the interim, she had found out that appellant had been seeing other women including Sue Burlingame, the women with whom he went to The Office on the day of the crime. (18 RT 6146.)

Of course, Mary Webster claimed that on the night of the killings, appellant came to her house wearing the bloodstained shirt that was in evidence. (14 RT 5007.) That testimony was directly contradicted by Webster's brother, Stephen Langford, the other person present at Webster's house that night. Langford testified that when appellant came in, he was wearing a yellow nylon shirt that had "something plastered all over" it. (20 RT 6699.) Langford told investigator Gane that appellant was wearing a yellow shirt, white pants and brown cowboy boots. (21 RT 7042.)

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[22] At trial, she claimed she had been confused when she talked with Gane. (13 RT 4730.)

[23] When he came home at around 11:00 or 11:30 p.m. that night, she did not see how he was dressed. (18 RT 6281.)

Moreover, Langford consistently stated that he did not see anything that looked like blood on appellant. (20 RT 6706, 6953.)

Adding to the uncertainty of whether appellant was wearing the bloodstained shirt on the night of the killings was evidence that appellant owned more than one pink striped shirt. (13 RT 4742 [discussing Exhibit I]; 18 RT 6279 [discussing Exhibits CC and I].) Further, criminalist Peter Barnett testified that some of the bloodstains on the shirt could not have been attributable to the shooting itself. (19 RT 6487-6493, 6503-6505.) Neither the large bloodstain on the back nor the one on the sleeve could be explained by the theory that the shooter was wearing the shirt at the time of the killings. (19 RT 6491.) Similarly, the stain on the right boot would not have resulted from the shooting itself. (19 RT 6495.) Barnett opined that some of these stains had to have been contact stains and some transfer stains. (19 RT 6618, 6645, 6654-6655; 20 RT 6674.) In his opinion, it was possible someone took the shirt and boots and deliberately put blood on them from the scene. (19 RT 6507.)

Thus, apart from appellant's *Miranda*-violative statement, the evidence concerning whether appellant was wearing the bloodstained shirt and boots in evidence on the night of the killings was conflicting at best. Appellant's obvious facetiousness in stating that the blood had gotten on the shirt when he cut himself shaving, as well as the follow-up statement that the reason he had no marks on his face was that he healed quickly, were in all likelihood viewed by the jury as implied admissions that he had in fact been wearing the shirt on the night in question. Appellant's statement was undoubtedly viewed as resolving the evidentiary conflict on the critical question of the relationship between the bloody clothes and the killings.

### 2. Apart from Appellant's Statement, There Was Room for Doubt That Appellant Was at The Office Near the Time of the Murders

Appellant's unlawfully-obtained statement also filled an evidentiary gap in that it placed him at The Office until 8:55 p.m. on the night of the killings. Apart from appellant's statement, Tracy Grimes provided the only direct evidence that appellant had gone back to The Office on the night of the crime after leaving there with Burlingame earlier in the day. Without appellant's statement as corroboration, Grimes's credibility was questionable. Law enforcement had never shown him a lineup or even a single photograph of appellant; the first time Grimes saw appellant's photograph was when it appeared on the front page of the newspaper, in an article identifying appellant as the suspect in the killings. (11 RT 4181, 4208; 20 RT 6920.) Grimes had also been told that blood had been found on appellant's hands, clothes and boots (20 RT 6904), which Grimes clearly viewed as proof that appellant was the killer. Grimes displayed animosity toward appellant. (20 RT 6898.) He was so sure appellant was the shooter that he planned to exact justice himself if appellant were not convicted. (20 RT 6901.) Grimes's bias was palpable, and his credibility was diminished accordingly. Appellant's statement that he had been at The Office on the night in question until 8:55 p.m. provided the prosecution with corroboration of Grimes's testimony. It removed any doubt that appellant had been at the scene of the crime well into the window of time between Grimes's departure at 8:40 p.m., when Manuel and Tudor were alive, and 9:20 p.m., when Leslie Lorman discovered their dead bodies in the

women's bathroom. (12 RT 4301-4307, 4319.)[24]

The admission of appellant's statement that he was driving Jerri Baker's car on the night of the killings also bolstered the prosecution's argument that Anita Dickinson had seen Baker's Probe behind The Office at the time of the shooting. Dickinson's description of the car she saw did not match the appearance of the Probe. Although she testified that she heard gunshots coming from The Office between 7:30 p.m. and 8:45 p.m. (11 RT 4248, 4258), on the night of the killings, she told Deputy Sheriff Elizabeth Sawyer that she had heard gunshots at 9:15 p.m or 9:30 p.m. (21 RT 7139.) Dickinson testified that when she head the shots, she saw a small grey compact car in the parking lot. (12 RT 4266.) However, on the night of the crime, Dickinson told Sawyer that she did not notice any other cars in the parking lot besides the bartenders' cars. (21 RT 7141.) Dickinson's husband, Randy Pickens, also testified that after learning about the gunshots, he did not see any cars in the parking lot except for those of the bartenders. He remembered a grey mid-sized compact car leaving the parking lot at 8:00 or 8:30 p.m. (21 RT 7143.) Pickens's statement contradicted his wife's and suggested that if appellant was driving a car matching the one Pickens described, he left the bar before the shooting. (21 RT 7255.) Appellant's statement that he was driving Baker's Ford Probe and that he was at The Office until 8:55 p.m. thus filled a significant gap in the prosecution's evidence and undercut the defense theory that Webster

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[24] Moreover, Anita Dickinson testified that she had heard gunshots coming from The Office between 7:30 p.m. and 8:45 p.m. (11 RT 4248, 4258.) If the jury believed Dickinson was correct regarding the timing of the shooting, appellant's statement that he was there until 8:55 p.m. placed him at the scene of the crime at the time of the shootings.

and/or Langford committed the crime.

The testimony of Sue Burlingame, evidence which was derivative of appellant's unlawful interrogation, also contributed greatly to the prejudice flowing from the illegality. Without Sue Burlingame's testimony, Grimes was the only witness who placed appellant at The Office on the day of the killings. Sue Burlingame's testimony established both that appellant had gone to The Office with her on the day of the charged offense and that he had taken her there once before. (13 RT 4641-4645.) Her testimony therefore provided a link between appellant and the crime scene and a basis for the prosecution to argue that when appellant and Burlingame left The Office on the day of the killings, the bar was empty and appellant saw an opportunity to go back and rob the place. (22 RT 7303.) Further, Burlingame testified that on the afternoon of the killings, appellant was wearing the shirt and boots that, stained with blood, Webster later turned into the police. (13 RT 4647-4648.) Although Jerri Baker also stated that appellant was wearing that shirt on the day of the killings (18 RT 6088-6089), Burlingame had seen him later in the day than Baker and Baker's credibility was assailable in a way that Burlingame's was not. Baker had initially said that she did not know what appellant was wearing that afternoon. (18 RT 6276-6277.) It was only after she had read the police reports which described the shirt that Webster had provided law enforcement and revealed that appellant had been seeing other women (including Webster and Burlingame) that Baker started saying that she knew that appellant had been wearing that shirt on the day in question. (18 RT 6274-6275.) Baker's bias, motive and opportunity to lie were evident.

### 3. There Was Room for Doubt That the Gun Was Appellant's and Was in His Possession on the Night of the Murders

Without the evidence obtained as a result of appellant's unlawful interrogation, the evidence linking appellant to the gun in evidence was weak. Apart from the testimony of the Billingsleys and Sue Burlingame, the prosecution witnesses who identified the gun as appellant's were of questionable credibility. Jerri Baker did so (18 RT 6080), but she had previously told police she had never seen appellant with a gun. (18 RT 6296.) Although she claimed that she intentionally lied to the police (18 RT 6296), the jury reasonably could have concluded that she had told the truth initially and that the changes in her version of events were fabrications. As stated above, in the interim, she had found out about appellant's infidelity and the relationship had ended. Billy Joe Gentry also claimed that he was able to identify the gun in evidence as that which appellant had shown him in September of 1992. (17 RT 5832, 5854.) However, his credibility was open to serious question: he purportedly had seen the gun for less than a minute nearly four years before trial and had consumed 80 ounces of malt liquor at the time. (17 RT 5834-5836, 5844.)[25]

The testimony of Stacey and Greg Billingsley, whose identities appellant revealed during the interrogation, corroborated Burlingame's testimony, also obtained a result of the interrogation, that appellant had stayed at their house the weekend before the killings and that Burlingame had found a gun under the couch after appellant left. (12 RT 4505, 4510;

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[25] Nevertheless, he claimed he was not drunk at that time. (17 RT 5835.)

13 RT 4570.)[26] Greg Billingsley identified the gun in evidence as the one Burlingame had found under the couch (13 RT 4572-4573); he testified that the gun was appellant's and that he had returned it to appellant a few days later, which was a few days before the robbery-murders. (13 RT 4566-4567, 23 RT 4575.) Greg Billingsley had seen the gun on multiple occasions, including a few days before the killings. His testimony identifying the gun as appellant's was far more credible than the other witnesses'.

In addition to establishing that the gun in evidence was appellant's, the testimony of Burlingame and the Billingsleys was crucial because it put the gun in appellant's possession shortly before the killings. The only other witnesses who testified that the gun in evidence was in appellant's possession at the time of the killings were Webster and Langford, who both claimed that appellant brought the gun to Webster's house on the night of the killings.[27] As set forth more fully below, their testimony was conflicting and their credibility questionable. Burlingame's and the Billingsleys' credibility was not comparably assailable. Their testimony, if believed, established not only that the gun was appellant's, but also that it was in

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[26] At trial, Burlingame looked at the gun that was in evidence and described it as dark metal with brown grips (13 RT 4739-4740), whereas she had told police that the gun she found under the couch was silver, with a triangle just below the hammer (17 RT 5877-5878), and she had told investigator Gane that the gun she had found was shiny and chrome. (21 RT 7022.)

[27] Baker testified that she thought she remembered seeing the box in the trunk of the car, but she had previously admitted that she did not remember whether it was there that day. (18 RT 6253.) Also, even if the box was there, she did not look in it to see if the gun was inside. (18 RT 6255.)

appellant's possession a few days before the killings. [28]

Apart from appellant's unlawful statement and the testimony obtained as a result of that statement, the prosecution failed to present reliable evidence that the gun in evidence was in appellant's possession on the night of the killings. The only two witnesses who claimed to have seen appellant in possession of a gun on the night in question were Mary Webster and her brother, Steve Langford.[29] Webster's description of the gun that she claimed appellant brought to her house on the night of the killings did not match the gun in evidence. When Webster called detective Ford on the morning after the killings, she said that the gun appellant had with him when he came to her house the previous night was a .45 caliber semi-automatic silver-colored gun. (14 RT 5108, 5128.) The gun seized from Webster's house was a semi-automatic, but was black with brown grips. (15 RT 5235;16 RT 5568.)[30] Webster told Sacramento Police Officer Dennis Biederman that the gun appellant had brought to her house

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[28] Another highly prejudicial aspect of the evidence derivative of the illegal interrogation was Greg Billingsley's testimony that appellant had twice asked him if he wanted to help rob the bowling alley. (17 RT 6020-6025.) As argued below, this evidence also was inadmissible as other crimes evidence, the prejudicial effect of which is widely recognized. (See Argument III, *infra*.)

[29] As stated above, Baker testified that she thought the gun was in the trunk of her car that afternoon when she went shopping, but she admitted telling the prosecutor that she could not remember if that was the case. (18 RT 6253.)

[30] Prosecution criminalist Gerald Arase indicated that there were spots on the gun that were worn and more silver in color, but said he would not describe the gun as "chrome" or "silver;" it was black. (16 RT 5568-5569.)

was a .45 caliber *revolver*, with four empty shells in the chamber. (15 RT 5227, 5229-5230, 5236-5237.)[31] The gun in evidence was a semi-automatic, not a revolver, and when a semi-automatic is fired, no shell is left in the clip. (15 RT 5235-5238.)

Webster also testified that on the night of the killings, appellant unloaded four bullets from the gun. (17 RT 5912.) Prior to trial, Webster had told District Attorney investigator Larry Carli that four shells were missing from the magazine. (21 RT 7099.)[32] In either case, Webster's description could not be reconciled with the theory that the gun she described was the one that was in evidence, which prosecution criminalist Gerald Arase testified was the one that was used to kill Manuel and Tudor. (16 RT 5553-5564.) The gun in evidence normally held seven bullets, but it was possible to load it with eight. (16 RT 5570, 5606.) Five rounds had been fired at The Office: Manuel and Tudor had each been shot twice (12 RT 4409, 4438); one additional slug was found on the floor behind the bar, near the cash register. (10 RT 3888.) If the gun had been loaded normally and five rounds were then fired from it, there would have been two bullets left in the gun. Even if the gun had been loaded with eight bullets, there would have been three, not four, rounds left after the offense. Thus, in addition to being wildly inconsistent with each other, Webster's

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[31] Webster claimed that she was not familiar with guns, but ultimately admitted that Miller, the elderly man whom she had bilked out of several thousand dollars, had bought her a gun. (17 RT 5942.) Webster also admitted that her husband had bought her an automatic. (15 RT 5217.) She claimed that when her husband died, she gave both guns to her brother, Steve Langford. (17 RT 5948.)

[32] She told detectives that appellant said he had fired seven to nine shots. (20 RT 6979.)

descriptions of the gun she claimed appellant brought to her house on the night of the killings suggest that if appellant, in fact, brought a gun to her house on the night of the killings, it was not the gun used to kill Manuel and Tudor. An alternative explanation and the defense theory was that Webster concocted the story about appellant coming to her house on the night of the killings, and it was really she and/or her brother who committed the robbery-murders.

Steven Langford, Webster's brother, also testified that on the night of the killings, appellant came to Webster's house with a gun. Langford's description of the gun matched the one in evidence more closely than Webster's. (20 RT 6727-6728.) However, Langford's credibility was at least as questionable as Webster's, as he admitted having reviewed notes that his sister had made of her version of the events of that night and altering his version of events to match hers. (20 RT 6738.) Furthermore, he claimed that the gun was warm to the touch. (20 RT 6704.) Given the amount of time that it would have taken to get to Webster's house from The Office and the events that Webster and Langford claimed happened between the time appellant arrived and the time the gun was retrieved from the car, that weapon would have cooled well before Langford and Webster saw it. (18 RT 6353; 19 RT 6419.) Langford's testimony in this regard cast further doubt on the credibility of his testimony as a whole.

Thus, without the unlawfully-obtained evidence, the prosecution's proof that appellant was in possession of the murder weapon on the night of the crimes was not solid, but rather was open to serious question. The jury reasonably could have believed that it was as least as likely that the gun had been used by Webster or Langford to commit the crimes as by appellant. The gun was found at Webster's house less than 24 hours after the killings.

(18 RT 6336.) While Webster readily handed over the bloodstained shirt and boots to law enforcement, she was reluctant to provide authorities with the gun she claimed appellant used to commit the murders. (21 RT 7000.) Webster's fingerprints were the only ones found on the gun and on the box where the gun was stored. (15 RT 5377, 5379-5380.) Although a number of latent prints were lifted from the gun and the box, none matched appellant's. (15 RT 5338, 5340, 5358, 5360, 5379-5380.) Thus, even if the gun was appellant's, there was no reliable evidence that he had it on the night of the killings.

#### 4. The Physical Evidence Did Not Match the Prosecutor's Theory of the Crime

The physical evidence also left room for doubt about the prosecution's case in several other respects: no blood was found in the car where one would expect it to be; several other possible sources were shown for the minuscule amount of blood that was found in the car; and the pattern of bloodstains on the shirt was inconsistent with the prosecution's theory of the crime.

The boots and shirt that Webster had turned in to police were heavily stained with blood. The stains on the back of the shirt ran from the shoulder to the tail. (16 RT 5509-5510.) There was also a large stain on the left sleeve. (16 RT 5510.) The right boot had bloodstains in five areas, including the toe, sole and inner arch. (16 RT 5480, 5519.) Mary Hansen, supervising criminalist of the Sacramento County crime laboratory's serology unit, admitted that if a car had been driven by a person wearing that shirt when the blood was wet, there would have been a transfer of blood onto the seat. (16 RT 5509.) Hansen thoroughly inspected Baker's grey Ford Probe, including the driver's seat, the seat belt, the seat

adjustment handle, the gas pedal, the exterior door handle, the rear view mirror, the hand break, all the knobs associated with the dash, door and glove box, the passenger's side generally and specifically the floor on both the driver's and passenger's sides. (15 RT 5448-5449.) All of these areas tested negative for blood. (15 RT 5459.) Hansen did presumptive testing of stains on the interior driver's side door, the handle of the glove box, and the floor on both the passenger and driver's side, all of which showed no presence of blood. (15 RT 5461.) Hansen ran a swab over the entire surface of the driver's pedals, and tested it for the presence of blood; again the result was negative. (16 RT 5506.)

In conducting presumptive testing for blood, the only positive results that Hansen obtained were on the gear shift knob and the lower left portion of the steering wheel. (15 RT 5451, 5457-5458.) She determined that both were human blood, but the quantities were too small to do additional testing, e.g., for ABO or enzyme type. (15 RT 5455, 5458.) There was enough blood that DNA testing could have been conducted, but Hansen's lab was not equipped to do so, and the blood was not sent to a lab that was. (16 RT 5514, 5519.) Hansen was not able to determine how much blood had been present on the knob, how long it had been there or whose blood it was; she was able to determine only that it was human. (16 RT 5515.) In this way, the prosecution failed to establish that the small amount of blood found in Baker's car came from either Manuel or Tudor.

The absence of blood on the seat, floor, pedals and driver's side door was inconsistent with the theory that the shooter drove Baker's car immediately after the killings. The minuscule amount of blood on the gear shift knob and steering wheel – blood which could have been on those surfaces for days or weeks before the killings – could as easily have been

deposited by one of the many other people who had access to the car as by appellant on the night of the killings. In addition to Baker herself and appellant, Baker's sister, brother-in-law and nephew all drove the car. (21 RT 7146.) Moreover, the blood most likely was not deposited by the shooter's hands, as there was no evidence of blood on any door knobs at The Office or on the door handles of the car.[33]

The evidence conflicted as to whether the car had been cleaned before Hansen examined it. Baker testified that between June 20, the night of the killings, and June 23, 1996, when Hansen inspected the car, she had not removed any items or stains from the car. (18 RT 6204.) Later, she contradicted herself and testified that the morning after the charged offense, she drove the car to work and cleaned it. (18 RT 6263.)[34] Even if that were true, she admitted that she had not cleaned the seats or cushions. (18 RT 6266.) She claimed that she had cleaned the area around the driver's seat with a solution of ammonia and soap, that it was her belief that this solution

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[33] Baker testified that she saw what appeared to be flesh or brain matter on the driver's side door of her car and cleaned it off before she got in the car the day after the killings. (18 RT 6096.) That testimony could only have been fabricated for dramatic affect, as it was contradicted by Webster's testimony that when appellant arrived at her house after the shootings, she got in the driver's seat of Baker's car and did not see any blood or anything else out of the ordinary. (15 RT 5194; 16 RT 5668-5669.) Further, Baker's first mention of seeing brain matter was in February of 1996, almost three years after the crimes. (18 RT 6268.) Further, defense expert Peter Barnett testified that he would not expect that the shooter would have had tissue on him from the act of shooting in this case, and that he did not see any indication that there was tissue of any kind in the bathroom at the crime scene. (19 RT 6510, 6661.)

[34] The first time that she had ever claimed she had wiped down the car was on December 27, 1994, a year and a half after the killings. (18 RT 6230.)

turned green when it came in contact with blood, and that the rag she used to clean the inside of the car turned green. (18 RT 6096.) Defense expert Peter Barnett conducted an experiment in which he wiped up human blood with a rag soaked in household ammonia. Refuting the validity of Baker's hypothesis, the rag turned reddish-brown, not green. (19 RT 6511-6512.) Thus, even if Baker did wipe down her car as she claimed, it was entirely unclear what substance she removed in so doing.

The prosecution was unable to show that the pattern of blood stains on the shirt was consistent with its theory of the crime. Prosecution pathologist Gregory Reiber admitted that some of the large bloodstains on the shirt could not have been produced by "blowback" from the gunshots. (12 RT 4435, 4477.) The prosecution presented no other evidence to explain how the stains could have been deposited on the shirt. Defense expert Peter Barnett agreed that the shooting itself would not have produced the large stains on the shirt or indeed some of the stains on the boots; he opined that at least some of them were contact transfer stains, indicating that the shirt had come in contact with a bloody object. (19 RT 6490-6501.) Barnett opined that the bloodstains on the shirt and boots could not have resulted from the shooting itself, but could have been deliberately placed on those items. (19 RT 6506.) As stated above, the prosecution's failure to explain this gap in its evidence provided one more ground for reasonable doubt about its entire theory that appellant committed the murders.

Similarly, the prosecution failed to connect the bloody footprints at the scene of the crime (12 RT 4360, 4383) to appellant or his boots. Although Hansen inspected the boots carefully, she found no evidence of blood on the bottom of the sole of either boot. (16 RT 5521.) Officers responding to the crime found bloody footprints inside The Office (12 RT

4359-4361), but Joseph Lorman, the civilian witness who found the bodies, did not notice any such prints at the scene, which suggests that the officers or other parties responding to the crime scene may have been responsible for making them. (12 RT 4325.)

The absence of fingerprint evidence connecting appellant to the crime was also inconsistent with appellant's guilt. Only one latent fingerprint lifted from the crime scene matched any known fingerprints, and that one matched Manuel's. (15 RT 5374.) There was no evidence that appellant wore gloves or Nu-skin on his hands on the night of the killings. He reportedly told Webster that he left his fingerprints at the scene. (14 RT 5016.) Appellant's fingerprints were not found on the gun or the box containing the gun; only Webster's were. The evidence did not show that any bloodstains had been found in Webster's or Baker's home, and there was no evidence of blood or fingerprints on the money that Webster turned over to the police.[35]

Furthermore, the money that appellant reportedly had after the killings was inconsistent with the prosecution's theory that he took the money that was missing from the bar. Webster testified at the preliminary hearing that when appellant came to her house that night, he gave her $100. (14 RT 5037.) At trial, she stated she had lied and that he had actually given her $125. (14 RT 5004.) She also testified that he gave her an additional $18 to buy bourbon, Coca Cola and cigarettes. (15 RT 5185.)

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[35] Defense expert Barnett testified that latent fingerprints could have been lifted from the money which Webster claimed to have received from appellant on the night of the killings. (19 RT 6507-6508.) The evidence did not indicate whether any attempt had been made to conduct this type of analysis, but certainly, if appellant's fingerprints had been found, the prosecution would have presented that evidence.

She stated that appellant left her house at about 11:00 p.m. (15 RT 5208.) Baker testified that appellant came home at around 11:00 or 11:30 p.m., presumably directly after leaving Webster's house, which was ten or 15 minutes away. (18 RT 6089.) Baker testified that after appellant had gone to bed that night, she went through his pockets and found $40. (20 RT 6944.) She had apparently previously told the prosecutor a few months before trial that appellant had $40 when he left home that afternoon, and that he "still had the forty bucks" when he got home that night. (18 RT 6241.) Even if appellant had $40 more when he got home than he had when he left, and even if he gave Webster $143, the total would have been $183, not even close to the $320 that was missing from the cash register at The Office. (13 RT 4774.) The prosecution did not account for the difference.

### 5. The Evidence of Motive Pointed as Strongly Toward Webster as it Did Toward Appellant

The evidence showed that appellant was gainfully employed and earning approximately $1300 per month. (18 RT 6148.) Baker testified that appellant would have been paid in cash if he worked on Saturday, the day before the crime. (18 RT 6226-6227.) On June 18th, two days before the killings, appellant had withdrawn $420.53 from his account at the Capital Power Federal Credit Union. (20 RT 6779.) Thus, there were reasons consistent with innocence for appellant having cash in hand and his having cash seriously undercut the theory that appellant committed the robbery-murders because he was in need of money.[36]

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[36] Even if appellant were strapped for money and was inclined to steal, the evidence showed that in his wallet, he had the combination to his employer's safe (21 RT 7260), which on weekends generally contained

(continued...)

The prosecutor argued that appellant's motive was the "thrill," the "rush," and the feeling of "power" that the prosecutor claimed appellant got from committing robbery. (22 RT 7374.) This theory was based exclusively on Jerri Baker's claim that a few months before the killings, appellant told her he felt an urge to commit robberies. (17 RT 6103.) Adding dramatic flair to this testimony, Baker opined that appellant had an "irresistible impulse" to commit robbery (17 RT 6104) and that committing robberies made appellant feel powerful (17 RT 6306). However, whether appellant actually made the statements that she attributed to him was highly questionable. Indeed, she admitted that she could not remember exactly what he had said (11 RT 4000, 4012), and her spin on the precise verbiage used was different each time she repeated it. (See, e.g., 11 RT 3980; 18 RT 6103-6104.) Moreover, like several other critical changes in her version of events, the first time she mentioned anything about this purported conversation was after she had read the police reports from the investigation of the homicides and found out that while living with her, appellant had been seeing other women. (17 RT 6242-6147, 6255.) There was substantial basis for the jury to discount Baker's testimony.

There also was evidence of another conversation Baker admitted having with appellant in which he told her that Webster had been pressuring him to commit robberies so Webster could get more money. (17 RT 6318.) Baker gave the detectives two wigs and said Webster had given them to appellant after he had moved in with her and asked him to start committing

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[36] (...continued)
$250 or $300. (18 RT 6228; 20 RT 6765.) The fact that appellant could have easily taken the money in the safe but did not do so undercut the prosecution's theory that he had a financial motive to commit the robbery.

robberies because she needed the money. (18 RT 6109, 6205.) Indeed, there was ample evidence that Webster needed and desired money far more than appellant. Unlike appellant, Webster had money problems. She had intentionally under-reported her income and had been receiving Social Security benefits to which she was not entitled. (14 RT 5156-5157.) Although she had been told by Social Security that the checks were overpayments, Webster had spent the money anyway. (16 RT 5621.) At the time of the killings, Social Security was demanding the return of that money. (16 RT 5621.) Webster had a far stronger motive for committing the crime than appellant.

### 6. Mary Webster and Jerri Baker Lacked Credibility

Mary Webster, one of the prosecution's most important witnesses, lacked credibility generally. She was a known thief, having extorted thousands of dollars from Clyde Miller, an elderly man with Alzheimer's disease. (14 RT 5079-5104; 19 RT 6564.) She was jealous and angry at appellant for having left her. (15 RT 5268.) She idolized appellant for his prowess as a robber and had reportedly encouraged him to commit robberies because she needed money. (18 RT 6205.) By her own admission, she lied to law enforcement about how much money appellant had given to her on the night of the charged offense and under oath on the witness stand at the preliminary hearing. (16 RT 5672-5673.) In light of these facts, all of Webster's testimony was suspect.

Furthermore, Webster's testimony was internally inconsistent and contradicted by other witnesses. For example, despite the amount of blood found on the shirt appellant allegedly wore, Webster testified at trial that when appellant entered her house on the night of the killings, he probably

walked up to her and gave her a kiss and even so, she did not notice anything unusual about his appearance. (14 RT 5004.) It was only after she walked into her bedroom that she noticed blood on his shirt. (14 RT 5172-5173.) She similarly testified inconsistently about the blood she saw on appellant's body. At the preliminary hearing, she had testified that she noticed blood on appellant's clothes earlier, when he came through the dining room. (1 CT 103.) At trial, she claimed that appellant's arms were "layered with blood" from just below the elbow to the tips of his fingers. (15 RT 5178.) However, although she said that he took some money out of his pants and handed her some bills *before he washed* (15 RT 5179-5181), she also testified that she did not actually see any blood on his arms or hands; she only saw blood around the sink when he finished washing. (15 RT 5178.)

Webster testified inconsistently about other facts concerning appellant's visit to her house on the night of the crimes such as: whether appellant knocked before entering her house on the night of the crimes (14 RT 5003; 15 RT 5167), whether he kissed her upon entering (15 RT 5166, 5171), whether appellant was wearing a t-shirt (14 RT 5015-5016; 15 RT 5164), whether appellant left her house in socks or barefoot (14 RT 5015; 1 CT 96 ), and whether appellant left wearing his Levi's or whether Webster had them (14 RT 5109-5110; 15 RT 5208, 5215-5216).

Webster credibility was highly suspect and also critical to the prosecution's case. The inconsistencies in her testimony as well as her history of dishonesty left room for doubt concerning her version of events on the night of the murders and her denial that appellant was referring to drugs when he asked her on the day after the murders whether she had gotten rid of the "stuff." (14 RT 5038.) The evidence was as consistent

with appellant's contention that Webster was a scorned former lover, bent on revenge (22 RT 7550-7551), as it was with the prosecution's theory that she was appellant's fearful "lap dog" (22 RT 7371, 7366).

Webster was not the only important prosecution witness whose credibility was lacking. As stated above, Jerri Baker, another key witness for the prosecution, changed her version of events radically after she read the police reports and found out that appellant had been seeing other women. (18 RT 6146.) In March of 1994, she told law enforcement for the first time that she would corroborate virtually everything that Webster had said. (18 RT 6209.) She stated that appellant told her also that he had shot two black men over a poker game in Del Paso Heights. (18 RT 6092.) Baker's statements in 1994 contradicted those that she had made in 1993. Moreover, after Baker gave some new and contradicting statements to detective Reed on March 22, 1994, she provided even more new material on December 28, 1994, when she spoke to District Attorney investigator Carli. (18 RT 6314.) Regardless of the reason for the changes, the inconsistencies between her various statements were so stark that at least some of them were necessarily false, and arguably none of them was reliable.

Thus, apart from the erroneously admitted evidence, the prosecution's case was far from overwhelming and was replete with inconsistencies. The prosecutor filled those gaps with evidence of appellant's statement to law enforcement and the testimony obtained as a result. Any remaining room for doubt was effectively obscured by the raft of evidence of appellant's bad character and other crimes which the trial court erroneously admitted. (See Arguments II, III and IV, *infra*.) Regardless of this Court's view of appellant's other claims of error, appellant's unlawfully obtained statement to law enforcement, presented at

the last possible moment and to maximum dramatic effect, as well as the testimony of Sue Burlingame, Stacey and Greg Billingsley, "might have contributed to the conviction." (*Fahy v. Connecticut*, *supra*, 375 U.S. at p. 87.) It cannot be said that the verdict "was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) The error was not harmless beyond a reasonable doubt. Reversal is required.

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## II

## THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING MINIMALLY PROBATIVE BUT EXTREMELY PREJUDICIAL EVIDENCE OF APPELLANT'S BAD CHARACTER AND MARY WEBSTER'S TAPED INTERVIEW FOR THE SOLE PURPOSE OF SUPPORTING WEBSTER'S CREDIBILITY

Recognizing the critical importance of Mary Webster's testimony to the prosecution's case, the trial court allowed the prosecution to present a deluge of inflammatory, prejudicial and otherwise inadmissible evidence of appellant's past crimes and acts of violence, based on a wisp of relevance to Webster's credibility. Webster's feelings for appellant were undisputed and established by other evidence, but in the guise of establishing why she felt as she did, the court allowed the prosecutor to put before the jury evidence that appellant had assaulted Webster's son, fought with her roommate, told her he was an ex-convict and a bank robber and admitted killing people in the past, as well as evidence of the investigating officers' emphatic assertions of appellant's guilt and dangerousness to Webster's safety made in order to secure Webster's cooperation. With no limitation on the use of the evidence that appellant had killed before and ineffective limiting instructions pertaining to the other evidence of appellant's criminality, the jury certainly considered the evidence as an indication of criminal propensity. The court's admission of the evidence was an abuse of discretion which tipped the scales toward conviction and rendered the trial fundamentally unfair. (Evid. Code § 352; Cal. Const., art. I, §§ 7, 15, 17; U.S. Const., 14th Amend.)

### A. The Trial Court Admitted Evidence That Appellant Told Webster He Had Committed Robberies, Assaults and Homicides in the Past, That Appellant had Assaulted Webster's Son and Former Roommate and That the Detectives Told Webster Appellant was a Liar Who Had Committed the Charged Murders and was a Danger to Webster's Safety, As Relevant to Webster's Credibility

Prior to trial, defense counsel indicated to the trial court that they intended to object to various aspects of Mary Webster's testimony which revealed her knowledge of appellant's past crimes. (10 RT 3872.) The prosecutor asked the defense to specify the evidence to which they would object. (10 RT 3876-3878.) Defense counsel filed a two-page motion seeking the exclusion of 24 categories of Webster's expected testimony. (1 CT 460-461.) Orally, defense counsel stated that their objections were made on the ground that the evidence at issue was irrelevant and more prejudicial than probative pursuant to Evidence Code section 352.[37] (10 RT 3872; 11 RT 4091-4094, 4096-4099.)

The trial court ruled on appellant's objections to Webster's testimony before any evidence had been presented to the jury.[38] The prosecutor

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[37] Appellant had previously been granted an order that any objection based on state statutory grounds would automatically be deemed to be based on state and federal constitutional grounds as well. (2 CT 308-310; 1 RT 1018.)

[38] The court had before it Webster's testimony from the preliminary hearing (1 CT 79-116) and the unredacted tape of her interview with detectives on the day after the killings (23 Aug CT 6690-6740). That tape and a transcript of it had been introduced into evidence at the in limine hearing on the admissibility of appellant's statement to law enforcement. (See 2 RT 1158, 1170-1171.) At the in limine hearing on appellant's motion to exclude Webster's testimony, the prosecutor also made various

(continued...)

addressed each of appellant's objections in turn, arguing generally that the evidence was relevant to Webster's credibility, which appellant was expected to attack, and to establish the relationship between appellant and Webster. (10 RT 3872-3875; 11 RT 4076-4090.) In response to the prosecutor's comments, defense counsel stated that the evidence was relevant only if the defense made it relevant, and noted that a central focus of the prosecutor's argument in favor of admission of the challenged evidence was that it was relevant to Webster's fear of appellant. (11 RT 4091.) Defense counsel stated that they would not dispute that Webster feared appellant, and would not object to Webster testifying that her fear was based on the things that appellant had said to her about his background and what he had done in the past, in general. (11 RT 4097-4098.) They argued that the fact that Webster was afraid did not open the door to "every possible thing that could put Mr. Case in bad light." (11 RT 4097.) Defense counsel argued that because appellant was not going to challenge the evidence that Webster was afraid or the basis of that sentiment, evidence of appellant's statements regarding past crimes was not admissible for the purpose of establishing Webster's fear, and the probative value of such evidence was outweighed by its prejudicial effect. (10 RT 3872; 11 RT 4091-4102, 4097-4098.)

As a preliminary matter, the trial court found that Webster was afraid of appellant but still loved him and that this was relevant to why she did not immediately go to the police after appellant came to her house on the night

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[38] (...continued)
oral representations to the court regarding the testimony that he expected Webster to provide at trial. The nature of his proffer as to each particular item of evidence is set forth below.

of the killings.

> The testimony, as I recall is, is that well, he comes home and he's got all of these clothes that are covered with blood and gives them to her to get rid of. And she doesn't leave immediately or even the following morning when she is on her way – is driving with this stuff in the back of her car. [¶] She doesn't go to someplace and call the police to tell them she's -- it appears that she's undecided about what she's going to be doing with these clothes. She's either going to get rid of them or she's going to turn them over. She's not sure what she's going to do. That's based on two things: [¶] One is she's afraid of Mr. Case, and the other one is she still loves him and doesn't want to believe that he would do something like this, even when he has all of these bloody clothes that he's given her. He's told her the story about how he killed two men in the poker game or the card game.

(11 RT 4092.) The court found that Webster was impressed and intrigued with the appellant because of his past, which explained why she was initially willing to do as he said:

> He's impressing her with what he says is his past, . . . whether it's true or not, he's telling her this. She's believing it. She's impressed by it and intrigued by it. And because of that, she does some of these other things. And when the critical moment arrives, when he hands her the bloody clothes and tells her to get rid of it and tells her how to dispose of the gun, the gun was to be – the clothing was to be disposed of right away and the gun was to be hidden and held for somebody else. That's pretty much the way she was going about doing it.

(11 RT 4093-4094.) The court found that appellant's statements about his past also showed why Webster feared him, and her fear explained her indecision about going to the police. Defense counsel objected that this rationale would lead to the introduction of "every possible thing that could put Mr. Case in a bad light." (11 RT 4096.) The court responded:

> Well, that's the relevance of it. He wants to put himself in a bad light to Mary Webster because that's good for him. And now that we're at the trial, putting himself in a bad light with Mary Webster can be bad for him. Unfortunately, putting himself in a bad light with Mary Webster is what motivated her to do some of the things that she did. And it's obvious from [the tape of Webster's interview with law enforcement on June 21, 1993] that's been admitted in evidence of a previous in limine motion, she harbors a substantial and significant fear of the defendant in this case. And she was afraid that her own life would definitely be in danger unless she followed his instructions to the letter.

(11 RT 4097.) After making these general findings, the court addressed each of the particular items of evidence which appellant had moved to suppress. The specific findings relevant to the evidence which appellant challenges here are set forth below.

In addition to denying appellant's pre-trial motion to suppress, during the guilt phase itself, over appellant's objection, the court admitted portions of Webster's taped interview with Reed and Edwards in which the officers repeatedly stated that appellant was responsible for the killings at The Office and why they knew that to be true. (18 RT 6167-6191.) Those rulings are also set forth in greater detail below.

### 1. Evidence of Appellant's Altercations with Greg Nivens and Randy Hobson

In his written motion, appellant objected to any reference to his attempt to kill three unnamed people (2 CT 460-461, item 17) or to a physical assault on Greg Nivens (2 CT 460-461, item 18). The prosecutor made the following representation to the court:

> Seventeen and eighteen relate, are tied together. And that is Mary Webster on one occasion, her son Greg Nivens, was doing something towards her, not necessarily physical, but smarting off to her verbally or something. And Greg Nivens

> is an adult who is developmentally disabled. At any rate, Greg Nivens did or said something towards Mary. [¶] The defendant got mad about that and hit him in the face. And there was some - - I don't know if it was a bloody nose as a result of that. I believe police may have been called, but the defendant did not get arrested at the time. And Mary Webster stood up for him at the time. [¶] On another occasion, the defendant got in a fight with and beat up a roommate who was a person who was a house maid [*sic*] of Mary Webster at the time, first name of Randy Hobson. [¶] And he, the defendant, hit Mr. Hobson with a fireplace poker in the course of that altercation.

(11 RT 4087-4088.) The prosecutor argued that appellant's altercations with Nivens and Hobson were admissible to show Webster's knowledge that appellant was capable of violence, had a short temper and was able to do harm. (11 RT 4088.)[39]

The court ruled as follows:

> The Court will allow Mary Webster to say that she has seen Mr. Case in two physical altercations. That would be the extent of it. No details about weapons, specifically, the fireplace poker. She has seen him in two physical altercations which would presumably support her belief that he was a man of his words.

(11 RT 4114.) The court later revisited its ruling regarding the fireplace poker. During a break in Webster's direct examination,[40] the prosecutor

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[39] Although appellant's written motion did not name Hobson as one of the individuals whom appellant had "tried to kill" (2 CT 460-461, item 17), the prosecutor's comments indicate that he understood appellant's objection to encompass evidence of appellant's altercation with Hobson.

[40] To accommodate various witnesses' schedules (RT 5045), both direct and cross-examination of Webster were interrupted with testimony of other witnesses. Webster's direct examination can be found at 14 RT 4959-5046 and 14 RT 5134-5150. Cross-examination appears at 14 RT 5151-15 (continued...)

noted that although the court had ruled Webster could not testify about the poker, it had not addressed whether Hobson could do so. (14 RT 5055.) The defense again objected. (14 RT 5056.) The prosecutor contended that Hobson's testimony regarding the fireplace poker was relevant to show the extent to which Webster was under appellant's control and domination. (14 RT 5056-5058.) The trial court reversed its prior ruling regarding the fireplace poker, stating:

> [T]he defense is going to mount a multifaceted attack to the credibility of Mary Webster. And this relates directly to that issue, which is an important one for the jury to decide. The court finds that the value of this evidence outweighs any potential prejudice and will allow it over defense's objection.

(14 RT 5059.) The defense requested a limiting instruction that the evidence was not being admitted to show that appellant "has a propensity to commit crime, only to show the effect that he has on Ms. Webster." (14 RT 5066.)

When Webster testified before the jury, the prosecutor asked her about appellant's altercations with Nivens and Hobson before she had mentioned anything about fearing appellant. Webster testified that one week after appellant moved in with her, he and her adult son, Greg Nivens, had an altercation. (14 RT 4981, 4984.) During that incident, appellant hit Nivens, and Nivens called the police. (14 RT 4981.) When the officers arrived, Webster told them something in appellant's favor,[41] and as a result, appellant was not arrested. (14 RT 4982.)

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[40] (...continued)
RT 5218, 16 RT 5613-17 RT 5676 and 17 RT 5893-5947.

[41] Webster did not indicate what she told the officers or whether her statement to the officers was true or false.

According to Webster, approximately a week later, appellant had an altercation with Webster's then-roommate, Randy Hobson. (14 RT 4983-4984.) Again law enforcement was called. (14 RT 4983.) When the authorities arrived, Webster told them something untrue that was to appellant's benefit.[42] (14 RT 4982-4984.) Immediately after this incident, Hobson moved out of Webster's home. (14 RT 4984.) On redirect examination, Webster added that during the incident, appellant hit Hobson with a fireplace poker, Hobson called the Sheriff's Department and, at appellant's request, Webster hid the fireplace poker and lied to the Sheriff. (17 RT 5958-5959.) Neither the prosecutor nor the defense asked Webster whether either of these altercations caused her to fear appellant, and she did not testify that they did.

The prosecution called Randy Hobson as a witness. (15 RT 5273-5315, 5325-5327.) Hobson testified that his altercation with appellant occurred one morning when he, Webster, and appellant were in the kitchen. (15 RT 5277.) Hobson asked Webster for money that she owed him. (15 RT 5277-5278.) Appellant intervened and told Webster not to pay Hobson. (15 RT 5278.) Hobson told appellant that the matter did not involve him. (15 RT 5278.) Appellant struck Hobson in the leg with the side, not the pointed end or hook, of a three- or four-foot long fireplace poker. (15 RT 5278-5279.) Hobson wrestled with appellant, put his thumbs to appellant's eyes and threatened to pluck them out. (15 RT 5280.) Hobson eventually released appellant, and Webster called the police.[43] (15 RT 5280.) When

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[42] Again, Webster did not indicate the content of her statement to officers.

[43] As noted above, Webster testified that it was Hobson who called (continued...)

the police arrived, Webster said something in appellant's defense. (15 RT 5281.) According to Hobson, the police officers told him that because they had conflicting reports about the incident, they could do nothing further. (15 RT 5281.) Hobson felt betrayed by Webster and moved out that very night. (15 RT 5283.)

After Hobson's testimony, the trial court instructed the jury that it could consider the evidence on the issue of Webster's credibility and the nature of the relationship between Webster and appellant, but not as evidence of appellant's propensity for violence or as an indication that he committed the charged crimes.[44]

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[43] (...continued)
the police. (17 RT 5959.)

[44] The trial court's instruction was as follows:

> Ladies and gentlemen, that testimony is admissible for a limited purpose. It's admissible on certain issues and should not be considered by you for other purposes. For example, it may be considered by you on the issue of the credibility of Mary Webster. It may be considered by you in assessing the nature of the relationship between Mary Webster and Mr. Case. It should not be considered by you, for example, to say that if Mr. Case committed this act of violence, he, therefore, would commit other acts of violence, to wit, the offenses for which he is charged and, therefore, he's more likely to be guilty of those offenses or not because of testimony of this act or fight involving a fireplace poker. You can say it's admissible on some issues but not admissible on others . . . One last comment, courts are often accused of hiding evidence from jurors because jurors fear that it is – the jurors will misuse the evidence. You should not use this evidence to show that Mr. Case is likely to commit an act of violence but for the purpose for which it is relevant, that is, the credibility of Mary Webster and the nature of the relationship between

(continued...)

The prosecution also called Nivens, Webster's son, to testify regarding the altercation that he had had with appellant. (17 RT 5973-5975, 5983.) Nivens testified that the incident occurred during the time that appellant was living with Webster. (17 RT 5974.) Nivens, approximately 20 years old at the time, six feet, four inches tall and learning disabled, was in the house, partying with some friends. (17 RT 5973-5974, 5983.) Webster was worried about her belongings and asked appellant to intervene. (17 RT 5974.) Nivens testified that appellant approached Nivens, who was sitting on the grass, and, unprovoked, hit Nivens on the mouth. (17 RT 5974-5975.) During cross-examination, Nivens admitted that Webster had asked him to lower the volume of the music he was playing and he had not complied with her request. (17 RT 5985-5987.) Although Nivens told an investigator from the district attorney's office that appellant hit him for no reason, he admitted that appellant did have a reason; appellant had later explained to him that he hit him because he had been disrespectful to his mother. (17 RT 5988.) Nivens also admitted that he had a baseball bat in his hands at the time appellant hit him. (17 RT 5994.) Tony Gane, appellant's investigator, testified that Nivens admitted that he had been swinging the bat around and that his mother thought he was threatening her with it. (21 RT 7055.)

After Nivens's testimony, the trial court gave the jury a limiting instruction stating that the evidence could be considered only as evidence of Mary Webster's character or feelings towards appellant, not as evidence

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[44] (...continued)
Mr. Case and Mary Webster. (15 RT 5285-5286.)

that appellant had any particular disposition.[45]

Further, at the close of the guilt phase evidence, the court gave a modified version of CALJIC 2.09, instructing the jury that it could consider the evidence of appellant's altercations with Hobson and Nivens only as evidence of "the nature of the relationship" between appellant and Webster and Webster's state of mind at the time of her statements to detectives and others on the day after the killings. (2 CT 514-515; 23 RT 7616-7617.)[46]

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[45] The trial court instructed the jury as follows:

> Ladies and gentlemen, this evidence is admitted for a limited purpose. It is not admitted to prove the defendant, Mr. Case's, disposition or his tendency to behave in a certain manner, but to establish the evidence as to the character of Mary Webster or her feelings toward Mr. Case. You can consider it for that purpose and for that purpose only.

(17 RT 5975-5976.)

[46] The relevant portion of the trial court's limiting instruction provided as follows:

> The following evidence was admitted to show the nature of the relationship between defendant, Charles Case, and Mary Webster and to show Mary Webster's state of mind at the time she made those statements. Mary Webster's testimony about:
>
> 1. Defendant's statements to her that he was a bank robber
> 2. Mary Webster's taped statement to detectives Reed and Edwards on June 21, 1993.
> 3. Testimony about the fight with Randy Hobson.
> 4. Testimony about the striking of Greg Nivens.
> 5. Mary Webster's telephone calls to Arlene Eschelman [*sic*], Randy Hobson and David Ford on June 21, 1993.
> 6. Mary Webster's statements to Officer Biederman on

(continued...)

### 2. Evidence That Appellant Told Webster He Was an Ex-Convict and a Bank Robber and That He Had Committed Robberies in the Past

Appellant moved to exclude all references to his status as an ex-convict (2 CT 460-461, item 1), to his criminal record (2 CT 460-461, item 8) and to his having committed robberies in the past (11 RT 4098-4099). In the last category, appellant specifically moved to exclude evidence that he had used "Nu-skin"[47] in prior robberies. (2 CT 460-461, item 13.)

In his proffer, the prosecutor stated that Webster would testify that appellant had told her he was a bank robber and an ex-convict and that he had committed robberies in the past. (10 RT 3873; 11 RT 4076.) The prosecutor linked the relevance of this evidence to other testimony that he

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[46] (...continued)

June 21, 1993. . . .

> At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> Do not consider such evidence for the purpose except the limited purpose for which it was admitted.

(2 CT 515-516; 23 RT 7616-7617.)

[47] According to Webster, Nu-skin is similar to a liquid bandaid. (16 RT 5645.) At the in limine hearing on appellant's motion to exclude, defense counsel clarified that they did not object to evidence that when with Webster, appellant bought Nu-skin or items for a disguise or to evidence that appellant told Webster how one could use those items; defense counsel objected only to evidence of references by appellant to having used such techniques in the past. (11 RT 4098.) On appeal, appellant does not challenge the testimony to which appellant did not object below.

intended to elicit from Webster: that is, that appellant had bought Nu-skin and showed it to Webster, that appellant "told [Webster] he could put the Nu-skin on the tips of his fingers and commit robberies and not leave fingerprints," that appellant told Webster how to use temporary tattoos and wigs as forms of disguise and that appellant had a couple of wigs and wanted to get another one for this purpose. (11 RT 4077-4078.)[48] The prosecutor argued that Webster's testimony about disguises and Nu-skin would "sit out there in a vacuum" if the jury did not also hear that appellant was an ex-convict and that he claimed to be a bank robber (11 RT 4077); that the evidence regarding Nu-skin and disguises "show the defendant's planning his deliberation and premeditation to ultimately commit robberies" (11 RT 4078); and that appellant's statements to Webster regarding his criminal history were also relevant to the nature of Webster's relationship with appellant, why she was intrigued by him and why she had fallen in love with him. (11 RT 4077-4080.)

As set forth above, the trial court found generally that all of the statements appellant had made to Webster that put him in a bad light were relevant to show why she was impressed and intrigued by him and why she feared him, and therefore why she initially did as he told her with the bloody clothes and why she hesitated to go to the police. (11 RT 4092, 4097.) The court found that evidence of the statements appellant made to her about other offenses were relevant to her subsequent conduct and her motivation for that conduct. (11 RT 4100.) In addition to these findings

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[48] The prosecutor stated that Webster knew appellant was an ex-convict also because she had met his parole officer. (11 RT 4076.) The trial court excluded evidence that appellant was on parole as unduly prejudicial. (11 RT 4107, 4111.)

about the relevance of appellant's statements generally, the court made the following comments specifically regarding the evidence that appellant told Webster he was an ex-convict and a bank robber, which the court linked to the evidence concerning Nu-skin and disguises:

> Number one, reference to being an ex-convict. [¶] And Mr. Druliner's explanation included new skin [*sic*], buying new skin with her so that he can do robberies, that he had a wig, another way to do robberies and he would provide temporary tattoos to undermine any identifications that were made of him, and making dry runs on robberies.[49] [¶] Regarding the new skin, the wigs and the temporary tattoos, that appears to the Court to be particularly relevant and the probative value would outweigh any prejudicial effect there. Because at the time he's talking to Mary Webster, which is before his relationship with Jerri Baker, his plan is to commit robberies, at least as stated to her, commit robberies and foil identifications by disguising himself. [¶] The evolution of his plans reaches its independent point when he's talking to Jerri Baker in that conversation in the back yard where his complaints have evolved from undermining eyewitness identification to eliminating eyewitness identification by eliminating eye witnesses by killing them during the course of the a robbery. [¶] So this is evidence of premeditation and deliberation, so far as how this plan with the gun, how it's formed and how to carry it out. [¶] As far as his being an ex-convict is concerned, that's interwoven with the rest of these statements, and the Court is going to admit that with a limiting instruction.

(11 RT 4104-4105.) Later in the hearing, the court added:

> Then evidence that he's an ex-con in that that's what he told her, of course, will be admitted because that's part and parcel of what he told her to impress her.

(11 RT 4111.) Regarding appellant's purported statement that he had used

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[49] The trial court later excluded Webster's testimony that appellant did "dry runs." (11 RT 4106.)

Nu-skin in the past, the court stated it would give a limiting instruction concerning that evidence specifically (11 RT 4112), but never did so.[50]

Early in Webster's direct examination before the jury, the prosecutor asked her if appellant had told her he was a bank robber and told her stories about robbing banks, both of which she confirmed. (14 RT 4971.) Webster testified that when appellant lived with her, he told her stories almost nightly about prior crimes that he had committed. (14 RT 4973, 4985.) He told her that he was the best bank robber, and she believed that he was. (14 RT 4985.)

The first reference that the jury heard to appellant's status as an ex-convict was in the context of Webster's testimony that appellant had moved out of her house several months before the killings.[51] Webster testified that appellant told her the reason he was moving out was that he wanted to see other women. (14 RT 4986.) The following exchange then occurred:

> Prosecutor: And when he told you that [he wanted to move out], did he tell you that in relation to his being an ex-con at all?

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[50] The court stated that it would give a limiting instruction regarding appellant's statements that he had used Nu-skin in prior robberies (11 RT 4112), but not as to the act of buying Nu-skin (11 RT 4105). Defense counsel did not remind the court to given the instruction that it stated it would give, and therefore appellant does not contend on appeal that the court's failure to so instruct was error. (See *People v. Cowan* (2010) 50 Cal.4th 401, 480.) Although not the basis for a claim of error on appeal, the fact that no limiting instruction was given is nevertheless relevant to assessing the prejudice that resulted from trial court's error in admitting the evidence.

[51] Although this was the first evidence the jury heard on the subject, the prosecutor had mentioned that appellant was an ex-convict in his opening statement. (11 RT 4137, 4139.)

Webster: No

Prosecutor: Okay. Did he say anything to you with regard to having been an ex-convict and always wanting to just basically party or date lots of women?

Webster: Never said it like that, no.

(14 RT 4986.) The first evidence of appellant's ex-convict status was introduced in response to the prosecutor again raising the subject:

Prosecutor: At that point in time where he was indicating that he wanted to buy a gun, he already told you that he was an ex-convict?

Webster: Yes

Prosecutor: And he'd already introduced himself to you as or described himself to you as you've already described to us, as being a bank robber?

Webster: Yes

(14 RT 4992-4993.)

Upon appellant's request, the court then gave the following limiting instruction:

> Here, the answer to the last question is not offered for the truth of the matter asserted, and that is that Mr. Case was, in fact, a bank robber, but to explain that this is what he said and it's affect on the person who heard it, Miss Webster. . . . The same with ex-convict; not whether he was, in fact, an ex-convict, but that that is what he said to Ms. Webster and what affect it had on her and how it may explain her subsequent conduct.

(14 RT 4993.)

Also on direct examination, Webster testified that appellant told her that he had used the product called "Nu-skin" before and "it worked good." (14 RT 4972.) Despite the court's earlier statement that it would give a

limiting instruction in this regard, no limiting instruction was given. Webster also testified that appellant "used to layer his clothes" (14 RT 4974) so that he looked "a couple hundred pounds or a hundred and fifty pounds more than he really is. Completely disguise himself" (14 RT 4975).[52]

As noted above, when the jury was instructed at the close of the guilt phase, the court gave a modified version of CALJIC No. 2.09, stating that evidence of appellant's statements to Webster that he was a bank robber had been admitted to show the nature of appellant's relationship with Webster and Webster's state of mind at the time of her statements to Eshelman, Hobson, Biederman, Ford, Reed and Edwards on the day after the killings

### 3. Evidence That Appellant Told Webster He Had Hurt and Killed People in the Past

In his written motion, appellant moved to exclude Webster's expected testimony that appellant had referred "to hurting people in prior criminal activities" (2 CT 460-461, item 8), "to killing people, that he is capable of murder, or that he is going to kill someone else" (2 CT 460-461, item 9) and "to how he did something to someone who had turned him in to the police" (2 CT 460-461, item 15). The prosecutor stated that appellant told Webster he had committed acts of violence in prison, that appellant

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[52] Webster also testified, without objection, that appellant bought Nu-skin, temporary tattoos, a wig and a moustache (14 RT 4973-4974, 4976-4978) and that he told her he bought the wig and moustache "to go out and do something, rob and stuff" (14 RT 4978). However, Baker testified that when appellant lived with her, Webster brought him two wigs (18 RT 6109, 6205; 20 RT 6937), and that appellant had told her that Webster bought the wigs for him and asked him to start doing robberies because she needed money (18 RT 6110, 6205, 6318).

made references to having "pistol whipped people in the past and bumped people off" and that he said he had "taken care of" the person who acted as the getaway driver in his 1978 robberies and had turned state's evidence against him. (10 RT 3873; 11 RT 4086.)

In addition to the court's general findings of relevance of appellant's statements regarding his past bad acts (see pp. 123-125, *ante*), the court made the following remarks specifically concerning appellant's reported reference to hurting people in prior criminal activities, item 8 of appellant's motion to exclude:

> That's going to be admitted. But again, with a limiting instruction, that Mr. Case's allegations of his past are offered not for the truth of the matter asserted therein. It is not to show that this is, in fact, what he's done in the past but to explain why Mary Webster was impressed and intrigued with him and why she followed his instructions after he gave her the bloody clothes and the gun.

(11 RT 4108.) The court ruled that Webster would not be permitted to mention specific instances of such conduct, but could make general references.

With respect to evidence that appellant referred to having killed people in the past, which was encompassed in item nine of appellant's motion, the court's only remark was: "[n]ine, again, that will be admitted with the limiting instruction." (11 RT 4109.) With respect specifically to the evidence that appellant said he had had something done to his former crime partner, item 15 of appellant's motion to exclude, the court ruled:

> Unfortunately, for the defense, that's a statement that whether it's true or not, let's assume that it's not true. But still in the context of all the rest of this and in the context of their relationship explains her actions on the date that she's driving him around with these bloody clothes in the car because,

> again, she's not decided that she's going to drive directly to the police department or sheriffs department and turn these things in. She's still turning over in her mind what she is going to do with it. [¶] Doesn't make the decision to turn them in until she sees that police officer on H Street. And so, again, it's not admitted for the truth of the matter asserted. It's, again, to show the effect on the hearer. And I don't expect there is going to be – the prosecution will not be permitted to present evidence of someone who was allegedly killed at Mr. Case's direction some other time some other place. But, again, this is something that he told her, which the context of their relationship becomes more meaningful when compared with the event that occurred later on.

(11 RT 4112-4113.)

At trial, Webster testified that the morning after appellant came to her house with the bloody clothes and the gun, she started to go to work, but on the way there, thought about some of the things appellant had said in the past and changed her mind:

> On my way to work I was recalling all the things he told me, that he bumped -- bumped a couple people off and, um, then I started to recall maybe the story was true. And I wasn't about to let him get away with -- maybe he could kill a couple more people, so I started making some phone calls. I started getting real nervous.

(14 RT 5021.) She testified that until then, she had found appellant's stories about being a bank robber and his use of disguises intriguing and exciting. (14 RT 5022.) That morning, she started to worry that the story appellant had told her the night before might be true. (14 RT 5022.) She called Detective Ford to ask for advice. (14 RT 5022.) The prosecutor asked her why she called Detective Ford, and she responded:

> Well, like I said, all this [*sic*] stories I heard every single night of what – how he lived, his little stories, you know, how he knocked people off, old people, slapped right – you know –

(14 RT 5032.) Defense counsel objected, and the objection was sustained. The following exchange then occurred:

| | |
|---|---|
| Prosecutor: | What I'm asking you is what caused you in general to call Detective Ford. |
| Webster: | Fear of someone else's life |
| Prosecutor: | And did that include fear of your son, Greg Nivens' life or your brother? . . . |
| Webster: | No, fear of somebody's life. . . .Somebody. That could be anybody? |
| Prosecutor: | Somebody else's life? |
| Webster: | Yes |
| Prosecutor: | As in fear that it could happen again? |
| Webster: | Yes |

(14 RT 5032-5033.) The court gave no limiting instruction regarding this evidence.[53]

Webster also testified that she was reluctant to testify, and that on the day after appellant was arrested, she told the detectives that she was not going to "go in front of" appellant to testify. (14 RT 5043.) Webster then stated that she had been unable to sleep the night before. When the

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[53] Although the limiting instruction given immediately prior to deliberations addressed the evidence of appellant's statements to Webster that he was a bank robber (2 CT 515-516), it did not address the evidence of appellant's statements that he had "bumped a couple people off" (14 RT 5021), "knocked people off" (14 RT 5032) or slapped people (14 RT 5032). Because defense counsel did not remind the court that it planned to give a limiting instruction regarding this evidence, appellant does not argue on appeal that the failure to so instruct was error. (See fn. 50, *ante*.) However, the fact that such an instruction was not given is relevant to the assessment of prejudice resulting from the erroneous admission of the evidence.

prosecutor asked her why she had been unable to sleep, she stated that she was afraid for her life. (14 RT 5044.) The following exchange then occurred:

> Prosecutor: Did Mr. Case say things to you before that caused you to believe that you should be afraid?
>
> Webster: Yes
>
> Prosecutor: Now, one specific question. Did Mr. Case ever tell you anything with regard to a former getaway driver that had snitched him off?
>
> Webster: Yes
>
> Prosecutor: What did he tell you?
>
> Webster: He got rid of him.

(14 RT 5044.) The court then gave the following limiting instructions:

> Court: Again, Ladies and Gentlemen, that's not offered to prove the truth of the matter in the statement, that is, got rid of the female getaway driver; just that the statement was made to her and what effect it had on Ms. Webster.
>
> Prosecutor: I don't know if it was a female driver. I meant former.

(14 RT 5044.) The limiting instruction given at the conclusion of the evidence, the relevant portion of which is set forth in full above, did not address this evidence. (See 2 CT 515-516; 23 RT 7616-7617; fn. 46, *ante*.)

#### 4. The Tape of Webster's Interview with Detectives on June 21, 1993

During a break in the cross-examination of Webster, the prosecutor offered into evidence a redacted tape of Webster's initial interview with detectives Reed and Edwards on June 21, 1993. (17 RT 5801; see 23 Aug

CT 6650-6683 [Exhibit 93-A[54]].) Appellant objected to various sections of the tape and requested further redactions. The court overruled appellant's objections and denied the redaction requests as follows:[55]

First, appellant objected to the following exchange (18 RT 6168-6169):

| | |
|---|---|
| Webster: | Why would he tell me it was Del Paso Heights? |
| Reed: | Why would he come and tell you anything? That whole thing was stupid. What we're telling you is, is that's what it looks like to us |
| Webster: | You – are you serious right now? |
| Reed: | Absolutely |

(23 Aug CT 6668 [p. 19], lines 23-28.) The court overruled the objection

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[54] Exhibit 93-A is a transcription of Exhibit 93, the version of the tape that the prosecutor initially offered into evidence. (18 RT 6167.) Additional redactions were made after the hearing on the issue, and Exhibit 94 is the version of the tape that was played for the jury. (18 RT 6341.) Exhibit 94-A (Aug CT 6611-6649) is a transcription of Exhibit 94. (18 RT 6338.) At the hearing on the issue, the parties referred to the relevant portions of the transcription by reference to the internal pagination of that document. Where that transcription is cited here, internal page numbers are included in brackets.

[55] In stating their objections to the tape, defense counsel frequently, but not invariably, cited Evidence Code section 352 or argued that the evidence was more prejudicial than probative. In several instances where defense counsel did not expressly make such a reference, the trial court nevertheless addressed whether it found the evidence more prejudicial than probative. (See, e.g., 18 RT 6168-6173.) This indicates that the trial court understood the motion to include that objection and that it exercised its discretion pursuant to section 352 throughout this hearing. Accordingly, whether or not each of defense counsel's objections made specific reference to Evidence Code section 352, the issue is properly preserved for review, and any further reference by defense counsel to that provision would have been futile. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

without explanation. (18 RT 6171.)

Second, the defense objected to Edwards' statement to Webster that the reason appellant told her he had shot two people in Del Paso Heights was that he wanted to boast about having killed somebody, but did not want to give Webster the true facts. (18 RT 6172; 23 Aug CT 6669 [p. 20], lines 11-16.) The prosecutor argued that the evidence showed the degree of Webster's resistance to believing that appellant had committed the crimes at The Office. (18 RT 6173.) The trial court ruled:

> I think it's admissible for that purpose, and I think the probative value outweighs any possible prejudice. I don't see that there is that much, if any prejudice from those lines. I will overrule the defense objection to that portion. I think it definitely shows the efforts of the detectives to convince Mary Webster to cooperate, and it provides a good look at her state of mind at that time, which was an unwillingness to believe and an unwillingness to cooperate.

(18 RT 6173.)

Third, appellant objected to the detectives' answer when Webster asked why they believed appellant was responsible for the killings at The Office. The detectives listed various reasons for that belief: "the caliber of the weapon," presumably meaning that the caliber of the gun used in the killings at The Office was the same as the caliber of the gun that Webster said appellant brought to her house the previous night; "all the blood on his boots," which Reed said fit the crime scene; the timing of the killings at The Office, which Reed said were between 8:30 and 9:30; and appellant's "boastin' about doing two people," when two people were killed at The Office. (18 RT 6174; 23 Aug CT 6670 [p. 21], lines 5-28; 23 Aug CT 6671 [p. 22], lines 1-12.) Webster responded that appellant had told her the people he shot were black. (23 Aug CT 6671 [p. 22].) Reed and Edwards

responded that appellant was lying. (23 Aug CT 6671 [p. 22].) Defense counsel objected that the evidence was more prejudicial than probative pursuant to Evidence Code section 352. (18 RT 6174-6175.) The prosecutor argued that the length of the interview, the amount of information that the detectives provided to Webster and the length of time that she continued to resist were significant. (18 RT 6175-6176.) The trial court agreed:

> I'm going to overrule the defense objection to this section. I believe that it does, as Mr. Druliner points out, shows the resistance that was offered by Mary Webster, that is, her strong desire not to believe that what the officers were saying was true and her desire not to cooperate with them. So I think this is a good example of that.

(18 RT 6176.)

Fourth, appellant objected to another statement by Reed asserting that appellant had lied to Webster. (18 RT 6178; 23 Aug CT 6674 [p. 25], lines 14-15.) Defense counsel argued that it was cumulative of statements made to her in other portions of the interview. (18 RT 6178.) The trial court ruled that it showed "the efforts they went through and it shows her state of mind as well," and "it also shows at some point, she begins to come around. And this may be where it begins." (18 RT 6178.)

Fifth, appellant objected to statements by the officers that "all this fits" with the crime scene evidence, that "he lied to you about the circumstances, but it's cards, ah – kinds of money" and that the motive may have been robbery. (18 RT 6179; 23 Aug CT 6674 [p. 25], lines 27-28; 23 Aug CT 6675 [p. 26], lines 1-5.) Defense counsel argued that this conveyed that appellant was guilty and therefore was prejudicial. (18 RT 6181.) The trial court overruled the objection, finding that "the point of this evidence

here is that in the face of all of the facts that she is given by the detectives, she still stubbornly refuses to believe that Mr. Case could have any involvement whatsoever in the Rancho Cordova shootings." (18 RT 6181.)

Sixth, appellant objected to detective Edwards's statement asserting that the reason appellant told Webster that he had committed the shooting in Del Paso Heights was "[p]robably to cover up a little bit? Probably hopefully that you wouldn't put the one out in Rancho Cordova with the one in Del Paso . . . And he could look like a big man and – throw fear into you, thinking –." (23 Aug CT 6675 [p. 26], lines 20-27) Defense counsel argued that inter alia, the evidence was more prejudicial than probative. (18 RT 6181-6182.) The trial court ruled that it would admit the evidence with a cautionary instruction, stating:

> the primary purpose of what the officers are saying here is to get her to cooperate and give them the gun and any other evidence that she might have. So that's the purpose of these efforts and whether the things they say turn out to be true or not is really secondary. It does show a continued resistance here.

(18 RT 6183.)

Seventh, appellant objected that additional statements made by the officers asserting that appellant killed two people were cumulative. (18 RT 6184; 23 Aug CT 6676, lines 4, 7-8.) The court ruled:

> At this point though, they are right down to the real issue here. She's reluctant to give up the gun because she's afraid and she doesn't want to believe it and they are countering with he killed two people. Give us this evidence. It's the moral dilemma that she faces, really, she has information and evidence which could link her former boyfriend to the death of these two individuals. And yet, she still doesn't want to give evidence against him. For example, at line seven, Edwards intrigued her, "Let us look at the gun and prove

> that." And her response is explain this to me one more time. "Is this for real?" So that will be admitted over defense objection.

(18 RT 6184.)

Eighth, appellant objected to the officers telling Webster repeatedly that appellant "did it," arguing that it was just a continued expression of the officers' belief that appellant was the guilty party and was therefore cumulative. (18 RT 6185; 23 Aug CT 6678 [p. 29], lines 5-7.) The court ruled that the evidence would be admitted, finding "This is an attempt to sway this person to cooperate. The officer's opinion as to who did it is irrelevant. It doesn't matter what he thinks except the jury." (18 RT 6186.)

Ninth, over appellant's objection, the court admitted Reed's statement to Webster that, "[h]e's not going to come after you because I am convinced that he's the one that did this." (18 RT 6187; 23 Aug CT 6684 [p. 35], lines 20-21.) The court found the statement probative and that "it shows that she is at this point, she's beginning to – resistance is beginning to crumble." (18 RT 6188.)

Finally, appellant objected to evidence of Reed's and Edwards' stated opinions: Reed stating that if he were Webster, he would not sleep at night as long as appellant remained on the street (18 RT 6189; 23 Aug CT 6685 [p. 36], lines 8-9); Reed and Edwards telling Webster that appellant was responsible for the killings at The Office (18 RT 6189; 23 Aug CT 6685 [p. 36], lines 11-13); and Reed theorizing that the shootings were done at close range and that appellant was standing in a particular position on the floor so that blood got on his boots (18 RT 6189; 23 Aug CT 6685 [p. 36], lines 21-28; 23 Aug CT 6686 [p. 37], lines 1-4). The court found that at the time of this exchange, Webster "still doesn't believe it" and that the

detectives' statements "confirming with the evidence over and over again" were admissible "to try to get her to cooperate." (18 RT 6190.)

The redacted tape was played for the jury, and a transcription of it was distributed for jurors to read while the tape was playing. (18 RT 6338, 6341.) The defense requested a limiting instruction. (18 RT 6276-6277.) At the time that the tape was played, the court instructed the jury as follows:

> During the interview, Detective Edwards and Detective Reed will tell Mary Webster certain facts about the investigation. [¶] You should keep in mind at all times that the jury determines what the facts are. And that at the time that this interview was conducted, June 21st, 1993, first, the investigation was nowhere near complete. Second, the purpose of this interview was to persuade Mary Webster to cooperate with law enforcement. And for that reason, the detectives are permitted to shade the facts, if that is necessary, in their judgment to persuade the individual to whom they are speaking in this case, Mary Webster, to cooperate. [¶] So you should not believe that Detective Reed or Detective Edwards at that time had any special knowledge of what the truth is in as far as this case was concerned. [¶] Again, you will be the ultimate finders of the facts in this case. [¶] And, finally, this tape and the statements of Mary Webster are not offered for the truth of the matter asserted in those statements but to explain and demonstrate for you Mary Webster's state of mind at the time the interview was conducted. So that you may consider that if you find it relevant in resolving other issues in this trial.

(18 RT 6340-6341.) The evidence was also referenced in the limiting instruction given at the close of the evidence, stating that it could be considered only "to show the nature of the relationship between defendant, Charles Case, and Mary Webster and to show Mary Webster's state of mind at the time she made those statements." (2 CT 515-516; 23 RT 7616-7617; fn. 46, *ante*.)

### B. The Trial Court Abused its Discretion Pursuant to Evidence Code Section 352 in Admitting Evidence of Appellant's Other Crimes and Webster's Taped Interview with Law Enforcement

In the guise of bolstering the credibility of prosecution witness Mary Webster, the trial court erroneously permitted the prosecution to present evidence that: (1) Webster had seen appellant get into two physical altercations, one with her son, Greg Nivens, and the other with her then-roommate, Randy Hobson; (2) appellant told Webster he was an ex-convict and a bank robber and had committed a number of robberies; (3) appellant told Webster he had "bumped a couple people off" before; (4) appellant told Webster that he had gotten rid of a former crime partner who snitched him off; and (5) detectives told Webster repeatedly and emphatically that they believed appellant was responsible for the murders at The Office and the reasons for that belief, in order to secure her cooperation. Each of these items evidence was minimally relevant, but tremendously inflammatory and likely to have a prejudicial effect. Whether considered individually or cumulatively, the trial court's rulings admitting this evidence were an abuse of discretion.

Pursuant to Evidence Code section 352, evidence must be excluded if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, confusing the issues or misleading the jury. (Evid. Code § 352.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual and yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Evidence is substantially more prejudicial than probative under section

352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14).

This Court has long recognized the prejudicial effect inherent in evidence that the defendant has committed other crimes: "[t]he 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." (*People v. Thompson* (1980) 27 Cal.3d 303, 314; accord, *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

> [A]dmission of such 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 offenses . . . ." (*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." (Citation.)

(*People v. Thompson*, *supra*, 27 Cal.3d at p. 317.)

Because substantial prejudicial effect is inherent in evidence of uncharged offenses, such evidence is admissible only if it has "*substantial* probative value." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Evidence of uncharged misconduct is so prejudicial that its admission requires "'extremely careful analysis.'" (*People v. Lewis* (2001) 25 Cal.4th 610, 637, quoting *Ewoldt*, *supra*, 7 Cal.4th at p. 404.) "[A]ll doubts about its connection to the crime charged must be resolved in the accused's favor. [Citations]." (*People v. Alcala* (1984) 36 Cal.3d 604, 631, abrogated by statute on other grounds.)

In determining whether other crimes evidence is admissible under

Evidence Code section 352, the trial court must consider five factors: (1) whether the evidence of uncharged misconduct is material, i.e., the tendency of the evidence to demonstrate the issue for which it is being offered; (2) the extent to which the source of the evidence is independent of the evidence of the charged offense; (3) whether the defendant was punished for the uncharged misconduct; (4) whether the uncharged misconduct is more inflammatory than the charged offense; and (5) the remoteness in time of the uncharged misconduct. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.)

Pursuant to these governing legal principles, the trial court abused its discretion in admitting the evidence challenged here.

### 1. The Evidence of Appellant's Altercations with Greg Nivens and Randy Hobson Was Far More Prejudicial than Probative

The trial court erred in admitting evidence that some months prior to the robbery-murders, appellant had gotten into two physical altercations at Mary Webster's house, one with Greg Nivens, Mary Webster's son, and the other with Randy Hobson, Mary Webster's then-roommate. The court admitted the evidence to show Webster's state of mind and "the nature of the relationship" between Webster and appellant on the day after the killings. (2 CT 515-516; 23 RT 7616-7617.) To the extent that Webster's state of mind and the nature of her relationship with appellant were relevant, they were not in dispute, and were established by other evidence. Further, the altercations were not probative of Webster's state of mind, as there was no evidence as to the effect that those incidents had on her thinking. For these reasons, the probative value of the evidence was far from "substantial." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

On the other hand, the likelihood that the evidence would have a prejudicial effect was enormous. The incidents were highly inflammatory, and because appellant had not been arrested or prosecuted for his conduct, the evidence was likely to lead to confusion of the issues and a desire on the part of jurors to punish appellant for his prior bad acts. The prejudicial effect of the evidence far outweighed any probative value, and the court's admission of the evidence was an abuse of its discretion pursuant to Evidence Code section 352.

### a. The Evidence Had Minimal Probative Value

The principal factor in evaluating the probative value of other crimes evidence is whether it has a "strong" tendency to prove the material fact it is offered to prove. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; *People v. Balcom* (1994) 7 Cal.4th 414, 427; see *People v. Gray* (2005) 37 Cal.4th 168, 202 [the admissibility of evidence of uncharged offenses "depends on the materiality of the fact to be proved"]; *People v. Valdez* (2004) 32 Cal.4th 73, 109 [evidence with "minimal" probative value properly excluded under section 352].) Generally speaking, evidence bearing on Webster's credibility was relevant, but not everything that Webster knew about appellant's past was admissible. Rather, evidence of appellant's other crimes was admissible to bolster her credibility only if it had a strong tendency to prove the trustworthiness of her testimony.

The court admitted evidence of appellant's altercation with Hobson and his striking of Nivens to show Webster's "state of mind" and "the nature of the relationship" between Webster and appellant on the day after

the killings. (2 CT 515-516; 23 RT 7616-7617.)[56] The court's rationale was that Webster both feared and loved appellant, and that those feelings explained her hesitation to go to the police and her initial willingness to do as appellant said with the clothes and the gun. (11 RT 4092.) As a result of her knowledge of, or beliefs regarding, appellant's past, she was "impressed" and "intrigued" with appellant, but also afraid of him. (11 RT 4092, 4093, 4097.) The court found that appellant's statements putting himself in a bad light established "what motivated her to do some of the things that she did." (11 RT 4097.) The court ruled that "a witness's fear of a defendant is a basis for admitting evidence of what the defendant has said or even done in order to explain that witness's subsequent conduct." (11 RT 4100.)

Evidence that Webster feared retaliation from appellant was relevant to her credibility. This Court has also held that it is generally within the trial court's discretion to admit evidence of the basis for a witness's fear.

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[56] The relevant portion of this instruction is set forth above at footnote 46. The court used slightly different verbiage in the limiting instructions given at the time the testimony was presented: When Hobson testified about his altercation with appellant, the court instructed the jury that it could consider that evidence "on the issue of the credibility of Mary Webster" and "in assessing the nature of the relationship between Mary Webster and appellant." (15 RT 5285-5286.) During Nivens's testimony, the court instructed the jury that the evidence could be considered "as to the character of Mary Webster or her feelings toward Mr. Case." (17 RT 5975-5976.) Webster's credibility was the only aspect of her character that was in issue. As set forth below, her feelings toward appellant were the chief component of the state of mind to which the evidence was relevant. Therefore, these instructions communicated to the jury the same principles of relevancy as the court's final instruction stating that the evidence was relevant to her "state of mind" and "the nature of the relationship." (2 CT 515-516; 23 RT 7616-7617.)

(*People v. Burgener* (2003) 29 Cal.4th 833, 869.) It has found evidence of possible reasons for a witness's fear admissible even where there was no showing that they were the actual cause of that fear or even that the witness was actually afraid. (See, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1289 [evidence of threat admissible to show reason for witness to be fearful despite absence of evidence that the witness was afraid]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 945-946 [gang expert's testimony that gang members would intimidate any member who testified against the gang admissible to show "possible intimidation" of witness].) Pursuant to this authority, the evidence of appellant's altercations with Nivens and Hobson was of some relevance, even though there was no indication that those events had caused Webster to be fearful. However, there was no indication of how the two incidents had affected Webster's feelings or thoughts about appellant. Webster's feelings for appellant were undisputed and were amply established by other evidence. Furthermore, to the extent that evidence of Webster's response to the incidents – siding with and covering for appellant – reflected her devotion to appellant and her tolerance of (or attraction to) his criminality, the fact that Webster held those feelings and thoughts was undisputed. Under these circumstances, admitting the tremendously inflammatory evidence of appellant's uncharged acts of violence on such a thin thread of relevance was a clear abuse of discretion.

### 1. Appellant Did Not Dispute Webster's Feelings Regarding Appellant or the Nature of Their Relationship

Certainly, a central question at trial was Webster's credibility. The prosecutor argued that Webster was a scared former lover who turned appellant over to the authorities out of fear (22 RT 7371), while the defense

suggested that Webster was a scorned former lover who framed appellant for the crimes because he left her for another woman. (16 RT 5636-5637; 22 RT 7404.) The parties sharply dispute whether she testified truthfully about the events of the night of the robbery-murders and her reasons for implicating appellant.

The prosecutor contended that the story appellant told Webster on the night of the killings – that he had shot two men over a poker game in Del Paso Heights – was a lie, that in fact he had committed the double robbery-murder at The Office, that the shirt and boots which he gave to Webster were the ones he was wearing when he killed Manuel and Tudor and that the gun he gave Webster was the weapon he had used in committing those crimes. (11 RT 4147-4148; 22 RT 7319-7329, 7352.) The prosecutor sought to establish that fear motivated Webster to turn appellant in, and posited that witnessing the altercations with Nivens and Hobson showed that Webster had reason to be afraid. (11 RT 4088.)

The defense contended that Webster was angry at appellant for having left her for another woman and that she or her brother, Steve Langford, or both had committed the killings and, in revenge, framed appellant for them. (22 RT 7472, 7550-7551.) Appellant disputed Webster's overall veracity concerning what had happened on the night of the killings and bluntly argued that she was a liar. (See, e.g., 11 RT 4157-4158 [defense opening argument]; 22 RT 7394, 7442 [defense closing argument].) However, appellant did not dispute the prosecution's evidence regarding her feelings about appellant, the nature of their relationship or her actions on the day after the killing. The defense challenged Webster's credibility in two very specific ways: by presenting evidence of Webster's own *crimen falsi*, and by presenting evidence of Webster's prior

inconsistent statements regarding the events of the night of the killings.

Appellant showed that Webster had a history of acts involving dishonesty: she had obtained large sums of money and other items of value – arguably by fraud or theft – from Clyde Miller, an elderly man who had been in her care. (See, e.g., 14 RT 5079-5117; 17 RT 5929-5945; 20 RT 6772-6778; 20 6790-6794, 6876.) She had written bad checks. (See, e.g., 14 RT 5095; 20 RT 6878.) She had intentionally failed to report income to the government in order to obtain Social Security benefits. (14 RT 5156-5157.) She had knowingly spent Social Security benefits to which she was not entitled. (14 RT 5156.) And she had lied both in talking to law enforcement and in sworn testimony regarding the amount of money that appellant had reportedly given her on the night of the killings. (16 RT 5672-5674.)

Appellant also showed that Webster had made prior inconsistent statements regarding the events of the night of the killings, such as her statements concerning when she noticed the blood on appellant's shirt (17 RT 5949), how much blood she saw (16 RT 5627; 17 RT 5922-5923), the type of gun that appellant left with her (16 RT 5627-5628), the quantity of ammunition in the gun (16 RT 5627), what appellant said about the number of shots fired (17 RT 5895), whether appellant left his pants with her (RT 5670), whether appellant needed money (17 RT 5900, 5904), what appellant said about the money from the poker game (15 RT 5205; 17 RT 5919), the amount of money that appellant gave her (16 RT 5671-5673) and whether appellant was wearing socks when he went home (17 RT 5923). Appellant presented the testimony and prior statements of Webster's brother, Steve Langford, which contradicted Webster regarding the events of the night of the killings and revealed that Webster had written a virtual script of the

version of events to which she testified. (20 RT 6692-6714, 6740-6757; 21 RT 7039-7046, 7080-7092.)

Although appellant's defense placed in dispute Webster's motivations for coming forward, appellant did not dispute the emotions that Webster felt for appellant. At the in limine hearing on appellant's motion to exclude the evidence at issue, defense counsel expressly stated that they would not challenge or attempt to discredit evidence that Webster feared appellant. (11 RT 4097.) Counsel further indicated that they would not object to testimony from Webster that her fear was based generally on the things appellant had said and done. (11 RT 4098.)

As predicted, defense counsel did nothing at trial to place in dispute Webster's fear of appellant or the reasons for those fears, nor did appellant challenge the evidence that Webster loved appellant or the depth of that love. Although the defense disputed whether those feelings were in fact what motivated Webster to go to the police, evidence of the reasons for her feelings did not inform that question. Thus, the evidence was of minimal probative value to the central dispute concerning Webster's state of mind: i.e., her motivation for turning appellant in.

Further, the court's statement that the evidence could be considered for the purpose of determining the nature of Webster's relationship with appellant was arguably improper. Under this theory of relevance, evidence of anything that appellant or Webster had ever done or said that might conceivably have affected their relationship would have been admissible. Although "[t]he definition of relevant evidence is manifestly broad" (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843), it is not that broad. Evidence still must be probative of a dispute material fact. (Evid. Code §§ 210, 350.) Framing relevance in these terms effectively invited the jury to

consider the evidence of appellant's bad acts as indicative of appellant's criminal propensity or disposition, as long as it found that this character trait had something to do with the nature of appellant's relationship with Webster.

To the extent that the nature of the relationship was a proper consideration, it was not in dispute. Appellant did not challenge the evidence that Webster was devoted to appellant, that she had "always been there" for him (14 RT 4992), that she helped him obtain a gun and ammunition (14 RT 4994-4996) or that she continued to want his love and companionship even after he had been unfaithful to her and had rejected her.

As for the admission of the evidence of appellant's altercation with Nivens to show Webster's character, the only aspect of Webster's character that was in issue was her credibility, and the only way in which the evidence reflect on her credibility was as evidence of her state of mind. Whether framed as evidence of Webster's character, Webster's feelings or Webster's state of mind, the evidence went to establish facts that were not actually disputed: Webster feared appellant, was intrigued by his past criminal activities and adored him. None of these facts was disputed. Accordingly, if the evidence had any probative value, it was far from the "substantial" probative value that is required in order to justify admission of evidence of other crimes. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

### 2. The Evidence Failed to Establish That the Altercations Caused Webster's Fear

In addition to the fact that neither Webster's fear nor her adoration of appellant was disputed, the evidence failed to establish that the incidents

involving Nivens and Hobson were causally connected to those feelings. The principal factor in evaluating the probative value of other crimes evidence is whether it has a "strong" tendency to prove the material fact it is offered to prove. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) The trial court ruled that Webster would be allowed to testify that she observed appellant's altercations with Nivens and Hobson because it "would presumably support her belief that he was a man of his words." (11 RT 4114.) The court thus assumed that Webster's response to those two incidents was to believe that appellant's stories about other crimes and acts of violence were true. However, the evidence failed to show that Webster actually drew that inference herself. In fact, the prosecutor did not present any evidence at all of what Webster felt or thought as a result of the two incidents.

### 3. Webster's Feelings Regarding Appellant Were Established by Other Evidence

To the extent that evidence of the altercations had some relevance to Webster's state of mind and the nature of her relationship with appellant, it was cumulative of other evidence. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 405-406 ["In many cases the prejudicial effect of such evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute"].) Even if the jury had heard none of the evidence to which appellant objected, there would have been ample evidence of the facts that the evidence was admitted to show.

The evidence of Webster's fear was plentiful. Detective Ford testified that Webster was afraid that appellant would kill her or someone

else. (14 RT 5127-5128, 5032.) Arlene Eshelman testified that Webster worried appellant would retaliate if she turned him in. (15 RT 5262.) Webster testified on direct examination that she "was half-way afraid of" appellant (14 RT 5008), that she called Detective Ford out of "[f]ear of someone else's life" (14 RT 5032), that she was afraid that "it" could happen again (14 RT 5032-5033), that she did not give the detectives the gun that appellant had left with her because she was afraid appellant would shoot or kill her if he found the gun missing (14 RT 5034-5035) and that she had told the detectives she would not testify because she was afraid for her life (14 RT 5043-5044). The jury heard a tape of Webster's interview with detectives on the day after the killings in which Webster stated "at least 16 times" (22 RT 7371) that she was afraid of appellant and did not want him to know that she was talking to them (23 CT 6611-6649 [transcript of Exhibit 94-A (redacted tape)]). All of this evidence was uncontroverted, and none of it referred to appellant's past conduct. Even if the reasons for Webster's fear were of some relevance, defense counsel stated they would not challenge evidence that Webster's fears were based generally on the things appellant had said and done in the past. (11 RT 4098.)

Over appellant's objection, Webster also testified that on the morning after appellant gave her the bloody clothes and boots, she started thinking about things appellant had said in the past about having "bumped a couple people off" (14 RT 5021),"knocked people off" (14 RT 5032) and "slapped" people (14 RT 5032), and she started getting nervous. Also over objection, she testified that the reason she was afraid for her life if she should testify was because appellant had told her that he "got rid of" a former getaway driver who had "snitched him off." (14 RT 5043-5044.)

Appellant challenges the admission of this testimony. (See section B.3, *infra*.) However, even if this Court should find that it was not an abuse of discretion to admit some of the evidence of appellant's past criminality because of its relevance to Webster's fear, admitting all of it was an abuse of discretion.

To the extent that the evidence of the altercations showed the depth of Webster's adoration for appellant, that state of mind was also thoroughly established by other evidence. On direct examination, Webster testified that she invited appellant to move in with her approximately two weeks after they met. (14 RT 4969.) When he moved out eight months later, it was his choice to do so, not hers; he wanted to see other women. (14 RT 4986.) During the time appellant lived with her, she found him to be an "exciting person" (14 RT 4994), she was very attracted to him (14 RT 4994) and she fell in love with him (14 RT 4985, 4989). She helped him buy a gun and ammunition for the gun. (14 RT 4994, 4996-4997.) When he moved out, saying that he wanted to wine and dine other women, Webster was hurt and "pissed off," but still in love with him. (14 RT 4985, 4989.) Although he moved in with Jerri Baker, Webster continued to love him; she went on dates with him, had sex with him, and was always there for him. (14 RT 4992, 5002.) On the day of the murders and the day after, she still loved him. (14 RT 5042; 17 RT 5903; 21 RT 6983.) Webster's love for appellant was confirmed by Arlene Eshelman (15 RT 5267) and Randy Hobson (15 RT 5283). Appellant did not challenge any of this testimony. Indeed, it was defense counsel who elicited from Webster that she told detectives she was still in love with appellant. (17 RT 5903.)

The prosecutor argued that the relationship was founded on Webster's attraction to appellant's "outlaw mystique." (RT 4076.) To the

extent that the evidence of the altercations showed Webster's tolerance or perhaps attraction to appellant's criminality, that too was shown by other evidence such as Webster's willingness to help appellant buy a gun and ammunition (14 RT 4994, 4996-4997) and her willingness to go along with him while he bought Nu-skin and materials for a disguise (14 RT 4973-4974, 4976-4978). Appellant objected to none of that evidence.

To the extent that the evidence proved anything relevant to Webster's credibility, it was cumulative of other evidence.

**b. The Evidence of Appellant's Assaultiveness Was Inflammatory, and the Likelihood That it Would Have a Prejudicial Effect Was Heightened Because Appellant Had Not Been Prosecuted**

The risk that evidence of appellant's altercations with Nivens and Hobson would have a prejudicial effect was high. Evidence that appellant had physically attacked Webster's son for showing disrespect toward his mother and had wielded a fireplace poker to resolve a dispute with Webster's house-mate over money was sure to inflame the jury's emotions. The evidence of both incidents was likely to cause jurors to feel revulsion towards appellant, the kind of evidence that "'uniquely tends to evoke an emotional bias against a party as an individual.'" (*People v. Cowan*, *supra*, 50 Cal.4th at p. 475, citations omitted.) The fact that the trial court initially excluded any reference to the fireplace poker (11 RT 4114) suggests that it recognized the inflammatory and prejudicial effect of that detail. The risk was high that the jury would use the evidence of both incidents not solely to show the effect that they had on Webster, but as evidence that appellant was a violent and impulsive individual, the kind of person who would commit

the charged crimes. The risk was great that the jury would infer from it that appellant had a criminal propensity and was therefore guilty of the charged crimes. (See, e.g., *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395-1397 [where evidence of defendant's other crime was admitted solely to support a witness's credibility, the risk of prejudice outweighed its probative value].)

The circumstances surrounding admission of the two altercations strongly suggest that the prejudicial impact of the evidence – showing appellant to be a bad and violent person whom the jury should dislike and want to punish – was precisely the prosecutor's point. The Nivens and Hobson assaults were admitted without any obvious relationship to the charges and without any evidence of their effect on Webster. Webster's testimony regarding these incidents preceded any evidence that she was afraid and lacked any logical connection to her credibility. The effect of presenting the evidence was to "inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*People v. Branch* (2001) 91 Cal.App.4th 274, 286, citation omitted.)

The prejudicial effect of the evidence was also exacerbated by the fact that the jury knew appellant had not been prosecuted for his violence towards Nivens or Hobson. Webster testified that when talking with police after each of the incidents, she covered for appellant, and as a result, appellant did not get in trouble for them. (14 RT 4982-4984.) The prejudicial effect of other crimes evidence is heightened when the

defendant's uncharged acts have not resulted in criminal convictions, as it increases the danger that the jury will seek to punish the defendant for the uncharged offense. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405; see *People v. Falsetta* (1999) 21 Cal.4th 903, 917.) Such evidence also increases the risk of confusion of issues in that the jury's attention is likely to be diverted to determining the truth or falsity of the allegations of other crimes. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) That risk was particularly high here where not only Webster, but also Hobson and Nivens testified about the altercations. The result was a mini-trial which called upon the jurors to evaluate whether the incidents occurred as alleged, regardless of their connection to the testimony at trial or the crimes charged. These two factors – whether the other crime was adjudicated and whether the defendant was punished for it – are relevant to the calculus required pursuant to section 352. (*People v. Balcom*, *supra*, 7 Cal.4th at p. 427 [jury's knowledge that uncharged acts resulted in a criminal conviction and prison term decreased prejudicial impact, as jury's attention was not diverted to determining whether defendant had committed the uncharged offenses]; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405 [where uncharged acts did not result in criminal convictions, prejudicial effect was heightened, as lack of conviction increased the likelihood of confusing the issues because the jury had to determine whether the uncharged offenses had occurred].) Because it was clear to the jury that appellant had not been prosecuted for his violent behavior towards Nivens or Hobson, the evidence was even more likely to have a prejudicial effect.

### c. The Limiting Instruction Was Not a Sufficient Safeguard Against the High Risk of Prejudice

The trial court's instructions that the evidence could be considered only for the limited purpose stated were not a sufficient safeguard against the risk that the jury would consider the evidence as an indication of criminal propensity or disposition. Limiting instructions which tell the jurors to consider the other crimes evidence for a specific purpose are often deemed sufficient to offset the inherent prejudice of such evidence. (See, e.g., *Spencer v. Texas* (1967) 385 U.S. 554, 562 [jury is expected to follow instructions limiting evidence to its proper function].) However, the high court has recognized how difficult – sometimes impossible – it is for jurors to follow a limiting instruction. "The government should not have the windfall of having the jury be influenced by evidence against the defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." (*Jackson v. Denno* (1964) 378 U.S. 368, 388, fn. 15.) At least one justice called "naive" the "assumption that prejudicial effects can be overcome by instructions to the jury, [which] all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453, conc. opn. of Jackson, J., citations omitted.)

This Court long ago acknowledged that a limiting instruction with respect to a uncharged crime calls for "discrimination so subtle [as to be] a feat beyond the compass of ordinary minds." (*People v. Antick* (1975) 15 Cal.3d 79, 98, superceded on other grounds by constitutional amendment.) This Court has recognized that the risk the jury will misuse evidence that reveals a defendant's other crimes may be so great that no limiting instruction can sufficiently protect against it and the evidence must be

excluded. (See *People v. Coleman* (1985) 38 Cal.3d at pp. 85-86 [although limiting instruction was given, trial court abused 352 discretion by admitting letters written by murder victim revealing prior violence by appellant].) One lower appellate court bluntly criticized the "sophistry and lack of realism" in thinking that a limiting instruction "can have any realistic effect. . . ." on the jury's use of other crimes evidence; noting that "jurors are mere mortals. . . . We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence and not applying it in an improper manner." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.) More recently, another appellate court described the problem in vivid terms: "A limiting instruction warning jurors they should not think about the elephant in the room is not the same thing as having no elephant in the room." (*People v. Fritz* (2007) 153 Cal.App.4th 949, 962.)

Thus, one of the factors which the court must weigh in applying Evidence Code section 352 is "whether the circumstances of the statement are such that the jury will be unable to follow the limiting instruction." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 392.) "If the court concludes that the jury will be unable to use the evidence solely within its limitations, the court should exercise its discretion and exclude the evidence." (*Ibid.*) As this Court once said regarding statements by a murder victim revealing prior uncharged misconduct by the defendant,

> In a not very subtle way it told the jury what kind of man it was that was before them on trial. It will not do to say, as does the attorney general, that the jury was told that these declarations were not to be considered for their truthfulness but merely as verbal acts casting light upon [the victim's] state of mind. It is difficult to believe that even the trained mind of a psychoanalyst could thus departmentalize itself sufficiently to obey the mandate of the limiting instruction.

Certainly a lay mind could not do so.

(*People v. Hamilton* (1961) 55 Cal.2d 881, 898, overruled on other grounds in *People v. Wilson* (1969) 1 Cal.3d 431, 440.) Although in other respects, the *Hamilton* opinion has been abrogated, the concerns articulated in this passage are still valid and appropriate considerations in assessing the admissibility pursuant to section 352 of evidence that the defendant committed or threatened other criminal conduct. (*People v. Ortiz*, *supra*, 38 Cal.App.4th at p. 392. )

As shown above, the evidence of appellant's altercations with Nivens and Hobson were minimally relevant to the purpose for which that evidence was admitted. Because Webster did not identify the effect of either incident on her thinking, the jury had nowhere to go with the analysis that the instructions permitted. Furthermore, in both incidents, appellant had become physically violent under circumstances where his physical safety was by no means threatened and there had been no significant provocation. The evidence thus powerfully suggested that appellant had a propensity for violence. Under the circumstances, the court could not reasonably conclude that the jury would be capable of limiting its consideration of the evidence to its relevance to Webster's credibility. For the jury to infer from the evidence of the assaults on Nivens and Hobson that Webster feared appellant without also considering it as evidence as to appellant's character required "mental gymnastics" that were beyond the powers of any lay juror. (*People v. Coleman, supra*, 38 Cal.3d at p. 94.) In admitting the evidence, the trial court abused its discretion.

### 2. The Evidence That Appellant Told Webster He Was an Ex-Convict and a Bank Robber and Had Committed Robberies in the Past Using Nu-Skin and Disguises Was Minimally Probative but Extremely Prejudicial

The trial court abused its discretion in denying appellant's request to exclude the highly prejudicial evidence of his statements to Webster that he was an ex-convict and a bank robber and that in the past, he had committed robberies using Nu-skin and other methods of disguise. Again, the evidence was of scant probative value, and the likelihood that the evidence had a prejudicial effect was extremely high. Evidence that appellant admitted being a convicted criminal and a professional robber was so inflammatory that the jury could not possibly have followed the limiting instruction and ignored the natural human response of concluding that appellant had a criminal propensity.

#### a. The Probative Value of the Evidence Was Scant

Like the evidence of appellant's altercations with Nivens and Hobson, the probative value of the evidence that appellant had told Webster he was an ex-convict and a bank robber and told her stories about bank robberies was minimal. First, appellant did not dispute the factual issues to which it was relevant. Like the evidence of the altercations, this evidence was admitted to show the "nature of the relationship" between appellant and Webster and Webster's state of mind at the time of her statements to law enforcement. (2 CT 515-516; 23 RT 7616-7617; 14 RT 4993.) The court's rationale was that evidence of appellant's statements to Webster about his prior criminality explained Webster's feelings and thinking about appellant, particularly her fear of and attraction to him. (11 RT 4092, 4093, 4097,

4100.) The court found appellant's statements relevant to Webster's state of mind and the nature of her relationship with appellant. As stated above (see section B.1.a, *ante*), Webster's feelings about appellant – both her fear of and devotion to him – and the nature of their relationship were not disputed and were otherwise established by evidence to which appellant did not object. To the extent that the reasons for her fear were relevant, appellant indicated he would not challenge evidence that Webster's fears were based generally on statements appellant had made about his background and things he had done in the past. (11 RT 4098.) Evidence of appellant's statements about being an ex-convict and a bank robber was therefore cumulative of other evidence and of minimal probative value.

Second, like the evidence of appellant's altercations with Nivens and Hobson, there was no showing that appellant's statements about being an ex-convict and a bank robber or his stories about particular bank robberies actually caused Webster to fear him. As set forth above (see pp. 123-125, *ante*), the trial court's rationale for admitting the evidence was based on a finding that appellant's stories explained Webster's fear and her fear explained her actions on the day after the killings, i.e., her reasons for not immediately go to the police. However, there was no evidence that appellant's statements about being an ex-convict and a bank robber or the stories he had told about committing bank robberies in fact caused Webster to fear him. Even if, under the authorities cites above (see pp. 152-153, *ante*), the statements were relevant as possible reasons for Webster to be fearful, they were of minimal probative value because of the absence of any evidence that they actually caused Webster's fear.

Third, the trial court was incorrect in finding that appellant's purported statements about having committed robberies using Nu-skin and

having "layered his clothes" in the past showed premeditation and deliberation and a "plan to commit robberies . . . and foil identifications by disguising himself." (11 RT 4104-4105.)[57] Evidence that appellant said he had used Nu-skin or "layered his clothes" during past robberies did not logically indicate that he was planning a robbery in the future. Even if such evidence were probative of a plan to commit a future robbery using those techniques, it was not probative of a plan to commit the crime here at issue, as there was no indication that Nu-skin or any disguise was used during the offense. Further, the only way in which the evidence of past robbery suggested a plan or intention to commit future robberies was via an inference of propensity: i.e., a theory that because appellant had committed robbery using techniques for thwarting identification in the past, he was likely to do so again. As such, it was barred by the rule that "the inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with a material fact." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317.)

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[57] As indicated above (fn. 47, *ante*), defense counsel objected to evidence of appellant's reported references to past use of Nu-skin, but not to evidence that while with Webster, appellant bought Nu-skin or materials for a disguise or showed Webster how to use these and other techniques for thwarting identification. (11 RT 4098-4099.) Defense counsel asked the trial court to distinguish past use from present or future use, but the court admitted all reported statements regarding Nu-skin and disguises, without distinguishing statements regarding past use from those regarding present or future use.

Although defense counsel did not object specifically to evidence that appellant had used disguises in past crimes, such an objection would undoubtedly have been treated similarly to the objection regarding past use of Nu-skin and would therefore have been futile. Accordingly, the issue is not forfeited. (*People v. Welch*, *supra*, 5 Cal.4th at pp. 237-238.)

Fourth, the trial court was mistaken in finding the evidence that appellant said he was an ex-convict and a bank robber to be inextricably interwoven with appellant's purported statements regarding the use of wigs, fake tattoos, extra clothes and Nu-skin, and his purported statement to Jerri Baker regarding the pressure he was feeling to commit a robbery. (11 RT 4104-4105.) As noted above, defense counsel asked the court to exclude statements regarding past use of Nu-skin, but not those regarding present use. (11 RT 4098-4099.) The two types of evidence were independent of each other; evidence of appellant's statements about past crimes could easily have been excluded without preventing the prosecutor from presenting evidence of present use. Nor were appellant's statements about his status as an ex-convict or his past robberies inextricably intertwined with evidence of his statement to Baker in her backyard when he stated he was feeling "pressured to commit robberies," but did not want to spend the rest of his life in prison. (11 RT 3980.) Indeed, before the hearing on Webster's testimony, the trial court ruled that appellant's statement to Baker would be admitted, but the part of that statement in which he reportedly mentioned being a "three time loser" and having prior convictions would be excluded as more prejudicial than probative. (11 RT 4042.) Clearly, it was possible to exclude evidence of appellant's criminal history and still admit the rest of the statement which Baker attributed to him, as the trial court itself had done so.

Furthermore, the evidence of appellant's status as ex-convict was not an inextricable feature of Webster's testimony. Webster referred to appellant's status as an ex-convict three times, and on each occasion, the prosecutor raised the subject. The first two times occurred in the context of Webster's testimony that appellant told her he wanted to move out of her

house in order to date other women. (14 RT 4986.) When the prosecutor asked if appellant said this had to do with his being an ex-convict, Webster said it did not. (14 RT 4986.) The third reference was in the context of Webster's testimony that appellant told her he wanted a gun. (14 RT 4992 [the prosecutor asked, "[w]hen he told you that he wanted to buy a gun, had he already told you that he was an ex-convict?"].) Webster answered in the affirmative. (14 RT 4992-4993.) Evidence that appellant said he wanted a gun was certainly relevant to the charges, but evidence that, at the time of this statement, he was an ex-convict or that Webster knew he was an ex-convict was not. The references to his criminal history could easily have been excised without jeopardizing the clarity of Webster's testimony about the gun.

**b. The Evidence Was Highly Inflammatory and Likely to Have a Prejudicial Effect**

The likelihood of prejudice resulting from the evidence that appellant said he was a bank robber and an ex-convict cannot be underestimated. This is exactly the type of evidence which "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues" and which is therefore prejudicial within the meaning of Evidence Code section 352. (See *People v. Karis* (1988) 46 Cal.3d 612, 638.) Given that appellant was charged with a robbery-murder, evidence that he admitted being a bank robber and committing prior robberies was particularly likely to be viewed as evidence of criminal propensity, and of guilt of the charged crimes. The inflammatory effect of knowing that appellant was a convicted felon was also patent. Indeed, even the word "ex-convict" was likely to elicit an emotional response:

"'Exconvict' is a hateful word and the jurors would have read it in defendant's features as he sat before them as clearly as if it had been written there." (*People v. Ozuna* (1963) 213 Cal.App.2d 338, 342.)

### c. It Was Unlikely That the Jury Would Be Able to Comply with the Limiting Instruction

As set forth above, some evidence is so inflammatory that it is likely that no juror could comply with an instruction to consider it only for particular purpose. (See section B.1.c, *ante*.) Here, even the prosecutor was unable to do so. In his opening statement, he indicated that the appellant's statements to Webster were not being introduced for their truth. (11 RT 4136.) However, he himself treated the statement as true, stating that Baker was aware that appellant was an ex-convict (11 RT 4139) and "the defendant couldn't buy ammunition because of his status. And, by the way, obviously, he couldn't buy the gun either." (11 RT 4138.) These assertions suggest that the prosecutor himself misunderstood or forgot the limited facts appellant's statements were admitted to prove. If the "legally-trained prosecutor" was so confused about what the evidence served to prove that he "was unable to limit" his argument about them to the effect that they had on Webster, "we can safely infer" that the "lay jurors" were also confused about how they could use that evidence. (*People v. Fletcher* (1996) 13 Cal.4th 451, 471.) Similarly, it strains credulity to posit that the jury was able to ignore the evidence that appellant said he had committed prior robberies or bank robberies, and regard that evidence only for its effect on Webster's state of mind. Even though the jurors may well have tried diligently to limit their consideration in that manner, human beings simply are not able to compartmentalize their thinking to that degree.

Inevitably, they could not help but consider for its truth, as evidence that appellant had committed prior robberies and had been to prison.

In sum, evidence that appellant told Webster that he was an ex-convict and a bank robber and that he told her about bank robberies or other robberies that he had committed in the past showed little if anything about Webster's credibility. The probative value was minimal at best, but the likelihood of prejudice was enormous. Putting before the jury evidence that appellant was a convicted felon and an admitted robber, the very crime with which he was charged, made it extremely likely that jurors, even if conscientious, would not be able to limit their consideration of the evidence to its relevance to Webster's credibility. Rather, it was virtually inevitable that they would consider it as evidence that appellant had a propensity for robbery and that he was therefore more likely the person who had committed the charged crimes. Admitting the evidence was a clear abuse of the trial court's discretion.

### 3. Appellant's References to Having Hurt and Killed People in the Past Were of Little Probative Value but Were Extremely Likely to Have a Prejudicial Effect

Evidence that appellant told Mary Webster he had "bumped a couple people off" (14 RT 5021), "knocked people off" (14 RT 5032), "slapped" people (14 RT 5032), and "got[ten] rid of" his former getaway driver who had "snitched him off" (14 RT 5044), while admittedly of some relevance to Webster's fears, was not probative enough to justify its admission. The evidence was virtually certain to be considered as evidence that appellant had a propensity for violence and killing. No limiting instruction was capable of counteracting the prejudicial effect of such inflammatory and sensational evidence. Furthermore, no limiting instruction was given

concerning the evidence that he said he had "bumped people off," "knocked people off" or "slapped people,"[58] making it all the more certain that the evidence would have a prejudicial effect and all the more clear that the admission of the evidence was an abuse of discretion.

### a. The Probative Value of the Evidence Was Low

Like the evidence of appellant's his altercations with Nivens and Hobson and his other statements regarding his past, the evidence that appellant told Webster he had bumped people off or gotten rid of people was cumulative and of low probative value because it was admitted to show facts that were undisputed and were established by other evidence. The evidence that appellant told Webster he had gotten rid of a former getaway driver was admitted to show "that the statement was made to her and what effect it had on her." (14 RT 5044.) The court found that such evidence tended to explain her indecision about turning the bloody clothes in to the police. (11 RT 4112-4113.) The court found Webster's stories about hurting people relevant "to explain why Mary Webster was impressed and intrigued with [appellant] and why she followed his instructions after he gave her the bloody clothes and the gun." (11 RT 4108.) However, it was not appellant's stories, but the emotions that they produced – Webster's fear of retaliation if she turned appellant in, her fear that he would kill someone else, her love for him and intrigue with him -- that explained her conduct. As shown above, appellant did not dispute the evidence that Webster

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[58] As noted above (see fn. 53, *ante*), appellant does not argue on appeal that the trial court erred in failing to give a limiting instruction, but the absence of such an instruction is nevertheless relevant to the prejudice that flowed from the court's error in admitting the evidence.

harbored those feelings. (See section B.1.a, *ante*.) Therefore, the reasons for those feelings were of minimal if any probative value.

Admittedly, Webster testified that appellant's statement about having gotten rid of a former getaway driver had caused her to fear coming forward. (14 RT 5044.) However, as set forth more fully above (see section B.1.a.3, *ante*), even if all of the evidence to which appellant objected had been excluded, there would have been ample evidence of Webster's fear. Indeed, her statement that she had refused to testify because she was afraid to "go in front of [appellant]" (14 RT 5043) and afraid for her life (14 RT 5044) was uncontroverted, as was Arlene Eshelman's testimony that Webster was afraid appellant would retaliate (15 RT 5262). Evidence of appellant's statement about the getaway driver was not necessary to explain or substantiate Webster's fear. Moreover, to the extent the reasons for Webster's fears were relevant, defense counsel stated they would not object to evidence that her fear was based on statements appellant had made about his background, generally. (11 RT 4098.) Thus, to the extent that the specific statements that Webster attributed to appellant about having killed before were relevant to establishing Webster's fearfulness, they were cumulative of other evidence.

Further, because the evidence of appellant's statements came solely from Webster's own testimony, it was particularly lacking in probative value on the issue of her credibility, both because it was not independent of the evidence of the charges (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405 [probative value of other crimes evidence is diminished where witness is aware of the circumstances of the current charges, as her account may have been influenced by that knowledge]) and because it was self-serving (*id.* at pp. 407-408 [other crimes evidence is of diminished probative value

on the issue of a witness's credibility when the only evidence of the other offenses consists of uncorroborated testimony from the witness]).

For the foregoing reasons, the probative value of the evidence was low.

### b. The Evidence Was Extremely Inflammatory, and Prejudicial Effect Was a Virtual Certainty

Webster's testimony that appellant suggested he had committed or arranged murders in the past was exceedingly inflammatory, particularly in light of the fact that this was a murder prosecution. (See *People v. Brown, supra*, 17 Cal.App.4th 1389, 1396-1397 [evidence of other crimes inadmissible per section 352 when evidence was relevant only to a witness's credibility and involved the same type of crimes as those charged].) Webster's testimony suggested that appellant had killed before, and more than once. Moreover, his reported use of language – having "bumped a couple people off," "knocked people off" and "got[ten] rid of" people – implied a cavalier attitude about having done so. Even without any additional information regarding the nature or circumstances of appellant's claimed prior crimes, appellant's reported admissions were so inflammatory that the jury surely remembered and considered that evidence for the remainder of the trial.

Like the evidence of appellant's assaults on Nivens and Hobson (see section B.1.b, *ante*), the prejudicial effect of the evidence was heightened by the implication that he had not been convicted of or punished for the other crimes to which he referred. As noted above, that circumstance increases both the danger that the jury will punish the defendant for the uncharged offense and "the likelihood of 'confusing the issues,'" as the jury

must determine whether the uncharged offenses occurred. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405; see *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.)

Regardless of the fact that the evidence did not establish that appellant had actually committed the other offenses as he claimed, the danger was the same: as a result of the evidence, appellant "would be portrayed as a dangerous person more likely than others to have committed the present offense." (See *People v. Thompson*, *supra*, 45 Cal.3d at p. 109 [prejudicial effect of evidence that the defendant planned other offenses was similar to that of evidence that he had actually committed them].)

**c. Despite the Limiting Instruction, There Was an Overwhelming Probability That the Jury Would Consider the Evidence as an Indication That Appellant Had a Propensity for Violence**

As set forth above, in some cases the risk that jurors will not be able to follow a limiting instruction are so high and the consequences of that inability so unfair to the defendant that such an instruction is an insufficient safeguard against the risk of prejudice. (See section B.1.c, *ante*.) This is one of those cases. The "mental gymnastics" the limiting instructions required the jurors to undertake – i.e., considering the evidence that appellant said he had gotten rid of his former crime partner only for its effect on Webster and not as proof that he in fact killed the person or had the person killed – were clearly beyond the powers of most jurors. (*People v. Coleman*, *supra*, 38 Cal.3d at p. 92.)

In addition to the fact that the statement regarding getting rid of the getaway driver was so inflammatory that the limiting instruction could not

have been effective, the evidence that appellant said he had "bumped a couple people off" (14 RT 5021), "knocked people off" (14 RT 5032) and "slapped people" (14 RT 5032) were subject to no limiting instruction whatsoever. The jury was therefore free to consider that testimony in any way it chose, including as evidence that appellant had a criminal disposition and a propensity to commit murder and therefore as evidence of his guilt.

Both because the evidence at issue was so inflammatory that the court's limiting instruction could not have been effective and because the jury received no limiting instruction with respect to several of appellant's alleged statements, it was particularly likely that the jury would consider the evidence at issue for its prohibited purpose: that is, as criminal propensity evidence. Presented with such inflammatory evidence of other crimes, appellant's jury surely experienced the "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." (1A Wigmore, Evidence (Tillers rev. ed. 1983), § 58.2, p. 1215.)

For all of these reasons, the trial court's ruling admitting the evidence was an abuse of discretion.

#### 4. The Challenged Portions of Webster's Interview with Detectives Were More Prejudicial than Probative

As set forth above (see section A.4, *ante*), the trial court admitted segments of the taped interview of Mary Webster in which the officers repeatedly asserted that appellant was responsible for the murders at The Office and that he was a threat to Webster's safety as long as he remained a free man. (18 RT 6338-6341; 23 Aug CT 6611-6649; Exhibit 94-A [redacted tape played for the jury].) The trial court admitted the evidence to show Webster's state of mind at the time of the interview and the nature of

her relationship with appellant (2 CT 515-516; 23 RT 7616-7617), on the theory that it showed Webster's resistance to believing that appellant had committed the crimes at The Office. (18 RT 6173, 6176, 6178, 6181, 6183, 6184, 6185, 6187, 6190.) Although of some relevance, Webster's stated resistance was amply established by other evidence. The officers' opinions as to appellant's guilt and future dangerousness were so inflammatory and highly prejudicial that no limiting instruction could have effectively counteracted their prejudicial effect. The admission of the evidence was an abuse of discretion

### a. Webster's Resistance to Believing Appellant Might Be Guilty Was Shown by Other Evidence

Evidence of Webster's resistance to the idea that appellant was responsible for the murders at The Office was relevant to the extent it tended to show that she was not attempting to frame him. However, the portions of the interview to which appellant did not object provided ample evidence of that fact. Had all of segments of the interview to which appellant objected been redacted out, the jury would nevertheless have heard that after the detectives told Webster about the double homicide in Rancho Cordova (23 Aug CT 6668 [p. 19], lines 10-12), Webster asked, "why would he tell me this other story?" (23 Aug CT 6669 [p. 20], line 7) and stated "you're going to find whoever killed . . ." (23 Aug CT 6669 [p. 20], line 21). They would have heard that the detectives told Webster a 70-year old woman was killed (23 Aug CT 6670 [p. 21], line 3) and money was taken (23 Aug CT 6671, line 14-15), and that Webster then said, "how could it be?" (23 Aug CT 6671 [p. 22], line 22), "I think you're wrong about this. . . . I don't think he did this one" (23 Aug CT 6672 [p. 23], lines

18-19), "I think you . . . got the wrong person for this" (23 Aug CT 6673 [p. 24], line 2-3), "Why would he lie?" (23 Aug CT 6673 [p. 24], line 9), "Why would he tell me Del Paso Heights when it was in Rancho Cordova?" (23 Aug CT 6674, lines 10-11) and "Maybe you better check your records. I'm sure you found someone for these two people" (23 Aug CT 6674, lines 16-17).

But this is not all the jury would have heard. The jurors also would have heard that the detectives assured Webster that they had not found anyone else who could have committed the killings at The Office and that they had been "out there" at the crime scene all night. (23 Aug CT 6674 [p. 25], lines 18, 20, 21, 23-25.) They would have heard that Webster then said, "He don't need money that bad" (23 Aug CT 6675 [p. 26], line 6), and Edwards said, "But, he had money," and "Suddenly he had money" (23 Aug CT 6675 [p. 26], lines 7, 10). They would have heard that Webster said, "I can't believe this one" (23 Aug CT 6675 [p. 26], line 15), "Wait, wait. Wait. Explain this to me one more time . . . . is this for real?" (23 Aug CT 6676 [p. 27], lines 9-11) and "But, what's the reason? . . . For a hundred bucks? . . . And he gave it to me? That doesn't even make sense" (23 Aug CT 6679 [p. 30], lines 5-6, 8, 16-17).

Further, the jury would have heard that Reed said, "I know you don't want to believe it, Mary. First of all, we believe it. We're trying to convince you. . . . Got the blood, the blood on his boots and all that. . . ," (23 Aug CT 6680 [p. 31], lines 19-21, 24-25) and that Edwards said that appellant might kill Webster if he thought she might put two and two together (23 Aug CT 6681-6682 [pp. 32-33]). They would have heard that close to the end of the interview, Webster again said, "maybe this is not really for real" (23 Aug CT 6686 [p. 37], line 28), but then agreed to go to

her house with the detectives and give them the gun (23 Aug CT 6688-6689 [pp. 39-40]). In addition, Reed testified that Webster was resistant to believing that appellant had committed the killings at The Office and to handing over the gun (20 RT 6694), and Webster herself testified that even after appellant was arrested, she still did not believe he was the right man (14 RT 5042-5043).

Thus, the segments of the tape to which appellant objected were completely unnecessary to establish that during her interview with law enforcement on the day after the killings, Webster displayed resistance to believing that appellant was responsible for the killings at The Office.

### b. The Officers' Statements to Webster Were Inflammatory and Highly Prejudicial

The challenged portions of the tape included a number of prejudicial assertions on the part of the detectives. The officers asserted that appellant was lying when he told Webster he had shot two men over a poker game. (23 Aug CT 6671 [p. 22], lines 3-6, 8, 10; 23 Aug CT 6674 [p. 25], lines 14-15.) They told Webster what they believed were the reasons for which appellant told Webster that story. (23 Aug CT 6669 [p. 20], lines 11-16; 23 Aug CT 6675 [p. 25], lines 22-24, 26-27.) They asserted that appellant had committed the killings at The Office (23 Aug CT 6668 [p. 19], lines 24-26, 28; 23 Aug CT 6676, lines 4, 7-8; 23 Aug CT 6678 [p. 29], line 7; 23 Aug CT 6684 [p. 35], lines 19-22; 23 Aug CT 6685 [p. 36], lines 11, 12-13) and their reasons for coming to that conclusion (23 Aug CT 6670 [p. 21], lines 5-28; 23 Aug CT 6674 [p. 25], lines 26-28, 23 Aug CT 6675, Lines 1-2, 4-5; 23 Aug CT 6685 [p. 36], lines 22, 25, 27-28; 23 Aug CT 6686 [p. 37], lines 1-2, 4). Lastly, the evidence to which appellant objected included

several other highly inflammatory statements by the detectives, including repeatedly characterizing appellant as wanting to "boast" about having killed (23 Aug CT 6669 [p. 20 ], line 11; 23 Aug CT 6670 [p. 21], line 28), stating that appellant wanted to "look like a big man" and make Webster fear him (23 Aug CT 6675 [p. 26], lines 26-27), that he might kill Webster if he remained at large (23 Aug CT 6681-6682 [pp. 32-33]) and that Webster should be afraid as long as appellant was not in custody (23 Aug CT 6685 [p. 36], lines 8-9).

Certainly, if the prosecutor had attempted to introduce any of these opinions directly through live testimony, they would have been inadmissible. The statements were not admissible as lay or expert opinion testimony. (Evid. Code §§ 800, 801.) The officers' opinions as to appellant's guilt were inadmissible as lay opinion testimony because the officers did not witness the crime. (Evid. Code § 800, subd. (a); *People v. Farnam* (2002) 28 Cal.4th 107, 153.) Even if the officers had been qualified as experts, an expert witness's opinion concerning the guilt or innocence of the defendant is inadmissible. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47; *People v. Brown* (1981) 116 Cal.App.3d 820, 829; *People v. Clay* (1964) 227 Cal.App.2d 87, 98-99.) By allowing the prosecutor to play the portions of the tape containing the detectives' assertions and opinions because of their purported relevance to Webster's credibility, the trial court allowed the prosecutor to make an end run around established rules of evidence and exposed the jury to otherwise inadmissible and highly prejudicial evidence.

The statements of the investigating officers who, in the eyes of the jury, likely carried an aura of inherent authority and special knowledge, were likely to have a highly prejudicial and inflammatory effect because

they went to the central issue in dispute at appellant's trial: the identity of the killer. The statements were likely to cause the jury to dislike and fear appellant, whom the officers characterized as not only a murderer, but also a liar who would kill his ex-girlfriend who still loved him in spite of the fact that he had left her for another woman. Even more problematic, the jury could not possibly have disregarded the officers' repeated assertions that appellant had committed the crimes at issue and regarded those statements solely for their effect on Webster's state of mind.

### c. The Limiting Instruction Was Ineffectual

Although the trial court instructed the jury that the detectives may have shaded the facts in an effort to persuade Webster to cooperate and that their statements were not being offered for their truth (18 RT 6340-6341), it is nevertheless highly unlikely that the jury was able to disregard the content of the assertions that the officers made to Webster. In part by dint of pure repetition, but also by virtue of the officers' status and the jury's likely assumption that the officers had information to which the jury was not privy, the jurors could not have helped but be swayed by the officers' repeated and emphatic assertions of appellant's guilt and dangerousness, the theories they provided regarding appellant's behavior. Under the circumstances, it was unlikely that the jury would follow the instruction to limit its consideration of the tape to Webster's state of mind and the nature of her relationship with appellant. It was far more likely the jury would consider the officers' statements as evidence of appellant's guilt. The likelihood that the jury would not be able to follow the limiting instruction weighed heavily in favor of exclusion.

In sum, the probative value of the evidence was scant, as Webster's

state of mind at the time of the interview was of minimal or no relevance. The evidence was cumulative, as ample other evidence showed Webster's initial resistance to believing that appellant had committed the crimes charged. The jury was unlikely to be able to limit its consideration of the detectives' statements to the purpose of showing Webster's state of mind, and the evidence was highly inflammatory. For these reasons, it was an abuse of discretion pursuant to Evidence Code section 352 to admit the evidence.

### C. The Erroneous Admission of the Evidence Resulted in a Miscarriage of Justice That Requires Reversal of Appellant's Convictions and Death Sentence

Under state law, reversal of the guilt verdict is required if there is a reasonable probability that appellant would have achieved a more favorable result in the absence of the erroneously admitted evidence (*People v. Watson* (1956) 46 Cal.2d 818, 836) or if the admission of the evidence gave rise to a miscarriage of justice within the meaning of article VI, section 13, of the California Constitution (*People v. Green* (1980) 27 Cal.3d 1, 26). Reversal of appellant's conviction and death judgment is required under either of those standards.

At the guilt phase, the central issue for the jury to decide was the identity of the killer. As set forth above, the properly admitted evidence of appellant's actual connection to the charged crimes was marked by inconsistencies and evidentiary gaps. (See Argument I.E, *ante*.) No eyewitnesses or fingerprints connected appellant to the crime scene or the gun used in the crime. The evidence concerning whether appellant was wearing the blood-stained shirt and boots on the night in question was conflicting. The murder weapon did not match the descriptions of the gun

in appellant's possession shortly before the murders. The location of the blood stains on the shirt and boots in evidence, the absence of bloodstains in Baker's car and the amounts of money that appellant had before and after the killings were inconsistent with the prosecution's theory of the crime. Indeed, Webster's own testimony was internally inconsistent and was contradicted by other witnesses.

The prosecution obscured the inconsistencies in its case and filled the evidentiary gaps with inflammatory evidence of appellant's history of violent and criminal acts and the investigating officers' certainty that he was the killer. The evidence of uncharged crimes "served only to prey on the emotions of the jury, to lead them to mistrust [appellant], and to believe more easily that he was the type . . . who would kill . . . without much apparent motive." (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385.) Individually and cumulatively, the evidence that appellant told Webster he was a bank robber and an ex-convict, that he regaled her with stories about robberies, that he had "bumped people off," (14 RT 5021), "knocked people off" (14 RT 5032) and slapped people (14 RT 5032), and that he had "got[ten] rid of" a former crime partner (14 RT 5044), as well as the percipient witness testimony that he had physically assaulted Hobson and Nivens (14 RT 4981-4984; 15 RT 5273-5315, 5325-5327; 17 5973-5975, 5985-5994, 5958-5959), could only have been viewed as evidence of appellant's propensity for violence and criminal disposition.

The evidence not only invited the jury to convict based on appellant's propensity for violence and criminal disposition, but by its inflammatory nature, obscured the inconsistencies in Webster's statements and testimony and the conflicts between her statements and the other evidence. The evidence of appellant's statements regarding his criminal

past and of his altercations with Webster's roommate and son enabled the prosecutor to paint a picture of Webster as appellant's "lapdog" (22 RT 7366), a pathetic and hapless victim, while he portrayed appellant as a vicious professional criminal, an unintelligent braggart who captivated, manipulated and dominated her. (See, e.g., 22 RT 7324-7325, 7329, 7353.) By attacking appellant's character and building sympathy for Webster, the evidence enabled the prosecutor to appeal to the jury's emotions and disregard the evidence of Webster's dishonesty and the inconsistencies in her testimony.

Whether considered on its own or in combination with the other evidence admitted for the purported purpose of supporting Webster's credibility, the erroneously admitted portions of Webster's taped interview with Reed and Webster were also prejudicial. The jury could not have helped but be swayed by Reed's and Edwards' repeated and emphatic assertions that appellant was responsible for the killings at The Office. Given that those statements were coming from the law enforcement officers who had investigated the crimes, the jury could not possibly have regarded them merely as techniques for securing Webster's cooperation. The jury's view of appellant was certainly influenced by the detectives' inadmissible and inflammatory assertions that appellant was likely to kill again and that Webster was in danger as long as he remained on the street.

As set forth above, the limiting instructions which the trial court gave were insufficient to protect against the prejudicial effect of the evidence, and the ineffectiveness of those instructions is an important factor in assessing whether the admission of the evidence was an abuse of discretion. (See section B.1.c, *ante*.) The limiting instructions or lack thereof are also a critical aspect of the record to be considered in

determining whether the erroneous introduction of inadmissible evidence was prejudicial. (See, e.g., *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [assessment of prejudice under state law requires examination of entire record, including jury instructions].) With respect to the evidence that appellant said he had "bumped people off" or "knocked people off" in the past, the trial court gave the jury no limiting instruction whatsoever. (See 2 CT 515-516; 23 RT 7616-7617.) The jury was therefore free to regard it as evidence of appellant's propensity for murder and therefore of his guilt. Given that this was a murder case and the statements concerned prior killings, it is extremely likely that the jury did exactly that. On the basis of the erroneous admission of this evidence alone, reversal is required.

With respect to the evidence that appellant assaulted Nivens and Hobson, that he said he was an ex-convict and a bank robber and that he claimed to have gotten rid of a former crime partner who had "snitched" on him, as well as evidence of the statements made to and by Webster in her interview with Reed and Edwards, limiting instructions were given. (14 RT 4993, 5044; 23 RT 7616-7617; 2 CT 515-516.) However, the instruction that the jury could consider the evidence on the issue of the nature of Webster's relationship with appellant (2 CT 515-516; 23 RT 7616-7617) was so vague and ambiguous that it is reasonably probable that the jury interpreted it as permission to consider the evidence as an indication of appellant's character, as his character was relevant to the relationship. (See *People v. Brown*, *supra*, 17 Cal.App.4th 1389, 1397-1398 [ambiguous language in instruction invited jury to consider defendant's criminal propensity].)

Even as to the limiting instructions that properly instructed the jury to limit its consideration of the evidence to its effect on Webster's state of

mind and not to consider the statements as true, it is likely that the jurors were unable to abide by that limitation. Indeed, the prosecutor himself was confused about the permissible uses of the evidence appellant challenges. In his opening statement, the prosecutor stated as fact that appellant was an ex-convict, even though the trial court already had issued its in limine ruling that appellant's statements to Webster concerning his status and past were not being admitted for their truth. (11 RT 4139.) In closing argument, the prosecutor stated that appellant "used to tell [Webster] stuff all the time, almost nightly, when he was living with her about his escapades, his criminal background." (22 RT 7324.) Again, such statements signaled the jury that appellant's stories were true and that he did in fact commit "escapades" (14 RT 4973) and have a criminal background. The prosecutor argued that appellant was "a criminal – not good at it, but just simply a criminal" (22 RT 7552), a "professional criminal" (22 RT 7336) and a "vicious" one at that (22 RT 7325). The prosecutor treated the evidence at issue as evidence of appellant's actual criminal disposition, not as evidence of what Webster thought about appellant's character. Given that the prosecutor, a trained and experienced legal professional, was confused about the appropriate use of the evidence and the application of the limiting instruction, the jurors, lay people without any legal training or experience, certainly must have been as well. (*People v. Fletcher*, *supra*, 13 Cal.4th at p. 471.)

Without Webster's testimony, the evidence tying appellant to the crimes was at most weak, conflicting and circumstantial. Webster's testimony and credibility were critical to the prosecution's case. If the jury had found that Webster was not credible or found plausible defense counsel's argument suggestion that Webster set appellant up, it would

surely have also found reasonable doubt that appellant was the killer. The trial court recognized the importance of Webster's testimony, and the prosecution exploited that fact as an opportunity to bolster her less than sterling credibility.

Once the trial court ruled in limine that evidence of appellant's criminal history was admissible through Webster, numerous other witnesses were permitted to testify regarding their knowledge of appellant's criminal background. (See, e.g., 12 RT 4503 [Stacey Billingsley]; 13 RT 4564 [Greg Billingsley]; 13 RT 4751 [Burlingame]; 17 RT 5808 [Voudouris], 5865 [Curley]; 18 RT 6076 [Baker].) Thus, the court's rulings regarding the evidence offered on the issue of Webster's credibility resulted in a free-for-all assassination of appellant's character. Without even an attempt to limit the jury's use of the evidence that appellant had killed before and with evidence so sensational and inflammatory that the limiting instructions that were actually given were ineffectual, it is inevitable that the jury regarded the evidence as an indication that appellant had a propensity for violence and criminal conduct, particularly robbery. Given the weaknesses and inconsistencies in the prosecution's case, the evidence of appellant's other crimes tipped the scales toward conviction and encouraged the jury to disregard any reasonable doubt. It was only because of the highly inflammatory and inadmissible evidence of appellant's bad character that the prosecution was able to convince the jury that appellant was guilty of the crimes charged and that Webster was not a conniving and vengeful jilted lover who conspired with her brother to frame appellant, but was a subservient, pathetic patsy.

Further, the erroneously admitted evidence of appellant's other crimes undoubtedly affected the jury's penalty verdict, as the trial court

instructed that unadjudicated acts of force or violence or the threat of force or violence could be considered as circumstances in aggravation. (CALJIC No. 8.87; 3 CT 616; 25 RT 8430-8431.)

For the foregoing reasons, there is a reasonable probability that in the absence of the erroneously admitted evidence, at least one juror would have had a reasonable doubt as to appellant's guilt and would have refused to convict. (*People v. Bowers* (2002) 87 Cal.App.4th 722, 736 ["a mistrial [is] a more favorable result for defendant than conviction" under *Watson* standard].) In the alternative, there is a reasonable possibility that in the absence of the erroneously admitted evidence, at least one juror would not have voted for the death penalty. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448 [adopting reasonable possibility standard for penalty phase error].) The trial court's errors, individually and cumulatively, were prejudicial. Appellant's convictions and death sentence must be reversed.

### D. The Erroneous Admission of the Evidence Rendered the Trial Fundamentally Unfair In Violation of the Due Process Clause of the Fourteenth Amendment

The erroneous admission of the evidence not only resulted in a miscarriage of justice under state law, but also deprived appellant of his right to a fair trial under the Due Process Clause of the Fourteenth Amendment.[59] The Supreme Court has recognized that the improper

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[59] Prior to trial, the trial court granted appellant's request to deem all of his objections under state statute to have been made pursuant to the California and United States Constitutions as well. (1 RT 1018; 2 CT 308-310.) Thus, appellant preserved the federal constitutional claim raised herein. His trial objections based on section 352 preserved that claim as well. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [defendant's (continued...)

admission of evidence may violate the constitutional right to a fair trial (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) The question is whether the evidence "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Romano v. Oklahoma* (1994) 512 U.S. 1, 12-13, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) The answer requires an "examination of the entire proceedings in [the] case." (*DeChristoforo, supra*, 416 U.S. at p. 643; see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 [judging challenged instruction in the context of the instructions as a whole and the entire trial record]; *Darden v. Wainwright* (1986) 477 U.S. 168, 182 [considering prosecutor's improper argument in the context of defense counsel's argument, the trial court's instructions and the overwhelming evidence of guilt on all charges].) This comprehensive review is necessary because the conclusion that the challenged error rendered the trial so unfair as to violate due process is a finding of reversible constitutional error. If the error so corrupts the trial that it is fundamentally unfair, it cannot be deemed harmless. In this way, proof of the due process violation incorporates an assessment that the error mattered, i.e., that the error likely affected the verdict.

The unfairness of the evidence at issue is patent. All the factors discussed in Section C, *ante*, that made the error a miscarriage of justice also made it a due process violation. Appellant did not put his own credibility in issue, and even if he had, evidence of unadjudicated bank robberies, murders and assaults would have been inadmissible for impeachment purposes. However, for the purpose of bolstering the

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[59] (...continued)
trial objection under section 352 rendered cognizable on appeal his claim that admission of gang evidence violated his due process rights].)

credibility of a prosecution witness, the trial court permitted the prosecutor to put before the jury a raft of evidence of appellant's other crimes and bad character that served to inflame the jury's emotions and hinder its ability to carefully and rationally assess the prosecution's case for guilt. The net result of admitting this evidence was to relieve the jury of any qualms it might have had about Webster's credibility, not because the evidence showed her to be a trustworthy witness, but because it showed appellant to be a violent man with a criminal past, precisely the type of person who would commit a double robbery-murder. The evidence of appellant's other crimes and acts of violence, as well as the evidence of the investigating officers' repeated assertions of their certitude regarding his guilt, both cumulatively and individually, were "so inflammatory as to prevent a fair trial." (See *Duncan v. Henry* (1995) 513 U.S. 364, 366.)

In *McKinney v. Rees*, *supra*, 993 F.2d 1378, the Ninth Circuit held that the erroneous admission of "other crimes evidence violate[s] due process where: (1) the balance of the prosecution's case against the defendant was 'solely circumstantial;' (2) the other crimes evidence . . . was similar to the [crimes] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was 'emotionally charged.'" (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775, rev'd other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202, citing *McKinney v. Rees*, *supra*, 993 F.2d at p. 1384.) Here, there was no direct evidence of appellant's guilt, and the prosecution case rested entirely on circumstantial evidence. As shown above (see Argument I.E, *ante*), that evidence was marked by significant gaps and inconsistencies. No fingerprints tied appellant to the crime scene, the murder weapon, the box that it was in or the money that appellant

reportedly gave Webster on the night of the crime. The amount of cash that appellant had after the crime did not match the amount that was stolen. The evidence concerning what appellant was wearing on the night of the murders and whether he had on the clothes which Webster later handed over to police was conflicting. The pattern of bloodstains on the shirt and boots and the lack of blood in Jerri Baker's car were not consistent with the prosecution's theory of the crime.

Regarding the similarity of the other crimes to the charged crimes, Webster's testimony suggested that appellant had committed other murders and robberies (14 RT 4971, 5021, 5032, 5044), the very crimes for which appellant was prosecuted in this case. The evidence regarding the assaults on Nivens and Hobson (14 RT 4981-4984; 15 RT 5177-5280; 17 RT 5974-5976), while not involving robbery or murder, obviously involved a readiness to do physical violence to others, as did the charged crimes. Webster's testimony that appellant told her nightly stories about his past crimes (14 RT 4971, 4985) and that appellant talked about having committed crimes using disguises and other means of thwarting identification (14 RT 4972, 4974-4975) suggested that appellant was a professional criminal.

The prosecutor relied on the evidence of the assaults on Nivens and Hobson and appellant's statements regarding his prior crimes as a significant part of his case-in-chief and as a focus of his argument to the jury. Once he had successfully convinced the court that appellant's statements regarding his criminal history were admissible through Webster's testimony, he proceeded to elicit testimony regarding appellant's criminal history from several other witnesses. From Stacey Billingsley, Greg Billingsley and Sue Burlingame, he elicited testimony that appellant

said he was a robber or a bank robber. (12 RT 4503, 4564, 4749.)[60] Through the testimony of Brian Curley and Jerri Baker, he presented further evidence that appellant had committed multiple robberies. (17 RT 5865; 18 RT 6076.) From Ted Voudouris and Stacey Billingsley, he elicited additional testimony that appellant said had been to prison or was an ex-convict. (12 RT 4503; 17 RT 5808.) In closing argument, he repeatedly mentioned the assaults on Nivens and Hobson. (22 RT 7326, 7442.) He also repeatedly labeled appellant a professional criminal (22 RT 7252, 7336, 7552) and painted him as "vicious" (22 RT 7325) and determined not to return to prison (22 RT 7297).

The evidence of appellant's other crimes was more emotionally charged than the evidence at issue in *McKinney* itself, which involved the defendant's possession of two knives. (*McKinney v. Rees*, *supra*, 993 F.3d at p. 1382.) Whether considered individually or collectively, the evidence that appellant admitted having killed more than once before and his statement that he had "got[ten] rid of" a former crime partner, as well as the evidence of his ex-convict status, his assaults on Nivens and Hobson and his statements regarding prior robberies and bank robberies, were extremely inflammatory. Such evidence was far more likely than knife possession to provoke in the jury an emotional response such as revulsion, fear, anger, hatred or the urge to punish appellant for crimes which had previously gone

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[60] Before the trial court ruled on the admissibility of Webster's testimony regarding appellant's criminal history, defense counsel had persuaded the court to exclude Jerri Baker's references to appellant's criminal history. (11 RT 4041-4042.) However, once the court ruled that Webster would be permitted to testify that appellant had told her he was an ex-convict and a bank robber, additional efforts to exclude similar references by other witnesses would have been futile.

undetected.

An assessment of the *McKinney* factors reinforces what is otherwise obvious: admitting the wide array of damning character evidence which the court permitted in this case inevitably impaired the jury's ability to properly assess the remaining evidence. The primary issue in dispute at the trial was the identity of the perpetrator. By indicating that appellant was not only capable of killing, robbery and unprovoked acts of violence, but also was a career criminal, seemingly proud of his criminal exploits, the evidence foreclosed any rational assessment of the actual connection or lack thereof between appellant and the crimes for which he was being tried. The result was a trial that was fundamentally unfair.

An error which so corrupts the trial as to render it fundamentally unfair cannot be deemed harmless. In this way, proof of the due process violation incorporates an assessment that the error mattered, i.e., that the error likely affected the verdict. Thus, the foregoing showing requires that the entire judgment must be reversed. Appellant need not make any further showing of prejudice. Even if the federal harmless error test applies to this due process violation, the state cannot show that the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. Appellant's convictions and death sentence must be reversed.

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## III

## THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT APPELLANT HAD SOLICITED GREG BILLINGSLEY AND BILLY JOE GENTRY TO COMMIT OTHER CRIMES

During the guilt phase, the trial court granted the prosecutor's request to present testimony from Greg Billingsley that approximately one to two months prior to the killings at The Office, appellant asked him if he wanted to steal the bank deposit from the Crestview bowling alley, where the two men often bowled together. The court also allowed the prosecutor to present the testimony of Billy Joe Gentry that on Halloween, 1992, approximately eight months before the killings, appellant asked him if he wanted to be the driver for a hold-up. Admitting this testimony was prejudicial error under state law and the federal Constitution.

### A. The Trial Court Admitted Evidence That Appellant Had Invited Greg Billingsley and Billy Joe Gentry to Participate in Robberies Which Had No Connection to the Charged Crime

Over a lunch break taken during his cross-examination by defense counsel, Greg Billingsley approached the prosecutor and told him for the first time that appellant had asked him if wanted to commit a robbery together. (13 RT 4599-4600.)[61] Out of the jury's presence, a hearing was held on the admissibility of this testimony. Billingsley testified that

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[61] When Billingsley talked to the prosecutor during the lunch break, he said he was mad about the questions that defense counsel had been asking him on cross-examination. (13 RT 4597-4600.) However, he denied that it was because he was upset about the cross-examination that he had come forward with the allegation about the solicitation; he said that he was simply abiding by the oath to tell the whole truth. (13 RT 4606.)

approximately one to two months prior to the killings at The Office, appellant asked him if he wanted to do "a job" together. (13 RT 4599.) Appellant said he knew of a "good scam," a way to "make some fast money." (13 RT 4601.) Although appellant did not tell Billingsley specifically what he had in mind, he said he knew what day of the week and time of day the lady from the Crestview bowling alley made bank deposits. (13 RT 4601-4602, 4608-4609.) The conversation took place in the parking lot outside the bowling alley. (13 RT 4609.) Both appellant and Billingsley had been drinking. (13 RT 4609.) Billingsley told appellant he was not interested. (13 RT 4601.)

Billingsley testified that he and appellant had a second conversation on the subject about two weeks later, in Jerri Baker's car. (13 RT 4602, 4613.) In the latter conversation, appellant reportedly said that the lady from the bowling alley took the money to the bank on Sunday mornings. (13 RT 4603, 4610-4614.) Appellant did not state that he had decided to steal the money, how he would do so or what role Billingsley would play if he chose to participate. (13 RT 4603, 4612, 4614-4615.) Again, Billingsley declined to participate. (13 RT 4613.) Appellant never used the word "rob" in either of the two conversations; he used the word "job." (13 RT 4614.) However, Billingsley understood appellant to be talking about a robbery. (13 RT 4605.)

After Billingsley's testimony out of the jury's presence, the parties requested an opportunity to research the question of admissibility and provide the court with additional argument. (13 RT 4618, 4620.) The trial court indicated that it was inclined to exclude the evidence from the prosecution's case-in-chief. The court ordered the prosecutor to instruct Billingsley, who was about to resume his testimony before the jury, not to

mention the issue until further notice. (13 RT 4620-4621.)

A few days after Billingsley testified, the defense received discovery indicating that Billy Joe Gentry had also made a statement about the prospect of doing some type of robbery. (14 RT 4956.) Shortly thereafter, Gentry testified out of the jury's presence. (16 RT 5721-5746.) He, like Billingsley, had worked with appellant at McKenry's Cleaners. (16 RT 5722.) His wife had become close friends with Mary Webster. (16 RT 5745.) Gentry testified that on Halloween (October 31) of 1992, he and his family stopped by Webster's house. (16 RT 5726-5727.) Gentry, a convicted felon, had been drinking; he had probably consumed two 40-ounce bottles of malt liquor already that day, enough that his wife would not let him drive. (16 RT 5739, 5743.) Gentry and appellant walked from Webster's house to a liquor store around the corner. (16 RT 5727.) Along the way, appellant asked Gentry if he would like to make some extra money being a driver in a hold-up; appellant said that if Gentry would drive, he would do the rest. (16 RT 5727; 17 RT 5840.) Appellant did not seem to have anything planned; he talked about it as if it were something that might or might not happen. (16 RT 5741.) Appellant did not say whom he wanted to rob, when he wanted to commit the crime, whether he was going to use a gun or how much money Gentry could expect to make. (16 RT 5742.) Gentry declined to participate. (16 RT 5727, 5741-5742.) Appellant told Gentry to keep their conversation to himself. (16 RT 5727.) Gentry did not tell anyone about appellant's offer until the day after the killings at The Office, when Gentry told Greg Billingsley. (16 RT 5727.) When Billingsley told the prosecutor that appellant had invited him to participate in a robbery, he mentioned that Gentry had told him that appellant had asked him the same thing. (16 RT 5738.) It was then that the

prosecution contacted Gentry for the first time. (16 RT 5730, 5738.)

The prosecutor argued that Gentry's and Billingsley's testimony regarding appellant's invitations to participate in other crimes showed violations of Penal Code section 653f and was admissible pursuant to Evidence Code section 1101, subsection (b), as evidence of intent, motive, deliberation and premeditation, and common design and plan. (16 RT 5748-5755, 5767.)[62]

Defense counsel argued that the evidence was inadmissible under Evidence Code section 1101, that there was no dispute that the murders and robbery at The Office were committed by someone and that the real purpose of the evidence was to show the identity of the perpetrator, which was improper. (17 RT 5774, 5776, 5778.) The defense also argued that the evidence was more prejudicial than probative. (17 RT 5776.)

The trial court ruled that the testimony of both Gentry and Greg Billingsley would be admitted, stating as follows:

> These statements taken in context with the real state of the evidence, which is going to be admitted and some of which has already been presented to the jury, take on a new and different meaning. For example, the testimony of Mary Webster that while the defendant lived with her, he said he was a robber, purchased disguises, tattoos, would wear bulky clothing in order to thwart an identification, purchased Nu-Skin so that fingerprints would not be left during a robbery. [¶ ] The testimony of Jeri [*sic*] Baker, the defendant said he felt compelled to commit a robbery, would leave no witnesses, all of this tends to prove that the defendant intended to commit a robbery and intended to avoid

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[62] The prosecutor addressed the admissibility of this testimony together with the testimony of Voudouris and Curley. (16 RT 5746-5750; 17 RT 5783-5784.) Appellant addresses the admissibility of the testimony of Voudouris and Curley in Argument IV, *infra*.

> apprehension when he did it. [¶] This robbery of The Office was apparently not the result of a sudden impulse, but was the result of planning engaged in by the defendant, a great deal of deliberation. And while the target of the robbery, The Office may be something that was decided on the spur of the moment, the idea of doing a robbery, it appears it's something that was present in Mr. Case's mind for a long time. And it was an idea that finally culminated in the act which took place on the 20th of June 1993. They are all admissible to show that this is a design or plan that the defendant had begun to think about early on and had done his best to put together until he finally succeeded in doing so by this evidence here, if the jury believes it.

(17 RT 5789-5790.)[63] The court stated that the evidence was not admissible to show identity:

> It is not being offered to show the identity. Reading *Ewoldt*, the court says that the greatest degree . . . of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. . . . And soliciting to commit a generic robbery, soliciting to commit a robbery of a different location with a getaway driver would not be similar to the robbery of The Office bar, insofar as admissible for purposes of showing intent. And so it would not be admissible to show intent to commit that robbery. . . . I am sorry, identity. I misspoke."

(17 RT 5792.) The court found that the evidence was "highly probative" and that its probative value outweighed "any possible prejudice that might be drawn from it." (17 RT 5791.)

Both Billingsley and Gentry testified before the jury regarding the alleged solicitations. (17 RT 5825-5861, 6019-6066; 19 RT 6067-6069.)

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[63] The court indicated that it would admit the evidence also to show intent and motive. (17 RT 5791, 5793-5794.) However, as set forth below, the court instructed the jury that the evidence could be considered only on the issue of scheme or plan. (23 RT 7615.) Therefore, its admissibility for that purpose is the sole relevance question at issue. (See fn. 65, *infra*.)

No limiting instruction was given at the time of the testimony, but in the final instructions given immediately before guilt phase deliberations, the court instructed as follows:

> The following evidence was admitted for a limited purpose. Defendant's statements to Greg Billingsley and Billy Joe Gentry concerning "doing a job" or making some "quick money." This evidence is not admitted to establish that defendant has a criminal disposition or bad character, and you are not to consider it for that purpose. You may consider it on the issue of whether the defendant committed the charged offenses pursuant to an evolving or continuing scheme or plan, referred to in his comments to Billingsley and Gentry relating to those uncharged acts.

(2 CT 514; 23 RT 7615.)

### B. Evidence of the Solicitations Was Inadmissible to Show Design or Plan

The trial court abused its discretion in admitting evidence of appellant's solicitations of Billingsley and Gentry. The evidence was not admissible to show scheme or plan, as there was no question that the acts which formed the basis of the charged offenses had occurred. Identity was the only ultimate factual issue that was actually disputed, and the trial court correctly ruled that the solicitations were not similar enough to the charged offense to be admissible for that purpose. The evidence was barred by Evidence Code section 1101, and even if not, was far more prejudicial than probative pursuant to Evidence Code section 352.

Evidence of uncharged bad acts is generally inadmissible pursuant to the prohibition against character evidence codified in Evidence Code 1101,

subdivision (a).[64] Subdivision (b) of that statute provides that evidence of uncharged misconduct is admissible when "relevant to prove some fact (such as motive, opportunity, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than [the person's] disposition to commit such an act." However, even if evidence of an uncharged crime is relevant to one or more of these issues, Evidence Code section 352 requires that it be excluded if it lacks *substantial* probative value or if its probative value is "'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, quoting Evid. Code, § 352.) Trial court rulings as to the admissibility of evidence under Evidence Code section 1101, subdivision (b), and under section 352 are reviewed for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code § 1101]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973 [Evid. Code § 352].)

The trial court admitted the testimony regarding appellant's solicitations of Billingsley and Gentry as evidence of "an evolving or continuing scheme or plan." (2 CT 514; 23 RT 7615.) As this Court made clear in *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393, evidence of a prior uncharged crime may be admitted to show design or plan only where there is a question as to what *acts* the defendant committed in the charged

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[64] Evidence Code section 1101, subdivision (a), provides:

> 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.

offense. "The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done." (1A Wigmore, Evidence (Tillers rev. ed. 1983) § 102, p. 1666, quoted in *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.) Such evidence "is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.)

The distinction between using uncharged acts as evidence of design or plan and using them as evidence of identity or intent is significant:

> Evidence of a common design or plan is admissible to establish that the defendant committed the act alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, *the act is still undetermined . . .*' (Citation.) . . . . Evidence of identity is admissible where it is conceded or assumed that the charged offense was committed by someone, in order to prove that the defendant was the perpetrator.

(*Id.* at p. 394, fn. 2, italics added.)

In appellant's case, the acts involved in the charged offenses were not undetermined. As defense counsel noted, it was "beyond dispute in this case that these murders were committed by someone and that a robbery attended thereto was committed by someone." (17 RT 5774.) Appellant did not claim that any of the charged crimes did not occur. (Cf. *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403 [where defendant was charged with molesting his stepdaughter and claimed that the crimes had not occurred, evidence that he had molested another stepdaughter was admissible as evidence of common scheme or plan to show that the charged acts had occurred].) There was no question that force or fear was used. (Cf. *People v. Balcom* (1994) 7 Cal.4th 414, 424 [where defendant was charged with

rape and defense was consent, evidence that the defendant had committed another rape under similar circumstances was admissible as evidence of common plan or scheme because it tended to show that force was used in the charged offense].) On the contrary, the acts involved in the charged offenses were "conceded or assumed" (see *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2), and therefore evidence of plan or scheme was inadmissible.

The only ultimate issue that appellant actually disputed was the identity of the perpetrator.

> For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (Citation.) "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803.)

(*Id.* at p. 403.) As the trial court correctly found, appellant's solicitations of Gentry and Billingsley were not similar enough to the charged crimes to be admissible to show identity. (17 RT 5792.) Furthermore, evidence of scheme or plan cannot be used to show identity. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.)

Even if this Court should find that evidence of common scheme or plan was theoretically relevant to an issue in dispute in this case, the solicitations were not similar enough to the charged crimes to be admissible for that purpose. When evidence of other crimes is offered to show common scheme or plan, the required degree of similarity is lower than that required for evidence offered to show identity, but higher than that applicable to evidence offered to show intent. (*Id.* at p. 402.)

To establish a common design or plan, the evidence must

> demonstrate not merely a similarity in the results, but "'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.]"

(*People v. Balcom*, *supra*, 7 Cal.4th at pp. 423-424; see also *Ewoldt*, at 402, quoting 2 Wigmore, Evidence (Chadbourn rev. ed. 1978), § 304, p. 249, italics omitted.) The solicitations reported by Billingsley and Gentry fall far short of meeting that standard. Neither the testimony of Billingsley nor that of Gentry established that appellant had stolen anything, robbed anyone or even contemplated carrying a weapon, let alone that he had killed anyone. The uncharged crimes bore no "similarity in the results" to the charged crimes, in which two people were shot to death at close range and money was taken from the cash register.

Nor did the crimes which appellant reportedly proposed have features in common with the charged crimes, other than that they involved some kind of theft. They were not similar in terms of location, victim, plan or method of perpetration. In proposing the theft of the bowling alley's bank deposit, appellant did not mention carrying a weapon, shooting or killing anyone or exerting any other force. (13 RT 4611.) In inviting Gentry to participate in a "hold-up," appellant did not tell Gentry what person or business he intended to rob and made no mention of being armed or of shooting or killing anyone. (16 RT 5742.) Neither of the proposed offenses involved stealing the cash out of the cash register, robbing a bar or bartender, using a gun, shooting, killing or being prepared to do either. Both alleged solicitations contemplated crimes in which appellant would have had a crime partner, Billingsley or Gentry, acting as the driver, rather than acting alone, as the prosecution's evidence indicated about the charged offenses. Neither of the proposed crimes was similar enough to the charged

offenses to show anything about what acts were committed at The Office. The only relevance of the evidence was to show appellant's propensity to commit robbery.

The evidence of uncharged misconduct here bore far less similarity to the charged offenses than that which this Court has previously found admissible as evidence of common plan or design. For example, in *Ewoldt*, both the charged crimes and uncharged acts involved molestations of the defendant's stepdaughters, committed in almost identical fashion, and when discovered, defendant proffered similar excuses. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.) In *Balcom*, in both the charged and uncharged crimes, the perpetrator was wearing dark clothing and a cap, went to an apartment complex in the early morning, sought out a lone woman, gained control over her at gunpoint, at first claimed it was a robbery, then forcibly removed her clothes, committed a single act of rape, stole the victim's ATM card and then escaped in the victim's car. (*People v. Balcom*, *supra*, 7 Cal.4th at p. 424.) In *People v. Kipp* (1998) 18 Cal.4th 349, both the charged offense and the uncharged offense were rape murders in which the perpetrator strangled a 19-year-old woman in one location, carried the victim's body to an enclosed area belonging to the victim and covered the body with bedding; both victims were found with a garment on the upper body, the breasts and genital area were unclothed, the clothes had not been torn, and both victims had been bruised on the legs. (*Id.* at p. 370.) *People v. Prince* (2007) 40 Cal.4th 1179, involved an uncharged incident in which the defendant followed the witness home from the store and stared at her from bottom of staircase to her apartment; the witness and the victims of the six charged murders were all of the same age, race and gender as the witness, two of the victims lived in her apartment complex and several of

them had been stalked and killed in similar fashion. (*Id.* at pp. 1271-1272.) In *People v. Catlin* (2001) 26 Cal.4th 81, evidence of the uncharged murder of defendant's fifth wife was admissible at his trial for murdering his mother and fourth wife, where each victim was a close relative of the defendant, the defendant stood to gain financially from each death, and there was evidence that each victim had died from paraquat poisoning, having been healthy before suffering flu-like symptoms followed by respiratory collapse. (*Id.* at pp. 111-112.)

In appellant's case, by contrast, the only aspect of the crimes described in the solicitations that was arguably similar to the charged offense was that robbery was contemplated. None of the other circumstances were similar. Even if there had been a dispute as to what acts were committed in the charged offense, the solicitations would have done nothing to resolve it. Assuming arguendo that the solicitations showed that appellant had been planning to commit a robbery, the evidence nevertheless shed no light on the question of what had occurred at The Office on June 20, 1993, which is the only legitimate purpose of plan or design evidence. The only logical inference that the jury could have drawn from the evidence of the uncharged crimes in this case was that appellant had a propensity to commit robbery and that therefore he was more likely to have been the perpetrator of the charged offenses. That is precisely the use for which evidence prior uncharged misconduct is prohibited: i.e., to show the defendant's criminal disposition. (Evid. Code, §1101, subd. (b).)[65]

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[65] Because the jury was instructed that the evidence could be considered only for the limited purpose of scheme or plan, whether it could have been admitted for any other purpose is irrelevant. As this Court stated (continued...)

Even if this Court should find that the solicitations were relevant, the probative value of the evidence was at best scant and was far outweighed by its prejudicial effect. As this Court has recognized, evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) The primary focus of this careful analysis is to determine precisely the actual relevance of the proffered evidence, to ensure that the evidence is not offered to prove character or propensity and to determine whether its practical value outweighs the danger that the jury will nevertheless use it as evidence of criminal propensity. In conducting this analysis under Evidence Code section 352, the trial court must consider five factors: (1) whether the evidence of uncharged misconduct is material, i.e., the tendency of the evidence to demonstrate the issue for which it is being offered; (2) the extent to which the source of the evidence is independent of the evidence of the charged offense; (3) whether the defendant was punished for the uncharged misconduct; (4) whether the uncharged misconduct is more inflammatory than the charged offense; and (5) the remoteness in time of the uncharged misconduct. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.)

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[65] (...continued)
in *Ewoldt*,

> We need not, and do not, consider whether the evidence of defendant's uncharged misconduct was admissible to establish defendant's intent as to the single charge of annoying or molesting a child, because the evidence was not admitted for that limited purpose and the jury was not instructed to consider the evidence only as to that charge.

(*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 406-407.)

For the reasons set forth above, the materiality of the evidence was minimal at best. If relevant at all, it was "merely cumulative regarding an issue that was not reasonably subject to dispute." (*Id.* at pp. 405-406) As this Court observed in *Ewoldt*,

> in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.

(*Id.* at p. 406.)

This is precisely the situation here. The evidence that the cash was missing from the cash register and that the bartender and her associate had been shot twice in the head at close range was uncontroverted, and defense counsel conceded that both the murders and the robbery were "committed by someone." (17 RT 5774.) There was no dispute as to what acts had been committed. As defense counsel stated, the only real question for the jury was whether the defendant was the perpetrator. (17 RT 5776, 5778.) The trial court properly found that the solicitations were not sufficiently similar to the charged offense to be admissible for identity. (17 RT 5792.) The solicitations and the charged crimes shared no unusual or distinctive characteristics. (Cf. *People v. Balcom*, *supra*, 7 Cal.4th at p. 424 [presence

of unusual or distinctive characteristics increases probative value of evidence of common design or plan].) The uncharged misconduct evidence at issue was exactly the kind of evidence that this Court in *Ewoldt* found would be cumulative and more prejudicial than probative.

Nor was the source of the solicitation evidence independent of the evidence of the charged offense. In *Ewoldt*, the Court explained:

> if a witness to the uncharged offense provided a detailed report of that incident without being aware of the circumstances of the charged offense, the risk that the witness's account may have been influenced by knowledge of the charged offense would be eliminated and the probative value of the evidence would be enhanced

(*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Here, both Billingsley and Gentry knew about the charges against appellant before they reported the alleged solicitations. Billingsley did not report his alleged solicitation to law enforcement until he had testified at appellant's trial and had become annoyed at defense counsel's cross-examination. (13 RT 4597-4600.)[66] Gentry testified that he and Billingsley had discussed the subject, but only after the murders at The Office had occurred. (16 RT 5727.) Like Billingsley, Gentry did not report appellant's solicitation to law enforcement until the middle of appellant's trial. (16 RT 5727.) Thus, both Gentry and Billingsley necessarily knew that appellant was being prosecuted for the killings at The Office before they reported the solicitations to anyone in a position of authority. Both men also testified

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[66] Billingsley testified that he had never reported the alleged solicitation to anyone, not even his wife. (13 RT 4605.) He later contradicted himself and stated that, at some time prior to his conversation with the prosecutor on the subject, he and Gentry had told each other about appellant's alleged solicitations. (17 RT 6059-6060.)

regarding other matters directly relevant to the charged killings: Billingsley identified the gun in evidence as one that he had borrowed from appellant for a camping trip (13 RT 4566-4567), corroborated other evidence that appellant had spent the night and left the gun at the Billingsley's house the weekend before the killings (13 RT 4570-4573) and testified that he had returned the gun to appellant a few days before the killings (13 RT 4574-4575). Gentry identified the gun in evidence as one that appellant had acquired in 1992 and had shown him at that time. (17 RT 5829-5832.) Thus, both Billingsley's and Gentry's testimony regarding the solicitations may well have been influenced by their respective beliefs about appellant's involvement in the charged offenses. The evidence of the solicitations was not independent of the evidence of the charged offenses, and its probative value was accordingly diminished.

Further, because appellant had not been charged with or punished for the solicitations, there was a risk that the jury would be inclined to punish him for those uncharged offenses, whether or not it considered him guilty of the charged offenses. There was also a likelihood of confusion of issues (Evid. Code, § 352) because the jury had to determine whether the uncharged offenses had occurred. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

Given that the evidence resolved no factual dispute and was at best cumulative of other evidence, the probative value of the solicitation evidence was far outweighed by its prejudicial effect. Although the jury was instructed that the evidence could be considered only as evidence of scheme or plan, the evidence revealed nothing about the charged crimes except that appellant had a criminal disposition and a propensity to commit robbery. In admitting the evidence, the trial court abused its discretion.

(See *People v. Ashmus*, *supra*, 54 Cal.3d 932, 973.)

### C. The Erroneous Admission of the Solicitations Resulted in a Miscarriage of Justice That Requires Reversal of Appellant's Convictions and Death Sentence

As set forth above (see Argument I.E, *ante*), a close look at the record on appeal reveals that the admissible evidence which actually connected appellant to the charged crimes was not as strong as might appear at first glance. The prosecution obscured the gaps and inconsistencies in its case by showering the jury with evidence of appellant's bad character and criminal propensity. Evidence that appellant solicited Billingsley and Gentry to participate in other robberies was relevant to nothing other than appellant's propensity to commit robbery. Although the prosecutor gave lip service to the prohibition against considering this evidence as an indication of appellant's bad character (22 RT 7349), it was precisely that inference which the jury must have drawn from it. The effect of the evidence was to distract the jury from the weaknesses in the prosecution's case and persuade them that because appellant was, as the prosecutor argued, a "professional criminal" (22 RT 7336), he must have committed the crimes charged.

The importance of the solicitations to the prosecution's ability to obtain the convictions in this case is reflected in the fact that the prosecutor made numerous references to them in closing argument. (See, e.g., 22 RT 7347-7351, 7560-7562; 23 RT 7592-7595, 7598-7599.) Indeed, the solicitations were two of the enumerated reasons for which he argued the jury should find appellant guilty. (22 RT 7347-7351.) Whether considered in isolation or together with the other evidentiary errors which occurred at the guilt phase of appellant's trial, the erroneous admission of evidence of

the solicitations certainly was a contributing cause of the guilt verdicts against appellant. The prosecutor also relied on the solicitations in arguing for a death verdict at the penalty phase. (25 RT 8380-8381.) Individually and in combination with the other numerous items of improperly admitted evidence that had a similar effect, there is no question that the solicitation evidence contributed to both the verdicts of guilt and penalty. Under the standard applicable to errors of state law, reversal is required. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

### D. The Error Rendered Appellant's Trial Fundamentally Unfair in Violation of the Due Process Clause of the Fourteenth Amendment

The erroneous admission of the evidence of uncharged solicitations to commit robbery also violated appellant's right to a fair trial under the Due Process clause of the Fourteenth Amendment to the United States Constitution.[67] Under the authorities set forth above (see Argument II, D, *ante*), the admission of irrelevant and inflammatory evidence may so infect the trial with unfairness that due process is violated. The factors which, in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, led the Ninth Circuit to

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[67] Appellant's federal constitutional claim was preserved below. As set forth above (see fn. 37, *ante*), the trial court granted appellant's request to deem all of his objections under state statute to have been made on constitutional grounds as well. (1 RT 1018; 2 CT 308-310.) Moreover, his objections based on Evidence Code sections 352 and 1101 also preserved those claims. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [defendant's trial objection under sections 352 and 1101 preserved both a due process claim and an Eighth Amendment reliability claim regarding the admission of evidence of prior cohabitant abuse]; *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [defendant's trial objection under section 352 rendered cognizable on appeal his claim that admission of gang evidence violated his due process rights].)

find that the admission of other crimes evidence violated due process are also present here. The first *McKinney* factor – that the prosecution's case against the defendant was solely circumstantial – is true of appellant's case. The evidence was not only entirely circumstantial, but as shown above (see Argument I.E, *ante*), the admissible evidence left room for reasonable doubt as to appellant's guilt.

The second *McKinney* factor – that the uncharged crimes were similar to the charged one – also supports the conclusion that the admission of the evidence deprived appellant of a fair trial, as both the uncharged crimes and the charged offenses involved robbery.

As to the third *McKinney* factor, the prosecutor relied on the evidence of uncharged solicitations as a significant part of his case-in-chief and as a focus of his argument to the jury. (See section C, *ante*.)

As to the fourth *McKinney* factor, it is likely that the solicitations evidence provoked an emotional response such as the urge to punish appellant for crimes which had previously gone undetected. The effect of admitting it was to impair the jury's ability to properly assess the relative weakness of the remaining evidence. The evidence therefore unfairly bolstered the prosecution's case. Indeed, it is because other crimes evidence amounts to character or propensity evidence that can lead jurors to convict despite a lack of sufficient proof of guilt – either because they decide that the defendant is the type to commit such crimes, or because they want to punish him for the other crimes – that such evidence has historically been held inadmissible in criminal trials. (See, e.g., 1A Wigmore, Evidence (Tillers rev. ed. 1983) § 58.2, p. 1215.)

Furthermore, all of the factors discussed in Section C, *ante*, that made the error a miscarriage of justice also made it a due process violation.

Viewed in context, the evidence of the solicitations tainted appellant's trial and rendered it fundamentally unfair. As set forth above (see Argument II.D, *ante*), such error cannot be deemed harmless, and appellant need not make any further showing of prejudice. However, even if the federal harmless error test applies to such due process violations, the state cannot show that the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24. Appellant's convictions and death sentence must be reversed.

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## IV

## THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S STATEMENTS AS A GUEST SPEAKER AT THE MEETINGS OF ROBBERY INVESTIGATORS

Five or six months before the murders, appellant was an invited speaker at two gatherings of law enforcement investigators and private security agents, after he had agreed to be interviewed about his experiences as a robber in the 1978 crimes for which he had been sent to prison in 1979. At both gatherings, he was asked what he would have done or what he would do if, during a robbery, someone resisted or interfered. At one of the events, appellant responded that he "would be 'willing to take them out'" (16 RT 5689) or he "would take somebody out" (17 RT 5812, 5819). At the other event, he responded that "would blow the person away." (16 RT 5715; 17 RT 5865.) This highly inflammatory evidence bore no logical relevance to any material fact in dispute at appellant's trial. Even if of some relevance, its prejudicial effect far outweighed its probative value, which was minimal. The admission of this evidence was an abuse of the trial court's discretion which resulted in a miscarriage of justice and rendered appellant's trial fundamentally unfair. (Cal. Const., art. I, §§ 7, 15, 17; U.S. Const., 14th Amend.)

### A. The Trial Court Admitted Evidence of Appellant's Statements to Two Groups of Investigators Regarding His Past Experience As a Robber

Prior to trial, defense counsel filed a motion in limine seeking exclusion of the above-described evidence, the general nature of which had been disclosed in pre-trial discovery. (2 CT 431-432.8.) Appellant objected that the evidence was hearsay, irrelevant and more prejudicial than

probative pursuant to Evidence Code section 352. (2 CT 431-432.4.) At a hearing held outside the presence of the jury, Sergeant Voudouris testified that, in the fall of 1992, he took part in a panel interview of appellant and other ex-offenders, facilitated by appellant's parole officer. (16 RT 5682-5685.) In the interview, appellant talked about the 1978 robberies and rapes for which he was incarcerated in 1979. (16 RT 5685.) A week or ten days later, Voudouris, together with appellant's parole officer, visited appellant at McKenry's dry cleaners, where appellant worked. (16 RT 5685.) Again they talked about the 1978 crimes for which appellant was sent to prison in 1979. (16 RT 5685-5686.) During that conversation, Voudouris asked appellant if he would be willing to come talk to a group of investigators about what he had done. (16 RT 5687.) Voudouris told appellant that if he did well and impressed the people in attendance, he might be able to make some money in the future as a consultant or advisor. (16 RT 5696-5697.) At first, appellant said no, but later, he contacted Voudouris and agreed "to be interviewed relative to what he had done in the past" (16 RT 5687); the understanding was that he would be asked questions "relative to his priors." (16 RT 5698.)

Appellant spoke at the seminar for robbery investigators in January or February, 1993. (16 RT 5687-5688, 5699.) On direct examination of Voudouris at the hearing, the prosecutor elicited the following testimony:

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| Prosecutor: | Do you remember specifically Mr. Case being asked a question about committing robberies and if he faced any resistance or anyone interfered with that, what he would do? |
| Voudouris | Yeah. He replied something to the effect that he would be "willing to take them out." |

(16 RT 5689.) Voudouris did not take notes and did not remember who asked the question, the form of the question, or precisely what appellant said in response. (16 RT 5701-5703.)

About four to six weeks after the seminar, appellant spoke at the luncheon for robbery investigators and private security officers held in a Mexican restaurant. (16 RT 5690, 5713, 5717.) There, appellant gave a presentation about his experiences concerning robberies. (16 RT 5713-5715.) The prosecutor elicited the following testimony from Brian Curley:

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|---|---|
| Prosecutor: | And do you recall the question being asked of Mr. Case concerning, quote, if you were committing a robbery and someone resisted, what would you do, closed quote? |
| Curley: | Yes, I do |
| Prosecutor: | What did he say? |
| Curley: | His response back to the question was that he would blow them away. . . . That's almost verbatim, the best I can recall. |

(16 RT 5715.) On cross-examination, Curley corrected the syntax of the question that had been posed to appellant:

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|---|---|
| Defense counsel: | And do you recall the actual question that was asked? |
| Curley: | As I recall, the question was that in situations in the course of a robbery, if you encountered someone who resisted you, what would you have done? |
| Defense counsel: | Okay. So that was – that was talking about what he would have done in the past; is that correct? |
| Curley: | That was the nature of the question, yes. |

| | |
|---|---|
| Defense counsel: | He wasn't talking about what he would do in the future, then, was he? |
| Curley: | No. That was – the question was what had you done? We weren't talking about future events. |

(16 RT 5720.) Curley did not take notes, he did not recall who asked the question and, until he got a letter from the Sheriff's Department asking about the luncheon, he did not remember appellant's name. (16 RT 5718-5720.) The letter that Curley received from the Sheriff's Department was sent shortly after appellant's arrest for the murders at The Office; it named appellant, stated that he had been a guest speaker at the luncheon, that he had since been arrested for a double robbery-homicide and that he had made the statement at issue. The letter stated:

> It is my understanding from Robbery Investigators from this Department that someone asked Case what he would do if someone resisted his robbery attempt, and that his reply was that he would "blow them away." . . . We are attempting to find out who asked this question and/or heard his reply well enough to give us a report on his statement. This may help our case by establishing his frame of mind.

(24 CT 7135; 16 RT 5719.)

The prosecutor argued that appellant's statements were relevant to his "intent and his motive and his preparation and deliberation towards doing the robbery" (16 RT 5748), that they were admissible as statements of a defendant pursuant to Evidence Code section 1220 and that they indicated appellant's "present state of mind as to a future act." (17 RT 5771.)

The trial court ruled that the evidence was admissible:

> First, regarding the statements made to Detective Voudouris and Brian Curley. [¶] Specifically, as Detective Voudouris testified, the defendant was asked about his willingness to use force. His response was he would use whatever force it took.

> He would be willing to take them out. [¶] And the statement by Mr. Curley, which accounted Mr. Case's response to the question of what he would do if during a robbery the victims resisted, the response was he would blow them away. [¶] It appears that these are statements under 1270 of the – 1250 of the Evidence Code, and they reflect an existing state of mind. It doesn't appear that these statements were directed to what the defendant did or had done in the past had he encountered the situation where the victims resisted or how much force he was prepared to use during the prior robberies. [¶] From the testimony, it appears that they were speaking of what he would do if, in a robbery, he encountered resistance.

(17 RT 5785.) The court indicated that if the evidence qualified for admission pursuant to Evidence Code section 1250, it would be relevant to show appellant's state of mind at a later time. (17 RT 5785.) Quoting extensively from this Court's decision in *People v. Karis* (1988) 46 Cal.3d 612 (17 RT 5786), the court admitted appellant's statements, finding that they constituted "a generic threat which unfortunately came to pass." (17 RT 5787.)

The trial court also found the statements admissible notwithstanding Evidence Code section 352. (17 RT 5788-5791.) The court's stated rationale for this ruling is interwoven with its discussion of appellant's purported solicitations of Billy Joe Gentry and Greg Billingsley. Referring to all of these statements, the court stated:

> These statements taken in context with the real state of the evidence, which is going to be admitted and some of which has already been presented to the jury, take on a new and different meaning. For example, the testimony of Mary Webster that while the defendant lived with her, he said he was a robber, purchased disguises, tattoos, would wear bulky clothing in order to thwart an identification, purchased Nu-Skin so that fingerprints would not be left during a robbery. [¶] The testimony of Jeri [*sic*] Baker, the defendant said he

> felt compelled to commit a robbery, would leave no witnesses, all of this tends to prove that the defendant intended to commit a robbery and intended to avoid apprehension when he did it. [¶] This robbery of The Office was apparently not the result of a sudden impulse, but was the result of planning engaged in by the defendant, a great deal of deliberation. And while the target of the robbery, The Office may be something that was decided on the spur of the moment, the idea of doing a robbery, it appears it's something that was present in Mr. Case's mind for a long time. And it was an idea that finally culminated in the act which took place on the 20th of June 1993. They are also admissible to show that this is a design or plan that the defendant had begun to think about early on and had done his best to put together until he finally succeeded in doing so by this evidence here, if the jury believes it. [¶] The question under 352, is the evidence of the solicitation to Billy Joe Gentry and Greg Billingsley so prejudicial that it should not be admitted and it outweighs the probative value, and the same would hold true for the testimony of Detective Voudouris and Brian Curley. [¶] And here, this evidence, the Court finds is highly probative. And that the probative value of it outweighs any possible prejudice that might be drawn from it. The Court would therefore allow the evidence to be presented.

(17 RT 5789-5791.)

When Voudouris testified before the jury, he stated that at the meeting of investigators in downtown Sacramento, appellant was asked a question "similar to what would you do if you met with resistance during a robbery? And the response was I would take somebody out." (17 RT 5812.) On cross-examination, Voudouris stated that the question was *not* "assuming that you are doing a robbery down the road here and you ran into resistance what would you do?"; the question concerned "what he would have done in the past had there been resistance." (17 RT 5819.) On redirect examination, he added that he did not recall specifically that either

the question or the answer was expressly qualified so that it referred only to the past. (17 RT 5820-5821.)

Curley testified before the jury that at the investigators' luncheon, appellant was asked "During the question and answer period, was a question asked, quote, if you were committing a robbery and if somebody resisted, what would you do?" Curley answered that something "very similar" to that was asked. (17 RT 5864.) He stated that appellant's answer was "that he would blow the person away." On cross-examination, Curley stated that the question posed of appellant was actually, "if in the course of a robbery, someone resisted you, what would you *have done*?" (17 RT 5868.) He made clear that appellant was not talking about what he would do in the future. (17 RT 5869-5870.)

No limiting instruction was given at the time of the testimony on this subject, but the instructions given to the jury just prior to guilt phase deliberations included the following:

> Evidence was also admitted relating to defendant's statements on two occasions, to law enforcement officers and private security personnel, regarding what defendant would do, or would have done, if he met with resistance during a robbery. [¶] Reference to his reaction to a certain situation, that might occur during a robbery may be considered by you on the issue of the existence of a specific intent or mental state which is a necessary element of the crimes charged. This evidence would be relevant and admissible regarding defendant's mental state or intent or premeditation and deliberation. None of the evidence is admissible to show defendant's bad character or disposition to commit crime. . . . [¶] At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all the other evidence

in the case. [¶] Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

(2 CT 514-516; 23 RT 7615-7617.)

### B. Appellant's Statements to Robbery Investigators Were Irrelevant to Any Material Disputed Fact

In order to be admissible, evidence must be relevant. (Evid. Code, § 350.) The general test of relevancy of indirect evidence is "whether it tends logically, naturally and by reasonable inference to prove or disprove a material issue." (*People v Jones* (1954) 42 Cal.2d 219, 222.) Purely speculative inferences are impermissible. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Whether considered as falling within the hearsay exceptions provided by Evidence Code section 1220[68] or 1250,[69] appellant's

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[68] Evidence Code section 1220 provides:

Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

[69] Evidence Code section 1250 provides:

(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts

(continued...)

statements about what he would have done in a hypothetical robbery in the past were inadmissible because they were not relevant to any disputed fact of consequence. (Evid. Code, § 210.) The trial court found that the evidence showed appellant's state of mind at the time of the statements and constituted a "generic threat." (17 RT 5787. ) The trial court's holding was erroneous because: (1) the statements did not constitute a threat of any kind or reflect even a conditional intention to commit any act in the future; (2) the victims of the shooting at The Office did not come within the scope of the purported "threat;" (3) the statements, reflecting appellant's state of mind 15 years before the charged crimes, were too stale to constitute a threat or otherwise have probative value; and (4) even if envisioning future conduct or reflecting appellant's state of mind when he spoke at the meetings of robbery investigators, the statements were not relevant to any disputed material fact.

This Court has held that in a murder prosecution, evidence that the defendant stated a generic threat is admissible to show "the defendant's homicidal intent where other evidence brings the actual victim within the scope of the threat." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 757.) This holding was based on the principle that such a threat "[tends] to show a design or intent to kill members of a class of persons under certain circumstances." (*Ibid.*) As stated by Wigmore, "the presence of a design or plan to do or not do a given act has probative value to show that the act was

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[69] (...continued)

or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out." (1A Wigmore, Evidence (Tillers ed. 1983), § 102.) The intention, design or plan to do an act tends to prove that the act was accomplished. (*Id.* at § 103.)[70]

In *People v. Karis*, *supra*, 46 Cal.3d at pp. 636-637, this Court applied the "generic threats" doctrine of *Rodriguez* to a statement by the defendant which was hypothetical in nature.[71] However, the Court recognized that admitting a defendant's hypothetical statements may violate the prohibition against evidence of propensity to commit criminal acts pursuant to Evidence Code section 1101. (*Id.* at p. 636.) Whether analyzed pursuant to section 1220 or 1250, the Court's admonition about proceeding with caution in analyzing a defendant's non-specific threats applies to the

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[70] Wigmore distinguishes the term "intent," meaning the mental state element of a particular crime, from "intention" to do a particular act, which he equates with design or plan. (1A Wigmore, *supra*, § 103.) Courts often use the term "intent" when the intended meaning is what Wigmore would call "intention," design or plan. The conceptual distinction is codified in Evidence Code section 1250(a)(1) (evidence of a state of mind at the time of the declaration, offered to show to a state of mind which "is itself an issue in the case," i.e., "intent") and 1250(a)(2) (evidence of state of mind at the time of the declaration, "offered to prove or explain acts or conduct of the declarant," i.e., "intention").

[71] In *Karis*, the Court found the defendant's statement admissible pursuant to Evidence Code section 1250, governing statements of the declarant's existing state of mind. In *Rodriguez*, the specific hearsay exception under which the evidence was admitted was not discussed. Pursuant to Evidence Code section 1220, evidence of a defendant's statement, offered into evidence by the prosecution, is not barred by the hearsay rule. However, it must also be relevant to be admissible. (*People v. Lewis* (2008) 43 Cal.4th 415, 529.) Whether the statement at issue is considered under section 1250 or 1220, the principles of relevancy discussed here apply.

question of relevance in this case:

> Evidence of a defendant's statement regarding possible future criminal conduct in a hypothetical situation has at least as great potential for prejudice in suggesting a propensity to commit crime as evidence of other crimes. Therefore, the content of and circumstances in which such statements are made must be carefully examined both in determining whether the statements fall within the state-of-mind exception, as circumstantial evidence that defendant acted in accordance with his stated intent, and in assessing whether the probative value of the evidence outweighs that potential prejudicial effect.

(*People v. Karis*, *supra*, 46 Cal.3d at p. 636; see also *People v. Lew* (1968) 68 Cal.2d 774, 779 [where evidence of threatened violence is involved, "a careful examination of the precise issues to which the threats might be relevant" is required].)

First, the trial court erred in finding the evidence to constitute a generic threat. Carefully examining the testimony of Curley and Voudouris, appellant's statements cannot be fairly characterized as "threats" or statements of an intention to commit future criminal conduct even in a hypothetical situation. At the foundational hearing, Voudouris stated very plainly that when appellant spoke to the investigators, the understanding was that he would be interviewed "relative to what he had done in the past" (16 RT 5687) and that he would be asked "questions relative to his priors" (16 RT 5698) or "his past record" (16 RT 5702), the crimes that he had committed in 1978 and before. Curley testified that at the robbery luncheon, appellant was presented as a reformed ex-convict, someone who, after a life of incarceration, "had turned the corner and now was wanting to explain what caused him to do that." (16 RT 5718.) Both Voudouris and Curley clearly stated that appellant gave no indication of an intention to

commit any further robberies. (16 RT 5702, 5704, 5717-5718.)

However, both at the foundational hearing and before the jury, the prosecutor framed his questions of Voudouris and Curley in the present tense, virtually forcing both witnesses to characterize appellant's statements as made in the present conditional rather than in the past conditional tense. For example, at the foundational hearing, the prosecutor asked Voudouris, "Do you remember specifically Mr. Case being asked a question about committing robberies and if he faced any resistance or anyone interfered with that, *what he would do*?" (16 RT 5689, italics added.) Voudouris responded that he did not remember precisely what the question was or what appellant had said in response, and thereby avoided clarifying the syntax. (16 RT 5702, 5703.) He later clarified that the focus of the question posed to appellant was what he would have done in the past:

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| Defense counsel: | So the question wasn't, well, Mr. Case, assuming that you are doing a robbery down the road here and you ran into resistance, what would you do? That wasn't the question, was it? |
| Voudouris: | No. |
| Defense counsel: | Mr. Case was relating to what he would have done in the past had there been resistance? |
| Voudouris: | Correct. |

(17RT 5819.)

Also at the foundational hearing, the prosecutor asked Curley, "do you recall the question being asked of Mr. Case concerning, quote, if you were committing a robbery and someone resisted, what would you do,

closed quote?" (16 RT 5715.)[72] When appellant's counsel asked a more open-ended question – i.e., "do you recall the actual question that was asked" – Curley stated unequivocally that the question posed of appellant had been, "if you encountered someone who resisted you, *what would you have done?*" (16 RT 5720.) Curley then clarified further that they "weren't talking about future events," but were talking about what appellant would have done when committing robberies in the past. (16 RT 5720) Despite the prosecutor's attempts to adjust the temporal framework of appellant's purported statements, the testimony of both Curley and Voudouris shows clearly that at both events, appellant was hypothesizing about what he would have done in the past, not what he contemplated doing in the future. The trial court's finding to the contrary (17 RT 5787) was not supported by substantial evidence.

Appellant's statements did not contemplate any future action, hypothetical or otherwise. As such, they were materially distinct from the kind of evidence which has been held admissible under the rubric of "generic threats." In *Karis*, *supra*, 46 Cal.3d at p. 634, the defendant stated "that he would not hesitate to eliminate witnesses if he committed a crime." In *People v. Lang* (1989) 49 Cal.3d 991, 1013-1016, a witness testified that he asked the defendant why he carried a gun; the defendant pointed the weapon at him and replied, "'I'll waste any mother fucker that screws with me.'" In *Rodriguez*, *supra*, 42 Cal.3d at p. 756, the defendant had been heard to "express contempt and hatred for police and declare that he would kill any officer who attempted to arrest him." In *People v. Thompson*

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[72] The prosecutor was apparently quoting from the letter which detective Edwards had written to those who attended the luncheon. (24 CT 7135.)

(1988) 45 Cal.3d 86, 109-110, the defendant said "he would kill anyone who got in the way of his plan."

In each of the above cases, the statement at issue, even if conditional, contemplated some future action on the part of the defendant. The statements attributed to appellant by Voudouris and Curley did not. As set forth above, both Curley and Voudouris stated clearly that appellant gave no impression that he intended to commit any further robberies and presented himself as a reformed former criminal. Had the statements at issue been stated in terms that contemplated the possibility that appellant might commit a robbery again, those witnesses would not have so testified. In the context of talking about crimes committed years earlier, the defendant's statements cannot fairly be characterized as threats or as "statement[s] regarding possible future criminal conduct in a hypothetical situation." (*People v. Karis*, *supra*, 46 Cal.3d at p. 636.)

Second, appellant's statements were not admissible because the victims in this case, Manuel and Tudor, did not belong to the category of individuals which were the subject of the purported threats. Appellant's reported statements concerned what he would have done if he had encountered resistance during a robbery. There was no evidence that Manuel or Tudor had resisted the robbery at The Office. The autopsies revealed no defensive wounds on their bodies. (12 RT 4408, 4438.) Indeed, the prosecutor argued that there was no resistance. (11 RT 4154.) Thus, the evidence did not bring the actual victims within the scope of the "threat," to the extent that any threat was stated, and this case stands in sharp contrast to decisions in which the defendant's statements were admitted as such. (See, e.g., *People v. Lang*, *supra*, 49 Cal.3d at pp. 1013-1016 [evidence of defendant's statement, "I'll waste any mother fucker that

screws with me" was admissible where defendant had introduced evidence that murder victim made a sexual advance and made gestures toward defendant with a rifle]; *People v Rodriguez*, *supra*, 42 Cal.3d at p. 756 [evidence that appellant had expressed contempt and hatred for police and stated that he would kill any officer who attempted to arrest him found relevant at trial for murder of two highway patrol officers]; *People v. Wilt* (1916) 173 Cal. 477, 481-483 [evidence that defendant had said, "I will get my revenge on that bunch" found relevant where the victim was in the presence of a man who had been a member of the "bunch" to which the defendant had referred].)

Third, because appellant's statements concerned his state of mind 15 years earlier, when he committed the crimes for which he was sent to prison in 1979, they were inadmissible on remoteness grounds. Where "the circumstances in which the statements were made, the lapse of time, or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged crime," the statements are inadmissible. (*People v. Karis*, *supra*, 46 Cal.3d at p. 637.) As stated above, appellant spoke to the investigators as an ex-offender. In talking at the gatherings of robbery investigators, he was describing his state of mind at the time of his prior offenses. He gave no indication that he was presently contemplating future criminal conduct or that he continued to harbor the same state of mind.

Lastly, even if appellant's statements had contemplated some future conduct or reflected his present state of mind, they nevertheless were inadmissible because they were not relevant to any material fact in dispute. The prosecutor argued that they were relevant to motive, intent or "preparation and deliberation towards doing the robbery." (16 RT 5748.)

However, the statements do not suggest any motive for robbery. At most, the statements might have been relevant to show that the motive for killing was to overcome resistance to the robbery. However, that motive was irrelevant for the same reason that the Manuel and Tudor did not come within the scope of the threat: the evidence indicated that they did not resist the robbery. Nor was the evidence relevant to intention, preparation or deliberation to commit robbery. As noted above, both Curley and Voudouris stated appellant said nothing to indicate he was planning to commit another robbery. (17 RT 5823, 5870.) If the statements at issue had reasonably been susceptible of such an inference, Curley and Voudouris would not have so testified.

Appellant's record as a robber predated his arrest in 1978. His retrospective speculation when asked at both the luncheon and the seminar about what he would have done if he had faced resistance to a robbery had no bearing on the disputed factual issues in the present case. Appellant's statements did not contemplate any future action on his part, even conditionally. The statements addressed a hypothetical scenario in which the victims resisted a robbery, which, as the prosecutor conceded, is *not* what occurred in this case. The statements concerned appellant's state of mind 15 years earlier. For these reasons, the statements were not relevant to any material fact in dispute, and the only use to which the jury could have put them was as evidence that appellant had a propensity to kill. As such, evidence of the statements was barred by Evidence Code section 1101, subdivision (a).[73] (See *People v. Karis*, *supra*, 46 Cal.3d at p. 636 [if

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[73] Evidence Code section 1101, subdivision (a), provides:

(continued...)

defendant's statement regarding possible future criminal conduct does not fit the relevancy criteria for statements of state of mind, its admission violates section 1101]; cf. *People v. Lang*, *supra*, 49 Cal.3d at pp. 1015-1016 [because the defendant's statement, "I'll waste any mother fucker that screws with me," was relevant to his intent to kill anyone who interfered with him or thwarted his desires or plans, it was not barred by section 1101]; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 756-757 [evidence of defendant's statements did not violate section 1101 because it showed future intent to kill any police officer who arrested him].) In admitting the evidence, the trial court abused its discretion.

### C. The Evidence of Appellant's Statements to the Robbery Investigators Was More Prejudicial than Probative

For the reasons that appellant's purported statements to the robbery investigators were irrelevant, their probative value was weak and was outweighed by the risk of prejudice. (Evid. Code, § 352.) Even if found to be relevant to intent to kill, the statements were cumulative of other evidence. As defense counsel conceded, the circumstances surrounded the killings themselves established intent to kill. (17 RT 5776.) Furthermore, at the time the court admitted the statements at issue, it had already found

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[73] (...continued)

> 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.

admissible appellant's statement to Baker indicating that if he committed another robbery, he would kill any witnesses. (11 RT 4040-4041.) Therefore, appellant's statements were of minimal or no probative value in this case.

On the other hand, the prejudicial effect of the evidence was enormous. It is difficult to imagine anything more inflammatory in a prosecution for robbery-murder than evidence that the defendant was invited by a body of law enforcement officers to address them in the manner of an expert in committing robberies, and then told those officers that when committing a robbery, he would have killed anyone who resisted. If probative of anything, the evidence was probative of a propensity to commit murder; it suggested that appellant was the type of person who would not hesitate to kill in order to accomplish a robbery.

> "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."

(*People v. Karis*, *supra*, 46 Cal.3d at p. 638, quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) The evidence here at issue is precisely the type of evidence described: it was extremely likely to elicit in the jury an emotional response, to cause them to dislike appellant, to fear him, to brand him as a person of bad character and view him as "a dangerous person, more likely than others to have committed the present offenses." (*People v. Thompson*, *supra*, 45 Cal.3d at p. 109 [stating that this is the risk of admitting evidence that the defendant planned other crimes, even if there's no evidence that he committed them].) It invited the jury to believe that because appellant committed robberies in the past and would have killed anyone who resisted then, he did so in this case. It was impermissible

propensity evidence.

In finding that the probative value outweighed the prejudicial effect, the trial court found that appellant had been planning to commit a robbery and avoid apprehension for it, and that in light of that, the statements took on "a new and different meaning." (17 RT 5789-5790.) The court relied on Webster's testimony that appellant told her how to use disguises and Nu-Skin to thwart identification. (17 RT 5790.) However, there was no evidence that Nu-skin or any disguise was used in the crimes committed at The Office. Thus, if the evidence suggested that appellant was planning a crime, it was not the crime involved in the present case. Moreover, even if there was other evidence that appellant had been planning a robbery, that evidence did not change the nature of the statements that he reportedly made to the robbery investigators several months before the crimes. The fact remains that Curley and Voudouris stated unequivocally that appellant made no statements suggesting he was even considering committing robbery ever again. Thus, the court's reasoning fails to withstand scrutiny.

The central factual issue in dispute was identity. The prosecution contended that appellant killed Tudor and Manuel, and the defense countered that Webster or her brother, Steve Langford, had done so. Appellant did not dispute intent to kill. Under these circumstances, it was particularly likely that the jury would be unable to follow the limiting instruction limiting use of appellant's statements to the "specific intent or mental state" required for the crimes charged and would regard his remarks as evidence of propensity to rob and kill and therefore of guilt. Accordingly, the trial court abused discretion in admitting the evidence.

### D. The Admission into Evidence of Appellant's Statements to Robbery Investigators Resulted in a Miscarriage of Justice

As indicated above (see Argument I.E, *ante*), the evidence actually connecting appellant to the murders left room for reasonable doubt as to appellant's guilt. The erroneously admitted evidence of appellant's statements to the robbery investigators, probative of nothing other than appellant's propensity for violence, surely helped convince the jury to convict.

The prosecutor's comments during closing argument demonstrate the importance of this evidence and the effect that it must have had on the jury. The prosecutor argued that, based on the statements that Voudouris and Curley attributed to appellant at the two speaking events, appellant was not reformed, but was the kind of person who would kill without even thinking about it. (22 RT 7335.) Obviously referring to the question regarding what appellant would have done if he had met with resistance during a robbery, the prosecutor argued, "A question is asked that really kind of cuts right to the core of what's going on and it just kind of flows on out. Easy answer. That's what happens. You just kill 'em." (22 RT 7335.) The prosecutor argued that the answer was memorable because it was so "chilling" and "upsetting" to Voudouris and Curley. (22 RT 7335-7336.) "What it establishes is that Charles Case is honestly so completely committed to this stuff that he can't hide it. He just simply can't hide it. It just flows out of him because that's what he is. . . . He is truly a professional criminal." (22 RT 7336.) The prosecutor argued that evidence of appellant's purported statements to Voudouris and Curley "shows the thought process, the state of mind of the defendant with regard to his willingness to use deadly force when committing a robbery. If he determines that it's appropriate and

necessary for whatever reason, he will be the judge of that. And he has no bones about it." (22 RT 7569.)

Thus, the prosecutor invited the jury to use the evidence in precisely the manner that it could not properly be used: as evidence that appellant had a propensity to kill. Encouraged by the prosecutor in this fashion, the jury undoubtedly was unable to determine dispassionately what, if anything, appellant's statements to the robbery investigators indicated about his state of mind at the time of the crimes charged. The emotional force of the evidence, together with the prosecutor's argument, impaired the jurors' ability to analyze the relevance of the evidence for themselves and to disregard it if, for example, they found no evidence that Tudor or Manuel resisted the robbery.

The prejudice flowing from the erroneous admission of appellant's statements to the robbery investigators is not undercut by Jerri Baker's testimony regarding the conversation that she had with appellant in her backyard. Baker testified that appellant said if he were to commit a robbery, he would have to kill any *witnesses*. (18 RT 6104.) The question that he reportedly answered at the robbery investigators' events had to do with *resisters*. Baker's testimony was of questionable credibility in any event. Baker could not remember exactly what appellant said. More importantly, Baker had not mentioned anything about this purported conversation with appellant until many months after the crime and numerous contacts with law enforcement, after she had read all the police reports, started seeing someone else and stopped visiting appellant. (18 RT 6102, 6209, 6298-6299.) Having read the police reports, she was presumably aware of the report regarding appellant's statements to the robbery investigators. Because of the possibility that she was motivated by

anger toward appellant, her testimony regarding the backyard statement undoubtedly had far less impact than the statements to the robbery investigators, and the admission of the latter evidence was prejudicial notwithstanding Baker's testimony.

Viewed independently or together with the other numerous items of improperly admitted evidence that had a similar effect, the erroneous admission of appellant's statements essentially ensured a verdict of capital murder. The trial court's error resulted in a miscarriage of justice, and reversal is required. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

### E. The Error Rendered Appellant's Trial Fundamentally Unfair In Violation of the Due Process Clause of the Fourteenth Amendment

In addition to violating state law, the erroneous admission of appellant's statements to the robbery investigators violated appellant's right to a fair trial under the Due Process clause of the Fourteenth Amendment.[74] Under the authorities set forth above (see Argument II.D, *ante*), the admission of irrelevant and inflammatory evidence may so infect the trial with unfairness that due process is violated. The factors that made the error a miscarriage of justice, as discussed in Section C, *ante*, also made it a due process violation. Furthermore, the factors which, in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, led the Ninth Circuit to find that the admission of

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[74] As set forth above (fn. 37, *ante*), the trial court deemed all of appellant's objections under state statute to have been made on constitutional grounds as well. (1 RT 1018; 2 CT 308-310.) The constitutional error is therefore preserved for appeal. Moreover, appellant's objection based on Evidence Code section 352 also preserves the claims. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [defendant's trial objection under section 352 rendered cognizable on appeal his claim that admission of gang evidence violated his due process rights].)

other crimes evidence violated due process are also present. The prosecution's case against the defendant was solely circumstantial and left room for doubt as to appellant's guilt. (See Argument I.E, *ante*.) The evidence of appellant's statements to robbery investigators related to appellant's prior robberies, which involved the very crime charged in the present case. As shown above, the prosecutor relied on the evidence of appellant's statement as a significant part of his case-in-chief and as a focus of his argument to the jury. (See section C, *ante*.) Finally, the evidence undoubtedly provoked an emotional response such as contempt and anger at appellant. The effect of admitting the evidence was to impair the jury's ability to properly assess the evidence that actually connected him to the charged crimes. Viewed in the context of the entire trial, the evidence of the statements rendered the trial fundamentally unfair. As set forth above (see Argument II.D, *ante*), such error cannot be deemed harmless. However, even if the federal harmless error test applies, reversal is required, as the state cannot show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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## V

## THE TRIAL COURT ERRONEOUSLY EXCLUDED RELEVANT EVIDENCE OF DETECTIVE REED'S INCOMPLETE INVESTIGATION

Stan Reed, a detective with the Sacramento County Sheriff's Department, was one of two principal investigators regarding the crimes for which appellant is sentenced to death. Reed also testified for the prosecution at trial, corroborating the testimony of Mary Webster. While examining Reed as a defense witness, defense counsel sought to reveal the gaps and inconsistencies in Reed's investigation. The trial court unfairly foreclosed this examination, finding that any evidence about Reed's lack of knowledge concerning inconsistent statements made about the gun used in the murders and clothing worn by appellant was irrelevant. The trial court's error not only constituted state law evidentiary error, but violated appellant's rights to present a defense and to a fair trial under article I, sections 7 and 15 of the California Constitution and the Sixth and Fourteenth Amendments to the federal Constitution.

### A. The Trial Court Cut Off Appellant's Attempt to Examine Investigating Officer Reed about His Knowledge of Inconsistent Witness Statements Regarding the Murder Weapon and Bloody Clothing

During a meeting with Detectives Reed and Edwards at the police station, Webster stated that she took the gun used in the murders out of the car. (21 RT 7001.) Webster's brother, Stephen Langford, however, admitted during his testimony that he told the prosecutor and the prosecution's investigator that *he* retrieved the gun from the car. (20 RT 6703.) Langford told the prosecution team that he picked up the box in the

back seat on the floor area of the car and that there was heat coming off of the barrel of the gun. (20 RT 6705.) Called as a witness for the defense, investigating officer Reed testified that Mr. Druliner, the prosecutor, had told him about Langford's statement about heat emanating from the gun. (21 RT 6972.) Reed clarified that he did not learn about Langford's statement about heat coming off of the gun until *after* Langford had testified at trial. (21 RT 6972.) Reed, however, never *heard from Langford* that he was the one that got the gun out of the car. (21 RT 6973.) Reed testified that knowing who handled the gun would have been important to his investigation. (21 RT 6973.) Defense counsel asked Reed, "And were you ever made aware of this by anyone prior to court?" (21 RT 6973.) The prosecutor objected to this questioning as irrelevant. (21 RT 6973.) Defense counsel argued that the evidence was relevant to whether the detectives had conducted a complete investigation. Specifically, as defense counsel explained, the evidence was relevant to show whether Reed knew that there was another story about who retrieved the gun. (21 RT 6973.) The trial court sustained the prosecutor's objection. (21 RT 6973.) Defense counsel then asked, "So you never knew that Mr. Langford had made a statement that he had obtained the gun from the car[?]" (21 RT 6973.) The prosecutor objected again, and the trial court sustained the objection. (21 RT 6973.)

Subsequently, based on Langford's trial testimony that appellant changed his clothes at Webster's house (20 RT 6699, 6701), defense counsel asked Reed, "Did you know that Mr. Langford also indicated that Mr. Case had changed his clothes at Mary Webster's house, changed into a new set of clothing there?" (21 RT 6973-6974.) The prosecutor again objected on relevancy grounds and the trial court sustained this objection.

(21 RT 6974.) Thereafter, defense counsel asked to be heard on the issue outside the presence of the jurors. (21 RT 6974.)

With the jurors absent, defense counsel argued that whether a complete investigation was done was relevant to the jury's determination of guilt. (21 RT 6974.) Defense counsel explained that other law enforcement officials knew there were inconsistencies in the statements of key witnesses and failed to inform investigating officer Reed; such evidence was relevant to the jury's decision regarding whether appellant was guilty or not. (21 RT 6974-6975.) Further, defense counsel argued, Reed had just testified that this information Langford provided would have been important to his investigation. (21 RT 6974-6975.) The trial court responded:

> Well, you're asking this particular detective what he considers to be important insofar as the investigation is concerned. That's really irrelevant to what the jury considers important as what is relevant. This case has to be decided on what was done and what evidence has been presented. If there are inconsistencies in that evidence or there are gaps in that evidence, then that's the state of the evidence and that's the facts upon which the jury must rely in reaching their decision.

(21 RT 6975.) Defense counsel agreed with the trial court about the evidence containing inconsistencies. However, he asserted that he should not be precluded from asking Reed what facts he knew of during the course of his investigation, which would lay a foundation for his argument about what Reed knew or did about inconsistencies in the prosecution's case. (21 RT 6975.) The prosecutor asserted that defense counsel had made a similar objection to the questioning of a prior witness, but defense counsel pointed out that the defense had raised a hearsay objection. (21 RT 6975.) The prosecutor remarked: "The same objection would land here, then, wouldn't it?" (21 RT 6975) The trial court sustained the objection. (21 RT 6976.)

### B. The Trial Court Erroneously Precluded Appellant from Eliciting Evidence of Investigating Officer Reed's Knowledge about the Murder Weapon and Bloody Clothing, Even Though the Evidence Was Relevant to Impeach Reed's Credibility and Raise Doubt about the Prosecution's Case by Showing That the Police Investigation Was Inadequate and Incomplete

The trial court erred in precluding appellant from examining investigating officer Reed about the inconsistent statements prosecution witnesses made about the gun and clothing Mary Webster turned over to police. The record clearly shows that the prosecutor objected on the grounds of relevance. (21 RT 6973.) "'Relevant evidence' means evidence, *including evidence relevant to the credibility of a witness*, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.) All relevant evidence is admissible at trial unless excluded by statute. (Cal. Const., art. I, § 28, subd. (d); Evid. Code, § 351.) Defense counsel's questions sought to elicit relevant evidence. Contrary to the trial court's understanding, defense counsel's questions did not seek to establish what Reed thought was important to the investigation. (21 RT 6975.) Defense counsel simply noted this fact, pointing out that Reed already had testified that identifying who had retrieved the gun from the car was important. (21 RT 6974-6975.) Nor were defense counsel's questions trying to prove or disprove the gaps and inconsistencies in the prosecution's evidence. Those too already had been established, as defense counsel acknowledged. (21 RT 6976.)

Rather, the excluded examination was relevant because defense counsel's questions were designed to impeach Reed's credibility by

showing the inadequacy of his investigative work and thus to establish that the flawed investigation raised a reasonable doubt about appellant's guilt. (See Evid. Code, §§ 780, subds. (c), (d), (f) and (i).)[75] By prohibiting defense counsel's questions, the trial court denied appellant the opportunity to lay the foundation needed to question the quality of the sheriff's investigation. Depending on Reed's answers to questions about the inconsistencies in the gun evidence and clothing evidence, defense counsel could have argued his characterization of the investigation to the jury – i.e., that Reed's investigation was slipshod, either because he deliberately failed to look into evidence that was inconsistent with Webster's story or because others working on the investigation shielded him from evidence that contradicted the information he obtained from Webster, his primary source.

In this way, Reed's knowledge of, and actions in response to, inconsistencies in the evidence law enforcement gathered were probative of his credibility and the sufficiency of the prosecution's case. Reed, as the lead investigating officer, not only headed up the investigation but also testified for the prosecution, corroborating and bolster the credibility of Mary Webster. (18 RT 6335-6343.) To the extent that Reed based his testimony on incomplete information, his credibility and the credibility of the investigation would have been tarnished. The United States Supreme Court has recognized that substandard police investigation can cast doubt on the prosecution's case.. (See *Kyles v. Whitley* (1995) 514 U.S. 419, 446, fn. 15 ["When . . . the probative force of evidence depends on the

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[75] The credibility of a witness may be attacked or supported by any party, including the party calling the witness. (Evid. Code, §785; see *People v. Stanley* (1967) 67 Cal.2d 812, 816, fn. 1 [defense can impeach own witness].)

circumstances in which it was obtained . . . , indications of conscientious police work will enhance probative force and slovenly work will diminish it"]; see also *id.* at p. 442, fn. 13 [discussing the utility of attacking police investigations as "shoddy"].) So have other courts. (See, e.g., *Bowen v. Maryland* (10th Cir. 1986) 799 F.2d 593, 613 ["A common trial tactic of defense lawyers is to discredit the caliber of the investigation," and courts consider such use in assessing *Brady* error]; *United States v. Sager* (9th Cir. 2000) 227 F.3d 1138, 1145-1146 [trial court committed plain error in excluding as irrelevant evidence relating to police investigation, and in instructing jurors to refrain from "grading" the investigation, which removed from the jury potentially relevant information].) In contrast, the trial court here mistakenly failed to perceive the relevance of defense counsel's line of questioning.

Outside the presence of the jury, the subject of hearsay was raised when the prosecutor noted that defense counsel had made a similar objection during the examination of defense investigator Tony Gane. (21 RT 6975.)[76] Correcting the prosecutor, defense counsel explained that the defense objection was based on hearsay, not relevance. (21 RT 6975.) The prosecutor replied, "The same objection would land here, then, wouldn't it?," but said nothing more about hearsay. (21 RT 6975.) The trial court simply stated that there was no need to relitigate the Gane objection. (21 RT 6976.) Making no mention of hearsay, defense counsel further argued

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[76] The prosecutor was presumably referring to defense counsel's objection when the prosecutor asked Gane whether he knew that appellant had been to The Office more than two times. (20 RT 6907.) Defense counsel objected on hearsay grounds, pointing out that Gane knew only what people had told him. (20 RT 6907.)

his position. Without further comment from the prosecutor and without addressing the hearsay rule, the trial court sustained the prosecutor's objection. (21 RT 6975.) Fairly read, the record does not reflect a hearsay objection by the prosecution. He did not expressly object under the hearsay rule. Neither the court nor the parties appears to have understood that the exchange between defense counsel and the prosecutor about a different objection to a different question to a different witness raised a hearsay objection to the questioning of Reed.

But even assuming a hearsay objection were adequately raised, it would not have supported the trial court's ruling. The out-of-court statements were not offered for their truth, which would have been barred by the hearsay rule (Evid. Code, § 1200, subd. (a)), but to show whether Reed had knowledge of statements made to other law enforcement officers. Whether Reed knew about contradictory statements concerning the gun and clothing was relevant to disputed issues: the quality of the investigation, Reed's credibility as the prosecution's lead investigator and the sufficiency of the prosecution's case. Thus, the statements were admissible for nonhearsay purposes. (*People v. Turner* (1994) 8 Cal.4th 137, 189 ["An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute."], abrogated on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536; see *People v. Laymen* (1931) 117 Cal.App. 476, 478 [in prosecution for perjury regarding street car accident, train dispatchers' testimony that they received no report of accident held not hearsay]; see also *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [""evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and that the hearer, believing such

information to be true, acted in conformity with that belief. . . is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.'"].) Because the evidence appellant sought to elicit was relevant and was not offered to prove the truth of the mattered asserted, defense counsel's proposed examination of Reed about the inconsistencies in the gun and clothing evidence was not barred by the hearsay rule.

The Court's decisions in *People v. Valdez* (2004) 32 Cal.4th 73 and *People v. Page* (2008) 44 Cal.4th 1, 34, do not require a different result. Both decisions, which affirmed exclusion of evidence of incomplete police work, are distinguishable. In *Valdez*, a murder case, defense counsel intended to challenge and undermine the police investigation of the murder, specifically the failure to investigate and pinpoint the source of shoe prints discovered at the crime scene. (*Id.* at p. 108.) The trial court excluded the evidence under Evidence Code section 352, finding that the evidence would unduly consume time and would create a substantial danger of confusing the issues and misleading the jury. This Court upheld the trial court's ruling, finding that the probative value of the attack on the investigation was limited and the trial court's ruling was proper. (*Id.* at p. 109.) It also noted that the trial court permitted defense counsel to question the police officer about the investigation of a group of individuals found near the crime scene, including about "whether shoe comparisons were made of the group or whether the individuals gave a reason for being in the alley so late at night," but defense counsel declined to do so. (*Id.* at p. 110.) This Court's ruling implicitly supports a finding of error in appellant's case because it implicitly recognizes what the trial court here denied: that the excluded evidence was relevant. Moreover, in appellant's case, there were

no issues regarding undue consumption of time or misleading the jury, and, unlike defense counsel in *Valdez*, appellant's attorneys were not offered an alternative line of questioning that might have served a similar evidentiary purpose as the prohibited examination.

In *Page*, defense counsel sought to introduce evidence that police failed to record the name of a witness who saw the victim on the night of her murder and evidence that police focused on the defendant to the exclusion of other suspects. (*People v. Page*, *supra*, 44 Cal 4th at p. 34.) This Court upheld the trial court's ruling excluding the evidence, finding that the evidence had no tendency to establish any relevant fact. This Court held that police attempted, but failed, to verify the purported sighting of the victim, and that for valid and objective reasons, the defendant quickly became the prime suspect and the police elected not to investigate other potential suspects more thoroughly. The Court held that the possibility the police may have chosen not to follow up more thoroughly on all leads did not impeach the evidence against the defendant. (*Ibid.*) In appellant case, by contrast, the evidence of an incomplete investigation went to facts that were central to the prosecution's case: the origin of the bloodstained clothes and the murder weapon.

### C. The Trial Court's Error in Precluding Relevant Examination of Investigating Officer Reed about the Murder Weapon and the Bloody Clothing Violated Appellant's State and Federal Constitutional Rights to Present a Defense and to a Fair Trial

In addition to violating state evidentiary law, the trial court's error in limiting appellant's examination of investigating officer Reed violated appellant's state and federal constitutional rights to present a defense and to

a fair trial under the Sixth and Fourteenth Amendments to the Federal Constitution, and Article I, sections 7, subdivision (a), and 15 of the California Constitution.[77]

"[A] criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor . . . ." ( *People v. Marshall* (1996) 13 Cal.4th 799, 836; *People v. Northrop* (1982) 132 Cal.App.3d 1027, 1042, disapproved on another ground in *People v. Smith* (1984) 35 Cal.3d 798, 808; accord, *United States v. Scheffer* (1998) 523 U.S. 303, 308.) The compulsory process and confrontation clauses of the Sixth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution guarantee criminal defendants "the right to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691.) Few rights are more fundamental than that of the accused to "present his version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (*Washington v. Texas* (1967) 388 U.S. 14, 19; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [the right of an accused to due process of law "is, in essence, the right to a fair opportunity to defend against the State's accusations]".)

The trial court's exclusion of impeachment evidence pertaining to Reed's knowledge of other inconsistent witness statements restricted appellant's ability to present his defense that Webster framed appellant for the crimes. Inconsistent statements made by Langford and Webster should have impacted the investigation of the case. Further, whether Reed knew of those inconsistencies and acted upon them dictated the course of the

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[77] As noted above (see fn. 37, *ante*), defense counsel's federal objections were preserved. (1 CT 308; 1 RT 1018.)

investigation. Demonstrating that Reed did not know about the inconsistencies between Langford's and Webster's testimony was important to appellant's defense that Webster framed appellant. Without this evidence, appellant was not able to present fully his version of the facts.

### D. The Trial Court's Error in Restricting Appellant's Examination of Investigating Officer Reed about the Murder Weapon and Bloody Clothing Requires Reversal of Appellant's Convictions

The trial court's error in restricting defense examination of officer Reed about his knowledge of inconsistent statements concerning the murder weapon and bloodstained clothing requires reversal. Under state law, reversal of the guilt verdict is required if there is a reasonable probability appellant would have achieved a more favorable result but for the erroneous exclusion of the evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836) Under federal constitutional law, reversal is required unless the State can prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal of appellant's convictions is required under either standard.

Contradictory information about who had retrieved the gun from the car and the clothing worn by appellant was directly relevant to the question of identity, the primary issue in dispute in the case. Central to appellant's defense was Langford's testimony contradicting Webster on the key issues of who had handled the gun and what appellant was wearing on the night of the crimes. Excluding evidence of that the investigation was incomplete and disorganized effectively bolstered unfairly the credibility of the prosecution's main witness, Mary Webster, and thus the prosecution's entire case, which rested heavily on Webster's credibility. In their opening statement and closing argument, defense counsel pointed out that Webster's

and Langford's stories were contradictory (11 RT 4159, 22 RT 7523-7527) and explained the importance of these issues (11 RT 4160, 22 RT 7412-7413), but were unable to show that these contradictions were not investigated. The contradictions that defense counsel hoped to reveal supported the theory that Webster and Langford had framed appellant for the murders. (11 RT 4163.) Defense counsel noted that Langford's story had changed repeatedly and that Webster had coached him with a written script, but that document was missing. (22 RT 7412-7413.) The person from whom appellant allegedly purchased the gun had not been identified. (22 RT 7414.) The box in which the murder weapon was found had not been tested for the presence of blood. (22 RT 7418.) The money in Webster's possession had not been tested for fingerprints or the presence of blood. (22 RT 7418.) The detectives had not asked Grimes, one of the last customers in The Office before the murders, what appellant was wearing when Grimes saw him that night. (22 RT 7428.) Reed's lack of knowledge of statements made about the gun and clothing would have reflected the detectives' failure to identify and investigate other possible suspects and would have revealed that the officers had based their entire investigation on the assumption that Webster's version of events was true, without having investigating it sufficiently. Such evidence would have provided significant additional reason to doubt the prosecution's theory of the crime.

The excluded evidence was also critical to the jury's assessment of Reed's credibility as a testifying witness, which was also important to the prosecution's case. Reed's testimony outlined the investigation and corroborated Mary Webster, appellant's main accuser. Had the jurors heard that Reed did not know about Langford's statements pre-trial, or that other detectives knew about the statements, but did not bring them to Reed's

attention, they would have realized that Reed's testimony and entire approach to the investigation were based on incomplete information and were inappropriately biased toward believing Webster.

In sum, had the evidence at issue not been excluded, the jurors would have perceived significant additional reason to doubt the prosecution's case for guilt. On this record, it is reasonably probable that the result of the proceeding would have been different – that at least one juror would have had a reasonable doubt as to appellant's guilt and would have refused to convict – if the erroneously excluded evidence had been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Similarly, the error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Accordingly, appellant's convictions and death sentence must be reversed.

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## VI

## THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DUE PROCESS BY PERMITTING THE PROSECUTION TO PRESENT APPELLANT'S STATEMENT ON REBUTTAL RATHER THAN IN ITS CASE-IN-CHIEF

Although the trial court ruled that appellant's statement to interrogators was admissible for all purposes, the prosecutor waited until the very close of his case in rebuttal before introducing it. The prosecutor's reasons for withholding the interrogation statement from his case-in-chief and introducing it only after he had heard the defense case are unknown. His timing, however, suggests at least two possibilities. First, he may have had qualms about whether appellant's statement was lawfully obtained, but after hearing the defense evidence, was concerned that the likelihood of securing convictions was in jeopardy and decided to use appellant's statement even if it meant risking reversal on appeal. Second, the prosecutor, for strategic advantage, may have planned from the start of trial to hold the statement until the end of his rebuttal, when the defense would have difficulty responding to the evidence. Whatever the prosecutor's motive, it is clear that, over appellant's objection, the trial court permitted the prosecutor to present appellant's statement at the last possible moment before the jury retired to deliberate, thereby maximizing the statement's dramatic effect. This ruling was an abuse of discretion and violated appellant's due process right to fundamental fairness. (Cal. Const., art. I, § 15; U.S. Const., 14th Amend.)

### A. After the Prosecutor Had Chosen Not to Present Evidence of Appellant's Interrogation Statement in His Case-in-Chief, the Trial Court Nevertheless Permitted Him to Present Such Evidence as Part of His Case in Rebuttal

Before opening statements, the trial court ruled that appellant's statement to his interrogators was admissible without limitation. (11 RT 4067-4068.) Although the prosecutor had argued in favor of the admissibility of appellant's statement (11 RT 4060-4066; 2 CT 423-429), he did not present that evidence until the very end of his case in rebuttal, after the close of the defense case and the testimony of the all other rebuttal witnesses. (21 RT 7197-7203B.) Appellant objected that the evidence was improper rebuttal, and that the prosecutor had forfeited his opportunity to present the evidence by not presenting it in his case-in-chief. (21 RT 7204-7209.) The trial court overruled the objection and allowed the prosecutor to present appellant's statements on the following four subjects: (1) that on the morning of the interrogation (i.e., June 21, 1993), he had seen the television news about the homicide that had happened the night before at The Office (21 RT 7217, 7226);[78] (2) that on the night of the homicides, he

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[78] The court admitted two statements in this regard. The first was:

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| Reed: | Ah, we're investigating a homicide that occurred Jackson Highway and Bradshaw Road. Occurred last night. You may have seen it on the news. |
| Appellant: | Yeah |

(Aug CT of 11/10/09 Appendix A, p. 1: 10-13; see also 21 RT 7252.) Second, when one of interrogating detectives stated to appellant that a homicide had occurred at The Office bar the previous night, appellant

(continued...)

was at The Office with a girlfriend named Sue, that he took Sue home at around 6:00 or 7:00 p.m., that he went back to The Office, arriving there at around 7:30 or 8:00 p.m. and that he stayed there shooting pool by himself until about 8:55 p.m (21 RT 7230-7232); (3) that when he went to The Office on the night of the homicides, he drove Jerri Baker's Ford Probe (21 RT 7232-7233); (4) that when asked if he could explain the bloody clothing that Webster said she had gotten from him, appellant said, "I guess you'll have to talk to Mary about that," that he had no idea what she was talking about and had no idea whether the blood would match the people's in The Office, that the clothes were his, that he had gotten the blood on them from shaving, that the people were alive when he left the bar and that the reason that he did not have any marks on his face from shaving was that he "healed fast" (21 RT 7248-7250). Detective Reed then testified before the jury, recounting appellant's statements in these four areas. (21 RT 7252-7258.)

### B. Evidence of Appellant's Statement Was Improper Rebuttal

The scope of rebuttal evidence is generally within the trial court's discretion, and on appeal, the question for the reviewing court is whether that discretion was abused. (Pen. Code, § 1093, subd. (d); *People v. Wallace* (2008) 44 Cal.4th 1032, 1088.) However, the trial court's discretion is not unlimited. Rebuttal "is restricted to evidence that is made necessary by the defendant's case, i.e., is responsive to proof introduced by the defendant that is not implicit in his denial of guilt." (*People v. Jackson* (1980) 28 Cal.3d 264, 333 [citations omitted]; 7 Wigmore, Evidence

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[78] (...continued)
responded, "I seen it on TV this morning." (Aug CT of 11/10/09 Appendix A, pp. 4: 28 - 5: 2.)

(Chadbourn rev. 1978) § 1873 ["[T]he usual rule [on rebuttal evidence] will exclude all evidence which has not been made necessary by the opponent's case in reply."].)

This Court has articulated the purpose of restricting what can be presented on rebuttal as follows:

> The purpose of the restriction in [then Penal Code section 1093, subdivision 4, now section 1093, subdivision (d)] is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at end of trial with an additional piece of crucial evidence. Thus proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. [Citations.]

(*People v. Carter* (1957) 48 Cal.2d 737, 753-754.) That is, the main purpose of the statute is to prevent gamesmanship and sandbagging. "[T]he governing consideration is fairness." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 546, pp. 782-783.)

Evidence which is "obviously central to the criminal prosecution . . . should be proved as part of the prosecution case-in-chief." (*People v. Daniels* (1991) 52 Cal.3d 815, 860.) Evidence that the defendant has made admissions regarding the charged crime "'tends to establish the defendant's commission of the crime'" and is improper rebuttal; it should be presented, if at all, in the prosecution's case-in-chief. (*People v. Thompson* (1980) 27 Cal.3d 303, 330-331, quoting *People v. Carter*, *supra*, 48 Cal.2d at p. 753.)

This is particularly true where the defendant does not testify. (See, e.g., *People v. Crew* (2003) 31 Cal.4th 822, 846 [defendant's admission that he killed victim was improper rebuttal evidence at the penalty phase as it did not counter any evidence presented by the defense]; *People v. Daniels*, *supra*, 52 Cal.3d at p. 859 [trial court abused its discretion by permitting evidence of the defendant's admissions to be introduced in rebuttal where defendant did not testify and statement was an implied admission of guilt]; *People v. Robinson* (1960) 179 Cal.App.2d 624, 630 [prosecutor had duty to present evidence of confession before resting his case, when the testimony was then available and there was no reason for not offering it in the case-in-chief].)

Under these well-settled principles, appellant's interrogation statement was not proper rebuttal. The trial court had ruled prior to trial that the prosecutor could present evidence of appellant's interrogation in its case-in-chief. Appellant did not testify, and appellant's statement did not actually rebut any evidence presented by the defense. Regardless of whether the prosecutor intended all along to present the evidence in rebuttal or decided to do so only after he saw the strength the defense case, the tactic of reserving it until after the defense had rested was nothing short of sandbagging. This Court has condemned such tactics: "It is improper for the prosecution to deliberately withhold evidence that is appropriately part of its case-in-chief, in order to offer it after the defense rests its case and thus perhaps surprise the defense or unduly magnify the importance of the evidence. (*People v. Coffman* (2004) 34 Cal.4th 1, 68.) The prosecutor here engaged in unfair gamesmanship. The trial court abused its discretion in condoning this practice, and as a result, appellant's trial was fundamentally unfair. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67;

*Walter v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357 [erroneous admission of evidence violates Due Process when it renders trial fundamentally unfair]; see also *People v. Coffman, supra*, 34 Cal.4th at p. 59 [assuming that prosecutor's use of defendant's statements was fundamentally unfair, but finding the error harmless in light of abundant evidence of guilt].)

### 1. Appellant's Statement That He Had Seen Coverage of the Killings on the Television News

The trial court allowed the prosecutor to present evidence of the portions of appellant's statement in which he said that on the morning of his arrest and interrogation, he had seen television news coverage of the shootings at The Office. (Aug CT of 11/10/09 Appendix A, pp. 1, 4.) The trial court ruled:

> And with regard to the first offer of rebuttal evidence on behalf of the Prosecution relating to the fact that the defendant was watching the news, the Court finds that these assertions in the defense case were not implicit in his denial of guilt and, therefore, this is proper rebuttal and the Court will allow this section to be used.

(21 RT 7217.) A few minutes later, the court added:

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| Court: | Not to revisit the last ruling, but, for example, the Defense put on evidence that nobody could have been watching the news at the time that this witness said they were watching the news. . . . . And the evidence that rebuts that is your client's statement that he was watching the news. |
| Defense Counsel: | And the fair inference being it could have been at that time, I guess. |
| Court: | Right. |

(21 RT 7226.)

In the prosecution's case-in-chief, Greg Nivens, Mary Webster's son, testified that he had arrived at his mother's house sometime in the morning on June 21, 1993 (the day of appellant's arrest), and at about 11:00 a.m., appellant was there also, watching the news on television. (17 RT 5977-5979.) Investigator Tony Gane testified for the defense that the television schedule for that morning indicated that there was no local news between 9:00 a.m. and 12:00 p.m. that day. (20 RT 6825-6826.) The prosecutor argued that appellant's statement that he had seen coverage of the killings on the television rebutted appellant's attack on Nivens's credibility. (21 RT 7210-7217.)

In fact, appellant's statement that he had seen something about the homicide on the television news that morning was not inconsistent with the defense evidence. Gane's testimony addressed only what was on television between 9:00 a.m. and noon. When appellant stated that he had watched the news "this morning," he could have been referring to any time between 12:01 a.m. and 11:59 a.m. Indeed, appellant could have watched the news on television at his home before he went to Webster's. That is, both Gane's testimony and appellant's statement could have been true. Evidence of appellant's statement therefore did not contradict, was not inconsistent with, and therefore was not "made necessary by" the evidence presented by the defense. Indeed, evidence that appellant had seen news of the charged crimes on television was not relevant to any material issue in dispute, and was arguably inadmissible for all purposes. (Evid. Code, § 350.) Even if marginally relevant, it was certainly improper as rebuttal evidence.

### 2. Appellant's Statement That He Was At The Office On The Night of the Crime

The trial court permitted the prosecutor to present appellant's

statements to the interrogating officers (1) that on the day of the killings, he was at The Office with a girlfriend named Sue (Aug CT of 11/10/09 Appendix A, p. 4); (2) that he took Sue home at around 6:00 or 7:00 p.m. (*id.* at p. 5); (3) that he went back to The Office, arriving there at around 7:30 or 8:00 p.m. (*id.* at p. 5), and (4) that he stayed there playing pool by himself until about 8:55 p.m. (*id.* at pp. 5, 7). The prosecutor argued that the portion of the statement concerning Sue was admissible to rebut appellant's attack on the credibility of prosecution witness Susan Burlingame (21 RT 7200), but later conceded that the defense had not attacked Burlingame's credibility on the issue of what time she had gotten home (21 RT 7227). The prosecutor argued that the portions of the statement in which appellant said he went back to The Office and stayed until 8:55 p.m. were admissible because appellant had attacked the credibility of prosecution witness Tracy Grimes. (21 RT 7200-7201.) Appellant's counsel pointed out that the defense had not attacked Grimes's identification of appellant or his time estimates (21 RT 7228-7231), but the trial court ruled as follows:

> Well, let's just say that it seems like a logical argument to make. Sure, they chose to make it. And should they choose to make it, it would be supported by the evidence that they introduced during their cross-examination and during their case in chief. Because the value or the weight of that identification, the validity of that identification has certainly been challenged implicitly. And I believe that this evidence does go to rebut the assertion that Tracy Grimes is identifying Mr. Case for some other reason than the fact that he actually saw him there, so it will be admitted.

(21 RT 7231-7232.) The court admitted the portion of appellant's statement that related to Burlingame "because it does tend to give more meaning to the testimony of Grimes." (21 RT 7232.) These rulings were erroneous.

Appellant had not created any factual dispute that this portion of his statement tended to resolve. To the extent that appellant's statement that he was at The Office until 8:55 p.m. was, in and of itself, probative of his guilt, it should have been presented in the prosecution's case-in-chief. Appellant's statement that earlier that same day, he was at The Office with Sue Burlingame and that he took her home at around 6:00 or 7:00 p.m. was not relevant to any material disputed fact, and the court's justification for allowing it did not fit within the limited role that rebuttal evidence may properly serve.

During the prosecution's case-in-chief, Grimes testified that on the night in question, he arrived at The Office at around 8:30 p.m. and stayed for five to ten minutes; Grimes identified appellant as one of the patrons there at that time. (11 RT 4171, 4176, 4186.) Neither appellant's cross-examination of Grimes nor the testimony presented during the defense case placed in dispute Grimes's testimony that appellant was at The Office when Grimes said he was there. The thrust of appellant's cross-examination of Grimes concerned the inconsistency between his testimony on direct examination and his pretrial statements regarding what appellant was wearing at that time. (11 RT 4176-4178 [direct examination: appellant was wearing blue jeans, a sport shirt and roughed-up, grayish-brown cowboy boots resembling the boots in evidence]; 11 RT 4200 [cross-examination: Grimes did not recall telling a defense investigator that appellant was wearing a Levi-type shirt that was pale in color or telling the police that appellant was wearing gray boots].) Appellant's counsel did not question Grimes regarding how he was able to identify appellant or at what time he was at The Office on the night in question.

During the defense case, appellant called Detective Reed and

defense investigator Gane to testify to Grimes's prior inconsistent statements concerning the clothing that appellant was wearing on the night of the killings. (20 RT 6894-6909, 6916-6925.) Appellant did not present any evidence of alibi or any eyewitness identification expert. Appellant did not testify. Thus, the defense did not place in dispute Grimes's identification of appellant or his testimony regarding the timing of his stop at The Office on the night in question. The cross-examination of Grimes regarding appellant's shirt and boots went to what appellant was wearing on the night of the killings, which in turn was relevant to the defense theory that the blood had been planted on the clothes and boots in evidence. Appellant's cross-examination of Grimes regarding appellant's clothing was not an attack on Grimes's identification of appellant any more than appellant's cross-examination of Sue Burlingame regarding appellant's clothing on the day of the killings was an attack on her identification of appellant. (See 13 RT 4707-4710, 4729-4731.) Appellant did not dispute that he was at The Office when Grimes said he was.

Moreover, contrary to the trial court's finding, appellant did not assert "that Tracy Grimes [was] identifying Mr. Case for some other reason than the fact that he actually saw him there." (21 RT 7232.) Although defense counsel elicited from the defense investigator that Grimes showed some animosity toward appellant (20 RT 6898), it was the prosecution that elicited from Grimes that he had seen appellant's photograph on the front page of the newspaper, that Grimes believed appellant had killed his friends and that if appellant was not convicted, Grimes and his friends would see that justice was done. (20 RT 6901.) The defense did not assert or imply that this bias disproved that appellant was at The Office when Grimes claimed.

Appellant's statement that he had been at The Office until 8:55 p.m. on the night of the killings was relevant not to any particular issue that the defense had placed in dispute, but to the central question before the jury – i.e., whether appellant killed Manuel and Tudor. It was "a material part of the case in the prosecution's possession that tend[ed] to establish the defendant's commission of the crime," and as such, it was not proper rebuttal evidence. (*People v. Carter*, *supra*, 48 Cal.2d at p. 753 [evidence that a red cap similar to one worn by the defendant had been found with the murder victim's wallet in a slough near the defendant's house was "crucial evidence" of the defendant's guilt and was therefore improper rebuttal evidence]; see also *People v. Crew*, *supra*, 31 Cal.4th at p. 846 [defendant's statement that he killed the victim was improper rebuttal evidence, as it did not counter any new evidence presented during the defense case]; *People v. Daniels*, *supra*, 52 Cal.3d at p. 860 [defendant's admission suggesting that he had killed the victims was improper rebuttal evidence]; *People v. Robinson*, *supra*, 179 Cal.App.2d at pp. 629-630 [in a prosecution for sale and possession of narcotics, evidence that the defendant had admitted using narcotics and receiving a shipment of narcotics shortly before his arrest was improper as rebuttal evidence and should have been presented in the prosecution's case-in-chief]; compare *People v. Friend* (2009) 47 Cal.4th 1, 40 [evidence that attorney for prosecution witness had not attempted to secure leniency for his client in exchange for his cooperation with the prosecution was not "crucial" or "material" to the prosecution's case and therefore was not improper rebuttal].) The prosecution should not have been permitted to sandbag the defense by withholding this evidence until the last moment before the jury retired to deliberate; if the evidence was to be presented, it belonged in the prosecution's case-in-chief.

The trial court erred also in allowing the prosecution to introduce the portions of appellant's statement concerning his date with Sue Burlingame on the day of the crime. On direct examination, Burlingame testified that she and appellant had gone to The Office on the day of the killings, they left the bar at about 6:30 p.m. and appellant then dropped her off at the Dairy Queen near her daughter's house. (13 RT 4641-4655.) Appellant's counsel did not challenge that testimony on cross-examination or present any evidence that contradicted it. Indeed, the prosecutor conceded that the defense had not attacked Burlingame's credibility on these points. (21 RT 7227.) The court found that this aspect of appellant's statement gave "more meaning" to the testimony of Tracy Grimes. (21 RT 7232.) However, even if appellant's statement made Grimes's testimony make more sense, that is not a proper basis for permitting it in rebuttal. Evidence that appellant had been at The Office with Burlingame earlier on the day of the killings and had taken her home over an hour before Grimes saw him was entirely consistent with Grimes's testimony. Arguably, this portion of appellant's statement was not relevant to any material issue in dispute. (Evid. Code, § 350.) Certainly, it was not "made necessary" by the defense case. It was therefore was improper rebuttal. (*People v. Carter*, *supra*, 48 Cal.2d at pp. 753-754.)

### 3. Appellant's Statement That He Was Driving Jerri Baker's Ford Probe on the Night of the Murders

The trial court ruled that the prosecution could present as rebuttal evidence appellant's statement that on the night of the murders, he was driving Jerri Baker's Ford Probe. (Aug CT of 11/10/09 Appendix A, pp. 7-8.) The trial court found that this evidence rebutted appellant's attack on

Anita Dickinson's testimony that on the night of the killings, she noticed an unfamiliar car in the parking lot behind The Office. (21 RT 7232-7233.) In fact, appellant's statement that he had driven Baker's car that night did not rebut the defense challenge to Dickinson's testimony.

Dickinson testified that in the parking lot on the night of the killings, she saw a small two-door compact, the size of a Hyundai or a Honda and about half the size of the Camaro next to which it was parked. (12 RT 4269-4270.) Investigator Tony Gane testified for the defense that Jerri Baker's Ford Probe was taller than the Camaro and only slightly less long and wide. (20 RT 6823-6824, 6832, 6833.) The defense also called Deputy Sheriff Elizabeth Sawyer, who had responded to the crime scene and interviewed Dickinson on the night of the murders. Sawyer testified that Dickinson told her she had seen only the Camaro and the two vehicles that belonged to the two bartenders; she said she had not noticed any other vehicles in the parking lot behind The Office that night. (21 RT 7140-7141.) The trial court ruled as follows:

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| Prosecutor: | The defense's last witness, in fact, was one of the attacks on Dickinson's ability or testimony concerning the car, scene of the car and its location. The other witness was Tony Gane who, I believe, interviewed Anita Dickinson he said three times. |
| Court: | And she said that the car that she saw was half the size of the Camaro. |
| Prosecutor: | Right |
| Court: | But the statement offered here is that the defendant was there in Jerri's gray Ford Probe. |
| Prosecutor: | Yes |

Court: Alright. Well, that would seem to directly rebut that. That testimony would be allowed.

(21 RT 7232-7233.)

Evidence that appellant said he was driving Baker's car on the night of the killings did not bolster Dickinson's credibility or rebut the testimony of Sawyer. Baker's car did not match Dickinson's description of the unfamiliar vehicle that she saw that night. Whereas Dickinson described the car as a "small compact" (11 RT 4243, 4253), a Honda or a Hyundai (12 RT 4269), and half the size of the Camaro (12 RT 4270), the Probe was an American car and was actually taller than the Camaro, and only slightly shorter and narrower (20 RT 6832-6833). The Probe was far bigger than the vehicle Dickinson described. Nor was the color of the car Dickinson saw consistent with Baker's Probe. Dickinson described the car she saw as light in color and silverish or bluish. (12 RT 4268.) Baker's car was described as darker in color – as brownish (12 RT 4517), greyish-brownish (12 RT 4518; 20 RT 6800), silver-gray (13 RT 4631), gray (Aug CT of 11/10/09 Appendix A, p. 8; 15 RT 5459), silver (13 RT 4643; 20 RT 6929) and dark smokey (14 RT 5010).

Nor did appellant's statement rebut Sawyer's testimony. Sawyer testified for the defense that on the night of the killings, Dickinson denied seeing any vehicles in the parking lot behind The Office other than those belonging to the bartenders. (21 RT 7140-7141.) Although Sawyer's testimony tended to undermine Dickinson's credibility regarding when she saw the unfamiliar vehicle that she described in her testimony, appellant's statement that he was driving Baker's car did nothing to restore her credibility. The point made by Sawyer's testimony remained: Dickinson

did not tell Sawyer that she had seen any other vehicle in the parking lot that night. Evidence that appellant was driving Baker's car that night did not change the impact of Sawyer's testimony, which was to call into question whether Dickinson had seen a different car – not Baker's Probe – in the lot on the night in question. Appellant's statement was not proper rebuttal because it was not inconsistent with the evidence appellant presented to attack Dickinson's credibility.

#### 4. Appellant's Statement Regarding the Clothes and the Blood on the Clothes

The trial court allowed the prosecution to present rebuttal evidence that, when asked to explain the clothing that Mary Webster said she had gotten from him, appellant responded, "I guess you'll have to talk to Mary about that," and said he had no idea what she was talking about and that he had no idea whether the blood would match the people's in The Office. (Aug CT of 11/10/09 Appendix A, p. 11.) The court also allowed evidence that later in the interrogation, appellant said, "Well, the clothes are mine. I got the blood on 'em from shaving. And the people were alive when I left the bar" (Aug CT of 11/10/09 Appendix A, p. 18), and when asked why he had no marks on his face from shaving, appellant said "I heal fast" (Aug CT of 11/10/09 Appendix A, p. 19; 21 RT 7242-7250). The prosecutor argued that, through the testimony of Peter Barnett, the defense had attacked the prosecution's theory regarding how the blood got on the clothes and had suggested that the blood could have been planted. (21 RT 7243, 7247.) The court found that the statement was not being offered for its truth:

> But it's not offered for the truth of the matter asserted, because if one had knicked oneself shaving to the extent that they would let that much blood on the shirt - - . . . Well it's certainly not a denial or a statement. I have no idea. . . . It's

an inconsistent explanation, really.

(21 RT 7247.) The court went on to state:

> Well, what it is is the Prosecution there contends and has contended that the blood on the shirt came from the victims and that the shirt was on Mr. Case when he shot them to death. [¶] The Defense has seemed to indicate in its case in chief through Mr. Barnett that another possible source of the blood would be someone dipping the shirt in the blood or the boots in the blood. . . . So the question, then, is does the defendant's remark when confronted about the blood on his boots and shirt how it got there when he cut himself shaving, does that tend to rebut the plant defense?

(21 RT 7248.) The court found that the statement rebutted the defense theory that the blood had been planted on the shirt and the assertion that appellant was not wearing the clothes on the night in question:

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| Prosecutor: | You know, the two subjects that are raised in this is, one the source of the blood. . . Barnett's testimony. And the other is questions by counsel and photographs offered by counsel as to, I believe, whether clothing was left in Mary's place and where this clothing came from. |
| Defense Counsel: | Not to mention the testimony of Steve Langford. |
| Court: | And then there's the clothes of mine I got the blood on from shaving. But the clothes are mine. |
| Defense Counsel: | I don't think there's ever been an allegation those aren't Mr. Case's clothing. We've got photographs before of him wearing this clothing. And I think the only issue is whether he was wearing them on the night in question. |
| Court: | And this would tend to rebut that, |

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| | because if he was wearing them on the night in question, they could not have been smeared through the victims' blood by someone perpetrating a frame-up. |
| Defense Counsel: | And what – and this is tending to rebut the assertion that he wasn't wearing them? |
| Prosecutor: | Both, and the concept through Peter Barnett that it was planted on the blood – the blood was planted on the shirt. |
| Defense Counsel: | I don't see where his acknowledgment – Incidentally, the evidence would show that at the time that he says this, they haven't even shown him these clothes yet. |
| Court: | I think it's admissible for the purposes just stated, so the Court will allow the evidence for that purpose. |

(21 RT 7249-7250.)

Appellant had not disputed that the clothes were his. His statement that he did not know whether the blood on the clothes would match the blood of the people at The Office did not rebut any defense evidence or assertion, as it was entirely consistent with the defense evidence.

Appellant's statement that he had gotten blood on the clothes from shaving was improper rebuttal as well, as it did not in fact rebut the evidence regarding the possible origin of the blood on the clothes. The trial court found that this aspect of appellant's statement was not relevant for its truth (21 RT 7247), implicitly finding the quantity of blood on the clothes was too substantial to have come from a shaving accident. A false exculpatory statement is evidence of consciousness of guilt. (*People v. Hughes* (2002) 27 Cal.4th 287, 335; *People v. Kimble* (1988) 44 Cal.3d

480, 496; *People v. Osslo* (1958) 50 Cal.2d 75, 93.) Appellant's statement tended to show that he had a guilty state of mind at the time of the interrogation, but it was not evidence of the content of the statement itself. It did not rebut the defense evidence that the blood could have been planted except insofar as it was material evidence that tended to establish appellant's commission of the crimes charged. As such, it should have been presented in the prosecution's case-in-chief.

Although the trial court regarded the statement as false insofar as it purported to address the origin of the blood on the clothes, it viewed the statement as a true admission on appellant's part that he was wearing the clothes on the night in question. (See 21 RT 7249 ["And this would tend to rebut that, because if he was wearing them on the night in question, they could not have been smeared through the victim's blood by someone perpetrating a frame-up."].) Appellant's statement did not indicate, expressly or implicitly, *when* he had gotten the blood on the clothes from shaving, nor did appellant make any other statement implying that he had been wearing the clothes on the night of the murders. However, even if the statement could properly be construed as an admission that appellant was wearing the clothes on the night of the killings, it was part and parcel of appellant's patently implausible statement that he had cut himself shaving and was material evidence of appellant's guilt. Presenting appellant's statement in rebuttal vastly magnified its dramatic effect. In allowing the prosecutor to present appellant's statement at the last possible moment, after the defense had rested and immediately before the jury retired to deliberate, the trial court abused its discretion and deprived appellant of a fair trial.

### C. Reversal Is Required

For the reasons set forth above in Argument I.E, *ante*, which are incorporated by reference here, the erroneous admission of appellant's statement was prejudicial. Although the prosecution's case for appellant's guilt might at first glance appear strong, close and careful examination of the evidence actually connecting appellant to the charged crimes reveals that it was seriously flawed. Key witnesses lacked credibility, the evidence was conflicting in important respects, and the testimony contradicted or failed to support significant aspects of the prosecution's theory of the crime. Apart from appellant's statements, there was ample room for reasonable doubt as to his guilt. Under the standard applicable to state law error, there is a reasonable probability that the outcome would have been different had evidence of the statement not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under the standard applicable to federal constitutional error, the error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23.) Reversal is required.

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## VII

## THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO TRIAL BY AN IMPARTIAL JURY BY RESTRICTING DEFENSE COUNSEL'S VOIR DIRE ABOUT SPECIFIC MITIGATING FACTORS

After defense counsel during the first part of voir dire asked prospective jurors if they would consider specific potential mitigating factors about appellant's background, the trial court ruled that defense counsel could not continue this practice and restricted the inquiry into mitigation to asking whether a juror could carefully consider appellant's background. The trial court's order was surprising, given that it already had granted a defense challenge for cause after this same line of questioning had shown that a prospective juror could not consider appellant's economically disadvantaged background and abusive childhood in determining the appropriate penalty. The trial court's ruling encompassed two distinct orders: (1) that defense counsel could not ask if a juror could "meaningfully consider," but could ask if the juror could "carefully consider," appellant's mitigating evidence (6 RT 2558-2559), and (2) that even using the "carefully consider" language, defense counsel could not inquire into a juror's ability to consider specific mitigating factors, such as poverty or abuse (6 RT 2559-2560). On appeal, appellant does not contest the first ruling, but he does challenge the second ruling, which violated appellant's constitutional rights to trial by an impartial jury. (Cal. Const., art. I, §§ 15, 16; U.S. Const., 6th & 14th Amends.)[79]

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[79] Although appellant does not challenge the trial court's ruling prohibiting use of the phrase "meaningfully consider" and restricting

(continued...)

### A. The Trial Court Precluded Defense Counsel from Conducting Voir Dire on Specific Mitigating Factors Even Though Counsel Had Been Asking Such Questions Throughout Jury Selection

Before trial, defense counsel filed a motion requesting that all voir dire of prospective jurors be sequestered and done individually. (1 CT 233.) The parties and trial court agreed to ask all their questions during individualized voir dire, rather than conducting separate general and individualized voir dire. (1 RT 1067-1072.) They later decided to try to streamline the process by calling five prospective jurors at a time, giving them some introductory instructions, and asking them the information that was on the missing page two of the jury questionnaire, and then conducting individualized death-qualification voir dire outside the presence of the other jurors. (2 RT 2390-2392.) From the beginning of jury voir dire, defense counsel asked prospective jurors if they would consider specific mitigating factors when deciding whether to impose the death penalty. Defense counsel either asked jurors the question directly or gave examples of specific mitigating factors that would be presented and asked if the juror could consider them. (See, e.g. 4 RT 1917-1919, 1943, 1964-1965, 2040-2043, 2071, 2108; 5 RT 2215-2216, 2239, 2281, 2327, 2408, 2430; 6 RT 2455, 2478-2480, 2499-2500, 2535-2536.)

During this part of voir dire, the following exchange occurred with

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[79] (...continued)
counsel to the phrase "carefully consider," the statement of facts in Section A includes the arguments and ruling on that issue because they are intertwined with the arguments and ruling on the second issue that is raised as error on appeal and excising them would create a distorted picture of what transpired in response to the prosecutor's objection.

prospective juror Warren:

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| Defense counsel: | The defense on the other hand can produce factors in mitigation such as how the person grew up, whether he had a, you know, lack of a good family background, whether there was economic disadvantages, whether there was abuse in the family, whether alcohol played a part in this person's life. [¶] Do you think factors like that I've just listed in mitigation would be something that you would at least consider as afactors [*sic*] in mitigation? |
| Warren: | Prior convictions, yes, would play a factor. As far as upbringing and such as that, no I don't figure it would. |
| Defense counsel: | Okay. So the factor in mitigation such as this person has a real, you know, economically disadvantaged childhood, that is something that you wouldn't feel like you would give any weight to or consider it? |
| Warren: | No I wouldn't. |
| Defense counsel: | What if a person had a background where they were subject to abuse at an earlier age. Would that be a factor that you could consider, or would it not be something that's important to you? |
| Warren: | Drawing on my experience, it wouldn't have any, as far as it wouldn't have any relation to what we are discussing. |
| Defense counsel: | And what about if the person had abused alcohol during their life time. Would that be a factor that you could consider as possibly some explanation or mitigating factor? |

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| Warren: | No. |
| Defense counsel: | Do you feel that if a person did have a substantial prior criminal record, that -- |
| Warren: | That would enter into it, yes. |

(5 RT 2429-2430). The prosecutor tried to rehabilitate prospective juror Warren, who said that, in determining the appropriate penalty, he would have to consider evidence presented in mitigation and "would be willing to listen to both sides." (5 RT 2433.) However, after further questioning by defense counsel and the trial court (5 RT 2434-2437), Warren ultimately stated, "I honestly don't know," when asked whether he could meaningfully consider factors such as a poor upbringing (5 RT 2437). Defense counsel challenged Warren for cause, and the trial court granted the challenge. (5 RT 2438.) Defense counsel questioned four prospective jurors who ultimately sat as jurors about potential mitigating factors in this same manner: Juror No. 1 (4 RT 2108), Juror No. 2 (4 RT 1918-1919), Juror No. 7 (5 RT 2281) and Juror No. 10 (4 RT 2071-2072).

It was not until the middle of jury selection that defense counsel was prohibited from asking questions about specific mitigating factors. Defense counsel Bogh began to ask prospective juror Payne about the factors in aggravation, when the prosecutor objected that defense counsel was asking the juror to prejudge specific types of evidence. (6 RT 2542.) The trial court sustained the objection. (6 RT 2542.) Defense counsel tried again. After telling the juror that the district attorney would introduce factors in aggravation and that the defense would introduce factors in mitigation, the juror agreed she would be willing to listen to the factors on both sides. (6 RT 2542.) Defense counsel then asked:

> Would you be able to consider such factors in mitigation such as: A person's background, the defendant's background. Do you think you could meaningfully consider –

(6 RT 2543.) The prosecutor again objected: "Your Honor, other than the factors themselves, in the instructions, I would object and ask that Mrs. Payne not prejudge evidence that's inappropriate." (6 RT 2543.) Defense counsel explained he was not asking the juror "to assign or make any decision. I'm just simply asking her if she could meaningfully consider certain factors in mitigation." (6 RT 2543.)

The trial court agreed with the prosecutor that defense counsel was impermissibly asking the juror to prejudge the evidence of specific mitigating factors:

> [W]e give her specific facts in mitigation and ask her if she could meaningfully consider those. And that's in effect asking her to prejudge evidence, and also it's incomplete as to what evidence about those factors is going to be. And it's impermissible to try the case here at this point.

(6 RT 2543; see 6 RT 2549.) In the court's view, the best approach was to follow the instructions and the general, rather than specific, type of evidence that can be considered and "ask the juror if her mind wouldn't be completely closed to that type of evidence, or if that type of evidence would be something that she could consider." (6 RT 2544.)

At that point, the trial court asked the juror to step out to the hallway, and the parties and the court discussed the objection outside the juror's presence. (6 RT 2544.) Acknowledging that he had not objected to the same questions previously, the prosecutor focused on defense counsel's use of the phrase "meaningfully consider." He asserted that asking jurors whether they could meaningfully consider certain factors in evidence was asking them to prejudge the evidence. (6 RT 2545; see 6 RT 2549-2550,

2555.) The prosecutor assumed that the jurors "[o]bviously . . . will be open minded enough to consider the types of evidence that are otherwise described in the instructions." (6 RT 2545.)

Defense counsel Gable disagreed. He pointed out that "[t]he proof in the pudding is the tasting" – the careful probing of the jury "revealed biases that would never ever have been discovered had it not been for asking them if they could meaningfully consider." (6 RT 2545; see 6 RT 2561.) He explained the need to ask not only whether jurors "can listen to the evidence, everybody can do that, but whether they can meaningfully consider it." (6 RT 2545.) Emphasizing the need for this particularized inquiry, defense counsel told the trial court:

> When you ask someone if they could listen to the evidence; well, they have to listen to the evidence. The only way they are not going to listen to the evidence is if they physically stick their fingers in their ears. Will they take in and give weight to it and consider it, that's what the law requires.

(6 RT 2545.) Gable repeatedly emphasized that defense counsel was not asking how much weight a juror *would* give the defendant's background, but whether the juror *could* consider it in a meaningful manner. (6 RT 2546.)

The trial court rejected defense counsel's position, stating:

> I have to disagree that it revealed hidden biases. The manner in which those questions have been phrased, I think, creates situations in which the answer is almost predetermined. You ask jurors to weigh a multiple murder committed during the commission of a robbery against the mitigating factor that the defendant was impoverished as a child.

(6 RT 2546; see 6 RT 2549.) In the court's view, asking the juror to compare these two factors was asking the juror to assess the penalty without the further evidence necessary to make that decision. (6 RT 2546-2547.)

Defense counsel Gable countered that he was not asking how the juror would vote, but whether the juror could consider the mitigating evidence that the defense would present. (6 RT 2547.) Defense counsel argued that it would not be helpful to ask a juror in the abstract: "we [are] going to be presenting mitigating evidence, can you consider that?" (6 RT 2547.) As defense counsel pointed out:

> Of course they will say that they can consider it, but they don't know what they are. [¶] The fact of the matter is when you break it down, these are the categories of evidence that are typically presented in these kinds of cases, is this something that you can listen to, take into consideration and give some meaning to it.

(6 RT 2547.)

The trial court returned to the phrasing of the question, stating, "I think you can ask that question, but not in the manner which this last question has been posed and has been posed from time to time here." (6 RT 2547-2548.) The prosecutor concurred. Although he objected to asking "would you meaningfully consider this," he had no objection to defense counsel asking, "Could you listen to and consider these forms of evidence." (6 RT 2548.) As he acknowledged, "[t]he question is, simply, can they in the penalty phase . . . consider, listen to, and will they consider, not be closed to these different forms of evidence." (6 RT 2548.) Defense counsel Gable indicated he was open to using a term other than "meaningfully consider" (6 RT 2548), but reiterated the need to identify and excuse jurors who would not consider the mitigating evidence (6 RT 2549).

The trial court ruled that it would permit "questions along the lines of the Instruction CALJIC 8.88," that

> mitigating circumstances is . . . [a]ny fact, condition or event which as such does not constitute a justification or excuse for

> the crime, but may be considered an extenuating circumstance in determining the appropriateness of the death penalty.

(6 RT 2551.) In response to defense counsel's concern that talking about "extenuating circumstances" would be meaningless to jurors, the court later clarified that if jurors asked about the term, counsel could explain that "extenuating circumstances" meant "[s]ome aspect of his character of some aspects of life which maybe [*sic*] grounds for something less than the death sentence." (6 RT 2555.) However, in the trial court's view, words describing specific mitigating circumstances, such as poverty or abuse, "don't tell the jurors much of anything," and without hearing the evidence, jurors "can't effectively and accurately give an opinion as to how they would evaluate those things." (6 RT 2555.) The trial court ruled that defense counsel could ask jurors "if the background of the defendant would be something they would consider" (6 RT 2553) and could ask "if their minds are absolutely closed to mitigating evidence" (6 RT 2554). Defense counsel Gable later expressed concern that in answering the prosecutor's questions about whether they would listen to the penalty phase evidence, jurors would simply "parrot a response that they think is socially acceptable." (6 RT 2557.) In that situation, the trial court would permit defense counsel to question further. (6 RT 2557.)

The trial court resolved what it viewed as "a close question of semantics." (6 RT 2556.) It found that the phrase "meaningful consideration . . . implies other evidence [jurors] receive is not worth the same serious type of consideration." (6 RT 2556.) In sustaining the prosecutor's objection, the court ruled that defense counsel could ask about "careful consideration rather than meaningful consideration." (6 RT 2558.) The prosecutor had no objection to the court's word choice. (6 RT 2559.)

The trial court also ruled that defense counsel could not inquire about specific mitigating factors, such as poverty, even with the approved "careful consideration" language. (6 RT 2559.) It found that such questions had "a tendency to be misleading" and also asked the juror "to prejudge the fact: Does poverty outweigh or could it possibly outweigh multiple murder and murder committed during the course of robbery." (6 RT 2559.) At the same time, the trial court acknowledged that the jurors must be able to consider the evidence that would be presented at the penalty phase: "if their mind is closed because of the enormity of the offense, then they shouldn't be on the jury." (6 RT 2560.) In conclusion, the trial court ruled that the voir dire should not go into the "specifics on poverty or abuse," but could go into victim impact evidence, which it acknowledged could be "very, very powerful." (6 RT 2560.)

After the trial court's ruling, defense counsel asked jurors whether they would consider evidence of the defendant's background, character or extenuating circumstances. (See, e.g. (7 RT 2797 [voir dire of Juror No. 6]; 6 RT 2578 [voir dire of Juror No. 11]; 6 RT 2668 [voir dire of Juror No. 9]; 7 RT 2833 [voir dire of Juror No. 13]; 9 RT 3553 [voir dire of Juror No. 14].) Under the trial court's ruling, defense counsel was not able to ask these five jurors who ultimately sat on appellant's jury whether they could consider evidence of poverty or abuse as a factor in mitigation.

### B. The Trial Court Improperly Restricted Defense Counsel's Voir Dire on Mitigation, Resulting in Inadequate Voir Dire and a Potentially Biased Jury

The Sixth and Fourteenth Amendments to the United States Constitution require the impartiality of the jury in a criminal case. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472.) The California Constitution also

guarantees this right. (Cal. Const., art. I, §§ 15, 16; *People v. Martinez* (2009) 47 Cal.4th 399, 425 [under the due process clause of both the federal and state Constitutions, a capital defendant is entitled to an impartial jury at the guilt and penalty phases of trial].) "Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729.) Thus, voir dire must be sufficient to provide a defendant with a jury whose members all are "able impartially to follow the court's instructions and evaluate the evidence." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) To be qualified to serve in a capital case, a juror must be able to follow the law and consider the evidence relevant to the decision to impose or reject a death penalty. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [a prospective juror is unqualified if the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties in accordance with the court's instructions and the juror's oath]; *People v. Cash* (2002) 28 Cal.4th 703, 719-720 [applying *Witt* standard in reversing death sentence].) This law includes well-settled rules about a defendant's mitigating evidence.

Under the Eighth Amendment, the defendant in a capital case has a right to present mitigating evidence about his background in support of his case for a life sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 [recognizing defendant's right to present, as a mitigating factor, any aspect of his character or record and any of the circumstances of the offense as a basis for a sentence less than death].) As corollary, the sentencer must be willing to consider giving effect to the defendant's mitigating evidence. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 114 [the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence]; *id.*

at p. 115, fn. 10 [noting that "*Lockett* requires the sentencer to listen" to the defendant's mitigating evidence which included evidence of his violent family history].) More recently, the high court has reiterated that "a sentencer may not categorically refuse to consider any relevant mitigating evidence." (*Kansas v. Marsh* (2006) 548 U.S. 163, 174.) There is no question that under both the federal Constitution and the California death penalty statute, evidence of a defendant's poverty and abuse as a child is relevant mitigating evidence that the sentencer must consider in deciding the appropriate punishment. (*In re Lucas* (2004) 33 Cal.4th 682, 716, 735, citing *Wiggins v. Smith* (2003) 539 U.S. 510, 535 and *Eddings v. Oklahoma*, *supra*, 455 U.S. at pp. 107, 108-113 ["turbulent family background and childhood abuse is of particular relevance to a jury's consideration of whether to impose the death penalty"]; see CALJIC No. 8.85 [defining section 190.3, factor (k) as encompassing "any sympathetic or other aspect of the defendant's character of record [that the defendant offers] as a basis for a sentence less than death"].) A juror who will not consider abuse or poverty as potential mitigation is disqualified from service in a capital case, because he or she cannot "consider the evidence of aggravating and mitigating circumstances as the instructions require." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) A trial court's limitation on voir dire is subject to review for abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 990.)

In this case, the trial court's abrupt ban on defense questions about specific mitigating factors was an abuse of discretion resulting in voir dire inadequate to guarantee that an impartial jury would decide appellant's sentence. To be sure, the trial court did not absolutely refuse inquiry into the subject of mitigation, nor did it deny defense counsel all opportunity to

ascertain juror views about mitigating evidence. (See *People v. Carasi* (2008) 44 Cal.4th 1263, 1286.) But its order restricting inquiry into questions about appellant's "background" or "extenuating circumstances" and prohibiting mention of specific mitigating factors severely limited defense counsel's ability to ferret out prospective jurors whose ability to follow the law on mitigation was substantially impaired. In *People v. Cash*, *supra*, 28 Cal.4th at pp. 720-721, this Court reaffirmed "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." That was the opportunity appellant requested and the trial court denied here. While the prosecutor assumed, despite prior voir dire to the contrary, that the jurors "will be opened minded enough to consider the types of evidence" presented at the penalty phase (6 RT 2545), defense counsel wanted to make sure they would. Appellant was entitled to find out if the jurors who would judge him would consider his mitigation case.

As the high court has explained, a juror could swear in good conscience to uphold the law, but be unaware that underlying beliefs about the death penalty would prevent him from doing so. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 735.) An analogous problem existed here. A juror could swear to consider evidence about appellant's background at the penalty phase, but be unaware of the scope of mitigating evidence and harbor views about certain factors like poverty or abuse that would impair the juror's ability to consider such evidence in mitigation. Defense counsel made this precise point. As he explained, the general voir dire terms

approved by the trial court would not mean much to the jurors (6 RT 2555) and would not convey the types of evidence, which include poverty or abuse, that the law required them to consider (6 RT 2547). Defense counsel pinpointed the inadequacy of the limited inquiry: jurors would say they would consider the mitigating circumstances, but would not know what they were. (6 RT 2547.) Without giving the jurors some sense of the kinds or categories of mitigating evidence, such as poverty, abuse, or alcoholism, there was little or no way to determine whether a juror would be able to consider appellant's penalty-phase defense.

The prosecutor recognized that the question was whether the jurors in the penalty phase would "consider, not be closed to these different forms of evidence." (6 RT 2548.) And the trial court was fully aware that jurors who could not consider appellant's mitigating evidence would be excluded. (6 RT 2560.) But the limited questions about appellant's "background" and "extenuating circumstances" that the court permitted were sorely insufficient to elicit juror bias with regard to their ability or willingness to consider appellant's mitigating evidence. To ensure that his fate would be decided by an impartial jury, appellant needed "particularized death-qualifying voir dire" which informed the jurors of basic facts about the mitigating evidence he planned to present. (*People v. Cash*, *supra*, 28 Cal.4th at p. 721.) Without this voir dire, appellant was unable "to lay bare the foundation of [a] challenge for cause" against those prospective jurors who would not consider his mitigating evidence, and consequently his right to be sentenced by an impartial jury was rendered "nugatory and meaningless. . . ." (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-734.)

The trial court's suggestion that defense counsel "can ask them [the jurors] if their minds are absolutely closed to mitigating evidence" (6 RT

2554) offered an equally inadequate alternative. During jury selection, the jurors were informed that the prosecutor would present aggravating evidence and appellant would present mitigating evidence at the penalty phase. (See, e.g., 6 RT 2517-2518, 2600-2602; 7 RT 2816-2817; 8 RT 3110-3112; 9 RT 3511-3516.) The trial court did not define "mitigating evidence" to include evidence of poverty or abuse, but only described it in amorphous terms as "evidence designed to persuade the jury that the appropriate sentence in this case is life in prison without the possibility of parole" (6 RT 2753; see also 8 RT 3111; 9 RT 3513), or "as extenuating circumstances which do not constitute a justification for the crime or an excuse for the crime but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty" (6 RT 2600-2601). The trial court's most specific explanation stated that "these extenuating circumstances . . . might include evidence . . . about the defendant; who he is, where he has been, what has happened to him, and what he has or has not done in his life." (9 RT 3513.) After hearing such general descriptions of mitigating evidence, asking whether jurors were "absolutely closed" to considering appellant's evidence would not likely yield admissions of bias. As this Court observed long ago, when a juror's response to general questions whether he or she will follow the law provided by the court "is merely a predictable promise that cannot be expected to reveal some substantial overtly held bias against particular doctrines[,] . . . a reasonable question about the potential juror's willingness to apply a particular doctrine of law should be permitted when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial." (*People v. Williams* (1981) 29 Cal.3d 392, 410, superseded by statute, Proposition 115.) General questions about whether a juror will consider mitigating

factors or the defendant's background have only one right answer – "yes." A juror "who wishes to seem fair-minded . . . is unlikely to give a negative response." (*People v. Balderas* (1985) 41 Cal.3d 144, 183 [using this line of reasoning where jurors were asked about specific doctrines of law].) Again, defense counsel Gable made this same point. He worried that the limited inquiry permitted by the trial court would lead prospective jurors "to parrot a response that they think is socially acceptable." (6 RT 2557.)

The trial court's question asking whether the jurors minds were absolutely closed to mitigating evidence, just like its question asking whether jurors could consider evidence of appellant's background, was not likely to elicit a response from a juror that would disclose any difficulty the juror might have in considering the categories of evidence appellant planned to introduce. Because the jury was constitutionally required to consider appellant's mitigating evidence in fixing his punishment, questions about a prospective juror's ability or inability to consider poverty and abuse as potential mitigation went to the juror's willingness to apply the law, and thus were directly relevant to and in aid of an exercise of a challenge for cause. (See *People v. Cash*, *supra*, 28 Cal.4th at p. 720 ["A challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried"].)

The trial court based its decision to preclude the voir dire questions that defense counsel had been asking throughout jury selection on two erroneous findings. First, the court concluded that the questions did not reveal hidden juror bias. (6 RT 2546.) This conclusion is somewhat puzzling and plainly mistaken given the trial court's exclusion of prospective juror Warren for cause after precisely the type of voir dire that it then prohibited. The questioning of prospective juror Warren illustrates

both the effectiveness of defense counsel's questions in discovering bias and the connection between a juror's willingness to consider mitigating factors and his being an impartial juror. (See 5 RT 2425-2438.) In response to questions about specific factors relating to appellant's background, Warren made clear he would not consider "an economically disadvantaged childhood" or being subject to "abuse at an early age" as potential mitigation. (5 RT 2429-2430.) Defense counsel's questions about these mitigating factors revealed that Warren was unable to follow the law and thus was biased. The trial court correctly granted defense counsel's challenge for cause. (5 RT 2438.) In short, the record before the trial court proved the efficacy of the very voir dire it suddenly disallowed. Appellant was entitled to have twelve unbiased jurors deliberate his fate, but the trial court's truncation of voir dire precluded him from determining whether any other juror, like prospective juror Warren, was categorically closed to certain types of mitigating evidence in his case.

Second, the trial court ruled that inquiry about specific mitigating factors would be asking the jurors to prejudge the facts. (6 RT 2559.) This conclusion also was mistaken. Much of the focus in the argument on the prosecutor's objection was on the part of the defense question asking whether jurors could "meaningfully consider" mitigating factors. (See 6 RT 2543, 2545-2546, 2548, 2556, 2557.) The trial court found that this particular language required the jurors to prejudge the penalty-phase evidence (6 RT 2543, 2546-2547) apparently because, as the prosecutor suggested, the word "meaningfully" connoted weighing those factors (6 RT 2555). The trial court observed that the questions, as phrased, asked "jurors to weigh a multiple murder committed during the commission of a robbery against the mitigating factor that the defendant was impoverished as a

child." (6 RT 2546.) Whatever its merit, this concern was resolved when defense counsel accepted, although disagreeing with, the trial court's order that the questions could be phrased in terms of "carefully" but not "meaningfully" considering the evidence. (6 RT 2558-2559.)

Nevertheless, the trial court still viewed asking about specific mitigator factors as requiring the jurors to prejudge the facts. (6 RT 2559.) The court was mistaken, as defense counsel pointed out. (6 RT 2545-2546.) Inquiring whether a juror could carefully consider specific mitigating factors, such as poverty or abuse, did not ask the juror to indicate how he or she would weigh those factors either independently or in relation to the aggravating evidence. Defense counsel here did not seek to give a detailed account of the evidence to determine whether prospective jurors would impose a death sentence under those facts. (See *People v. Jenkins, supra*, 22 Cal.4th at pp. 990-991 [no error in refusing to allow such voir dire].) Nor did their questions about the specific mitigating factors "attempt to bind the prospective juror regarding his or her position on the evidence." (*Soria v. Johnson* (5th Cir. 2000) 207 F.3d 232, 243-244 [no error in prohibiting question "'No matter what the other evidence would show, could you consider [evidence such as youth or voluntary intoxication] as a mitigating factor in setting punishment,'" where the trial court allowed defendant to phrase the question as "'Can you consider [for example] the age of the Defendant in deciding on punishment?'"].) Instead, the questions here simply inquired whether a juror could consider evidence of poverty or abuse, as the Eighth Amendment required.

The fallacy in the trial court's prohibition of voir dire about specific mitigating factors is seen in its very different stance on voir dire about victim impact evidence, which is admissible as an aggravating factor under

section 190.3, factor (a). (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836.) In stark contrast to its ban on questions about evidence of abuse and poverty, the trial court expressly permitted voir dire about whether a juror could consider victim impact evidence. (6 RT 2560.) The court dismissed the likely impact of poverty as a mitigating factor, asserting that "multiple murder weighed against the word poverty is probably not going to affect most of these people to the extent that they will say that poverty excuses multiple murder." (6 RT 2554.) The court, however, held a different opinion about the likely weight of victim impact evidence:

> I don't think you should go into specifics on poverty and abuse evidence. Evidently, you can go into victim impact evidence, that can be very, very powerful, and you have asked before how they might consider that, and that's appropriate.

(6 RT 2560.) There is no principled basis for the court's distinction between poverty and abuse evidence, on the one hand, and victim impact evidence, on the other. The former is a subcategory of factor (k) mitigation (see *People v. Easley* (1983) 34 Cal.3d 858, 877-878), and the latter is a subcategory of factor (a) aggravation (see *People v. Edwards*, *supra*, 54 Cal.3d at pp. 833-836). A juror's inability or unwillingness to consider either a lawful mitigating factor or lawful aggravating factor would disqualify him from jury service, as exemplified by the exclusion of prospective juror Warren.

In discussing the prosecutor's objection, the trial court opined that most jurors would say that "if you have multiple murder during the commission of a robbery and it was committed by somebody who was poor, then I think that's probably going to be a death penalty for him." (6 RT 2547.) The trial court's divergent opinions about the relative impact of mitigating factors and aggravating factors indicates that in deciding the

scope of voir dire, the court improperly prejudged the likely weight of the penalty-phase evidence. This, of course, is the same fault the trial court mistakenly found in defense counsel's questions about specific mitigating factors. The issue here is not that the court conceptualized the mitigating factor of poverty as having force only if it "excuses" the crime, which is clearly wrong under both section 190.3 (see CALJIC Nos. 8.85, 8.88; *People v. Easley*, *supra*, 34 Cal.3d at pp. 878-879 & fn. 10) and the Eighth Amendment (see *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285). Nor is the question whether, as a general matter, the court correctly or incorrectly anticipated the comparative weight of these aggravating and mitigating factors in this case. The point is that in deciding whether to permit voir dire regarding certain types of penalty-phase evidence, the trial court permitted voir dire only on the factors that it believed would be "powerful." The court's approach was erroneous because a juror at appellant's penalty phase was entitled and instructed to give whatever weight he or she deemed appropriate to any aggravating or mitigating factor. (3 CT 628; 7 RT 2896-2897 [CALJIC No. 8.88].) If a juror could not consider a category of mitigating evidence appellant presented, the juror would not be impartial and would be subject to exclusion for cause.

Appellant's claim finds support in decisions of this Court upholding prosecution voir dire about a juror's views on potential mitigating factors. In *People v. Noguera* (1992) 4 Cal.4th 599, this Court concluded "that the specific questions posed by the prosecutor on voir dire simply inquired whether a juror would consider the death penalty" notwithstanding particular mitigating factors, "and were thus not improper." (*Id.* at pp. 645-646.) In *Noguera*, the trial court permitted the prosecutor to ask each prospective juror whether the fact that a capital defendant was "18 or 19 at

the time of the killing . . . [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" (*Id.* at p. 645.) In addition, the prosecutor was permitted to ask each juror in the sequestered voir dire whether "you would be able to consider imposing the death penalty . . . if we have one victim as opposed to requiring that the defendant kill two or more people?" (*Ibid.*) The defendant in *Noguera* challenged the prosecution's questions on precisely the same grounds asserted by the prosecutor and sustained by the trial court in appellant's case: he contended that the questions asked the jurors to prejudge the evidence. Rejecting the defendant's claim, this Court held that because the disputed voir dire questions were directly relevant to and in aid of the exercise of a challenge for cause, they were proper, both under the standards governing voir dire in effect at the time of trial and the narrower standard later enacted by Proposition 115. (*Id.* at p. 646.)

Moreover, as this Court noted in *People v. Cash*, *supra*, 28 Cal.4th at pp. 720-721, prosecutors also have been permitted to ask jurors if they can impose death in cases involving specific, potentially mitigating factors, such as a defendant who did not personally kill the victim (*People v. Ervin* (2000) 22 Cal.4th 48, 70-71), who was young or who lacked a prior murder conviction (*People v. Livaditis* (1992) 2 Cal.4th 759, 772-773) and who was convicted of felony murder (*People v. Pinholster* (1992) 1 Cal.4th 865, 916-917). What was true for the prosecutors in those cases and in *Noguera* is equally true for appellant in this case: voir dire inquiring about specific mitigating factors was necessary to determine whether jurors harbored views about the mitigating factors that substantially impair their ability "to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." (*People v. Cash*, *supra*, 28 Cal.4th at

p. 721.) To be sure, the prosecutor's questions in the cases noted above asked whether the existence of a specific mitigating factor foreclosed the possibility of the juror returning a death sentence, while defense counsel's questions here more narrowly sought to determine whether the juror could consider constitutionally and statutorily relevant factors that would be part of appellant's mitigation case. But this difference is not decisive. In both situations, counsel's questions sought to elicit whether the juror could follow the law governing the penalty selection. An inability to consider mitigating factors of poverty and abuse, just like an inability to consider a death sentence for a felony murder, a murder by a teenage defendant, or a murder by a defendant without a prior conviction – all involving potentially mitigating circumstances – would disqualify a juror from serving in a capital case.

Although reviewing courts are generally afforded broad discretion in structuring and conducting voir dire (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, fn.22), that discretion is not boundless. As the high court has explained, it is constrained by the Sixth Amendment right to trial by an impartial jury and the Fourteenth Amendment guarantee of due process:

> "*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States,* 451 U.S. 182, 188, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981) (plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Aldridge v. United States,* 283

U.S. 308, 310, 51 S.Ct. 470, 471-472, 75 L.Ed. 1054 (1931). (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-730.) The trial court here did not fulfill its responsibility to ensure appellant an impartial jury. It ignored that injunction that capital cases "demand inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 731.) By preventing voir dire about common categories of mitigating evidence that appellant would present and the jury would be required to consider at the penalty phase, the trial court prohibited inquiry that might have demonstrated bias on the part of the jurors and provided grounds for challenges for cause. Certainly, the trial court's abuse of discretion is made evident by its decision to exclude juror Warren for cause based on exactly the type of questioning that it later halted. Under the circumstances here, the trial court's order prohibiting defense counsel from conducting voir dire on specific mitigating factors, such as poverty and abuse, violated appellant's Sixth and Fourteenth Amendment right to an impartial jury. (See *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 728, 729, 739.)

### C. The Trial Court's Error in Restricting Voir Dire On Specific Mitigating Factors Requires Reversal

Appellant's death sentence must be reversed because the trial court's restriction of voir dire makes it doubtful appellant "'was sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment.'" (*People v. Cash*, *supra*, 28 Cal.4th at p. 723, quoting *Morgan v. Illinois*, *supra*, 504 U.S. at p. 739.) A federal constitutional error either is reversible per se or subject to the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24. The decision in *Morgan* reversed the defendant's death sentence without a discussion of prejudice,

which indicates that an error in unconstitutionally restricting death-qualification voir dire is automatically reversible. (*Morgan v. Illinois, supra*, at p. 739.) This result makes sense since the error prevents the parties and trial court from guaranteeing an impartial jury, which is "'[a]mong those basic fair trial rights that can never be treated as harmless.'" (*Rivera v. Illinois* (2009) __ U.S. __, 129 S.Ct. 1449, 1455-1456, quoting *Gomez v. United States* (1989) 490 U.S. 858, 876.) And the result is consistent with the per se standard of reversal applied to erroneous exclusions for views about capital punishment which, like an inability or unwillingness to consider a defendant's mitigating evidence, also undermines the impartiality of the jury. (*Gray v. Mississippi* (1987) 481 U.S. 648, 668 [refusing to abandon per se reversal rule of *Davis v. Georgia* (1976) 429 U.S. 122 and apply harmless error review to such exclusions]; *People v. Cooper* (1991) 53 Cal.3d 771, 809.) Under these precedents, the trial court's error requires an automatic reversal of appellant's death sentence.

Even assuming arguendo that the error does not require automatic reversal, appellant's death sentence still must be reversed. The State cannot prove the error harmless beyond a reasonable doubt under *Chapman*. There simply is no way to know whether any of the seated jurors who were selected pursuant to the trial court's order restricting voir dire about mitigating factors were, like prospective juror Warren, unable or unwilling to consider evidence of poverty and abuse and thus denied appellant a trial by twelve impartial peers.

Furthermore, reversal of appellant's death sentence is required under this Court's standard. In *Cash*, this Court recognized that an "[e]rror in restricting death-qualification voir dire does not invariably require reversal

of a judgment of death." (*People v. Cash*, *supra*, 28 Cal.4th at p. 722.) Under *People v. Cunningham* (2001) 25 Cal.4th 926, which is discussed in *Cash*, error in restricting death-qualification voir dire may be harmless error if the defense was permitted "to use the general voir dire to explore further the prospective jurors' responses to the facts and circumstances of the case" or if the record otherwise establishes that none of the jurors had a view about the circumstances of the case that would disqualify that juror. (*Id.* at p. 974.) But as in *Cash*, the record here does not permit those conclusions. In this case, general voir dire at first was folded into the individualized, sequestered voir dire (see 1 RT 1067-1072) and later consisted of a few questions primarily to obtain information missing from the jury questionnaires (see 2 RT 2390-2392). Thus, as in *Cash*, defense counsel was not able to use the general voir dire to compensate for the trial court's erroneous limitation on voir dire on mitigating factors. Moreover, as discussed above in Section B, permitting defense counsel to ask prospective jurors whether they would consider "defendant's background" or "extenuating circumstances" in deciding the appropriate penalty was an insufficient substitute for exploring their ability to consider specific mitigating factors. Further, there was no indication from discussions with prospective jurors after the trial court's ruling that the jurors would be able to follow the law and consider specific mitigating factors such as poverty and abuse. In short, the circumstances outlined in *Cunningham* that might render an erroneous restriction on death-qualification voir dire harmless do not apply to this case.

Rather, as in *Cash*, the trial court's error here makes an assessment of prejudice impossible. (*People v. Cash*, *supra*, 28 Cal.4th at p. 723.) As in *Cash*, appellant "cannot identify a particular biased juror, but that is

because he was denied an adequate voir dire" on what may have been the disqualifying bias. (*Ibid.*) Moreover, the record here offers a stronger basis for doubt than in *Cash* that all jurors who deliberated were impartial. The trial court limited defense counsel's voir dire on mitigation in questioning Juror Nos. 6 (7 RT 2796-2797), 9 (6 RT 2668) and 11 (6 RT 2578), alternate Juror No. 13, who later became Juror No. 3 (7 RT 2833-2834), and alternate Juror No. 15, who later became Juror No. 4 (Aug RT 3145D-3145E).[80] Although appellant cannot identify any of these jurors as biased, the trial court's exclusion of prospective juror Warren for cause after defense questioning about specific mitigating factors disclosed that he was biased should negate any suggestion that the denial of adequate voir dire did not compromise appellant's right to have twelve impartial jurors decide whether he should live or die. If there was one prospective juror who, when specifically asked, candidly admitted he would not consider appellant's evidence of poverty and abuse in assessing the appropriate penalty, there may have been more. Because the trial court's error makes it impossible to determine from the record whether any of the seated jurors held similar disqualifying views, the error cannot be dismissed as harmless. (See *People v. Cash, supra,* 28 Cal.4th at p. 723 [reversing death sentence 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" should have been removed for cause under *Morgan*].) Accordingly, this Court should reverse appellant's judgment of death.

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[80] The redacted voir dire of alternate juror no. 15, who was ultimately seated as juror no. 4, was augmented into the record on appeal in October, 2010 (see Aug RT 3145A-3145E), after the court reporter determined that it had previously been inadvertently omitted.

## VIII

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

### A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers

eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 19 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained nine qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 3 CT 609; 25 RT 8427-8429.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the

killing, and the location of the killing. In this case, for instance, the prosecutor argued that the murders were aggravated because they were multiple murders, committed in the course of a robbery (25 RT 8376), because appellant fired a warning shot into the floor (25 RT 8402) and because appellant shot Manuel and Tudor twice each at close range (25 RT 8402-8403).

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

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

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

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

*Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, require any fact that is used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 3 CT 628-630; 25 RT 8436-8437.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*,

*Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

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

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (3 CT 609, 628-630; 25 RT 8427-8429, 8436-8437), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

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

#### a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina*

(1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

**b. Unadjudicated Criminal Activity**

Appellant's jury was not instructed that prior criminality had to be

found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 3 CT 616; 25 RT 8430-8431) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant (e.g., 14 RT 4972, 4974-4975, 4981, 4983-4984, 4993, 5021, 5044; 15 RT 5277-5280; 17 RT 5825-5861, 5958-5959, 5974-5975, 6019-6066; 19 RT 6067-6069), and argued that such activity supported a sentence of death (See, e.g., 25 RT 8380-8381).

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to

reconsider its holdings in *Anderson* and *Ward*.

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

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (25 RT 8437.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

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

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized

sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

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

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is

unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

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

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

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

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be

instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.) and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

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

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

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right

to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

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

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

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 3 CT 609-611; 25 RT 8427-8429) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

#### 2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85 (e) [victim participation], (f) [moral justification], (g) [duress or domination], (i) [age of defendant], (j) [minor participation].) The trial court failed to omit those factors from the jury instructions (3 CT 609-611; 25 RT 8427-8429), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's

constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

### 3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (3 CT 609-611; 25 RT 8427-8429.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

### F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

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

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of

proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

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

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* , *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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## IX

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

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

The trial court's erroneous failure to suppress appellant's involuntary and *Miranda*-violative interrogation statement and the evidence derivative of the interrogating officers' deliberate misconduct (Argument I), together with the unfair advantage which the prosecutor obtained by withholding evidence of that statement until rebuttal (Argument VI), made appellant's conviction a near foregone conclusion. Appellant's trial was rendered fundamentally unfair and his fate was sealed by the trial court's erroneous

admission into evidence of: his statements to Mary Webster revealing other crimes, his acts of violence against Greg Nivens and Randy Hobson and the detectives' statements to Webster asserting his guilt and dangerousness (Argument II); his solicitations of Greg Billingsley and Billy Joe Gentry to assist with a robbery (Argument III); and his statements to robbery investigators (Argument IV). The jurors' ability to determine whether the prosecution had proved beyond a reasonable doubt that appellant committed the crimes charged, the only issue actually disputed, was obliterated by the avalanche of inflammatory, irrelevant and prejudicial evidence of appellant's bad character. Appellant's conviction was further guaranteed by the erroneous exclusion of evidence that law enforcement's investigation was incomplete (Argument V).

The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (Cal. Const., art. I, § 15; U.S. Const. 14th Amend.; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of

appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Further, the cumulative effect of the errors relating to the penalty phase of the trial undermine the reliability of the death sentence. During jury selection, the trial court improperly restricted defense counsel's voir dire of prospective jurors (Argument VII). That error was exacerbated by the other defects in California's capital-sentencing scheme (Argument VIII).

In this way, the errors at the penalty phase – even if individually not found to be prejudicial – precluded the possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or the federal constitutional requirements of a fundamentally fair, reliable, non-arbitrary and individualized sentencing determination. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 39; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

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

## X

## THE RESTITUTION FINE IS UNLAWFUL BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF ABILITY TO PAY AND BECAUSE THE COURT FAILED TO OFFSET THE FINE WITH THE AMOUNT OF DIRECT VICTIM RESTITUTION ORDERED

After sentencing appellant to death, the trial court imposed both a restitution fine and an order for direct victim restitution. (25 RT 8471.) The court's only comments on the subject were as follows:

> The Court will be ordering a restitution fine pursuant to Government Code Section 13967 subdivision (a) in the amount of ten thousand dollars to be paid forthwith or as provided by Penal Code Section 2085.5 subdivision (a). [¶] Defendant will make victim restitution in the amount of four thousand dollars pursuant to Penal Code Section 2085.5 subdivision (b), pursuant to Government Code Section 13967.2 and Penal Code Section 1203.04. Defendant will pay restitution to the victim and the standard income deduction to be effective so long as the records for restitution upon which it is based is effective or until further order of the court.

(25 RT 8471.)[81] The restitution fine must be vacated, as it was based on insufficient evidence of appellant's ability to pay, a statutory prerequisite to the imposition of that fine pursuant to the 1993 law applicable to appellant's case. Even if the restitution fine was lawful, appellant was

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[81] The trial court was presumably relying on the probation officer's report, which recommended imposition of both the $10,000 restitution fine and the order for $4,000 in victim restitution, citing the same statutory authority to which the trial court referred in entering these orders. (3 CT 746-7477.) The probation report indicated that Mr. Manuel, the oldest son of Val Manuel, was seeking restitution in the amount of $4,000 to recover burial expenses. (3 CT 735.) The probation report made no mention of appellant's ability or inability to pay.

entitled to have the amount of that fine reduced by the amount of direct victim restitution ordered.

### A. The Restitution Fine Must Be Vacated Due to Insufficient Evidence of Appellant's Inability to Pay

In imposing the restitution fine, the trial court relied correctly on Government Code section 13967, the restitution statute in effect at the time of appellant's offense in June, 1993. (25 RT 8471.) At that time, the pertinent part of that statute provided as follows:

> (a) Upon a person being convicted of any crime in the State of California, the court shall, in addition to any other penalty provided or imposed under the law, order the defendant to pay restitution in the form of a penalty assessment in accordance with Section 1464 of the Penal Code and to pay restitution to the victim in accordance with subdivision (c). In addition, if the person is convicted of one or more felony offenses, the court shall impose a separate and additional restitution fine of not less than two hundred dollars ($200), *subject to the defendant's ability to pay*, and not more than ten thousand dollars ($10,000). In setting the amount of the fine for felony convictions, the court shall consider any relevant factors including, but not limited to, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, and the extent to which others suffered losses as a result of the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Except as provided in Section 1202.4 of the Penal Code and subdivision (c) of this section, under no circumstances shall the court fail to impose the separate and additional restitution fine required by this section. This fine shall not be subject to penalty assessments as provided in Section 1464 of the Penal Code. . . .
>
> (c) In cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct, and the

> defendant is denied probation, *in lieu of imposing all or a portion of the restitution fine,* the court shall order restitution to be paid to the victim.

(Stats. 1992, ch. 682, § 4, p. 2922, italics added.)

The language of subdivision (a) of that statute plainly stated that a restitution fine could be imposed only to the extent that the defendant had the ability to pay it. At that time, Penal Code section 1202.4, subdivision (a), provided:

> In any case in which a defendant is convicted of a felony, the court shall order the defendant to pay a restitution fine as provided in subdivision (a) of Section 13967 of the Government Code. Such restitution fine shall be in addition to any other penalty or fine imposed and shall be ordered *regardless of the defendant's present ability to pay. However, if the court finds that there are compelling and extraordinary reasons, the court may waive imposition of the fine.* When such a waiver is granted, the court shall state on the record all reasons supporting the waiver.

(Stats. 1990, c. 45 (A.B.1893), § 4, italics added.)

In *People v. Frye* (1994) 21 Cal.App.4th 1483, the Court of Appeal harmonized the two statutes, holding that no restitution fine, including one of $200, could be imposed if it was beyond the defendant's ability to pay. (*Id.* at p. 1486.) The court rejected the prosecution's argument that, read together, the statutes permitted the imposition of a $200 fine without considering ability to pay, and concluded that "even the imposition of the $200 minimum fine must be subject to a defendant's ability to pay." (*Ibid.*) Thus, in 1993, when the offenses were committed, ability to pay was an absolute prerequisite to imposition of even the minimum restitution fine. (*Ibid.*)

As noted above, the trial court did not address appellant's ability to

pay. Admittedly, Government Code section 13967 did not require an express finding on that factual question, and absent a showing to the contrary, the trial court is presumed to have fulfilled its duty to make the requisite determination. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1836-1837; *People v. Frye*, *supra*, 21 Cal.App.4th at pp. 1485-1486.) Appellant does not contend that the trial court failed to make the necessary finding. However, because the trial court had before it no evidence that appellant would be able to pay any amount of fine, and indeed, had ample evidence to the contrary, the implied finding that he was able to pay a fine of $10,000, or indeed any fine at all, was based on insufficient evidence.

Because the trial court's statutory authority to order the restitution fine was subject to a finding that appellant was able to pay, that finding must be supported by substantial evidence and appellant may challenge the sufficiency of that evidence for the first time on appeal. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1126.) In *Butler*, this Court held that the defendant's failure to object to an order for HIV testing in the trial court did not bar his challenge on appeal to the sufficiency of the evidence to support the factual prerequisite on which the order depended. The Court observed that

> "[g]enerally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception." [Citation.] This principle of appellate review is not limited to judgments . . . .

(*Ibid.*, footnote omitted.)

The statute at issue in *Butler*, Penal Code section 1202.1, required the issuance of an HIV testing order for anyone convicted of certain sex offenses, but only upon a finding of probable cause to believe that body

fluids had been transmitted from the defendant to the victim. The prerequisite of probable cause defined the substantive authority of the court to make the order. (*Ibid.*)

> Because the terms of the statute condition imposition on the existence of imposition on the existence of probable cause, the appellate court can sustain the order only if it finds evidentiary support, which it can do simply from examining the record.

(*Id.* at p. 1127.) The Court held that the defendant's challenge to the sufficiency of the evidence was not forfeited by the failure to raise it at trial. (*Id.* at 1128.) The majority implicitly rejected the position of the concurring opinion that the *Butler* holding should be limited to HIV testing orders. (*People v. Butler*, *supra*, 31 Cal.4th at pp. 1130-1131 (conc. opn. of Baxter, J., joined by Chin, J.).)[82] The Court in *Butler* recognized an additional reason that the forfeiture rule should not apply to a claim such as appellant's: applying that rule would have the effect of "converting an appellate issue into a habeas corpus claim of ineffective assistance of counsel for failure to preserve the question by timely objection." (*Id.* at p.

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[82] The concurring opinion's reliance on *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1470, does not undercut appellant's claim, notwithstanding the holding in *Gibson* that a defendant should not be permitted to contest for the first time on appeal the sufficiency of the record to support his ability to pay a restitution fine pursuant to Government Code section 13967, subdivision (a). The Court of Appeal in *Gibson* did not have the benefit of the Court's decision in *Butler*, recognizing that an exception to the waiver and forfeiture rules must be made where the court's very authority to enter the order depends upon a particular factual predicate, and the Court of Appeal in *Gibson* also failed to recognize that because the court's authority to impose a restitution fine pursuant to Government Code section 13967, subdivision (a), was statutorily conditioned on a finding that appellant was able to pay, that finding, whether express or implicit, must be supported by substantial evidence in the record on appeal.

1128.) In this capital case, that would certainly be the result, and would therefore defeat what the *Butler* Court found was the principal rationale for the forfeiture doctrine: judicial economy. (See *ibid.*)

The record of the trial court proceedings in appellant's case included no evidence that, once sentenced to death, appellant would be able to pay a fine of any amount, let alone one of $10,000. The trial court appointed counsel for appellant through the Indigent Criminal Defender Program, indicating that appellant was indigent from the outset of the criminal proceedings. (1 RT 4-5.) Indeed, at his first court appearance, appellant stated on the record that he was indigent. (1 RT 4.) At trial, the prosecution presented evidence that when appellant was arrested, he had only $189 in the bank. (20 RT 6786.) The testimony of James Park established that the California Department of Corrections does not permit death row inmates to work. (25 RT 8300.) Park also testified that it appeared appellant had nobody who would send him money in prison. (25 RT 8338.) The evidence before the trial court showed that appellant had no assets and no prospect of earning any money whatsoever. The evidence was therefore insufficient to satisfy the statutory ability-to-pay prerequisite for imposing a restitution fine.

This Court's recent decisions in *People v. Gamache* (2010) 48 Cal.4th 347 and *People v. Avila* (2009) 46 Cal.4th 680 do not require a different result. The defendant in *Gamache* argued that he was entitled to application of ameliorative statutory amendments which had occurred while his case was pending appeal and that the trial court had erred by imposing a restitution fine without taking adequate consideration of his ability to pay. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 409) Appellant makes neither contention. The defendant in *Gamache* did not argue that there was

insufficient evidence of his ability to pay, as appellant does here. Further, in *Gamache*, the Court found no evidence in the record to substantiate the defendant's claimed inability to pay. (*Ibid.*)

In *People v. Avila*, *supra*, 46 Cal.4th at pp. 728-729, the defendant sought the benefit of the version of the restitution statute in effect from 1992 to 1994. This Court rejected that claim because neither the offense nor sentencing had occurred in that period of time. (*Ibid.*) Here, appellant seeks the benefit of the statute in effect at the time of his offenses. The defendant in *Avila* also challenged the restitution fine on the ground that it was unauthorized; unlike appellant, he did not contend that there was insufficient evidence of his ability to pay. (*Id.* at p. 729.) Thus, both *Gamache* and *Avila* are inapposite.

The record on appeal contains no substantial evidence that appellant had any present or future ability to pay a restitution fine of any amount, and in fact contains ample evidence to the contrary. The evidence was insufficient to support the restitution fine of $10,000, and that order must be vacated.

### B. Even If the Restitution Fine Is Not Vacated, it Must Be Reduced by the Amount of the Victim Restitution Order

In addition to imposing the restitution fine of $10,000, the trial court entered an order for victim restitution in the amount of $4,000. (25 RT 8471.) The trial court had the authority to impose a victim restitution order pursuant to the version of Government Code section 13967, subdivision (c), in effect at the time of appellant's offenses.[83] However, that statute

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[83] The trial court cited Government Code section 13967.2 and Penal (continued...)

required that the amount of the restitution fine be offset by the amount of any direct restitution order.

As set forth above, when the offenses were committed, Government Code section 13967, subdivision (a), allowed for imposition of a maximum restitution fine of $10,000.[84] Subdivision (c) of that statute provided that where the victim suffered economic loss as a result of the offense, the court could order direct victim restitution "in lieu of imposing all or a portion of the restitution fine." (Stats. 1992, ch. 682, § 4, p. 2922.) In other cases, the Attorney General has conceded, and the Court of Appeal has found, that this language prohibited courts from imposing both a restitution fine and a direct victim restitution order. (See *People v. Zito* (1992) 8 Cal.App.4th

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[83] (...continued)
Code sections 1203.04 and 2085.5(b) as the authority for the victim restitution order. At the time of appellant's sentencing in 1996, Government Code section 13967.2 addressed the mechanics by which payment of a restitution order could be obtained from a defendant's wages, not the authority for such an order. (Stats. 1990, c. 45 (A.B.1893), § 3.) Section 1203.04 had been repealed in 1995, before appellant was sentenced. (Stats. 1995, c. 313 (A.B. 817), § 8, eff. Aug. 3, 1995.) At the time of the offenses in 1993, section 1203.04 provided the authority to order victim restitution as a condition of probation. (Stats. 1992, c. 682 (S.B.1444), § 5, eff. Sept. 14, 1992.) Appellant was statutorily ineligible for probation. (Pen. Code § 1203.06(a)(1).) At the time of sentencing, Penal Code section 2085.5 (b) provided the California Department of Corrections with the power to collect a percentage of an inmate's wages and trust account deposits in order to satisfy a victim restitution order. (Stats. 1995, c. 876 (S.B. 911), § 4.) Thus, none of the statutes cited by the trial court provided the authority to impose a victim restitution order in the present case. However, such authority was provided by the statutes discussed below.

[84] The relevant portions of the statute are set forth above at pp. 318-319.

736, 743 [trial court was prohibited from imposing a $10,000 restitution fine when it had imposed a $300,000 direct restitution order]; *People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1536 [trial court erred in imposing a $5,000 restitution fine when it also imposed a $19,806 direct restitution order].) Although under the 1993 version of Government Code section 13967, subdivision (c), a trial court could order the defendant to pay direct restitution to the victim in the full, unlimited amount of his or her losses, the "in lieu of" language of that subdivision still limited the maximum restitution fine that could be imposed under subdivision (a). The limit was "not $10,000, but $10,000 less the amount of restitution to the victim. A credit toward the maximum restitution fine allowable must be given for that amount of direct restitution to be paid to the victim." (*People v. Cotter* (1992) 6 Cal.App.4th 1671, 1677 [discussing nearly identical provisions in the 1990 version of the statute].) Thus, appellant was entitled to have his $10,000 restitution fine reduced by the $4,000 direct restitution order.

Although appellant did not object to the restitution orders at the time of trial, the error is not forfeited. Where a sentencing order "could not lawfully be imposed under any circumstance in the particular case," it is "unauthorized," and the error need not be preserved by objection below. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The trial court ordered restitution in amounts that could not lawfully be imposed in this case under any circumstances. The orders were unauthorized and therefore the error is not waived or forfeited by appellant's failure to object. (*Ibid.*; see, e.g., *People v. Zito*, *supra*, 8 Cal.App.4th at p, 743.)

### C. The Restitution Fine May Not Stand

The $10,000 restitution fine must be stricken because the evidence in the record is insufficient to support the trial court's implied finding that appellant had the ability to pay. Given appellant's indigency and lack of earning capacity, a remand for reconsideration of appellant's ability to pay would be pointless.

In the event that the court declines to find that the restitution fine is supported by insufficient evidence, it must nevertheless reduce the amount of the restitution fine by $4,000, the amount of the direct victim restitution ordered.

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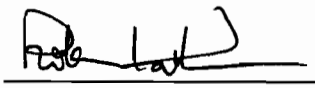
## CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: April 11, 2011

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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## CERTIFICATE OF COUNSEL

**(Cal. Rules of Court, rule 8.630(b)(2))**

I, Robin Kallman, am the Deputy State Public Defender assigned to represent appellant Charles Case in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 96,192 words in length.

Dated: April 11, 2011

ROBIN KALLMAN
Attorney for Appellant

## DECLARATION OF SERVICE

Re: *People v. Charles Case*

California Supreme Court
No. S057156

I, HIROKO CRUZ, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a true copy of the attached:

**APPELLANT'S OPENING BRIEF**

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

Office of the Attorney General
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Hon. Jack Sapunor
Superior Court of California,
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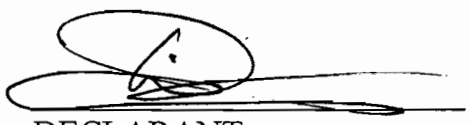
Sacramento, CA 95814

Each said envelope was then, on April 11, 2011, deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on April 11, 2011, at San Francisco, California.



DECLARANT