IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	Supreme Court
Plaintiff and Respondent,	)	Crim. S073316
	)	
v.	)	Orange County
	)	Superior Court
ROBERT MARK EDWARDS,	)	No. 93WF1180
	)	
Defendant and Appellant.	)	

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE THE HONORABLE JOHN J. RYAN, JUDGE

APPELLANT'S OPENING BRIEF

MICHAEL D. ABZUG
(State Bar No. 63306)
PMB 471
137 North Larchmont Boulevard
Los Angeles, California 90004
Telephone Number: (310) 337-4302
Facsimile Number: (310) 337-4392
E-Mail: jamaisvu5@aol.com
Attorney for Appellant
Robert Mark Edwards

Michael D. Abzug, Esq.
137 North Larchmont Blvd.
PMB 471
Los Angeles, California 90004
Telephone: 310 337-4301
Facsimile: 310-337-4392
California Bar Number 63306

Clerk; Supreme Court of California
350 McAllister Street
San Francisco, California 94102-3600

December 27, 2006

Re: People v. Robert Mark Edwards, S072216; Opening Brief

Dear Sir:

Enclosed are an original and thirteen copies of my client's opening brief, due December 31, 2006. I have also enclosed a face sheet to conform and a stamped self-addressed envelope.

As noted in the brief, the Court has previously granted permission to file an oversized brief of this length. The Errata Sheet in the front of the brief has accompanied all service copies.

I will be out of the country from December 29, 2006 to January 8, 2006.

Yours very truly.

Michael D. Abzug
Counsel for the Appellant

Errata Sheet for Appellant's Opening Brief – People v. Robert M. Edwards, S073316

1) Page xv of the Table of Contents: "IV. Cumulative Error" should read "XII. Cumulative Error."

2) Page 160: "***People v. Hernandez*** (1997) 70 Cal.App.4th 271" should read "***People v. Hernandez"*** (1977) 70 Cal.App.3d 271

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	Supreme Court
Plaintiff and Respondent,	)	Crim. S073316
	)	
v.	)	Orange County
	)	Superior Court
ROBERT MARK EDWARDS,	)	No. 93WF1180
	)	
Defendant and Appellant.	)	

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
THE HONORABLE JOHN J. RYAN, JUDGE

APPELLANT'S OPENING BRIEF

MICHAEL D. ABZUG
(State Bar No. 63306)
PMB 471
137 North Larchmont Boulevard
Los Angeles, California 90004
Telephone Number: (310) 337-4302
Facsimile Number: (310) 337-4392
E-Mail: jamaisvu5@aol.com
Attorney for Appellant
Robert Mark Edwards

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

Page(s)

CONSTITUTION

California Constitution:

United States Constitution:

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	**Supreme Court**
Plaintiff and Respondent,	)	**Crim. S073316**
	)	
v.	)	**Orange County**
	)	**Superior Court**
ROBERT MARK EDWARDS,	)	**No. 93WF1180**
	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

This is an automatic appeal from a judgment of death entered by the Orange County Superior Court on September 9, 1998. (R.T. 6551 – R.T. 6553; C.T. 1892 – C.T. 1897.)

On August 11, 1993, a felony complaint was filed charging Appellant, Robert Mark Edwards, in Count 1 with the murder of Marjorie Deeble. (Penal Code 187.)[1] In Count 2, he was charged with first-degree burglary of an inhabited dwelling. (459 and 460(a) (C.T. 189 – C.T. 190.)

The complaint alleged two special circumstances in connection with the murder count. The murder was alleged to have been committed on May 15, 1986

while Appellant was engaged in the commission of the crime of burglary in the first degree. (190.2(a)(17)(VII); C.T. 189.) The murder was also alleged to have been intentional and involved the infliction of torture (190.2(a)(18); (C.T. 189.) Finally, the complaint alleged that the murder and burglary were serious felonies. (1192.7(c)(1); C.T. 189.)

On August 12, 1994, a first amended felony complaint was filed that added a special circumstance allegation that on or about March 10, 1994, Appellant had been convicted in Hawaii of murder. (190.2(A)(2); C.T. 190 – C.T. 192.)

On October 21, 1994, a second amended felony complaint was filed that alleged the crimes occurred between May 12, 1986 and May 15, 1986, instead of May 15, 1986. (C.T. 193.)

Appellant was held to answer for these charges following a preliminary hearing held on May 26, 1995. (C.T. 195.) The same charges were filed in an information on June 5, 1995. (C.T. 198 – C.T. 199.)

On July 12, 1996, a defense motion to dismiss the prior murder special circumstance allegation was granted pursuant to Section 995 because the elements necessary to support Appellant's murder conviction in Hawaii did not necessarily establish the intent required to prove a murder under the California special circumstance statute. (C.T. 442; R.T. 82 – R.T. 88.)

---

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

On September 3, 1996, a jury trial began before the Honorable John J. Ryan. (C.T. 525.) The court also granted a motion by the People to dismiss Count 2 of the information because it was barred by the statute of limitations; there was no objection by the defense. (C.T. 525.)

Jury selection concluded on September 25, 1996. (C.T. 671 – C.T. 673.) The prosecution began presenting evidence in the guilt phase of the trial that same day. The presentation of the evidence concluded on October 15, 1996. (C.T. 844 – C.T. 845.) The next day, counsel began their arguments to the jury. (C.T. 846 – C.T. 847.)

On October 17, 1996, arguments of counsel concluded and the jury began its deliberations. (C.T. 848 – C.T. 849.) The court granted a motion by the People to strike that portion of the special circumstance allegations that charged that the burglary was committed in the first degree; there was no objection by the defense. (C.T. 848.)

Five days later, on October 22, 1996, the jury announced its verdicts. (C.T. 1051 – C.T. 1053.) The jury found Appellant guilty of first-degree murder as charged in the information. (C.T. 1052.) The jury further found the remaining special circumstance allegations to be true because the murder involved the infliction of torture and was committed during the commission of the burglary. (C.T. 1052.)

On November 4, 1996, the penalty phase began. (C.T. 1120 – C.T. 1121.) The presentation of evidence concluded on November 13, 1996. (C.T. 1157.) Closing arguments were on November 18, 1996. (C.T. 1161 – C.T. 1162.) Deliberations began on November 19, 1996. (C.T. 1163.)

On November 26, 1996, the jury announced that they were "deadlocked." (C.T. 1239.) After questioning the jurors, the trial court declared a mistrial. (C.T. 1239 – C.T. 1240.)

On March 3, 1998, a new penalty phase jury panel was assembled. Jury selection began with the distribution of juror questionnaire forms and hardship voir dire. (C.T. 1461.) Jury selection continued through March 16th and 17th; it concluded on March 18, 1998. (C.T. 1481 – C.T. 1498.) The presentation of the evidence began on March 23, 1998. (C.T. 1490 – C.T. 1492.) The evidence and argument of counsel concluded on April 13, 1998. (C.T. 1599 – C.T. 1601.) On April 16, 1998, the jury returned a verdict of death. (C.T. 1745 – C.T. 1746.)

On September 9, 1998, the trial court denied Appellant's motion to modify the verdict of death pursuant to 190.4(e). (C.T. 1894 – C.T. 1895.) The trial court imposed the death penalty on the murder count. (C.T. 1895.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Introduction

The information alleged that in 1986, Robert Edwards murdered Marjorie Deeble in Los Alamitos, California. The Court and the parties agreed that the evidence that Appellant committed this crime was insufficient, as a matter of law, unless evidence of an uncharged homicide in Hawaii committed in 1993 was also admitted against him. Thus, the legal sufficiency of the prosecution's case hinged on its theory that Robert Edwards committed the Deeble homicide because of its unique similarity to the murder of Muriel Delbecq, seven years later and thousands of miles away.

B. The Deeble Murder in May of 1986

1. Introduction

In 1986, Marjorie Deeble worked as a real estate agent at the Los Alamitos branch of Great Western Real Estate. At approximately 3:00 p.m. on the afternoon of May 12th, Mrs. Deeble stopped by her manager's office to notify her that she had an appointment at 5:00 p.m. that day. (R.T. 1985.) She never arrived at the appointment or appeared for work again. (R.T. 1986.)

2. The Scene of the Crime

On May 12th, and for the next three days, Mrs. Deeble's daughter, Kathy Valentine, left her a number of messages on her mother's telephone answering machine; none were returned. (R.T. 2074 – R.T. 2075.)

On May 15, 1986, at approximately 6:00 p.m., the police arrived at Mrs. Deeble's apartment at 3882 Green Street in Los Alamitos. (R.T. 1990.) They found the screen door to the front entrance closed, but unlocked; the front door was ajar approximately four inches. (R.T. 1990.) A window screen was lying against the apartment, just below the window adjacent to the front door. (R.T. 1992; R.T. 1998; R.T. 2003.) When the police entered the apartment, nothing out of ordinary appeared in the living room, kitchen or southwest bedroom. In the southeast bedroom, the police discovered Mrs. Deeble's body. The room had been ransacked. Clothing had been thrown on the floor, the contents of a purse were strewn about, and dresser drawers were open. (R.T. 2009 – R.T. 2010.) A radio was playing on the nightstand next to the bed. (R.T. 2018.) The police recalled that a bedspread or a large piece of cardboard covered the bedroom window. (R.T. 2019.)

Mrs. Deeble was laying face down at the foot of the bed. Her body was uncovered, except a nightgown was pushed up around her waist. (R.T. 2019 – R.T. 2023.) Her hands were tied behind her back with cloth that had been ripped or cut from the bottom of her nightgown; her hands were also bound with a length of telephone cord. (R.T. 2054.) Although her ankles and legs were not bound, there were abrasions on her ankle that could have been ligature marks. (R.T. 2070.) Her head was suspended about eight inches from the floor by a noose

around her neck. (R.T. 2045.) The noose was made from a belt; the free end of the belt was tied to a handle of a top drawer of a credenza. (R.T. 2011.) A can of hair mousse was discovered on top of the bed amongst some covers. (R.T. 2014.) A later examination of the can by a forensic expert revealed "wiping types of marks" as if it were handled by someone who attempted to wipe the can or was wearing gloves. (R.T. 2327.)

3. The Forensic Evidence

On May 15th, twenty-three latent fingerprints were discovered at the murder scene; four days later, another seven were taken from items that had been removed by the police from the murder scene. (R.T. 2323 – R.T. 2324.) Fingerprints, blood, and hair samples were taken from a number of potential suspects, including Appellant. (R.T. 2076; R.T. 2029 – R.T. 2030; R.T. 2068.) All of the latent prints were compared to the known fingerprints of Appellant by a forensic expert. No matches were found. (R.T. 2325.) There were also a number of latent fingerprints that were discovered on the victim's vehicle that were found in the parking lot next to her apartment; these were also compared to the Appellant's known fingerprints, but no matches were made. (R.T. 2330 – R.T. 2332.) None of the latent fingerprints that were found could be dated. (R.T. 2037.)

Pubic and other body hair were found throughout the murder scene: on sheets, pillows, the decedent's nightgown, the floor and in the shower. (R.T. 2063

– R.T. 2068.) Hair samples of Appellant and the victim were also compared to these hairs found at the crime scene. Expert opinion established that the pubic hair found in the victim's bed and in her bathroom were not consistent with her own. (R.T. 2792 – R.T. 2793.) None of the hair was Appellant's. (R.T. 2797 – R.T. 2799.)

Residue was discovered around the ridge of a small white cap discovered on the floor of the southeast bedroom, as well as on the top of the hair mousse canister. It appeared to the police that the cap might fit the canister. (R.T. 2046 – R.T. 2047.) Although presumptive tests for blood reached positively to these residues, the presumptive tests that were used are not always accurate; substances other than blood can react positively. (R.T. 2061 – R.T. 2062.) The witness who performed the tests testified that the residues may have been sent to the Serology Laboratory for more definitive results, there is no evidence in the record to confirm that such tests were ever performed or to otherwise establish that the residues were indeed blood. (R.T. 2062 – R.T. 2063.)

A makeshift hood was also discovered at the crime scene, which had been pieced together with adhesive tape, a pillowcase, portions of a dress, and a scarf. (R.T. 2048 – R.T. 2051.) This makeshift hood also appeared to be blood stained. (R.T. 2051.) The bed sheets and comforter were stained reddish brown and yellow; other than a presumptive test that excluded urine, there is no evidence in

the record that any attempt was made to determine the source of these stains. Finally, a stain was discovered on the descendant's left thigh that could have been semen; however, no further tests were performed. (R.T. 2070.)

The results of the autopsy were described by Dr. Richards Fukumoto; however, although Dr. Fukumoto specialized in pathology, he did not perform the autopsy himself. (R.T. 2122.) The autopsy revealed a ligature mark around the victim's neck consistent with a side-to-side movement. (R.T. 2126.) Her right eardrum was torn; the left eardrum was ruptured and bleeding. (R.T. 2127.) These injuries were consistent with pressure-damage caused by the victim's effort to take a breath. (R.T. 2128.) The victim received a blow to the bridge of her nose. (R.T. 2130; R.T. 2142; R.T. 2173.) The pancreas was damaged, indicating the receipt of a strong physical blow. (R.T. 2135 – R.T. 2136.) The labia, vaginal wall, and rectum had shallow lacerations that were inflicted before death. (R.T. 2127; R.T. 2162.) These lacerations were not deep within the vaginal vault and rectum; they were just inside the openings. (R.T. 2155 – R.T. 2157.) In Dr. Fukumoto's opinion, these injuries would have been "extremely painful" for the deceased. (R.T. 2128; R.T. 2138.) Her face was engorged, indicating the presence of trauma due to ligature strangulation. (R.T. 2130 – R.T. 2131; R.T. 2151.) Her left chin was lacerated. Fluid inside her skull was bloody; this indicated that she received blunt force trauma to her head. (R.T. 2133.) Dr. Fukumoto testified that broken

neck bones and hemorrhaging in the muscle tissue are common in cases of manual strangulation; none were observed during the autopsy. On the other hand, ligature strangulation can be achieved without such injuries. (R.T. 2134 – R.T. 2135.) The cause of Mrs. Deeble's death was asphyxiation due to ligature strangulation. (R.T. 2139.) During such strangulation, loss of consciousness occurs before death; a victim can lose consciousness in less than a minute. (R.T. 2153 – R.T. 2154.)

The defense called Dr. Paul Wolfe, a trauma pathologist at the University of California at San Diego Hospital, as well as the Director of Autopsy at the Veteran's Administration Center in La Jolla. He was also a Clinical Professor of Pathology at UCSD. (R.T. 2475.) Dr. Wolfe testified that x-rays did not confirm a finding that Mrs. Deeble's nose was fractured. (R.T. 2478.) He also testified that bleeding from the ear canal and tearing of the eardrum are characteristics of ligature strangulation; they do not necessarily indicate the use of a sharp object to inflict ear injuries. (R.T. 2479 – R.T. 2486.) Strangulation can cause an individual to lose consciousness within 15 to 30 seconds. (R.T. 2481.) When consciousness is lost, one does not feel any pain. (R.T. 2484 – R.T. 2485.) Ligature strangulation does not necessarily produce extreme or prolonged pain, nor does hemorrhaging from the ears; indeed, bleeding from the ear canal could have occurred while Mrs. Deeble was unconscious. (R.T. 2486.)

In Dr. Wolfe's opinion, the injuries to the vagina and rectum were "extremely minor" and consistent with consensual sex; (R.T. 2492 - 2495; R.T. 2514.) Dr. Wolfe opined that the microscopic amount of bleeding detected in the vagina and rectum was insufficient to produce the unknown residue found around the ridge of the cap which may have fit to the canister of hair mousse. (R.T. 2496 – R.T. 2498.)

Dr. Wolfe noted major differences between the injuries suffered by Mrs. Deeble and Mrs. Delbecq, though neither of them felt any pain before they died. (R.T. 2516 – R.T. 2517.) In contrast to the minor injuries to Mrs. Deeble's genitalia, Mrs. Delbecq had severe injuries to her vagina and rectum. As a result of those injuries, and the perforation of her vaginal cavity with a canister of hair mousse, 100 milliliters of blood was found in her lower abdomen. Her neck was broken. Her breasts were heavily abraded and contused. Strangulation of the two victims was by different modalities; Mrs. Delbecq was strangled manually, while Mrs. Deeble died from ligature strangulation. (R.T. 2499; R.T. 2519.)

4. The Relationship Between Robert Edwards and Mrs. Deeble at the Time of the Homicide

Kathy Valentine met Robert Edwards in March of 1986, when she offered him a ride in her vehicle because he was on crutches. (R.T. 2087 – R.T. 2088.) For the next two months, the couple saw each other every evening. To her knowledge, Kathy Valentine only saw Robert Edwards under the influence of an

intoxicant on a single occasion during that time. (R.T. 2084 – R.T. 2085; R.T. 2100.)

In early May, Marjorie Deeble loaned Robert Edwards her truck; he damaged it, which upset Mrs. Deeble. However, she did not yell or curse at him as a result of the accident. (R.T. 2110 – R.T. 2112.) She arranged for him to take the damaged vehicle to a shop where she charged the ensuing repairs on her credit card. (R.T. 2075 – R.T. 2076; R.T. 2092 – R.T. 2093.) Mrs. Deeble's limited interactions with Robert Edwards never impaired her daughter's relationship with him. (R.T. 2093.) Indeed, Kathy Valentine did not know how her mother even felt about him. (R.T. 2106 – R.T. 2107.)

Robert Edwards went to Mrs. Deeble's apartment on two occasions. On the first occasion, Kathy Valentine introduced him. This was the only time he ever saw the decedent. (R.T. 2106 – R.T. 2107; R.T. 2076 – R.T. 2077.) On the second occasion, Mrs. Deeble was away on a trip. On this latter occasion, he spent the night in the apartment with Kathy Valentine. (R.T. 2076 – R.T. 2077; R.T. 2093.)

Robert Edwards did not attend Mrs. Deeble's funeral; he explained to Kathy Valentine that he had nothing to wear and did not want to see her upset. (R.T. 2079 – R.T. 2080.) He continued to date Kathy Valentine for another week after her mother's death. (R.T. 2102.) According to Kathy Valentine, he was aware that

her mother kept a key to her apartment in a drainpipe in front of the apartment building. (R.T. 2076.)

Kathy Valentine alleged that certain pieces of her mother's jewelry were missing after the murder. Those allegedly missing items were never recovered. (R.T. 2081 – R.T. 2083.) Moreover, a ring that Mrs. Deeble was wearing at the time of her murder was not stolen; its presence was noted during her autopsy. (R.T. 2060 – R.T. 2061.)

C. The Uncharged Homicide of Muriel Delbecq in January of 1993

1. Introduction

In 1993, Muriel Delbecq owned a one-bedroom condominium in Maui: Unit 105, 2050 Kanoe Street. (R.T. 2179.) Her usual morning activities included a one-half mile swim at a beach four blocks away. (R.T. 2179 – R.T. 2180.)

At approximately 8:00 p.m. on January 25, 1993, her daughter, Peggy Ventura, dropped her mother off at the Kanoe Street condominium. (R.T. 2184.) That was the last time Mrs. Delbecq was seen alive. At 7:20 a.m. the following morning, Ms. Ventura telephoned her mother, but there was no answer. (R.T. 2185.) She drove to the condominium and knocked on the front door, which was locked. There was no response. She opened the front door with a key that she had and saw blood on the carpet. (R.T. 2186 – R.T. 2187.) As Ms. Ventura ran through the condominium calling her mother's name, she noticed that the living

room telephone was gone. (R.T. 2189.) When she couldn't get into her mother's bedroom through the door, she went outside. She took the screen off her mother's bedroom window; it was more damaged than she remembered. (R.T. 2193 – R.T. 2194.) She removed the window itself. (R.T. 2192.) Her mother's comforter was over the window and the bedroom light did not work. In the darkness, Ms. Ventura called out her mother's name. She removed a pile of blankets on the bed and discovered her mother underneath, lying on her back, completely naked. (R.T. 2193.) Her mother's wedding ring, which she always wore, had been removed. (R.T. 2196.)

2. The Scene of the Crime

Mrs. Delbecq's bedroom was ransacked. (R.T. 2208.) Various household articles, including a telephone cord, were found in a pillowcase abandoned in a dumpster a short distance down the street. (R.T. 2224; R.T. 2207; R.T. 2227 – R.T. 2230.) The pillowcase also contained cut up pieces of clothing. (R.T. 2224.) The pillowcase had the same pattern as the sheets on Mrs. Delbecq's bed. (R.T. 2210; R.T. 2213.) Mrs. Delbecq's hands were not bound, although ligature marks were on her wrists and ankles. (R.T. 2235; R.T. 2219.) Pieces of dried grass were discovered on the bedroom floor below the windowsill of the bedroom in which Mrs. Delbecq was discovered. (R.T. 2239.)

3. Forensic Evidence

A white colored T-shirt with Appellant's bloody footprint was found in the bedroom. (R.T. 2217 – R.T. 2218; R.T. 2257.) An expert testified that his palm print was found on the bedroom wall. (R.T. 2216; R.T. 2255 – R.T. 2256; R.T. 2243 – R.T. 2244.)

The victim's head, neck, and right ear were bruised. Her nose was fractured and her jaw was abraded. (R.T. 2298.) These head wounds were caused by blunt force trauma. A sharpened or pointed object scraped the skin of her neck in a horizontal direction, as well as her breast. (R.T. 2294.) The entrance to the vaginal cavity was bruised. There were two perforations of the vaginal wall. One was in the rectal area, approximately two inches into the cavity. The other was in the abdomen and was approximately three-to-four inches into the cavity. It was in this latter perforation that the metal canister of hair mousse was discovered. (R.T. 2295; R.T. 2301 – R.T. 2302.) In the opinion of the physician who performed the autopsy, hemorrhaging around the musculature of the anal and vaginal area indicated that Mrs. Delbecq was alive at the time the injuries to those areas were inflicted. (R.T. 2296 – R.T. 2297.) The hyoid bone in her neck was fractured. (R.T. 2296.) The most probable cause of death was asphyxia. (R.T. 2298.)

4. The Absence of a Relationship Between Appellant and Mrs. Delbecq at the Time of the Homicide

Ms. Ventura had never heard of Mr. Edwards before her mother's death. (R.T. 2204.) At the time of the murder, Appellant lived in Maui at 2134 South Kihei Road with his girlfriend, Janis Hunt, and her daughter. (R.T. 2297.) A few days after the murder, the police searched Robert Edward's apartment. No physical evidence was discovered that linked him to the murder.

D. The Defense Case

1. The Robert Edwards' Abusive Childhood and Early Addiction

Robert Edwards' father was a vicious alcoholic. He began beating him when he was six months old. (R.T. 2528 – R.T. 2531.) His father believed that he might not be his child. (R.T. 2529.) As Robert Edwards grew up, his father beat him almost daily. His father referred to Appellant and his brother as "Shit for Brains #1 and #2," or "SFB #1 and #2" for short. (R.T. 2530 – R.T. 2533.) While they were growing up, they watched their father beat their mother, who also abused prescription drugs and alcohol. (R.T. 2530 – R.T. 2531; R.T. 2536; R.T. 2529.)

Robert Edwards began experimenting with illegal narcotics when he was 11 or 12 years old. Heavy abuse of alcohol followed about a year later. (R.T. 2549 – R.T. 2550.) From 11 to 14 years of age, he experimented with virtually every illegal narcotic, including marijuana, hashish, LSD, cocaine and heroin. By 14 years of age, he was injecting narcotics. (R.T. 2548 – R.T. 2552.) During his teenage years, his drug and alcohol abuse steadily increased. (R.T. 2555 – R.T.

2556.) He dropped out of school in eighth grade and worked odd jobs to support his habit of substance abuse. (R.T. 2559.) His first alcoholic blackout was when he was 16 years old. He was partying with friends; the next day he awoke and found himself at another house with no idea how he got there. (R.T. 2565.) These blackouts occurred periodically thereafter. (R.T. 2556 – R.T. 2569.)

In December of 1985, Robert Edwards was involved in a serious motorcycle accident and injured his leg. Surgery was required. In May of 1986, he had a second surgery to remove the surgical staples that had been placed in the bone. He was on crutches for months afterward. He had very little mobility in his right leg and could barely bend it. He could not run at the time of Mrs. Deeble's murder. Robert Edwards could not put any weight on his right leg and could only hop on one leg, if he had to move quickly. (R.T. 2572 – R.T. 2576.)

2. The Deeble Murder

While Robert Edwards was dating Kathy Valentine, he continued to abuse drugs and alcohol, but tried to conceal his habit from her. (R.T. 2589 – R.T. 2590.) He testified that he did not feel any ill will toward Marjorie Deeble. (R.T. 2582.) He was unaware that she had a key to her house hidden outside. (R.T. 2588.)

On the evening of May 12, 1986, he and his brother went to a Judas Priest rock concert in Los Angeles to sell counterfeit LSD. (R.T. 2596 – R.T. 2597.) They left the concert around 11 p.m. and returned to Long Beach. There, they

purchased some drugs and went home. Throughout the evening, he consumed alcohol; he didn't remember very much of that evening. When he arrived home at approximately 11:30 p.m., he injected heroin and cocaine and consumed more alcohol. When he woke up the next morning at home, he didn't recall anything unusual. (R.T. 2598 – R.T. 2604.) He did not learn of Mrs. Deeble's death until the police informed Kathy Valentine of the murder. (R.T. 2592.) After Kathy Valentine was advised of her mother's death, Robert Edwards and Ms. Valentine drove to the Los Alamitos Police Station. (R.T. 2592 – R.T. 2595.) He told the jury that he did not kill Marjorie Deeble. (R.T. 2604.)

3. The Delbecq Murder

In 1993, Appellant lived with Janis Hunt at 2135 South Kihei Road, Apartment 210, in Maui. He met Ms. Hunt in September; by December he had moved in with her and her 12-year-old daughter. (R.T. 2635 – R.T. 2637.) During his relationship with Ms. Hunt, Appellant drank on an almost daily basis and abused narcotics. When he drank heavily, he would consume between 12 and 24 cans of beer and up to a fifth of hard liquor. (R.T. 2637 – R.T. 2638.) Appellant's substance abuse increased in December of 1992, when he learned of his father's death in an airplane crash. (R.T. 2639.)

On one occasion, after a heavy night of drinking, Ms. Hunt had to help Appellant find his truck because he couldn't remember where he parked it. On

another occasion, Robert Edwards forgot that he had groceries in his car after he had been drinking. (R.T. 2640 – R.T. 2646.)

On January 25, 1993, Robert Edwards learned that his dog had been killed on Kihei Road. He was upset and cried as he cradled his dog. He dipped his fingers in his dog's blood and brought them close to his face. (R.T. 2674.) When they buried the dog later that evening, he was still upset and crying. Although Robert Edwards did not appear inebriated to Ms. Hunt, they had been drinking all day. (R.T. 2672 – R.T. 2673.) Between 8:00 p.m. and 11:00 p.m. that evening, he went to David Long's house and injected cocaine four to five times. (R.T. 2678 – R.T. 2680; R.T. 2686.) When he left Mr. Long's house, he was babbling incoherently and was more intoxicated than Mr. Long had ever seen him. (R.T. 2680 – R.T. 2681; R.T. 2685.)

Ms. Hunt and her daughter went to bed around 11:30 p.m.; Robert Edwards still had not yet returned to the apartment. When she saw him later that night, there was nothing unusual about his appearance, other than he appeared to be tired and very distraught about his dog. (R.T. 2663 – R.T. 2664.) The next morning, Ms. Hunt learned of Mrs. Delbecq's murder from a neighbor. When she told him about it, his demeanor did not change; he simply replied, "Wow, no way." (R.T. 2666 – R.T. 2667.)

During cross-examination, Robert Edwards was impeached with three felony convictions: On March 10, 1994, he was convicted in Hawaii of the murder of Muriel Delbecq and the burglary of her home. Ten years earlier, he had also been convicted of Second-Degree Burglary in California. (R.T. 2616.)

4. Expert Testimony about Blackouts

Dr. Alex Stalcup testified as a defense expert in the field of addictive medicine. (R.T. 2378 – R.T. 2380.) Twenty percent of individuals who experiment with drugs or alcohol will become addicted. (R.T. 2386.) A number of predictive factors are found in this population. Individuals with a low amount of endorphins in their brains are predisposed to substance abuse. This condition is called "chronic dysphoria." (R.T. 2386; R.T. 2406 – R.T. 2310.) An abused childhood is the second most prevalent risk factor, only exceeded by genetics. (R.T. 2416.) Thirdly, an early exposure to illegal narcotics also contributes to addiction as well as an early, positive experience from drugs or alcohol. (R.T. 2387 – R.T. 2388.) Finally, an enabling environment contributes to addiction such as the absence of discouraging influences and parents teaching that drugs and alcohol are bad. (R.T. 2389.) Among the signs of addiction include the loss of control and continued use, despite adverse consequences. (R.T. 2390.)

The multi-generational alcohol and drug abuse in Appellant's family are consistent with genetic predisposition. (R.T. 2412 – R.T. 2414.) In the opinion of

Dr. Stalcup, the risk factors for addiction for an individual who began using drugs when he was eight years old, progressed to injecting amphetamines by the age of 14, and who then began injecting cocaine and heroin were "as bad as it could be." (R.T. 2420; R.T. 2429; R.T. 2431 – R.T. 2432.) Such progression demonstrates that an individual can't stand sobriety; it is too painful. (R.T. 2429.)

Dr. Stalcup opined that it is very difficult to predict the onset of a "blackout;" it depends on tolerance and the amount of alcohol consumed. (R.T. 2383; R.T. 2413 – R.T. 2414.) A tolerant individual who consumes enough alcohol to produce a level of intoxication over three times the legal limit in California can look completely normal. (R.T. 2415.) Generally, as the consumption of alcohol increases, judgment and coordination become progressively impaired. (R.T. 2450 – R.T. 2453.)

If Appellant consumed alcohol and cocaine on May 12, 1986, the cocaine would have reduced his clumsiness produced by alcohol, as well as the appearance of intoxication. According to Dr. Stalcup, the combination of alcohol and cocaine would have made it "far, far, far more likely (for Appellant) to go into an alcoholic blackout." (R.T. 2423.)

II. THE FIRST PENALTY PHASE

The first penalty phase began on November 4, 1996. (R.T. 3205.) Evidence was presented over four days. (R.T. 3229 – R.T. 3941.) The jury heard arguments of counsel on November 18, 1996. (R.T. 4008 – R.T. 4173.)

On November 19, 1996, the jury received instructions, including the so-called "lingering doubt," charge and began its deliberations. (R.T. 4180 – R.T. 4200.)

On November 26, 1996, the court found that the jury was hopelessly deadlocked and declared a mistrial. (R.T. 4268 – R.T. 4270.)

III. THE SECOND PENALTY PHASE

A. The Prosecution's Case-in-Chief

The second penalty phase began on March 16, 1998. The jury for the penalty re-trial heard virtually all of the evidence that was presented during the guilt phase. (R.T. 5125 – R.T. 5203; R.T. 5297 – R.T. 5357.) The prosecution introduced extensive victim impact testimony from the daughter and older sister of Marjorie Deeble. They testified about her personal characteristics, their emotional reaction to her murder, and their feelings about the way she was killed. (R.T. 5204 – R.T. 5208; R.T. 5216 – R.T. 5260.) As further evidence in aggravation, Appellant's former girlfriend, Naomi Lindeman, testified that in 1990 he made unwanted sexual advances and attempted to insert a bottle into her vagina and rectum. (R.T.

5209 – R.T. 5215.) Evidence was also introduced that on July 8, 1997, Appellant and another inmate were observed sharpening a "shank" at the Orange County Central Jail. (R.T. 5262 – R.T. 5286.)

B. The Defense Case

Robert Edwards testified about the events and substance abuse that led up to the homicides just as he had during the guilt phase, with one notable exception. While at the guilt phase he denied committing the murders, in the retried penalty phase he explained that since his conviction he had reflected and come to the conclusion that he had committed both crimes. (R.T. 5519.) He also explained that in the summer of 1997, racial tensions at the Orange County Jail were high and that he was afraid for his life. He planned to use the shank only if his life were threatened. (R.T. 5380 – R.T. 5386.)

Evidence was presented that none of the latent fingerprints or pubic hair found at the Deeble crime scene matched those of Appellant; his testimony regarding his whereabouts on the night of the Deeble homicide was also corroborated by proof that there was a Judas Priest rock concert in Los Angeles that evening. (R.T. 5534 – R.T. 5535; R.T. 5598 – R.T. 5621; R.T. 5883 – R.T. 5902.) Witnesses testified that on the evening before the Delbecq murder, Robert Edwards became extremely intoxicated from heavy drinking and cocaine injections

after he learned that his dog had died. (R.T. 5973 – R.T. 5978; R.T. 5985 – R.T. 5989.)

The victim's son, Scott Deeble, testified that he felt compassion for Robert Edwards. (R.T. 5658.) Over twenty witnesses who knew Robert Edwards in and out of custody in Hawaii testified about the help that he had given to them to recover from drug and alcohol addiction. (R.T. 5849 – R.T. 5852; R.T. 5911 – R.T. 5923; R.T. 5938; R.T. 5781 – R.T. 5796; R.T. 5847 – R.T. 5852; R.T. 5660 – R.T. 5665; R.T. 5745 – R.T 5755; R.T. 6041 – R.T 6042; R.T. 6069 – R.T. 6071.)

Craig Furtado and William Farmer, who employed Robert Edwards in Hawaii, testified that when sober, he was a loyal and hardworking man; when intoxicated, he was a completely different person. (R.T. 5832 – R.T. 5836; R.T. 5944 – R.T. 5948.) A religious counselor at the Maui Community Correctional Center testified that when he discussed his crimes with her, he would cry and acknowledge that he never should be released from jail; they prayed for the families of the victims. (R.T. 5771.) Guards and a teacher at the Maui Community Correctional Center testified that Appellant was a "model prisoner." (R.T. 6007 – R.T 6010.) In 1993, he had an opportunity to escape, but chose not to do so because, as he explained later, "(he) wanted to do his time." (R.T. 5798 – R.T 5806; R.T. 5813 – R.T. 5815.) A guard at the Orange County Jail likewise

described Robert Edwards' strict adherence to the rules of that institution. (R.T. 5820 – R.T. 5823.)

Numerous family members recounted its history of substance abuse and the daily physical and emotional abuse of Robert Edwards by his father. (R.T. 5667 – R.T. 5718; R.T. 6086 – R.T. 6091; R.T. 6097 – R.T 6101.) This abuse included forcing him to rub his own excrement all over his chest and eat food befouled by animal hairs as punishment. (R.T. 5681; R.T. 5684.) It included beating so violent that they turned his lips "to hamburger." (R.T. 6099 – R.T. 6100.) Dr. Alexander Stalcup repeated his expert testimony that he gave at the guilt phase about the predictive factors of substance abuse that were present in Robert Edwards' background. He also described the effects of a "blackout" due to intoxication. (R.T. 5536 – R.T. 5583; R.T. 6015 – R.T. 6020.)

Several witnesses testified about the close relationship between Robert Edwards and his son Robby who was 13 years old at the time of the second penalty phase. Since Appellant's incarceration, he and his son corresponded regularly; he took an active role in helping his son make decisions about his life. (R.T. 5720 – R.T. 5742; R.T. 6074 – R.T. 6076; R.T. 6082 – R.T. 6083; R.T. 6118.) A child psychologist, Dr. Roberta Falke, testified that Robert Edwards and his son had a very strong, positive relationship. He had "unflagging devotion towards his son." (R.T. 6173 – R.T. 6174.) Robby Edwards overcame academic problems thanks, in

part, to his interest and encouragement. (R.T. 6144 – R.T. 6142.) During her conversations with Appellant, he expressed concern over his son's health and low-self esteem; he was open to suggestions about how to improve his relationship with his son. (R.T. 6162 – R.T. 6165.) Dr. Falke concluded that it would be important and essential for the father/son relationship to continue. (R.T. 6175.) Robby Edwards' therapist, Dr. Kara Cross, testified that Appellant's relationship was the "bedrock" of his son's emotional stability. It was vital for it to continue. (R.T. 6236; R.T. 6238.)

C. Rebuttal Case

Although he was not called as a witness at the first penalty phase proceedings, the prosecution called a forensic psychiatrist, Dr. Park Deitz, to testify about alcoholic blackouts. According to Dr. Deitz, a "blackout" simply means that short-term memory has not been recorded in long-term memory. Even if Appellant could not recall the murders because of a blackout, that did not exclude a finding that he was behaving intentionally and voluntarily at the time of their commission. Dr. Dietz noted that Appellant was not too intoxicated to engage in a very orderly sequence of complicated behaviors, such as gaining access to the victims' homes and subduing them; in his opinion, Appellant was not in a "blackout" at the time of the murders. (R.T. 3638 – R.T. 3645.)

ARGUMENT – GUILT PHASE ISSUES

I. THE TRIAL COURT'S HANDLING OF THE VOIR DIRE VIOLATED CALIFORNIA LAW AND DENIED ROBERT EDWARDS HIS FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAW, A FAIR TRIAL BEFORE AN IMPARTIAL JURY, AND A RELIABLE DETERMINATION OF GUILT AND OF THE PENALTY

A. Introduction

Appellant's constitutional rights were violated when the prosecution improperly used a preemptory challenge to strike one of the few African-American jurors on the entire panel. (R.T. 1807 – R.T. 1808.)

Maxine Garcia Mickens (Juror No. 161915201) was a 46 year old, unmarried pharmacy technician. She was a member of Neighborhood Watch, a crime prevention group. (C.T. 3768.) She was in the Naval Reserves as an intelligence specialist. She had served on a jury which reached a verdict in a prosecution for car theft, but had no other acquaintance with the criminal justice system. She stated under oath that she was ready to vote for a death verdict, if the allegations against Appellant were proved beyond a reasonable doubt. (R.T. 3775.)

The prosecutor asked Ms. Mickens a single question on voir dire, based on a fragment of her response to Question 36 on the Questionnaire, which asked her "What are your GENERAL FEELINGS regarding the death penalty?" She was asked if she had resolved her "personal" thoughts of "whether society should or

should not have the death penalty." She replied, "not really." However, the entirety of Ms. Mickens' response to Question 36 read as follows:

> "I've thought about it on a personal level without coming to a conclusion as to whether society should or should not have the death penalty. As the law now states, we have it so therefore I am prepared to obey the law of the land. On a personal level, I will continue to ponder.'"

(C.T. 3773; *emphasis supplied.*)

By any objective standard, Ms. Mickens was a respectable and solid citizen who would ordinarily be welcomed by any prosecutor on any jury. Nevertheless, for reasons that it was never required to reveal, the prosecution excluded the only African-American woman on the panel by using a peremptory challenge to excuse her from service. (R.T. 1806.)

The prosecutor violated Appellant's state and federal constitutional rights by exercising a peremptory challenge to this African-American prospective juror. Appellant objected to the challenge pursuant to (***People v. Wheeler*** (1979) 22 Cal.3d 258, overruled in part, ***Johnson v. California*** (2005) 545 U.S. 162.) (R.T. 1807.)

The court summarily denied the defense motion without any additional inquiry into the prosecution's motivation for his challenge. Nonetheless, the court noted that when it read Ms. Mickens answers to her questionnaire, it recognized that "we were going to have a ***Wheeler*** issue." (R.T. 1810.) However, the court

ruled that Appellant had not shown a prima facie case that Mrs. Mickens was excluded because of her race. (R.T. 1810 – R.T. 1811.) The finding that Appellant did not make a prima facie showing that the African-American juror named above was challenged on the basis of group association was erroneous. Since the prosecution was not ordered to show genuine, non-discriminatory reasons for the challenge, a reversal is required. (*See*, ***People v. Fuentes*** (1991) 54 Cal.3d 707; ***People v. Wheeler***, *supra*, 22 Cal.3d 258, 280 - 281.)

B. The Trial Court Erred in Finding Appellant Did Not Make Out a Prima Facie Case

1. Appellant Has Not Waived his Federal Claims

Appellant did not explicitly invoke ***Batson v. Kentucky*** (1986) 476 U.S. 79, overruled in part, ***Powers v. Ohio*** (1991) 499 U.S. 400, when he objected to the prosecution's peremptory challenge. This does not waive Appellant's equal protection claim under ***Batson***. This court has held that a state challenge under ***Wheeler*** also preserves the federal claim under ***Batson vs. Kentucky***. In ***People vs. Yeoman*** (2003) 31 Cal.4th 93, 118, *cert. denied,* (2004) 541 U.S. 991, this court stated that it would consider federal constitutional claims under ***Batson***, although an objection was only made under ***Wheeler,*** because the two cases presented "identical factual issues before the court." Indeed, in this case, the trial court referenced the ***Batson*** decision during its discussion of Appellant's challenge.

(R.T. 1809.) Accordingly, this court must consider all of Appellant's federal constitutional claims.

2. Standard of Review

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

Acknowledging that the moving party will usually be without any direct evidence of discrimination at the prima facie stage, the Supreme Court has repeatedly emphasized that a prima facie burden is low, describing it as "minimal." (***St. Mary's Honor Center v. Hicks*** (1993) 509 U.S. 502, 506.) This minimal burden is in response to the Court's recognition that "there can be no dispute, the peremptory challenges constitute a jury selection practice that permits 'those to

discriminate who are of a mind to discriminate.'" (***Batson v. Kentucky,*** *supra*, 476 U.S. 79, 96; *citation omitted.*) The burden of production at Step 1 does not entail an evaluation of the prosecution's credibility but only a determination of whether the facts support a reasonable inference of the improper use of the strike. (***Batson v. Kentucky,*** *supra*, 476 U.S. at 96 - 97.) In the case of ***Johnson v. California***, (2005) 545 U.S. 162, the Supreme Court held that California's "more likely than not" standard is an inappropriate yardstick with which to measure the sufficiency of a prima facie case. Instead, a defendant satisfies the requirement of ***Batson's*** first step by merely producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Because of a right to a jury presenting a "cross-section" of a community is so important, courts reviewing whether a prima facie case has been made under ***Wheeler/Batson*** should "err on the side of the defendant's right to a fair and impartial jury." (***United States v. Chinchilla*** (9th Cir. 1989) 874 F.2d 695, 697.)

Appellant need not demonstrate that more than one peremptory challenge against a cognizable group was motivated by group bias. If a single peremptory challenge of a prospective juror in the subject cognizable group is not justified, the Supreme Court intended that the jury panel must be discharged. (***People vs. Gonzalez*** (1989) 211 Cal.App.3d 1186,1193.) Thus, Appellant need only persuade the court that at least one of the prosecution's peremptory challenges was not

justified. Considered together, the considerations set forth above establish an "inference" of discrimination required by ***Batson***.

3. Appellant Established a Prima Facie Case

Under the controlling precedent of ***Johnson v. California,*** *supra*, the trial court was required to demand an explanation from the prosecutor about his inexplicable decision to exclude one of the few available African-American jurors from service.

First, African-Americans are a cognizable group for ***Wheeler/Batson*** purposes. (***Batson v. Kentucky***, *supra*.) By striking Ms. Mickens, the prosecutor excluded one of the few eligible black venire panelists.[2] *Compare*, ***Miller-El v. Dretke*** (2005) 545 U.S. 231 (where a high percentage of exclusions of a protected group was found to be an indication of prosecutor discrimination.)

Second, the prosecution exercised a peremptory challenge, notwithstanding the fact that Ms. Micken's answers strongly favored the prosecution. She had previously served on a trial jury in a criminal case. A verdict had been reached. She was a member of Neighborhood Watch. She expressed no hesitancy voting for death in the appropriate case. (R.T. 1804; C.T. 3764 – C.T. 3776.)

Finally, the ***Miller-El*** decision noted that in light of the black juror's "outspoken support for the death penalty, it would be reasonable to expect that the

prosecutor would have asked further questions to resolve any doubts he had about his willingness to impose it before getting to the point of exercising a strike, if such doubts were truly his motivation. (*Id.*)" Here, too, Mrs. Micken's willingness to impose the death penalty was unequivocal. Although "on a personal level" she continued to wonder whether society should retain it, she emphasized that she was ready to follow the law of the land. Nevertheless, the prosecutor only asked a single question about whether she had resolved her *personal* thoughts about the retention of the penalty. He received a non-committal answer and never followed it up; he simply excused her. The record is also replete with extensive inquiries by the prosecution of non-black jurors regarding their attitudes towards the death penalty before it exercised peremptory challenges. For example, before the prosecution excused Mrs. Mittle-Reeder (R.T. 1543), it questioned her about whether her history of substance abuse would prevent her from imposing the death penalty upon someone else who used drugs, whether she would openly consider evidence from both sides regarding the death penalty, whether she was comfortable evaluating evidence "on the issue of penalty" and whether she was prepared to reject that evidence.[3] (R.T 1379; R.T. 1402 – R.T. 1403.) Under ***Miller-El***, the comparatively half-hearted inquiry into a black juror's attitude towards the death

[2] Although the record does not disclose the racial composition of the jury that was eventually empanelled or the exact number of minority venire panelists, it is evident that the number of potential minority jurors was very small; the trial court only counted a mere four with certainty. (R.T. 1807 – R.T. 1808.)

penalty is powerful circumstantial evidence that the challenge was exercised upon a prohibited race basis.

A comparison of this record to post-***Batson*** precedent compel a conclusion that the trial court erred when it ruled that the defense failed raise the mere inference of race based challenge that required the prosecution to give a "reasonably specific explanation" for its decision to peremptorily exclude Ms. Mickens from service. ***Morse v. Hanks*** (7th Cir.) 172 F.3d 983, 985, *cert. denied*, 528 U.S. 851 (1999), (the prosecutor's decision to strike the only black venire man on the panel after a perfunctory voir dire satisfies the prima facie burden under ***Batson***; *compare*, ***People vs. Griffin*** (2004) 33 Cal.4th 536, 556, where the California Supreme Court held that the defendant failed to establish a prima facie case for purposeful discrimination because the record disclosed grounds upon which the prosecution properly might have made a peremptory challenge: the juror had a substantial acquaintance with a person engaged in criminal activity, he viewed the administration of the death penalty as random, and he was asleep during most of the voir dire.)

In light of the facts available to the trial court, "an inference of discrimination" was established and it had "a duty to determine if the defendant

[3] Although Mrs. Mittle-Reeder's race is not expressly identified in the record, it is reasonable to assume that she is not black since her challenge by the prosecutor was never discussed during the ***Wheeler*** motion that was made five days earlier.

had established purposeful discrimination." (***Batson v. Kentucky,*** *supra*, 476 U.S. 79, 98.) Appellant raised an inference that the prosecution had excluded Ms. Micken's on account of race and the burden should have shifted to the prosecution to articulate a race-neutral explanation of the peremptory challenge in question. The trial court's failure to find that Appellant established a prima facie case of discrimination with respect to the challenge violated ***Batson*** and ***Wheeler***.

The discrimination of the selection of Appellant's jury violated his right to equal protection under the Fourteenth Amendment of the United States Constitution and his right to a representative cross-section of the community under the Sixth Amendment and Article 1, Section 16 of the California Constitution and U.S. Const. Amend. XIV. (***Batson v. Kentucky*** (1986) 476 U.S. 79.) In addition to being a violation of the Equal Protection Clause of the Fourteenth Amendment, the discrimination in jury selection violated Appellant's right to a fundamentally fair and reliable capital trial under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. To the extent that the error was one of state, but not federal law, it violated Appellant's right to due process by depriving him of a state-created liberty interest. (***Hicks v. Oklahoma,*** (1980) 447 U.S. 343.) "The exclusion of even a single juror based on race is unconstitutional and requires reversal." (***People v. Jackson*** (1996) 13 Cal.4th 1164, 1254 (Most, J., concurring); ***People v. Silva*** (2001) 25 Cal.4th 345, 386.)

After the passage of over ten years, it is impractical to remand the case to allow the prosecutor to attempt to articulate a reason-neutral explanation for the challenge. Appellant acknowledges that there is conflicting authority regarding the appropriateness of a remand when a trial judge erroneously finds no *prima facie* case of group bias. There several decisions authorizing a limited remand for purposes of a further hearing on the validity of the prosecutor's peremptory challenges (***People v. Gore*** (1993) 18 Cal.App.4th 692, 705 – 707, and ***People v. Williams*** (2000) 78 Cal.App.4th 1118, 1125), and several other decisions finding a remand inappropriate due to the passage of time. (***People vs. Snow*** (1987) 44 Cal.3d 216, 226 – 227; ***People v. Allen*** (2004) 115 Cal.App.4th 542, 553.)

The principle distinguishing feature among these cases appears to be the speed with which the cases were resolved on appeal. In ***Gore***, the case was tried in 1992, and the Court of Appeal's decision was filed in 1993. In ***Williams***, the case was tried in 1999, and the Court of Appeal filed its decision in 2000. These cases were remanded. The other cases involved much longer delays between trial and resolution of the appeal, three years (***People v. Allen***) and six years (***People v. Snow***), respectively. These cases were *not* remanded. Appellant asserts that a remand would be inappropriate in this case, given that the jury selection occurred in 1996, ten years ago. Therefore; reversal of Appellant's convictions and judgment of death is required.

II. THE COURT IMPROPERLY DENIED APPELLANT'S MOTION TO DISMISS THE PANEL THAT HAD BEEN IRREPARABLY PREJUDICED BY A PRISON GUARD'S REMARKS ABOUT THE DANGER THAT INMATES POSE IN PRISON

A. Introduction

During the trial court's voir dire of Randy Berthoud, the prospective juror was asked "Can you be an objective juror in this type of case?" (R.T. 1699, Line 24.) Mr. Berthoud gave a lengthy narrative reply about his thoughts and experiences as a prison guard; the narrative ended with the following comment to the court and to the entire jury panel:

> "I deal with all these people, and I know what it is like when they are locked up and how to deal with it, and they are still – they are still hard to deal with if they just have life, you know, because they are still affecting people. They are still – they – there are still victims inside correctional institutions and things like that in prisons. But I see there are some people that can be in for life and they are fine, you know. It is hard because I have to deal with it. The thing we just had a few weeks ago someone in for 25 to life that beat one of us officers to death."

(R.T. 1700.)

Instead of cutting the juror off, the court pursued the matter by asking whether the murder was "inside the CYA?" Mr. Berthoud expanded upon his remarks about the danger of incarcerating someone for life:

> "Yeah, out there in Chino. So that is hard to deal with because I think that gentleman, young man, he is 24, 25, he just beat someone, okay? But he beat someone to death. So there is another victim he created while he was in.
>
> * * *
>
> If the jury finds the defendant guilty or not guilty, if he is found guilty, then it would be hard not to go for the death penalty, very hard, because again I see the people that are locked up. I deal with hundreds of them that are in for life, and I know what it is like in there. And I know that it is a lot easier than these people know what – you know, it is not as bad as what these people think it is."

(R.T. 1700 - R.T. 1701.)

At the end of the voir dire, the defense reserved its challenge for cause. (R.T. 1708, Line 14.) A few moments later at sidebar, the defense challenged Mr. Berthoud for cause and moved to dismiss the entire jury panel as irreparably tainted by his remarks regarding the danger that inmates imprisoned for life posed to prison guards. (R.T. 1711, Line 12 – R.T. 1716, Line 8.) The defense voiced its concern that continued voir dire of the prospective jurors would bring attention to the inflammatory remarks. The court agreed that it was "a big concern." (R.T. 1715, Lines 19 - 25.) The court granted the challenge to excuse Mr. Berthoud for cause, but denied the motion to excuse the panel. (R.T. 1716, Lines 9 - 26.) In so ruling, the court inaccurately observed that it cut Mr. Berthoud's remarks off before there was irreparable prejudice. It also pointed out to counsel that Mr.

Berthoud's remarks pertained to his experience in the California Youth Authority, which was not relevant to the Edwards case:

> "I am more concerned with his attitude towards inmates, and that may be for or against you; I don't know. That is what I am concerned with. And I shut him off on purpose because I thought he was getting into an area that was not appropriate. And I don't want to say any more on the record."

(R.T. 1714, Lines 2 - 7.)

* * *

> First of all, you have no basis upon which to base your conclusion that anybody has been tainted or even that anybody understood. I knew where he was going, and I shut him off. And then I told him that we are not talking about C.Y.A. We are talking about other places. And that would be a quantum leap for jurors to think that prison is like C.Y.A. Now, it is, but they don't know that. They would assume that C.Y.A. is for the kids, and that state prison is for the bad guys, and there is harsher treatment in prison, I think your conclusion is wrong."

(R.T. 1715, Lines 7 - 18.)

That afternoon, the following admonition was delivered to the panel:

"The Court This morning you may recall hearing a prospective juror, Mr. Berthoud, who was sitting in Seat No. 3 – one, two, three, on top of where Mrs. Kulp is now seated. You may have heard that gentleman express some of his opinions and experiences as a counselor at the California Youth Authority. The custodian facility for minors are far different than those for adults. Mr. Berthoud has no

> experience as a custodial officer in the adult state prison system or with adult life without possibility of parole prisoners. The purpose of incarceration in a state prison for crime is punishment. Do any of you have any questions regarding Mr. Berthoud's statement? If so, please raise your hand? Anybody with a hand? Do any of you wish to comment on Mr. Berthoud's statement, please raise your hand. How many of you don't recall what he said, please raise your hand? Okay, several – several hands went up, and no hand went up for questions.

(R.T. 1736, Line 11- R.T. 1736, Line 6.)

> * * *
> In any event, for those of you who may recall what Mr. Berthoud said, you are to disregard his statement regarding his personal experiences."

(R.T. 1736, Lines 20 - 22.)

Prospective Juror Jacklyn Dake indicated that she wished to make a comment. (R.T. 1737, Lines 8 – 14.) Nevertheless, the record does not reflect that she was ever questioned *in camera* or solicited to make her comment.

B. Discussion

A criminal defendant has federal and state constitutional rights to due process of law, trial by an impartial jury, and to a highly reliable determination by that jury in a capital proceeding. (U.S. Const. Amends V, VI, VIII and XIV; Cal. Const., Article I, Sections 17, 15, 16, 17; ***Morgan v. Illinois*** (1992) 504 U.S. 719; ***Witherspoon v. Illinois*** (1968) 391 U.S. 510, 521; ***People v. Hayes*** (1999) 21 Cal. 4th 1211, 1285; *cert. denied*, 531 U.S. 990 (2000.)

This court has remarked that when a jury panel overhears inflammatory remarks, "unquestionably, further investigation and more probing voir dire examination may be called for...." (***People v. Medina*** (1990) 51 Cal.3d 870, *cert. denied*, in part, ***Medina v. California*** (1991) 502 U.S. 924, *aff'd* (1992) 505 U.S. 437.) This is an obligation whenever the trial court is put on notice that improper or external influences were brought to bear on a juror. (*See, e.g.*, ***People v. Kauris*** (1990) 52 Cal.3d 648, 694, *cert. denied*, (1991) 502 U.S. 837.) In carrying out its duty to select a fair and impartial jury, "the trial court is not only permitted but required by inquiries sufficient for the purpose to ascertain whether prospective jurors are, through absence of bias or prejudice, capable of participating in their assigned function in such a fashion or will provide the defendant the fair trial to which he is constitutionally entitled." (***People v. Martinez*** (1991) 228 Cal.App.3d 1456, 1463, *citing,* ***People v. Fimbres*** (1980) 104 Cal.App.3d 780.) The conclusion of a trial judge on the question of group bias in a jury panel is entitled to deference and is reversed only upon a showing an abuse of discretion. (***People v. Martinez,*** *supra,* 228 Cal.App.3d 1456, 1487.) Yet, here, the trial court erred by failing to discharge its duty to ascertain that the panel was free from bias after Mr. Berthoud's inflammatory remarks so that it could meaningfully exercise that discretion.

In ***People v. Medina***, this court found that the discharge of an entire venire that may have overheard five potential jurors expressing bias against the defense was too drastic a remedy since none of the jurors who expressed the remarks were impaneled. (*Ibid.* at 889.) While Mr. Berthoud was excused, the record is insufficient to conclude that none of the jurors who overheard his remarks served and subsequently voted for death. The trial court simply asked how many of the panel didn't recall the offending remarks; only several jurors responded. As such, a real and substantial probability exist that most of the jury selected overheard the offending language; thus, this presents a different record from that considered in ***Medina***.[4]

The record in this case is also distinguishable from that in ***Martinez***. There, during voir dire, the panel over heard various jurors express strong biases against persons charged with crimes and defendants who did not speak English. Defense counsel challenged the entire panel as a consequence. His motion was denied after jurors re-affirmed to the Court their understanding of the presumption of innocence and the prosecution's burden of proof. ***People v. Martinez, supra***, 228 Cal.App.3d 1456. The panel was not questioned about whether they could follow the court's instructions or whether they could conduct their deliberations free from the influence of Mr. Berthoud's experience as a prison guard. Thus, unlike in

[4] The ***Medina*** opinion did not rule that Appellant's failure to exhaust his peremptory challenges and his decision to forgo further voir dire because of a far that it would create additional bias, barred his challenge on appeal.

Martinez, this court in this case need not "discount or ignore" the reassuring responses by the Appellant's panel in order to grant relief; none were given in this case because none were solicited. Although the Court asked if any juror had a "comment" about Mr. Berthoud's prejudicial remarks, the jurors were not questioned about whether those remarks might influence their impartiality or their ability to adhere to essential principles of law.

Finally, the trial court in this case did not "cut off" the juror as it became evident that he was recounting an experience that could weigh heavily upon the jury's decision to select life imprisonment over a death verdict. Rather than question Mr. Berthoud *in camera*, the Court asked him to "flesh out" the circumstances of his experience, causing him to remark to the panel that an inmate serving a lengthy sentence beat a guard to death so that "there (was) another victim created while he was in." (R.T. 1700, Lines 21 - 26.) (*Compare*, ***People v. Fimbres***, *supra*, 104 Cal.App.3d 789; while ***Fimbres*** held that *in camera* voir dire of a prospective juror following initial expressions of bias "no doubt might have been appropriate" but was not required, it was a non-capital case that did not require heightened reliability.)

The facts in the recent opinion in ***People v. Cleveland*** (2004) 32 Cal.4th 704, are also distinguishable. There, Appellant argued that the comments of a

---

(***People v. Medina***, *supra*, 51 Cal.3d at 870.)

prospective juror who was a retired law enforcement officer with substantial experience in homicide cases tainted the entire venire. The prospective juror remarked that the death penalty was "too seldom (used) due to legal obstructions" and that he thought that he "would be unfair to the defense based upon (his) knowledge of how these trials are conducted." (*Ibid.* at 736 - 737.) Unlike here, where a timely motion to dismiss the venire was made, the Appellant in ***Cleveland*** made no such request; he did not even request admonition, as did Appellant in this case. On the merits, the ***Cleveland*** opinion found that the comments "did not give the other prospective jurors information to the specifics of the case, but just exposed them to one person's opinion about the judicial system." (*Ibid.* at 736.) Here, by contrast, the prospective juror gave specific information that pertained to the case: in effect, he predicted that Appellant might continue to pose danger to others if he was sentenced to life imprisonment. Based on his personal experience as a prison guard for eight years, he lectured the attending venire that those who are serving life terms "are still affecting people ... there are still victims inside correctional institutions...." (R.T. 1700 – R.T. 1701.) Indeed, he told the jury of one instance where a prisoner serving a life term at the California Correctional Institution at Chino created another victim, notwithstanding that life term, by beating a correctional officer to death. (R.T. 1700.) Mr. Berthoud also created a substantial danger that jurors would select the death penalty, by minimizing the

severity of life imprisonment as a potential punishment, based upon his personal experience: "I deal with hundreds of them who are in for life and I know what it is like in there. And I know that it is a lot easier than people think it is." (R.T. 1701.)

The record in this case is much more similar to that in ***Mach v. Stewart*** (9th Cir. 1998) 137 F.3d 630, *cert. denied*, ***Mach v. Schriro*** (2006) 126 S.Ct. 1438, where the Circuit reversed a conviction in a child abuse case. A prospective juror, who was an experienced children's social worker, repeated comments before the entire venire that she had never been involved in a case in which a child had falsely accused an adult of sexual abuse. Despite the trial court's attempt to cure the prejudice by reminding the venire that their determinations were to be based upon the evidence alone, the Ninth Circuit presumed that at least one juror was tainted and entered into jury deliberations with the conviction that children never lie about being sexually abused. The Circuit reached this conclusion, "(g)iven the nature of (the prospective juror's) statements, the certainty with which they were delivered, the years of experience that lead to them, and the number of times that they were repeated." Although no juror was questioned about whether they were influenced by the comments, the presumption created a "structural error" that required reversal because the intrinsically prejudicial comments were impossible to assess in the context of evidence presented at trial since the evidence was presented to an already tainted jury. As the trial court itself recognized in another context during

voir dire, prejudicial remarks by prospective jurors can influence the venire.[5] The real life experience of a prison murder by an individual serving a life term cannot be dismissed as a fanciful supposition that could not have improperly influenced the verdict of other prospective jurors. (*Compare*, ***People v. Martinez*** (2003) 31 Cal.4th 673, 700, *cert. denied* (2004) 541 U.S. 1045.) (Trial court's comment that a "cataclysmic earthquake" that destroyed all prisons might cause the release of an inmate's sentence to life imprisonment without parole "could not have possibly affected the verdict.")

The instruction delivered by the trial court was not curative. First, curative instructions are not always effective. More specifically, although the instruction was read, and the venire was asked whether it had any questions or comments regarding Mr. Berthoud's statement, the court never asked whether there was a question or comment about its instruction or whether they could disregard Mr. Berthoud's comments. (R.T. 1736 – R.T. 1737.) (*Compare*, ***People v. Bandhauer*** (1970) 1 Cal.3d 609, 613, [where a venireman was excused after he reported he

---

[5] "The Court — The problem is, and since we are all experienced in this business, as far as the attorneys are concerned, is their answers get worse when they get on the stand.

Mr. Brent — Right.

The Court — And sometimes it influences other potential jurors.

Mr. Brent — Yes, that is my fear, so –

The Court — So they are excused...."

would have difficulty following the curative instruction]; ***People v. McNeal*** (1979) 90 Cal.App.3d 830, 839, [case reversed because trial court failed to ascertain whether the jury could set aside any information outside the evidence after it came to light that one of their members had personal knowledge about the case that might affect the verdict]; ***Mach v. Stewart***, *supra*, 137 F.2d 1630, [the court asked other jurors whether they disagreed with the prejudicial comments, but received no response].) Since the trial court failed to conduct a hearing to exclude those jurors who overheard Mr. Berthoud's improper remarks and could not promise to ignore them during their deliberations, a reversal is required. Unlike ***People v. Burgener,*** (1986) 41 Cal.3d 505, 517, overruled on other grounds, ***People v. Reyes*** (1998) 19 Cal.4th 743, 753, (where the Court could not find that the juror was actually intoxicated), a finding can reliably be made in this case that jurors who may have sat in judgment actually overheard the improper remark; only "several" of the assembled voir dire stated that they could not recall the remark. The prejudice of Mr. Berthoud's remarks went to the ability of the jurors' to impartially determine facts generally, since the assumptions inherent in his remarks struck at the heart of the presumption of innocence and prosecution's burden of proof. Since none of the venire was asked whether the remarks would impair their ability to follow these essential principles of fairness, a reversal of the conviction is required.

(R.T. 1420 - R.T. 1421.)

III. THE ADMISSION OF EVIDENCE OF THE BRUTAL MURDER OF MURIEL DELBECQ AS PROOF THAT APPELLANT COMMITTED THE HOMICIDE OF MARJORIE DEEBLE, SEVEN YEARS EARLIER AND 5,000 MILES AWAY, WAS CONTRARY TO STATE LAW AND VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Factual Background and Proceedings in the Trial Court

Appellant made timely, written objections to the admission of evidence of the uncharged Delbecq murder in Hawaii on a variety of grounds. The pre-trial pleadings challenged the sufficiency of the showing that the Hawaii murder was admissible to prove identity, plan, and intent under Evidence Code Section 1101(b). (C.T. 583 – C.T. 592.) Alternatively, the defense broadly asserted that even if the evidence was admissible under Section 1101(b), it should be excluded under Section 352 of the Evidence Code because its probative value did not substantially outweigh the danger of undue prejudice. (C.T. 592 – C.T. 595.) Elsewhere in its pleadings, the defense argued that the dissimilar features between the commission of the Hawaii and the California homicides should be excluded, or "pruned," from the evidence admitted under Section 1101(b), and that evidence that might be admissible to prove identity was inadmissible to prove intent. (C.T. 644 – C.T. 651.) Finally, the defense argued that the Ex Post Facto Clause of the Constitution prohibited the prosecution from arguing that evidence of the Hawaii

homicide was admissible to show "common scheme or plan" under the standard announced in the Supreme Court decision in ***People v. Ewoldt*** (1994) 7 Cal.4th 380; instead, the standard set forth in ***People v. Tassell*** (1984) 36 Cal.3d 77 that prevailed at the time of the charged offense should apply. (R.T. 836 – R.T. 839.)

The court ruled that the prosecution's pre-trial offer of proof was sufficient to demonstrate that the evidence of the Hawaii murder was admissible to show identity and common scheme; the showing was also satisfactory, albeit less convincing, to prove intent. (R.T. 1215, Lines 5 - 13; R.T. 1950, Lines 16 - 19.) The court also denied the alternative motion to exclude evidence under Section 352. Although it found that the challenged evidence was "highly prejudicial," it also found that the jury could find it to be highly probative. (R.T. 1950, Line 26 – R.T. 1951, Line 16.) The court left open the possibility that specific, dissimilar characteristics of the Hawaii homicide might be excluded at trial. (R.T. 1215, Line 25 – R.T. 1216, Line 8.) Finally, the court denied the defense motion to apply the standard announced in ***Tassell*** to evaluate the admissibility of evidence in the Delbecq homicide to show common plan or scheme; it found that the Ex Post Facto Clause was not violated by the application of this standard because there was no prohibited change in the law after the charged offense was committed in 1986. (R.T. 1944 – R.T. 1948; R.T. 2849 – R.T. 1951.) In the end, the court allowed

evidence of the Hawaii homicide to prove identity, common plan, and intent in the California homicide. (R.T. 1943.)

B. Overview of Legal Arguments on Appeal

The trial court's erroneous admission of evidence that Robert Edwards brutally murdered Muriel Delbecq, seven years after the charged offense, denied him fundamental rights guaranteed by several provisions of the federal and state constitutions. Admission of this evidence violated his federal constitutional rights to a fair trial and due process of law under the Fifth and Fourteenth Amendments as well as to reliable capital convictions and sentences as guaranteed by the Eighth and Fourteenth Amendments. (***Beck v. Alabama*** (1980) 447 U.S. 625, 637 - 638.)

The trial court's evidentiary rulings were erroneous on several grounds under state evidence law. First, the trial court's finding that the common features between the two crimes were sufficiently distinctive to justify admission of evidence of the uncharged murder to prove identity, common plan, and intent was incorrect. Secondly, the trial court's admission of evidence pursuant to Section 1101(b) under the test announced in ***Ewoldt***, instead of the more demanding test set forth in ***Tassell*** that was in effect at the time the crime was committed, violated the Ex Post Facto Clause.[6] Finally, the trial court abused its discretion under

[6] In ***People v. Tassell*** (1984) 36 Cal.3d 77, the court ruled that uncharged misconduct could be used to demonstrate common plan only "where there is a single conception or plot of which the charged and uncharged crimes are individual manifestations. Over defense objection, the trial court used the ***Ewoldt*** standard to evaluate the admissibility of the evidence of the uncharged Delbecq murder. (R.T. 1215; R.T. 1950) The trial court held that the

Evidence Code Section 352 when it admitted evidence of the uncharged offense since its probative value was substantially outweighed by its potential for undue prejudice and jury confusion; at a minimum, the trial court was required to exclude evidence of the manner in which the Hawaii homicide was committed that was dissimilar from the California homicide. (***People v. Clair*** (1992) 2 Cal.4th 629, *cert. denied*, 506 U.S. 1063.)

The trial court's erroneous admission of this evidence in contravention of established state law deprived Robert Edwards of a state-created liberty interest and denied him Due Process of Law as required by the Fifth and Fourteenth Amendments to the Federal Constitution. For all these reasons, the trial court's erroneous rulings require the reversal of Robert Edwards's conviction and sentence of death. (***Hicks v. Oklahoma*** (1980) 447 U.S. 343, 346.)

C. Standard of Review

This court typically reviews a trial court's determination of the admissibility of evidence of uncharged offenses for an abuse of discretion. (*See*, ***People v.***

Ewoldt standard was not an "Ex Post Facto" law because it corrected, as distinguished from changed, existing law; that is, the trial court held that ***Tassell*** was simply wrong. (R.T. 1947, Lines 22 - 25; R.T. 2849 – R.T. 2850.) Yet, the law makes no such distinction. Rather, the United States Supreme Court has held that "(A)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an Ex Post Facto Law, such as Article I, Section 10 of the Constitution forbids...If a state legislature is barred by the Ex Post Facto Law from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (***Marks v. United States***, (1977) 430 U.S. 188, 192, *citing*, ***Bouie v. City of Columbia*** (1964) 378 U.S. 347, 353,- 354.) Here, the judicial expansion of the admissibility under Section 1101(b) allowed the jury to consider evidence of a brutal murder that occurred seven years after the charged murder was committed. The application of the less demanding standard of admissibility in ***Ewoldt*** constituted a retroactive and unforeseeable enlargement of Section 1101(b) prohibited by the Due Process Clause. In any event, as set forth above, even under the improperly applied ***Ewoldt*** standard, the evidence was inadmissible to prove either identity, common plan or intent.

Catlin (2001) 26 Cal.4th 81, *cert. denied*, 535 U.S. 976 (2002); Evidence Code Sections 350, 352.) However, Robert Edwards contends that heightened scrutiny is appropriate and necessary because this claim involves error of constitutional magnitude during a capital case. This evidence was essential to the prosecution. (R.T. 1199.) Its admission deprived Robert Edwards of his constitutional rights to Due Process of Law, to a fair trial, and a reliable determination of guilt and penalty. (U.S. Const. Amends. Fifth, Sixth, Eighth and Fourteenth; Cal. Const., Art. I, Sections 7, 15, and 17.)

The United States Supreme Court has applied heightened scrutiny to procedures involved in capital cases based on its recognition that "death is different." (***Gardner vs. Florida*** (1977) 430 U.S. 349, 357 - 358. *See, also, e.g.*, ***Lockett v. Ohio*** (1978) 438 U.S. 586; ***Godfrey v. Georgia*** (1980) 446 U.S. 420.) This increased concern with accuracy in capital cases has led the Supreme Court to "set strict guidelines for the type of evidence which must be admitted, and may not be admitted." (***Skipper v. South Carolina*** (1986) 476 U.S. 1; ***Booth v. Maryland*** (1987) 482 U.S. 496.) According to the reasoning of these cases, this court should independently examine the record to determine whether the trial court's erroneous admission of this evidence was harmless beyond a reasonable doubt. (***Chapman v. California*** (1967) 386 U.S. 18, 24.)

D. The Admission of the Evidence of the Hawaii Murder Only Tended to Show a Predisposition to Commit the

Charged Offense and Therefore Violated Appellant's Fundamental Right to a Fair Trial and to Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution

1. Evidence of the Hawaii Homicide was Inadmissible to Prove the Identity, Common Plan, or the Intent of the Individual who Murdered Mrs. Deeble Seven Years Earlier

a. Prevailing Law

Evidence Code Section 1101(a) and (b) provide, in their pertinent parts, that:

> "(a) Except as provided in this section ..., 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."
>
> "Nothing in this section prohibits the admission of evidence that a person committed a crime...when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident) . . . other than his or her disposition to commit such an act."

Evidence Code Section 1101(b) permits "other crimes" evidence if its purpose is to prove something other than a disposition to commit the crime charged. Its admissibility depends upon three principle factors: (1) the materiality of fact to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of a rule or policy requiring the

exclusion of relevant evidence. (***People v. Thompson*** (1980) 27 Cal.3d 303, 315 - 319.)

Evidence of an uncharged offense is so prejudicial that it requires extremely careful analysis. Since a substantial prejudicial affect is inherent in such evidence, uncharged offenses are admissible only if they *have substantial probative value.* (***People v. Ewoldt***, *supra, 404;* ***People v. Hawkins*** (2002) 98 Cal.App.4th 1428, 1445, *cert. denied*, (2003) 537 U.S. 1189; ***People v. Balcom***, (1994) 7 Cal.4th 414, 422; ***In re: Jones*** (1996) 13 Cal. 4th 552, 581 - 582.)

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the common law invests the defendant a presumption of good character (*citation*), but it simply closes the whole matter of character, disposition and reputation on the prosecution's case–in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even through such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is a practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." (***Michaelson v. United States***

(1948) 335 U.S. 469, 475 - 476; *accord*, ***Old Chief v. United States*** (1997) 519 U.S. 172.)

To decide whether evidence of other crimes has the tendency to prove the material fact in dispute, the Court must first determine if the uncharged offense serves logically, naturally and by reasonable inference to establish that fact. To determine if there is a rule or policy requiring exclusion of the evidence, the court must consider that Evidence Code Section 1101(a) expressly prohibits such evidence if the only theory of relevance is that the accused has a propensity to commit the crime charged, and that there is a grave danger of prejudice when evidence of an uncharged crime is given to a jury. Also, the evidence will not be admitted, even for legitimate purpose, if it is too remote, and it must only be used if it has substantial probative value. As trial counsel argued, if there is any doubt, the evidence should be excluded. (*Ibid.* at 315 - 319.) (***People v. Guerrero*** (1976) 16 Cal.3d 719, 724; R.T. 1198.)

The distinction between the admission of evidence to prove identity and common plan is "subtle, but significant." (***People v. Ewoldt,*** *supra*, 7 Cal.4th at 380.) The very highest degree of similarity between the charged and uncharged offense is required to prove identity. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like "a signature." (***People v. Ewolt***, *supra,* 7 Cal.4th 380, 403.) Thus, in order to apply the appropriate standard of

admissibility, the Supreme Court cautioned that great care must be exercised to properly identify the purpose for which the evidence is admitted.

> "Our holding does not mean that evidence of a defendant's similar uncharged acts that demonstrate the existence of a common design or plan will be admissible in all (or even most) criminal prosecutions. 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 [*Citation omitted.*] . . . . For example, 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. In ruling upon the admissibility of evidence of uncharged acts, therefore, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose."

(***Ewoldt*** at pages 405 – 406; *emphasis supplied.*)

Evidence of the Hawaii murder was admissible, if at all, only to show identity, since the commission of the act of murder was not in dispute. The trial court recognized this logical starting point during pretrial argument:

"The Court	Mr. Brent, you said you wanted this stuff offered for all 1101(b) purposes. Why don't you be more specific and tell the Court what you plan having this evidence introduced for.
Mr. Brent	Well, clearly for other totality of the – clearly goes to identification.
The Court	You start there.
Mr. Brent	Sure.
The Court	Because if you don't get that, you don't get anything."

* * *

(R.T. 1195, Line 22 – R.T. 1196, Line 5.)

"The Court	This is an I.D. case. Either we let it in for I.D. purposes and then whatever else maybe relevant or it doesn't come in. If it doesn't come in for I.D. the case is over. Finished. At least based upon what you have told me so far.
Mr. Brent	That is true.
The Court	And that is the hardest to satisfy for the other acts.
Mr. Brent	That is right."

(R.T. 1199, Lines 1 – 9.)

Despite its recognition that the Hawaii murder was admissible, if at all, only to prove the identity of Mrs. Delbecq's assailant, and that the very highest degree of similarity between the charged and uncharged offenses was therefore required, the trial court admitted evidence of the Hawaii murder even though the foundational "signature" of the two crimes was never established in the record.

b. There was No Evidence that Mrs. Deeble Was Sexually Assaulted with a Hair Mousse Can, the Alleged Foundational "Signature" of the Hawaii and California Crimes

The "signature" advanced to the court to justify the admission of evidence of the Hawaii murder was the alleged use of a hair mousse canister to assault both women. As the prosecutor commented to the trial court, "it is the heart of the case . . . this is an extreme similarity. This is a signature all the way. It is the most signature aspect of this whole case." (R.T. 1190, Lines 14 - 18.) It was also the leitmotif of the prosecution's argument to the jury that Appellant committed both crimes. He described this case as "The Tale of Two Mousse Cans." (R.T. 1953.) He expressly designated the mousse cans as Appellant's "signature." (R.T. 3092, Line 9.) Yet, the key foundational fact that a mousse can was used to assault both women was never established to the court during the pre-trial proceedings or by the subsequent proof at trial.

Unquestionably, a mousse can was used as an instrument to violently assault Mrs. Delbecq in Hawaii; it was discovered during her autopsy, deep inside the vaginal vault, protruding into the abdominal cavity. (R.T. 2301 – R.T. 2302; R.T. 2295.) By contrast, the evidence that a mousse can was used to assault Mrs. Deeble was at most speculative. The canister was not found in her body; it was merely discovered in the bedding; her corpse lay on the floor below. (R.T. 2013.)

Furthermore, there was no persuasive forensic evidence that the canister was used to assault Mrs. Deeble. For example, her injuries do not circumstantially establish that the mousse can was used in the assault. The abrasions to her vaginal cavity were relatively minor and could have been caused by consensual sex; the abrasions were also shallow and near the opening of the vagina. (R.T. 2153; R.T. 2162.) Similarily, while the rectum was dilated, the diameter and cause were never established in the record. (R.T. 2147 – R.T. 2148.) Based upon these injuries, the prosecution's expert witness, Dr. Fukumoto, could not opine that they were caused, even probably, by the mousse can that was discovered at the scene; at best, he could only state that those injuries may have been caused by the canister:

"Mr. Brent	First of all, we cannot know from the medical findings from looking at it, what it was that caused these injuries. Can we?
Dr. Fukomoto	No, I cannot tell you. All I can say it is something that is - does not have any sharp edges.

Mr. Brent — O.K., and so if I were to show you what would be marked as People's Exhibit 16 for identification (the mousse can), would this be consistent with an object that could have caused these various injuries?

Dr. Fukomoto — Yes.

(R.T. 2138, Lines 10 - 19.)

* * *

Mr. Brent — Doctor, staying with that area of the body again, Dr. Richards noted in that the rectal area appears dilated.

Dr. Fukomoto — Yes.

Mr. Brent — Now, as to this he did not, if I am reading this correctly, he did not know an amount of dilation?

Dr. Fukomoto — Correct, he did not measure the diameters of the anus.

Mr. Brent — Now, from the available information, the dilation could be caused by a number of things; is that correct?

Dr. Fukomoto — Yes.

Mr. Brent — Could be caused by a finger or fingers, if you wish?

Dr. Fukomoto — Manipulation of the finger, yes.

Mr. Brent — Could be caused by a penis?

Dr. Fukomoto — Yes.

Mr. Brent — Could be caused by any number of other objects?

Dr. Fukomoto — Yes.

Mr. Brent — And from the autopsy before us, there is just no way to tell what in fact may have caused it?

Mr. Fukomoto No, I cannot tell you."

(R.T. 2147, Line 19 – R.T. 2148, Line 16.)

Finally, the serological evidence did not circumstantially establish that the mousse can was used in the assault. A small amount of substance of an undetermined nature was found on the rim of a cap found at the scene; as the People's medical examiner, Dwight Reed, conceded, although a presumptive test for blood reacted positively, substances other than blood can also react positively. (R.T. 2446; R.T. 2062.) Thus, there is no evidence in the record to convincingly establish that the residue was blood, much less the victim's blood. In addition, Dr. Wolfe testified that the microscopic bleeding detected in the victim's vagina and rectum could not have produced the substance found on the purported cap of the canister, assuming that the substance was blood. (R.T. 2496 – R.T. 2497.) He also testified that the minor injuries to the vagina and rectum were wholly consistent with a consensual sexual encounter. (R.T. 2494 – R.T. 2496.) Finally, there was not even any credible evidence that the cap belonged to the mousse can (R.T. 2046 – R.T. 2047), must less than the mousse can itself was the instrument of a sexual assault.

In ***People v. Kipp***, this court stated that the strength of the inference that the charged and uncharged offense was committed by the same individual depended upon the degree of distinctiveness of the individually shared marks and number of

minimally distinctive shared marks. (1998) 18 Cal.4th 349, 370, *cert. denied*, (1999) 525, U.S. 1152. There, the Supreme Court approved the admission of un uncharged murder to prove identity and intent because both victims were 19 year old women who were strangled in one location, carried to an enclosed area which belonged to them, and then covered with bedding. The clothes of the victims were not torn, but each were discovered with bruises on their legs and their breasts and genitals exposed. Finally, the uncharged murder occurred only three months before the charged offense. Against this standard, the presence of a similar canister at the scene of the Deeble murder seven years after the charged offense, that may have been used as an instrument to her assault, on an unspecified part of her body, with some undefined degree of probability, hardly establishes the "degree of distinctiveness" necessary to admit this highly inflammatory evidence of a brutal crime.

The record in this case is similar to that considered in ***State v. Barriner***, (Mo. 2000) 34 S.W.3d 139. There, in a prosecution for sexual assault, the prosecutor argued that a videotape of the sexual practices of the defendant, depicting his girlfriend in bondage, was admissible to prove identity because the knots used to bind the girlfriend were identical to those used to bind the victim. Yet, in rejecting the argument, the court noted that "there is no testimony anywhere in this trial from any witness regarding the type of knots or the manner in which

they were tied. The prosecutor simply asserted in his guilt-phase closing argument, playing the tape for the second time, that the knots were used to bind Niswunger were identical to those used to bind the victims." (*Id.* at 146.) Here, too, there was no evidence introduced, by testimony or document, that mousse cans were used as instruments in both sexual assaults. The "evidence" was nothing more than the flamboyant assertions of the prosecutor, from his opening statement to his closing remarks that it was so: that the identity of Appellant was writ for all to see in "The Tale of Two Mousse Cans."

The record in this case can be easily distinguished from those cases that have approved the admission of other crime evidence to establish identity because of pronounced shared "signatures." (*Compare*, ***People v. Scully*** (1991) 53 Cal.3d 1195, 1225, *cert. denied*, (1992) 503 U.S. 944 (victims all prostitutes and bound in the defendant's warehouse); ***People v. Medina*** (1995) 11 Cal.4th 694, 748 (the same gun used in both murders; defendant's automobile seen in the vicinity of both crimes.) (***People v. Roldan***, *supra*, (2005) 35 Cal.4th 646, 704, *cert. denied*, 125 S.Ct. 570; the charged and uncharged offenses were robberies at a swap meet involving three perpetrators, each with all identical and distinctive roles; the robbery only took cash and not merchandise; they used machine guns, covered by clothing.) (***People v. Catlin***, *supra*, 26 Cal.4th 98, 120; all victims were female relatives of the defendant, who died by parquet poisoning, a "rare and unlikely

cause of death" for three such closely related individuals; finally, the defendant stood to gain financially from each death.)

While "The Tale of Two Mousse Cans" may have been an effective rhetorical device to persuade the jury that the two crimes shared a perpetrator, a sober examination of record reveals only that common household items were present at both scenes, and nothing more. This circumstance is an unremarkable coincidence and not a signature. Even if the factual showing was enough to support an inference that a mousse can was used as an instrument of a sexual assault in the California crime, the case law still bars the Hawaii evidence because the offenses are too dissimilar.

c. The California and Hawaii Crimes are too Dissimilar to Display the Required Shared "Signatures"

The number of minimally distinctive marks in this case are exceedingly few. Indeed, many of those initially advanced by the prosecution in its pre-trial brief, such as that the victims shared the same initials and were both realtors, were rejected by the court as a basis to admit evidence under Section 1101(b). (C.T. 529 – C.T. 530; R.T. 1186 – R.T. 1188.) Similarly, almost all of the other "shared marks" advanced by the prosecution do not support admission of evidence of the uncharged offense because they are not "minimally distinctive." For example, the fact that both women may have been assaulted with some kind of foreign object is

not "minimally distinctive." Unfortunately, this type of criminal behavior is so common that statutes specifically prohibit it by name. (*See*, California Penal Code Section 289(g)(f) and Section 264.) Similarly, the fact that there is no evidence of forced entry at either crime scene, the victims' homes were ransacked, they were restrained by readily accessible telephone cords and that valuables were missing[7] after the crimes, fails to distinguish them from many others. These relatively common features of home invasion assaults are distinguishable from the truly unusual features cited in cases that approve admission under Section 1101(b). (*See, e.g.*, ***Featherstone v. Estelle*** (9th Cir. 1991) 948 F.2d 1497, [where a unique ruse was used by the defendant to gain access to victims' homes]; ***People v. Craft*** (2000) 23 Cal.4th 978, *cert. denied*, (2001) 532 U.S. 908 [all victims were hitchhikers who were given drugs or alcohol by the defendant, sexually assaulted, and then later dumped from his car].) Indeed, when the analysis of the California and Hawaii murders are stripped of its rhetorical flourishes, it is striking how distinctively dissimilar the crimes are.

The strangulation of the California victim was distinctive in its relative complexity. The victim's hands were tied and she was faced down on the floor; her neck was placed in a makeshift noose suspended from a dresser drawer. This

[7] In point of fact, the evidence of theft in the Delbecq case is hardly overwhelming. The only valuable missing was her wedding ring. (R.T. 2195 – R.T. 2196.) The ring on Mrs. Deeble's finger at the time of her murder was not removed; its presence was noted during the autopsy. (R.T. 2760 – R.T 2761.) This is worth considering, especially since Kathy Valentine's allegations about the alleged theft of her mother's jewelry were uncorroborated.

strangulation did not break any bones in her neck. (R.T. 2134.) By contrast, there is nothing distinctive about the end of the Hawaii victim. Her assailant ended her life directly and without elaboration: he manually strangled her, crushing the hyoid bones in her neck. (R.T. 2296, Lines 21 - 24.)

The behavior of the assailant at the crime scenes was also very different. The assailant left his palm print and bloody footprints at the Delbecq murder scene for forensic examination. (R.T. 2245; R.T. 2257.) By contrast, although Mrs. Deeble's assailant remained at the crime scene long enough to bind her, no latent prints were found at the crime scene that linked him to the murder. (R.T. 2328 – R.T. 2342.)

Finally, Appellant knew the California victim; according to the prosecution's theory, her dislike provided a motive for him to harm her. (R.T. 1958, Lines 16 - 17.) There is no evidence that Appellant knew the Hawaii victim. This absence of a personal relationship, and corresponding lack of motive, distinguishes the charged and uncharged offenses in this case from those found sufficiently similar in the past to justify admission of an uncharged offense under Section 1101(b). *Compare*, ***People v. Scheer***, where the "presence of the same motive in both instances may be a contributing factor in finding a common plan or design." (1998) 68 Cal.App.4th 1009, 1020 - 1021; ***People v. Diaz*** (1992) 3 Cal.4th 495 *cert. denied*, (1993) 508 U.S. 916 [all patients under the care of the defendant, who

was a nurse in the cardiac intensive care unit]; ***People v. Ruiz*** (1988) 44 Cal.3d 589, *cert. denied*, 488 U.S. 871 [both victims were wives of the defendant]; ***People v. Ewoldt***, *supra*, [both victims were step-daughters of similar ages who lived with the defendant]; ***People v. Catlin*** (2001) 26 Cal.4th 81, 111, *cert. denied*, (2002) 535 U.S. 976 [victims both close relatives who died from rare parquet poisoning]; ***People v. Ing*** (1967) 65 Cal.2d 603, 612 [evidence admissible to show common plan in rape prosecution, where the victims were all patients of the defendant who had been sedated by injection and then assaulted].)

The dissimilarities set forth above are not incidental or minor quibbles; they are dissimilarities that reasonably call into question whether the same person committed the homicides separated by many years and thousands of miles of ocean. They are fundamental differences in method, motive and means.

The dissimilarities, as well as the similarities, between the charged and uncharged offenses must be evaluated in order to decide whether admission is justified under Section 1101(b). (***People v. Balcom***, *supra*, 7 Cal.4th 414.) Dissimilarities decrease the probative value of the proffered evidence; conversely, the geographical and temporal proximity of the charged and uncharged offenses increases probative value. (*Ibid.* at p. 427.) Thus, in ***Balcom***, the close temporal proximity of the offenses (six weeks), the distinctive methods of committing the offenses (each occurred in the early morning), the fact that the assailants raped

their robbery victims and then used their vehicles and ATM cards to profit from the crimes, justified the admission of the uncharged offense. Moreover, the dissimilarities between the two offenses in ***Balcom*** were incidental. By sharp contrast, the two murders in this case are separated by seven years and thousands of miles of ocean. The Hawaii homicide lacked all of the characteristically distinctive elements of the California homicide, such as binding and suspending the victim to immobilize her. There was no pervasive evidence of a sexual assault upon the California victim. The minor injuries to the genitalia were consistent with consensual sexual intercourse.[8] She was not violently and indisputably assaulted with a foreign object as was the Hawaii crime victim.

The opinion in ***People v. Rivera*** is instructive. (1985) 41 Cal.3d 388. There, the Supreme Court reversed the lower court's decision to admit evidence of an earlier robbery to prove the identity of the individual who committed the charged offense. In so doing, the Supreme Court was not persuaded by a "laundry list" of alleged similarities that were not truly distinctive: both crimes were committed on Friday nights, at corner convenience stores in Rialto, by three perpetrators who used "get away vehicles." The court found also found notable dissimilarities between the two crimes: one was an armed robbery, while the other was an unarmed burglary; the co-conspirators were different individuals. Here, too,

[8] Indeed, as argued in Section VII (C), the evidence in the Deeble homicide was insufficient to sustain the special circumstance finding of murder involving torture.

despite a list of seeming similarities, there were insufficient distinctive marks in the California and Hawaii homicides to justify admission of evidence of an uncharged offense to prove identity: the sum of zeros is always zero. (***People v. Guerrero***, *supra*, 16 Cal.3d 719, 792.)

This court's opinion in ***People v. Alcala*** (1984) 36 Cal.3d 604, also supports Appellant's position. There, as here, "the alleged similarities break down under examination." (*Id.* at 632.) In ***Alcala***, the prosecution sought to establish the defendant's identity by arguing that the crimes showed a distinctive pattern: the defendant approached underage girls, engaged them in conversations, enticed them into his automobile, restrained them by force, took them to remote outdoor locations, and sexually assaulted them. Yet, as the Court pointed out when it ruled that there was an insufficient "signature" to justify admission, not all victims were forcibly restrained and outdoor settings and photography were often absent in many of the assaults. Here, too, the dissimilarities between the California and Hawaii homicides are more striking than their similarities. The "Tale of Two Mousse Cans" is more fairly characterized as a "strained theory" than an objective reality upon which to hinge the admission of a conclusively prejudicial uncharged offense. (*See, **People v. Alcala***, where the court branded the People's attempt to unite the crimes under the umbrella of outdoor settings a "strained theory" because the defendant merely showed one of the victims a poster of forests. *Id.* at 632.)

In closing, the evidence of the Hawaii murder was only relevant to show what is expressly prohibited: that Appellant had a propensity to commit the crime charged. The two crimes lacked the distinctive "signatures" necessary to justify the admission of the uncharged offense under ***Ewolt*** to show identity. Since all agreed that the evidence that Robert Edwards committed the charged offense was insufficient as a matter of law unless evidence of the Hawaii homicide was admitted to prove his identity, the case should have been over and no further analyses is necessary to determine whether the uncharged offense was admissible to prove his intent or common plan or whether its improper admission prejudiced Appellant's right to a fair trial.

d. The Uncharged Offense was also Inadmissible to Prove Intent

Even assuming that the similarities between the two homicides were sufficient to justify the admission of the Hawaii crime to prove identity, the specific manner and means by which the crimes were accomplished are nevertheless too different to justify the admission on the issue of *intent*. To satisfy this theory of admissibility, the charged and uncharged crimes need be "sufficiently similar to support the inference that the defendant 'probably harbored) the same intent in each instance.' *(citations.)* ***(People v. Ewolt**, supra*, 7 Cal.4th at 402.) The recent case of ***People v. Demetrulias*** is instructive. (2006) 39 Cal.4th 1.)

In ***Demetrulias***, the trial court admitted the uncharged offenses to prove motive and intent. The relevant similarities noted by the Opinion were that twice in one evening the defendant entered an older man's house, confronted him alone, and stabbed him several times in the chest hard enough to inflict very severe injuries. The court concluded: "Especially in light of the close proximity of time and space between the incidents, we disagree that these dissimilarities violated the inference that the defendant had the same intent in each incident." By obvious contrast, the Hawaii and California crimes in this case were not committed on the same evening, but occurred seven years apart. *See, also,* ***People v. Harvey*** (1984) 163 Cal.App.3d 90, 104 – 105, where the passage of six months between the charged and uncharged robberies were enough to prevent admission on the issue of intent, even thought they occurred in the same area. Additionally, the uncharged offense in this case did not occur less than a mile from the charged offense as in ***Demetrulias***, but was committed an ocean away.

Furthermore, the crimes were not committed in so similar a manner that the same intent to kill or torture could be inferred. Evidence of an intent to kill the victim in Hawaii is relatively strong: she was strangled manually with such force that the hyoid bone in her throat was broken. Similarly, evidence that the assailant intended to inflict the requisite "extreme pain" to determine an intent to torture the Hawaii victim is arguably established by the presence of a hair mousse can deep

within her vaginal vault. By sharp contrast, the victim in the California homicide died as a result of her bindings. As argued fully in Section VII below, binding a victim is only consistent with an intent to restrain movement, not with an intent to kill or cause "extreme pain." Likewise, the injuries that she suffered to her head and neck are consistent with either her struggles to free herself from her bindings or her assailant's attempts to immobilize her; the balance of her injuries are too minor to support a finding of either an intent to kill or to torture.

Finally, but not least importantly, the "glue" that held the prosecutor's theory of admissibility together – the use of mousse canisters to sexually assault the two victims – was nothing more than a rhetorical device, unsupported by evidence. In this regard, ***People v. Guerrero*** is relevant. (1976) 16 Cal.3d 719, 727 – 728.) There, an uncharged rape was admitted to prove that the charged murder occurred in the course of an attempted rape. The Supreme Court held that the admission was erroneous because of the lack of evidence that sexual activity took place with the homicide victim.

Under these circumstances, even if the evidence of the uncharged offense was admissible to prove identity, the trial court erred when it admitted the evidence and instructed the jury that it could be considered on the wholly separate issue of intent.

2. Assuming that Evidence of the Uncharged Hawaii Murder was Admissible under

Sections 1101(b), it Should Have Been Excluded Under Evidence Code 352 because its Probative Value was Substantially Outweighed by the Danger of Undue Prejudice

a. Introduction

Section 352 of the Evidence Code provides:

> "The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

In ***Ewoldt***, the Supreme Court noted that even if evidence of an uncharged crime was admissible to prove a material fact under Section 1101(b), it still may be excluded under Section 352 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 misleading the jury." (*Ibid.* at 404.) The trial court's discretion in admitting evidence of other offenses must, in all cases, be exercised within the context of the fundamental rule that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted. Consequently, even if relevant and admissible under Section 1101(b), evidence of the uncharged offense must often be excluded because of its "inflammatory impact." (***People v. Alcala***, *supra*, 36 Cal.3d 604, 631.)

This court typically reviews a trial court's determination of admissibility of evidence under Section 352 to determine whether there was an abuse of discretion. (***People v. Lewis*** (2001) 25 Cal.4th 610, 637, *cert. denied*, 534 U.S. 1045.) Nevertheless, Appellant renews his request for the court to apply a heightened standard of review, as set forth in Section III(C) of this brief.

The defense made a timely objection to the introduction of the evidence of the uncharged Hawaii murder under Section 352 because its probative value was substantially outweighed by the danger of undue prejudice. The argument was raised in the pre-trial pleadings. (C.T. 592; C.T. 644 – C.T. 672.) It was the subject of pre-trial argument. (R.T. 1215, Line 14 – R.T. 1216, Line 8; R.T. 1931 – R.T. 1951.) It was renewed at trial. (R.T. 2165; R.T. 2676.) In summary, the defense argued that evidence of the uncharged murder was broadly inadmissible under Section 352; it also asserted that the inflammatory and dissimilar characteristics of the uncharged crime, such as the gruesome injuries to the Hawaii victim's vaginal wall caused by the use of the canister to sexually assault her, should be excluded or "pruned" from the evidence. It offered to stipulate that Mrs. Delbecq was sexually assaulted with a hair mousse canister. (R.T. 1931, Line 15 – R.T. 1938, Line 17.)

The trial court overruled Appellant's objection under Section 352 without considering that the uncharged offense was substantially more brutal and,

therefore, substantially more prejudicial than the charged offense. Indeed, it ruled with the mistaken belief that evidence of the "Orange County case" was as inflammatory as evidence of the Hawaiian murder seven years later:

> "As far as 352 is concerned, I don't even think it is close. I don't see how any of that Hawaii evidence that is admissible could create a substantial danger of undue prejudice. I mean you only need one event to have prejudice. He is going to get in all the prejudice. And he has to get it in, and he is entitled to get it in on the Orange County case. Just because some of that happened before, that doesn't make it undue prejudice when it is relevant to prove I.D.
>
> So, 352 argument just doesn't go far in my opinion."

(R.T. 1215, Lines 14 - 24.)

When the court rejected the offer to stipulate that Mrs. Delbecq was sexually assaulted with a mousse can, it again acknowledged that the evidence of the uncharged crime was "highly prejudicial." (R.T. 1943, Lines 13 – 14.) Yet, the court ruled that it was "so highly probative, (it) didn't see how we would ever find that its evidentiary value would be substantially outweighed by its probative value." (R.T. 1951, Lines 12 – 16.) The trial court's comments appear to invert and confuse the test for relevancy with that for undue prejudice. Relevant evidence, even if highly probative, can be excluded under Section 352. Evidence of the Hawaii homicide was relevant and necessary to the prosecution's case because the California homicide could not be tried without it. The trial court

concluded, in so many words, that since the evidence of the Hawaii homicide was "so highly probative," the weighing process of Section 352 was unnecessary. Yet, it is precisely because of the absence of evidence that Appellant committed the charged offense that admission of the Hawaii homicide was so unduly prejudicial. The weighing process was not irrelevant; it was required by statute and by simple fairness. This somewhat brusque rejection of Appellant's argument that the probative value of the evidence was outweighed by its unduly prejudicial effect stands in strong contrast to the careful analysis of Section 352 factors in ***People v. Brandon*** (1996) 32 Cal.App.4th 1033, 1046 - 1047. The trial court's cursory acknowledgment of the vastly more prejudicial nature of the uncharged Hawaii murder, and the absence of any articulate balancing of that prejudice with the evidence's probative value, do not deserve the deference which a reasoned Section 352 analysis commands.

b. The Evidence of the Hawaii Murder Should Have Been Excluded in its Entirety Since its Probative Value was Low and its Potential for Undue Prejudice was High

The disparity between the absence of evidence linking Appellant to the charged murder and the comparatively compelling evidence that he brutally murdered Muriel Delbecq made the danger of undue prejudice particularly grave. As the prosecution openly conceded below, "if the Court (did) not allow the

evidence of the Hawaii murder to come in (it had) no case." (R.T. 144, Lines 11 - 13.) Thus, it "bootstrapped" legally insufficient evidence on the charged offense into a triable case by directing the jury's attention to an uncharged crime. (*Compare,* ***Davis v. Woodford***, (9th Cir. 2004) 384 F.3d 628, 638 – 639, where the Circuit found no undue prejudice from the joinder of two offenses since the evidence was "cross-admissible on the issue of identity and intent" and "the state did not join 'a strong evidentiary case with a much weaker case in the hope that the cumulation of the evidence would lead to convictions in both cases.' (*case cited*).") This is an unusual case indeed since the danger of undue prejudice is so plain in the record and was clearly recognized by the parties, including the trial court:

"The Court	This is an I.D. case. Either we let it in for I.D. purposes and then whatever else may be relevant or it don't come in. If it doesn't come in for I.D., this case is over. Finished. At least based upon what you have both told me so far.
Mr. Brent	That is true."

(R.T. 1199, Lines 1 - 7.)

In ***Ewoldt***, the court held that the principal factor affecting the probative value of evidence of the uncharged offense is its tendency to demonstrate a fact in dispute such as identity, common plan and intent. Under the facts of that case, the Supreme Court found that the tendency was strong since the uncharged offense

was committed in a manner "nearly identical" to the charged offense. (*Ibid* at 403.) The Supreme Court went on to find that in order to properly balance the competing factors under Section 352, "it is imperative that the trial court determine specifically what the proffered evidence is offered to prove so that its probative value can be evaluated for that purpose." (*Ibid.* at 406.) Since the evidence of the uncharged offense in this case is admissible, if at all, to prove identity, the degree of necessary similarity to establish its probative nature was exceedingly high: a unique, shared "signature" must have been present. As set forth above, no such shared signature was established at trial.

Under ***Balcom,*** "(t)he close proximity in time of the uncharged offenses to the charged offenses increases the probative value of the evidence; there, the two crimes occurred only six weeks apart. (1994) 7 Cal.4th 414, 427. Here, they were separated by approximately 350 weeks.

The relative brutality of the uncharged murder had a multiplier effect upon the danger of improperly creating a conviction, where there should have been none. Although no murder scene is pleasant, the vicious assault upon Mrs. Delbecq with a canister of hair mousse, and her appalling injuries, are quantitatively different that the injuries to the victim in the charged offense. As previously noted, the trial court failed to consider this dramatic and important difference between the two crimes when it engaged in its abbreviated and inverted

analysis of whether the probative value of the brutal Hawaiian crime was outweighed by its danger of undue prejudice when the jury considered the evidence that Appellant committed the charged offense. The record in this case can be easily distinguished from that in ***Ewoldt*** where the proof of the uncharged acts "was no stronger and no more inflammatory than the testimony concerning the charged offense." (*Ibid.* at p. 405.)

As a general matter, the introduction of a conviction tends to reduce the danger of potential prejudice because "the attention of the jury was not diverted to a determination of whether or not the defendant had committed (it)."[9] Yet, the introduction of Appellant's conviction for the Hawaii homicide does not compel a conclusion that the jury was not unduly prejudiced in this case. The manifest discrepancy in proof the Appellant committed the charged versus the uncharged offense, the weak probative inference of Appellant's identity as Mrs. Deeble's assailant, and the less inflammatory injuries that she suffered, all combine to present a uniquely compelling case for the exclusion of the evidence of the uncharged offense under Section 352.

c. Assuming that Similarities of the Two Homicides were Sufficiently Probative to Justify their Admission, the Remaining Dissimilarities Should Have Been Excluded

[9] ***People v. Balcom***, *supra*, at 405 - 406, *citing* ***People v. Ewoldt***, J. Arabian, concurring.

In ***Ewoldt***, the court commented that only the common marks should be admissible under Section 1101(b): "due to the prejudicial nature of (uncharged crimes) . . . the possibility of severing relevant from irrelevant portions should be in every case considered, thereby protecting the defendant against reference to other crimes where it has no tendency to establish facts pertinent to the proof of the crime charged." (*Ibid.* at 404.) (*See, also*, ***People v. Dabb*** (1948) 32 Cal.2d 491, 506; ***People v. Guerrero***, *supra*, 16 Cal.3d 719, 727; ***People v. Kelly*** (1967) 66 Cal.2d 232, 239.)

As set forth above, there were significant dissimilarities between the injuries suffered by Mrs. Deeble and those inflicted upon Mrs. Delbecq seven years later. The use of the mousse can to assault Mrs. Delbecq was unequivocal and horrific. In addition to the multiple ruptures of the vaginal wall, Mrs. Delbecq was assaulted in other ways not present in the Deeble homicide. For example, Mrs. Delbecq's hydroid bones in her neck were fractured, she was bitten on her breasts, and her teeth were broken; none of these injuries were present in the Los Alamitos murder seven years earlier; all of these should have been redacted from the prosecution's evidence, along with any mention that she was assaulted with a hair mousse canister. The trial court recognized that dissimilarities were potentially subject to exclusion. (R.T. 1215 – R.T. 1216.) Defense counsel argued that they should be excluded because the dissimilarities, while inflammatory, were not relevant. (R.T.

1931; R.T. 1936.) Indeed, as argued above, there was no evidence that the keystone of the prosecution's case (the mousse can at the scene of both crimes) was even used as an instrument to sexually assault Marjorie Deeble. Nevertheless, many of these dissimilarities figured prominently in the prosecution's case. The prosecutor mentioned the trauma to Mrs. Delbecq's rectum and breasts during his opening argument. Despite renewed objections during trial to the introduction of the Delbecq crime scene photos and testimony about the discovery of the mousse can in the vaginal vault during the autopsy (R.T. 2165, Lines 5 - 25; R.T. 2676.), photographs and expert testimony were admitted to describe the incised wounds to the neck, crushed hyoid bone, and perforations deep within the vaginal vault and rectum. (R.T. 2292 – R.T. 2304.)

Evidence that Mrs. Delbecq was brutally assaulted with a mousse can could have been easily redacted from the prosecution's evidence, leaving the arguably relevant similarities intact; to have done so would not have impaired the jury's understanding or proper evaluation of those similarities. The other dissimilar injuries also could have been removed from the proof. (*See, e.g.*, ***People v. Perkins*** (1970) 7 Cal.App.3d 593, 602; [evidence that the defendant was on a prison work crew in the vicinity of the burglarized house should have been "pruned" to eliminate the reference to the prison work crew].) As set forth above, the probative value of dissimilar features of the uncharged murder was,

necessarily, very slight. Conversely, the brutality of these dissimilar features created an especially high risk of undue prejudice since bitten breasts and an unspeakably violent assault with a foreign object tends "to evoke an emotional response against the defendant as an individual" that has nothing to do with the merits of the case against him. (***People v. Branch*** (2001) 91 Cal.App.4th 274, 284.)

Quite simply, there is no reported case where the prosecution conceded that, without the challenged evidence, it could not proceed; the potential for prejudice in this record cannot be highlighted more clearly.

3. The Trial Court's Erroneous Ruling Denied Robert Edwards his Federal Constitutional Rights to Due Process of Law, Fundamental Fairness, and a Reliable Determination of Guilt and of the Penalty

a. Introduction

The trial court's erroneous admission of evidence of the Delbecq homicide was more than an abuse of discretion under California's evidentiary statutes. By admitting evidence which, as discussed above, should have been excluded under state law under Evidence Code Sections 1101 and 352, the trial court deprived Robert Edwards of a state created liberty interest and denied him his federal constitutional right to Due Process of Law. (*See*, ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346.) The United States Supreme Court and the Federal Circuits have

been particularly vigilant where claims concern a state's application of their own statutory rules in the context of capital litigation pursuant to the Eighth Amendment's mandate of heightened reliability in capital cases. (*See, e.g.*, ***Ford v. Wainwright*** (1986) 477 U.S. 399, 414; ***Beck v. Alabama***, *supra*, 447 U.S. 625.) The state may create a liberty interest in the correct application of its own statutes:

> "Where a defendant is deprived of a statutory right, such deprivation may implicate the Federal Due Process Clause. States may create a 'liberty interest' that is protected by the Fourteenth Amendment. (*citation.*) As this court has held on more than one occasion, 'the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitratory depravation by a state.' (***Fetterly v. Paskett*** (9th Cir. 1993) 997 F.2d 1295, 1300, *cert. denied*, 513 U.S. 914 (1994), *citing* ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346.)"

Moreover, a state court's erroneous admission or exclusion of evidence may violate the Federal Constitution by causing fundamental unfairness to the criminal defendant. (*See,* ***Kealohapauole v. Shimoda***, (9th Cir. 1986), 800 F.2d 1463, 1466, *cert. denied*, 479 U.S. 1068 (1987); ***Batchelor v. Cupp***, (9th Cir 1982), 693 F.2d 859, 865 (9th Cir. 1982) *cert. denied*, (1983) 463 U.S. 1212 (1983).)

The trial court's erroneous admission of evidence of an uncharged homicide was thus contrary to state law, and denied Robert Edwards his Federal Constitutional rights to Due Process of Law and a fundamentally fair trial under the Fifth and Fourteenth Amendments. In addition, the court's ruling also deprived

him of a fair and reliable determination of his convictions and sentence in violation of the Eighth Amendment. (*See*, ***Sullivan v. Louisiana*** (1993) 508 U.S. 275; ***Beck v. Alabama***, *supra*, 447 U.S. 625, 637.) For all of the reasons, this court must reverse Robert Edwards' convictions and sentence of death.

b. The Trial Court's Erroneous Admission of Evidence of the Uncharged Hawaii Homicide was Especially Prejudicial Since the Court Improperly Refused to Deliver Defense Jury Instructions that were Necessary to Adequately Explain the Limited Use to Which that Evidence Could be Considered by the Jury During its Deliberations

1. The Trial Court's Modification of Standard CALJIC Instruction 2.50 was Improper

Using language from the ***Ewoldt*** decision, the court proposed the following other crimes instruction designated as "2.50 fn. (1994)":

> "Evidence has been introduced for the purpose of showing that defendant committed a crime other than that for which he is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: the identity of the person who committed the crime, if any, of which the defendant is accused; a characteristic design or plan in the commission of criminal acts similar to the design or plan or scheme in the commission of the offense in this case; the

> existence of the intent of which is a necessary element of the crime charged. For the limited purpose of which you may consider such evidence, you must weigh it in the same manner as you do other evidence in the case. You are not permitted to consider such evidence for any other purpose. For identity to be established, the uncharged misconduct and charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts."

(C.T. 935.)

The court then asked if there were any objections to its special instruction from the defense. (R.T. 2857, Line 20 – R.T. 2858, Line 10.)

First, the defense objected to the final paragraph of the court's proposed instruction on the ground that application of the ***Ewoldt*** decision violated the Ex Post Facto Clause of the United States Constitution. (R.T. 2858, Lines 9 - 13.) Second, the defense urged the court to deliver a series of additional instructions. (C.T. 8979 – C.T. 8984.) The first series of instructions were direct quotations from ***Ewoldt*** that would have added the following language to the Court's instruction:

> "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged conduct 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. The pattern and

> characteristics of the crimes must be so unusual and distinctive as to be like a signature."

(C.T. 881.)

The defense also proposed the following additional language based upon ***People v. Guerrero***, *supra*, 7 Cal.4th 380:

> "If you have no doubt that the perpetrator of the Los Alamitos homicide was Mr. Edwards, then you may consider the evidence of the Hawaii homicide on the issue of intent in the Los Alamitos homicide."

(C.T. 883.)

The court acknowledged that the task of determining whether the similarities between the crimes are close enough to justify an inference of identity was "a difficult concept." (R.T. 2859, Line 14.) It rejected the defense proposed "signature" language to its modification because it was a "vague concept" out of "one of the treatises" that "wasn't that helpful" to the jury. Nevertheless, it invited counsel to use the language during closing argument. (R.T. 2861, Line 15 – R.T. 2862, Line 6.) Likewise, the court rejected "the greatest degree of "similarity" language proposed by the defense as asking the jury to make an unhelpful comparison." (R.T. 2862, Lines 15 - 21.) Finally, the court rejected the defense instruction based on ***Guerrero*** as an incorrect statement of the law. (R.T. 2862, Line 22 – R.T. 2863, Line 8.)

Here, as in ***Grant***, Appellant did not receive a fair trial: " . . . the similarity of the evidence (on the two crimes), the prosecutor's improper closing argument, and the trial court's instructional errors had a substantial and injurious effect on both verdicts. For these reasons it is reasonably probable that the joinder affected the jury's verdict on both counts." (***People v. Grant***, *supra*, 113 Cal.App.4th 579, 499.) Since the state cannot demonstrate beyond a reasonable doubt that the faulty and incomplete instruction did not contribute to the verdict, a reversal is required.

2. The Trial Court's Special Instruction for the Use of Other Crimes was Erroneous

Upon request, the trial court must give an instruction limiting other crimes evidence to its proper scope. (***People v. Grant*** (2003) 113 Cal.App.4th 579, 591.) Here, the court's decision to supplement the standard instruction with quotations from ***Ewoldt*** ran the inherent risk of confusion that occurs whenever the words of an appellate decision are transmitted into a jury instruction. (*See*, ***People v. Colantuono*** (1994) 7 Cal.4th 206, 222 fn. 11.) Having chosen to do so, however, the defense asserted that the trial court had the obligation to include the entire, relevant quotation from ***Ewoldt*** in order to make its instruction fair and comprehensible to the jury.

The language proposed by the defense was neither redundant nor an incorrect statement of the law; it was a direct quote from the opinion itself.

(*Compare*, ***United States v. Tarallo*** (9th Cir. 2004) 380 F.3d 1174, [no error to refuse instruction that defendant must intend harm to the investors, as well as deceive them;] and ***People v. Lenart*** (2004) 32 Cal.4th 1107, 1133, [court does not err when it refuses an instruction which incorrectly states the law].) Rather, once a trial court instructed the jury that the common features must be "sufficiently distinctive" so as to support the inference that the same person committed the uncharged acts, it was obliged to instruct the jury how it was to determine that "sufficiency."

The opinion in ***People v. Grant***, *supra*, is instructive. In ***Grant***, the Court of Appeals held that the trial court erred when it failed to give a defense instruction regarding the limited use to which it could use other crime evidence. The proposed special instruction read: "The admissibility of other crimes evidence for the purpose of proving identity depends on whether the offenses shared marks of distinction. Only common marks having some degree of distinctiveness tend to raise an inference of identity and thereby invest other crime evidence with probative value. The strength of the inference in case depends on two factors: (1) the degree of distinctiveness of individual shared marks and (2) the number of minimally distinctively shared marks." (*Ibid.* at 592, fn. 5.) While the decision did not mandate this language upon request, it is notable that the proposed instruction

went beyond simply instructing the jury that it must find "some degree of distinctiveness," and informed them how to do it.

Here, too, the defense proposed instructions supplied the necessary explanation by advising the jury that "sufficiently distinctive" shared common features are those that are "so unusual and distinctive as to be like a signature" and "the greatest degree of similarity" is required for evidence of uncharged conduct to prove identity. The trial court's opinion that the language proposed by the defense should be redacted because it introduced a "vague concept" is undercut by the Supreme Court's very decision to use that exact language from ***McCormick*** on Evidence (4th Ed. 1992) in its opinion as a necessary explanation of the circumstances under which other crimes evidence should be admitted to prove identity.

Similarly, the trial court's rejection of the defense instruction that "the greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity" opened the door for the jury to misconstrue the very different burdens of proof that the Supreme Court required, depending upon the purpose for which the uncharged misconduct was considered relevant. The trial court rejected the language because it "asked (the jury) to compare." (R.T. 2862.) Yet, the trial court's very decision to instruct the jury that it could consider evidence by the Delbecq homicide as relevant to the issue of intent or a

characteristic design or identity required the jurors to make a comparison, simply because of the different standards of proof. As the defense counsel pointed out, the rejected instruction was 'a pure quotation out of ***Ewoldt.***'" (R.T. 2862.) The trial court's rejection left the jury with the erroneous and very damaging impression that the necessary degree of similarity was equivalent (or perhaps was even greater) for it to consider the uncharged conduct on the issue of intent as it was for identity.

Finally, the trial court's decision to reject the defense instruction based on their language in ***Guerrero*** because it was an incorrect statement of law, runs afoul of this court's admonition in ***People v. Falsetta*** (1999) 21 Cal.4th 903, 924, *cert. denied*, (2000) 529 U.S. 1089.) In ***Falsetta***, the Supreme Court held that the trial court erred in failing to tailor the defendant's proposed instruction to give the jury some guidance regarding the use other crimes evidence, rather than denying the instruction outright. Here, while the trial court failed to specify the perceived defect of delivering a quotation from the ***Guerrero*** opinion to the jury, it had an obligation under ***Falsetta*** to modify the proposed instruction in order to properly instruct the jury.[10] In absence of the explanatory language in ***Guerrero***, the jury could have reasonably used circumstantial evidence of Mr. Edwards's intent in the Hawaii homicide for an improper purpose.

[10] For example, if the trial court objected to the proposed instruction "if you have no doubt that the perpetrator . . . was Mr. Edwards," it could have been easily modified to conform to the reasonable doubt instruction.

3. Even Assuming that the Trial Court Properly Admitted Evidence of the Delbecq Homicide, its Special Instruction and Failure to Grant Defense Proposed Instructions on "Other Crimes Evidence" Requires a New Trial

An erroneous instruction renders a criminal trial fundamentally unfair because it creates an unreliable verdict unless it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (***People v. Petznick*** (2003) 114 Cal.App.4th 663, 681.) Here, as noted previously, virtually the entire trial was consumed by a comparison between the features of the California and Hawaii homicides. The closing arguments of the parties were extensively devoted to that comparison. (R.T. 2914 – R.T 2936; R.T. 3022 – R.T. 3054; R.T. 3092 – R.T. 3096.) The degree of necessary similarity was also discussed in terms of the court's instruction. (R.T. 2914, Line 5; R.T. 3095, Line 13.) Under these circumstances, where the comparison is the very "signature" of the litigation, so to speak, an instruction that correctly informs the jury as to the standard against which it must evaluate whether the similarity is "close enough" to justify an inference of identity, was vital. (*See, e.g.,* ***People v. Petznick****, supra*, and ***People v. Beeman*** (1984) 35 Cal.3d 547, 561, [where conviction were reversed because Appellant's defense focused on an area of the defective instructions].) The danger of jury confusion and an unreliable verdict was especially pronounced

in this case because the jury was instructed that it could consider evidence of the uncharged murder as proof of identity, common plan, and intent, but it was only partially instructed about the *standard* to use for determining whether such evidence could be considered to determine identity. (R.T. 3120 – R.T. 3121.)

Moveover, since the commission of the California homicide (by someone) was not in dispute, the jury never should have been instructed that it could consider the uncharged offense as evidence of a "common plan." As noted previously, ***Ewoldt*** held that it was improper for evidence of an uncharged offense to be admitted to prove common plan when the commission of the crime is not in issue: ". . . if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect . . . would outweigh the probative value." (*Id.* at 405.) Here, the danger of prejudicial confusion was heightened because the prosecutors expressly argued for the existence of a common plan: to dominate and kill older, vulnerable women to satisfy a "sexually sadistic purpose." (R.T. 3095, Line 21 – R.T. 3096, Line 15.) *Compare*, ***People v. Demetrulias***, *supra*, where no prejudice was found where the jury was instructed that it could consider evidence on an uncharged offense to prove common plan yet the prosecutor "did not argue for the existence of a common design or plan as such."

Finally, it is well-settled that the mere ability of counsel to argue a key concept of law is not an adequate substitute for a proper instruction from the court.

(***People v. Vann*** (1974) 12 Cal.3d 220, 227, n. 6, [*citing* ***Parker v. Atchinson T&S***, 263 C.A.2d. 675, 680: "We dismiss at once the defendant's contention that counsel's arguments to the jury can cure an error in the court's instructions. The arguments of counsel are not a substitute for instructions by the Court."]) Thus, the trial court's invitation to counsel to argue that the degree of similarity between the charged and uncharged offense must be so close as to be a "signature" in order to establish an assailant's identity, does not cure the prejudice of having the jury deliberate without proper guidance from the Court.

4. The Trial Court's Admission of the Evidence of an Uncharged Homicide was Highly Prejudicial Error Requiring Reversal of Robert Edwards Convictions Applying Either the ***Chapman*** Standard of Reversal or the less stringent standard of ***People v. Watson***

a. This Court Should Apply the "Harmless Error" Standard of Reversal of ***Chapman v. California*** because the Trial Court's Erroneous Ruling Affected Robert Edwards' Federal Constitutional Rights

As discussed above, the trial court denied Robert Edwards several fundamental constitutional rights by admitting prosecution evidence of Mrs. Delbecq's brutal homicide. Because the trial court's ruling impacted these fundamental rights, the proper standard of reversal is the "harmless error" analysis of ***Chapman v. California***, *supra*, 386 U.S. 1824. (*See*, ***Delaware v. Van Arsdall***, (1986) 475 U.S. 673, 680.) Under the ***Chapman*** standard, reversal is required

unless the state can show "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Ibid.*) This familiar rule is a reiteration by the Supreme Court of the standard in ***Fahy v. Connecticut*** (1963) 375 U.S. 65: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Most recently, the court has formulated the inquiry as "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (***Sullivan v. Louisiana*** (1993) 508 U.S. 275, 279.) Under any of these formulations, one cannot declare that the error in this case was harmless beyond a reasonable doubt.

b. The State cannot Show that the Trial Court's Ruling that Admitted Proof of the Hawaii Homicide was Harmless Error because All Parties below Agreed that Without It, There was Insufficient Evidence to Convict Appellant of the Charged Offense

The evidence of the Delbecq murder was simply essential to the prosecution's case. The following exchanges during the pre-trial litigation amply illustrate this point:

"The Court	What you are saying is that you can't prove I.D. without the Hawaii case?
Mr. Brent	That is correct.
The Court	So there is no case?

Mr. Brent	That is correct.
The Court	That is understood.
Mr. Brent	O.K. Thank you.

(R.T. 145, Lines 13 - 19.)

* * *

`The Court	This is an I.D. case. Either we let it in for I.D. purposes and then whatever else may be relevant or it don't [*sic*] come in. If it doesn't come for I.D., this case is over. Finished. At least based upon what you both have told me so far.
Mr. Brent	That is true.

(R.T. 1199, Lines 1 - 6.)

* * *

The Court	Now, on the I.D. issue, if the jury doesn't find that the acts are similar enough, there is going to be an acquittal.
Mr. Brent	That is right.

(R.T. 1942, Lines 6 - 11.)

The proceedings at trial confirmed these predictions that evidence of the Hawaii murder was an indispensable ingredient of the proof that Robert Edwards committed the charged offense. During his opening statement, the prosecution highlighted the importance of the alleged similarities between the two homicides: he introduced the case to the jury as "The Tale of Two Mousse Cans." (R.T. 1953, Lines 25 - 26.) He continued, "Ladies and Gentlemen, as you can see . . . this truly

is a case of two separate crime scenes. One crime scene leading to and helping you as the trier of fact. One crime scene where there is a known perpetrator solving the crime scene where the perpetrator is unknown. The points of commonality being so similar and unique that it will be fairly easy for you as a trier of fact to conclude that the perpetrator of one is the perpetrator of the other." (R.T. 1964, Lines 18 - 26.) Predictably, the prosecutor's trial evidence was weighted towards proof that Appellant murdered Muriel Delbecq and the alleged similarities between that crime and the Deeble homicide.

Appellant's name was not even mentioned during the prosecution's proof of the Deeble homicide, except to establish that he knew her slightly because he dated her daughter and was allegedly aware that a key to the victim's residence was hidden in a drainpipe in the front of her building. (R.T. 2071 – R.T. 2084.)[11] The vast proportion of the prosecution's proof consisted of comparative descriptions of the crime scenes and injuries inflicted upon the respective victims. (R.T. 1990 – R.T. 2055; R.T. 2121 – R.T. 2139; R.T. 2178 – R.T. 2290.)

The prosecution's summation punctuated the crucial importance of the evidence admitted under Section 1101(b). The prosecutor argued that a comparison between the two murder scenes conclusively demonstrated Robert Edwards's guilt. (R.T. 2913, Lines 14 - 22; R.T. 2950.) He concluded that "the

[11] As a parenthetical aside, the relevancy of even this disputed fact is questionable in light of the prosecution's proof that there was forced entry through the window of the Deeble residence. (R.T. 2056 – R.T. 2057.)

ultimate question that you are going to have to determine . . . (1) did Mr. Edwards kill Muriel Delbecq in Hawaii. That is a simple question to answer. And if he did, does that give you enough information to conclude that he also killed Marjorie Deeble? Obviously, I submit to you, that it does." (R.T. 2913, Lines 14 - 22.)

The danger of undue prejudice was particularly strong in the case. First, the evidence that Appellant committed the uncharged offense was strong while the evidence that he committed the charged offense exceedingly weak; indeed, the prosecution and the trial court agreed that it was insufficient as a matter of law. (R.T. 145; R.T. 1199.) Thus, as in ***People v. Rivera***, the prejudice of the improper admission is especially severe. There, as here, there were no eyewitnesses or physical evidence to link the defendant to the charged offense. (*Ibid.* at 393.) (*See, also*, ***People v. Dabb*** (1948) 32 Cal.2d 491, 500, [where there was no reversal based upon the introduction of evidence of an uncharged offense because "there was clear proof" of the charged offense]. This same point was made by this court in ***Williams v. Superior Court*** [during an improper joinder analysis when it commented, "it would be difficult for jurors to maintain doubts about the weaker case when presented with stronger evidence as to the other]. ***Williams v. Superior Court*** (1984) 36 Cal.3d 441, 443, *cert. denied*, (1998) 522 U.S. 1150. *See, generally,* ***People v. Marshall*** (1997) 15 Cal.4th 1, 28 [where a joinder was considered proper because evidence of both offenses was substantial].) Indeed, the

evidence against Appellant was so insubstantial that he wasn't charged until after the commission of the Delbecq murder, seven years later.

Second of all, the evidence of the Hawaii homicide was far more cruel and inflammatory then that of the Deeble homicide, where the physical injuries were far less severe. (*See*, ***People v. Balcom*** [where the court noted that prejudice was increased "when the other crime is particularly inflammatory relative to the instant crime]. (J. Arabian.) Thus, since a substantial portion of the guilt phase was devoted to proving the Hawaii homicide, there was a strong possibility that the jury considered that inflammatory proof for an improper purpose: that Appellant had a propensity to commit murder. (*See, e.g.*, ***People v. Archer*** (2000) 82 Cal.App.4th 1380, 1392.) In ***Archer***, the court considered a murder prosecution during which the victim was stabbed with a knife. It held that it was error to admit evidence that knives were discovered in the defendant's bedroom, backyard and workshop since there was no indication that any of the knives were used in the murder. As defense counsel argued below (R.T. 1189 – R.T. 1190), the vast discrepancy between the violent mauling that the Hawaii victim received and the assailant's efforts simply to immobilize the California victim also created a separate danger that the jury would improperly consider evidence of the uncharged offense as proof that Robert Edwards had an intent to kill and torture, in addition to a propensity to commit the charged offense.

Third, the prejudicial impact of the improper omission of the Hawaii homicide was increased still further because the prosecution used the qualitatively more violent homicide in Hawaii for the improper purpose specifically forbidden by Section 1101(a), to prove bad character:

> Mr. Brent "I guess that means the killer isn't the same one because (the mousse cans) are not the same kind and they are not used quite the same way. Because Mr. Edwards graduated to a more sadistic level a few years later. Or perhaps it was because in Hawaii he could be more sadistic because Mrs. Delbecq wasn't dead yet. Because he didn't get the chance to ram the Merci Gelle can all the way up Mrs. Deeble. Perhaps it was over, she died too quickly, he didn't prolong it long enough."

(R.T. 2931, Lines 7 - 15.) (*Compare*, ***People v. Demetrulias***, *supra*, 39 Cal.4th 1.) (where the court found the danger of potential prejudice from the admission of an uncharged offense to be low since "the prosecutor did not suggest to the jury that it considered (it) for any improper purpose.")

Although the trial court instructed the jury about the limited purpose for which the other crime evidence could be considered,[12] this limiting instruction was not sufficient to ensure that the jury considered the inflammatory evidence for its proper purpose since the strength of the evidence that Appellant committed the uncharged offense was vastly more convincing than the feeble and legally insufficient proof that he committed the Deeble murder. In this situation, "(N)o

[12] (R.T. 3116, Line 21 – R.T. 3117, Line 4; R.T. 3120, Line 22 – R.T. 3122, Line 13.)

limiting instruction, however thoughtfully phrased or often repeated, could cure the prejudice of improperly admitted 'other crimes' evidence." (***People v. Guerrero*** (1976) 16 Cal.3d 719, 730.) Thus, a reliance upon the trial court's limiting instructions to the jury regarding the use of prior acts in its deliberation is misplaced. As the Supreme Court noted in a related context, "the naïve presumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction . . . ." (***Bruton v. United States*** (1987) 391 U.S. 123, 129. *See, e.g.,* ***United States v. Daniels*** (D.C. Cir. 1985) 770 F.2d 1111, 1118.) ("We are not nearly so sanguine concerning the efficacy of jury instructions in curing the prejudice caused by the introduction of other crimes evidence"); ***United States v. Figueroa*** (2d Cir. 1980) 618 F.2d 934, 943 (utility of limiting instructions "is not to be invariably rejected, neither should it be in variably accepted"); ***United States v. Delli Paoli*** (2d Cir. 1956) 229 F.2d 319, 321, *aff'd*, 352 U.S. 232 (1957) (in which Judge Learned Hand argued that limiting instructions are often a "placebo"); ***People v. Coleman*** (1985) 38 Cal.3d 69 (where instructions to the jury that letters from the victim which allege prior threats from the defendant could only be considered for impeachment were insufficient to ensure that they would not be considered as proof of the accusations that they contained.) Moreover, since the jury was not adequately instructed about

the quantum of proof needed to properly consider evidence of the Hawaii homicide to establish the identity of the assailant, any limiting instructions was useless.

Finally, as a general matter, the undue prejudice caused by the improper admission of an uncharged homicide is particularly pronounced since it occurred in a capital case, in which the conviction carried the gravest consequences. (***Williams v. Superior Court***, *supra*, at 485; *see, also,* ***People v. Johnson*** (1987) 43 Cal.3d 296, *cert. denied*, (1989) 493 U.S. 829.)

c. The Admission of Other Crimes Evidence was So Highly Prejudicial that Reversal of Appellant's Conviction is Required

The purpose of Evidence Code Section 1101(a) is to prevent the admission of evidence that is likely to produce the wrong result. The wrong result is the conviction of an innocent man. Here, substantial amounts of evidence that is proscribed by Section 1101(a) was admitted. The record demonstrates that it was used by the People for the very purpose that such evidence is excluded by Section 1101. The People argued to the jury that this evidence showed that Appellant had the character of a man who was not only capable of killing, but enjoyed it. In short, the People produced guilty verdicts, and a death sentence, by proving that Appellant had the disposition to commit murder.

As set forth above, without such evidence and argument by the People, a jury would not have convicted Appellant of a first-degree murder and would not have sentenced him to death. All parties agreed that the evidence of the Deeble homicide, standing alone, was too weak to support Appellant's conviction and subsequent sentence of death. Even with the improper admission of the Delbecq homicide, and the inadequate instructions regarding its use, the jury had a difficult time reaching a verdict. Deliberations began on October 17, 1996. (R.T. 3144.) The jury requested substantial portions of Appellant's trial testimony to be re-read, pertaining to the events of May 12, 1986. (R.T. 3150.) A verdict was not reached until October 22nd, after three days of deliberations. (R.T. 3166.) Under both the state and federal standards, the error was prejudicial.

A result reached by evidence and legal argument that is, by definition and by law, impermissible because of its unreliability cannot stand. The Eighth and Fourteenth Amendments require reliable procedures for a capital offense. (***Beck v. Alabama*** (1980) 447 U.S. 625, 637 - 638.) Appellant was deprived of his Eighth and Fourteenth Amendment rights to such procedures, not only by the evidence that was presented, but how the People actually used that evidence.

Here, the ". . . simultaneous trial of more than one offense . . . actually rendered Appellant's state trial fundamentally unfair and, hence, violative of due

process." (***Sandoval v. Calderon*** (9th. Cir. 2000) 231 F.3d 1140, 1146.) As shown above, prejudice is shown in this case since the de facto joinder had a substantial and injurious effect or influence in determining the verdict. (*Ibid.*) Hence, under Federal Constitutional Test of Due Process, Appellant's right to due process as protected by the Fourteenth Amendment of the United States Constitution was violated.

d. Even under the State Error Standard, Reversal of Robert Edwards Conviction is Required because the Trial Court's Evidentiary Ruling Produced a Reasonable Possibility that it Considered Evidence that he Committed an Uncharged Offense as Proof of a Disposition to Commit Murder

In ***People v. Watson*** (1956) 46 Cal.2d 818, 836, *cert. denied*, (1957) 355 U.S. 846, this court held that reversal is required where it is, "reasonably probable" that a more favorable result would have been obtained absent the error. Errors involving a trial court's decision to admit evidence are typically reviewed under the ***Watson*** standard. However, this court has made an exception for state court errors implicating important constitutional rights. In ***People v. Fudge*** (1994) 7 Cal.4th 1075, 1102 - 1103, *cert. denied*, (1995) 514 U.S. 1021, this Court held that errors involving merely state evidentiary rules are analyzed under the ***Watson*** standard, but if the error is of constitutional dimensions, the ***Chapman*** standard is

controlling. Robert Edwards submits that the ***Chapman*** standard should apply in this case, even though reversal of both the convictions and the sentence is required if the court applies the less rigorous standard of ***People v. Watson***.

As set forth above, the admission of evidence of the Delbecq murder was highly prejudicial, especially given the undisputed insufficiency of the prosecution's case without it. Absent the erroneous admission of that evidence, it is reasonably probable that the jury would have reached a different result and concluded that there was reasonable doubt concerning Appellant's guilt. Reversal of the convictions is, therefore, required.

IV. THE IMPEACHMENT OF ROBERT EDWARDS WITH HIS FIRST DEGREE MURDER AND BURGLARY CONVICTIONS IN HAWAII AND HIS BURGLARY CONVICTION IN CALIFORNIA, VIOLATED STATE LAW AND DEPRIVED HIM OF HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL AND A RELIABLE CAPITAL CONVICTION UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Factual Background

The prosecution's first question to Appellant on cross-examination was whether he was convicted of the murder of Muriel Delbecq on March 10, 1994. An immediate objection and motion to strike was made, following a motion for a mistrial. (R.T. 2605, Lines 8 - 19.)

The defense alleged prosecutorial misconduct, based on a claim that the Delbecq murder had only been admitted as a prior act under Section 1101(b) and that the prosecution had agreed not to introduce Robert Edwards' arrest for that offense, much less his conviction. (R.T. 2605 – R.T. 2606.) The Court replied that the convictions for murder and burglary in Hawaii, as well as the burglary conviction in California suffered in August of 1984, were all crimes of moral turpitude and admissible as impeachment. The court denied the motion. (R.T. 2629, Line 19 – R.T. 2630, Line 1.) The defense argued that, nevertheless, the conviction should be excluded as prejudicial and cumulative. (R.T. 2605 – R.T. 2612.) The court observed that the crime of burglary bore heavily on credibility since it was a crime of moral turpitude. Their admission was not prejudicial since Appellant had testified that he was "living a life of crime to support a dope habit and alcohol habit." They were not remote since Appellant had been "continuously in and out of trouble," based upon convictions in 1984, 1987, 1988 and 1994. (R.T. 2612, Line 15; R.T. 2613, Line 14.) Regarding the murder conviction, the court acknowledged that its similarity to the charged offense was a factor arguing against its admission, but dismissed it by noting that evidence of the Delbecq murder had already been admitted under Section 1101(b). (RT 2613, Line 20 – RT 2614, Line 14.) When proceedings resumed in open court, the prosecution asked Appellant whether, on March 10, 1994, he was convicted of a murder in Hawaii, as

well as a second burglary in California in August of 1984. Appellant acknowledged that he had been. (R.T. 2616, Lines 4 - 17.)

B. The Admission of these Felonies to Impeach Appellant Violated State Law

1. Introduction

In 1982 the "Victims' Bill of Rights" was added to the California Constitution as Sections 28 (d) and (f) of Article 1. These provisions sought to expand the permissible use of prior crimes beyond well established statutory acceptations. (*See*, Evidence Code Sections 786, 787, 788, 790, 1101 and 1102.) Subsection 28(d) provides in relevant part: "Except as provided by statute hereinafter enacted by two-thirds vote of the membership in each house of the legislature, relevant evidence should not be excluded in a criminal proceeding . . . . Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay or Evidence Code Sections 352, 782 or 1103. . . ." Subsection 28(f) provides, *inter alia*: "any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purpose of impeachment. . . ."

By the time Robert Edwards was tried, it was well settled that the adoption of the above-cited state constitutional provisions did not entirely eliminate Evidence Code Section 352 as the basis for excluding evidence of prior felony

convictions. (***People v. Castro*** (1985) 38 Cal.3d 301, 313 - 314.) In ***Castro***, this court also ruled that impeachment using prior felony convictions amounted to a violation of due process unless the convictions used for impeachment demonstrated a general "readiness to do evil." (*Ibid.*)

The admission of past misconduct involving moral turpitude to impeach a witness is subject to the trial court's discretion under Evidence Code Section 352. (***People v. Feaster*** (2002) 102 Cal.App.4th 1084, 1092.) On appeal, the trial court's decision is reviewed for an abuse of discretion. (*Ibid.*) In exercising this discretion under Evidence Code Section 352, the trial court may consider four factors identified in ***People v. Beagle*** (1972) 6 Cal.3d 441, though it need not apply them rigidly; (1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged defense; and (4) what the affect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. (***People v. Mendoza*** (2000) 78 Cal.App.4th 918, 925.)

2. Application of the ***Beagle*** Factors

The factors identified in ***Beagle*** support the exclusion of the conviction as impeachment; considered together, they form a compelling argument that the trial

court committed reversible error when it admitted the conviction for the uncharged homicide with the vain hope that the jury would only consider it as to Appellant's veracity.

First, although a crime of "moral turpitude" need not include dishonesty as an element" to be used for impeachment,[13] a conviction for a crime of violence does not create a strong adverse inference that an individual lacks veracity. *See*, ***People v. Rollo*** (1977) 20 Cal.3d 109, 188: "no one denies that different felonies have different degrees of probative value on the issue of credibility . . . 'acts of violence . . . generally have little or no direct bearing on honesty and veracity.' (*case cited*)."

Moreover, the trial court's characterization of Appellant as "leading a life of crime" and "continuously in and out of trouble," overstates his criminality. During his direct testimony, Appellant acknowledged purchasing all types of narcotics during his lifetime, but no other criminality beyond selling fake LSD. Other than those sales, he supported his drug and alcohol habit by legitimate employment. (R.T. 2529 – R.T. 2560.) The prosecution did not challenge this history on cross-examination, other than to impeach him with the burglary felonies in 1984 and

[13] ***People v. Feaster***, *supra*, 102 Cal.App. 1084, 1091.

1994.[14] Those widely separated felonies, together with a criminal history that essentially amounts to no more than possession of the illegal narcotics, is distinguishable from the record in those cases which admit remote felonies based on a finding that the defendants "did not subsequently lead a blameless life." (***People v. Green***, (1995) 34 Cal.App.4th 165, 183.) For example, in ***Green***, the court justified its admission of a conviction suffered in 1973, 20 years before trial, because Green had a "systematic occurrence" of convictions in 1978, 1985, 1987, 1988 and 1989 that were relevant to his credibility. Likewise, in ***People v. Mendoza***, the court noted that the defendant suffered multiple convictions following the crime in 1974 with which he was impeached: convictions in 1989, 1991 and 1993. Moreover, the record in ***Mendoza*** disclosed that the ten year gap between convictions in 1979 and 1989 was due to his imprisonment during most of that time. (***People v. Mendoza***, *supra*, 78 Cal.App.4th at 926.) Here, there is no evidence in the record that the gaps between Appellant's convictions for the relatively minor offenses of theft, possession of a firearm and second-degree burglary that he suffered in 1984, 1987, and 1988 were filled in by lengthy periods of incarceration. (R.T. 2605 – R.T. 2610.) Appellant's continuous unlawful drug use is hardly comparable; possession of narcotics is not a crime of moral turpitude. (*See*, ***People v. Campbell*** (1994) 23 Cal.App.4th 1488, 1494.)

[14] The court refused to admit convictions for auto theft in 1988 and possession of a firearm in 1987 to impeach Appellant. (R.T. 2614.)

The "black-out" defense would have been impossible to mount without the testimony of Robert Edwards that he did not remember killing Mrs. Deeble or any of the events around the time of her death. Quite simply, if he did not testify from fear of impeachment, he could not have raised this defense of choice. It is evident from the record that Appellant took the stand under the assumption that he would not be so impeached. Defense counsel was shocked and outraged by the prosecutor's decision to impeach their client, because of their belief that he had been implicitly forbidden from doing so by his agreement that he would not introduce Appellant's arrest during his case-in-chief and the court's decision to admit only evidence of the circumstances of the Delbecq murder under Section 1101(b). (R.T. 2605, Line 18 – R.T. 2606, Line 24.) Whether or not defense counsel's reliance was sensible,[15] it cannot be said that Appellant and his counsel made a decision to have him testify on his own behalf after a full and fair consideration of the potential dangers of impeachment.

Finally, the danger that the jury would impermissibly consider the Hawaii conviction for reasons other than impeachment (e.g., a propensity to commit the charged offense) is plain from the prosecutor's argument from the very beginning

[15] The trial court noted that a motion to exclude felony impeachment is "typically made . . . before every trial." (R.T. 2606, Lines 23 - 23.) In an explicit attempt to forestall a claim that defense counsel's failure to make such a motion denied Appellant's constitutionally effective assistance of counsel, the prosecution unsuccessfully sought to compel counsel to state on the record "tactical reason" for having failed to do so. (R.T. 2658, Line 11 – R.T. 2659, Line 2.)

of the trial to its final end that the two crimes were virtually identical, united by "The Tale of Two Mousse Cans." (*See*, ***People v. Fries***, (1979) 24 Cal.3d 222, 230, where this court held that because the prior conviction admitted for impeachment was identical to the offense for which the defendant was on trial, its admission was erroneous; "while the risk of undue prejudice is substantial when any prior conviction is used to impeach the credibility of a defendant–witness, it is far greater when the prior conviction is similar or identical to the crime charged. (*cases cited.*)" As the trial court recognized, the similarity between the alleged offense and the admission of a conviction for that same offense for impeachment argued against its admission under Section 352. While unspoken by the court, the same argument against the admission of the burglaries for impeachment could be made, since the Appellant was accused of the special circumstance of murder during the commission of a burglary. Although this court has observed that "prior convictions for identical offenses are not automatically excluded, the identity . . . is just one factor to be considered,"[16] this record is unique because the alleged factual identity between the uncharged and charged offense was described in the greatest detail to the jury following the court's admission of the Delbecq murder under Section 1101(b). Thus, the accepted danger of admitting the bare fact of a conviction that shares the same elements of proof as the charged offense to

[16] ***People v. Green*** (1995) 34 Cal.App.4th 165, 183.

impeach a defendant's credibility was ratcheted up to an unacceptable level. Because of the confluence of the court's evidentiary rulings under Sections 788 and 1101(b) of the Evidence Code, the jury knew that Appellant had been convicted of a crime that was allegedly identical to the charged offense because of their unique shared signatures. Counsel has been unable to find any reported case that considers the massive potential prejudice of this unique situation.

C. The Admission of the Three Felony Convictions Irreparably Prejudiced Appellant's Right to a Fair Trial

In assessing the prejudice caused by the admission of the conviction and underlying facts of an allegedly identical offense, one need look no further than the settled rule that "the scope of inquiry when a criminal defendant is impeached with evidence of a prior felony conviction does not extend to the facts of the underlying offense." (***People v. Shea*** (1995) 39 Cal.App.4th 1257, 1267 (*cited*, ***People v. Heckathorne*** (1988) 202 Cal.App.3d 458, 462.)[17] Indeed, even after it improperly admitted evidence of the Delbecq murder under Section 1101, the court honored the letter, if not the spirit, of this rule when it admonished the prosecution to admit "just the facts of these convictions (for impeachment). Nothing further on them." (R.T. 2614, Lines 13 - 14.) Here, as noted in Argument III, the underlying facts of

[17] There is a limited exception to this rule, not applicable here, when the defendant attempts to mislead or minimize the facts of that earlier conviction. (*Ibid.*) In ***People v. Smith***, the Supreme Court noted, but did not decide, the question of whether the truth-in-evidence provision of the California Constitution affected the vitality of the rule prohibiting inquiry into the facts underlying a crime admitted for impeachment. (2003) 30 Cal.4th 581, 633, *cert. denied*, (2004) 540 U.S. 1163.)

the Delbecq murder comprised a substantial – and indeed crucial – portion of the prosecution's case against Appellant.

It is evident from the record that the trial court failed to consider the grave prejudice that flowed from its decision to admit the underlying facts of the Delbecq murder together with the Appellant's conviction for that murder. The court simply, but improperly, assumed that the jury's consideration of Appellant's conviction for the same offense was no more prejudicial than its consideration of the facts underlying that conviction.

"The Court	The only negative or meaning in the defense favor on the murder is that it is an identical crime, but that is offset by the fact that they have already heard the 1101(b) evidence. The test is the same. The evidence in Hawaii was very strong in that palm prints were left and there is probably going to be no attack against that. I could be wrong on that.
Mr. Severin	No, there won't be."

(R.T. 2613, Line 20 – R.T. 2614, Line 1.)

Counsel's concession that the palm print evidence would not be challenged cannot be construed as an acknowledgment that the combined admission of the underlying facts of the Hawaii murder and Appellant's conviction for that crime had no

potential for prejudice. During the guilt phase, neither Appellant nor his counsel conceded his responsibility for the Hawaii murder.[18]

As set forth above, courts have long-recognized that the admission of uncharged criminal acts poses an inherent danger of prejudice. Here, the admission of Appellant's conviction for committing that uncharged act – the brutal murder of Muriel Delbecq – multiplied the danger of undue prejudice in two ways.

First, it was undoubtedly used by the jury to wholly – but improperly – to satisfy the prosecution's burden to prove Appellant's commission of the Delbecq murder by a preponderance of the evidence before it could consider that evidence to establish identity or intent. (***People v. McClellan*** (1969) 71 Cal.2d 793, 804.) Although the jury was instructed that it can only consider Appellant's conviction for the Delbecq murder to impeach his credibility,[19] any and fair and honest evaluation of its impact upon the jury's verdict would conclude that it had a decisive, conclusive effect. The recent opinion in ***People v. Song*** is instructive. (2004) 124 Cal.App. 4th 973.)

In ***Song***, the Court of Appeals reversed a kidnapping conviction based upon a so-called ***Aranda-Bruton*** error that occurred when the trial court admitted a co-

[18] Indeed, although the prosecution characterized it as "a simple question to answer," he admitted during closing argument that one of the two "ultimate questions" that the jury had to consider was "did Mr. Robert Edwards kill Muriel Delbecq in Hawaii?" (R.T. 2913, Lines 18 - 19.) In response, the defense closing argument asked the jury to

defendant statement that he saw the defendant force the victim into a car against her will. The limiting instruction was insufficient to eliminate the error. In so ruling, the opinion cited Justice Trayor's observation in ***Aranda-Bruton:*** "A jury cannot `segregate evidence in to separate intellectual boxes.' (*citation omitted.*) It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and, at the same time, effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." (*Ibid.* at 983.) Here, of course, the jury's task to confine its application of a criminal conviction of an uncharged offense to impeachment, without using it to conclude that Appellant committed the uncharged offense, is even more difficult than the jury's task in ***Aranda-Bruton*** or ***Song***. There, the courts found that a limiting instruction could not protect a defendant against a co-defendant's accusation of a crime. Here, the court did not simply admit a mere accusation that Appellant committed the Delbecq murder; it admitted a conclusive judicial finding that he did so.

Second, as defense counsel argued below,[20] admission of Appellant's conviction of the Delbecq murder made it even more likely that the jury would ignore the limiting "similar acts" instruction[21] and conclude that since he was convicted of one brutal murder, he must also be guilty of the charged offense.

"look at evidence, Hawaii evidence, analyze it carefully, very carefully, just as you do the Los Alamitos case." (R.T. 3019, Lines 23 - 26.)

[19] R.T. 3119, Lines 3 - 12.

Again, this record is unique since the jury was asked to ignore two natural, but wholly improper conclusions, to be drawn from the admission of evidence of the "identical" Delbecq murder and Appellant's conviction for that offense: first, that the conviction conclusively established his responsibility for the Delbecq murder and, second, that is undoubted commission of the Delbecq murder showed his propensity to commit the charged offense. Case after case has held, in circumstances much less demanding on the triers of fact, that fairness and simple common sense compel a conclusion that limiting instructions are ineffectual. (*See*, cases Section III(D)(3)(b) of the Opening Brief.)

The impact of the admission of the Hawaiian conviction upon the jury's deliberation upon whether Appellant committed the Delbecq murder was not harmless. Neither defense counsel or Appellant ever conceded his commission of the Delbecq murder; that issue remained open through the conclusion of the closing arguments.[22] The question of whether Appellant committed the Delbecq murder was of signal importance; all parties agreed that if the jury concluded that he did not, an acquittal would inevitably follow.

D. Appellant's Federal Constitutional Rights to Due Process of Law, Fundamental Fairness, and a Reliable

[20] R.T. 2607, Line 26 – R.T. 2608, Line 8.
[21] R.T. 3120 – R.T. 3122.
[22] During its closing remarks, the prosecution acknowledged that defense counsel had not conceded Appellant's commission of the Delbecq murder; rather, he only expressed his opinion that defense counsel appeared to him "to understand" that the jury would conclude that Appellant did so. (R.T. 3292, Lines 14 - 20.)

Determination of Guilt and of the Penalty were Violated by the Improper Impeachment

By the dual errors of admitting evidence of the Delbecq murder as well as Appellant's actual conviction for that offense, the trial court in essence invited the jury to find that Robert Edwards' bad character disposed him to commit the charged offense. This was not only an abuse of judicial discretion under Evidence Code Section 352, but a violation of Appellant's right to a fair trial, due process of law, and a reliable determination in a capital case. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343; ***Beck vs. Alabama***, *supra*, 447 U.S. 625, 627.) "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (***United States v. Myers*** (5th Cir. 1977) 550 F.2d 1036, 1044, *cert. denied*, (1978) 439 U.S. 847.) As a result of the use of Delbecq murder for impeachment, Robert Edwards was regrettably tried for "who he is," and not for "what he did." (*Ibid.*) His federal and state constitutional rights to due process of law and a reliable determination of guilt and penalty were violated. (U.S. Const. Amends. V, VI, VIII and XIV.) His convictions must be reversed under either the ***Chapman*** or ***Watson*** standards.

V. THE TRIAL COURT EXCLUDED EXCULPATORY DEFENSE EVIDENCE IN VIOLATION OF STATE LAW AND APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS

A. The Trial Court Excluded Expert Testimony that Would Have Established that a Mousse Can was Not Used to Assault Mrs. Deeble as well as other Evidence that would have Circumstantially Corroborated his Innocence, Contrary to State Law and in Violation of his Federal Constitutional Rights to a Fair Trial, to Present a Defense and Compulsory Process and Heightened Reliability in a Capital Trial in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments

1. Standard of Review

As set forth in Section III(C), this court typically reviews a trial court's evidentiary rulings for abuse of discretion. (*See*, ***People v. Burgener*** (1986) 41 Cal.3d 505.) However, Appellant renews his contention, as set forth in that section, that because this is a capital case and because the error was a violation of federal constitutional rights, a heightened standard of review should be applied and this court should independently examine the record to determine whether the erroneous exclusion discussed below was not harmless beyond a reasonable doubt. (***Chapman v. California*** (1967) 386 U.S. 18, 24.)

2. The Trial Court Improperly Excluded Expert Opinion that the Injuries to Mrs. Deeble's Vagina and Rectum were Consistent with Consensual Vaginal and Rectal Intercourse

a. Introduction

In the guilt phase, the prosecution presented the testimony of pathologist Dr. Richard Fukumoto to support its theory that Appellant committed the murders of Marjorie Deeble and Muriel Delbecq because of a uniquely distinctive modus

operendi: the use of hair mousse can to sexually assault both women. Dr. Fukumoto was allowed to opine that the injuries to Mrs. Deeble were consistent with those that could have been caused by a mousse can found in the bedroom, near her body. In rebuttal, the defense called its pathologist, Dr. Paul Wolfe. However, the trial court prevented Appellant from asking his expert witness whether the injuries to Mrs. Deeble were consistent with consensual sexual intercourse, finding that the hypothetical questions were not supported by the evidence. The court's ruling was erroneous. Since the court applied an arbitrary and uneven evidentiary standard to the parties when it made these rulings, it violated Appellant's federal constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and Cal. Const., Article 1, Sections 7, 15.

b. The Testimonies of Drs. Fukumoto and Wolfe

Dr. Fukumoto did not conduct the autopsy of Marjorie Deeble; he based his opinions upon his review of the slides, photographs, and reports prepared by his partner, Dr. Richards, who retired since conducting the autopsy. (R.T. 2121 – R.T. 2123.) Dr. Fukumoto noted bruising on the labia and vaginal vault. He also noted a hemorrhage and laceration of the posterior fourchette. (R.T. 2137.) The bleeding was only detected microscopically; there was no surface bleeding. Although Dr. Richards did not indicate the size of the lacerations, the microscopic

nature of the bleeding indicated that the lacerations were not deep and that they were very tiny. (R.T. 2146, Line 25 – R.T. 2147, Line 5.) The rectum was dilated, although Dr. Richards did not measure its extent. The bruising and lacerations were not deep within the vagina and rectum; they were just inside the openings. (R.T. 2155, Line 18 – R.T. 2157, Line 1.)

After Dr. Fukomoto's attention was directed to the injuries that Dr. Richards observed to Mrs. Deeble's rectum and vaginal areas, the court permitted the following questions:

"Q (by Mr. Brent)	And I want to show you what we have marked – first of all, we cannot know from the medical findings by looking at it, what it was that caused these injuries, can we?
A	No, I can not tell you. All I can say it is something that is – does not have any sharp edges.
Q	Okay, so if I were to show you what would be marked at People's 16 for identification (the mousse can) would this be consistent with an object that could have caused these various injuries.
A	Yes."

(R.T. 2138, Lines 8 - 19.)

The defense called Dr. Wolfe in rebuttal. Dr. Wolfe saw "small mucosal lacerations in the rectal area." (R.T. 2487.) He joined with Dr. Fukumoto in noting that Dr. Richards did not describe the length and depth of the lacerations that he observed in the vaginal area. (R.T. 2488.) There was "a very minor

amount of hemorrhage beneath the covering of the vagina." (R.T. 2489, Lines 13 - 15.) In sum, Dr. Wolfe characterized the injuries to the vagina and rectum as "extremely minor" and consisting of "small areas of removal of the vaginal mucosa with a small amount of hemorrhage in the areas of that removal . . . ." (R.T. 2492.) The following questions regarding Dr. Wolfe's opinion of the cause of Mrs. Deeble's vaginal and rectal injuries were disallowed:

"Q	Now, doctor, the degree of injuries in the Deeble case, can you determine as a pathologist that the trivial amount of injuries in this case are minor enough that they are consistent with consensual vaginal and rectal intercourse?
Mr. Brent	Assumes the fact not in evidence, object.
The Court	Sustained.
Q (by Mr. Bates)	What, if anything, is the degree of submucosal or of microscopic injury consistent with?
Mr. Brent	Objection, Your Honor, calls for speculation. Assumes facts not in evidence.
The Court	Sustained.
Q (by Mr. Bates)	Doctor, as a pathologist, do you have access to studies in particular, and is it accepted in the field that ordinary vaginal intercourse, ordinary routine intercourse can cause microscopic injuries in as much as 61% of the cases?
Mr. Brent	Objection, assumes facts not in evidence, Your Honor.
The Court	Sustained.
Q (by Mr. Bates)	Doctor, do you have any information on that subject?

Mr. Brent	Objection, Your Honor, vague. Same objection, assumes facts not in evidence. Can we go on to another question?
The Court	The objection is sustained.
Q (by Mr. Bates)	Doctor, this will just take a yes or no answer. In your opinion are pathologists in 1996 in a position to be able to render an opinion as to whether microscopic injury to the vagina can be caused by ordinary intercourse?
Mr. Brent	Objection, relevance, assumes facts not in evidence in this case.
The Court	Sustained."

(R.T. 2490, Line 22 – R.T. 2492, Line 5.)

c. The Trial Court's Rulings were Plainly Erroneous and under State Law and Violated the Federal Constitution

The trial court erred when it repeatedly prevented Appellant from asking questions which were plainly relevant in light of the prosecution's theory of the case and examination of its own expert, Dr. Fukumoto. The prosecutor's objections were transparently baseless because the hypothetical questions were supported by evidence in the record. (***People v. Simms*** (1993) 5 Cal.4th 405, 436, fn. 6, *cert. denied*, (1994) 512 U.S. 1253; ***People v. Hayes*** (1985) 172 Cal.App.3d 517, 523.) Indeed, in ***People v. Boyette*** (2002) 29 Cal.4th 381, this court recently stated, "the hypothetical statement of facts posed to an expert witness need not be limited to evidence already admitted into evidence, 'so long as it is material of a type that is reasonably relied upon by experts in the particular field forming their

opinions . . . .' (*Ibid.* at 449, *quoting* ***People v. Gardeley*** (1996) 14 Cal.4th 605, 618, *cert. denied*, (1997) 522 U.S. 854.)

In Appellant's case, there was ample evidence in the record to support the challenged hypotheticals. Before they were posed, Dr. Fukumoto noted that the bleeding was only detected microscopically and that this denoted either very shallow or very small lacerations; nothing in his testimony about the injuries to the vaginal and rectal areas rebutted Dr. Wolfe's characterization of those injuries as "extremely minor." Based upon this record, the trial court's ruling that the hypotheticals posed to Dr. Wolfe about the "trivial injuries" assumed facts "not in evidence" was unjustified. Indeed, the court did not and could not elaborate upon its ruling.

Assuming arguendo that counsel's characterization of Mrs. Deeble's injuries as "trivial" was an objectionable fact not in evidence, the court erred when it sustained two attempts by counsel to correct the deficiency: first, by asking Dr. Wolfe to opine upon the cause of the injuries and then, failing that, by simply asking a foundational question of whether pathologist is able to render an opinion as to whether a "microscopic injury to the vagina can be caused by ordinary intercourse." (R.T. 2491, Line 24 – R.T. 2492, Line 2.) The court's ruling that the first question called for improper speculation by the expert witness was directly

contrary to its willingness to allow Dr. Fukumoto to speculate that the cause of the injuries were consistent with those which could have been inflicted by a hair mousse can.[23]

Likewise, the court's ruling that it was "irrelevant" and "assumed a fact not in evidence" for Dr. Wolfe to express an opinion as to whether pathologists could express an opinion about whether injuries could be inflicted during intercourse is difficult to justify. While there was not proof that Mrs. Deeble had intercourse near the time of her death, there also was no proof that the mousse can was used as an instrument of assault. The court apparently relied upon the mere presence of the mousse can at the scene of the crime to justify the hypothetical about its possible use as an instrument of Mrs. Deeble's injuries. Thus, by the same token, the long standing romantic relationship between Mrs. Deeble and Paul Roy at the time of her death,[24] and the fact that Mr. Roy called her the evening before her death, should have been sufficient facts in the record to justify a question about whether sexual intercourse was the cause of her injuries other than a mousse can. This is especially true since the People's expert did not ever quantify the probability that the mousse can was the source of the injuries. Accordingly, the threshold showing

[23] Again, the court did not elaborate upon the basis of this ruling. Certainly, it cannot be explained by a lack of qualification to express such an opinion. Dr. Wolfe's credentials as a pathologist met, and could be fairly said to have exceeded, those of Dr. Fukumoto. Dr. Wolfe was the Director of Autopsy for the Veteran's Administration in La Jolla and Trauma Pathology at the University Hospital for the University of California at San Diego. (R.T. 2477.)

[24] R.T. 2770 – R.T. 2772.

of relevance that was required to admit an opinion as to the cause of Mrs. Deeble's injuries by the defense expert should have been exceedingly low.

d. The Trial Court's Decision to Sustain the Baseless Objection Violated Appellant's Federal Constitutional Right to Present a Defense

Appellant has a constitutional right to present a defense:

> Whether rooted in the Due Process Clause of the Fourteenth Amendment, ***Chambers v. Mississippi***, *supra*, or Confrontation clauses of the Sixth Amendment, ***Washington v. Texas***, 388 U.S. 14, 23 (1967); ***Davis v. Alaska***, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ***California v. Trombetta***, 467 U.S., at 485; *cf.* ***Strickland v. Washington***, 466 U.S. 668, 684 - 685 (1984) ("The Constitution guarantees a fair trial largely through the several provisions of the Sixth Amendment.") (***Crane v. Kentucky*** (1986) 476 U.S. 683, 690.)

Numerous decisions of the United States Supreme Court affirm this right. In ***Chambers v. Mississippi*** (1973) 410 U.S. 284, the constitutional error arose from Mississippi's refusal to admit exculpatory hearsay evidence. In ***Green v. Georgia***, (1979) 442 U.S. 95, the court reversed for similar reasons a Georgia penalty determination in which a hearsay statement of a co-conspirator, implicating himself and exculpating the defendant in the actual murder, was excluded as hearsay. The high court found a due process violation in Georgia's application of

its hearsay law when the excluded testimony was highly relevant to a critical issue in the penalty phase, and substantial reasons existed to assume its reliability. (*Id.* at 97.) Finally, in ***Holmes v. South Carolina*** ____ ***United States*** ____ (Decided May 1, 2006), the United States Supreme Court reversed a conviction where a trial court excluded evidence of third party culpability because it violated the defendant's Sixth Amendment right to have "a meaningful opportunity to present a complete defense."

People v. Cunningham (2001) 25 Cal.4th 926, *cert. denied*, (2002) 534 U.S. 1141, this court's most recent word on the subject, sets forth a controlling principle. The prosecution's evidence established that defendant went to a bar in Pasadena where the victims Treto and Cebreros were socializing. Several times during the evening, Treto displayed a large amount of cash. (*Id.* at 957.) At the end of the evening, Treto and Cebreros proceeded to the parking lot behind the bar and were about to enter Treto's vehicle when defendant approached the two, drew a gun, demanded Treto's cash and finally shot Treto. (*Id.*) Over defense objection, the trial court excluded evidence that the two men had participated in a high stakes gambling tournament two nights earlier. The defense argued that this public exposure of Treto's high stakes gambling could have motivated others to steal Treto's money. (*Id.* at 996.) The trial court also prevented defense counsel from cross-examining Treto's wife concerning letters that had been found in his wallet,

written by another woman to Treto, apparently concerning their relationship. (*Id.* at 997.) The latter ruling was based upon the trial court's determination that defense counsel had not provided information to support a plausible theory that the murder was somehow connected to Treto's personal life. (*Id.* at 997 – 998.) This court held that the rulings did not constitute an abuse of discretion, but affirmed the principle that the Fifth Amendment guaranteed the right to present a defense:

> Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional rights. (***People v. Fudge***, *supra*, 7 Cal.4th 1075, 1103.) Accordingly, such a ruling, if erroneous, is 'an error of law merely,' which is governed by the standard of review announced in ***People v. Watson*** (1956) 45 Cal.2d 818, 836, 299 P.2d 342; ***People v. Fudge***, *supra*, 7 Cal.4th at 1103.)

This is not a case of Appellant claiming constitutional error merely from an erroneous evidentiary ruling. The inequity of allowing a prosecution witness to express an opinion about the cause of injuries to the victim, and denying that same opportunity to the defense, is self-evident. As set forth below, the key to the prosecution's case was that the "signature" use of mousse cans to sexually assault both women inexorably pointed to Appellant as the assailant. The defense reasonably attempted to show that this conjecture was not based upon any

evidence, other than Dr. Fukumoto's expert opinion that the injuries "could have been caused" by a mousse can found at the crime scene. Without a doubt, Appellant was denied "a meaningful opportunity to present a complete defense" when the court sustained the prosecution's objections to hypothetical questions, amply justified by evidence in the record, to establish that the "Tale of Two Mousse Cans" was a work of fiction, and not fact. (***Crane v. Kentucky***, *supra*, 476 U.S. 689, 690.)

e. The Trial Court's Decision to Sustain the Baseless Objection Also Violated Appellant's Federal Constitutional Right to Fair Treatment Between the Parties

The trial court's refusal to allow defense counsel to pose relevant hypothetical questions to its expert witness that were based upon evidence in the record violated not only state law but also Appellant's federal constitutional rights. The application of asymmetrical evidentiary standards to the parties violates a defendant's constitutional rights, including the Sixth and Fourteenth Amendment rights to present a defense and to due process. Such arbitrariness also violates the Eighth Amendment requirement of a reliable determination of capital murder. (***Beck v. Alabama***, *supra*, 447 U.S. 625.)

The United States Supreme Court has recognized the need for fairness between the defense and the prosecution. In ***Wardius v. Oregon*** (1973) 412 U.S.

470, 475 fn. 6, the United States Supreme Court warned that, "state trial rules which provide nonreciprocal benefits to the state where the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (*See, also*, ***Washington v. Texas*** (1967) 388 U.S. 14, 22; ***Green v. Georgia*** (1979) 442 U.S. 95, 97; ***Webb v. Texas*** (1972) 409 U.S. 95, 97 - 98; ***Izazaga v. Superior Court*** (1991) 54 Cal.3d 356, 372 - 377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1180 - 1192 (1960).) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," ***Wardius*** held that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (***Wardius***, 412 U.S. at 474.) Other Supreme Court opinions also agree that the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (*Ibid.*; *see, also*, ***Lindsay v. Normet*** (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; ***Green v. Georgia*** (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the co-defendant]; ***Webb v. Texas*** (1972) 409 U.S. 95, 97 - 98 [judge gave defense witness a special warning to testify truthfully but not the prosecution

witnesses]; ***Washington v. Texas*** (1967) 388 U.S. 14 [accomplice permitted to testify for the prosecution but not for the defense]; ***Chambers v. Mississippi*** (1973) 410 U.S. 284 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness]; ***Hicks v. Oklahoma,*** *supra.*

Based upon these Constitutional principles, the trial court could not prevent Appellant from posing a hypothetical question to an expert witness regarding the cause of the vaginal and rectal injuries to Mrs. Deeble and employ a different rule for the prosecutor by allowing him to posit essentially the same hypothetical that had the same, if not less, evidentiary support. By curtailing only the defense questioning of its pathologist, the trial court inexplicably employed different evidentiary standards without enunciating any rational basis upon which to do so. The trial court's disparate treatment of the parties thus violated Appellant's constitutional rights, including the rights to present a defense and to due process under the Sixth and Fourteenth Amendments, and to a reliable determination of his guilt of capital murder as required by the Eighth Amendment.

f. The Errors Prejudiced Appellant

These arbitrary, erroneous and asymmetrical rulings prejudiced Appellant under both state and federal harmless error standards. (***People v. Watson,*** *supra,* 46 Cal.2d 818, 836; ***Chapman v. California,*** *supra*, 386 U.S. 18, 23.) As set forth

in Argument III, all parties, as well as the trial court, agreed that there was insufficient evidence to convict Appellant of the charged offense unless the jury considered evidence of the Delbecq homicide to establish his identify as the assailant in both crimes. In turn, the lynchpin of the prosecution's argument for the admission of the Delbecq murder, as well as his eventual argument to the jury that Appellant committed the Deeble murder, was his assertion that the two crimes shared a unique signature: the alleged use of a hair mousse can to sexually assault both women. As the prosecution colorfully commented during his opening statement, his proof against Appellant was "The Tale of Two Mousse Cans." (R.T. 1953, Lines 25 - 26.) Very simply, Appellant's guilt or innocence rested upon the prosecution's ability to persuade the jury that both women were assaulted with hair mousse cans. During closing argument, the defense repeatedly suggested to the jury that the relatively minor injuries to Mrs. Deeble's vagina and rectum, coupled with the absence of a definitive conclusion that the reddish-brown substance on the mousse can cap was human blood, undercut the prosecution's central contention that the crimes were joined by unique signature. (R.T. 2988 – R.T. 2989; R.T. 3055 – R.T. 3058.) The prosecution replied that the use of "The Tale of Two Mousse Cans" was "arguably (his) strongest piece of evidence." (R.T. 3103, R.T. 3121 – R.T. 3123.) Indeed, the prosecution somewhat playfully told the jury that when he started his closing argument he thought about "holding up these two

mousse cans and saying `mousse cans' and sitting down." (R.T. 2898, Line 608.) The prosecution noted the defense effort to establish, through its expert witness, Dr. Wolfe, that Mrs. Deeble's injuries were result of "a consensual sexual encounter,"[25] but dismissed it at length by arguing that there was "no apparent penile penetration." (R.T. 2931, Line 32.) The prosecution's readiness to dismiss the attempt by the defense to rebut its key argument was doubly unfair; first, because the court improperly permitted the defense from eliciting an expert opinion that Mrs. Deeble's injuries were caused by some agent other than a mousse can and, second, because the prosecution's argument itself was not based on any evidence other than the presence of a mousse can at the crime scene and Dr. Fukumoto's opinion that, maybe, the can "could have" caused those injuries. Thus, the court's uneven application of the rule of evidence that allowed the prosecution's expert to opine that Mrs. Deeble's injuries were consistent with those that could have been inflicted by the mousse can found at the scene, but prohibited the defense expert from opining that they were consistent with consensual vaginal and rectal intercourse, were both plainly unfair and gravely prejudicial.

The conflicting rulings of the trial court allowed the prosecutor to abuse the hypothetical question and prevent the jury from hearing all relevant testimony Dr. Wolfe had to offer. The record establishes that these errors were not harmless

[25] R.T. 2905.

beyond a reasonable doubt because the parties agreed that without connecting the Hawaii to the California case, there was insufficient evidence to support conviction for the charged offense. (***Chapman v. California,*** *supra,* 386 U.S. 18, 23.) Alternatively, there is a reasonable probability that the errors affected the outcome of the trial. (***People v. Watson****, supra,* 46 Cal.2d at 836.) As previously noted, the jury was unable to reach a verdict for days and asked for significant portions of the trial to be reread. Appellant's convictions and sentence of death must be reversed.

B. The Trial Court Improperly Excluded Vital Testimony that Could have Circumstantially Corroborated Appellant's Defense that he was in an Unconscious State at the Time of the Murder

1. Introduction

Appellant testified at trial that he was in a "blackout" or unconscious state on the night of the Deeble homicide, due to alcohol and narcotic abuse. (R.T. 2596 - R.T. 2604.) The "blackout defense," or argument that Appellant's degree of intoxication was so severe that he lacked the specific intent to commit the charged offense, was the thrust of much of the closing argument to the jury. (R.T. 2992 – R.T. 3002.) The prosecution attacked the defense, both during cross-examination of Appellant and during closing argument. (R.T. 2626 – R.T. 2627; R.T. 2963 - 2964; R.T. 2936 – R.T. 2949.) In sum, the prosecution argued that the planning and complexity of the murder was inconsistent with the finding that Appellant was

so intoxicated that he was in an unconscious state. It is significant to the argument below that the prosecution also argued that there was no corroboration of Appellant's claim that he suffered blackouts:

> "So the only words you have, the only person that knows whether they had a blackout was Mr. Edwards. And you are back to that same issue, why do you believe Mr. Edwards? Why do you believe a convicted burglar and a convicted murderer? Why would you believe him?"

R.T. 2944, Lines 19 - 25.)

2. Excluded Testimony that Corroborated Appellant's Claim that He was Unconscious in an Alcoholic Blackout on the Night of the Deeble Murder

Vincent Portello testified that one evening in 1991 or 1992, he spent the evening with Appellant and his girlfriend, Brenda. The three were drinking heavily and decided to get some more beer. As Appellant was driving to get some beer, Brenda began hitting him and threatening him with a screwdriver. As a result, Appellant lost control of his car. Portello spent the night with Appellant and Brenda. (R.T. 2713 – R.T. 2715.) The court sustained the prosecutor's objection to any testimony about whether Appellant remembered the fracas:

Q Now, on the following day after this incident, this just calls for what you said, on the following day after this incident, did you mention the incident to Rob?

A	Yes, I did.
Q	Now, did Mr. Edwards reply back to you that he did not recall any of it?
Mr. Brent	Your Honor, that, of course, calls for hearsay, and I would object to it.
Mr. Bates	Your Honor, on that issue I would offer it not as hearsay at all but as circumstantial evidence of an alcoholic blackout and pursuant to 1250 of the Evidence Code, Your Honor.
Mr. Brent	No foundation that ties into any kind of blackout.
The Court	Sustained."

(R.T. 2715, Line 17 – R.T. 1716, Line 16.)

Janice Hunt recalled an evening in Hawaii during which Appellant had been drinking heavily. She asked him to pick up groceries. The following morning she found the groceries, including some refrigerated items, still in the vehicle that Appellant used to drive to the market. (R.T. 2644 – R.T. 2645.) When the defense asked the witness for Appellant's response when she told him he had left the groceries, the following exchange took place:

"Q (by Mr. Severin)	Did you tell him you had found these things down there?
A	Yes.
Q	And what was his response?
Mr. Brent	Objection, calls for hearsay.
Mr. Severin	Your Honor, it is not offered for its truth, state of mind.
The Court	The objection is sustained.

Q (by Mr. Severin)	You showed Mr. Edwards the items?
A	Yes.
Q	How did he appear when you showed him the items?
Mr. Brent	Objection. Irrelevance.
The Court	Overruled.
The Witness	Surprised.
Q (by Mr. Severin)	Did you tell where you found them?
A	Yes."

(R.T. 2647, Lines 2 - 19.)

3. The Court's Rulings were Erroneous Under State Law and Violated Appellant's Federal Constitutional Right to a Fair Trial and to Present a Defense

Under Evidence Code Section 1250(a) (subject to Section 1252) "evidence of the statement of declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when the evidence is offered to prove the declarant's state of mind at that time or at any other time when it is itself an issue in the action." Section 1250(b) provides that the section "does not make inadmissible evidence of a statement of memory or belief to prove the fact remembered or believed." Section 1252 prohibits the admission of a statement of mental state if it "was made under circumstances such as indicate its lack of trustworthiness." Here the testimony of Mr. Portello and Ms. Hunt about whether Appellant recalled certain actions after drinking was offered to prove his state of

mind at those times as circumstantial proof that he was similarly "blacked out" when he committed the homicides. Those proffered declarations of mental state are distinguishable from that rejected in ***People v. Swain*** (1962) 200 Cal.App.2d 344. There, the Court of Appeals rejected testimony of the defendant's wife in an arson prosecution that some time after the fire he telephoned her and said that he did not know whether he had any insurance. The opinion reasoned that a statement by the husband of his past memory in connection with an alleged criminal act already committed was self-serving and therefore untrustworthy. (*Ibid.* at 352.)

Here, Appellant's responses would not have been untrustworthy since they were not statements made in connection with alleged criminal acts; rather, they were statements of memory of events of which Appellant had no motive to feign forgetfulness. Similarly, testimony about whether Appellant said he remembered certain events does not run afoul of Section 1250(b) since the statements were indicative of the condition of the mind of the declarant at the time he made those statements and not "merely a declaration as to a past event." (***In re: Estate of Anderson*** (1921) 185 Cal. 700; *see, generally, Witkin, California Evidence*, Section 203, V.1, 4th Edition.)

Finally, the objection by the prosecution that the proffered evidence had "no foundation that ties into any kind of blackout" was not supported by record. In

both instances, the witnesses testified that the events in question were preceded by heavy drinking. Expert testimony had been introduced by Dr. Stalberg that heavy drinking can cause blackouts. (R.T. 2383, R.T. 2413 – R.T. 2414; R.T. 2432.) Indeed, the proffered testimony was preceded by testimony from Appellant himself that he had a history of "blackout" from heavy drinking[26] and that on the evening of the Deeble murder he was drinking heavily and could not remember his activities after 1:30 p.m. (R.T. 2594 – R.T. 2611.) Accordingly, the Court improperly excluded testimony that Appellant could not recall these events.[27]

4. The Exclusion of the Evidence Prejudiced Appellant and Violated his Federal Constitutional Right to Present a Defense, Due Process of Law and Heightened Reliability in a Capital Trial under the Fifth, Sixth, Eighth and Fourteenth Amendments

As set forth in the preceding section, the argument that Appellant's intoxication was so pronounced that he did not have the requisite degree of criminal intent for a first degree homicide was crucial to his defense. The prosecution objected to Appellant's attempt to corroborate his explanation and then took advantage of the court's improper decision to prevent Appellant from circumstantially establishing the legitimacy of this defense by pillorying the defense for its inability to corroborate this claim; during its closing argument, it

[26] R.T. 2585 – R.T. 2569.

argued that the only evidence that Appellant ever had a blackout came from Appellant himself, a convicted felon. (R.T. 2944, Lines 19 - 25.) Such tactics violate the Constitution, as well as simple notions of fair play. Due Process precludes a prosecutor from asking a jury to convict a defendant because he has failed to present certain evidence without having given the defendant a full opportunity to present that evidence. *See,* ***Simmons v. South Carolina***, 512 U.S. 154 (1994); ***Skipper v. South Carolina***, 476 U.S. 1, 5 n.1 (1986). Applying the same principle, due process precludes a prosecutor from asking a jury to convict a defendant because he has failed to present certain evidence when that very evidence was excluded on the prosecution's own motion. (***Paxton v. Ward***, (10th Cir. 1999) 199 F.3d 1197, 1217 - 1218); ***United States v. Ebens***, (6th Cir. 1986) 800 F.2d 1422, 1440 - 1441; ***United States v. Toney***, (6th Cir. 1979) 599 F.2d 787, 790 - 791; ***State v. Bass***, (N.C. 1996) 465 S.E.2d 334, 337 - 338; ***State v. Ross***, (N.J. App. Div. 1991) 249 N.J. Super. 246, 249 - 250; ***People v. Daggett***, (1990) 225 Cal.App.3d 751, 757 - 758; ***People v. Varona***, (1983) 143 Cal.App.3d 566, 570. *See,* ***Franklin v. Duncan***, 884 F.Supp. 1435, (N.D. Cal.), *aff'd and adopted in full*, 70 F.3d 75 (9th Cir. 1995). Because there is no way for a defendant to respond to such an argument, such arguments by prosecutors violate a petitioner's "constitutional rights . . . to rebut evidence and argument used against him . . . ."

[27] Even if the testimony was inadmissible hearsay, the court should have admitted it since state evidentiary rules must give way to the constitutional right to present a defense. (***Green v. Georgia*** (1972) 442 U.S. 95.)

(***Paxton***, 199 F.3d at 1218.) Based upon the foregoing, the improper exclusion of this key corroborating evidence violated Appellant's federal constitutional right to present a defense, and a fair trial under the Fifth and Sixth Amendments. (***Wardius v. Oregon***, *supra*, 412 U.S. 476, 475; ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343.)

C. The Court Improperly Excluded Circumstantial and Opinion Evidence that could have Established that Kathy Valentine, and not Appellant, Stole Mrs. Deeble's Jewelry that was Allegedly Missing

1. Introduction

The defense subpoenaed Marjorie Deeble's boyfriend, Paul Daniel Roy. Mr. Roy filed a motion quash the subpoena on the ground that he was a "sovereign citizen" and not required to testify. (R.T. 2758; C.T. 792 – C.T. 828.) The court found that no response was necessary to his motion. (R.T. 2558, Line 25 – R.T. 2759, Line 3.) Mr. Roy subsequently appeared as a witness and feigned forgetfulness. (R.T. 2752 – R.T. 2754.) The court found that he was willfully evasive. (R.T. 2755, Lines 18 - 19.) The parties agreed that the defense would make an offer of proof that would outline Mr. Roy's relevant testimony, based upon statements to prosecution and defense investigators. The prosecution would make its objections, subject to the court's rulings, and the investigators would then be able to recite their conversations with Mr. Roy. The witness would then be released from subpoena, without further testimony. (R.T. 2759, Lines 4 - 8; R.T.

2762, Lines 11 - 13; R.T. 2763, Lines 10 - 18; R.T. 2766, Lines 2 - 26.) Pursuant to this agreement, the defense proffered the following testimony:

> `Your Honor, in relation to her state of mind near the time of her demise, Marge Deeble told Mr. Roy that Kathy would come in to the apartment sometimes when Marge was not there and would take things out of the apartment which would upset the victim quite a bit. That was a statement to Sergeant Jessen on August 4, of 1986. Again, as to her frame of mind near the time of her demise, she also told Mr. Roy that – or his impression, he feels that the victim finally removed the key from its hiding place in the drain pipe so that the kids could not get into the house while she was gone.'

(R.T. 2761, Lines 10 - 21.)

The prosecution objected on the grounds of hearsay and that "the victim's state of mind (was not) relevant to anything." (R.T. 2763, Lines 15 - 26.) The Court sustained the objections. (R.T. 2765, Line 4; R.T. 2767, Lines 3 - 26.)

2. Marjorie Deeble's Statement to Paul Roy was Relevant and Admissible to Prove Motive Under an Exception to the Hearsay Rule

During her testimony, Kathy Valentine testified that several items of her mother's jewelry were missing. (R.T. 2080.) Photographs of the allegedly missing jewelry were marked as exhibits.. (R.T. 2081 – R.T. 2083.)[28] During cross-examination, Ms. Valentine admitted that she did not have separate keys to her

mother's apartment; she claimed that she did not recall the last time that she used the set of keys hidden in the drain pipe outside the apartment to enter her mother's residence. (R.T. 2107 – R.T. 2108.)

During his opening statement and during his closing argument, the prosecution asserted that Appellant took Mrs. Deeble's missing jewelry during the homicide. (R.T. 1956; R.T. 2935; R.T. 3100 – R.T. 3103.) The prosecutor also invited the jury to speculate that Appellant used the drain pipe key to gain access to the house. He cited this alleged access as similar to the unforced entry by Appellant in the Delbecq murder. (R.T. 2917, Lines 15 - 16.) The defense contested this speculation during its closing address to the jury. (R.T. 3079.) Similarly, the availability of the key to Appellant as a means to enter Mrs. Deeble's residence was a hotly contested issue at trial. Kathy Valentine alleged that Appellant was aware of the key and had used it; Appellant denied the allegation during his testimony. (R.T. 2076, Lines 21 - 25; R.T. 2112; R.T. 2587 – R.T. 2588.)

There was no direct proof that Appellant took Mrs. Deeble's jewelry; indeed, there was no corroboration that the jewelry was even truly missing. The prosecution's argument rested on the bare allegation of Kathy Valentine. Similarly, there was no proof that a key was used by Mrs. Deeble's assailant to

[28] Those photographs (Exhibits 20 thru 27) were not offered as evidence during the guilt phase. (R.T. 2305.)

enter her residence. Indeed, the police criminologist who investigated the crime scene noted signs of a forced entry when the screen to the Southwest bedroom window was discovered laying on the ground. (R.T. 1992; R.T. 2056.) Against this background, circumstantial evidence that reasonably suggested (1) an alternative explanation to the missing jewelry and (2) a probability that the key was not accessible to Mrs. Deeble's assailant was plainly relevant. Evidence that the victim was upset that her daughter entered her apartment and took away her personal belongings without permission easily falls within the category of relevant evidence. Mrs. Deeble's statement to her boyfriend was reliable; neither had a motive to fabricate evidence about Kathy Valentine's actions. Finally, while Mrs. Deeble's statement to Mr. Roy is hearsay, it falls within a recognized exception to the hearsay rule.

Section 1250 of the Evidence Code provides that "(s)ubject to Section 1262 (which provides that the statement must appear trustworthy,) evidence of a statement of the declarant's then existing state of mind . . . is not made inadmissible by the hearsay rule when . . .(2) the evidence is offered to prove or explain acts or conduct of the declarant." Pursuant to Section 1250, the Supreme Court approved the admission of a statement of a 12-year-old declarant that she intended to tell her stepfather to stop fondling her to prove the probability of her future behavior. (***People v. Griffin*** (2004) 33 Cal.4th 536, 578 - 579.) Here, too,

the statement of Mrs. Deeble that she was upset by her daughter's behavior should have been admitted to show the probability that she removed the key from the drainpipe.

Similarly, Mr. Roy's opinion that Mrs. Deeble removed the key from its hiding place in the drainpipe to prevent Kathy Valentine from unauthorized entries into the residence should have been admissible as lay opinion under Section 800 of the Evidence Code. That section provides that "(I)f a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as permitted by law, including, but not limited to an opinion that is: rationally based on the perception of the witness and helpful to the clear understand of his testimony." Here, while Mr. Roy's opinion was not predicated upon his own perception of an event, but upon his perception of the statement of another, the statute does not explicitly exclude it on that basis. (*See*, ***People v. Ogg*** (1968) 258 Cal.App.2d 841, 846, [where the Court of Appeals approved the admission of a lay opinion that a defendant was a violent man based on a fight that he had apparently witnessed].) While Mr. Roy had not seen Mrs. Deeble remove the key from the drainpipe, his opinion that she did so was based upon a reliable fact that he perceived: her admission to him that her daughter went into the house without her knowledge and took her personal belongings.

There are other relevant exceptions to the hearsay rule; Section 1230 provides "that evidence of the statement by declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness if the statement, when made . . . created such a risk of making her an object of . . . ridicule or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true." Under this standard, a suggestion to a friend that one's child his sneaking into one's house and stealing jewelry falls well within the exception. As in ***People v. Wheeler***, which approved the admission of adultery under Section 1230, there is no possible motive for Mrs. Deeble to make such a statement unless she believed it to be true. (***People v. Wheeler*** (2003) 105 Cal.App.4th 1423, 1428.) Finally, even if properly excluded under the provisions of the California Evidence Code, the contested testimony should have been admitted pursuant to Appellant's constitutional right to present a defense. (***Green v. Georgia*** (1972) 442 U.S. 92.) For all the foregoing reasons, the court's ruling violated Appellant's federal constitutional rights to due process of law, to present a defense and to compulsory process, a fair trial, and a heightened reliability of determinations by the juror. (U.S. Const. Amends. V, VI, VIII and XIV; ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343; ***Beck v. Alabama***, *supra*, 447 U.S. 625, 627; ***Wardius v. Oregon***, *supra*, 412 U.S. 470, 475.)

D. The Court Improperly Excluded Evidence of Appellant's Surprised Reaction to the News of Marjorie Deeble's Murder that Would have Circumstantially Established that he did Not Commit the Crime Violating his Federal Constitutional Right to a Heightened Reliability of Jury Deliberations, Due Process of Law and the Right to Present a Defense

1. Introduction

Ms. Valentine was asked to go to the Los Alamitos Police Department because something had happened to her mother. She and the Appellant drove to the police station. Appellant remained in the lobby; Ms. Valentine spoke to the police. (R.T. 2594.) The following exchange then followed direct examination of Appellant about what transpired after Ms. Valentine returned to the police lobby:

"Q	Do you remember what she told you?
Mr. Brent	Objection, calls for hearsay, relevance.
The Court	Sustained.
Mr. Severin	It is not offered for the truth, Your Honor.
The Court	It is irrelevant.
Mr. Severin	It is state of mind.
The Court	The objection is sustained.
Q (by Mr. Severin)	Mr. Edwards, were you concerned at all about being at the Los Alamitos Police Department with Kathy Deeble on that date?
Mr. Brent	Objection, relevance.

The Court	Sustained.
Q (by Mr. Severin)	When you left your aunt's residence to drive Miss Deeble to the Los Alamitos Police Department, what were you thinking?
Mr. Brent	Objection, relevance.
The Court	Sustained."

(R.T. 2595, Lines 2 - 20.)

2. The Court Improperly Excluded Testimony Regarding Robert Edwards' Reaction to the News of the California Homicide

As the defense argued below, Ms. Valentine's statement to Appellant at the police station was not offered for its truth, but to explain Appellant's reaction to the news of the murder. As such, her statement was not hearsay under Section 1200 of the Evidence Code which only prohibits evidence of an out-of-court statement "that is offered to prove the truth of the matter stated." Appellant's reaction and his innocent state of mind as he was driving to the police station after Kathy Valentine had been warned that "something had happened" to her mother, is a relevant circumstance for the evaluation of guilt; in the reverse circumstance, it is well settled that a defendant's furtive actions after the commission of the crime can be properly considered by the jury as an indication of guilt. (***People v. Pensinger*** (1991) 52 Cal.3d 1210, 1244.) Indeed, there is a standard jury instruction on the issue. CALJIC 2.25 ("flight after crime.") The trial court's exclusion of this

probative circumstantial evidence on the crucial issue of the identity of the assailant violated Robert Edwards' federal constitutional rights to Due Process of Law to present a defense, and to a heightened reliability of deliberations in a capital case under the Fifth, Sixth, Eighth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*; ***Beck v. Alabama***, *supra*; ***Wardius v. Oregon***.)

E. The Trial Court Excluded Evidence that Would have Powerfully Rebutted the Prosecution's Theory that Appellant Committed the Charged Offense because of its Similarity to the Delbecq Murder in Violation of State Law and his Federal Constitutional Rights to Due Process of Law

An envelope addressed to Mrs. Deeble's son, Steve Deeble, was recovered by the police on May 16th from a trash can in the southwest bedroom of her apartment. The envelope and its contents were marked as Defense Exhibit C. (R.T. 2025.) The envelope contained a photograph of a woman in bondage, a photograph of Charles Manson and a newspaper article about bondage murder. The defense offered it into evidence as circumstantial proof that someone other than Appellant found and murdered Mrs. Deeble. The prosecution objected, without stating its grounds; likewise, the court sustained the objection without specifying the reason. (R.T. 2842 – R.T. 2843.)

The trial court abused its discretion by refusing admission of Defense Exhibit C. As noted above, the court rejected the exhibit without stating the reason

that it was inadmissible or requiring the opposing party to do so. The People's case against Appellant was wholly circumstantial, based upon an argument that the similarity between the Deeble and Delbecq murders inexorably pointed to his guilt, despite the yawning temporal and spatial gap between the two crimes. Exhibit C would have been a powerful reminder to the jury that the allegedly inexplicable coincidence between the two crimes was illusionary, since the material mailed to the decedent's own son at the very crime scene closely resembled the method of his mother's death. Even if one excludes the argument that the material pointed to a suspect other than Appellant, the mere existence of this material at the crime scene which was unconnected to Appellant is a coincidence that would have rebutted the notion that the Deeble/Delbecq murders were uniquely Appellant's work. Its exclusion violated Appellant's constitutional right to due process, to present a defense, and to a heightened reliability of deliberations. (***Hicks v. Oklahoma***, *supra*; ***Beck v. Alabama***, *supra*; ***Wardius v. Oregon***.)

F. The Cumulative Impact of the Improper Exclusion of Exculpatory Evidence Denied Appellant His Federal Constitutional Rights to Present a Defense, Have a Fair Trial, and to Heightened Reliability in a Capital Case

In the proceeding argument, Appellant has demonstrated the reversal of his convictions is required because of various exclusions of vital defense evidence. However, even if this court determines that none of the errors warrant reversal

standing alone, it is necessary to consider their cumulative impact. (***Taylor v. Kentucky*** (1978) 436 U.S. 478, 487, fn. 15; ***United States v. Frederick*** (9th Cir. 1996) 78 F.3d 1370, 1381.) This court has also held that the cumulative effect of multiple errors may be so unduly prejudicial that reversal is necessary though the prejudice from any one instance of error would not be sufficient standing alone. (***People v. Hill*** (1998) 17 Cal.4th 800.) In this case, reversal of the convictions is required.

VI. THE TRIAL COURT ADMITTED TESTIMONY AND EXHIBITS CONTRARY TO STATE LAW IN VIOLATION OF ROBERT EDWARDS' FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO CONFRONT ADVERSE WITNESSES UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. The Trial Court's Admission of the Coroner's Unfounded Opinion that Injuries Suffered by Mrs. Deeble were Inflicted Before Death and were Painful was Contrary to California Law and a Violation of Appellant's Federal Constitutional Rights

1. Factual Background

Richard Fukumoto testified about the results of the autopsy of Marjorie Deeble. (R.T. 2121 – R.T. 2164.) He did not perform the autopsy himself; instead, his testimony was based upon the examination performed by another pathologist in his medical group, Dr. Richards. (R.T. 2122, Line 22 – R.T. 2124, Line 3.)

During the course of direct examination, Dr. Fukumoto was repeatedly asked whether the burst eardrum and lacerations to her neck that Mrs. Deeble suffered as she struggled against the belt, the incision allegedly caused by a sharp object inserted into her ear, and the bruising and laceration to her rectum and vagina would be "highly or extremely painful." (R.T. 2128, Line 8 – R.T. 2129, Line 2; R.T. 2137, Line 4 – R.T. 2138, Line 7.) Timely foundational objections were made. (R.T. 2128.) The court overruled them and the witness agreed with the prosecution's characterization of the injuries.[29]

Dr. Fukumoto was also asked whether the injuries to Mrs. Deeble's rectum and vagina were sustained before or after her death. Without explanation, he replied that they occurred before her death. (R.T. 2138, Lines 15 - 25.) The immediate defense objection and motion to strike his answer as without foundation were denied. (R.T. 2138, Line 26 – R.T. 2138, Line 2.)

2. Argument

a. Standard of Review

As a general rule, a trial court has wide discretion to admit or exclude expert testimony. (***People v. Page*** (1991) 2 Cal.App.4th 161, 187.) "[T]he question whether the statements fall within a firmly rooted hearsay exception for

[29] In addition to a lack of foundation, the prosecutor's questions to Dr. Fukumoto were objectionable because they

Confrontation Clause purposes is a question of federal law." (***Lilly v. Virginia*** (1999) 527 U.S. 116, 125 (plur. opn. of Stevens, J.).) A trial court's determination that a hearsay statement possesses particularized guarantees of trustworthiness to satisfy the demands of the Confrontation Clause is subject to independent review. (*Id.* at pp. 136 – 137.) Moreover, as more fully set out below, in addition to violating Appellant's right to confrontation, the admission of Dr. Fukomoto's opinions also violated Appellant's rights to due process and heightened reliability because they were utterly without foundation.

b. Prejudicial Forensic Evidence was Admitted in Violation of ***Crawford v. Washington***

A defendant has a right under the Sixth Amendment to the United States Constitution to confront witnesses testifying against him. In ***Crawford v. Washington*** (2004) 541 U.S. 36, the United States Supreme Court changed the manner in which courts consider confrontation clause issues. ***Crawford*** rejected the view that the confrontation clause applied only to in-court testimony and that its application to out-of-court statements introduced at trial depended largely on the state statutory rules of evidence. ***Crawford*** held that out-of-court testimonial statements are constitutionally admissible only where the declarant is unavailable and there was a prior opportunity for cross-examination. (*Ibid.*) ***Crawford*** thus

---

were plainly leading.

overruled the rule of ***Ohio v. Roberts*** (1980) 448 U.S. 56 to the extent that ***Roberts*** held that the confrontation clause did not bar admission of an unavailable witnesses statement against a criminal defendant if the statement fell within a firmly established hearsay exception and bore adequate "indicia of reliability."

Much of the evidence concerning the death of Marjorie Deeble was based on the evidence of an autopsy report which was prepared by a coroner whom the defense did not have an opportunity to examine. The court in ***Crawford*** noted that "involvement of government officers in the production of testimony with an eye towards trial presents a unique potential for prosecutorial abuse" and plainly suggested that such statements would be testimonial and hence subject to the Sixth Amendment." (*Ibid.*) Coroner's reports such as relied upon by Dr. Fukumoto are testimonial hearsay within the meaning of ***Crawford***. ***Smith v. Alabama*** is directly in point. (2004) 898 So.2d 907. There, the Appellate Court held that the admission of autopsy evidence and the autopsy report, without the testimony of the medical examiner who performed the autopsy, violated the defendant's Sixth Amendment right to confrontation. Experts have traditionally been permitted to rely on hearsay. *See*, California Evidence Code Section 801(b). Nevertheless, as the ***Smith*** decision found, the Confrontation Clause, as construed by recent decisions of the United States Supreme Court, prohibits the introduction of otherwise admissible evidence, when to do so permits the prosecution to prove an

essential element of the crime by hearsay. Accordingly, it held the admission of the autopsy report to violate the Sixth Amendment right to confrontation, despite its admissibility as a business record under state law. (*Id.* at 917.) Here, too, Dr. Fukumoto's opinions that the injuries were "extremely painful" and were inflicted before death were used to satisfy those elements of proof in the prosecution's torture murder and special circumstances allegations against Appellant. (*See*, Section 2(d)(5) below.) Consequently, an expert's general entitlement to consider hearsay as a basis of his opinion gives way to Appellant's constitutional right to confront witnesses against him.

Appellant's interpretation of ***Crawford*** is also consistent with a recent decision in the California Court of Appeal. In ***People v. Sisavath*** (2004) 118 Cal.App.4th 1396, the statement of a four year old (who could not qualify as a witness) was at issue. The boy's statement was made during a "multi-disciplinary team interview" conducted by a forensic interview specialist at which a prosecutor and district attorney investigator were present; the statement was made after charges were filed. Because an objective observer could reasonably foresee that this statement would be used in a prosecution, it was testimonial and its admission violated ***Crawford***. The Court of Appeal held: "The pertinent question is whether an objective observer would reasonably expect the statement to be available for use in a prosecution." (*Ibid.* at 1401.) As with ***Sisavath***, an objective observer would

reasonably expect that Dr. Richards's autopsy report in this case would be used in a criminal prosecution.

In this case, the coroner testified based largely upon his review of the work of the retired Dr. Richards. Even the photographs and slides he reviewed were made at the time of the autopsy, presumably under the supervision of Dr. Richards, whose work could not be examined by the defense. Appellant's right to effectively cross-examine Dr. Fukomoto on the presumptive basis of his key opinions (the nature and extent of the victim's injuries) was therefore rendered a nullity; the witness who described them and supervised the preparation of the slides and photographs that depicted them was unavailable.[30] As such, his testimony is classic hearsay, within the meaning of California Evidence Code Section 1200(a) since his statements were offered for the truth of the matters in Dr. Richards' report. The report relied upon by Dr. Fukumoto to describe Dr. Richards "findings"[31] was testimonial hearsay because it was made by a law enforcement agent[32] who prepared it with the express purpose of advancing a criminal prosecution. As a statement made by law enforcement in preparation for litigation, the statement implicates the core concern of ***Crawford***: the preparation of

[30] Again, since Dr. Fukomoto never set forth the bases for these opinions, one must perforce guess at the foundation, if any. As a parenthetical aside, the record did not establish that Dr. Richards was "unavailable" within the meaning of the Evidence Code; only that he was retired. (R.T. 2122, Lines 4 – 10.)
[31] R.T. 2130, Lines 8 - 10 – R.T. 2136, Lines 4 - 7.
[32] Dr. Richards and Dr. Fukumoto were part of a medical group that contracted with the Orange County Sheriff's Department to perform autopsies in the County of Orange. (R.T. 2124 – R.T. 2122, Line 2.)

evidence against a defendant by the government without the opportunity for the defendant to cross-examine the witness who prepared the evidence. Under the ***Crawford*** analysis, state evidentiary rules do not govern admissibility under the Sixth Amendment. Dr. Fukumoto's testimony presents the same confrontation issues that the autopsy report does: it is evidence prepared by the government without a defense opportunity to test the information upon which the testimony was based. As such, the Confrontation Clause bars its admission.

c. Reversal is Required

Appellant's conviction for the first-degree murder of Marjorie Deeble must be reversed. Evidence admitted in violation of the confrontation and due process clauses requires reversal unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (***Chapman v. California,*** *supra*, 386 U.S. 18, 24.) Under the ***Chapman*** test, the question is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (***Sullivan v. Louisiana*** (1993) 508 U.S. 275, 279.) The prosecution cannot meet the ***Chapman*** test because it cannot assure that the verdict in this case was not attributed to the error admitting the coroner's testimony. Dr. Fukumoto's testimony was an indispensable part of the prosecution's case that Appellant was the assailant of Mrs. Deeble.

The prosecution's closing argument focused upon the autopsy results as the key ingredient of its contention that the Deeble and Delbecq homicides were so similar that Appellant must be responsible. (R.T. 2922 – R.T. 2933; R.T. 3095.) Based upon Dr. Fukumoto's testimony, the prosecutor argued that the assailant used a sharp instrument as a means of assault. (R.T. 2924.) Both women were severely beaten; Mrs. Deeble suffered a fractured nose. (R.T. 2925.) A hair mousse canister was used to sexually assault both women. (R.T. 2930 – R.T. 2932; R.T. 3103.) The autopsy results were also prominently featured in the prosecution's argument that both women were tortured, an essential element of the first degree murder and special circumstance allegations against Appellant. (R.T. 2901 – R.T. 2908.) The defense bitterly contested the conclusions of the autopsy report, through cross-examination, the testimony of Dr. Wolfe, and during its closing remarks to the jury. (R.T. 2977 – R.T. 2990.) Indeed, the entire closing address of Mr. Severin was devoted to attacking the autopsy results in an attempt to debunk the prosecutor's claim that the murders carried unique signatures. (R.T. 2978, Lines 10 - 14; R.T. 3024 – R.T. 3038.)

The essential importance of the autopsy results to the prosecution's very case that Appellant was the perpetrator of the charged offense cannot be credibly disputed. *Compare,* ***Smith v. Alabama,*** *supra*, 898 So.2d. 907, 918, where the record "overwhelmingly" supported the conviction, even without consideration of

the autopsy report. Because of the dispute over the autopsy results, the prosecutor in this case acknowledged the absence of Dr. Richards as a problem, but breezily sought to discuss it:

> "But in the death of Mrs. Deeble here in Los Alamitos, there was a significant disagreement. Dr. Fukumoto – and there was a disadvantage not having Dr. Richards here, and that is the way it is, okay?

(R.T. 2923, Lines 7 - 10.)

The prosecution was wrong; the United States Supreme Court disagrees. The absence of Dr. Fukumoto was neither a "disadvantage" or "okay." It disabled the defense and violated Appellant's right to confrontation. Reversal of his conviction is required.

d. Assuming Dr. Fukumoto's Testimony was not Wholly Inadmissible as a Violation of Appellant's Sixth Amendment Right to Confront Witnesses, his Opinion that her Injuries were "Extremely Painful" and Occurred Before Death Should have been Excluded because it Lacked Proper Foundation and was Therefore Irrelevant, Violating his Federal Constitutional Rights to Due Process of Law and a Heightened Reliability in a Capital Trial Under the Fifth, Sixth, Eighth and Fourteenth Amendments

1. Overview of Legal Arguments

The trial court's decision to allow Dr. Fukumoto to offer an opinion on the crucial elements of the torture murder allegations of whether the victim's injuries were "extremely painful" and occurred before death was erroneous in several respects. First, as the prosecutor himself recognized, the jurors could draw their own conclusions about the painfulness of the injuries. Because the jury received no appreciable help from Dr. Fukumoto's opinion testimony in this regard, this testimony was not relevant and should have not been admitted. (*See,* ***People v. Champion*** (1995) 9 Cal.4th 879, 924; ***Soule v. General Motors Corp.*** (1994) 8 Cal.4th 548, 567, Section D, *infra.*) Second, even assuming that an expert opinion regarding the injuries and whether they occurred before death would have been useful for the jury, the prosecutor did not lay a proper foundation for this witness to render an opinion on this precise question. (*See*, Section E, *infra*; ***Alef v. Alta Bates Hospital*** (1992) 5 Cal.App.4th 208.) Finally, the court erred in its analysis under Evidence Code Section 352 by concluding that the probative value of this opinion testimony outweighed the resulting prejudice. (*See,* ***People v. Clark*** (1980) 109 Cal.App.3d 88; ***People v. Roscoe*** (1985) 168 Cal.App.3d 1093, Section F, *infra.*)

2. This Expert Opinion Testimony was not Relevant Because the Jurors Were Capable of Drawing their Own Conclusions about Whether the Injuries were

Painful Without the Expert's Opinion

The California standard for qualified expert opinion is set forth in Evidence Code Section 801, which provides, in pertinent part:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

Both factors listed in Evidence Code Subsection (a) must be satisfied. In order to be admissible, the expert's opinion must be on a subject "beyond common experience," and the opinion must also be of appreciable help to the jury. (***People v. Champion***, *supra*, 9 Cal.4th 879, 924; ***Soule v. General Motors Corp.***, *supra*, 8 Cal.4th 548, 567.) Where the jurors are able to draw a conclusion from the facts in evidence as easily and intelligently as the expert could, expert testimony is not admissible. (***McCleery v. City of Bakersfield*** (1985) 170 C.A.3d 1059, 1074, n. 10; ***People v. Hernandez*** (1997) 70 Cal.App.4th 271, 280; ***People v. Torres*** (1995) 33 Cal.App.3rd 37, 45.)

All living individuals have wide experience in a body's sensitivity to pain: it is most certainly not "sufficiently beyond the common experience that the opinion of an expert would assist the trier of fact." (***People v. Hernandez*** (1997) 70 Cal.App.3d 271, 280.) Unlike the cause of death, whether a particular injury was

"extreme painful" is a subjective judgment which could reasonably call forth a wide range of opinions from jurors, based upon their varying experiences and consideration of the ample evidence at trial regarding the nature and degree of those injuries. The injuries inflicted upon Mrs. Deeble were described in great detail by Dr. Fukumoto during his direct examination in which he used exhibits which graphically depicted them. (R.T. 2125; R.T. 2129.) Indeed, the prosecutor acknowledged during his closing remarks that the expert testimony of Dr. Fukumoto was not necessary to enable the jury to determine whether the injuries were painful; the jury's common experience was sufficient. (R.T. 2924 – R.T. 2925.)

Despite the admission that Dr. Fukumoto's opinion was not of appreciable help to the jury, the prosecution argued below that his opinion that Mrs. Deeble's injuries were "extremely" painful was necessary to rebut the contrary assertion by the defense pathologist, Dr. Wolfe:

> "Did it really take Dr. Fukumoto to tell us that? I guess it did because this other doctor said it wouldn't be painful."

(R.T. 2924, Lines 23 - 25.)

The prosecution's contention was wrong on two counts. First of all, Dr. Fukumoto's improper opinion[33] preceded that of Dr. Wolfe's.[34] Thus, the prosecutor's justification was backward; it was necessary for the defense to introduce Dr. Wolfe's opinion to rebut the improperly admitted opinion of Dr. Fukumoto. Secondly, and more importantly, even if Dr. Fukumoto's opinion regarding Mrs. Deeble's response to her injuries was the proper subject of expert testimony, this did not render it automatically admissible. Under Section 720 and 352, it must have an adequate foundation as well. As set forth below, Dr. Fukumoto's testimony that the injuries were extremely painful and inflicted before death failed to meet this requirement.

In sum, cases in this court and in other California courts have permitted expert opinion evidence where the subject matter calling for the opinion would **not** be understood by the average juror. (*See, e.g.,* ***People v. Champion****, supra*, 9 Cal.4th 879, 924 [expert in street gangs allowed to testify regarding gang terminology and unusual slang expressions used in tape recorded conversation]; ***People v. Harvey*** (1991) 233 Cal.App.3d 1206, 1226 [police agent's opinion in narcotics case about relative roles of defendants in drug organization].) As the prosecution himself recognized, Dr. Fukumoto's opinion was not necessary to

[33] R.T. 2128 – R.T. 2129; R.T. 2138.
[34] R.T. 2486; R.T. 2516 – R.T. 2517.

clarify the significance of the evidence nor fill any gap in the jury's common experience. His opinion in that precise area, therefore, was not of appreciable help and ought to have been excluded. (***People v. Stoll*** (1989) 49 Cal.3d 1136, 1154 [exclusion of expert opinion evidence is required where it would add nothing to the jury's common pool of information].)

3. There was No Foundation for Dr. Fukumoto to Give an Expert Opinion Concerning Whether the Injuries Were Inflicted Before Death and Were "Extremely Painful"

a. Introduction

In addition to Evidence Code Section 801, which addresses the subject matter of expert opinion, California law imposes specific requirements for the qualification of the particular expert witness. Evidence Code Section 720 states in relevant part:

> A person is qualified to testify as an expert if he has special knowledge, skills, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

As noted above, timely foundational objections were raised to Dr. Fukumoto's testimony about whether the injuries were inflicted ante-mortem and their painfulness.

b. Dr. Fukumoto's Opinion was Not Within His Area of Expertise

Where a foundational objection is raised, the proponent of the expert testimony has the burden of proving its admissibility. (***Alef v. Alta Bates Hospital,*** *supra*, 5 Cal.App.4th 208, review denied.) Moreover, the burden will not be met simply by establishing that the witness has credentials in the general field. The proponent of the testimony must affirmatively show that the witness' expertise is directly and specifically related to the subject of the opinion they plan to offer. (*See,* ***Salasguevara v. Wyeth Laboratories, Inc.*** (1990) 222 Cal.App.3d 379 [reversing grant of summary judgment in favor of the defense in a medical malpractice action where the defendants relied on the deposition testimony of the plaintiff's own doctor because nothing in the record demonstrated that the doctor was a specialist qualified to render an opinion on the precise issues involved in the action].) The prosecutor failed to meet the statutory burden in this case.

The general standard for qualifying an expert to give an opinion is whether the witness' peculiar skill, training or experience enable him to form an opinion which would be helpful to the jury. (Evidence Code Section 720; ***People v. Davis*** (1965) 64 Cal.2d 791.) However, this court has repeatedly held that the qualifications of a purported expert must be **directly related** to the subject of the proposed expert opinion. The competency of an expert is in every case is a relative

one; that is, relative to the topic about which the expert is to make a statement. (***Huffman v. Lindquist*** (1951) 37 Cal.2d 465.)

Expert qualifications receive especially close scrutiny where the proposed opinion testimony involves the interpretation of crucial evidence. In ***People v. Hogan*** (1982) 31 Cal.3d 815, this court held that the expert was not qualified where, although qualified to testify about whether stains found on defendant's pants and shoes were blood and about blood typing of the stains, he was not qualified as an expert on the particular subject of whether blood was deposited by flying drops or by surface to surface contact. (*See, also,* ***People v. Fierro*** (1992) 1 Cal.4th 173, (1992) *cert. denied*, 506 U.S. 907 [licensed private investigator could not be certified as an expert in ballistics and crime scene reconstruction where his experience was based on military service 20 years earlier at which time he took photographs of plane and car crashes; witness had never photographed a crime scene involving a gun shot death, and his opinion on the effects of bullets on the victim's body was based on viewing of documentary films of men in combat].)

Precise training is never more important than when the opinion is given in a capital case. In this context, this Court has typically required very specific credentials before upholding the trial courts' decisions to admit expert opinion. (*See, e.g.,* ***People v. Bolin*** (1998) 18 Cal.4th 297, *cert. denied*, 526 U.S. 1006

[criminalist was qualified to give expert testimony in murder prosecution regarding the positions of the victims at the time they were shot in view of his educational background in biochemistry and serology and his training for 13 years as a criminalist which included attending and giving lectures on blood-spatter analysis and crime scene investigation]; ***People v. Clark*** (1993) 5 Cal.4th 950, *cert. denied*, (1994) 512 U.S. 1253.) [witness was qualified to give expert "blood-spatter" testimony in capital murder prosecution where the witness had attended lectures and training seminars on the subject of blood dynamics, read relevant literature, and conducted relevant experiments and visited crime scenes where blood spatter tests were conducted].)

The trial court here failed to investigate the coroner's credentials to determine whether this witness had the necessary background and training to support his opinion about the way the body's neurological response to certain types of injuries and an evaluation of when they were inflicted, vis-à-vis, the time of death. Instead the court relied on a brief description of the coroner's medical training, the number of autopsies that he had performed, and a general representation that he had qualified in court as an expert in an unspecified field a number of times:

"Q (By Mr. Brent) Dr. Fukumoto, what is your profession, sir?

A I am a licensed physician surgeon pathologist by specialty.

Q And what is your background, training and experience in that area?

A I graduated from the Indiana University School of Medicine 1958. I have taken a year's rotating internship in Clinical Medicine followed by four years of training in pathology. The last three years being at Long Beach Memorial Hospital.

I have served as pathologist in the U.S. Army, and I have served as Chief of Anatomical pathology at the Orange County Medical Center. And since 1966 I have been in the private practice of Pathology with this group in Anaheim.

Q And what is the name of that group?

A It is Richards, Fisher, Fukumoto Medical Group, Inc.

Q And is that the group that has contracted with the Orange County Sheriff's Department to perform the autopsies in the County of Orange?

A Yes.

Q And Dr, Richards is now retired. You said Richards, he is now retired, is he not?

A Yes. Dr. Richards has been retired since I believe either 1989 or 1990.

Q Okay. And so during the time that you have been a licensed Pathologist, approximately how many autopsies have you performed?

A I would say I have personally conducted now over 12,000 cases.

Q And would it be fair to say that you have qualified as an expert in this field in the various courts of our State numerous times?

A Yes, I have.

(R.T. 2121 – R.T. 2122.)

Cases make clear that medical training alone is not sufficient. (*See,* ***Salasguevara v. Wyeth Laboratories, Inc.****, supra,* 222 Cal.App.3d 379 [child's treating physician did not have medical expertise to offer competent medical testimony on subject of whether administration of DPT vaccine caused child's seizures, where it could not be determined based on information before the court whether this doctor had adequate skill training or experience;] ***Miller v. Silver*** (1986) 181 Cal.App.3d 652 {psychiatrist lacked credentials permitting him to give expert testimony concerning surgical technique used in highly specialized field of plastic surgery].) The mere fact that this witness had general experience in performing autopsies is similarly unpersuasive. It is not self-evident that a coroner whose training and expertise is with the dead has an adequate background to offer an opinion on pain response. (*See, also,* ***People v. Cole*** (2004) 33 Cal.4th 1158, 1196, *cert. denied*, 544 U.S. 1001, where the trial court admitted the testimony of the surgeon who treated the victim to prove the commission of the act calculated to cause extreme pain; the opinion that it was not irrelevant evidence under Code Section 352.) Without additional information supporting his qualifications to give an opinion about pain

response and whether injuries were inflicted before death, his opinions in those areas should have been excluded.

This court's opinion in ***People v. Cole*** (1956) 47 Cal.2d 99 is instructive. There, a trial court's decision to admit a pathologist's opinion that a wound was self-inflicted was approved. After reviewing conflicting authorities on the matter, the opinion concluded that "(a) conclusion that the testimony complained of was inadmissible would amount to a holding that jurors, although layman, whose experience with gunshot wounds and suicide was likely to be limited or nonexistent, could not have derived assistance from the opinion of a doctor who was an expert on those matters and had personally examined the body and performed the autopsy as a specialist on causes of death." (*Ibid.* at 105.)

In the instant case, there is no showing in the record that Dr. Fukumoto was a specialist on the body's sensation to various types of trauma. As the trial court admonished in ***People v. Kelly***, "in considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited." (1976) 17 Cal.3d 24, 39. Here, as in ***Kelly***, while Dr. Fukumoto may have had an impressive list of credentials in one field, there was no showing that those credentials as a pathologist qualified him to express an opinion as to a body's pain response. Assuming for the moment that expert opinion was even appropriate on

that subject, a background in neurology is a basic prerequisite to offer such an opinion.

Trial courts are obligated to contain expert opinion testimony within the area of professed experience and to require that there be an adequate foundation for the opinion testimony. (***Korsak v. Atlas Hotels, Inc.*** (1992) 2 Cal.App.4th 1516.) A trial court must have adequate information in order to exercise its discretion regarding whether the expert's credentials are sufficient. (***Mayer v. Alexander*** (1946) 73 Cal.App.2d 752.) Whether the trial court has properly exercised its discretion as to qualification of an expert depends on whether the witness has disclosed sufficient knowledge of the subject to entitle his or her opinion to go to the jury. (***Agnew v. City of Los Angeles*** (1950) 97 Cal.App.2d 557.)

In the present case, nothing before the court suggested that Dr. Fukumoto witness had the necessary expertise to offer an opinion about the degree of pain that Mrs. Deeble suffered nor the timing of her injuries. Accordingly, the court's ruling does not reflect a true exercise of judicial discretion but, rather, an abdication of the court's duty to evaluate the coroner's credentials relative to the subject matter of the expert opinion sought. (*See, e.g.,* ***Agnew v. City of Los Angeles,*** *supra*, 97 Cal.App.2d 557.)

c. Dr. Fukumoto's Opinion was Conclusionary

The second and independent ground for excluding Dr. Fukumoto's opinions was that they were impermissibly conclusionary. (R.T. 2127 – R.T. 2129.) The jury was not informed as to the reason that these Mrs. Deeble's injuries were so painful; it was simply asked to accept bald conclusion as fact. (R.T. 2127 – R.T. 2129.) Similarly, other than the prosecution's characteristically leading prompt as to whether his conclusion was based upon his "microscopic examination," Dr. Fukumoto was allowed to opine without explanation that the injuries to the "vaginal, rectal area" were caused before Mrs. Deeble's death. Dr. Fukumoto's opinion about the timing of these injuries was admitted by virtual fiat. (R.T. 2138, R.T. 2139.)

With regard to the laceration of the posterior fourchette in the vagina and rectum, the prosecution led the witness to acknowledge that those areas were "highly vascular" and "full of lots of nerve endings"[35] before prompting the witness in the following improper fashion:

"Q	And so trauma to those areas would you agree are highly painful?
Mr. Bates	Your Honor, again, objection, no foundation.
The Court	Overruled.
The Witness	Yes."

(R.T. 2138, Lines 3 - 8.)

[35] R.T. 2137, Lines 4 - 26.

The other absence of any foundational basis for Dr. Fukumoto's opinions stands in stark contrast to the sufficient foundation found by the Supreme Court in ***Cole*** for the admission of the pathologist's opinion that the fatal wound was not self-inflicted: "In elaborating, (the witness) referred to the location of the wound, the course of the bullet and the obesity of the victim, and he stated that it would be difficult for a person, whether right-handed or left-handed, to hold the muzzle of a gun against himself in the position necessary to produce such a wound. He testified that his opinion was based on his training and experience, as well as the condition of body, and that he had examined suicide victims who had died of gun shot wounds and he had never seen a self-inflicted wound `in this position.'" (*Ibid.* at 103.)

Appellant contends that since Dr. Fukumoto was not the physician who performed the autopsy, and since his expertise to express these opinions was not evident in the record, the absence of any credible foundation for those opinions themselves rendered them inadmissible under Section 720. The jury never should have been called upon to evaluate the weight of those opinions. (*See*, *generally*, ***People v. Cole***, *supra*, [concurring and dissenting opinions of J. Schauer and J. Carter.] [Proper procedure for an expert opinion without adequate foundation would be to exclude it entirely from evidence.] 47 Cal.2d 99, 108 - 111.)

4. The Trial Court's Admission of this Testimony was An Abuse of its Discretion Under Evidence Code Section 352 which was Contrary to California Law and Abridged both State and Federal Constitutional Rights

The Court's decision to admit Dr. Fukumoto's opinions was an abuse of the trial court's discretion under Evidence Code Section 352, resulting from the overstatement of the probative value of the expert opinion and a simultaneous underestimation of the prejudicial effects of this evidence. The trial court here assigned far too much probative value to the coroner's opinion in this area. As demonstrated above, the jury did not need expert testimony to understand the evidence. Where there is no need for an expert opinion that testimony has no probative value. It is error under Evidence Code Section 352 to admit expert opinion testimony in a criminal case were the need for any expert opinion is questionable and, on the other hand, the evidence is not overwhelming. (***People v. Clark,*** *supra* 109 Cal.App.3d 88 [error to admit testimony of rape expert that the victim's conduct was reasonable where the case was a close contest on credibility and the trial court had questioned the need for any expert opinion.] *See, also;* ***People v. Roscoe*** (1985) 168 Cal.App.3d 1093 [probative value of psychologist's testimony regarding specific responses of the victim in that case was far outweighed by the prejudicial effect especially where the expert could have relied upon general studies and not a detailed, case specific analysis]; ***United States v.***

Boyd (D.C. Cir. 1995) 55 F.3d 667, 672, [reversible error to admit expert opinion about defendant's intent to commit the crime.)

For all of these reasons, the trial court's admission of this expert opinion was contrary to established California law. The erroneous admission of this evidence was highly prejudicial, and the error affected both the guilt and penalty phases of the capital trial. As a result, Robert Edwards was denied his state and federal constitutional rights to due process of law, to a fundamentally fair trial and reliable determination of guilt and penalty. (U.S. Const., Amends. V, VI, VII and XIV; Cal. Const., Art. I, Sections 7(a), 15 and 17; ***Gardner v. Florida***, *supra*, 430 U.S. 349; ***Beck v. Alabama***, *supra*, 447 U.S. 625; ***Ford v. Wainwright***, *supra*, 477 U.S. 399.) The trial court's actions in the contravention of California law also deprived Robert Edwards of a state created liberty interest and denied him equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343.) The conviction should be reversed.

5. Admission of Dr. Fukumoto's Unfounded Opinion was Prejudicial and Violated Robert Edwards' Federal Constitutional Right to a Fair Trial, Due Process and a Heightened Reliability in a Capital Case Under the Fifth, Sixth, Eighth and Fourteenth Amendment

Both parties devoted a substantial portion of their closing arguments to whether the prosecution had satisfied its burden of proof to demonstrate that

Appellant intended to inflict extreme and prolonged pain, as an element of first degree murder, and whether he did in fact inflict extreme cruel physical pain and suffering, as an element of the special circumstance of torture. (R.T. 2901; R.T. 2976 – R.T. 2976; R.T. 2980 – R.T. 2989.) The prosecutor argued vociferously that Dr. Fukumoto's opinion that Mrs. Deeble suffered intensely was far more probative than Dr. Wolfe's rebuttal testimony that she did not. (R.T. 2924 – R.T. 2925; R.T. 2927.) The damage that Dr. Fukumoto's improper opinion inflicted upon the defense was immense. The seriousness of the injuries inflicted upon Mrs. Deeble was strenuously contested by the defense.

During its closing argument, the prosecution used Dr. Fukumoto's improperly admitted opinions again and again as a means to persuade the jury that Appellant intended to inflict extreme pain and that she had, in fact, suffered "extreme cruel and physical pain." (R.T. 2966, Line 17 – R.T. 2970, Line 3; R.T. 2924, Line 19 – R.T. 2925, Line 2; R.T. 2921, Line 18 – R.T. 2928, Line 17.) Dr. Fukumoto's opinion, that struggling against the ligature was "extremely painful," was also the only direct proof in the record that the acts of torture were a cause of death, an essential element of the crime of murder by torture. (R.T. 2118, *see,* Section VI.) As previously noted, it also spawned the necessity for the defense to present expert rebuttal testimony by Dr. Wolfe. This testimony became the focal point of an attack upon Appellant both during the prosecution's cross examination

of Dr. Wolfe and during his closing arguments to the jury. (R.T. 2516, Line 11 – R.T. 2517, Line 7; R.T. 2906, Line 7 – R.T. 2907, Line 3; R.T. 2927, Lines 13 - 17.) In the end, as the prosecutor implicitly conceded during his closing argument, Dr. Fukumoto's opinion regarding the pain experienced by Mrs. Deeble was an unnecessary and improper intrusion upon the jury's fact finding responsibility. The prosecution was allowed to use foundationless opinions as the key element of its argument to persuade the jury that it had satisfied essential elements of the crimes of first degree murder by torture as well as the special circumstance of torture. The conviction and finding should be reversed.

B. The Trial Court's Admission of Unfounded Testimony that Muriel Delbecq Put her Key Outside her Residence was Contrary to State Law and in Violation of Appellant's Federal Constitutional Rights

1. Factual Background

During direct examination, Peggy Ventura testified that her mother told her that she was going to hide an extra key to her apartment under a rock near the front door. She never found the key after that conversation. (R.T. 2194, Line 22 – R.T. 2195, Line 20.) During cross examination, the defense explored whether the witness had any personal knowledge that her mother had a key outside her door; when it became evident that her testimony was based solely upon hearsay, the defense made a motion to strike Ms. Ventura's testimony upon that ground. (R.T. 2201, Line 25 – R.T. 2202, Line 21.) The motion was denied as untimely. (R.T.

2201, Lines 22 - 23.) Later in the trial, the defense renewed the motion to strike Ms. Ventura's testimony, arguing that it failed to object during direct examination because the improper foundation of Ms. Ventura's testimony was not fully apparent at the time that it was given. (C.T. 840 – C.T. 843.) The court adhered to its earlier ruling that the question was untimely, without reaching its merits. (R.T. 2846, Line 1 – R.T. 2847, Line 19.)

2. Argument

a. The Objection Was Not Untimely

Section 353(a) of the Evidence Code provides that a judgment shall not be reversed by reason of erroneous admission unless there appears of record an objection or motion to strike and so stated as to make clear the specific ground of the objection and motion. The general purpose of the rule is to give the trial court an opportunity to correct or avoid errors so that the defendant can receive a fair trial. (***People v. Carrillo*** (2004) 119 Cal.App. 4th 94, 101.) A motion to strike evidence that appeared admissible, but is later shown to be inadmissible, should be made when the inadmissibility is demonstrated. (***People v. Szeto*** (1981) 29 Cal.3d 20, 32.) Here, the hearsay basis of Ms. Ventura's testimony that her mother had hidden a key under a rock outside her door was not completely evident until cross-examination; at that point, a timely objection and motion to strike was made.

While, as in ***Carrillo***, defense counsel did not make an immediate objection, it did not take long for him to do so. There, as here, defense counsel's oral and written motion to strike made it clear to the trial court that he believed the line of inquiry to be improper. The trial court had ample opportunity to respond. The objection was therefore preserved.

b. Ms. Ventura's Testimony was Inadmissible

As noted above, the trial court did not rule on the merits of Appellant's hearsay objection, nor did the prosecutor contend that the testimony was admissible under any exception to the hearsay rule. This is unsurprising since Mrs. Deeble's alleged statement to her daughter that she had hidden the key outside the door was plainly inadmissible hearsay under Evidence Code Section 1200.

3. Admission of Testimony that Mrs. Delbecq kept a Key outside her Residence deprived Appellant of his Federal Constitutional Right to a Fair Trial, Due Process, and Heightened Reliability in a Capital Case, Pursuant to the Fifth, Eighth and Fourteenth Amendments

As previously argued, all parties below agreed that the evidence that Appellant committed the charged murder was insufficient to convict him without the admission of the "similar crime" that he committed seven years later in Hawaii. Accordingly, the majority of the prosecutor's closing remarks were devoted to the alleged similarity between the murders. (R.T. 2913 – R.T. 2937.) A key

ingredient in this argument was the alleged fact that neither crime involved a forced entry. (R.T. 2917 – R.T. 2918.) The prosecutor's arguments specifically referenced "evidence . . . about a key being available at both buildings." (R.T. 2917, Lines 15 - 16.) Inasmuch as there is no evidence that Mrs. Delbecq had a key outside her residence, save the hearsay testimony of her daughter, its improper admission severely prejudiced the defense by cementing the relationship between the two crimes in the minds of the jury.

For all of these reasons, the trial court's admission of Peggy Ventura's testimony was contrary to established California law. The erroneous admission of this evidence was highly prejudicial, and the error affected both the guilt and penalty phases of the capital trial. As a result, Robert Edwards was denied his state and federal constitutional rights to due process of law, to a fundamentally fair trial and reliable determination of guilt and penalty. (U.S. Const., Amends. V, VI, VII and XIV; Cal. Const., Art. I, Sections 7(a), 15 and 17; ***Gardner v. Florida***, *supra*, 430 U.S. 349; ***Beck v. Alabama***, *supra*, 447 U.S. 625; ***Ford v. Wainwright***, *supra*, 477 U.S. 399.) The trial court's actions in the contravention of California law also deprived Robert Edwards of a state created liberty interest and denied him equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343.) The conviction should be reversed.

C. The Trial Court's Admission of Unfounded Testimony by Sergeant Jessen that "Based Upon Information from Lab Personnel" A List of Suspects other than Appellant had Been Eliminated as Donors of Semen and Fluid at the Crime Scene Violated State Law as well as the Appellant's Federal Constitutional Rights to a Fair Trial and Heightened Reliability of Determination Under the Fifth, Eighth, and Fourteenth Amendments

1. Introduction

During pre-trial proceedings in June of 1995, the prosecution disclosed to the Court and defense that DNA analysis had not produced useful results:

> "Mr. Brent I will be very honest with the Court and counsel. DNA was used. As the Court saw on the Information, there was a trial in Hawaii a year ago and DNA was used in that case and that, I believe, was RFLP and that was done in this case, which did not generate any kind of meaningful results, in my opinion. There has been some attempt to try to do the PSR analysis. Your Honor, I am saying that I am leaning towards not using any DNA at all.

(R.T. 8, Line 25 – R.T. 9, Line 8.)

By August, the prosecutor represented that DNA evidence would not be presented. (R.T. 147, Lines 7 – 10.)

Under the guise of defusing a defense suggestion that the police rushed to focus the investigation upon Appellant to the exclusion of other legitimate suspects, the prosecutor tried to present false and/or foundationless evidence: that potential suspects had been eliminated by DNA testing, but Appellant had not:

"Q (by Mr. Brent)	First of all, Sergeant Jessen, you began to focus on Mr. Edwards to the exclusion of the persons that the defense mentioned, correct?
A	Correct.
Mr. Severin	Objection, irrelevant.
The Court	Overruled.
The Witness	Excuse me.
Q (by Mr. Brent)	And one of the reasons was, was it not, what has already come out that Mr. Edwards refused to supply you with samples of hair, saliva and blood?
A	Correct.
Mr. Severin	Objection, irrelevant.
The Court	Overruled.
Q (by Mr. Brent)	And, in fact, you had to actually get a court order to get those items, did you not?
A	Correct.
Q	Okay. Another reason, is it not true that these people had been eliminated by DNA from providing the samples at the Deeble residence of semen and fluids, and Mr. Edwards had not been eliminated, correct?
Mr. Severin	Objection, no foundation, speculation.
The Court	Sustained."

(R.T. 2818 – R.T. 2820.)

The trial court found that the prosecutor's factual assertion about the results of DNA testimony was wrong. The suspects (were) not eliminated. They (were) just not tied into a semen stain." (R.T. 2831, Lines 2 – 3.) The defense vigorously challenged even the assertion; it contended that no testing had "tied in" all suspects, save Appellant:

"The Court	How are they eliminated?
Mr. Brent	By DNA testing.
The Court	On what, the semen stain?
Mr. Brent	Yes, and other stains on the bed.
The Court	And then you have two who are 1 in 20?
Mr. Brent	No. On the semen stain Edwards is, but eventually the other one, the son, he is eliminated altogether. The only person left is Edwards.
Mr. Bates	Just a second. The son is so-called – they are both in the – Dave can correct me if I am wrong. I don't think I am wrong. They are both in the semen stain on the thigh. They are both part of 1 in 20. They could have put that stain there. There is another stain in the bed that Rob could be in and Steve Deeble could not be in. But wait a second. I am sorry. <u>But there is no showing that those two stains were put there by the same person. There is only – the semen stain to her thigh has two guys in it, and those are the two</u>. (*emphasis supplied.*):

(R.T. 2827, Lines 3 - 21.)

The defense challenge to the foundation of the question was relentless; "(Sergeant Jessen) has no basis to form the opinion as to whether these people were eliminated by DNA in the first place." (R.T. 2821, Lines 16 – 18.); "Your Honor, in response, there is an inference that the DNA reference inculpates Mr. Edwards, not just that it eliminates others; it is not true. They didn't file on him for seven years because they did not have it." (R.T. 2825, Lines 22 –26.) "Judge, this is bringing stuff in through the backdoor that was never presented as evidence. He never even testified that the darn stain was semen. Criminologist Reed eyeballed it and thought it might look like it to him. No further testing is in evidence at all. We're far off into the realm of speculation and for stuff that is so inflammatory." (R.T. 2828, Line 20 – R.T. 2829, Line 1.) Notwithstanding these objections and repeated challenges to the truthfulness of the prosecution's assertion about the results of scientific testing, the Court did not compel him to disclose the bases for that assertion; instead, the court ruled that Appellant's cross-examination of Sergeant Jessen about the investigator's failure to adequately explore the reasonable possibility that suspects other than Appellant committed the Deeble homicide "opened the door" to a re-examination of his motive to focus upon Robert Edwards as the key suspect. (R.T. 2829 – R.T. 2831.) Based upon the Court's ruling, the following re-direct examination ensued:

"Q (by Mr. Brent)	Sergeant Jessen, isn't true that as a result of scientific testing that this group of names of the defense had mentioned as persons who had supplied inadequate samples that I asked you about before were eliminated as the donor's of the various semen and fluids at the crime scene?
Mr. Severin	Objection, misstates the testimony, lack of foundation.
The Court	Re-phrase your question.
Mr. Brent	Yes, sir.
Q (by Mr. Brent)	Isn't it true that in your mind, based upon information that you had received from other people, lab personnel, that this list of people that the defense had mentioned as people who had provided inadequate samples were eliminated as donors of semen and fluid at the crime scene?
Mr. Severin	Objection, lack of foundation.
The Court	Overruled.
The Witness	Yes. Excuse me. Yes.
Q (by Mr. Brent)	And with that and other information that you had, then you focused on Mr. Edwards back in your investigation, right?
Mr. Bates	Objection, irrelevant, vague as to time period.
The Court	Overruled.
The Witness	Correct.
Q (by Mr. Brent)	But it wasn't until you received a phone call from Hawaii indicating a homicide that took place over there in 1993 that you felt that you had enough evidence to actually arrest Mr. Edwards, true?

A Correct."

(R.T. 2838, Line 4 – R.T. 2839.)

2. Sergeant Jessen's Testimony that He Focused on Appellant after He Received Unspecified Information from Unspecified Lab Personnel was Admitted in Violation of State Law and Appellant's Right to Due Process of Law and a Fair Trial under the Fifth, Sixth and Fourteenth Amendments

There was not an iota of admissible evidence in the record that any scientific testing was performed that "eliminated" any suspect as the donor of semen or fluids at the crime scene. Moreover, defense counsel repeatedly represented to the trial court that no scientific testing had ever been performed that eliminated all suspects other than Appellant as donors of fluids found at the Deeble crime scene.[36] Notwithstanding this record, Sergeant Jessen (under the prosecution's customary and impermissible leading interrogatories) was allowed to confirm that certain individuals associated with Mrs. Deeble had been "eliminated" as donors and that, as a consequence, the investigation focused on Appellant. This was error of Constitutional dimension in a number of ways.

First, the prosecutor's knowing presentation of false testimony and false argument denied Edwards his rights to due process of law and a fair trial guaranteed by the

Sixth and Fourteenth Amendments to the United States Constitution and precluded the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense. (***Beck v. Alabama*** (1980) 447 U.S. 625, 637 – 638.) "Due process is violation when the prosecutor, although not soliciting false evidence from a Government witness, allows it to stand uncorrected when it appears. That the false testimony goes only to credibility of the witness does not weaken this rule." (***United States v. Sanfilippo*** (5th Cir. 1977) 564 F.2d 176, 178.) In ***Giglio v. United States*** (1972) 405 U.S. 105, the Supreme Court considered a case in which new evidence had been discovered after the conviction "indicating that the Government had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government." (*Id.* at p. 151.) The prosecution also argued in summation that the witness "received no promises that he would not be indicted." (*Id.* at p 152.) This was false as the new evidence confirmed "petitioner's claim that a promise was made" that if the witness "testified before the grand jury and at trial he would not be prosecuted."

(*Ibid.*)

The Supreme Court reversed the conviction, explaining:

> "As long ago as ***Mooney v. Holohan*** [*citation*], this Court made clear that deliberate deception of a court and jurors by the

---

[36] Later in the trial, the defense repeated its assertion that no DNA testing was ever performed. While the prosecution denied the accusation, and countered that there was DNA testing, it never responded to the defense demand for proof that it occurred. (R.T. 2886 – R.T. 2888; *see*, Argument IX(B), *infra.*)

> presentation of known false evidence is incompatible with 'rudimentary demands of justice.' . . . In ***Napue v. Illinois*** [*citation*], we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' [*Citation.*] Thereafter ***Brady v. Maryland*** [citation], held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' [*Citation.*]

Here, defense counsel asserted that the prosecutor had sought to willfully mislead the jury into believing that scientific testing had "eliminated" Appellant as a suspect when, in fact, no such testing had been performed. Such conduct by the prosecutor plainly violates its obligation of fairness under ***Giglio*** and ***Napue***. Given the absence of <u>any</u> foundational facts in the record that "lab personnel <u>ever conveyed</u> any information to Sergeant Jessen that eliminated potential suspects (besides Appellant) as the donor of biological material found at the crime scene, as well as representations by defense counsel that no DNA testing was <u>ever performed</u> that "eliminated" suspects, it was error for the trial court to permit Sergeant Jessen to present this testimony as fact to the jury without requiring adequate foundation. Quite simply, since the preliminary fact of the testing was disputed, the trial court had a duty to resolve it. Evidence Code 310(a): "Determination of issues of fact preliminary in the admission of evidence are to be decided by the Court. . . . "(***People v. Wilson*** (2006) 38 Cal.4th 1237, 1250 – 1251.

> The United States Supreme Court has held that the state's duty to correct false or misleading testimony

> by prosecution witnesses applied to testimony which the prosecution knows, *or should know*, is false or misleading [*citation*], and has concluded this obligation applies to testimony whose false or misleading character would be evident in light of information known to other prosecutors, to the police, or to other investigative agencies involved in the criminal prosecution. [*Citations.*]" (***In re: Jackson*** (1992) 3 Cal.4th 578, 595) overruled on other grounds, ***In re: Sassounian*** (1995) 9 Cal.4th 535, n.6

Nevertheless, the trial court did nothing. The prosecutor was allowed to present the results of scientific testing when those results were hotly disputed by the defense and there was no foundation laid, either in or out of the jury's presence, as to what testing was done, by whom, when, and with what results. Even assuming that the question posed to Sergeant Jensen was relevant to establish his state of mind,[37] the objection should have been sustained since the Court had utterly no basis to determine whether its probative value, if any, was outweighed by the obvious potential for undue prejudice if, in fact, no reliable testing had been performed. As a consequence, through a leading question that has no basis in fact, the prosecutor was able to acquaint the jury with "the results" of forensic testing that identified Appellant as the only like perpetrator of the charged offense. Neither the Court nor the jury had any basis for evaluating the probative value of

[37] Appellant does not concede that Sergeant Jessen's state of mind when he focused the investigation on him was the proper subject for re-examination. Indeed, defense counsel at trial expressly argued that he did not "open the door" to this inquiry. (R.T. 2822, Lines 13 – 15; R.T. 2830, Lines 17 - 23.) Defense counsel does not open the door to the opinion of a law enforcement officer as to the guilt of his client simply by challenging the investigative choices that he made. Yet, the defense did no more in this case.

Sergeant Jessen's state of mind since the unspecified information that he received from unspecified lab personnel was never admitted into the record nor otherwise described with any probative particularity.

3. The Admission of Sergeant Jessen's State-Of-Mind Regarding the Probability of Appellant's Guilt Violated Robert Edwards Federal Constitutional Right to a Fair Trial

In ***United States v. Agurs*** (1976) 427 U.S. 97, the Supreme Court held: "In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aide if there is any reasonable likelihood that the false testimony could have affected the judgment if the jury." (*Id.* at p. 103.)

This Court has summarized:

> "The United States Supreme Court has held that the state's duty to correct false or misleading testimony by prosecution witnesses applied to testimony which the prosecution knows, *or should know*, is false or misleading [*citation*], and has concluded this obligation applies to testimony whose false or misleading character would be evident in light of information known to other prosecutors, to the police, or to other investigative agencies involved in the criminal prosecution. [*Citations*]" (***In re: Jackson*** (1992) 3 Cal.4th 578, 595 [11 Cal.Rptr.2d 5321, 835 P.2d 371].)

In ***Jackson***, this Court reaffirmed that the prosecution has a "constitutional obligation" to correct false and misleading testimony if it should have known of

the misleading nature of that testimony. (***In re: Jackson***, *supra*, 3 Cal.4th at p. 597.) Here, the defense alleged that the prosecutor had actual knowledge that the resulting of scientific testing that he was presented was false. In such circumstances, this Court has reiterated that this that this ***Chapman*** standard applies, which requires reversal unless the error was harmless beyond a reasonable doubt. (*Id.* at pp. 597 - 598.) In ***Jackson***, the error in that case was ruled harmless because the defendant had made numerous statements and admissions confessing to the crime. (*Id.* at pp. 598 – 599.) There were no such admissions made by Edwards in this case. The prosecution's case was wholly circumstantial and utterly dependent upon the improper admission of an uncharged offense that occurred several years after the Deeble homicide.

Even assuming that the error was not the willful presentation of false evidence, the failure of the trial court to require a proper foundation to present evidence compels reversal under the ***Watson***[38] harmless error standard. Because of the phrasing of the leading questions posed to Sergeant Jessen, the jury was compelled to speculate upon what manner of "information" from "lab personnel" caused him to disregard various associates of Mrs. Deeble who had been asked to furnish fluid samples as suspects and focus upon Appellant. It is reasonable to

[38] In ***People v. Watson***, *supra*, 46 Cal.2d 8128, 836, this Court held that reversal is required where it is "reasonably probable" that a more favorable result would have been obtained absent the error.

assume that since the jury was allowed to hear that a key investigative decision was based upon laboratory information, the Court's previous admonition to disregard any reference to DNA evidence was impossible to follow. In any event, without any basis in the record whatsoever, the jury heard testimony that scientific testing of some manner was performed that was so reliable that when Sergeant Jessen was advised of its results, he dramatically changed the course of his investigation to focus solely on Appellant. Since the record fails to disclose the nature of this alleged testing, it is impossible to conclude that the defense had any effective means to rebut this devastating backdoor admission of "scientific proof" of Appellant's guilt. The "results" of this forensic testing supplied the essential missing ingredient to the prosecution's efforts to identify Appellant as the perpetrator of the offense. Without it, there was no evidence tying Appellant to the murder of Mrs. Deeble, other than the spurious claim that the crime scene shared unique signature characteristics with the Delbecq homicide, committed during the following decade, thousands of miles away. With it, the jury had "proof" that the prosecutor's claim had a basis in reliable and impartially obtained scientific fact. Therefore, its admission severely prejudiced the defense, violated Appellant's federal constitutional right to due process of law and to confront adverse witnesses, heightened reliability in a capital case and therefore entitles him to a new trial

under the Fifth, Sixth, Eighth and Fourteenth Amendments. (***Hicks v. Oklahoma***, *supra*; ***Beck v. Alabama***, *supra*.)

D. Each of the Evidentiary Errors Require Reversal Since the State Cannot Establish that their Erroneous Admission was Harmless Beyond a Reasonable Doubt

Errors involving a trial court's decision to admit evidence are typically reviewed under the less stringent standard of ***People v. Watson***, *supra,* 46 Cal.2d 818. However, this court has made an exception for state law errors implicating important constitutional rights. In ***People v. Fudge*** (1994) 7 Cal.4th 1075, 1102 - 1103, this court held that errors involving merely state evidentiary rules are analyzed under the ***Watson*** standard, but if the error is of constitutional dimensions, the ***Chapman*** standard is controlling. Because federal constitutional rights are implicated here, this court should independently review the record, and reverse the convictions and sentence if the errors complained of are not found to have been harmless beyond a reasonable doubt. (***Chapman v. California***, *supra*, 386 U.S. 18, 24; ***People v. Fudge***, *supra*, 7 Cal.4th 1075, 1102 - 1103.) Under the *Chapman* standard, the burden shifts to the state to prove that the error was harmless beyond a reasonable doubt. (***Chapman v. California***, *supra*, 386 U.S. 18, 24.) The state cannot meet this burden on the facts of this case.

As previously discussed, the improper admission of Dr. Fukumoto's testimony regarding the autopsy report supplied the key and indispensable

ingredient to the prosecutor's theory that Appellant was the individual who committed the charged offense because of its "signature" similarity to the Delbecq homicide. His improper opinion that the injuries occurred before death and were extremely painful supplied necessary grist for the prosecutor's argument that Mrs. Deeble was tortured, an essential element of the first-degree murder charge and the special circumstance allegation. Peggy Ventura's inadmissible testimony that her mother kept a key outside her apartment contributed substantially to the prosecutor's theory that the two murders, vastly separated by time and geography, were no doubt committed by the same individual because neither crime involved a forced entry. Finally, the improper admission of a police officer's state of mind regarding a defendant's guilt, based by the false and/or foundationless results of scientific testing damaged Appellant's prospects for a fair trial in a manner too obvious to merit any further discussion.

To fully appreciate the prejudicial effects of this evidence, it must be assessed in conjunction with the other guilt phase evidence. (***People v. Hill*** (1998) 17 Cal.4th 800, 844 - 846.) Quite simply, as the Court and parties agreed, there was nothing to connect Appellant to the commission of the Deeble murder, other than its supposed similarity to the Delbecq homicide, committed an ocean away during the following decade.

Appellant submits that even under the less stringent standard of review announced under ***People v. Watson***, it was "reasonably possible" that a more favorable result would have been obtained had any of the improper evidence been excluded; in combination, and under the correct ***Chapman*** standard, the record compels a conclusion that the errors were not harmless beyond a reasonable doubt. His convictions must be reversed.

VII. THE SPECIAL CIRCUMSTANCE FINDINGS MUST BE REVERSED BECAUSE OF INSUFFICIENCY OF EVIDENCE WHICH DENIED APPELLANT HIS FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND NARROWING OF HOMICIDE CASES MOST DESERVING OF THE DEATH PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Standard of Proof

In determining whether there is sufficient evidence to support a criminal conviction, an "appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden or proving the defendant guilty beyond a reasonable doubt." (***People v. Rayford*** (1994) 9 Cal.4th 1, 23; ***People v. Reyes*** (1974) 12 Cal.3d 486, 497.) The "substantial evidence" rule is the yardstick used by the courts to determine whether a verdict meets this minimal standard of reasonableness.

> "The court must determine 'whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' [*Citation*] . . . '[T]he court must review the whole record . . . to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [*Citation*] (***People v. Williams*** (1997) 16 Cal.4th 635, 678; *cert. denied* (1998) 523 U.S. 1027.)

"Substantial evidence" does not just mean some evidence that could support the jury's verdict; it mans "evidence that reasonably inspires confidence and is 'of solid value.'" (***People v. Redmond*** (1969) 71 Cal.2d 745, 755; ***In re: Khamphouy*** (1993) 12 Cal.App.4th 1130, 1134.) "To survive an insufficiency of evidence challenge, the evidence must be substantial enough to support the finding of each essential element of the crime...." (***People v. Johnson*** (1992) 5 Cal.App.4th 552, 558.)

> [I]t is not enough for the [prosecution] simply to point to 'some evidence supporting the finding, for, 'Not every surface conflict of evidence remains substantial in the light of other facts.'" (***People v. Johnson,*** (1980) 26 Cal.3d 557, 577.)

"The power of the factfinder . . . has never been thought to include a power to enter an unreasonable verdict of guilty." (***Jackson v. Virginia*** (1979) 443 U.S. 307, 317.) A conviction of a capital crime which is not supported by substantial evidence violates due process of law and a reliable penalty determination

guaranteed by the Fifth, Eighth, and Fourteenth Amendments. (***Jackson v. Virginia***, *supra*; ***Woodson v. North Carolina*** (1976) 428 U.S. 280; ***Beck v. Alabama*** (1980) 447 U.S. 625.) "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (***Jackson v. Virginia***, *supra*, 443 U.S. at 318.)

B. Introduction

This is an unusual case. Not because Robert Edwards was charged with and convicted of murder with burglary and torture murder special circumstances. Examples of such convictions abound in the California Reports. Rather, this is an unusual case because the jurors were presented with two crime scenes, attributed to a single man, that were not only widely separated by distance and time, but also by plainly divergent methods and intent.

In Hawaii, the victim was strangled manually and sexually assaulted with a foreign object in an obvious and brutal fashion.

In California, the victim was simply bound, demonstrating nothing more than her assailant's intent to *immobilize* her, not to torture or kill her. Her injuries are consistent with her struggles to free herself and her assailant's intent that she should not. The prosecution's case that she suffered "extreme pain" before she

died is based on solely upon the unfounded and conclusionary testimony of a coroner who did not even perform the autopsy. Its case that Robert Edwards was the assailant is not based upon a shred of forensic evidence, a single percipient witness, or a discernable motive for him to attack the victim, but instead upon the hyperbolic "Tale of Two Mousse Cans" that was, in reality, nothing more than "Great Expectations," never realized in the evidence.

C. The Torture Special Circumstance Allegation

1. Factual Background

When the body of Mrs. Deeble was discovered lying face down on the floor of her bedroom, her hands were tied behind her back. Her neck was suspended in a noose fashioned by attaching the free end of a belt to the drawer handle of a bedroom cupboard. (R.T. 2011 – R.T. 2012.) Blood was running out of her left ear and nose. Her eyes were closed. (R.T. 2012.)

According to the state's forensic pathologist, Dr. Fukumoto, Mrs. Deeble died because of asphyxiation due to ligature strangulation. (R.T. 2139.) Death occurs from ligature strangulation in approximately six minutes; unconsciousness can occur in less than 60 seconds. (R.T. 2153 – R.T. 2154.) He opined that a deep furrow on Mrs. Deeble's neck was created by the ligature; he did not know how. He speculated that the neck abrasions may indicate a movement of her body with

the ligature in place; alternatively, the ligature may have slipped and thus have been tightened. (R.T. 2126; R.T. 2158.) The right eardrum was torn, possibly as a result of a struggle of Mrs. Deeble to get a breath. The left eardrum had a wound that was incisional and could have been caused by a sharp instrument. (R.T. 2127 – R.T. 2128; R.T. 2151.) Dr. Fukumoto opined (again, without foundation) that struggling against the belt would have been "extremely painful;" so too would have been the pressure on Mrs. Deeble's ears. (R.T. 2128.) Bloody subarachnoid fluid inside her skull and a blood clot on the membrane between the skull and the brain indicated that Mrs. Deeble received a blunt force trauma to her head; in the opinion of Dr. Richards, a flattening of the bridge of her nose indicated that it was fractured. (R.T. 2130 – R.T. 2133; R.T. 2160.) Yet, at one point during his testimony, Dr. Fukumoto noted that Dr. Richards's autopsy report revealed that the x-rays did not reveal a nose fracture. (R.T. 2142.) Mrs. Deeble's pancreas was damaged by a strong blow to the left backside of the abdomen. (R.T. 2135 – R.T. 2136.) Her vagina was bruised and the rectum was lacerated. Dr. Fukumoto could not describe the size of the lacerations nor did he notice any blood on the lining of the vagina or rectum. (R.T. 2125 – R.T. 2125; R.T. 2127.) He opined that trauma to these areas would be highly painful. (R.T. 2138.)[39] In his foundationless opinion, the injuries to the vagina and rectum occurred before death. (R.T. 2138.)

[39] Dr. Fukumoto's readiness to offer this opinion is inconsistent with his response to the same question posed at the preliminary hearing:

The defense's forensic pathologist, Dr. Wolfe, testified that bleeding from the ear canals and incisional tearing of the eardrums is consistent with ligature strangulation. Ligature strangulation and hemorrhaging from the ears are not necessarily consistent with extreme or prolonged pain. The presence of ligature marks on Mrs. Deeble's ankles likewise did not necessarily establish that she suffered extreme or prolonged pain. (R.T. 2486.) The injuries to the vagina and rectum, in Dr. Wolfe's opinion, were extremely minor and could have been caused by consensual sexual intercourse. (R.T. 2494 – R.T. 2497; R.T. 2514.) The lacerations' depth and length were not measured by Dr. Richards nor was the size or extent of the bruising that he observed. (R.T. 2510 – R.T. 2512.)

2. The Evidence of Torture was Insufficient as a Matter of Law for this Special Circumstance Allegation to be True

a. Introduction

Penal Code Section 190.2(a)(18) provides a special circumstance if "(t)he murder was intentional and involved the infliction of torture. For purpose of this section, torture requires proof of the infliction of extreme physical pain no matter how long its duration." The elements necessary to establish the torture-murder

---

"Q The type of injuries that were done to the vagina and rectal areas prior to death, is it fair to say that these would be very painful?

A I would say there would be pain associated with it."

(R.T. 73.)

special circumstance were set forth by the California Supreme Court in ***People v. Davenport*** (1985) 41 Cal.3d 247. The court held that: "the evident purpose of this statute is to encompass killings in which the perpetrator intentionally performed acts which were calculated to cause extreme physical pain to the victim and which were inflicted prior to death." (*Ibid.* at 271.) The court then concluded:

> "In sum, we find that the words used in Section 190.2(a)(18) must be understood in light of the established meaning of torture. Proof of a murder committed under the torture-murder special circumstance therefore requires proof of a first-degree murder (Section 190.2(a), proof that the defendant intended to kill and to torture the victim (190.2(a)(18)) and the infliction of an extremely painful act upon a living victim. The special circumstance is distinguished from murder by torture under Section 189 because under 190.2 subdivision (a)(18) the defendant must have acted with the intent to kill."

(*Ibid.*)

Accordingly, the jury was instructed as follows:

> "To find that the special circumstance referred to in these instructions as murder involving the infliction of torture is true, each of the following facts must be proved:
>
> 1. The defendant intended to kill human being.
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a human being for the purpose of revenge,

extortion, persuasion or for any sadistic purpose, and

3. The defendant did, in fact, inflict extreme cruel physical pain and suffering upon a human being no matter how long its duration.

Awareness of pain by the deceased is not a necessary element of torture.

(R.T. 3137 – R.T. 3138.)[40]

In this case, the People failed to meet each of the three elements listed above.

b. The People Failed to Produce Sufficient Evidence that the Injuries Caused Mrs. Deeble "Extreme Pain"

1. Dr. Fukomoto's Opinion Lacked Foundation and was An Insufficient Basis to Satisfy the Element of "Extreme Pain"

As set forth above, Mrs. Deeble's end could have come relatively quickly: unconsciousness in less than one minute and death approximately five minutes thereafter. The only direct proof that any of her injuries occurred before death was Dr. Fukumoto's foundationless opinion regarding those to her vagina and rectum;

[40] As set forth in Argument XI(B), this instruction was erroneous since it omitted the requirement that a "living human being must be tortured."

No opinion was expressed as to whether the furrows on her neck, or the injuries to her head and other parts of her body, were inflicted before death. (R.T. 2128.) The limited number of ante-mortum injuries was never addressed by the prosecution during his closing argument. He simply sought to rely on the injuries depicted in the crime scene photographs, without reference to the key issue of whether they were suffered after her death and therefore could not have caused any pain, extreme or otherwise:

> "The torture instruction talks about – and it is interesting to me because it talks about the victim does not need to be aware of the pain, does not need to know that she is suffering pain. That is interesting to me because the point I want to raise about that is that I was frankly flabbergastedness by a witness the defense called, Dr. Wolfe. And may be you picked up on my flabbergastedness, whatever that is worth, but the point is I assume you felt the same way. That that witness said some things I want to talk about, and I couldn't understand why, because what was the point? He made a ridiculous statement. I am going to say that is what it was.

(R.T. 2904.)

* * *

> Exhibit 1 and Exhibit 33, these are two photographs I held up. Are you telling us that these women did not feel any pain? And I was a little sarcastic, frankly, when I asked that. Do we have that much to be grateful for that they didn't feel – yeah they didn't feel any pain. He said no, they did not feel pain. They did not feel pain that is ridiculous. That

defies common sense. It goes against what Dr. Fukumoto told us about the extreme pain they felt, the torture kind of pain that they felt along the way leading up to their demise, however long that demise took. We all –

Mr. Bates — I have to object to that. Dr. Fukumoto didn't say anything about torture kind of pain. Move to strike.

The Court — Overruled."

(R.T. 2906 – R.T. 2907.)

Defense counsel's objections were well-taken. The opinions offered by Dr. Fukumoto that the allegedly ante-mortum injuries were "very" or "highly painful" were an insufficient basis to sustain a special circumstance finding for a number of reasons. First and foremost, those opinions were without foundation and therefore an unreliable basis to impose a death verdict. This point is addressed at length in Section VI(A) herein. Even if one assumes that his opinions were admissible, the absence of any explanatory testimony as to the reason that they would fall into the category of "highly painful," as opposed to merely painful, injuries or were inflicted before death makes them an inadequate basis upon which to make Appellant death-eligible. It is certainly not self-evident that minor abrasions to the neck or bruises and lacerations to the rectum and vagina of an unknown size, depth or length, as in this record, would cause extreme pain. Secondly, Dr. Fukumoto's opinion about the degree of pain caused by the rectal and vaginal injuries is

inconsistent with his sworn testimony at the preliminary hearing; when given an opportunity to describe those injuries as "very painful," Dr. Fukumoto declined to do so. (R.T. 73.) Finally, while the mere conflict between expert opinions is normally an issue left to the sound discretion of the trier of fact, Dr. Wolfe's opinion that the injuries to Mrs. Deeble genitals were minor and that the injuries to her neck and eardrums were not necessarily consistent with extreme pain, when coupled with the other insufficiencies in the People's case, compel a conclusion that there was insufficient evidence as a matter of law to sustain a finding that the special circumstance was true.

2. The Physical Evidence Does Not Support a Finding that the Victim Experienced Extreme Pain

The record in this case sharply differs from those in which the evidence of extreme pain was found sufficient to satisfy the special circumstance of torture in two ways.

First, unlike the prosecutor's attempt in this case to satisfy the jury as to this element with the broad strokes of a distasteful crime scene photograph, cases that have considered this issue carefully distinguish between injuries that are inflicted before and after death. Thus, in ***People v. Proctor*** (1992) 4 Cal.4th 499, 417 - 418, *aff'd,* (1994) 512 U.S. 967 and ***People v. Crittenden*** (1994) 9 Cal.4th 83, 109, *cert. denied,* (1995) 516 U.S. 849, both opinions focused on the infliction of those

injuries that occurred while the victim was still alive. Here, despite the prosecutor's efforts to obscure whether the injuries were inflicted before the victim's death with a crime scene photograph, his witness only identified pre-mortem injuries that were not visible in that photograph; indeed, the bleeding from those injuries was so slight that it was only detected during the autopsy microscopically. (R.T. 2146 – R.T. 2147.) The prosecutor impermissibly left it to the jurors' imagination to determine the basis upon which Dr. Fukomoto rested his bald assertion that the isolated injuries to the victim's genitals were inflicted before her death; no explanation of the basis for that opinion was given by the witness nor were the injuries such that common experience would tell the jurors that they necessarily occurred before death. There was no visible bleeding from the injuries nor were their depth and breadth measured by the physician who performed the autopsy. Thus, the evidences does not show, with any degree of reliability, that even some of the injuries identified during the autopsy occurred before the victim's death.

Second, unlike here, where the pre-mortem injuries cited by Dr. Fukomoto as causing extreme pain consist of superficial wounds, the pre-mortem injuries in earlier precedent are obviously consistent with the infliction of severe pain. (*See, e.g.*, ***People v. Davenport*** (1985) 41 Cal.3d 247, *cert. denied*, (1996) 519 U.S. 951, [a wooden stake driven so deeply into the victim's rectum that it came to rest by

the armpit, piercing internal organs; ***People v. Proctor***, *supra*, 4 Cal.4th 499, 517 - 518, [multiple blood force trauma, bruises, together with seven wounds to the right breast, each approximately two inches deep, and inflicted slowly and deliberately]; ***People v. Crittenden***, *supra*, 9 Cal.4th 83, 109 [a knife driven so deeply into the victim's chest – probably with a fire extinguisher as a battering ram – that its handle disappeared into his body].)

This court's recent opinion in ***People v. Elliott*** (2005) 37 Cal.4th 453 is instructive. There, the element of extreme pain "was satisfied by evidence of 81 pre-mortem stab and slash wounds, many of which suggested a "meticulous, controlled approach," and only three of which were potentially fatal. (*Id.* at 967.) Here, there were far fewer, and less calculated, wounds. Moreover, unlike here, there was evidence in ***Elliott*** to suggest a motive to torture the victim: to get her to reveal the combination to a floor safe. Thus, while expert testimony that the victim suffered extreme pain is not necessary to establish that element of proof, the wounds suffered by the victims in earlier decisions were of such a horrifying nature, that a reasonable jury could find the consequence of extreme pain without such assistance. Here, no reasonable jury could have concluded that the abrasions caused by the ligature around Mrs. Deeble's neck, and the otherwise undescribed injuries to her rectum and vagina, caused extreme pain or, indeed, were even inflicted before death. This special circumstance should be reversed.

c. Even if the Jury Could Have Found the Four Wounds to have been Extremely Painful, there was Insufficient Evidence that Appellant Intended to Inflict Extreme Pain

As set forth in ***People v. Davenport,*** *supra,* in order to establish the torture-murder special circumstance, the people must produce evidence that Appellant intended to torture the victim; that is, that he intended to inflict extreme pain upon that person. Here, there is no reliable evidence whatsoever that Appellant formed such an intent. The People attempted to raise an inference of torture upon the evidence that Mrs. Deeble sustained several less-than-lethal wounds to her genitals, which only generated microscopic bleeding and were of unknown dimensions and those wounds depicted in the crime scene photograph which were never identified by Dr. Fukomoto as capable of inflicting "extreme pain." (R.T. 2906 – R.T. 2907.) Although ligature strangulation was the act that was identified by Dr. Fukomoto as the "extremely painful" cause of death (R.T. 2128; R.T. 2139), he admitted that the lacerations of the victim's neck could have been self-inflicted, as she struggled to set herself free from her bindings. Moveover, "murder by strangulation indicates malice, but does not by itself indicate an intent to make the victim suffer. (***People v. Caldwell*** (1955) 43 Cal.2d 864, 869.) Finally, although Dr. Fukomoto's testimony was based solely on the wounds that were inflicted on the victim, it is well settled that torture cannot be inferred only from the condition

of the victim's body. (***People v. Wiley*** (1976) 18 Cal.3d 162, 168; ***People v. Anderson*** (1965) 63 Cal.2d 351; ***People v. Soltero*** (1978) 81 Cal.App.3d 423, 429. [Other evidence of an intent to cause suffering is also required.] ***People v. Wiley,*** *supra,* 18 Cal.3d at 168.)

In the cases that have found sufficient evidence of torture, there has always been compelling evidence of an intent to inflict extreme pain, in addition to whatever inferences might have been drawn from the condition of the victim's body. (*See, e.g.*, ***People v. Morales*** (1989) 48 Cal.3d 527, 560, [evidence regarding the manner in which the murder was carried out along with defendant's earlier statement that he intended to "hurt" and strangle a girl, found sufficient to sustain jury's implied finding of intent to inflict extreme pain]; ***People v. Robertson*** (1982) 33 Cal.3d 21, 51, *cert. denied*, (1989) 493 U.S. 985 [defendant admitted in his confession that he stabbed the victim in the vagina while she was still alive and a witness testified that defendant had declared his desire to cause pain to women]; ***Ortega v. Superior Court*** (1982) 135 Cal.App.3d 244, 258; [evidence that defendant, prior to the murder, had told his girlfriend that he agreed to "hurt" a girl provided a sufficient basis to demonstrate an intent to torture]; ***People v. Pensinger*** (1991) 52 Cal.3d 1210, 1240, *cert. denied*, 502 U.S. 930 (evidence of defendant's admissions that he broke his baby's ribs and slashed her with a knife to stop her crying before he killed her.) ***People v. Soltero*** (1978) 81

Cal.App.3d 423, 429 - 430 [evidence that defendant sought revenge for having been "burned" in a drug deal along with threats made to the victim and others that he would "get them," as well as evidence that the victim sustained 18 separate non-fatal stab wounds with two non-fatal strangulations over a four to six hour period sufficient evidence of a specific intent to inflict pain].) If anything, it is reasonable to assume that the blow to Mrs. Deeble's head rendered her senseless and is therefore inconsistent with a finding that the perpetrator intended to cause her extreme and prolonged suffering. (R.T. 2133.) Moreover, Appellant barely knew Mrs. Deeble and the record is devoid of evidence that he had any animosity towards her.

The requirement that the prosecution produce evidence of an intent to torture other than simply the condition of the victim's body is a sound one. Without additional evidence, the trier of fact is left to speculate how, and under what circumstances, the injuries occurred. For example, although the prosecution argued that the injuries to the victim were caused by a sexual assault, Dr. Wolfe attempted to opine that the key pre-mortum injuries to the rectum and vagina could have been caused by consensual sexual intercourse; this testimony was unrebutted by the prosecution's pathologist, Dr. Fukumoto.

This court has also cautioned against divining an intent to torture simply on the basis of the severity of wounds, since severe wounds may be inflicted for some

other purpose than to inflict pain, such as explosion of violence. (***People v. Mincey*** (1992) 2 Cal.4th 408, 432, *cert. denied*, 506 U.S. 104; *see, also*, ***People v. Daveport***, *supra*, 41 Cal.3d at 268.) Thus, in ***People v. Cole*** (2004) 33 Cal.4th 1158, 1198 and ***People v. Proctor***, *supra*, 4 Cal.4th 499, 517-518.) The opinions relied on statements that were made as the wounds were being inflicted as part of the basis for finding an intent to torture; here, the record reflects no such explanatory statements by Mrs. Deeble's assailant.

Lastly, as previously discussed in another context, the wounds are not of such a nature as to leave no reasonable doubt that the assailant must have harbored an intent to torture his victim. (*Compare*, ***People v. Pre*** (2004) 117 Cal.App.4th 413, 423, [where the court had no difficulty finding an intent to torture where the assailant bit the ear of an immobile victim causing a wound that needed 100 stitches to close].) Those cases that have considered the sufficiency of evidence to satisfy the element of intent to torture have also focused upon injuries that were incidental to the cause of death and, therefore, could be logically attributed to an intent to cause pain rather than to kill. Thus, in ***Crittenden***, the Supreme Court found that evidence that the victim was bound excluded a finding that the wounds were caused by "an explosion of rage;" it went on to find that the receipt of wounds that were "clearly not intended to be fatal" supported a reasonable conclusion that they were inflicted solely to cause pain. (*Ibid.* at 142.)

Here, the neck wound was caused by the very instrument that immobilized Mrs. Deeble: the ligature. Thus, unlike the wounds inflicted in ***Crittenden*** which were non-lethal and therefore inconsistent with any other logical finding than an intent to cause pain, one could reasonably find that the ligature wound was an artifact of the assailant's intent to immobilize, and not to torture or kill her. The assailant's use of the ligature to bind Mrs. Deeble is not evidence that he intended to inflict extreme pain or to kill her. The binding of the victim merely displays an intent to overcome any resistance to the crime. Dr. Fukumoto theorized that the deep furrow in Mrs. Deeble's neck was not caused by any direct action by the assailant; it was caused by the victim's election to struggle against the ligature. (R.T. 2168.) Thus, while it may be reasonable to assume that the assailant used the ligature to subdue Mrs. Deeble, it is mere speculation to assume that he did so with the intent that she would struggle against it and cause her "extreme pain." For all the foregoing reasons, the special circumstance allegation of torture murder should have been dismissed because of insufficient evidence. (*See,* ***People v. Crittenden,*** *supra,* 9 Cal.4th 83, 140.)

d. Even if the Jury Could Have Found the Victim's Wounds to Have Been Extremely Painful and that Appellant Intended that Result, There was Insufficient Evidence that Appellant Intended to Kill Her

Proof of the torture special circumstance requires evidence that the defendant intended to torture and kill the victim. ***People v. Proctor***, *supra*, 4th Cal. at 533. Here, as previously argued, the bindings of the victim show nothing more than an intent to immobilize her. Even assuming that the bindings and non-lethal wounds are enough to prove an intent to torture the victim, they are not sufficient to prove an intent to kill her. ***Proctor*** is distinguishable. There, the defendant's intent to asphyxiate the victim – the eventual cause of her death – supported by evidence of manual strangulation that preceded the ligature strangulation that led to her death. Here, no such evidence is present in the record. Thus, the special circumstance allegation of torture murder should have been dismissed because of insufficient evidence.

D. The Burglary Special Circumstance Allegation

1. Factual Background

As previously noted in Argument III(D)(1) herein, there was no persuasive evidence that the mousse can that was found in the bedding at the scene of the crime was used to assault Mrs. Deeble, whose body lay on the floor below. (R.T. 2013.) There was no convincing forensic evidence of an assault with a foreign object; the injuries to her vaginal cavity were relatively minor and consistent with consensual sex. (R.T. 2153; R.T. 2162; R.T. 2147 – R.T. 2148.) Dr. Fukumoto could not testify with any degree of probability that her injuries were caused by the

canister. (R.T. 2138, Lines 10 - 19; R.T. 2147, Line 19 – R.T. 2148, Line 16.) Finally, there was no serological evidence that the can was used in the assault. (R.T. 2496 - 2497; R.T. 2446; R.T. 2062.)

The evidence that a theft occurred at the Deeble residence during the commission of her murder was similarly insubstantial. Although her daughter alleged certain pieces of her mother's jewelry were "missing" after the murder. She had no way of knowing whether they were truly "missing" or simply misplaced. (R.T. 2081 – R.T. 2083.) Indeed, a ring that Mrs. Deeble was wearing at the time of her murder was not stolen. (R.T. 2060 – R.T. 2061.) The timing of the alleged thefts, if they indeed occurred, was a matter of speculation.

2. The Evidence of Burglary was Insufficient as a Matter of Law for this Special Allegation to be True

a. Introduction

Section 190.2(a)(17)(G) provides, in its pertinent part, that a defendant is death-eligible if the following circumstance is found to be true: "The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of the attempted commission of, or the immediate flight after committing or attempting to commit, the following felonies: burglary in the first or second degree in violation of Section 460."

The elements of the special circumstance of burglary require proof by a reasonable doubt that the defendant intended to commit the felony at the time he killed the victim and that the killing and the felony were part of one continuous transaction. (***People v. Coffman*** (2004) 34 Cal.4th 1, 87, *cert. denied*, (2005) 544 U.S. 953.) Accordingly, the jury was instructed as follows:

> "If you find that the special circumstance referred to in these instructions as murder in the commission of burglary is true, it must be proved:
>
> "(1A) That the murder was committed while the defendant was engaged in the commission of a burglary,
>
> "(B) The defendant intended to kill a human being, and
>
> "(2) The murder was committed in order to carry out or advance the commission of the crime of burglary or to facilitate the escape therefrom or to avoid detention. In order words, the special circumstance referred to in these instructions is not established if the burglary was merely incidental to the commission of the murder.

(R.T. 3137, Lines 9 - 23.)

* * *

> "The specific intent to commit burglary and the commission of such crime must be proved beyond a reasonable doubt."

"Every person who enters any building with the specific intent to steal, take and carry away to personal property of another of any value and with the further specific intent to deprive the owner permanently of such property or with the specific intent to commit the crime of penetration with a foreign object, a felony, is guilty of the crime of burglary, in violation of Penal Code Section 459. (R.T. 3130.) For felony murder, the defendant must form the intent to commit the felony before he entered the residence." (***People v. Sears***, (1965) 62 Cal.2d 737, 744, overruled on other grounds; ***People v. Calhill***, (1993) 5 Cal.4th 478.)[41]

b. There is no Evidence that the Predicate Crime of Burglary Occurred or was Intended

1. No Theft or Intended Theft was Proven

Preliminary, there was insufficient evidence to persuade any reasonable juror that the predicate felony (a theft) even occurred or was planned in order to satisfy this element. The only evidence introduced was the uncorroborated and high circumstantial opinion of the victim's daughter that she never saw certain items of jewelry that were worn by her mother after murder. (R.T. 2080, Line 709.) Obviously, this kind of evidence hardly demonstrates even a probability that the items in question were stolen or, indeed even missing from her mother's house, much less stolen by Appellant. This is especially true since there is no evidence in the record that Ms. Valentine even saw any of these items in her mother's

[41] The elements of burglary were defined for the jury at R.T. 3130, Line 3 – R.T. 3132, Line 7.

possession immediately before the homicide, except for a single necklace. (R.T. 2105, Lines 1 - 23.) Moreover, when the police arrived at the crime scene, the front door to the residence was unlocked and ajar, affording anyone easy access to the belongings inside. (R.T. 1990.) Indeed, thirty latent fingerprints as well as pubic body hair were also identified inside the residence; forensic examinations excluded Robert Edwards at the donor. (R.T. 2797 – R.T. 2799; R.T. 2330 – R.T. 2332.)

(*Compare*, ***People v. Coffman***, *supra* 34 C.4th 1, 88 (where there was compelling circumstantial evidence that the defendant stole the victim's answering machine, thus proving the burglary.)

2. No Penetration or Intent to Penetrate with a Foreign Object was Proven

The same startling voids of essential evidence is present with regard to the alternative allegation that Appellant assaulted, or intended to assault the victim with a foreign object (the mousse can.) There is no evidence in the record from which a reasonable juror could have concluded that he did so, beyond a reasonable doubt. Indeed, as previously observed, the prosecution's expert, with all his training and experience, could not say that Mrs. Deeble was sexually assaulted with a foreign object with any degree of certainty. (*Compare*, ***People v. Coffman***, *supra* 34 Cal.4th 1, 88, where pathologists' unequivocal testimony that sperm was

present in the victim's rectum was sufficient to establish the element of penetration for a sodomy felony-murder special circumstance allegation.) Again, even if one assumes that Appellant murdered Mrs. Deeble, and even if one further assumes that he assaulted her with a foreign object, there is no evidence from which a reasonable juror could have concluded, beyond a reasonable doubt, that he entered her home with that intent. There is no evidence that he had any sexual feelings towards her, or that he entered her home with the foreign object used to assault her. (*See*, ***People v. Anderson***, (1968) 70 Cal.2d 15, 35 (where the intent to commit the sexual assault -- pre-dating and independent of the homicide – was not satisfied because the prosecutor failed to present any evidence other than that of the murder itself).)

c. There was No Evidence that the Assailant Entered the Residence with the Intent to Commit a Felony

Even assuming that articles of value were taken from Mrs. Deeble's residence or that she was assaulted with a foreign object, and even assuming further that Appellant committed either of these acts, there is utterly no evidence in the record from which any reasonable juror could have concluded that he entered her residence with the intent to do so. (*Compare, **People v. Sears**, supra*, 62 Cal.2d 737, 746 (where the burden of proof to demonstrate an intent to assault the victim before the defendant entered the house was satisfied by evidence that he did

so with a piece of reinforced pipe underneath his short.) In sum, even if one makes several unjustified leaps of faith and concludes that Appellant stole some of Mrs. Deeble's jewelry during the homicide, there is absolutely no basis in the record to conclude that the theft was anything other than an impulsive opportunistic crime, wholly incidental to the homicide. There is simply no evidence upon which to conclude that he entered the residence with the intent to commit a felony or that he formed the intent to commit a felony before the application of fatal force.

d. There was Insufficient Evidence that the Assailant Intended to Commit the Felony at the time He Killed the Victim and that it was Part of a Single Continuous Transaction

Even assuming there was proof that a burglary occurred or was intended, and that Appellant was the responsible party, there was no proof that it was a continuous transaction: " . . . what is required is proof beyond a reasonable doubt that the defendant intended to commit the felony at the time he killed the victim and that the killing and the felony were part of one continuous transaction." (*cases cited*) (***People v. Coffman***, *supra*, 34 Cal.4th 1; 88.) In ***Coffman***, this Court was satisfied that the burglary and murder was a single transaction because the victim lived alone in an apartment that was difficult to find. This supported the jury's finding that the defendants formed the intent to burglarize the apartment before the victim was killed. There was also ample evidence to support a finding that the

defendants committed a theft of the victim's answering machine. (*Id.*) By contrast, the record in this case does not support a finding that either a penetration or theft, assuming they occurred, was planned as part of the murder of the victim; either act could have easily been an opportunistic afterthought. (*See*, ***People v. Ford*** (1966) 65 Cal.2d 41, *cert. denied*, (1987) 385 U.S. 1018, overruled on other grounds in ***People v. Satchell*** (1971) 6 Cal.3d 28, 35, where the murder of a deputy sheriff was not motivated by the robbery several hours earlier was therefore not part of one transaction.) Here, the timing, sequence, and motivation for the burglary and murder of the victim is a matter of impermissible, arrant speculation.

e. There was Insufficient Evidence that the Assailant had an Intent to Kill the Victim

Since this was a so-called ***Carlos***-era case, the prosecution was required to prove that the assailant intended to kill the victim. (*See,* ***Carlos v. Superior Court*** (1983) 35 Cal.3d 131, 135; ***People v. Anderson*** (1987) 43 Cal.3d 1104, 1139 – 1140, *cert. denied*, 534 U.S. 1136 (*overruling* ***Carlos***); ***People v. Duncan*** (1991) 53 Cal.3d 955, 973 fn.4, *cert. denied*, (1992) 503 U.S. 908 (holding that ***Anderson*** cannot be applied retroactively.) For reasons set forth in Section VII(C)(2)(d), the prosecution failed to introduce sufficient evidence to support a finding that Robert Edwards intended to kill the victim.

E. Conclusion

"Conviction of a capital crime which is not supported by substantial evidence violates Due Process of Law and a reliable penalty determination guaranteed by the Fifth, Eighth, and Fourteenth Amendments. (***Jackson v. Virginia*** (1979) 443 U.S. The failure of the prosecution to sustain its burden of proof on both special circumstance allegations also fails to narrow Appellant's case to those most deserving of death, in violation of his Federal Constitutional right under the Eighth Amendment. (***Zant v. Stephens*** (1983) 462 U.S. 862, 876 - 877.)

VIII. THE FIRST DEGREE MURDER CONVICTION MUST BE REVERSED BECAUSE OF INSUFFICIENCY OF EVIDENCE

A. Introduction

The jury was instructed that it could return a verdict of guilty of first degree murder upon one of two theories: murder by torture or felony-murder. (R.T. 3125 – R.T. 3126.) When the verdict was returned, there was no showing as to which of these two theories was adopted. (R.T. 3163 – R.T. 3166; C.T. 969.)

Section 189 of the Penal Code provides "all murder which is perpetrated by...torture... is murder of the first degree." The crime of murder by torture requires findings, beyond a reasonable doubt, that:

1) one person murdered another person;

2) the acts or actions taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death;

3) the perpetrator committed the acts with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose. (***People v. Davenport*** (1985) 41 Cal.3d 247, 207.) (R.T. 3132, Lines 11 – 19.)

Section 189 of the Penal Code also provides that "all murder . . . which is committed in the perpetration of, or attempt to perpetrate, . . . burglary . . . is murder of the first degree. The elements are:

"The unlawful killing of a human being, whether intentional or accidental which occurs during the commission of burglary is murder of the first degree when the perpetrator had the specific intent to commit such crime." "The specific intent to commit burglary and the commission of such crime must be provide beyond a reasonable doubt." (R.T. 3129, Line 24 – R.T. 3132, Line 7; ***People v. Cain*** (1995) 10 Cal.4th 1, 36, *cert. denied*, (1996) 516 U.S. 1077.)

B. Argument

1. There was Insufficient Evidence to Prove Torture Murder

Historically, this Court has "strictly construed the definition of torture in Section 189," (***People v. Steger*** (1976) 16 Cal.3d 539, 543.) The Court has taken this approach in part because many homicides not involving torture also leave the

victims with horrific wounds that are repulsive to view, wounds that may be indistinguishable from those torturously inflicted, and in part because a finding of torture murder relieves the jury of the obligation to determine whether or not the murder was premeditated and deliberate. "[A] restrictive definition of torture was reemphasized in ***People v. Tubby*** (1949) 34 Cal.2d 72...[and] we have consistently followed this strict construction of torture in cases applying Section 189." (***People v. Steger,*** 16 Cal.3d at 544.)

Here, the cause of the victim's death was asphyxiation due to ligature strangulation. (R.T. 2139.) Thus, to satisfy the requirement that "the acts ...to inflict extreme or prolonged pain were a cause of the victim's death," the prosecution must demonstrate the ligature had that effect, beyond a reasonable doubt.

As previously argued in Section VII, there is no proof -- save the inadmissible and unreliable opinion of Dr. Fukomoto – that the burst eardrum and lacerations caused by the ligature strangulation actually caused the victim extreme and prolonged pain. Moreover, unlike the special circumstance allegation, which requires proof of the infliction of extreme physical pain "no matter how long its duration," in order to prove murder by torture, the prosecution must establish that the torturous wounds were inflicted over a prolonged period of time. ***People v. Steger***, *supra*; "[M]urder by means of torture under Section 189 is murder

committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (***People v. Steger***, *supra*, 16 Cal.3d at 546; ***People v. Crittenden***, *supra*, 9 Cal. 4th at 137; proof that pain was inflicted continuously for a lengthy period could well lead to a conclusion that the victim was tortured. . . ." (***People v. Steger***, *supra*, 16 Cal.3d at 548.)

Death from ligature strangulation occurs in approximately six minutes; unconsciousness can occur in less than sixty seconds. (R.T. 2153 – R.T. 2154.) There is simply no evidence whatsoever establishing how long (if at all) the victim suffered extreme pain during that period. There is no evidence that the eardrum burst before death. There is no evidence that her neck was lacerated before death. Indeed, Dr. Fukomoto conceded that the lacerations could have occurred when the ligature slipped and was re-tightened, an event that could have easily occurred after death. Finally, as previously argued, the assailant's use of a ligature is merely consistent with an intent to immobilize Mrs. Deeble to overcome resistance to the burglary; no reasonable juror could conclude, beyond a reasonable doubt, that the binding was a sure sign that he intended his victim to suffer and die. (*Compare,* ***People v. Demond,*** in which evidence that the defendant forced a child to eat her own feces strongly suggested that the weekly beatings that lead to his death were prompted by sadistic impulses. (1970) 59 Cal.App.3d 574, 585.) Accordingly, there was insufficient evidence of torture murder because there was no solid

evidence that the victim suffered extreme or prolonged pain, that her assailant had the intent to inflict it, and that injuries that caused extreme or prolonged pain were the cause of her death.

2. There is Insufficient Evidence to Prove Felony Murder

Similarly, for the reasons set forth in Section VII, Appellant contends that the evidence as insufficient to show that Mrs. Deeble was murdered during a burglary. There was insufficient evidence, as a matter of law, that 1) a theft or penetration occurred; 2) that Appellant was responsible or 3) that it was anything more than a spontaneous act, wholly incidental to the homicide itself. (*Compare*, ***People v. Osband*** (1996) 13 Cal.4th 622, 691, *cert. denied*, (1977) 519 U.S. 1061, where the element of a taking was satisfied by proof that the contents of the murder victim's purse had been emptied out at the crime scene, personal possessions were missing, and the victim's wallet was mailed back to her relatives by the Post Office two weeks after the homicide; ***People v. Hayes*** (1990) 52 Cal.3d 577, 630 - 631, *cert. denied*, (1991) 502 U.S. 958, where the element of taking and a continuous transaction was satisfied by testimony that defendant admitted killing the victim as he was loading 30 cartons of cigarettes into the back side of his automobile and the discovery of the victim dead, with approximately 30 cartons of cigarettes missing from his office.

Likewise, for the reasons set forth in Section VII, Appellant contends that there was insufficient evidence that the victim's assailant entered her residence with the specific intent to penetrate her with a foreign object or commit a theft. Again, there was insufficient evidence to establish every essential predicate fact; there was no evidence from which a reasonable juror could find, beyond a reasonable doubt that 1) a theft occurred or that the victim was penetrated with a foreign object; 2) that her assailant entered the residence with the intent to commit that act, as opposed to committing it spontaneously, wholly apart from his intent as he entered the dwelling or 3) that Robert Edwards was the assailant who was responsible for the alleged penetration or theft. For felony murder, the defendant must form the intent to commit the felony before he entered the residence. (***People v. Sears***, (1965) Cal.2d 737, 455.)

"[M]ere speculation cannot support a conviction." (***People v. Marshall***, *supra*, 15 Cal.4th 1, 35.) "A jury is entitled to draw a vast range of reasonable inferences from evidence, but may not base a verdict on mere speculation." (***United States v. Long*** (D.C. Cir. 1990) 905 F.2d 1572, 1576.)

> "A reasonable inference, however, 'may not be based on suspicion alone, or imagination, speculation, supposition, surmise, conjecture, or guess work. [¶]…. A finding of fact must be an inference drawn from evidence rather than a … mere speculation as to probabilities without evidence." (***People vs. Perez,*** (1992) 2 Cal.4th 1117, 1133.)

The fact that the jury apparently bought the first-degree murder argument, as shown by the verdict, does not end the matter. Although a jury's factual finding is entitled to great deference, it is not immune from judicial review. "[T]he application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievable committed to jury discretion.... The power of the fact finder...has never been thought to include a power to enter an unreasonable verdict of guilt." (***Jackson v. Virginia***, *supra*, 443 U.S. at 317; ***United States v. Hogue*** (5th Cir. 1998) 132 F.3d 1087, 1090.) The evidence was insufficient as to each of the first-degree murder theories, in violation of Appellant's Federal Constitutional Rights to a fair trial, due process, and heightened reliability of determination is a capital case. (U.S. Const. Amends. V, VIII and XIV; ***Woodson v. North Carolina*** (1970) 428 U.S. 280, 305; ***Beck v. Alabama*** (1980) 447 U.S. 625, 638.)

IX. THE PROSECUTOR'S PERVASIVE PATTERN OF PRESENTING INADMISSIBLE EVIDENCE BEFORE THE JURY, PRESENTING EVIDENCE THAT WAS EITHER FALSE OR UTTERLY WITHOUT FOUNDATION, MISSTATING THE EVIDENCE, AND DISREGARDING THE COURT'S ADMONITIONS AGAINST IMPROPER QUESTIONS CONSTITUTED REVERSIBLE MISCONDUCT RESULTING IN A DENIAL OF APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND RELIABLE CAPITAL TRIAL AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

Defying the rules of evidence and the court's admonitions, the prosecutor engaged in a pervasive and prejudicial campaign to obtain a conviction at any cost. The prosecutor relied on such tactics as misstating the evidence, presenting evidence that was either false or utterly without foundation, referring to inadmissible evidence, and improperly using cross-examination to argue his case to the jury. This type of conduct has no place in the criminal judicial system: "Our justice system will crumble should those, in whose hands are entrusted its preservation and sanctity, betray its fundamental values and principles. Attorneys are obliged by oath to give due respect to the court and its officers. (*citation*)" (***Morrow v. Superior Court*** (1990) 30 Cal.App. 4th 1252, 1261.)

"Improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process." (***Darden v. Wainwright*** (1968) 477 U.S. 168, 181.) A prosecutor's intemperate behavior violates the federal constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (***People v. Gionis*** (1995) 9 Cal.4th 1196, 1214.) Conduct by a prosecutor that involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or jury also violates state law." (***People v. Espinosa*** (1992) 3 Cal.4th 806, 820, *cert. denied*, (1994) 512 U.S. 1253.)

The Fifth Circuit has articulated the importance of the rules governing criminal trials.

> "The Supreme Court and several federal appellate courts have long recognized that the prosecutor has the distinctive role in criminal prosecutions. As a representative of the government, the prosecutor is compelled to seek justice, not convictions. Justice is served only when convictions are sought and secured in a manner consistent with the rules that have been crafted with great care over the centuries. Those rules have not resulted from happenstance or indifference but are the product of measured, reasoned thought, marching under the guidon that criminal convictions should be based upon guilt clearly proven in a calm, reflective atmosphere, free from undue passion and prejudice."

(***United States v. Murrah*** (5th Cir. 1989) 888 F.2d 24, 27.)

In recognition of the respected position held by prosecutors, the Supreme Court has warned that improper the suggestion of a prosecutor "carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence." (***United States v. Young*** (1985) 470 U.S. 1, 18.) This court has emphasized that "(a) prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. (***People v. Hill***, *supra,* 17 Cal.4th 800, 820.) The prosecutor's important role in society carries with it equally important responsibilities: "It is as much (the prosecutor's) duty to refrain from improper

methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (***Berger v. United States*** (1935) 295 U.S. 78, 88.) Here, the prosecutor's conduct throughout Appellant's trial demeaned the integrity of the proceedings and undermined the fairness of trial.

B. The Prosecutor Falsely Suggested to the Jury that Scientific Testing of DNA had Excluded all Suspects but Appellant, by Asking a Question of his Witness which He knew to be Leading and Without Foundation

As set forth in Section VI(C), *infra*, the prosecution may not present testimony which it knows, or should know, is false or misleading. ***In re: Jackson***, *supra*, 3 Cal.4th 578, 595, *citing*, ***United States v. Agurs***, *supra*, and ***Napue v. Illinois*** (1959) 360 U.S. 264, 269. Additionally, a prosecutor may not question witnesses solely to get before the jury the inferred facts, insinuations and suggestions raised by the question rather than attempting to seek a truly responsive answer. (***People v. Wagner*** (1975) 13 Cal.3d 612, 619; ***United States v. Sanchez***, (9th Cir. 1999) 176 F.3d 1214, 1223.) Repeated questions calling for inadmissible or prejudicial answers may also be misconduct. (***People v. Evans*** (1952) 39 Cal.2d 242, 248-49) (misconduct where prosecutor repeatedly asked leading questions for apparent purpose of getting uncorroborated testimony before a jury.) It is "improper to ask questions which clearly suggest . . . the existence of facts which are (harmful) to the defendants, in absence of a good faith belief by the prosecutor

that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied." (***People v. Mooc*** (2001) 26 Cal.4th 1216), (*citing* ***People v. Perez*** (1962) 58 Cal.2d 229, 241).) The prosecutor eliciting inadmissible testimony during the examination of witnesses can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence. (***People v. Bolton*** (1979) 23 Cal.3d 208, 213.) "Statement of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (5 Witkin & Epstein, Cal. Crim. Law 2d ed. 1988) (Trial, Section 2901, p. 3550.)

During pre-trial proceedings, the prosecutor affirmatively represented that evidence of DNA testing would not be presented. (R.T. 147, Line 9.) Consequently, there was no litigation, and no court finding, about the reliability of whatever DNA testing of potential suspects may have occurred, let alone whether any DNA testing actually occurred. Nevertheless, under the guise of a "question," the prosecutor asked Sergeant Jessen" . . . "is it not true that (other suspects) had been eliminated by DNA from providing the samples at the Deeble residence of semen and fluids, and Mr. Edwards had not been eliminated, correct?" (R.T. 2820, Lines 14 - 17.) At the time the prosecution interjected the alleged results of testing before the jury, there was not a shred of evidence to support his unqualified

assertion to the jury that all suspects who had donated DNA samples had been eliminated, but not Appellant. Not surprisingly, the court sustained the immediate objection to the bombshell contained in this question.

The defense made a timely motion for a mistrial. (R.T. 2823, Line 4.) It argued that the witness had no basis upon which to "form an opinion as to whether those people were eliminated by DNA in the first place." (R.T. 2821.) The prosecution's statement to the jury about the alleged results of scientific testing was simply untrue. (R.T. 2886, Lines 4 – 15.) Secondly, the prosecutor's description of the results of DNA testing to the jury was improper rebuttal since no mention of that testing had been made during the defense. (R.T. 2822.) Finally, the defense argued that the insinuated results of the testing was so "incredibly inflammatory" that the attempted introduction simply to explain Sergeant's Jessen's "state of mind" when he chose to pursue Appellant as a prime suspect could not be justified. (R.T. 2826.) The court noted the absence of any proof at trial to justify the question and directed the prosecutor to "stay away from DNA unless you are going to put it on." (R.T. 2824.) In making this ruling, the court also noted that "DNA requires a hearing foundational evidence," none of which was in the record at the time the prosecutor elected to tell the jury that the focus of the investigation fell on Appellant because of DNA testing. (R.T. 2828.) The

court also noted that the prosecutor's description of the results to the jury were simply wrong:

> "The Court: And I am a little concerned about DNA, without a hearing on it, even though he was told that they were all eliminated, that the other names were eliminated as suspects. Actually, they are not eliminated. They are just not tied into a semen stain."

(R.T. 2830 – R.T. 2831.)

Over continuing defense foundational objections, the prosecutor then asked the witness whether "scientific testing" had eliminated suspects who had donated samples as a donor of semen and fluid discovered at the crime scene and whether those people had been eliminated in his mind based upon the information received from "lab personnel." The witness responded affirmatively to the misleading inquiry. (R.T. 2832, Lines 4 - 21.) The court also refused to deliver a supplemental admonition to the jury prepared by the defense.[42] Although the defense alleged that this stronger admonition was necessary because no DNA testing was ever done that eliminated all suspects other than Appellant, the court denied that request for the admonition; yet, it did not resolve the dispute as to whether the prosecutor's question about DNA testing had a factual basis and, therefore, was in good faith. (R.T. 2885 – R.T. 2889.)

[42] The failure to give that proposed instruction is addressed in Argument XI, herein.

Appellant contends that the prosecutor could not have a good faith belief that DNA testing had "eliminated" all suspects, save Appellant. The prosecutor acknowledged that the analysis that had been performed was useless. (R.T. 8 - 9.) The prosecutor made no effort to produce any evidence of DNA, despite the court's invitation to do so. (R.T. 2823 – R.T. 2824.) Similarly, the prosecutor made no effort to demonstrate to the court that DNA testing had been performed that eliminated all suspects as donors, other than Appellant despite defense counsel's assertion that it had not. (R.T. 2820 – R.T. 2821; R.T. 2888.) As previously argued in Section VI(C), it is reversible misconduct for a prosecutor to introduce misleading evidence (***United States v. Agurs***, *supra*; ***Napue v. Illinois***, *supra*. Nevertheless, the court ruled that there was no misconduct because the officer's "state of mind as to the exclusion of other possible suspects (was relevant) and the prosecutor had the capability of introducing DNA evidence, inconclusive as it was." Therefore, it denied the motion for a mistrial. (R.T. 2823, Line 20 – R.T. 2824, Line 11.) The court then delivered an admonition to the jury to disregard the letters "DNA" and that the questions posed to Sergeant Jessen were to be considered only to determine his state of mind. (R.T. 2837, Line 14 – R.T. 2838, Line 2.)

Preliminarily, while a defendant need not prove misconduct was intentional in order to obtain a reversal,[43] it is fair to assert that the prosecutor intentionally placed the alleged result of DNA testing before the jury; this is not a situation where a witness unexpectedly blurts out inadmissible evidence in response to a proper inquiry. (*Compare*, ***People v. Sapp*** (2003) 31 Cal.4th 240, 299, *cert. denied*, (2004) 541 U.S. 1101, where a prosecution witness blurts out that the defendant took a polygraph.); ***People v. Valdez*** (2004) 32 Cal.4th 73, 125, *cert. denied*, (2005) 543 U.S. 1145, where the court noted that the "prosecutor did not intentionally solicit, and could not have anticipated, the witnesses' improper disclosure of immaterial and prejudicial matter." Secondly, it is also fair to observe that the prosecution knew that he had not laid a foundation to demonstrate that his question had a good faith basis; indeed, after the court heard his description of the DNA testing at sidebar, it commented that his assertion that all other suspects had been "eliminated" as donors of the fluids found at the murder scene had no basis in fact. (*Compare*, ***People v. Ramos*** (1997) 15 Cal.4th 1133, 1173, (1998) 523 U.S. 1027 [where the prosecutor had certified records of facts to support his question to a defense character witness about Appellant's possession of a weapon in prison].)

In ***People v. Boldon***, the court held that "it is improper for a prosecutor to ask questions of a witness that suggests facts harmful to a defendant, absent a good

[43] (***People v. Hill*** (1998) 17 Cal.4th 800, 822 - 823.)

faith belief that such facts exist." (*cases cited*) (2002) 29 Cal.4th 515, 562 - 563, *cert. denied*, (2003) 538 U.S. 1016.) Here – even assuming that some questioning pertaining to Sergeant Jessen's state of mind was proper rebuttal – it is evident that the prosecution did not have a good faith belief that he could lay a proper foundation for the facts that he asserted; none was proven at trial, either before the question was asked or, or that matter, even after it was asked, despite the court's invitation to do so. (R.T. 2828, Line 6; R.T. 2868, Lines 9 - 14.) "(I)t is improper 'over the guise of artful cross-examination,' to tell the jury the substance of inadmissible evidence." (***United States v. Sanchez***, *supra*, 176 F.3d 1214, 122 (*quoting* ***United States v. Hall*** (4th Cir. 1993) 989 F.2d 711, 716.)) As the Ninth Circuit observed, "while prosecutors are not required to describe sinners as saints, they are required to establish the state of sin by admissible evidence unaided by aspersions that rest on inadmissible evidence, hunch or spite." (***United States v. Schindler*** (9th Cir. 1980) 614 F.2d 227, 228.)

Petitioner was clearly prejudiced by the prosecution's attempt to present false evidence. In ***People v. Farnam*** (2002) 28 Cal.4th 107, 168 - 169, *cert. denied*, (2003) 537 U.S. 1124.) There, the court held that there was no misconduct when a prosecutor asked an investigating officer whether the murder that the defendant allegedly committed was investigated as part of a series of murders of elderly women. The court noted that the inquiry was relevant background and that

its prejudicial impact was dispelled by the detective's testimony that the murder for which the defendant was tried was unrelated and dissimilar to the others. On the other hand, in this case, despite the trial court's recognition that the prosecutor had falsely told the jury that suspects other than Appellant had been "eliminated" by DNA testing, no clarification was provided to the jury that ameliorated the prejudicial impact of this assertion; the jury was simply told that the witness' response regarding the outcome of DNA testing was stricken and that all further questions about his investigation were offered for the limited purpose of showing his "state of mind" when he focused upon Appellant. The jury was not individually polled about their willingness to follow the court's admonitions; no response is evident in the record when the court asked the jury after its admonition "Can you handle that alright?" (R.T. 2837.)

The prosecutor's election to place the inadmissible results of DNA testing before the jury was particularly prejudicial since there was no other evidence connecting Appellant to the commission of the crime, save the disputed "other acts" evidence. While Sergeant Jessen did not reply to the prosecutor's "question," its argumentative and improper leading nature caused it to be more of a statement of fact to the jury, rather than an unanswered inquiry. Because of the high regard with which prosecutors are held, it is reasonable to assume that the jury could not ignore the assertion of fact contained in the impermissible question, especially

when it bore on such a critical issue of fact as the elimination of other possible suspects to a murder which remained unsolved for many years.

The danger of prejudice was heightened still further by the prosecutor's assertion that scientific testing - as opposed to less empirical evidence – eliminated all suspects but Appellant. The danger that the juror would consider the alleged results of DNA testing as a reliable and important indication of Appellant's guilt was multiplied to an almost incalculable degree by the trial court's improper ruling that permitted Sergeant Jessen to testify that unspecified information that he had received from unidentified "lab personnel" had eliminated all suspects, save Appellant, "as donors of the semen and fluid at the crime scene. (R.T. 2838 – R.T. 2839; *see,* Argument VI(C), herein.)

Sergeant Jessen's failure to respond to the improper question, and the court's subsequent admonition to the jury, did not cure its prejudice. In an analogous context, the Court of Appeals remarked, "nor is the impropriety of such cross-examination cured by the fact that the questions elicit negative answers." (***People v. Pitts*** (1990) 223 Cal.App.3d 606, 637.) As Justice Richards wrote:

> "The impropriety of the prosecutor's conduct in this case was not cured by the fact that his questions elicited negative answers. By the very nature the question suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question. The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for

> the purpose of getting before the jury the facts inferred therein, together with insinuations and suggestions they inevitable contained, rather than for the answers which might be given.'" (***People v. Wagner***, *supra*, 13 Cal.3d 612, 619; *quoting* ***People v. Hamilton*** (1963) 60 Cal.2d 105, 116.)

Finally, an instruction to the jury to disregard insinuations contained in questions to a witness do not invariably cure prejudice. (*See, e.g.,* ***People v. Wagner***, *supra,* where a reversal was required despite the delivery of such a curative instruction; *see, also,* ***People v. McGreen*** (1980) 107 Cal.App.3d 504, 517, overruled on her other grounds (1983) 34 Cal.3d 92.) Clearly, Appellant was prejudiced and his convictions and sentence must be reversed.

C. The Prosecutor Repeatedly Ignored Court Rulings by Referring to Inflammatory and Inadmissible Matters before the Jury

It is misconduct for a prosecutor to intentionally elicit inadmissible testimony. (***People v. Bonin*** (1988) 46 Cal.3d 659, 689), (overruled on another point, ***People v. Hill***, *supra*, 17 Cal.4th 800, 823 fn. 1.) Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after an adverse ruling. (***People v. Smithey*** (1999) 20 Cal.4th 936, 960, *cert. denied*, (2000) 529 U.S. 1026; ***People v. Bell*** (1989) 49 Cal.3d 502, 532, *cert. denied*, (1990) 493 U.S. 963.)

The prosecutor demonstrated his disregard for the court's rulings and Appellant's right to a fair trial by repeatedly and improperly denigrating Dr. Wolfe's testimony during its cross examination of him:

"Q	Now, from what I have heard you told us these women were really both pretty darn lucky because neither of them suffered nor felt any pain before they died?
Mr. Bates	Objection, misstates the witness, argumentative.
The Court	It is argumentative, sustained.
Q (by Mr. Brent)	Didn't you, in response to Mr. Bates' series of questions, basically have both of these women unconscious and not feeling any pain before they died?
A	Yes.
Q	And so if I would show you Exhibit 1, a photograph of Mrs. Deeble in death, and Exhibit 33, a photograph of Mrs. Delbecq in death, you are going to tell us, doctor, that these women did not feel any pain before they died?
A	Yes.
Q	They were fortunate, indeed, weren't they?
Mr. Bates	Your Honor, that is argumentative, Your Honor.
The Court	Sustained."

(R.T. 2516, Line 10 – R.T. 2517, Line 6.)[44]

[44] The prosecutor's habitual denigration of defense witnesses is also demonstrated when he asked Janis Hunt why she exposed her daughter to Appellant's drug use. (R.T. 2673, Lines 10 - 14.) During cross-examination, the prosecutor also challenged Appellant if he was willing to take responsibility for the choices he made. (R.T. 2627, Lines 3 - 17) and if individuals who sought drug abuse treatment could find it. (R.T. 2628, Lines 17 - 22.) Although the court overruled timely objections to these sarcasms, Appellant contends that they are further examples of the prosecutor's improperly argumentative style of examination.

Despite these rulings, the prosecutor reminded the jury during his closing argument of his improper attack on Dr. Wolfe:

> "Exhibit 1 and Exhibit 3, these are the two, these are the two photographs I held up. You are telling us that these women did not feel any pain? And I was a little sarcastic, frankly, when I asked that. Do we have that much to be grateful for that they did feel – yeah, they didn't feel pain he said, no, they did not feel pain. They did not feel pain. That is ridiculous. That defies common sense."

(R.T. 2906, Lines 16 - 25.)[45]

D. The Prosecutor Repeatedly made Remarks During his Examination of Witnesses and During his Closing Argument that He Must of Known were Improper

As noted above, a defendant need not demonstrate bad faith to gain appellate relief on the basis of prosecutorial misconduct. Yet, in finding reversible prejudice, cases have cited "blatant" misconduct by the prosecutor. (*See, e.g.*, ***People v. Hill,*** *supra*, 17 Cal.4th 800, 844.) Here, the prosecutor's continuous remarks that denigrated Appellant, his witnesses, and his counsel were blatantly improper, since no trial attorney would have believed that they were appropriate.

Furthermore, it is reversible error for a witness to testify over objection whether a previous witness was telling the truth. (***United States v. Geston*** (9th Cir.

---

[45] Although no objection or request for an admonition was made to this portion to the prosecutor's closing argument, Appellant contends that this point is nevertheless preserved for appeal because an admonition would not have cured the prejudice caused by the prosecutor's pervasive pattern of misconduct. (***People v. Hill,*** *supra* 17 Cal.4th 800, 820 - 882.)

2002) 299 F.3d 1130, 1136; *see, e.g.*, ***United States v. Henke*** (9th Cir. 2000) 222 F.3d 633, 643; ***United States v. Sanchez***, *supra*, 176 F.3d 1214, 1219 - 1220.) It is the jurors' responsibility alone to determine credibility. (***United States v. Sullivan*** (1st Cir. 1996) 85 F.3d 743, 749 - 750, [improper for the prosecutor to ask defendant a series of questions regarding whether another witness had lied because counsel should not ask one witness to comment on the veracity of the testimony of another witness]; (***United States v. Richtery*** (2d. Cir. 1987) 826 F.2d 206, 208 [error for prosecutor to induce a witness to testify that another witness, in particular, a government agent, has lied on the stand].)

Despite this settled rule, the prosecutor repeatedly asked Appellant if Kathy Valentine lied under oath; his misbehavior was especially blatant since it continued despite repeated rulings by the court that it was improper:

"Q (by Mr. Brent)	What I am wondering, Mr. Edwards, is with people in your condition losing inhibitions and becoming more aggressive, progressively losing fine motor coordination and then gross motor coordination, if you were under these conditions all the time, how could you have hidden that from Kathy Valentine?
A	Is that a question?
Q	That is a question. How did you do it?
A	I didn't hide from her. She knew my drinking and my using.

Q	But she testified that other than having a few beers one time and seeing you inject, she never saw you under the influence of anything?
A	I thought that was interesting when she testified to that.
Q	She lied, right?
A	Evidently.
Q	Do you know why she would lie against you?
A	Well, may be because I am accused of murdering her mother. I don't know.
Q	Do you think the acquisition is enough for her to come in here and lie in a serious crime?
Mr. Severin	Objection, speculation.
The Court	Sustained.
Q (by Mr. Brent)	Is that what you are saying, the reason they came in here to lie?
A	I don't know why she answered the – what she did the other day.
Q	She testified you were aware of a key at her mother's residence of a screen. Was that the lie or the truth?
A	It is not the truth?
Q	Do you know why she would lie about that?
A	No, sir, I do not.
Q	She didn't seem to paint you in a particularly awful light when she testified, did she?

Mr. Severin	Objection, this calls for speculation. It is an improper question.
The Court	Sustained.
Q (by Mr. Brent)	Did she come in here and make up a story that she admitted that you killed –
Mr. Severin	Objection, improper question.
The Court	Sustained.
Q (by Mr. Brent)	I am just wondering, Mr. Edwards, why you think she came in here and lied?
Mr. Severin	I am going to object, improper question, speculation.
The Court	Sustained.
Q (by Mr. Brent)	If you know.
Mr. Brent	Objection, it is the same objection.
The Court	Sustained."

(R.T. 622, Line 12 – R.T. 2624, Line 13.)

Unfortunately for Appellant, the prosecutor's denigration of defense witnesses continued throughout the trial. When the defense witness Janis Hunt gave an answer that displeased him, the prosecutor improperly challenged her credibility in front of the jury, rather than requesting a motion to strike or rephrasing his question; again, the court sustained a defense objection:

"Q (by Mr. Brent)	Ms. Hunt, I noticed that when we were breaking at the lunch break, that you looked over at Mr. Edwards and

	gave him a big wave and big smile. Do you remember doing that?
A	Yes.
Q	You still carry a little bit of a torch for him?
A	I still feel he is innocent.
Q	That is not what my question madam.
A	I am sorry.
Q	You wanted to say that, didn't you?
Mr. Bates	I will object, hostile and argumentative.
The Court	It is argumentative, sustained."

(R.T. 2668, Lines 12 - 24.)

Questions such as these that are designed to engage a witness in an argument or a debate are improper. (***People v. White*** (1954) 43 Cal.2d 740, 474 (cross-examination designed to argue with the prosecutrix properly excluded.) Nevertheless, despite no less than five consecutive court rulings that sustained objections to his improper attempts to have Appellant brand another witness as a liar, the prosecutor continued his improper behavior by asking Appellant to comment upon the testimony of the defense expert, Dr. Alex Stalcup.[46] Again, the court sustained a defense objection:

[46] The prosecutor's habit of ignoring adverse rulings was also demonstrated during his cross-examination of defense witness, Alden Olson. The court recognized the prosecutor's improperly argumentative style of cross examination

"Q	(Dr. Stalcup) talked about some of the things in the body, the loss of inhabitation that takes place as one begins to drink and get above a .08. Do you recall that?
A	Yes, sir.
Q	Your fine motor coordination begins to go away where it would be difficult to tie things or use your fingers to do fine type work. Do you recall that?
A	Yes, sir.
Q	And that eventually – it is only eventually that the gross motor coordination, stumbling and staggering takes place?
A	A huh.
Q	Dr. Stalcup never said that you as an addict or a user of alcohol didn't go through those stages, did he?
A	No. I don't – he doesn't know me.
Q	He doesn't know you?
A	Dr. Stalcup, he never interviewed me.
Q	Okay. And he talked about people in your condition, did he not?
A	Yes.
Q	That was the whole point of his testimony, wasn't it?
A	Yes.
Mr. Severin	Objection, calls for speculation.

---

by sustaining a defense objection to whether Appellant asserted that "50 million addicts" who wanted rehabilitative help could not get it. (R.T. 2628, Lines 10 - 16.)

The Court	Sustained.
Mr. Severin	Motion to strike the answer.
The Court	If there was an answer, it is stricken. The jury is ordered to disregard it."

(R.T. 2621, Line 9 – R.T. 2622, Line 11.)

These comments by the prosecution are not isolated, sarcastic asides made in the heat of trial that didn't bear on any material issue. (*See, e.g.*, ***People vs. Hillhouse*** (2002) 27 Cal.4th 469, 502, *cert. denied*, (2003) 537 U.S. 1114.) (During cross-examination, defense expert could not recall a particular meeting with defense counsel; the prosecutor replied "good move. Leave it off your bill.") Rather, they were repeated and improper efforts to strike at the heart of the fact-finding process: the jurors' role as the arbiters of credibility.

The prosecutor also improperly attacked defense counsel. A defendant's conviction should be based on evidence, and not the purported improprieties of his counsel. When a prosecutor denigrates defense counsel, it directs the jury's attention away from the evidence and is therefore improper. (***People v. Frye*** (1998) 18 Cal.4th 894, 979; *citing,* ***People v. Sandoval*** (1992) 4 Cal.4th 155, 183, *aff'd*, (1994) 511 U.S. 1.) Nevertheless, during defense counsel Daniel Bates portion of Appellant's closing argument, the prosecutor interrupted him. Instead of imposing a proper objection, the prosecutor angrily voiced his opinion to the jury

that defense counsel had intentionally sought to mislead them by asking them to consider whether Mrs. Deeble was unconscious during the assault:

"Q (by Mr. Bates)	Why do you have to get into these gory details, the acts taken by perpetrator to inflict extreme and prolonged pain. You got to find that the guy or gal intended to inflict the prolonged pain, something that lasts a long time. You have to find that intent. Okay? If the first thing that happened was that she was strangled, she would be unconscious in less than a minute. Dr. Fukumoto and Dr. Wolfe were not far off on that period. Dr. Fukumoto said less than a minute. Go back, review their testimony. Dr. Wolfe said maybe less than 30 seconds. They are within a few seconds of each other. Very quick. What about unconsciousness? Any of you who have seen a boxing match knows that when a knock-out blow lands, there is no lapse of time. And that is what Dr. Wolfe said. And again that is why Dr. Fukumoto was not called back on rebuttal to refute him. Dr. Fukumoto isn't going to say anything different from him –
Mr. Brent	That is not true, You're Honor, and in fact that unconsciousness is irrelevant and Mr. Bates knows it.
Mr. Bates	I objection to the constant objections.
The Court	The objection is sustained.
Mr. Bates	Doctor.....
The Court	Mr. Brent's objection is sustained."

(R.T. 2983, Line 2 – R.T. 2984, Line 2.)

Regardless of whether defense counsel's argument was legally sound,[47] it is improper for the prosecutor to suggest to the jury that he was intentionally raising an irrelevancy for it to consider. The allegation that defense counsel "knows" that his argument is frivolous distinguishes this record from that considered in other cases where the prosecution did not directly allege defense counsel's bad faith. (*See, e.g.*, ***People v. Frye***, *supra*, 18 Cal.4th 894, 978, [where the prosecution charged that defense counsel was "irresponsible" for raising arguments that were "ludicrous" and "a smoke screen"].) Rather, it is a plain example of the type of denigration that has been condemned by the California Supreme Court. (*See, e.g.*, ***People v. Sandoval,*** *supra,* 4 Cal.4th 155, 184, [accusation that defense was perpetrating "a fraud upon the court" went "far beyond" the boundaries of appropriate argument].)

In addition to the improper suggestion that defense counsel was intentionally attempting to mislead the jury, he was interrupted twice during his closing argument by the prosecutor's complaint that he had been personally attacked. In the first instance, defense counsel remarked that "Mr. Brent wanted to ride through his false front western town real fast." The court admonished him to "stick with the evidence." (R.T. 2989 – R.T. 2990.) Later, as defense counsel was describing the reliability of Dr. Stalcup's testimony, he noted that he had worked for the

[47] The victim's consciousness is shown to be relevant in Argument XI(C), herein.

Department of Justice, headed by Janet Reno. He speculated that the prosecution might discount the association because Janet Reno was a Democrat. This provoked the following exchange:

"Mr. Brent	Why does Mr. Bates bring me into every argument?
The Court	I don't know what politics have to do with this particular case, Mr. Bates.
Mr. Bates	Nothing at all, Your Honor.
The Court	Then stay away from it."

(R.T. 2995, Lines 9 - 14.)

Defense counsel described the prosecutor's suggestion that Dr. Wolfe was underqualified, compared to Dr. Fukumoto, as "derisory." (R.T. 2980, Lines 8 - 24.)

Apparently goaded by these innocuous remarks, the prosecutor retaliated during rebuttal argument:

"Mr. Brent	There is a word Mr. Bates used in describing me twice yesterday, a word called 'derisory.' I don't know what he meant. And he was in the middle attacking me personally over and over and over again when he was using that word.
Mr. Bates	I am going to object, this is not proper argument.
The Court	Overruled.
Mr. Brent	So I figured it had to be some kind of snap at me `derisory.' So I looked this word up. And 'derisory,' I

got a copy of it out of the dictionary here, a little page of it. 'Derisory' means it is worthy of derision. That didn't help me very much. What is this derision? Well, I looked up 'derision' which is about two words above there, and it says an object of ridicule or scorn, a laughing stock. That is what they think of me. That is what they think of this case.

(R.T. 3091, Line 10 – R.T. 3092, Line 1.)

* * *

Mr. Brent — They don't know what the defense is. They are defending the defendant without knowing the defense. They are hoping that by attacking the police, by attacking the crime scene, by attacking me, that is the old – you know, you know, I'm sure Judge Ryan has heard this hundreds of times, a thousand times, the old law school deal; we heard Mr. Bates and Mr. Severin, "a law school professor." You used to hear this all the time: 'if the facts are on your side, you argue the facts. If the law is on your side, you argue the law. If neither is on your side, you attack your opponent.' That is the only way I can explain. Why Mr. Severin didn't do that. I don't know why – I don't know why Mr. Bates had to get up there and start this attack.

I am going to object to the personal attacks, improper argument.

The Court — Overruled."[48]

(R.T. 3099, Line 10; R.T. 3100, Line 2.)

It is misconduct for the prosecutor in argument to impugn the integrity of defense counsel. (***People v. Cash*** (2002) 28 Cal.4th 703, 732 - 733, *cert. denied,*

[48] The trial court's ruling was improper, or at least inconsistent. As the trial court appeared to recognize when it repeatedly sustained the prosecutor's objections to Mr. Bates comments about him, closing argument should be

(2003) 537 U.S. 1199; ***People v. Herring*** (1993) 20 Cal.App.4th 1066, 1075-76.) Here, the prosecutor's remarks purported to simply respond to what he perceived to be as an unfair attack upon him. It is well-settled that improper comments by a prosecutor during his closing argument cannot be justified even though they may be made in reply to those made by defense counsel. (***People v. Perry*** (1972) 7 Cal.3d 756, 789.) In any event, the prosecutor's comments far exceeded the appropriate boundaries of fair comment to defense counsel's relatively mild remarks; indeed, since his objections to defense counsel's remarks were sustained by the Court, one wonders why the prosecutor felt that a reply was necessary at all, except as a pretext to savage defense counsel.

The prosecutor's comments went far beyond pointing out deficiencies in the defense case, which is permissible. (*See, e.g.*, ***People v. Cash,*** *supra,* 28 Cal.4th 703, 733, prosecutor's comment supported by evidence at trial.) The prosecutor accused defense counsel of thinking that he, as well as the case itself, was "a laughing stock." (R.T. 3091, Line 25.) Given the seriousness of the charges and the brutality of the two murders, the prosecutor's accusation that defense counsel was laughing at its case is an example of an inflammatory and personal attack that "directed the jury's attention to an irrelevant matter and (was) not proper comments on the evidence or inferences to be drawn therefrom. (*case cited*)"

---

based upon evidence in the record, or common knowledge and experience. ***People v. Brown***, (2004) 33 Cal.4th 382, 399 - 400, *cert. denied,* 125 S.Ct. 1297.)

(***People v. Herring***, *supra*, 20 Cal.4th 1068, 1075.) Certainly, defense counsel's personal assessment of the prosecutor and his case is irrelevant. (*See, e.g.*, ***People v. Herring,*** *supra*, "whether Appellant's counsel believed Appellant's testimony is irrelevant.")

The prejudice of the prosecutor's impermissible attack on defense counsel escalated when he charged that "(t)hey don't know what the defense is. They are defending the defendant without knowing the defense." (R.T. 399, Lines 11 - 12.) His objection carried the clear implication that defense counsel did not believe in Appellant's innocence, an implication which was as irrelevant and improper as it was inflammatory. "The role of the prosecutor is to see that those accused of crime are afforded a fair trial . . . and far transcends the objective of high scores of convictions. (*case cited*) Personal attacks on the integrity of opposing counsel constitutes prosecutional misconduct." (***People v. Herring,*** *supra,* 20 Cal.App. 4th 1068, 1076.) Here, as in ***Herring***, the prosecutor's remarks went to the heart of the defense by asserting that "defense counsel did not believe his own client." (*Ibid.)* (*See, also*, ***People v. Perry***, *supra*, 7 Cal.3d 756, 789, [where a conviction was reversed for prosecutorial misconduct, including a closing argument that "questioned the sincerity of "defense" counsel].)" In ***Herring***, the Court of Appeals recognized that admonitions by the court would not have cured the harm

and held that the judgment would have to be reversed. (***People v. Herring,*** *supra,* 20 Cal.App. 4th 1068, 1077.)

This case is distinguishable from the record in ***People v. Perry,*** *supra,* where this court found that the misconduct did not require reversal. In the instant case, the prosecutor's remarks were not brief; they were an extended diatribe on defense counsel's supposed attack upon him. Defense counsel's remarks cannot be construed as an inflammatory attack upon the prosecutor. At worst, they were a mild political irrelevancy and claim that the prosecutor rushed by certain weaknesses in his case during his opening address to the jury. On this record, it is unreasonable to dismiss the prosecutor's allegation that Appellant's counsel were laughing at the case and that they did not believe in the defense that they mounted on his behalf as a "mere polemic retaliation." (*Ibid.* at 791.) Finally, the evidence against Appellant "did not point unerringly to his guilt." (***People v. Pitts***, *supra*, 223 Cal.App.3d 606, 816.) Therefore, reversal is required.

E. Extensive Misconduct in Closing Argument Misled the Jury on Several Critical Issues and Resulted in a Fundamentally Unfair Trial in Violation of the State Law and the Federal Constitution

"A prosecutor's closing argument is an especially critical period of the trial." (***People v. Pitts***, 223 Cal.App.3d 606, 694.) It is long been recognized that:

> "The argument of the district attorney, particularly his closing argument, comes from an official representative of the People. As such, it does, and it

> should, carry great weight. Defense counsel and the prosecuting attorney do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. (***People v. Tally***, (1992) 111 Cal.App.2d 650, 677.)"

Accordingly, improprieties in closing arguments can, in themselves, violate due process. ***Chapman*** itself recognized that a prosecutor's closing argument could be so improper as to create federal constitutional error. (***Chapman v. California***, *supra*, 386 U.S. 18, 25-26; ***People v. Bolton***, *supra*, 23 Cal.3d 208, 214, fn. 4.) "Prosecutor's statements may violate Due Process in two ways: First, the statements may implicate a specific provision of the Bill of Right incorporated into the Fourteenth Amendment by the Due Process Clause; second, the statement may constitute a denial of due process generally." (***Rogers v. Lynaugh*** (5th Cir. 1988) 848 F.2d 606, 608.) As will appear, both forms of due process violation are present here.

It is improper for the prosecution to misstate the law during its closing argument, particularly if it has the effect of absolving the prosecution from its prima facie obligation to overcome reasonable doubt in all elements. (***People v. Marshall*** (1996) 13 Cal.4th 799, 831, *cert. denied*, (1997) 520 U.S. 1157; ***People v. Gonzalez*** (1990) 51 Cal.3d 1179, 1214 – 12115, *cert. denied*, (1991) 502 U.S.

835; ***People v. Hill, supra,*** 17 Cal.4th 977, 831.) "Tinkering" with the reasonable doubt instruction qualifies as a structural error and reversal per se. (***People v. Johnson*** (2004) 119 Cal.4th 976, 986; ***People v. Johnson*** (2004) 115 Cal.App.4th 1169, 1172.) Nevertheless, during his closing argument, the prosecution urged the jury that when it assessed Appellant's conduct "not to give him the benefit of any factual or mental, or anything to his benefit." (R.T. 2932, Lines 8 - 10.) The defense immediately objected:

"Mr. Bates	Your Honor, this is an improper lessening of the burden of proof of the prosecution. I asked that the prosecutor be admonished.
The Court	I am going to instruct the jury. You are going to get a chance to rebut and the jury will follow the Court's instructions.
Mr. Brent	You understand what I am saying? I want to repeat it. I don't want the defense to be doing something I should be. I am not talking about the burden of proof. I am talking about when Mr. Edwards, for example, gets up on the stand and gives you a story. These are the words of a convicted murderer. You can put those words in perspective. That is a man who has been convicted of murder. And when he tells you about the way things happen, you get to filter what he says to the fact that he is a convicted murderer as opposed to someone testifying who is not a convicted murderer. It makes a difference, doesn't it?

(R.T. 2932, Line 11 – R.T. 2933, Line 4.)

Even though (unlike ***Gonzalez*** and ***Marshall***) defense counsel made a timely objection, the trial court did not use the opportunity to rule on it and deliver a

curative instruction. Its comment that it would instruct the jurors later was inscrutable and did not have the curative effect that an immediate reminder to the jury about the prosecutor's burden of proof beyond a reasonable doubt would have had. Similarly, the prosecutor's attempt to recover from his misstatement by a quick remark that he "wasn't talking about the burden of proof" could not have had the ameliorative effect of a clear and immediate curative instruction from the trial court. Lastly, ***Gonzalez*** and ***Marshall*** are distinguishable since defense counsel's attempt to provide his own curative instruction during rebuttal was quashed by the Court:

"By Mr. Bates	You know, Mr. Brent, and God Bless him, he did a nice job when he tries to make you think what you are doing here is easy. It is not easy. When he tries to make you think it is all obvious, it is not obvious. And when he tells you at the tail end of his argument that he is not asking to decide this case on less then beyond a reasonable doubt, well, you know, you all can remember 15 years – 15 minutes ago, it seems like 15 years – 15 minutes in the core of his argument, you know, he said exactly that. He said – you know he said it. You can have the reporter read it back. He said don't give this man the benefit of the doubt, and he said as to the issues of specific intent and mental state, don't give him the benefit of the doubt. He said that –
Mr. Brent	Your Honor, that is not what I said.
The Court	Well, it is in the record and it is in your memories. If you need any help, my reporter will find it for you, okay? The People have the burden of proof, I don't recall anybody trying to lessen that. If somebody did, ignore it. You will get the law. I will read it to you very carefully,

	and I am going to give it to you in writing. And what I tell you about the law is what counts.
Mr. Bates	Ladies and Gentlemen, when Mr. Brent asked you to decide the case against Mr. Edwards on less than a reasonable doubt, which is what he means when he says don't give him the benefit of the doubt –
Mr. Brent	That is not what it means. That is not what I said, and I am going to object. It is improper. It is misstating my argument.
The Court	Your objection is sustained."

(R.T. 2953, Line 6 – R.T. 2954, Line 13.)

The court's belated reminder to the jury that the "People have the burden of proof" was no substitute for a favorable ruling on defense counsel's original objection and complete instruction that the People have the burden of proof, beyond a reasonable doubt. "(S)ince it is reasonably likely (the prosecutor's) comments taken in context, were understood by the jury to mean defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt . . . we conclude (the prosecutor) committed misconduct by misstating the law." (***People v. Hill, supra,*** 17 Cal.4th 800, 831 - 882; *see, also*, ***United States v. Roberts*** (1st Cir. 1997) 119 F.3d 1006, 1015, [prosecutor's improper comments that when defendant testifies he has responsibility to present compelling case is reversible error where no curative instructions requested or given]; ***Mahorney v. Wallman*** (10th Cir. 1990) 917 F.2d 469, 473 - 474 [prosecutor's remark that presumption of innocence

no longer applied to defendant reversible error where remarks undermined federal constitutional rights].) The unequivocal invitation by the prosecutor to deny Appellant any benefit when analyzing the proof, together with the absence of any immediate and clear curative instruction, requires reversal. (*Compare*, ***People v. Bell***, *supra*, 49 Cal.3d 502, 540, a combination of trial court's admonitions and instruction were sufficient to cure the potential prejudice of the prosecutor's misconduct.)

Finally, the prosecutor repeatedly and improperly suggested to the jury that the Deeble and Delbecq homicides were uniquely similar and, if they weren't, the defense would have introduced evidence to the contrary. During his examination of Dr. Wolfe, the defense pathologist, the prosecutor asked him "how many violent deaths have you heard about where there are mousse cans found at both scenes." The court sustained a defense objection. (R.T. 2520, Lines 8 - 14.) Notwithstanding the court's ruling, the prosecutor repeated the improper point during its closing argument and compounded the prejudice by arguing a fact that he must have known was not established in the record: that the defense team had access to "all the other murders" to compare to the charged offense:

"Mr. Brent: So, you know, what did you hear any of the defense witnesses – did you hear anybody in cross-examination by the defense on any of their experts, any of the buddies of Mr. Edwards, did you hear anybody come in here and tell you how these mousse cans got in both places? Do they have an explanation for you at any point along the

way? None. It can not be explained. Do they have access to show us all the other murders out there that happened this same way? Of course they do. There aren't any.

Mr. Bates — Your Honor, that assumes facts not in evidence –

The Court — Sustained.

Mr. Bates — Ask that comment be stricken.

The Court — It is stricken."

(R.T. 2933, Lines 4 - 20.)

F. The Trial Court Abused its Discretion When it Denied Motion for A Mistrial Following the Prosecution's Breach of Its Promise that it Would Not Disclose Appellant's Arrest for the Delbecq Murder to the Jury

The prosecutor's habit of ignoring rulings of the court extended to agreements with counsel. Shortly before trial began, defense counsel approached the prosecution to seek his assurance that no mention would be made during his opening statement of Appellant's arrest for the Delbecq murder. It was given. Nevertheless, not ten minutes later, during his opening address, the prosecutor disclosed to the jury that Appellant was "ultimately arrested" for that murder. (R.T. 1916, Lines 19 - 20.) At the sidebar conference that shortly ensued, the prosecutor admitted that he had breached his promise, but argued that defense motion for a mistrial should be denied because it was inadvertent and harmless.

(R.T. 1966, Lines 17 - 26.) The court commented, that "an arrest (was) a far cry from a conviction," and denied the motion. (R.T. 1967, Lines 13 - 16.)

In ***People v. Valdez***, *supra*, (2004) 32 Cal.4th 73, the Supreme Court held that a witness' explanation that he obtained a defendant's photograph from jail was too ambiguous a reference to a prior conviction to support a reversal, especially since no objection was made and the prosecutor didn't intend to elicit the disclosure from the witness. (*Ibid.* at 122 - 123.) Here, the record is quite different. The prejudicial remark came directly from the prosecutor; it was not an anticipated response from the third party witness. The prosecutor's attempt to minimize his responsibility by characterizing his disclosure as something that "just slipped out" in the heat of litigation must be viewed with considerable reservation in light of his concession that he promised not to make that disclosure only a few moments before he began to address the jury, as well as his disturbing habit of ignoring adverse evidentiary rulings by the Court. Unlike ***Valdez***, a timely objection and motion for a mistrial was made. Lastly, the disclosure did not require the jury to guess at its relevance. The jury was explicitedly told that Appellant had been arrested for the Delbecq murder. A mistrial must be granted when a defendant's chance of receiving a fair trial are irreparably damaged; a trial court's ruling is reviewed for an abuse of discretion. (***People v. Silva***, *supra*, (2001) 25 Cal.4th 345, 372.)

Here, neither the court nor prosecutor sought to excuse the disclosure as proper. Although Appellant's conviction for Delbecq murder was disclosed to the jury as impeachment of his direct testimony (R.T. 2605), the prosecution's disclosure of his arrest for the crime at the earliest stage of the trial was not harmless since it can be reasonably assumed that it may have strongly influenced Appellant's very decision to testify.

Although this court held in ***People v. Price*** (1991) 1 Cal.4th 324, 480 - 481, *cert. denied*, (1992) 506 U.S. 851, that disclosure of a defendant's arrest was harmless because he later testified about it, the case is distinguishable. There, the improper disclosure was made during the penalty phase of the trial and pertained to an attempted robbery that was otherwise unrelated to the case. By sharp contrast, the improper disclosure of Appellant's arrest was made during the guilt phase of his trial and pertained to a uncharged offense which the prosecutor expressly used as a basis for its argument that Appellant committed the charged offense. Therefore, it was an abuse of discretion to deny the motion for a mistrial.

G. Asserting "He is the Killer," the Prosecutor Injected his Belief as to Guilt

A prosecutor "may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence in his command on which he bases his conclusion." (***People v. Thompson*** (1988) 45 Cal.3d 86, 112, *cert. denied*, 488 U.S. 960.) In this case, the prosecutor repeatedly

accused Appellant of lying and of fabricating his defense, which he asserted was necessary because the prosecution had presented an open-and-shut case. Indeed, at the beginning of his final remarks to the jury, the prosecutor, with tongue in cheek, confided to the jury that he was going to hold up the two mousse cans and say "mousse cans" and sit down. (R.T. 2898.) He then concluded his remarks with the following assertion:

> "You know, we just – you know, any killer that knew both had access to these women, one knew her, one lived by, that is just any killer would have done. See, when you come to that conclusion, when you arrive there, then whether or not pubic hairs got left or not blown around or whatever doesn't mean very much. Because you know that, whereas that evidence would be in a crime scene or it wouldn't. You know it wasn't here, legitimately wasn't here. And that is just the way it was. Because he is the killer and it just didn't happen. I hope you see what I am saying by that. The possibilities of interpretation go away when you know what happened. So, folks, thanks so much."

(R.T. 3108 – R.T. 3109.)

The bald assertion "he is the killer" was not conditioned or linked directly to any argument from the evidence. It dispensed with the absence of proof. It was a pure assertion of prosecutorial opinion as to Appellant's guilt and the lack of merit in his defense, based on his personal knowledge the "truth." "(A) prosecutor may not, of course, vouch personally for the appropriateness of the verdict he or she urges." (***People v. Benson*** (1990) 52 Cal.3d 754, 795, *cert. denied*, (1991) 502

U.S. 924.) This type of factual assertion was condemned in ***People v. Bain*** (1971) 5 Cal.3d 839, p. 848, and it should be condemned here.

H. The Prosecutor's Continuing Pattern of Misconduct Deprived Appellant of his Federal Constitutional Right to a Fair Trial and a Reliable Capital Trial in Violation of the Fifth, Eighth and Fourteenth Amendments

1. Introduction

Prosecutorial misconduct requires reversal under federal law if it "so infected the trial within fairness as to make the resulting conviction the denial of due process." (***Donnelly v. DeChristoforo*** (1974) 416 U.S. 637, 643.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law if it involves "the use of deceptive or reprehensible methods to attempt to persuade the court of the jury." (***People v. Samayoa***, (1997) 15 Cal.4th 795, 841, *cert. denied*, (1998) 522 U.S. 1125.) Appellant need not establish "a pattern of misconduct" before obtaining relief; a single act of misconduct, in closing argument or examination of witnesses, for example, is sufficient to require reversal if it violated due process or another constitutional guarantee, undermined Appellant's right to a fair trial, or was otherwise prejudicial. (*See, e.g.*, ***Hicks v. Oklahoma***, *supra*; ***Chapman v. California*** (1967) 386 U.S. 18, 26; ***People v. Bain***, *supra*, 5 Cal.3d 839, 849; ***People v. Alverson*** (1964) 60 Cal.2d 803, 810; ["it seems quite clear that

prejudicial error occurred" based on one instance of misconduct during cross examination].)

2. The Drumfire of Unjustified and Comprehensive Misconduct Requires a New Trial, without Resort to a Prejudice Analysis

The misconduct at Robert Edwards' trial was pervasive. The tactics used to convict him cannot be explained as impulsive acts, spawned by the heat of litigation, or justified as hard blows, but not foul ones. They destroyed any realistic hope that he had for a fair trial, based upon the evidence impartially applied to the law. The misconduct extended to every category of prosecutorial impropriety that has been identified by precedent over the years.

- He told the jury that he was personally convinced of Robert Edwards' guilt;

- He attempted to introduce false and/or foundationless testimony that scientific testing, excluded all suspects to the homicide but Robert Edwards, but made no effort whatsoever to introduce the results of that alleged testing into the record;

- He denigrated defense witnesses, including Mr. Edwards, with argumentative and sarcastic asides and interjections;

- He attacked the competence of defense counsel by claiming that "they were defending the defendant without knowing the defense;"

- He misstated the law;

- He repeatedly ignored the trial court's efforts to enforce fair conduct.

Based upon this unremitting pattern of unfair and palpable prejudicial behavior, a per se reversal is compelled. ***United States v. Kerr*** (9th Cir. 1992) 981 F.2d 1050, 1052 - 1054; ***United States v. Burse*** (2nd Cir. 1976) 531 F.2d 1151, 1153-1154; [where "a pattern of prosecutorial misconduct," combined with trial error "infects the integrity of the proceeding," relief should be granted without evaluating its affect on the jury verdict]; ***Brecht v. Abrahamson*** (1993) 507 U.S. 619.) Thus, where, as here, the prosecutorial misconduct is egregious it "infected the entire proceeding and destroyed its fairness," it is so "incapable of redemption by actual prejudice analysis." (***Hardnett v. Marshall*** (9th Cir. 1994) 25 F.3d 875, 879 – 880, *cert. denied*, (1995) 513 U.S 1130.)

3. The Cumulative Prejudice of Prosecutor's Misconduct Requires Reversal

The persuasive prosecutorial misconduct in the case requires a new trial under both the federal and state standards because the trial was infected by the repeated use of deceptive and reprehensible methods of persuasion. As set forth above, the guilt phase of the trial was replete with instances of the prosecutor employing various improper methods to present prejudicial facts before the jury. What emerges is the troubling pattern of a prosecutor repeatedly ignoring both the

rules of evidence and the court's rulings and admonitions. The prosecutor breached pre-trial agreements with the court and counsel about staying away from potentially prejudicial areas such as DNA testing and Appellant's criminal record. The prosecutor repeatedly asked Appellant if witnesses were liars, despite clear precedent forbidding him from doing so. In closing argument, he sought to reduce the prosecution's burden of proof. He also argued facts which he knew were not in the record when he claimed that the murders were unique since the defense didn't introduce any proof to the contrary, despite its access to "all the murders." (R.T. 2933.) In the words of the United States Supreme Court, "such a machine gun repetition of denial of constitutional rights, designed and calculated to make (Appellant's) version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession." (***United States v. Chapman***, *supra,* 386 U.S. 18, 24.)

The prosecutor's actions in this case were "of a type which repeatedly has been condemned as flagrant misconduct. Rather than consisting of a single statement interjected in the heat of debate, they were interspersed throughout the closing argument in such a manner that their cumulative affect was devastating." (***People v. Kirkes***, (1952) 39 Cal.2d 719, 726.) Although one particular instance of misconduct may be sufficient to require reversal, the cumulative prejudice of overall misconduct requires a new trial. (*See*, ***People v. Hill***, *supra*, 17 Cal.4th

800, 845 ["although we might conclude any single instance of misconduct was harmless standing along, we cannot ignore the overall prejudice to defendant's fair trial rights caused (by prosecutor's) pervasive campaign to mislead the jury of key legal points, as well as her unceasing denigration of defense counsel before the jury];" ***People v. Purvis*** (1963) 60 Cal.2d 323, 348, 353 [combination of "relatively unimportant misstatement of law in fact," when considered on the "total record" and in "connection with other errors" required reversal]; ***People v. Herring***, *supra*, 20 Cal.App.4th 1066, 1075 - 1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal]; ***People v. Pitts***, *supra*, 223 Cal.App.3d 606 [although many instances of prosecutorial misconduct were mild and, if considered singly, would be inconsequential, the court considered their cumulative effect].)

Cumulative prejudice is not harmless error. (*See*, ***United States v. Sanchez,*** *supra*, 176 F.3d 1214, 1225 [conviction reversed because prosecutor committed misconduct in attempting to destroy defendant's credibility and in his argument to the jury]; ***United States v. Hands*** (11th Cir. 1999) 184 F.3d 1322, 1331 - 1332 [prosecutor's improper attacks on defense witness credibility were not harmless because key to defense case rested on witness credibility]; ***United States v. Wilson*** (4th Cir. 1998) 135 F.3d 291, 299 - 302 [prosecutor's improper closing argument indicated that defendant murdered someone during soured drug deal was not

harmless error because the remarks were not supported by the record, misled the jury, and were prominent and well developed; therefore, general curative instructions were insufficient of correct the record].)

In sum, as this Court has observed "you can't unring a bell." (***People v. Hill,*** *supra*, 17 Cal.4th 800, 846.) As in ***Hill***, the jury in this case "heard not just a bell, but a constant clang of erroneous law and fact." *Id.* Edwards should be given a constitutionally fair trial, free of pervasive prosecutorial misconduct. Because the misconduct assumed federal constitutional dimensions, the ***Chapman*** standard applies and Appellant is entitled to relief unless the state proves the misconduct was harmless beyond a reasonable doubt. However, even if the misconduct did not arise to a constitutional violation, prejudice exists under the ***Watson*** standard. (***People v. Pitts,*** *supra*, 223 Cal.App.3d 800, 815, "a miscarriage of justice (under ***Watson***) has occurred when the case is closely balanced and the acts of misconduct are such as to have contributed materially to the verdict. (***People v. Wagner,*** *supra*, 13 Cal.3d 612, 621.) Undeniably, the case here was closely balanced and the acts of misconduct were of the type likely to contribute materially to the verdict.

X. THE TRIAL COURT'S REPEATED INTERRUPTIONS OF DEFENSE COUNSEL'S CLOSING ARGUMENT TO THE JURY VIOLATED STATE LAW AS WELL AS APPELLANT'S

CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND HEIGHTENED RELIABILITY IN A CAPITAL TRIAL

A. Introduction

During his summation, defense counsel was prevented from arguing a key inference from evidence in the record that Appellant did not harbor the requisite intent to cause "extreme and prolonged pain" as well as prevented from introducing a demonstrative exhibit to rebut the central theme of the prosecution: that the California and Hawaii homicides were uniquely similar.

Section 1093(e) of the Penal Code provides that "(w)hen the evidence is concluded, unless the case is submitted . . . without argument . . . counsel for defendant may argue the case to the court and jury." A corollary to the Sixth Amendment's constitutional right to be represented by counsel is the right of counsel to present argument to the jury in an attempt persuade the fact finder of the defendant's innocence. (***People v. Manning*** (1981) 120 Cal.App.3d 421, 423.) Under Section 1040 of the Penal Code, the court has the duty to limit argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

B. Standard of Review

The trial court has broad discretion under Section 1040 to assure a defendant is afforded a fair trial. Unless there is a patent abuse of discretion, a trial court's

determination under this section must be upheld on appeal. (***People v. Cline*** (1997) 60 Cal.App.4th 1327, 1334.)

C. The Trial Court's Rulings Violated State Law

1. Unconsciousness was A Relevant Issue

As set forth in Section VIII, an essential element of the crime of murder by torture is the element that the perpetrator acted with the intent to inflict extreme and prolonged pain for any sadistic purpose. (C.T. 943; C.T. 962.) Likewise, for the special circumstance of murder involving the infliction of torture to be true, the perpetrator must have the same specific intent. (C.T. 943; C.T. 953.) Nevertheless, when defense counsel began to argue that the act of quickly rendering the victim senseless by a "knock-out blow" was inconsistent with a finding of an intent to cause extreme and prolonged pain, the court sustained the prosecutor's objection.

"Q (by Mr. Bates)	What about unconsciousness? Any of you who have seen a boxing match knows that when a knock-out blow lands, there is no lapse of time. And that is what Dr. Wolfe said. And again that is why Dr. Fukumoto was not called back on rebuttal to refute him. Dr. Fukumoto isn't going to say anything different from him.
Mr. Brent	That is not true, Your Honor, and in fact that unconsciousness is irrelevant and Mr. Bates knows it.
Mr. Bates	I object to the constant objections.
The Court	The objection is sustained.

Mr. Bates Doctor –

The Court Mr. Brent's objection is sustained."

(R.T. 2983, Line 16 – R.T. 2984, Line 2.)

While a victim's actual awareness of pain is not an element of the crime of murder by torture or the special circumstance of murder involving torture,[49] the court's ruling failed to recognize the legitimacy of defense counsel's argument that an assailant's decision to render his victim quickly insensible to pain is powerful circumstantial evidence that he did not intend to cause "extreme and prolonged pain;" in this important way, consciousness is not "irrelevant," as the prosecutor so strongly advised the jury in a typically improper "speaking" objection. As the Court held in ***People v. Cole***, evidence that a murder victim suffered extreme pain is "part of the circumstances of the crime relevant to prove intent to torture, both for murder by torture and the torture murder special circumstance. (*cases cited*)" (2004) 33 Cal.4th 1158, 1197.) Counsel is entitled to make relevant arguments, based upon properly admitted evidence. (*See*, ***People v. Washington*** (1969) 71 Cal.2d 1061, 1083 - 1084, [in murder by torture, prosecutor was entitled to comment upon the injuries suffered by the victim and reaction of her treating health professional during its closing argument to prove its theory of the case].)

[49] (C.T. 943; C.T. 962.)

Here, likewise, based upon the testimony of the pathologists that Mrs. Deeble suffered a heavy blow to her head (R.T. 2130 – R.T. 2133) and that strangulation could cause loss of consciousness in seconds (R.T. 2153 – R.T. 2154), defense counsel should have been permitted to argue that the assailant lacked the requisite intent to cause extreme and prolonged pain. The prosecutor's interruption, which contained an improper argument before the jury and an unfair charge that defense counsel was trying to mislead the jury was, in effect, adopted by the court when it construed it as an objection and sustained it. The net consequence of the court's ruling was to persuade the jury, first of all, that defense counsel could not be trusted because he advanced arguments which he knew to be misleading and, second, to instruct them to disregard a powerfully exculpatory piece of circumstantial evidence bearing upon essential elements in both the crime of murder and the special circumstance of murder by torture. In this regard, the court's ruling had the exact opposite effect of a curative instruction; it magnified and gave credence to the dual improper suggestions in the prosecutor's speaking objection. (*Compare*, ***People v. Thomas*** (1970) 3 Cal.App.3d 859, 864; [where the court's stern admonition to the jury to disregard an improper suggestion by the prosecutor during closing argument cured the prejudice to the defendant].)

2. The Demonstrative Exhibit Should Have Been Allowed

As set forth in Section III, the alleged similarity in the charged offense and the murder of Muriel Delbecq seven years later was an indispensable argument for the prosecution; quite simply, if the jury found that the similarities were coincidental, rather than circumstantial proof that the assailants were the same, the prosecution had no case. The trial court should take a liberal posture towards counsel's right to argue its case as eloquently and as persuasively as possible. (***California v. Palmer*** (1984) 154 Cal.App.3d 79, 89, fn. 9.) Accordingly, defense counsel has been given broad discretion to read such things as newspaper articles to the jury on the issue of identification, if the material deals with matters of common knowledge. (***People v. Travis*** (1954) 129 Cal.App.2d 29.)

Notwithstanding these authorities, the court prohibited defense counsel from playing not more than five minutes of a television program that depicted striking similarities in the lives of two women, such as the same date of birth, the same maiden name, same wedding anniversary, children born in the same years, and the same social security numbers. (R.T. 3043 – R.T. 3053.) The court denied permission to play the exhibit because there was no foundation of the accuracy of the information presented in the program; it permitted counsel to describe the contents of that program to the jury. (R.T. 3052 – R.T. 3053.)

In exercising its discretion to determine whether an outside source, not in evidence, can be used during closing argument, cases have held that the trial court

should read the material and consider whether it relates to matters of common knowledge or substantially illustrates common experience, whether the material is relevant to the case, and whether it may confuse the issues in the case. (***People v. Palmer,*** *supra.*) The court denied the request to play the videotape without listening to the brief segment, despite defense counsel's urging to "see the tape, look at the tape and judge for yourself." (R.T. 3048, Lines 17 - 18.)[50] In so doing, the court abused its discretion by ruling without fully informing itself. The trial court's failure to review the brief segment of the videotape in order to properly exercise its discretion is similar to the error in ***People v. Guzman*** (1975) 47 Cal.App.3d 380, overruled on other grounds, 44 Cal.3d 137.) There, the Court of Appeals found a violation of the rule of ***Travis*** because defense counsel was "stopped from reading from a book merely because he was reading and not because the court examined what he intended to read." (*Ibid.* at 392.) Although defense counsel attempted to describe the contents from the videotape program to the jury following the court's decision to "let him play with it for awhile" (R.T. 3046 – R.T. 3048; R.T. 3052), this summation was no substitute for the dramatic impact of the actual program itself.

The videotape, although not more than five minutes, included interviews with not two but three women named Patricia and Campbell with the same date of

[50] The videotape was made part of the supplemental record. Clerk's Supplemental Transcript, July 2004, page 20.

birth. Two of the women not only shared the same social security numbers, but all other life circumstances far more detailed and dramatic then could be reasonably and effectively described by defense counsel during his closing argument. (*Compare*, ***People v. Guzman*** [where the error was found non-prejudicial because "counsel was allowed fully to state those considerations in his own words without reference to supporting authorities.]" (*Ibid.* at 392.) (*emphasis supplied*).)

For all the foregoing reasons, the trial court abused its discretion and unfairly limited defense counsel's closing argument, in violation of Appellant's Sixth, Eighth and Fourteenth Eighth Amendment rights to counsel, to present a defense, to due process of law, and to heightened reliability in a capital case. (***Hicks v. Oklahoma***, *supra*; ***Beck v. Alabama***, *supra*.) Appellant is entitled to a new trial.

XI. THE COURT VIOLATED STATE LAW, AND DENIED APPELLANT HIS FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN IT REFUSED JURY INSTRUCTIONS PROPOSED BY THE DEFENSE

A. The Court Erred When it Refused to Deliver A Further Cautionary Instruction to the Jury about the Limited Use for Which it Could Consider Sergeant Jessen's Testimony that the Investigation Focused Upon Appellant after He was Advised that Scientific Testing had Eliminated All Other Suspects

1. Factual Background

As set forth in Section VI(C), the court sustained a timely defense objection to a question posed to Sergeant Jessen which asked him whether he began to focus on Appellant to the exclusion of other individuals who furnished fluid, hair, and fingerprint exemplars because those persons had been "eliminated by DNA" and Appellant had not. (R.T. 2820, Lines 14 - 20.) The defense made a timely motion for mistrial which was denied. (R.T. 2837 – R.T. 2838.) The court delivered the following admonition to the jury:

"The Court Earlier in the trial certain evidence was being offered for a limited purpose. Well, the last question by the way. The jury is ordered to disregard it. But these questions of this officer are being offered for a limited purpose, and the limited purpose is this officer's state of mind. And what that is relevant to, I think will become obvious by the questions and by any cross-examination on those questions. The letters "D-N-A" were used in the last question. Don't assume or think about it. Those letters are stricken. They are meaningless as far as your duty is concerned. Is that understood? Can you handle that all right?"

(R.T. 2837, Line 14 – R.T. 2838, Line 2.)

The record does not reflect any affirmative response from the jury in response to the court's inquiry. The defense proposed that the following supplemental instruction was necessary to protect Appellant's right to a fair trial:

> "Sergeant Jessen testified yesterday that seven named individuals were eliminated by 'DNA' testing. After consultation with the attorneys it

> appears that the statement was false. There never was DNA testing regarding the seven named individuals. Other testing led Sergeant Jessen to believe they were not viable suspects in his mind."

(R.T. 2885, Line 8 - 10; C.T. 852.)

The defense asserted that the admonition was necessary and appropriate because the prosecution's question to Sergeant Jessen was in bad faith:

> "Your Honor, I think in light of what I am bringing before the Court now we need a much stronger admonition for this reason: It is not that there just wasn't a 402 regarding DNA and other foundational issues, the statement itself is apparently not true. The seven named individuals were never tested for DNA and they were never excluded by DNA. I think other various testing of perhaps an ABO type was done. But the specific invocation of the kind of evidence that people find I believe to be one of most powerful of all is not true. It is factually unfounded. And for that reason I think a much stronger admonition is – I'm not going to reargue our motion for a mistrial, but I think a much stronger admonition is required. And I included ***People v. Bolton*** for the People and the Court because I think it is a very comparable kind of situation. That happened to come up during closing argument. This came up during rebuttal. Evidence at the end of the case is taken to have a disproportioned impact, whether it be closing argument or rebuttal. And in fact in ***Bolton*** there was a comparable type situation in that the prosecutor alluded in argument to evidence which, in fact, did not exist. It wasn't just that the defendant's prior record hadn't been introduced. He did not have one. And I think that is directly comparable here, too. It is just not the DNA wasn't introduced. There wasn't any DNA testing in the seven named individuals. So I think as in

> ***Bolton*** it would be appropriate to admonish now and then given them the same wording as an instruction for them to take back in the jury room."

(R.T. 2886, Line 4 – R.T. 2887, Line 10.)

The prosecutor replied that the defense was wrong and that DNA testing was performed. However, he offered no proof of that fact. Instead, he argued against proposed admonition:

> "Mr. Brent Well, Mr. Bates is wrong. There was DNA testing; but even if he were correct and it was other testing, the matter has been – is solved. Because the only time the words "DNA" came from my mouth was when I asked Sergeant Jessen if based upon DNA testing – and I went on with the question. At that point the defense objected. Sergeant Jessen never answered. We had our sidebar conference. We agreed that – or the court said that the way I should ask the question was scientific testing, and the court admonished the jury to forget DNA. And so the only thing the jury has heard, the only question that the detective was asked to which there was an answer was specifically on scientific testing. And so this is completely unnecessary."

(R.T. 2887, Lines 11 - 26.)

The defense demanded a "citation to the record" by the prosecution to back up his claim that DNA testing was performed; he received none. (R.T. 2888, Lines 2 – 10.) Nevertheless, the court denied his motion for a further admonition, finding that the instruction that was delivered was an adequate response. It concluded with this observation:

"The Court Your motion for a further admonition is denied. Your request for further instruction is denied. This material was adequately covered yesterday. And I also disagree with your assumption that people, which includes the jurors, have this great reliance on DNA. I mean that has been disproved in a very major case which was recently litigated. This jury as far as I know hasn't heard anything about DNA. They heard the letters, and they were told to disregard that. I have to assume and I think I am legally correct on this that they would follow my admonition to disregard it. There was no evidence. They wouldn't – even if they did believe that, it is a highly reliable form of identification evidence; they didn't hear that. They didn't get it. So you opened the area up, you have, and properly so, by the way. I am not criticizing the defense. You have torn the crime scene investigation apart from top to bottom, hairs, stains, et cetera, et cetera, et cetera. You were trying to line up for the jury all these other possible suspects. What are the People suppose to do, just sit back and say go ahead and do; we did not have a good reason for doing further testing? They came back with what they were legally entitled to come back with. And that may have included DNA. The People chose not to go through the 400 Hearing with the DNA evidence, but the officer's state of mind was certainly relevant. And for good reason the People chose not to do it. It may never come in because of the figures.

(R.T. 2888, Line 10 – R.T. 2889, Line 15.)

2. The Court was Required by State Law to Deliver the Defense Curative Instruction

Neither the court nor the prosecution responded to defense counsel's explicit request for proof to corroborate the claim that DNA testing was performed. The prosecution's failure to reply to defense counsel's reasonable request to resolve the factual dispute of whether DNA testing was performed make it equally reasonable

to assume that no testing was done. In fairness, the court's failure to press the prosecution on defense counsel's request before it ruled compel that assumption for purposes of this appeal.

The defense objection to the adequacy of the court's curative instruction was timely. (*Compare*, ***People v. Mayfield*** (1997) 14 Cal.4th 668, 778, *cert. denied*, (1997) 522 U.S. 839, [defense did not ask the court to clarify or amplify a "pinpoint instruction;" therefore, it can not complain on appeal].) The court did not reject defense substitute because it was an improper statement of the law.[51] Nor, as set forth above, did it contain any misstatements of fact. The trial court rejected the proposals solely because the admonition was "adequately covered" in its own instruction.[52]

[51] *Compare*, ***People v. Lenart***, *supra*, 32 Cal.4th 1107, 1133, [defense proposed instruction rejected because it incorrectly stated the law].)

[52] Plainly, the trial court's observation that evidence may have been admissible to rebut the defense complaint that the police failed to pursue other likely suspects did not invite the prosecution's assertion about the alleged results of DNA testing nor reduce the need for a powerful and unambiguous curative instruction to the jury.

The defense asserts that the court's curative instruction to the jury was not an adequate response to the prosecution's faulty assertion to the jury that DNA testing "eliminated" all suspects, save Appellant. For the reasons set forth below, a reasonable juror would not have been able to disregard this factual statement during the deliberations unless he received the curative instruction proposed by the defense. (*See*, ***People v. Ashmus*** (1991) 54 Cal.3d 932, 981, *cert. denied*, (1992) 506 U.S. 841 [to evaluate a defense claim that a jury instruction defining intent to kill was improper, the court must ask itself did the instructions adequately inform the jury of the elements of proof and how a hypothetical reasonable juror would have, or at least could have, understood the charge].)

First of all, the prosecutor's comments were in bad faith. At the time the assertion about DNA testing was made, no evidence of it had been presented to the jury nor was the defense given an opportunity to litigate the admissibility of the supposed "DNA testing." Since the prosecution essentially represented to the jury that DNA testing had "fingered" Appellant, so to speak, the defense deserved an equally unambiguous corrective instruction; indeed, all parties agreed that the assertion was improper and that a curative instruction must be made to the jury to utterly disregard it during its deliberations.

There was a high probability that the jury would consider the "fact" that DNA testing had eliminated all suspects, except Appellant, in its deliberations.

Because the prosecution chose to lead Sergeant Jessen, the question posed to him was not truly an interrogatory; it was an assertion of fact. Thus, the prosecutor's argument below that no prejudice occurred because Sergeant Jessen did not respond to his question was disingenuous. (R.T. 2887, Lines 18 - 21.) He did not have to. The jury well understood that DNA testing allegedly picked out Appellant by the very nature of "the question." Since the prosecutor himself described the results of the testing, the jury was less likely to follow the admonition it was given. As the Supreme Court recognized in ***Bolton,*** juries have a special regard for statements by prosecutors, as opposed to witnesses and defense attorneys. (*Ibid.* at 213.)

The court's reliance upon the fact that the jury did not hear any evidence about DNA testing was misplaced.[53] As this Court has recognized, by the time of Appellant's trial, juries were being asked to convict defendants of serious felonies almost exclusively upon DNA evidence. (*See, e.g.*, ***People v. Venegas*** (1998) 18 Cal.4th 47, 94, 96.) Contrarywise, it is a matter of common experience that since the 1980's, DNA testing had lead to number of spectacular exonerations of the falsely convicted.[54] Indeed, three years before Appellant's trial, the ability of

[53] "They heard the letters, and they were told to disregard that." (R.T. 2888, Lines 18 - 19.)

[54] According to the Innocence Project, a national group that works on preventing and reversing wrongful convictions, 159 people who have been convicted have been exonerated through post-conviction DNA testing since it has become available in 1989. San Francisco Chronicle, May 9, 2005, "Rough Landing for Exonerated Inmate;" *See, also,* PBS Frontline "Burden of Innocence," discussing the release of more than 100 inmates who have been exonerated by DNA testing. (www.pbs.org); Senate Bill (S. 233) introduced at the First Session of the 107th

scientist to use DNA was dramatized in the popular consciousness by the release of the movie Jurassic Park. Against this background, it was unreasonable to hope that the letters "DNA" would have little significance to the jury, unless actual evidence was introduced.

Lastly, and most importantly, there is a qualitative difference between instructing the jury "don't think about (DNA)" and instructing them to disregard the statement of fact expressed in the prosecutor's question because it was false. The former instruction requires the jury to perform the impossible mental gymnastics recognized by the Supreme Court in the ***United States v. Bruton***.[55] By contrast, the defense instruction tells the jury the reason it must disregard the prosecutor's assertion: because it was untrue. This latter instruction was patently more effective to address the mischief which all parties sought to correct.

3. The Trial Court's Failure to Deliver the Instruction Violated Appellant's Federal Constitutional Rights to a Fair Trial

The record in this case is easily distinguishable from those cases in which a defense special instruction was rejected as duplicative. (***People v. Mayfield***, *supra*; ***People v. Ashmus, supra; People v. Jackson*** (1944) 63 Cal.App.2d 586, 595.) Unlike those cases, there was a distinctive and material difference between an

---

Congress to place a moratorium on executions by the federal government found that "at least 10 individuals sentenced to death have been exonerated through post-conviction DNA testing, some within days of execution."

[55] "The naïve presumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction." (*Ibid.*at 129.)

instruction that was delivered to the jury and that proposed by the defense. This instruction told the jury that DNA testing was never performed. For the reason set forth above, this factual rebuttal to the prosecutions improper assertion of fact was necessary to prevent the jury from factoring it into their deliberations. A useful comparison can be made to the record ***People v. McAfee*** (1927) 82 Cal.App. 389. There, in an incest prosecution, the jury heard testimony from a bacteriologist about a stain described by the prosecution as smears of blood and spermatozoa from a handkerchief found by investigators near some bushes pointed out by the child victim. The court sustained a defense foundational objection and instructed the jury to "disregard all testimony with reference to the handkerchief in connection with this case." (*Ibid.* at 400.) However, unlike here, the court's ruling and admonition was preceded by a lengthy critique in the presence of the jury which, in a language of the opinion, "could have left no doubt in any juror's mind that the court deprecated the evidentiary value of the handkerchief." Here, by contrast, despite the assertion of the prosecution, the court refused to follow the defense request to "deprecate the evidentiary value of the (alleged testing.)" Instead, it simply told the jury to disregard it. While the court's admonition was forceful as far as it went, as the ***McAfee*** opinion suggests, its failure to advise the jury of the reason that it should disregard the test made it ineffective, compared to the defense instruction. A reasonable reliance upon the efficacy of the court's

admonition is undercut further by the fact that there is no record of an affirmative response by the jury to the court's inquiry of whether it could follow its admonition to disregard the letters "DNA." (R.T. 2838 – R.T. 2838.)

The evidence of Appellant's guilt is not so overwhelming as to render the court's failure to deliver the special instruction harmless. (*See, e.g.*, ***People v. Lenart***, *supra*, 32 Cal.4th 1107, 1133 - 1134.) As all parties recognized below, the evidence linking Appellant to the charged offense was legally insufficient, without the circumstantial evidence of his alleged participation in the Hawaii murder seven years later. The prosecution's assertion of fact paraded before the jury quite simply supplied the image of a conclusive forensic proof of his guilt in a case where there was no forensic evidence of any kind to establish his guilt. For all the foregoing reasons, the refusal of the trial court to deliver the defense proposed instruction denied Appellant his federal constitutional right to a fair trial. *Chapman v. California*, *supra*, and ***People v. Watson***, *supra*.

B. The Murder by Torture and Torture-Murder Special Circumstance Verbal Instructions were Erroneous because They Omitted an Essential Element that Appellant Inflict Pain on A "Living" Human Being

1. Factual Background

The court's written instruction to the jury regarding the elements of the special circumstance of murder involving the infliction of torture read:

> "No. 1, that defendant intended to kill a human being; No. 2, the defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or any sadistic purpose and No. 3, the defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration. Awareness of pain by the deceased is not a necessary element of torture."

(C.T. 962.)

The court's written instruction to the jury regarding the elements of murder which was perpetrated by torture read as follows:

> "The essential elements of murder by torture are: No. 1, one person murdered another person and No. 2, the perpetrator committed the murder with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose, No. 3, the acts or actions taken by the perpetrator to inflict extreme and prolonged pain were the cause of the victim's death."

(C.T. 953.)

However, during its verbal delivery of the instructions to the jury, the court omitted the word "living" from the second and third paragraph of its special circumstance instruction. (R.T. 3138, Lines 4 - 10.) Likewise, the court omitted the word "living" from the second paragraph of the murder by torture instruction.

(R.T. 3132.)[56] At the conclusion of the charge, the defense immediately brought the omission from the special circumstance instruction to the court's attention, but declined to pursue the matter since the clerk verified that written instructions contained the requirement that the act of torture must be upon a "living" human being. (R.T. 3143 – R.T. 3144.) During his closing argument, the defense read that portion of the Court's written instruction that required the jury to find the infliction of extreme cruel pain upon a "living person" and that intent to do so in order to find the torture special circumstance as true (R.T. 2977); the prosecutor did the same for the first-degree torture murder allegation. (R.T. 2901.)

2. The Trial Court's Failure to Verbally Instruct the Jury that a Finding of Torture Murder Special Circumstance and A Conviction of Murder by Torture Required Proof that Appellant Inflicted Extreme Cruel Physical Pain Upon a "Living" Human Being is Reversible Error

a. A Harmless Error or Waiver Analysis of the Instructional Error in Appellant's Case is Precluded because the Instructional Error Removed an Element of the Offense from the Jury's Consideration and Therefore Violated Appellant's Right to Trial by Jury Guaranteed by the Sixth Amendment to the United States Constitution

[56] In its introductory comments, the Court also omitted the word "living" from the special circumstance instruction, but included it in its definition of murder by torture. (R.T. 3126, Lines 7 - 15.)

Long ago, this court held "(I)t is the trial court's duty to see to it that the jury are adequately informed of the law governing all elements of the case submitted to them to the extent necessary to enable them to perform their function in conformity with the applicable law." (***People v. Ford*** (1964) 60 Cal.2d 772, 792 – 793, *cert. denied*, 377 U.S. 940.) Consequently, failure by the trial court to instruct on the elements on the offense is in violation of Appellant's Sixth Amendment right to trial by jury. ***Apprendi v. New Jersey*** (2000) 530 U.S. 466; ***Ring v. Arizona*** (2002) 536 U.S. 584; ***People v. Lee*** (1987) 43 Cal.3d 666, 673.

The failure of the court to instruct the jury on an essential element of the crime charged is the legal equivalent of directing a verdict for the prosecution on that issue. It is not subject to a harmless error analysis. It is error per se. (***Rose v. Clark*** (1986) 478 U.S. 570; ***Connecticut v. Johnson*** (1983) 460 U.S. 73; ***Jackson v. Virginia*** (1979) 443 U.S. 307; ***Cole v. Young*** (7th Cir. 1987) 817 F.2d 412, 425 - 426. (*See also*, ***People v. Valdez*** (2004) 32 Cal.4th 73, 115 ["even in absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence."].) This court's decision in ***People v. Crittenden,*** *supra*, is not to the contrary.

In ***Crittenden***, the trial court's verbal instructions to the jury regarding the elements of the special circumstance of torture murder state that "if" Appellant inflicted extreme pain, the victim need not be aware of it. On appeal, Appellant

argued that the instruction eliminated that he must, if fact, inflict extreme pain for the special circumstance allegation to be true. This court rejected the argument for three reasons. First, the court's verbal instruction did not eliminate the element of extreme pain; it merely advised the jury that the victim's awareness of it was irrelevant if the infliction of extreme pain occurred. Second, the written instructions to the jury unambiguously set forth the requirement. Third, the closing arguments of the parties discussed the element. (*Ibid.* at 138 - 139.)

Here, unlike ***Crittenden***, the verbal instructions to the jury unquestionably omitted an element of the special circumstance and murder by torture; that is, that Appellant inflicted extreme pain and intended to do so, upon a "living" person. Secondly, during their closing arguments, both parties did not inform the jury of the requirement of a "living" person, for the special circumstance to be true. While the prosecution read the instructions setting forth the elements of murder by torture, which advised the jury that an intent to inflict extreme pain on a "living" person was required (R.T. 2901.), he never advised the jury that it need find a "living" human being in order to find the special circumstances of torture to be true. Indeed, he warned the jury a number of times that the special circumstance elements are "a little bit different" and "actually contains some other language." (R.T. 2903.) Defense counsel also warned the jury that "murder by means of

torture and the special circumstance of torture are not the same. They don't have the same elements." (R.T. 2981.)

The danger that the jury might conclude from the court's verbal instructions and the prosecution's closing remarks that the requirement of a "living" human being was not necessary to find the special circumstance to be true was particularly acute because of the prosecution's repeated emphasis that the victim did not have to be aware of the pain in order for the allegation to be true. (R.T. 2927; R.T. 2904; R.T. 2707.) This increased the chance that the jury may have mistakenly concluded that the victim could have been actually dead at the time the relevant injuries were inflicted, and the special circumstance allegation could still be true. Indeed, the proviso that a victim need not be aware of pain and suffering in the murder by torture instruction also has the logical tendency to create doubt in the jury's mind as to whether the defendant need inflict pain upon a "living" human being, notwithstanding the instruction's requirement that his acts must be the cause of the victim's death; were it otherwise, the very requirement that the instruction advised the jury that the defendant must intend to inflict pain on a "living" human being would be surplusage. Thus, while defense counsel read the special circumstance instruction to the jury, including the requirement of the infliction of pain, and the intent to do so, on a "living" human being, the failure of these comments to match the verbal instruction by the Court as well as the argument of

the prosecutor is another important distinguishing fact from the record in ***Crittenden.*** (R.T. 2977.) Similarly, the failure of the trial court to verbally instruct the jury that a "living person" was required as an element of the first-degree torture murder crime was not cured by the prosecutor arguing that it was so; defense counsel did not expressly agree that this requirement existed during his closing argument and the conflict between the verbal and written instructions, and the varying arguments of counsel, was never explicitly resolved by the Court for the jury. Thus, the failure of the court's verbal instruction to the jury that the Appellant must inflict pain upon a "living" human being created an ambiguity about an essential element that was never expressly resolved for the jury.

b. Even Assuming that an Instructional Error which Omits an Essential element of a Capital Crime is Subject to Harmless Error Review, the Error in Appellant's Case was not Harmless Because the Jury Never Found, Pursuant to any Properly Given Instruction, that Appellant did In Fact Inflict Extreme Cruel Physical Pain Upon the Living Victim or Intended to Do So

In ***People v. Odle*** (1988) 45 Cal.3d 386, 414, *cert. denied*, 488 U.S. 917, this Court held that the failure to instruct the jury on an element of a special circumstance is subject to the ***Chapman*** "harmless beyond a reasonable doubt standard." Subsequent decisions by the United States Supreme Court and the

Ninth Circuit have undermined the continuing authority of ***People v. Odle***. It has now become clear that where the jury was not instructed on an element of the crime, such an error may be found to be harmless only where the instructional issue that was omitted was, in fact, resolved by the jury, albeit, in another context; the focus of an appellate court's inquiry must not be whether or not the jury could have found the omitted element based on the evidence in the record, but whether or not the jury actually found the omitted element to be true based upon another, properly given instruction. (***People v. Lewis*** (2006) 139 Cal.App.4th 874, 890; ***People v. Ochoa*** (1991) 231 Cal.App.3d 1413.) (*See, also,* ***McCormick v. United States*** (1990) 500 U.S. 257, 270; ***United States v. McClelland*** (9th Cir. 1991) 941 F.2d 999, 1002 - 1003.)

The jury was never unequivocally instructed that it must unanimously agree that Appellant in fact tortured a "living" victim and had the intent to do so; there was a conflict between the Court's verbal and written instructions that was never expressly resolved by the Court nor addressed by the parties during closing argument. Since that issue was never resolved in another instructional context or resolved by the jury in a different context. The jury's verdict does not exclude a reasonable possibility that it was reached without a finding that Appellant intended to inflict extreme pain on a "living" human being. The first degree murder conviction and special circumstance finding must be reversed.

3. The Failure of the Trial Court to Instruct the Jury that both a Conviction of Murder by Torture and a Finding of Torture Murder Special Circumstance Required Proof that Appellant Inflicted Extreme, Cruel Physical Pain Upon a "living" human being and had the Intent to do so Violated Appellant's Due Process Right under the Fifth and Fourteenth Amendments to the United States Constitution

The failure of the trial court to instruct the jury on this critical element of the crime of murder by torture and the torture murder special circumstance violated Appellant's federal constitutional due process right to have his case tried in accordance with applicable state law. (***Hicks v. Oklahoma*** (1983) 447 U.S. 343, 346; ***Hernandez v. Y1st*** (9th Cir. 1991) 930 F.2d 714.) Consequently, the trial court's failure to properly instruct the jury violated Appellant's federal constitutional right to due process of law. The murder by torture conviction and torture murder special circumstance must be reversed and the death sentence imposed upon Appellant must be set aside.

XII. CUMULATIVE ERROR

State law errors might not be so prejudicial as to amount to a deprivation of due process when considered alone, but may cumulatively produce a trial setting that is fundamentally unfair. (*See*, ***Greer v. Miller*** (1987) 483 U.S. 756, 765; ***Marshall v. Walker*** (1983) 464 U.S. 951, 962; ***Taylor v. Kentucky*** (1978) 436

U.S. 478, 488; ***Donnelley v. DeChristoforo*** (1974) 416 U.S. 637, 642 - 645; ***Mak v. Blodgett*** (9th Cir. 1992) 970 F.2d 614, 622, *cert. denied*, (1993) 507 U.S. 95.)

In the present case, Appellant's trial was fundamentally unfair because the numerous state law and federal constitutional errors precluded Appellant from adequately defending against the charges and the jurors' verdict from meeting the heightened reliability requirements constitutionally mandated in a capital proceeding, and deprived Appellant of his rights to due process, fair trial by jury, confrontation, compulsory process, representation of counsel and the right to present a defense, in violation of the Fifth, Sixth, Eighth and Fourteen Amendments. (*See*, ***Beck v. Alabama*** (1980) 447 U.S. 625, 627 - 645; *see, also*, ***Kyles v. Whitley*** (1995) 514 U.S. 419, 422; ***Burger v. Kemp*** (1987) 483 U.S. 776, 785; ***Gilmore v. Taylor*** (1993) 508 U.S. 333, 342; ***White v. Illinois*** (1992) 502 U.S. 346, 363 - 364; ***Donnelly v. DeChristoforo*** (1974) 416 U.S. 637, 646.)

The errors were cumulatively prejudicial. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (*See*, ***People v. Hill*** (1998) 17 Cal.App.4th 800, 845 [numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial: the combined (aggregate) prejudicial effect of the errors was greater than the sum of the prejudice of each error standing along]; ***Delzell v. Day*** (1950) 36 Cal.2d 349, 351; ***People v. Buffum*** (1953) 40 Cal.2d 709, 726;

People v. Ford (1964) 60 Cal.2d 772, 798; ***Du Jardin v. City of Oxnard*** (1995) 38 Cal.App.4th 174, 180; ***People v. McGreen*** (1980) 107 Cal.App.3d 504, 519 - 520.)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed under ***Chapman*** standard. (***People v. Williams*** (1971) 22 Cal.App.3d 34, 58 - 59; ***In re: Rodriguez*** (1981) 119 Cal.App.3d 457, 469 - 470.) Accordingly, this court's review of guilt phase errors is not limited to the determination of whether a single error, by itself, constituted prejudice. In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (***United States v. Frederick*** (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, Appellant has identified numerous errors that occurred during the guilt of his trial:

- The jury was improperly allowed to consider evidence that Appellant allegedly committed an uncharged and unrelated homicide, even though the evidence that he was responsible for the charged offense was insufficient as a matter of law.

- The jury was improperly allowed to consider testimony that scientific testing "eliminated" all the suspects, save Appellant, as the donors of biological material discovered at the scene of the charged offense, even though the reliability (and indeed the simple occurrence) of that alleged testing was never established in the record.
- The trial court improperly excluded the basis for expert testimony that the minor injuries to Mrs. Deeble's genitals were consistent with those that could have been caused by consensual sexual intercourse, which would have significantly undercut the key prosecution assertion that the charged and uncharged homicides were "The Tale of Two Mousse Cans," committed by a single individual: the Appellant.
- The jury was inundated by improper remarks, suggestions and highly prejudicial but unfounded factual assertions by the prosecution, despite repeated, though ineffectual, attempts by the trial

court to control him by rulings, admonitions and cautionary instructions.

Each of these errors individually, and all the more clearly when considered cumulatively, deprived Appellant of due process of a fair trial, of the right to compulsory process and to confront the evidence against him, of a fair and impartial jury, of the right to present a defense, of the right to representation of counsel, and of fair and reliable guilt and penalty determinations in violation of Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself, is sufficiently prejudicial to warrant reversal of guilt and/or death judgment. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

Because the errors violated Appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the errors could have affected the proceedings. (***Chapman v. California*** (1967) 386 U.S. 18, 23 - 24; *see, also,* ***In re: Rodriguez*** (1987) 119 Cal.App.3d 457, 469 - 470 [***Chapman*** standard applied to combined impact of state and federal constitutional errors]; ***People v. Williams*** (1971) 22 Cal.App.3d 34, 58 - 59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution can not

meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

ARGUMENT – PENALTY PHASE ISSUES

XIII. THE TRIAL COURT'S HANDLING OF THE VOIR DIRE DURING THE SECOND PENALTY PHASE TRIAL VIOLATED CALIFORNIA LAW AND DENIED ROBERT EDWARDS HIS CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAW, A FAIR TRIAL BEFORE AN IMPARTIAL JURY, AND A RELIABLE DETERMINATION OF PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Reversal is Required Because the Trial Court's Mishandling of Voir Dire Prevented Appellant from Intelligently Exercising Challenges for Cause

1. Introduction

The trial court interfered with Appellant's attempt to gather information from prospective jurors about whether their views regarding capital punishment would substantially impair the performance of their duties. As a result, there is no guarantee that the jurors selected were fair and impartial. This court must reverse the convictions and judgment of death without a specific showing of prejudice because the errors during voir dire prevented an assurance of an impartial jury, thus undermining the very structure of a capital trial. (***People v. Wheeler*** (1978) 22 Cal.3d 258, 283.) Here, there was not mere an erroneous denial of challenges for cause or an erroneous restriction on the substance or number of voir dire

questions; the combination of errors in these aborted the trial process and rendered it fundamentally unfair. The total failure of the voir dire process deprived Robert Edwards of the basic protection of an impartial jury without which "a criminal trial cannot reliably serve its function as a vehicle for determination of innocence and no criminal punishment may be regarded as fundamentally fair." (***Rose v. Clark*** (1986) 478 U.S. 570, 577; ***Neder v. United States*** (1991) 527 U.S. 1, 9; ***Beck v. Alabama*** (1980) 447 U.S. 629, 637 638; ***Zant v. Stephens*** (1983) 462 U.S. 862, 879; ***Johnson v. Mississippi*** (1988) 486 U.S. 578; 584 - 585.)

2. The Unconstitutionally Restrictive Voir Dire

The trial court repeatedly refused to allow Appellant's counsel to ask two prospective jurors (Nos. 166 and 212), who eventually were selected to serve and voted for a death verdict, whether they would automatically return a verdict of death in a case involving generalized facts likely to be presented by the prosecutor (a brutal double homicide):

"Q (to Prospective) Juror 166)	Can you, sir, see yourself returning a verdict of life without the possibility of parole for a person who has been convicted of first degree premeditated, intentional murder, torture, burglary, sexual assault, strangulation and there is another homicide in Hawaii of a similar nature that you as a juror, I am just telling you factually, have found to be true that he is responsible for as well?
Mr. Brent	I am going to object, Your Honor, it calls for prejudgment and speculation as phrased.

The Court	Sustained.
Q (by Mr. Severin)	Can you see yourself returning a verdict of life without possibility of parole, depending upon the evidence that has been presented to you for a person who has been convicted of first degree murder, torture and burglary and that homicide involved a sexual assault, strangulation, and you find as a juror that Mr. Edwards is also responsible for a similar type of homicide in Hawaii?
Mr. Brent	Same objection.
The Court	Well, it is the same question.
Mr. Brent	Right.
The Court	Should I change the ruling?
Mr. Brent	I don't think so.
The Court	I don't either, sustained.
Q (by Mr. Severin)	Are you open to considering the evidence in this case, mitigating factors that may be presented to you in this case and having the possibility of returning a verdict of life without possibility of parole?
A	I am definitely open to considering all the facts before I render any type of decision.
Q	Okay. Would you vote for the death penalty in every case in a situation where you have found a person guilty of more than one homicide?
A	No, I would not."

(R.T. 4875 – R.T. 4877.)

The trial court also prevented meaningful voir dire with respect to another person who actually sat on the jury (Juror No. 212) by defense counsel, Ms. Bernadette Cemore:

"Ms. Cemore	Now, I am going to ask you each this question, and I am going to give you some facts. It is something we talked about this morning. I want you to assume for the purposes of this question that if you are to sit here as a juror, you are going to hear evidence, okay? And the kind of evidence you are going to hear is about a murder that involves a strangulation; it involves a sexual assault with a foreign object; it involves blows to the head; a second murder that involves sexual assault with a foreign object, blows to the head and strangulation. Okay? Now you haven't heard any facts in mitigation. You have heard some circumstances of the crime.

(R.T. 4514 – R.T. 4515.)

* * *

Ms. Cemore	And you heard a little factual scenario that I have given. Those are really awful crimes.
Prospective Juror 212	Yes.
Ms. Cemore	And is that the kind of crime where you think that the death penalty is always going to be warranted?
Mr. Brent	Objection as phrased, asks to prejudge.
The Court	Sustained.
Ms. Cemore	Is that the kind of case where the death penalty would always be warranted in your mind without listening to any other evidence?

Prospective Juror 212	To answer your question, I don't think the death penalty is always warranted in any case."

(R.T. 4520 – R.T. 4521.)

In addition to prohibiting inquiry into whether prospective jurors' views on capital punishment would substantially impair the performance of their duties based on the generalized circumstances of the murders, the trial court also prohibited any inquiry into whether prospective jurors would consider mitigation evidence that was likely to be presented at trial.

"Q (to Prospective) Juror No. 286)	Are you going to be moved or persuaded in any way about evidence that involves Mr. Edwards childhood? Is that going to be the kind of evidence that would move you in any way?
A	No.
Mr. Brent	Objection, asks for prejudgment.
The Court	Sustained.
Q (by Ms. Cemore)	Are you going to be open – let me ask you, you said it's going to be hard to convince you. What would you need to hear to even to get you to consider evidence that you would find mitigating in any way?
Mr. Brent	Objection, calls for speculation.
Prospective Juror No. 286	I don't know.
The Court	Sustained."

(R.T. 4746.)

The court curtailed similar questioning for another juror.

Ms. Cemore (to Prospective Juror No. 113)	Okay. If you were to sit as a juror and you were to be told that some of these factors that I've made reference to earlier, not so long ago, that we called aggravating and mitigating factors, if you were to be told that one of the factors that you may be able to consider in aggravation, if there's evidence to support it, his alcohol and drug use, how do you feel about that? Because some people feel that that's an aggravating thing.
The Court	You may have misstated it.
Ms. Cemore	Do you want me to read it specifically?
Mr. Brent	You said aggravated, not mitigated.
Ms. Cemore	Did I misstate it? Thank you. I said aggravating; I meant mitigating, okay? It's one of the factors that can only be mitigating, okay? The reason I am asking is because a lot of people find that to be aggravating, but the law is going to tell you if you hear that evidence, you can only consider it as mitigating. What do you think about that?
Prospective Juror No. 113	I think its mitigating as far as he had the choice on whether to go on the drugs. Now - whether he's under the influence at the time of the crime, well, then that's something that we'll have to look at.
Ms. Cemore	Okay.
Prospective Juror No. 113	But other than that, I am not – I heard of few people that were on drugs that handled it quite well and others that don't handle it very well at all.
Ms. Cemore	Okay. And if His Honor were to instruct you that that's a factor that you can use only as a mitigating factor, based on all the evidence you hear and depending on how much

Mr. Brent	Your Honor, I am going to object. Can we approach briefly? I'll just say misstates the law, what counsel just said.
The Court	Sustained.
Ms. Cemore	You'd follow the law?
Prospective Juror No. 113	I would."

(R.T. 4536 – R.T. 4537.)

Appellant used a peremptory challenge to excuse Prospective Juror No. 113. (R.T. 4775.) Prospective Juror No. 286 was excused by stipulation. (R.T. 4754.) As set forth above, Prospective Juror Nos. 166 and 212, in seat numbers 6 and 9, respectively, were sworn and were part of the panel that eventually returned a verdict of death. (R.T. 4499; R.T. 4873; R.T. 5015.)

3. The Trial Court Prevented Permissible and Necessary Voir Dire in Violation of State Law and the Appellant's Federal Constitutional Rights

This court has reversed a death judgment due to inadequate voir dire in another capital case, ***People v. Cash*** (2002) 28 Cal.4th 703, *cert. denied*, (2003) 537 U.S. 1199. The limitation on voir dire in ***Cash*** was similar to the trial court's restriction on voir dire in Appellant's case.

In ***Cash***, defense counsel anticipated two prior murders would be introduced in aggravation during the penalty phase of the trial. During voir dire, counsel

wanted to ask prospective jurors if there were "any particular crimes" or "any facts" that would cause them to automatically recommend death over life without possibility of parole. The trial court refused to allow the inquiry, holding that counsel could not "go past the information." (*Ibid.* at 554 - 555.) Defense counsel then requested to ask the prospective jurors whether there were any aggravating circumstances which would cause them to automatically vote for the death penalty, without considering the alternative of life imprisonment without possibility of parole. The trial court again prevented the inquiry, ruling that any questions about specific acts of mitigation or aggravation would impermissibly require the prospective jurors to prejudge the case. This Court ruled that the trial court's rulings unduly restricted Appellant's right to determine "whether the jurors' views about capital punishment would prevent or impair the jurors' ability to return a verdict of death in the case before the jury (*case cited.)*" (*Id.* at 720.)

In so ruling, the ***Cash*** opinion re-affirmed the principle that counsel should be allowed to ask about circumstances likely to be present in the case tried which would impair the jurors' ability to impose a verdict of life without the possibility of parole. The opinion noted precedent that had allowed defense counsel to ask whether jurors would automatically vote for death "in cases involving any generalized facts, whether pleaded or not, that were likely to be shown by the evidence." (*Emphasis in the original.)* (*Id.*)

Although counsel was able to ask whether Juror No. 166 would automatically vote for death in a double homicide case, the limited inquiry was "so abstract that it failed to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties . . . ." (***People v. Cash***, *supra*, 28 Cal.4th 703, 721.) In order to flush out bias, counsel should have been permitted to add to his hypothetical the generalized facts of the double homicides: that they allegedly involved torture, burglary, sexual assault, and strangulation. Neither the prosecution nor the trial court contended that these facts were not likely to be introduced at trial; indeed, the torture and burglary were specifically pled.

The disallowed question posed by Ms. Cemore to Prospective Juror 212 is the very distillate of proper inquiry under the ***Cash*** opinion: whether a prospective juror would invariably vote for or against the death penalty because of one or more circumstances likely to be present in the case tried. While the trial court allowed her to rephrase the question by amending it to add "without listening to any other evidence," this amendment muddied the crucial inquiry, rather than clarified it, since the "other evidence" was not specified. Under ***Cash***, the only relevant amendment, if any, to the disallowed inquiry should have been whether the juror would automatically vote for death in the generalized circumstances of the case "without regard to the strength of aggravating and mitigating circumstances." (*Id.*

at 720.) Thus, the trial court's ruling, in effect, replaced a wholly proper inquiry with one that gutted the relevance of the answer.

Furthermore, the prosecutor's objections to the trial court's ruling of the voir dire of Juror Nos. 113 and 286 were baseless. The high court has consistently maintained that in capital cases "the fact finder must have before it all possible relevant information about the individual whose fate it must determine." (***Ford v. Wainwright*** (1968) 477 U.S. 399, 413, *quoting* ***Jurek v. Texas*** (1976) 428 U.S. 262, 276.) A defendant's childhood and history of substance abuse indisputably falls within the Supreme Court's mandates. (*See*, ***Hitchcock v. Dugger*** (1986) 481 U.S. 393 (sentence reversed where jury was precluded from hearing evidence that defendant "had the habit of inhaling gasoline fumes from automobile tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that (defendant) had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that (defendant) had been a fond and affectionate uncle to the children to one of his brothers.) ***Eddings v. Oklahoma*** (1981) 455 U.S. 104, 108 - 109, 112 - 116 (sentence reversed where sentencer refused to consider evidence of defendant's unhappy upbringing and emotional disturbance or his violent background.)

As the trial court later acknowledged,[57] in the context of penalty phase evidence, drug and alcohol abuse can only be considered by the jurors as mitigating evidence. Based upon this principle of law, the court erred when it ruled that whether asking Prospective Juror No. 286 would "be moved or persuaded in any way about evidence that involved Mr. Edwards childhood" impermissibly asked him to prejudge the case; the inquiry was necessary and proper to determine whether the juror's views on capital punishment would substantially impair his ability to consider mitigating evidence that was likely to be presented at trial. Similarly, preventing an inquiry into whether Prospective Juror No. 113 would consider alcohol and drug abuse – which would figure prominently in the evidence presented on the Appellant's behalf – only as mitigation evidence as the law required, significantly prejudiced his ability to secure an impartial jury.

4. The Restriction of Voir Dire in this Case is Reversible Per Se

> "California courts have long held that insufficient voir dire is presumptively prejudicial because it undermines the entire trial structure. The right to a fair and impartial jury is one of the most sacred and important guarantees of the constitution. Where it has been infringed, no inquiry as to the sufficiency of evidence to show guilt is indulged and a conviction by the jury so selected must be set aside. (***People v. Wheeler*** (1978) 22 Cal.3d 258, 283; *see, also*, ***People v. Gilbert*** (1992) 5 Cal.App.4th 1372, 1379.)"

[57] (R.T. 4625, Line 23 – R.T. 4626, Line 21.)

Courts of Appeal in California have also refused to apply a harmless error analysis and have reversed convictions without a specific showing of prejudice where voir dire is ineffective. In ***People v. Mello***, the California Court's of Appeal found that the error in the trial court's handling of voir dire was not subject to harmless error analysis.

> "The failure of the trial court to allow inquiry into whether mitigating evidence would be considered is outcome determinative. This error – which inevitably skewed the integrity of the entire voir dire process and adversely affected the manner in which the jurors could evaluate the evidence – is a defect effecting frame within which the trial proceeds that is not subject to harmless error analysis. (2002) 97 Cal.App.4th 511, 519."

The denial of the right to an impartial jury is a structural defect. Cases that hold that a violation of the guarantee of a public trial requires reversal without any showing of prejudice, even though the values of a public trial may be intangible and improvable. (***Waller v. Georgia*** (1984) 467 U.S. 39, 49). Likewise, the failure to allow general voir dire to ensure a defendant's right to an impartial jury should require reversal without showing any prejudice.

Where a jury is selected based upon scant or inaccurate information, defendant's constitutional guarantee of an impartial jury is rendered meaningless. The voir dire in Appellant's case was repeatedly deficient. As a result, there was

no assurance that any prospective jurors where cause were impartial, including two (Juror Nos. 166 and 212) who actually sat in judgment over whether Mr. Edwards would live or die.

As this Court has observed:

> "By absolutely barring any voir dire beyond facts alleged on the face of the charging document, the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously been convicted of murder was impaneled and acted upon those views, thereby violating defendant's due process right to an impartial jury. (*case cited*) The trial court's restriction of voir dire leads us to doubt that defendant was sentenced to death by a jury impaneled in compliance with the Fourteenth Amendment." ***People v. Cash***, *supra*, 28 Cal.4th at 723.)

Because Appellant was repeatedly forced to use peremptory challenges to excuse prospective jurors "by guess and by God," so to speak, without vital information regarding their attitudes towards the death penalty to which he was entitled, his trial was structurally deficient. As such, his case is distinguishable from the record in ***People v. Stewart***, (2004) 33 Cal.4th 425, 452 - 454. There, the trial court did not, on its own initiative, conduct voir dire in specific areas which Appellant later claimed on appeal imperiled his right to an impartial jury, such as his criminal record and drug use. This court held that while inquiry in these areas might have assisted defense counsel in exercising challenges, they were not

constitutionally compelled since the voir dire, as a whole, adequately explored potential bias. Here, by contrast and as in ***Cash***, inquiry into whether mitigating evidence would be considered or whether the death penalty would be automatically imposed is "outcome determinative." (***People v. Cash***, *supra*.) Thus, unlike ***Stewart,*** Appellant has provided a persuasive basis upon which to view the trial court's error as a structural defect.

In ***Cash***, the penalty decision was reversed because the trial court neglected to voir dire the jury in one area that might have been outcome determinative in sentencing. The circumstances in Appellant's case are even more problematic since he was prevented from proper inquiry into numerous areas that might have been outcome determinative. Appellant's convictions must be reversed because the court's wholly inadequate voir dire failed to protect the Sixth Amendment right to an impartial jury and his Eighth Amendment right to a reliable penalty determination.

5. The Death Verdict Must be Reversed, Even Under the Most Differential "Abuse of Discretion" Standard, Because the Trial Court Violated Appellant's Constitutional Right to an Impartial Jury and Right to a Reliable Penalty Determination

As argued above, under ***Cash***, Appellant is entitled to an automatic reversal of his judgment of death. However, even if this court applies the more differential "abuse of discretion" standard, reversal is still mandated. The trial court abuses its

discretion under when the scope of its voir dire is too narrow to produce sufficient information related to challenges for cause. (***People v. Banner*** (1992) 3 Cal.App.4th 1315.) An inadequate voir dire is one in which "the questioning is not reasonably sufficient to test the jury for partiality." (***People v. Wilborn*** (1990) 70 Cal.App.4th 339, 347.) In such a case, the manner in which voir dire is conducted is a basis for reversal because the resulting trial is fundamentally unfair.

As set forth above, the inadequate voir dire in this case did not provide defense counsel sufficient information to appropriately determine challenges for cause. This case is distinguishable from ***People v. Champion***, *supra*, 9 Cal.4th 879 and ***People v. Kirkpatick*** (1994) 7 Cal.4th 988, *cert. denied*, (1995) 514 U.S. 1015. There, unlike here, the record supported a finding that trial counsel had the ability to ask questions to discover whether prospective jurors' attitudes towards the death penalty would substantially impair the exercise of their duties. Additionally, in ***Champion***, none of the jurors affected by unduly restricted voir dire were erroneously retained in the face of a challenge for cause by defense counsel. Accordingly, the Supreme Court found that the trial court's voir dire caused no prejudice. (*Ibid.* at 910.) Here by contrast, the trial court's restriction of voir dire fatally impaired trial counsel's ability to ensure that jurors who <u>actually</u> sat in judgment would not vote for death, simply upon charged allegations in the case. Questions to Juror No. 212 regarding whether facts described by <u>other</u> jurors as

"heinous" would cause her to automatically vote for death or whether unspecified "facts" would overwhelm her ability to listen to the evidence are no substitute for responses based upon the actual allegations against Robert Edwards. (R.T. 4557 – R.T. 4560.) Similarly, asking Juror No. 166 whether he would automatically vote for death in a multiple homicide case described the allegations against Mr. Edwards too incompletely to satisfy the constitutional entitlement under ***Cash*** to question prospective jurors about generalized facts likely to by shown be the evidence. (R.T. 4877.) There, as here, the limited inquiry allowed by the trial court was too abstract to allow defense counsel to identify those jurors whose death views would substantially impair the performance of their duties.

Based upon the foregoing, the trial court's decision regarding voir dire cannot constitute a valid exercise of its discretion and is not entitled to deference on appeal. This court should independently review the record and reverse the judgment because there is no assurance that impartial jurors were selected to hear Appellant's capital case.

XIV. THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL RIGHT TO AN IMPARTIAL JURY BY IMPROPERLY RULING UPON CHALLENGES FOR CAUSE ABOUT WHETHER THE ATTITUDES OF PROSPECTIVE JURORS WOULD AFFECT PENALTY DELIBERATIONS

A. The Trial Court Violated Appellant's Federal Constitutional Right to an Impartial Jury by Granting a

Prosecution Challenge for Cause to a Juror Who Simply Expressed Reservations About Her Willingness to Vote for Death

1. Introduction

Prospective Juror No. 180 told the court that she was somewhat unsure if she could vote for a death verdict. The prosecution moved to discharge her for cause. The trial court sustained the challenge. These actions violated Appellant's right to an impartial jury, composed of a representative cross section of the community, a fair capital sentencing hearing, a heightened reliability in a capital case and due process of law. (U.S. Const. Amends. V, VI, VIII & XIV; Cal. Const. Art. I, Sections 1, 7, 15, 16 & 17; ***Witherspoon v. Illinois*** (1968) 391 U.S. 510, 521 - 523; ***People v. Hayes***, *supra*, 21 Cal.4th 1211, 1285.) Prospective Juror No. 180 did not state with the requisite degree of certitude that she would not consider death as an option under proper instructions from the trial court. The error is structural, and reversal of the penalty is required. (***People v. Heard*** (2003) 31 Cal.4th 946, 969, *supra*, (2004) 541 U.S. 910; *see,* ***Arizona v. Fulminante*** (1991) 499 U.S. 270, 310.)

The Supreme Court held that "(t)he state may not, in a capital trial, excuse all jurors who express conscientious objections to capital punishment. Doing so violates defendant's Sixth Amendment right to an impartial jury and his right to due process, and subjects the defendant to trial by a jury uncommonly willing to

condemn a man to die." (***Witherspoon v. Illinois***, *supra*, 391 U.S. 510, 521.) All the state may require is "that jurors will consider and decide impartially and conscientiously apply the law as charged by the Court." (***Adams v. Texas*** (1980) 448 U.S. 38, 45.) The same standard is applicable under the California Constitution. (*See, e.g.*, ***People v. Guzman*** (1988) 45 Cal.3d 915, 955.)

In applying this standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. ***People v. Ashmus***, *supra*, 54 Cal.3d 932, 962. The trial court bears a special responsibility to conduct adequate death qualification voir dire, as this Court recently emphasized. When a prospective juror's views appear uncertain, the trial court must conduct careful and thorough questioning, including follow-up questions, to determine whether his "views concerning the death penalty would impair his ability to follow the law or otherwise perform his duties as a juror." (***People v. Heard***, *supra*, 31 Cal.4th 946, 965.)

In ***People v. Stewart*** (2004) 33 Cal.4th 425, 440-455, this Court held that the trial court committed reversible error by excusing five prospective jurors for cause based solely on an expression of general objections to the death penalty. This Court reiterated the United State Supreme Court's holding that personal objection to the death penalty is not a sufficient basis for excluding a person from jury service in a capital case. (*Ibid.* at 446. *Citing*, ***Lockhart v. McCree*** (1986) 476

U.S. 162, 176.) However, this Court has held that where the record shows a prospective juror is equivocal about his or her ability to vote for death, (1) a trial court may decide to discharge the juror and (2) that decision is binding on the reviewing court. (*See, e.g.,* ***People v. Cleveland*** (2004) 32 Cal.4th 704, *cert. denied*, (2005) 543 U.S. 1058.) However Appellant respectfully requests this Court to review this standard, based upon the argument below.

Seven years after the Supreme Court decision in ***Adams v. Texas***, *supra*, the Court held that a trial court's exclusion of a juror who has been equivocal about her ability to serve was unconstitutional. (*See*, ***Gray v. Mississippi*** (1987) 481 U.S. 648.) During voir dire in that case, prospective juror H.C. Bounds was questioned. According to the State Supreme Court, this voir dire was "lengthy and confusing" and resulted in responses from Ms. Bounds that were both equivocal. (***Gray v. State*** (Miss. 1985) 472 So.2d 409, 422.) The prosecutor moved to strike Ms. Bounds for cause. The trial court resolved the ambiguity by sustaining the challenge. In both the ***Adams*** and ***Gray*** opinions, the United States Supreme Court made clear that when a prospective capital case juror gives equivocal responses, the state has not carried its burden to prove that those views would "prevent or substantially impair the performance of his duties as a juror.") (***Adams v. Texas***, *supra*, 448 U.S. 38, 45.) In light of ***Adams*** and ***Gray***, Appellant urges this Court to reconsider its precedent that permits the state to satisfy its burden of proof by

eliciting equivocal answers from perspective jurors. This rule cannot be squared with the rule applied in either ***Adams*** or ***Gray***, or the Eighth Amendment jurisprudence upon which they are based. United States Supreme Court precedence requires that where a juror is ambivalent about the imposition of the death penalty, he may not be excluded from service.

2. Application of the ***Adams*** Standard Requires Reversal because Prospective Juror No. 180's Equivocal Responses did not clearly Exclude Her Consideration of Death as a Penalty

a. The Voir Dire in this Case

At various times during her voir dire, Juror No. 180 repeated that she would "have a great deal of difficulty" voting for the death penalty and that life without possibility of parole was "probably as high as (she) could go." (R.T. 4451; R.T. 4491.) She explained that her reservations were personal, and not based upon religious conviction. (R.T. 4451, Line 19 – R.T. 4452, Line 9.) She speculated that those reservations might prevent her from reaching a penalty decision:

"Prospective Juror No. 180	I think I might come to a place where, I mean, in that process where I could not make any decision.
The Court	Are you saying that you would either vote for life without possibility of parole or not even vote at all?
Prospective Juror No. 180	I am saying that sometimes I find decision making extremely stressful. And it might come to that. Sometimes I get very depressed when I have to make a hard decision."

(R.T. 4491 – R.T. 4492.)

In the end, however, she confirmed that while she didn't want to vote for the death penalty, she could weigh mitigating against aggravating evidence and consider death as a potential penalty:

"Q (By Ms. Cemore) Can you see yourself weighing aggravating and mitigating factors and finding the aggravating outweighing mitigating and considering death as a potential penalty?

A I could consider it, but I don't want to vote for it."

(R.T. 4496, Lines 5 – 10.)

Based on the foregoing, the court granted a prosecution motion to excuse her for cause, over a defense objection that her equivocation did not sufficiently establish impairment:

"The Court See, that is the problem, Mr. Severin, we know where it lies. We can play words on the record all we want. Here is where it lies: this lady was very emotional and was to my questions, to Ms. Cemore's questions and to Mr. Brent's questions, very emotional. And if you watched her walk back to the jury room, she was near tears. We are talking about a stressful event. There is no way, no matter what evidence, no matter what the law, that this lady could ever vote for a penalty of death. No way. Or vote at all. That is another problem. She indicated or vote at all. Not in those words, but that is the concept. So she is excused on Mr. Brent's motion."

(R.T. 4499, Lines 8 - 21.)

b. The Challenge was Improperly Granted and the Penalty of Death must be Reversed

In ***Heard***, this Court held that the trial court erred when it granted a challenge for cause based simply upon a jurors affirmative response to the following written question: "Do you have a conscientious opinion or belief about the death penalty which would present or make it very difficult for you to ever vote to impose the death penalty?" The opinion explained that the trial court could not summarily grant the challenge, without further inquiry, based upon a juror's strongly expressed unwillingness to vote for death:

> "In light of the gravity of the punishment, for many members of society their personal and conscientious views regarding the death penalty would make it 'very difficult' ever to vote to impose the death penalty. As explained below, however, a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled – indeed, duty bound – to sit on a capital jury, unless his or her personal views actually would present or substantially impair the performance of his or her duties as a juror." (***People v. Heard***, 31 Cal.4th at 446.)

In this case, although the trial court and counsel questioned Juror No. 180 before the challenge was granted, the decision to remove the juror was similarly flawed since she did nothing more than repeatedly express her personal reluctance to vote for death. As set forth above, where she was asked if she could effectively participate in the deliberative process and consider death as a penalty, she stated that she could do so, although she didn't "want" to vote for death. Under ***Heard***,

this personal reluctance, even when forcefully repeated, is not grounds for a successful challenge for cause. The trial court simply did not ask the constitutionally relevant question.

In ***People v. Harrison*** (2005) 35 Cal.4th 208, *cert. denied*, 126 S.Ct. 201, this court upheld a trial court's ruling that a juror's ability to discharge her duties was substantially impaired because she was equivocal about whether she could vote for death; at one point she said that she could not, while at other points during the voir dire she allows that "maybe" she could do so. The opinion also noted the trial court's observation that the juror was "quite uncomfortable" during voir dire. The record in this case is distinguishable. Although Prospective Juror No. 180 was unsure about her ability to vote for death and participate in deliberations, she eventually stated that she could consider death as a penalty alternative and deliberate. As previously argued, under United States Supreme Court precedent in ***Adams*** and ***Gray,*** a prospective juror's equivocal responses do not satisfy the state's burden of proving impairment; the challenge was therefore improperly granted.

The improper granting of even a single challenge for cause requires reversal of a death verdict. (***People v. Heard***, *supra*, 31 Cal.4th 946, 969; ***Gray v. Mississippi***, *supra*, 481 U.S. 648, 660.)

B. The Trial Court violated Appellant's Federal Constitutional Right to an Impartial Jury by Refusing a

Defense Challenge for Cause to a Juror Whose Views about the Death Penalty Substantially Impaired her Ability to Perform her Duties as a Penalty Phase Juror

1. General Principles of Law

The preceding argument in Section A considered a prosecution challenge against a juror whose belief left her allegedly pre-disposed against the death penalty. This argument considers a prospective juror with beliefs that made her unfairly pre-disposed in favor of the death penalty. Although ***Witherspoon v. Illinois*** did not expressly consider this group, this court has made it clear that California Statutory law requires exclusion of such persons from a capital jury regardless of whether the federal constitution would compel such exclusion. (*See,* ***Morgan v. Illinois*** (1992) 504 U.S. 719; ***Ross v. Oklahoma*** (1988) 487 U.S. 81; ***Hovey v. Superior Court*** (1980) 28 Cal.3d 1, 63-64, fn. 1106.)

A challenge for cause against a prospective juror should be granted if there is a "state of mind on the part of the juror in reference to the case, or to either of the parties, which would prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party...." (Penal Code Section 1073.) In the present case, any doubts regarding the application of this standard in specific instances should have been resolved in favor of the defense. Special sensitivity is required because of the fact that this was a capital case. This court recognized in ***People v. Armendariz*** (1984) 37 Cal.3d 573, 583, that whenever the

integrity of the jury is at issue, the special role of the jury in capital cases calls for even greater concern than in other cases. (*See, also,* ***People v. Hogan*** (1982) 31 Cal.3d 815, 848.) Thus, special sensitivity to jury selection issues in a capital case should be given not only by the trial court, but also by this court in its appellate review.

In view of the extra sensitivity that should have been exercised by the trial court in this case, and the particular care that this court should give in reviewing issues pertaining to the fairness of the jury selection procedures, the denial of the challenge for cause in the present case constituted an abuse of discretion. With these principles in mind, we can proceed with the discussion of the specific challenge for cause that was wrongfully denied.

2. Argument

Prospective Juror No. 254 felt that imprisonment for a deliberate murder was a waste of time and that based upon the court's description of Appellant's crime alone, she would vote for death. (R.T. 4813 – R.T. 4814.) The prospective juror also held strong views about alcohol and drug abuse. She stated that such abuse was "a choice" and that the individuals who made it were "responsible for their actions as far as that goes." (R.T. 4815, Lines 16 - 22.) When informed that she could only consider drug and alcohol addiction as a mitigating factor, the

prospective juror professed to be open minded, but then made the following replies to summarize her attitude, if she were selected to serve:

"Q	If those are your feelings about drug and alcohol, and you see them as something bad about a person – that's not a very descriptive word but let's just go with that for now – how could you ever really consider them in terms of if you heard evidence of them as a mitigating factor when you think it makes somebody bad? Do you see what I am asking?
A	Yeah.
Q	I need you to be honest.
A	I don't know. I can't think of any words.
Q	I am not saying you will reject it if you hear it, but I'm asking if you can look at it and consider it as a mitigating factor?
A	My experience with it has been limited. What I've seen, I couldn't see it as a mitigating factor, no.
Q	Okay. And that's how you feel about it and everything that you know about it tells you about it, right?
A	Yeah, I have not had a lot of experience with it though."

(R.T. 4817, Lines 4 - 21.)

In response to an aggressive inquiry by the prosecutor, Prospective Juror No. 254 agreed that she was "open to listening to evidence" of alcohol and drug abuse and "open to the possibility of being persuaded." (R.T. 4821, Lines 15 - 21.)

The court denied the subsequent defense challenge for cause to Prospective Juror No. 254. Although the court agreed that the juror "clearly" didn't like substance abuse, it rejected the defense argument that her prejudice would substantially impair her ability to consider such abuse as a "wild jump." In so ruling, the trial court never addressed the juror's initial comment that life imprisonment for a deliberate murder was a waste of time. (R.T. 4821, Line 11 – R.T. 4825, Line 25.) The defense then immediately excused Prospective Juror No. 254 with a peremptory challenge. (R.T. 4826, Lines 4 - 7.)

3. The Challenge for Cause Was Improperly Denied

Under existing California precedent, if a prospective juror's statements regarding bias are conflicting or equivocal, the trial court's determination of the actual state of mind is binding. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence. (***People v. Horning*** (2004) 34 Cal.4th 871, 896 – 897, *cert. denied*, (2005) 126 S.Ct. 45.) Although Appellant contends that this analysis violates ***Gray v. Mississippi***, the conflict need not be addressed here because the trial court made no express finding as to the juror's state of mind nor did it characterize her responses about whether she would consider substance abuse as a mitigating factor as conflicting or consistent. Based upon the allegations against Mr. Edwards, the juror stated that she would vote only for death. (R.T. 4818.) While she acknowledged that she had not yet heard the

defense, her unequivocal distain for the alternative penalty of life without the possibility of parole for a deliberate murder should have left no realistic doubt about her pronounced auto-death penalty bias. Furthermore, Appellant contends that her affirmative response to the prosecution's single, leading, virtual command that she would be "open to persuasion" regarding evidence of substance abuse hardly qualifies as an "inconsistent" reply to a previously-stated acknowledgment that she could not see herself viewing that evidence as mitigating.

Unlike the record in ***People v. Horning***, Prospective Juror No. 254 did not reassure the trial court that she could follow the law, including the prosecution's burden of proof. In this regard, the trial court's recollection of the record was faulty when it commented that (Prospective Juror 254) did indicate quite clearly that she would following the law. "I can ask her again, but I am sure that is what she was saying." (R.T. 4823, Lines 7 – 9.) Additionally, the prospective juror never specifically denied being unfair as in ***Horning***, nor did she specifically retract her statement that she couldn't see substance abuse as a mitigating factor; her bare affirmation to the prosecutor that it was possible that she might be "persuaded" by defense evidence was wholly unconvincing, given her failure to explain <u>how</u> that evidence might "persuade" during her deliberations. In sum, since the record cannot support a finding that Prospective Juror No. 254 even gave a truly inconsistent reply to her stated position that substance abuse was not a

mitigating factor, this court must evaluate whether the trial court's ruling was supported by substantial evidence. Plainly, it was not.

As set forth above, this record lacks any of the assurances of fairness that were given by the juror during voir dire in ***Horning***. As in ***Horning***, this prospective juror believed imprisonment was a waste of resources for a person convicted of an intentional homicide; unlike ***Horning***, she never assured the court that she would not select the death penalty just to save the state money. Thus, while this prospective juror stated a general acknowledgment that her final penalty decision would await the presentation of all evidence, this generally professed willingness is not conclusive. (*See,* ***People v. Williams*** (1989) 48 Cal.3d 1112, 1129 ("a juror's declaration of impartiality ... is not conclusive.") Indeed, Prospective Juror No. 254's belief that the crime merited the death sentence and that life imprisonment would be a waste further undercuts a finding that "substantial evidence" supports the trial court's implicit conclusion that the juror would not be auto-death. Based upon this record, her views would have substantially impaired the performance of her duties as a penalty phase juror; the trial court erred when it overruled the defense challenge for cause.

4. The Trial Court's Error Requires Reversal of Appellant's Sentence of Death

This Court has held that to preserve a claim based on a trial court's overruling of a defense challenge for cause, Appellant must (1) use a peremptory

challenge to remove the juror; (2) exhaust all his peremptory challenges or justify his failure to do so; (3) express dissatisfaction with the jury ultimately selected. (***People v. Horning***, *supra*, 34 Cal.4th 871, 896.) Here, although the defense used a peremptory challenge to remove Prospective Juror No. 254, he did not exhaust his challenges nor express overt dissatisfaction with the jury that was eventually accepted. (R.T. 4859.) Nevertheless, Appellant contends that he was denied his federal and state constitutional rights by the improper denial of the challenge since trial counsel had no reason to believe that the exercise of additional peremptory challenges would produce a jury that was more fairly disposed. As set forth in Argument XIII, herein, defense counsel was "flying blind" because the trial court had improperly restricted voir dire; consequently, his ability to judge the qualifications of the panel was fatally impaired.

Analogous strategic considerations have been recognized. In ***People v. Motton*** (1985) 39 Cal.3d 596, 607 - 608, this Court recognized that experienced trial attorneys may seek a tactical advantage by passing their challenges when they are confident that there are particular jurors who will be challenged by opposing counsel. In ***People v. Box*** (1984) 152 Cal.App.3d 461, 465, the Court of Appeals noted that, "experienced counsel seldom exercised one remaining challenge unless they are confident that they will get a better juror than the one who will be excused." While the ***Box*** principle is clearest when there is only one remaining

challenge, it is just as real when there are numerous remaining challenges, if there is no reason to believe that the end result will be any better than the 12 people in the jury box. Thus, although Appellant did not exhaust his supply of peremptory challenges, the trial court's erroneous refusal to grant challenges for cause had an unfair impact on the jury selection. Since they prejudiced Appellant's right to an impartial jury under the Sixth, Eighth, and Fourteenth Amendments, the errors cannot be deemed harmless. (*See,* ***Woodson v. North Carolina*** (1976) 428 U.S. 280, 305; *see also*, Justice Harlan's concurring opinion in ***Reid v. Colvert*** (1957) 354 U.S. 1, 77.) The death sentence must be reversed.

XV. THE CUMULATIVE IMPACT OF THE PROSECUTOR'S RELENTLESS PATTERN OF OBJECTIONABLE QUESTIONS, ARGUMENTS AND ASIDES, DESPITE COURT RULINGS PROHIBITING HIM FROM DOING SO, VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND A RELIABLE DETERMINATION OF PENALTY; THE JUDGMENT OF DEATH MUST BE REVERSED

A. Introduction

In Section IX, Appellant noted that improper remarks by a prosecutor can so infect a trial with unfairness, that the resulting judgment becomes a denial of due process under the fourteenth Amendment. (***Darden v. Wainwright*** (1968) 477 U.S. 168, 181.) Throughout the guilt phase, the prosecutor violated Appellant's constitutional rights, as well as simple, common sense notions of fair play, by

making prejudicial and foundationless assertions before the jury disguised as "questions" and by misleading the jury during closing argument. The prosecution's behavior was especially reprehensible since it continued after the court admonished him to stop. *See*, Argument IX(C) herein.

As Appellant will develop more fully below, the jury that was impaneled to consider whether he should live or die was also bombarded with patently improper and gravely prejudicial remarks by the prosecutor, including a wholly gratuitous disclosure that the jury that convicted Appellant of the Delbecq murder did not have the discretion to impose a death verdict. Although Appellant need not prove bad intent to receive a reversal, the defense asks the court to view the arguments below against the backdrop of improperly argumentative questions that peppered the penalty phase, despite the trial court's intervention.

The prosecutor asked its expert witness to offer an opinion whether Appellant was "blacked out" during the crimes when the trial court expressly prohibited him from doing so. The prosecutor asked a defense witness who had a history of substance abuse why he never killed anyone. The objection was sustained. (R.T. 5830 – R.T. 5831.) The prosecutor asked the defense psychiatrist if she determined the consequences of a death verdict on Appellant's son if he were to feel that his attendance at the penalty phase contributed to the verdict. The objection was sustained. (R.T. 6176.) The prosecutor repeatedly asked Appellant

provocative and argumentative questions about the circumstances under which he would have used the "shank" in prison, despite the court's ruling prohibiting him from doing so. (R.T. 5507 – R.T. 5509.) He continued to ask Appellant about other inmates' substance abuse in prison, despite the court ruling not to do so. (R.T. 5513.) He continued to question witnesses about their knowledge of the law, despite a court ruling not to do so. (R.T. 6030; R.T. 6192, Line 20 – R.T. 6192, Line 2.)[58]

B. The Prosecutor Committed Reversible Misconduct When He Ignored a Trial Court Ruling and Elicited Inadmissible Expert Testimony that Appellant Committed the Murders "Intentionally and Voluntarily" and Lied when he Testified that he Didn't Recall Committing those Alleged Crimes

1. Statement of Facts

During the defense opening statement, and during Appellant's testimony, the jury was told that Appellant did not recall committing either murder. (R.T. 5112 – R.T. 5113; R.T. 5445; R.T. 5459 – R.T. 5457.) Dr. Alex Stalcup generally opined that a substance-induced blackout caused "anterograde amnesia;" that is, from the

[58] It is worth noting that the prosecutor's improper behavior, despite the court's repeated attempts to rein him in, was also on display during the first penalty phase trial that ended in a hung jury. For example, at the first penalty phase, the Court sustained an objection as to why murders don't appear to affect defense witnesses. (R.T. 3465 – R.T. 3466.) The prosecutor repeated asked the Appellant "aren't you saying that your life has more value than your victims?" after objections were sustained. (R.T. 3632, Lines 3 – 11); the prosecutor repeated asked Appellant about his tattoos, after objections were sustained; the trial court directed him to "cease and desist." (R.T. 3646, Line 12.) The court sustained an objection to the prosecutor's question to a defense witness: "how many murders would it take to change your opinion (of the Appellant)?" (R.T. 3345, Line 23 – R.T. 3346, Line 6.) The court sustained an objection to the prosecutor's inquiry of a defense witness if another witness' testimony was "a lie." (R.T. 3347, Line 16.) The court sustained an objection to an inquiry of a defense witness of whether if Appellant committed a violent act against her family, would it change her opinion that he was a good person. (R.T. 3418, Lines 13 - 20.)

time of the onset of the intoxication until the time its affect dissipated, an individual's memory did not record any events that transpired. (R.T. 5576 – R.T. 5577.)

The prosecution proposed to call Dr. Park Dietz as a rebuttal witness to testify that Appellant was not in a blackout and established that the motivation for the murders was sexual sadism. (R.T. 6300, Lines 1 – 11.) The defense filed written objections to the proposed testimony. (C.T. 1525 – C.T. 1590.) In sum, the defense argued that the proposed testimony was (1) improper rebuttal because the defense had not introduced opinion testimony that Appellant was "blacked-out" during the crimes (C.T. 1532),[59] (2) improper because it lacked foundation, since the jury did not need the assistance of an expert to determine whether Appellant was in a blacked-out state (C.T. 1535 – Lines 17 – 23), and (3) inadmissible under Section 352 of the Evidence Code. (C.T. 1542, Lines 2 –11; R.T. 6302, Lines 5 – 21; R.T. 6306.)

The court made a preliminary ruling that Dr. Dietz could offer expert opinion to rebut the defense that Appellant was not in a blackout during the crime.

[59] Defense counsel's tactical decision to omit the presentation of Dr. Ervin's expert testimony on this issue to forestall Dr. Dietz's testimony in rebuttal was explained to the Court *in camera* before the trial began. (R.T. 4425 – R.T. 4428.)

(R.T. 6309 – R.T. 6312.) Dr. Dietz then testified in a so-called "402 hearing." (R.T. 6312 – R.T. 6325.) The court then ruled that Dr. Dietz could testify that an individual "would have known what he was doing" during the commission of the murders. (R.T. 6326, Lines 2 – 25.) The court clarified that Dr. Dietz could only offer an opinion "generally" that during a blackout state an individual would have present memory and that acts would be conscious, intentional choices; a specific opinion that Appellant was acting voluntarily and intentionally, based upon his review of the case, was improper rebuttal. (R.T. 6327, Lines 9 – 22.)

Dr. Dietz then testified before the jury that an alcoholic who commits homicides, and is in a true "blacked-out state, acts intentionally and voluntarily, but simply lacks any long-term memory of his behavior." (R.T 6343.) In violation of the limits demarcated by the trial court, the prosecution then elicited from the witness his opinion that Appellant did not suffer a blackout and that in the Maui homicide, when he placed a comforter over the window, he knew what he was doing was wrong and was trying to hide it from the outside world. (R.T. 6344, Lines 6 – 23.) The court sustained a defense objection to the question which asked Dr. Dietz to describe the evidence upon which his opinion was based. (R.T. 6344, Line 24 – R.T. 6345, Line 17.)

2. Dr. Dietz' Testimony that Appellant was not in a Blackout State was Admitted in Violation of State Law, as well as the Trial Court's Ruling

As noted above, after lengthy arguments, legal briefing, and an evidentiary hearing specifically designed to identify the limits of Dr. Dietz' expert rebuttal testimony, the court ruled that he could opine – in the abstract – that an individual in an alcoholic blackout could act intentionally and voluntarily. Upon a defense request, the court specified that Dr. Dietz could not offer an opinion whether Appellant was "blacked-out" during the crimes. No defense expert gave such an opinion regarding Appellant's mental state during the commission of the alleged crimes. The court ruled that for Dr. Dietz to do so would be improper rebuttal. (R.T. 6327, Lines 20 – 22.) A few moments later, the prosecution elicited Dr. Dietz' opinion that Appellant did not suffer a blackout, in open disregard of the court's earlier ruling.[60]

3. Admission of Dr. Dietz' Improper Opinion Violated Appellant's Federal Constitutional Rights to a Fair Trial and a Heightened Reliability of the Determination of Penalty Under the Fifth, Sixth, Eighth and Fourteenth Amendments and a New Trial Must be Granted as a Consequence

The prosecutor well-knew that Appellant's testimony that he did not remember the commission of the crimes was a key to his mitigation defense:

"Mr. Brent So, I mean, the defense, in essence, is trying to slow because he is in a blackout state, you know, he can't – I guess he can't feel the adequate amount of remorse because he has no memory of it. He can't be cross-

[60] As noted in pages 237 – 238 and 330 - 333 of the brief, the prosecution's disregard of the trial court's evidentiary rulings, to the prejudice of Appellant's right to a fair trial, was unfortunately all too common.

> examined about the crimes because he has no memory of it. I am trying to show that that is not true."

(R.T. 6311.)

Nevertheless, the prosecutor made extensive use of Dr. Dietz' impermissible testimony during his closing argument. (R.T. 6385 – R.T. 6386; R.T. 6388 - R.T. 6394.) Indeed, during his closing argument he specifically quoted Dr. Dietz' testimony that Robert Edwards did not suffer a blackout to exhort the jury to disregard Appellant's testimony about his addiction and feelings of remorse. (R.T. 6394, Lines 15 – 16.) Based upon this testimony, the prosecutor went on to argue:

> "Okay, so that being the case, that being the undisputed evidence, then, you know, then one wonders how much weight this evidence of addiction or whether or not the defendant was in a blackout, what it can have, how much evidence it can have, other than maybe one thing, and that would be if the defendant really was in the blackout and doesn't remember it. And if he really doesn't remember it. And if he really doesn't, then may be its hard for him to say I am sorry. Right? May be that's all there is. May that's all there is."

(R.T. 6394, Lines 15 – 26.)

The prosecutor continued to exploit Dr. Dietz' improperly admitted opinion to inflame the jury by branding Appellant as "this monster who says I don't remember" and to deride the misplaced loyalty of his friends and family who credited his explanation and testified on his behalf as a result. (R.T. 6412.)

One need not speculate about the impact upon the jury's deliberation of expert opinion that, in effect, Appellant was a liar. Dr. Dietz testified that Appellant was not "blacked out" only a few moments before the closing argument began. This court has held that the purpose of restricting rebuttal testimony "is to ensure 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 trial; and to avoid any unfair surprise that may result when a party thinks he has met his opponent's case and is suddenly confronted at the end of the trial with an additional piece of crucial evidence." (***People v. Brown (Andrew)*** (2003) 31 Cal.4th 518, 579, *cert. denied*, (2004) 541 U.S. 1041.) Nevertheless, the prosecutor's decision to violate the court order did just that; the improperly elicited expert opinion was still ringing in the jury's ears as the prosecution used it as the keystone of his emotional plea for the death verdict. The jury called for the expert's testimony to be re-read. (C.T. 1605.) The defense specifically objected to a re-read of that portion of the expert testimony that Appellant had not suffered a blackout; the objection was improperly overruled and the testimony was read, compounding the prejudice. (R.T. 6515 – R.T. 6516.) The next day, a death verdict was returned. (R.T. 6519.)

The death judgment for Appellant was returned in a penalty retrial, after the original jury became hopelessly deadlocked during its deliberations at the first

penalty phase. Both parties substantially altered the presentation of their evidence at the second penalty. At the first penalty phase, Appellant himself offered the opinions of two highly qualified health professionals that he was in a blackout state at the time he committed the homicides (Dr. Ernest Klatte: R.T. 3760 – Line 11 – R.T. 3761, Line 12; Dr. Frank Ervin: R.T. 3824, Line 24, - R.T. 3830, Line 25.) These opinions were unrebutted by any expert testimony from the prosecution at the first penalty phase. By contrast, at the second penalty phase, the defense did not present expert opinion on the matter of whether the Appellant was "blacked-out," reasoning that the prosecution could not introduce rebuttal testimony to the contrary. (R.T. 4425 - R.T. 4427.) Nevertheless, the prosecution introduced such evidence contrary to the court's ruling. The significance that a prosecutor assigns to erroneously admitted evidence provides a recognized measure for assessing the evidence's prejudicial impact. (*See, e.g.,* ***People v. Minifie*** (1996) 13 Cal.4th 1055, 1071, 1072; ***People v. Patino*** (1984) 160 Cal.App.3d 986, 994 (no prejudice where prosecution does not dwell upon the evidence improper admitted).)

As set forth above, the prosecution used Dr. Dietz opinion to devastating effect during its closing argument. The prosecution's revised strategy in the penalty re-trial was effective, resulting in a death judgment. This success is strong indication of the prejudicial impact of the improperly admitted evidence. This court has recognized that where certain evidence is not admitted in one trial, and

subsequently introduced during a second trial where a different verdict results, the prejudicial nature of the error is demonstrated almost to a certainty. (*See*, ***People v. Kelly***, *supra*, 66 Cal.2d 232, 245; ***People v. Taylor*** (1986) 180 Cal.App.3d 622, 634.)

The record in this case is distinguishable from that considered in ***Ramirez***. There, this court held that there is no reasonable possibility that the error could have affected the judgment in that case because (1) the inadmissible rebuttal evidence was relatively inaccurate; (2) the court's instruction to the jury minimized the possibility that it would be considered as an aggravating circumstance and (3) the prosecution did not dwell on the evidence during closing argument. (*Id.* at 1193 – 1194.) Here, as set forth above, the prosecution did everything that it could to rivet the jury's attention on the opinion that he improperly elicited; there were no prophylactic instructions to isolate Appellant from the improper attack. It is evident that the jury considered the improper testimony from its request to have it specifically read back. For all the foregoing reasons, the judgment of death must be reversed.

C. The Prosecution Committed Reversible Misconduct by Explicitly Telling the Jury that He Had Undisclosed knowledge of Appellant's Guilt

It is well settled that a prosecutor may not even imply that the People have evidence of guilt to which the jury is not privy; to do so is misconduct. ***People v.***

Hill, *supra*, 17 Cal.4th 800, 828 – 829; *see*, ***People v. Valdez***, *supra*, 32 Cal.4th 73.)

Here, the prosecutor did not imply that he had undisclosed evidence of the Appellant's guilt; he expressly asserted it. During his opening statement in the second penalty phase, the prosecutor told the jury:

> " I am not going to retry, as I mentioned to your folks early on, I am not going to retry the guilt phase of this case. And you have accepted that he has been proven guilty. I am not going to bring in every bit of evidence. But I don't want to mislead you either, and I won't do that. So although I am not bringing in all the evidence, I am not going to tell you that there was something there that wasn't or leave you with the inference. I don't want you to infer that either because all those years I mentioned to you that case was unsolved."

(R.T. 5103, Lines 6 – 16.)

The prosecutor's attempt to qualify his repeated assertions of unrepresented evidence was nonsensical and ineffective. A prosecutor cannot insulate his improper behavior from appellate review by telling the jury that there is unrepresented evidence then explain ("for the record") that he hasn't invited the trier of fact to consider that plainly improper representation. Indeed, the prosecutor's very attempt to mischaracterize his explicit statement of secret knowledge betokens his recognition that he had just made an improper and highly prejudicial remark to the jury. This assertion of secret knowledge is far more blatant than that found to be misconduct in ***Hill***. There, this court found that the prosecutor's <u>implication</u> that she could have had an expert analyze blood found at

the murder scene to be misconduct. This is not a case where the prosecution simply made permissible inferences from the record. (*See*, ***People v. Valdez***, *supra*, 32 Cal.4th 73, 133 – 134, where there was no error for the prosecutor to argue that the mitigation testimony of defendant's relatives was unconvincing since they only testified out of "family commitment.") Rather, the express representation that the jury would only receive a fraction of the prosecution's guilt phase evidence against Appellant violated his Fifth, Eighth and Fourteenth Amendment rights to a fair and reliable verdict by diminishing its sense of responsibility and thus "skew(ing) the jury's decision towards imposing the death verdict." (***People v. Valdez***, *supra*, 32 Cal.4th 73, 134, *citing*, ***Cadwell v. Mississippi*** (1985) 472 U.S. 320; ***Beck v. Alabama***, *supra*, 447 U.S. 625.)

D. The Prosecutor Committed Reversible Misconduct by Telling the jury that Appellant Could Not Have Received the Death Penalty in Hawaii for the Murder of Muriel Delbecq Because the Law Prohibited it

A substantial portion of the People's penalty phase evidence detailed Appellant's murder of Muriel Delbecq in Hawaii. (R.T. 5287 – R.T. 5356.) The penalty phase jury was also aware that Appellant had been convicted in Hawaii of this murder. (R.T. 5371.) The prosecution relied upon this evidence to characterize Appellant to the jury as a "monster" and urge his execution. (R.T. 6411 – R.T 6412.)

During its penalty phase case, the prosecution did not seek to introduce evidence that, under Hawaiian law, the jury that convicted Appellant did not have the discretion to impose the death verdict. The reason is obvious. It is an inadmissible circumstance in aggravation. Nevertheless, during its cross examination of a defense witness from Hawaii about his conviction for vehicular manslaughter, the following exchange took place:

"Q (Mr. Brent)	What were you in for?
A	Vehicular manslaughter.
Q	So that means you killed somebody while you were drunk, right?
A	Yeah.
Q	Do you know?
A	Yes.
Q	And that's a felony, right?
A	Yes, it is.
Q	And you only spent six months or so in jail?
A	Yes.
Q	There is no death penalty in Hawaii, is there?
Mr. Severin	Objection, irrelevant.
The Court	Sustained.
Mr. Brent	That's it."

(R.T. 6030, Lines 8 – 21.)

The prosecutor could not have had a good faith belief that his disclosure to the jury, disguised as a "question," could have elicited an admissible response. To begin with, the inquiry of whether Hawaii had the death penalty had no relevance to the credibility of the defense witness. The prosecution had no good faith basis to believe that the lay witness had any knowledge about whether capital punishment was a sentencing option in Hawaii. The prosecutor's question was an obvious pretext to bring an inadmissible matter to the jury's attention.[61] His decision to do so was especially reprehensible since defense counsel had expressly warned him and the trial court of the danger that the jury would improperly seek to punish Appellant for the commission of the Hawaii homicide. (R.T. 3994.) It is indisputable that the only purpose for asking this "question" was to alert the jury to the fact that their brethren in Hawaii were not empowered to impose the death penalty, no matter how deserving they may have thought Appellant to receive it. It is likewise indisputable that the intent, and the inexorable fact, of this disclosure was to incite the penalty phase jury to impose that verdict, based upon the unspoken argument that they must "make up" for the jury's inability to do so in Hawaii.

[61] *Compare*, ***People v. Clark***, where this court held that a defendant's knowledge of the California law regarding mandatory re-trials of deadlock capital penalty phase proceedings was relevant to impeach his testimony on direct examination. ((1990) 50 Cal.3d 583, 630.)

E. The Prosecutor Committed Reversible Misconduct by Impermissibly Inflammatory Remarks about Appellant's Character and Future Dangerousness during Closing Argument

A prosecutor is allowed to make vigorous arguments and may use epithets as warranted by the evidence, as long as those arguments are not inflammatory, and not principally aimed at arousing the passion or prejudice of the jury. (***People v. Haskett***, *supra*, 30 Cal.3d 841, 864.) Nevertheless, during his closing argument, the prosecutor repeatedly referred to Appellant as a "monster" and "an animal" and urged them to consider the sufferings of his "vulnerable and weak" victims who "couldn't fight back" and "couldn't plead properly for mercy." (R.T. 6407, Line 7 – R.T. 6416, Line 12.) The demand for the jury to consider the victim's suffering was relentlessly and explicitedly detailed during the prosecutor's closing address as he described her bindings, wounds and imagined sufferings and humiliations. The lengthy tirade culminated with the following appeal to the jury:

> "What happened? So what happens during this murder? Is it quick, defendant seeing the victim and 'I don't like you' and pulling a gun and shooting her and that's it? As awful as that would have been, was it that merciful? Or does he, in fact, engage in toying with his prize? Almost a cat and mouse situation where he begins a – I don't know – I want to say a night of terror.

(R.T. 6408 – Lines 16 – 22.)

* * *

> She did nothing to deserve nothing what happened to her, nothing. And before he thrust his mousse can deep through her vagina, up into her abdominal cavity – can any of us conceive the unimaginable terror of this? No we can't. But please don't hold that against the memory of these victims. Do your best to imagine it as your determining this penalty. We can't but give it a show, would you? This terror beyond comprehension. It is, its unimaginable terror, is it not.

(R.T. 6410, Lines 10 – 18.)

* * *

> She wasn't your daughter. She wasn't your mother. She wasn't you. But she was a human being. She deserved for this defendant to make a different choice. She did nothing to invite or encourage this murderer to come into her life. She did nothing. She was not given a penalty phase. She was not allowed to present mitigating evidence. Whether or not she pled and begged for mercy, we'll never know, but if she did, her pleas were unanswered. She was shown no sympathy whatsoever. He showed Marjorie Deeble no sympathy. He brutally raped and murdered her in such fashion to satisfy his sadistic desires. To feel better himself. To make himself feel good and pleasure, he did the things to her he did. He left her dying like to much garbage."

(R.T. 6415, Lines 4 – 17.)

The prosecutor's characterization of Appellant as a monster and his appeal to the jury about the victim's pleas for mercy "that might have been made" cannot be construed as anything other than arguments principally aimed at arousing the

passions of the jury. While the ***Haskett*** opinion allowed that some assessment of the offense from the victim's point of view may be permissible to evaluate the nature of the charged offense, it cautioned that "the jury must face its obligation soberly and rationally.... Inflammatory rhetoric that diverts the jury's attention from its proper role or invites an emotional, purely subjective response should be curtailed. (*Id.* at 864.) Here, the prosecutor's lengthy and emotional exhortation far exceed anything previously approved by this Court. (*Compare*, ***People v. Wash***, (1993) 6 Cal.4th 215, 263, *cert. denied*, (1994) 513 U.S. 836, imagine the victim thinking of her family.) The prosecutor's performance was *sui generis*, combining a lurid recitation of the victims' injuries with an invitation to speculate on whether they pled for mercy during an "almost cat and mouse" night of terror. It culminated in a cry that Robert Edwards was a "monster" who left his helpless victims "like so much garbage." Such imagery was not anchored in evidence, but can only be seen as a relentless and impermissible appeal to the passions of the jury.

The characterization of Appellant as less than human also exceeds the boundaries of evidence-based epitaphs that are not principally designed to inflame the jury. (*Compare*, ***People v. Pensinger***, *supra*, 52 Cal.3d 1210, where the term "perverted maniac" was held not to exceed the boundaries of proper argument.) This court has never approved the repeated denigration of a defendant as a

"monster" or an animal.[62] The characterization of Appellant as sub-human improperly seeks to lighten the jury's sense of responsibility in deciding whether to impose death on a fellow human being.

The prosecutor also committed reversible misconduct when he urged the jury to consider Appellant's future dangerousness:

> "Can you, ladies and gentlemen, as representative of the community, as conscience of this community, can you take a chance that this defendant is not going to use a weapon when he wants to? That he's going to kill some innocent guard; that he's going to kill some innocent, frankly, inmate. Can you take that chance with this man? Because by giving him life without parole, you are. You would give him that freedom of choice, and he doesn't deserve it any longer. And that's why this evidence is so powerful. I am sorry that it happened this way. And I'm going to tell you, in a certain sense, he forces your hand with this. He's trying to force a little bit to determine who's going to raise his son. Nut he forces your hand a little bit here, too. He is a danger. He is a danger to prison. He shouldn't be allowed to have the chances to kill somebody there. You can't believe that he would only use this when he is attacked. You can't believe that. You can't believe that he could prevent a weapon such as this from getting into someone's hands. You can't take that chance. I submit to you, as sad as it is, he seals his fate when he starts manufacturing weapons in prison."

(R.T. 6405, Line 5 – R.T. 6406, Line 1.)

---

[62] In ***People v. San Nichols***, the prosecutor referred to the defendant as "that animal" and as a "base individual." This court commented that even if the epitaphs "crossed the line in prosecutorial misconduct," Appellant's failure to object precluded review. (2004) 34 Cal.4th 614, 666, *cert. denied*, (2005) 126 S.Ct. 46.)

This court has held that a prosecutor may not argue future dangerousness unless there is sufficient evidence in the record to support this statement. (***People v. Brown (Andrew)***, *supra*, 31 Cal.4th 518, 533, *citing*, ***People v. Hughey*** (1987) 194 Cal.App.3d 1383, 1396.) Thus, in ***Hughey***, the appellate court found no misconduct when a prosecutor asked the jury whether it wanted the case in the future where the victim was dead since the evidence showed that the defendant threatened to kill the victim of his assault and their three-month-old daughter. Here, although the evidence suggested that Appellant had access to a homemade weapon in prison for the purpose of self-defense, there was utterly no evidence to support a reasonable conclusion that he posed a danger of an unprovoked assault on prison guards or inmates if his life was spared. On the contrary, the evidence at the penalty phase from prison guards in California and Hawaii, as well as former inmates, unanimously agreed that he was a peaceable and positive force in the institutions to which he was sentenced. He was usually respectful to correctional officers; he had no disciplinary infractions for acts of violence; when presented with an opportunity to join an escape attempt, he declined to do so. (R.T. 5798 – R.T. 5830.)

Finally, while proof the bad faith is not a prerequisite for reversal, it is nonetheless worth noting that the prosecutor should have been especially mindful of the danger which unsupported allegations of future dangerousness posed to a

fair trial. During the guilt phase jury selection, the court removed prison guard Randy Bethod from potential juror service and admonished the remaining panel, based upon his comment about the potential danger which inmates pose to correctional officers. (*See*, Argument II, herein.) The prosecutor's lack of good faith and fair dealing is further demonstrated by his concession to the trial court that the defense was "clearly within its rights to argue lingering doubt the jury and his later demand to that same jury to disregard any claim that "Mr. Edwards was not the killer of Marjorie Deeble" as "shameful." (R.T. 6274; R.T. 6359.)

F. The Issue is Preserved for Review and the Cumulative Impact of Misconduct Compels Reversal of the Death Verdict

In order to be prejudicial, "prosecutorial misconduct must bear a reasonable possibility of influencing the penalty verdict." (***People v. Farnam***, *supra*, 28 Cal.4th 107, 200.) Even if no objections are made to the misconduct, appellate review would not be foreclosed if the objection would have been futile and an admonition would not have cured the harm caused by the misconduct. (***People v. Hill***, *supra*, 17 Cal.4th 800, 820 – 822.)

Appellant contends that, as in ***Hill***, the gravity and repetition of misconduct preserves the issue for review, notwithstanding trial counsel's failure to interpose timely objections to each and every instance. The prosecutor's explicit representation that he had had undisclosed evidence of Appellant's criminal

conduct, his indefensible disclosure that the jury in Hawaii could not have imposed the death penalty even if it wanted to, and his baseless argument that Appellant posed a danger to guards and inmates alike if his life was spared "created a trial atmosphere so poisonous that (defense counsel) was thrust upon the horns of a dilemma." (*Id.* at 831.) he could continue to object, creating a danger that the jury would view him as obstructionist, or remain silent and expose Appellant to the consequences. As set forth above, it is noteworthy that even when defense counsel did object to the prosecutor's behavior, and the court did sustain these objections, the prosecutor continued to pursue the same improper conduct. Thus, objection were futile both because the prosecutor ignored them and because the conduct was so fundamentally damaging that an admonition would not have resurrected a fair trial. The bell simply could not be unrung.

The cumulative impact of the misconduct was not harmless. As the prosecutor acknowledged during his closing address to the jury,[63] the defense introduced a substantial amount of mitigating evidence. The evidence was wide-ranging and compelling. It included unrebutted lay and expert testimony about Appellant's abused childhood and consequent descent into profound addiction. Numerous witnesses testified that on the evening of Mrs. Delbecq's homicide, Appellant was genuinely impaired, both because of substance abuse and because of

[63] "The defense called a lot of witnesses." (R.T. 6354.)

the unexpected death of his pet. Likewise, on the evening of Mrs. Deeble's homicide, Appellant was drinking heavily, smoked marijuana and injected narcotics repeatedly. Correctional officers, family and psychologist all testified that Appellant would have a meaningful life in prison, both to staff, inmates and more importantly, to his son, Robby, with whom he had a very strong and positive relationship. Even with the prosecutor's thumb on the scales, so to speak, the jury had difficulty returning a death verdict. Indeed, the first penalty phase was deadlocked. The second took three full days of deliberations to reach a verdict (April 14 through 16), even though there was only eight days of testimony. During those three days, the jury called for the testimony of Appellant and Dr. Dietz to be read back. (R.T. 6513 – R.T. 6517.) (*See*, ***People v. Herring***, *supra*, 20 Cal.App.4th 1066, 1076, where this court cited a jury's inability to reach a verdict on the most serious offense and its questions to the court as evidence of reversible prejudice.) As in ***Herring***, and as suggested in ***Hall***, the cumulative impact of the misconduct in this case would have overwhelmed any attempt at a curative instruction. Since the misconduct involved federal constitutional error, the burden is in the prosecution to prove beyond a reasonable doubt that I did not contribute to the verdict. (***Chapman v. California***, *supra*, 386 U.S. 18; ***People v. Herring***, *supra*, 20 Cal.App.4th 1066, 1076.) Under this standard or, indeed, even under the lesser standard of ***People v. Brown*** (1988) 46 Cal.3d 432, *cert. denied*, (1989) 489

U.S. 1059, the death verdict must be reversed as violations of due process and the requirement of heightened reliability in a capital case under the Eighth and Fourteenth Amendments.[64]

XVI. THE TRIAL COURT'S ADMISSION OF IRRELEVANT AND HIGHLY PREJUDICIAL TESTIMONY AND EXHIBITS WAS CONTRARY TO CALIFORNIA LAW AND IN VIOLATION OF APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AS WELL AS A HEIGHTENED RELIABILITY OF THE DETERMINATION OF PENALTY UNDER AMENDMENTS FIVE, SIX, EIGHT AND FOURTEEN

A. Standard of Review

The United States Supreme Court has made it clear that capital cases require a higher standard of reliability for the fact-finding process and an overall heightened attention to due process and fundamental fairness. (***Beck v. Alabama***, *supra*, 447 U.S. 625.) Accordingly, this court should review *de novo* the trial court's admission of expert and victim impact testimony as well as the admission of another alleged criminal act. (***People v. Gordon*** (1990) 50 Cal.3d 1223, 1265, *cert. denied*, (1991) 499 U.S. 913.) The admission of the evidence below deprived Robert Edwards of a state liberty interest due process of law, and a reliable sentencing determination. (U.S. Const. Amends. V, VIII, XIV, Calif. Const. Art.

[64] In ***People v. Brown***, this Court reaffirmed the "reasonable possibility" test as the appropriate standard for assessing the effect of state law error on the penalty phase of a capital trial: [W]hen faced with a penalty phase error not amounting to a federal constitutional violation, affirm the judgment unless we conclude there is a "reasonable possibility that the jury would have rendered a different verdict had the error or errors not occurred." (*Id.* at 448.)

1, Sections 7, 15, 17 and 24; ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346. When a violation of the Constitution occurs in the penalty phase of a capital case, the reviewing court must proceed with special care, ***Satterwhite v. Texas*** (1988) 486 U.S. 249, 258. In evaluating the effects of error, the reviewing court does not consider whether a death sentence would or could have been reached in a hypothetical case where the error did not occur, rather, the court must find that, in the particular case, the death sentence was "surely unattributable to error." (***Sullivan v. Louisiana***, *supra*, 508 U.S. 275, 279.) The prosecution cannot satisfy the standard in this case.

B. The Trial Court Committed Reversible Error When It Admitted Expert Testimony Regarding "Black-Outs" and Appellant's Mental State at the Time of the Homicide's as Improper Rebuttal Testimony

1. Introduction

As set forth in Section XVI(B), the defense made a comprehensive and timely objection to the introduction of expert testimony by Dr. Park Dietz, ostensibly to rebut Appellant's "black-out" defense. The defense asserted that the testimony lacked foundation, was improper rebuttal and, finally, that its probative value outweighed its potential for undue prejudice under Evidence Code Section 352. The trial court overruled the objections, with exception that the prosecution could not introduce any specific opinion that Appellant was "blacked out" during the crimes. Dr. Dietz then testified that a black-out would not "tell us anything

about (Appellant's) mental state at the time of the homicides except that he was drunk." (R.T. 6341.) The expert noted for the jury that Appellant's intoxication did not prevent him from getting access to the victims, doing things to them and their property and leaving the scene. He repeated that a "black out" would not begin until after the commission of the homicides and did not offset Appellant's mental state at the time of their commission. (R.T. 6342.) In the opinion of Dr. Dietz, "as (Appellant) is committing the homicides, I think it is fair to say that he is behaving intentionally voluntarily. He knows where he is, what he is doing, who he is with, why he is engaging in each action, what he wants to do next, which things please him and which things don't. All of those are known to him, and he also knows what he just did before that, moments before that. Now, he may not know what he did give minutes ago or ten minutes ago. He may be in a black out already for those. But for what he just did and what he is going to do next, he is not in any black out at all. He is right there in the present tense in the moment doing as he pleases." (R.T. 6343, Lines 7 – 20.)

As set forth in Argument XVI(B), Dr. Dietz concluded his expert testimony by voicing the very opinion prohibited by the trial court: that Appellant did not suffer a black-out. (R.T. 6344.)

2. The Expert Testimony was Admitted in Violation of state Law and Violated Appellant's Constitutional Rights to a Fair Trial and Reliable Sentencing Determination

Expert opinion testimony is not admissible under Section 720(a) of the Evidence Code of it consists of influences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. (***People v. Hernandez*** (1977) 70 Cal.App.2d 271, 280; *see, generally*, discussion at pages 159 - 162, *infra*.) During the colloquy with counsel that preceded the court's ruling, the trial court's specifically noted that you don't need an expert (to rebut evidence that a black out occurred.) (R.T.6309 Lines 11 –16.)[65] Moreover, since no defense expert testified that Appellant was in a black out state during the crimes, allowing the prosecution to do so "in rebuttal" is impermissible under ***People v. Ramirez*** (1990) 50 Cal.3d 1158, 1192, *cert. denied*, (1991) 498 U.S. 1110. There, this court held that the prosecution's attempt during the penalty phase of a capital case to admit evidence of truancy, drug abuse and other juvenile misbehavior was improper rebuttal since the defense only introduced a number of adverse circumstances that the defendant

[65] *Compare*, ***People v. Carpenter*** (1997) 15 Cal.4th 312, 406, where this court held that an explanation of the term "personality disorder" was an appropriate subject for expert testimony.

experienced; these generally mitigating circumstances did not "open the door" for rebuttal to "all bad character evidence that the prosecution (could) dredge up." (*Id.* at 1192 – 1193.)

Finally, the probative value of the objectionable testimony under Evidence Code Section 352 was far outweighed by its potential for undue prejudice. As the trial court ruled, there was no probative value to an "expert" opinion that Robert Edward was not in a black out state since the jurors were capable of drawing that conclusion for themselves, based upon the evidence. The potential for undue prejudice was equally obvious: the jurors' function as the trier of facts on the issue of intent was endangered by an impermissible "expert" opinion that Robert Edwards was in a conscious and deliberate frame of mind at the time of the homicide. As set forth below, the prosecutor fully exploited this potential for prejudice during his closing remarks to the jury. In so doing, Appellant was deprived of a state right in violation of his right to Due Process of Law under the Fifth and Fourteenth Amendments. (***Hicks v. Oklahoma*** (1980) 477 U.S. 343.)

3. Admission of Dr. Dietz Improper Opinion Gravely Prejudiced Appellant and Requires a New Penalty Trial

As detailed in Section XVI(B)(3), Appellant's testimony that he did not remember the commission of the crimes was the key to his mitigation defense. The prosecution made extensive use of the inadmissible opinion testimony to

exhort the jury to disregard the feelings of remorse that he expressed on the stand and sentence him to death as "this monster who says I don't remember." (R.T. 6412.) Over a timely defense objection, Dr. Dietz' testimony was re-read to the jury during its deliberations. (R.T. 6515 – R.T. 6516.) It is evident from the record that Dr. Dietz testimony was literally the difference between life and death for Appellant; his appearance at the second trial transformed a hopelessly deadlocked jury into unanimous call for death. For all the foregoing reasons, the judgment of death must be reversed.

C. The Trial Court Improperly Admitted the Testimony of Naomi Titus (Nee Linderman) that Four Years after the Commission of the Charged Offense, Appellant, While Intoxicated, Woke her up by Trying to Insert a Bottle into her Vagina and Rectum

1. Statement of Facts

The defense objected to the introduction of testimony by Naomi Titus that Appellant attempted to insert a bottle into her vagina and rectum. The defense argued that it did not constitute "criminal activity ... which involved the use of

attempted use of force or violence," within the meaning of Section 190.3(b) of the Penal Code. (R.T. 4370 – R.T. 4381.)[66] The court rejected that argument, finding that the attempted assertion of a bottle, in an unconsenting, sleeping woman was admissible under that section. (R.T. 4381, Lines 11 – 17.) The prosecutor then described the alleged incident as "an act of malice" during his opening statement and called Ms. Titus as a witness. (R.T. 5110.) Ms. Titus then testified that she had a "dating relationship" with Appellant in 1990 on Maui. Although they both lived together for a time, she eventually kicked him out. Appellant later woke her up one night, drunk. The witness went back to sleep, but was awakened later. At first, Ms. Titus denied that she remembered what woke her up. In response to the prosecutor's leading inquiry, she eventually alleged that Appellant woke her up by attempting to assert a bottle into her vagina and rectum. (R.T. 5211 – R.T 5212.) She wasn't frightened and didn't call the police. She angrily ordered Appellant out of the house. (R.T. 5212 – R.T. 5215.)

2. The Trial Court's Admission of Appellant's Drunken Fumblings Many Years After the Charged Offense was Against California Law

Section 190.3(b) of the Penal code provides:

"In determining the penalty, the trier of fact shall take into account any one of the following factors if relevant:

[66] This same objection was raised and rejected during the first penalty phase trial. (R.T. 3194 – R.T. 3202.)

> The presence of absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or malice."

This court has held that to admit evidence under this section requires a rational trier of fact to be able to find that the activity actually occurred, beyond a reasonable doubt. (***People v. Griffin*** (2004) 33 Cal.4th 536, 584 – 587.) The trial court has the discretion to exclude particular items of evidence proffered under this subsection on the ground that it might unfairly persuade a trier of fact to find that a defendant engaged in other violent activity. (*Id.*)

Unlike the testimony considered in ***Griffin***, no rational trier of fact would have found Ms. Titus' testimony about the alleged penetration with a bottle to be true, beyond a reasonable doubt. The testimony was wholly uncorroborated; no testimony was elicited from Appellant that the incident ever took place. There was no contemporary complaint to law enforcement despite the witnesses' contention that Appellant both broke into her house and sexually assaulted her. The witness had a motive to fabricate the incident' she was a former girlfriend and displayed obvious distain and anger towards Appellant during her testimony. She did not remember the incident clearly; her eventually allegation that appellant assaulted her with a bottle came only in response to the most leading questions by the prosecutor. Indeed, the prosecutor later conceded to the jury that her testimony was not very credible. (R.T. 6399, Lines 6 – 14.) This foundation stands in stark

contrast to the record in ***Griffin*** where this court held that a rational trier of fact could have credited the testimony of the sexual assault because was "detailed, internally consistent, and not in conflict with any other evidence presented...." (*Id.* at 587.)

3. The Improper Admission of the Alleged Sexual Assault Violated the Appellant's Right to Due Process of Law and Heightened Reliability of a Penalty Determination Under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution

The admission of the alleged sexual assault deprived Appellant of a state liberty interest, due process of law, and reliable sentencing determination. (U.S. Const. Amends. V, VII, XIV, Calif. Const. Art. I, Sections 7, 15, 17 and 24; ***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346.)

The defense mitigating evidence was designed to establish that Appellant's behavior was a result of years of child abuse and substance addiction. The prosecution derided the claim. The first portion of his closing argument was devoted to his assertion that Appellant had a choice of how to behave. (R.T. 6384 – R.T. 6385.) Prosecutor asserted that Appellant was simply a sexual sadist. He enjoyed hurting and dominating women sexually: "He wants to commit sadistic acts." (R.T. 6466 – R.T. 6467.) Appellant was "monster" who "brutally raped and murdered (his victims) in such a fashion to satisfy his sadistic desires." (R.T. 6412 –R.T. 6413.) He cited Dr. Dietz' opinion that as Appellant was committing the

homicides, "he knows ... what he wants to do next, which things please him and which don't." (R.T. 6393, Lines 15 – 17.)

Against his background, the improper admission of the testimony of Naomi Titus had a disproportionately prejudicial affect as it was used to punctuate the key theme of the prosecutions argument for a death verdict:

> "So (Naomi Titus) just didn't drop out of the sky. We know the defendant likes inserting foreign objects into the anal and vaginal areas of women. And here's an eyewitness who tells us about it because the two dead women can't because he killed them."

(R.T. 6400, Lines 16 – 20.)

The nature of Ms. Titus' allegations made them especially prejudicial; Appellant could not call witnesses to rebut conduct that allegedly occurred in private. (*Compare*, ***People v. Koontz*** (2002) 27 Cal.4th 1041, 1088, *cert. denied*, (2003) 537 U.S. 1117, where this court found that any potential prejudice caused by the admission of evidence of other violent acts was reduced by the fact that defendant was able to rebut it by calling witnesses to the alleged incident.) Ms. Titus testimony was not redundant; as set forth above, the prosecutor used it as proof that Appellant sexually assaulted Marjorie Deeble with a foreign object[67] as well as proof that appellant was not "blacked out," but was engaged in a pattern of

[67] As set forth in pages 58 - 62 of the Opening Brief, there was no persuasive evidence that Ms. Deeble was assaulted with an aerosol canister. This heightened the prejudicial impact of the improperly admitted testimony of Naomi Titus.

sexually sadistic acts which he thoroughly intended, planned and enjoyed. (*Compare*, ***People v. Sapp***, *supra*, 31 Cal.4th 240, 304, where this court found that the admission of Appellant's statements that he intended to kill an individual caused no possible prejudice because the jury was already aware that he was responsible for multiple murders at the time the penalty phase as tried.) On this record, it cannot be said that the death sentence was "surely unattributed to error." (***Chapman v. California*** (1967) 386 U.S. 18.) Accordingly, judgment of death must be reversed. (***Satterwhite v. Texas***, *supra*, 486 U.S. 249, 258; ***Sullivan v. Louisiana***, *supra*, 508 U.S. 275, 279.)

D. The Trial Court Improperly Admitted "Victim Impact Testimony" in Violation of Appellant's Fifth, Sixth, Eighth and Fourteenth Amendment Rights under the United States Constitution to a Fair Trial and Heightened Reliability of the Determination of Penalty

1. Statement of Facts

The murder of Marjorie Deeble occurred in 1986, at a time when so-called victim impact testimony was inadmissible under ***People v. Boyd*** (1985) 38 Cal.3d 762; *see*, ***Booth v. Maryland*** (1987) 482 U.S. 496; ***People v. Gordon*** (1990) 50 Cal.3d 1223, re-affirming the rule. The United States Supreme Court changed the law five years later in ***Payne v. Tennessee*** (1991) 501 U.S. 808.

The prosecution introduced emotionally charged victim impact evidence at the second penalty phase trial. Marjorie Deeble's older sister, Lorraine Johnson,

testified that she was like a mother to the victim and that Mrs. Deeble was the younger sister that she always wanted. (R.T. 5264 – R.T. 5267.) Her sister's murder made her physically ill and she received treatment by a trauma therapist as a result. (R.T. 5207 – R.T. 5208.) Kathy Valentine testified that she felt guilty that she contributed to her mother's death by bringing appellant into her life. (R.T. 5244.) When she learned of her mother's death, "her life stopped momentarily." She had just established a friendly relationship with her mother and it was taken away from her. (R.T. 5241.) Photographs of Mrs. Deeble and her family were identified by her daughter. (R.T. 5233, R.T. 5237; PX 20 – 27; PX 48.) Following Kathy Valentine's testimony, the prosecutor offered the following photographs into evidence: PX 48 (Mrs. Deeble around the time of the homicide,) PX 22 (Mrs. Deeble and nine members of her family,) PX 26 (Mrs. Deeble and Lorraine Johnson,) and PX 27 (Mrs. Deeble and her sister-in-law.) (R.T. 5365 – R.T. 5367.)

The defense made timely objections to the testimony and exhibit evidence described above on two grounds. First, the defense argued that its admission violated the Ex Post Facto clause, as construed by ***Bouie v. City of Columbia*** (1964) 378 U.S. 344. (R.T. 5079 – R.T. 5081.) The trial court commented that it was a "good argument," but ruled that the new rule of evidence was not subject to the Ex Post Facto Clause, since it was not a "crime, defense or punishment." (R.T. 5082 – R.T. 5083.) The defense also objected to People's Exhibit 22, 26 and 27,

on the ground that their probative value was substantially outweighed by the potential for undue prejudice. (R.T. 5224 – R.T. 5229; R.T. 5362; R.T. 5367.) The court overruled the defense objections, and admitted the photographs along with people's Exhibit 48. (R.T. 5362 – R.T. 5367.)

2. Victim Impact Testimony was Improperly Admitted Under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Analogous Provisions of the California Constitution

a. The Admission Violated the Ex Post Facto Clause

As noted elsewhere in this Brief,[68] the United States Supreme Court has held that judicial options are bound by the Ex Post Facto Clause as well as legislative acts. (***Marks v. United States***, *supra*, 430 U.S. 188, 92.) In ***Marks***, the Supreme Court held that in a transportation of obscene materials prosecution the Due Process and the Ex Post Facto Clause prohibited the retroactive application of ***Mello v. California***, which announced a new standard for isolating pornography from First Amendment protections. Appellant likewise contends that the introduction of victim impact testimony under ***Payne v. Tennessee*** violated those same constitutional rights.

[68] *See*, Ex Post Facto claim under Argument III, pertaining to the admission of other crimes evidence under Section 1101(b).

The trial court's rejection of the Ex Post Facto claim conflicts cases in United States Supreme Court and elsewhere. In ***Stogner v. California*** (2003) 539 U.S. 607, the Supreme Court held that a law enacted after the expiration of a previously applicable limitations period violated the Clause when it was applied to revive a previously time-barred prosecution. In so ruling, the Opinion's reasoning applies with equal force to this case.

First, the Court noted that the retroactive application of the new limitations period deprived the defendant of "fair warning." (*Id.* at 611.) Here, as defense counsel argued below, the prevailing law at the time the Deeble homicide was committed held that victim impact evidence was inadmissible; the change ushered in by ***Payne*** five years later was unforeseeable. (R.T. 5080.) Second, the new rule of ***Payne*** falls literally within the categorical descriptions of those applications that the Supreme Court has identified as prohibited by the clause. Specifically, the ***Stogner*** decision recognized that the Clause traditionally prohibited four applications, including:

> "Every law that alters the legal rules of evidence, and required less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

(*Id.* at 612, *citing*, ***Calder v. Bull*** 3 Dal. 386, 390 – 391.)

State v. Metz (1999) 162 Ore.App.448 is also instructive. In ***Metz*** during the first penalty phase proceedings, the prosecution introduced victim impact evidence.

On appeal, the Appellate Court found that the evidence should have been excluded because existing law only permitted consideration of mitigating evidence. By the time of the remand, Oregon law had been amended to permit consideration of victim impact evidence and it was, again, admitted at the second penalty phase proceeding. The Appellate Court reversed and held that the Ex Post Facto Clause prohibited the application of the new rule, which, "although ostensibly merely a change in a rule of evidence, actually changed the fundamental nature of the question the jury was to answer" since it authorized the consideration of aggravating as well as mitigating evidence. (*Id.* at 460.) Here, too, the retroactive application of the rule permitting the consideration of victim impact testimony, fundamentally changed the nature of the penalty decision that the Edwards jury had to make.

b. The Admission of Photographs of the Victim with her Family and the Testimony of Family Members were Improperly Admitted

As set forth above, the defense made timely objections to the admission of Exhibits 22 through 26 and 27, photographs of Mrs. Deeble with her family. The photographs had little probative value since the family members had testified about the impact with her death had upon them, pointedly and without restriction. (*Compare*, ***People v. Griffin***, *supra*, 33 Cal.4th 536, 582, where the introduction of

crime scene photographs at the penalty phase was approved because they best demonstrate the circumstances of the crime.)

People v. Carpenter, *supra*, 15 Cal.4th 312, 400, cited by the prosecution below, is distinguishable. There, although this court acknowledged that the admissibility of the photographs of other victims (*e.g.*, the surviving relatives) was less clear, it found that the trial court did not abuse its discretion when it allowed the jury to see them. Here, unlike ***Carpenter***, the surviving relatives were not anonymous. Two of them testified before the jury. The photographs of other family members who did not testify and, indeed, whose responsive to Mrs. Deeble's death were never even described to the jury by any witness, only served to inflame the jury with speculative imaginings. The court therefore abused its discretion under Section 352 when it admitted them.

Similarly, testimony by Lorraine Johnson that she felt like a mother to the victim, who was the younger sister that she always wanted, and Kathy Valentine's feelings that she contributed to her mother's death by introducing her to Mr. Edwards, fall outside the parameters of admissible impact testimony. First, victim impact evidence may demonstrate "the specific harm" caused which would be relevant "for the jury to assess meaningful and defendant's moral culpability and blameworthiness...." (*Id.* at p. 825.) Second, the prosecution is entitled to balance mitigating evidence present by the defense. (*Ibid.*) Here, Ms. Valentine's feeling

of guilt, and Mrs. Johnson's metaphysical comparison, neither demonstrate "specific harm" nor balance any similarly expressed mitigation evidence introduced by the defense. The trial court therefore should have excluded it under Section 352.

c. The Admission of Victim Impact Evidence Unduly Prejudiced Appellant and Requires a New Trial

The prosecution used the improperly admitted victim impact testimony into evidence to disadvantage the defense in the most prejudicial way possible: As the finale to his closing remarks to the jury. (R.T. 6417 – R.T. 6424.) He specifically drew the jury's attention to the disputed photographs of Mrs. Deeble and her family. (R.T. 6424, Lines 2 – 17.) He cited extensively from the transcript of the testimonies of Kathy Valentine and Lorraine Johnson about the devastating impact which the murder had upon their lives. (R.T. 6419 – R.T. 6423.) Emotion must not "reign over reason at the penalty phase." (***People v. Haskett*** (1982) 30 Cal.3d 841, 847.) The death sentence was not "surely unattributable" to this error. (***Sullivan v. Louisiana***, *supra*, 508 U.S. 275, 279; ***Chapman v. California***, *supra*.) The death judgment must be reversed.

E. The Trial Court Abused its Discretion When it Admitted Evidence that Appellant was in Possession of a Home-Made Weapon while in Custody on July 8, 1997, Nine Years after the Commission of the Charged Offense

1. Statement of Facts

In its second amended notice of evidence in aggravation, the prosecution identified "the facts and circumstances surrounding the use and possession of a piece of metal or shank in the Orange County Jail on July 8, 1997." (C.T. 1256 – C.T. 1260.) The defense made a timely objection and the matter was briefed before the beginning of the second phase. (C.T. 1472 – C.T. 1476; R.T. 4776 – R.T. 4779.) The defense argued that the extenuating circumstances surrounding the incident (the need for Appellant to protect himself in prison) should cause the court to exercise its discretion to exclude the incident as outside Section 190.3(b). The trial court disagreed and denied the defense motion to exclude the incident. (R.T. 4778 – R.T. 47799; C.T. 1478.)

At the second penalty phase the prosecution called Orange County Sheriff Timothy Martin as a witness. While he was on duty at the Orange County Central jail on July 8, 1977, Deputy Martin observed Appellant sharpening a piece of metal in the shower. A few days before his observation, an incident had occurred in that shower involving serious injury. Appellant had never been disciplined for any assault while he was in custody at the Orange County Jail. (R.T. 5262 – R.T. 5285.)

While Appellant took the stand on his own behalf, he was extensively cross-examined about the weapon and acknowledged that he had manufactured it to protect himself. (R.T. 5498 – R.T. 5510.) He refused to identify others in prison

who helped him make the weapon because he was afraid of retaliation. When he was directed to do so by the trial court, he testified that he didn't remember who gave him the metal to manufacture the shank. (R.T. 5498 – R.T. 5499.) During closing argument, the prosecution argued at length that Appellant's possession of the shank showered that he was a continued danger to others even if sentenced to life behind bars and that therefore a death verdict was required. (R.T. 6368; R.T. 6401 – R.T. 6406.)

2. The Evidence of Appellant's Transitory Possession of the Home-Made Weapon was Admitted in Violation of California Law and Federal Rights to Due Process of Law and Heightened Reliability in Sentencing a Guaranteed by the Fifth, Eighth and Fourteenth Amendment

Appellant recognizes that the "availability of an innocent explanation for criminal activity ... does not make (it) inadmissible. (***People v. Mason*** (1991) 52 Cal.3d 909, 957.) Appellant contends, however, that his case is distinguishable from those that have admitted evidence of weapons at the penalty phase of trials under Section 190.3(b) because, unlike those cases[69] (1) his position of the shank was transitory; (2) his spotless disciplinary record in prison was utterly inconsistent with any other finding that he intended to use it, if at all, for self defense and not to

[69] *See, e.g.*, ***People v. Combs*** (2004) 34 Cal.4th 821, 860, *cert. denied*, (2005) 125 S.Ct. 2549; ***People v. Tuilaepa*** (1992) 4 Cal.4th 569, 589, *aff'd*, (1994) 512 U.S. 967.

engage in criminal activity. Therefore, the court improperly admitted the evidence and the death verdict must be reversed.

XVII. THE TRIAL COURT VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN IT PREVENTED HIM FROM INTRODUCING EVIDENCE OF REMORSE AND MITIGATING VICTIM IMPACT TESTIMONY

A. The Trial Court Prevented Appellant from Introducing Evidence of Remorse

1. Statement of Facts

In 1993, inmates escaped from a housing area where Appellant was confined at the Maui Community Correctional Center. The escape was described by two correctional officers on duty at the time. Sergeant Herbert Aguilar and Sergeant Robert Morris. (R.T. 5803 – R.T. 5804; R.T. 5814 – R.T. 5815.) Both witnesses discussed the escape with Appellant and his decision to remain behind; the court sustained hearsay objections to questions that called for the witnesses to describe Appellant's response. (R.T. 5803, Lines 17 – 25; R.T. 5814, Lines 18 – 25.)

The court also repeatedly sustained objections to questions which asked Father John McAndrew whether Appellant expressed remorse for committing the homicide, on grounds of hearsay and that it was cumulative. (R.T. 6132, Line 22 – R.T. 6133, Line 6.) Finally, the court sustained objections to testimony by William

Farmer as to whether Appellant remembered committing the crime on the ground that it was hearsay and that it was cumulative. (R.T. 5840, Lines 5 – 21.)

2. The Trial Ended in Concluding that the Hearsay Rule Superceded Appellant's Constitutional Right to Present Mitigating Evidence

It is now well established that "the jury in a capital case may not be precluded from considering as a mitigating factor any relevant evidence bearing on defendant's character, record or offense. (***Eddings v. Oklahoma*** (1981) 455 U.S. 104, 110 – 116, ***Lockett v. Ohio*** (1978) 438 U.S. 586, 604 – 608.) Jurors are not limited to considering statutory mitigating factors. (***People v. Thompson*** (1988) 45 Cal.3d 86, 132.) Indeed, the Eighth Amendment "requires consideration of the character and record of the individual offender and circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (***Woodson v. North Carolina*** (1976) 428 U.S. 280, 304.) The high court has consistently maintained that in a capital case "the fact finder must 'have before it all possible relevant information about the individual about whose fate it must determine'" (***Ford v. Wainwright*** (1986) 477 U.S. 399, 413, *quoting* ***Jurek v. Texas*** (1976) 428 U.S. 262, 276.)

Appellant's decision to "do his time" and subject himself to a murder trial instead of joining other inmates in their bid for freedom is powerful circumstantial evidence of remorse; direct expressions of post-conviction remorse to others

likewise indisputably falls within the Supreme Court's expansive definition of admissible mitigation evidence. (*See*, ***People v. Jones*** (2003) 29 Cal.4th 1229, 1265, *cert. denied*, 540 U.S. 952, post-conviction remorse is relevant mitigating evidence.) Finally, the parties and the court agreed that the question of whether Appellant "blacked out" his memory of the homicide was a relevant issue for the jury to decide. Despite the relevancy of this evidence, the trial court apparently concluded that the hearsay rule superceded Appellant's right to introduce such evidence in mitigation. In this, the trial court was in error.

In ***Green v. Georgia*** (1979) 442 U.S. 95, the trial court precluded the defendant from introducing penalty phase mitigation evidence on the grounds that testimony was hearsay. Green and co-defendant Moore were separately tried and convicted of murder. Green sought to introduce the testimony of a prosecution witness that he had not been present when the victim was murdered. The trial court refused to allow the testimony of this evidence, ruling that the witness's testimony was inadmissible hearsay. (*Id.* at 96.) The Supreme Court reversed. "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to the critical issue in the punishment phase of the trial ... and substantial reasons existed to assume its reliability." (*Id.* at 97.) With the relevance and

reliability requirements met, the court went on to hold that the hearsay rule could not be applied mechanistically to defeat the ends of justice. (*Ibid, citing*, ***Chambers v. Mississippi*** (1973) 410 U.S. 484, 302.)

This court applied ***Green*** in ***People v. Harris*** (1984) 36 Cal.3d 36, *cert. denied*, ***California v. Harris*** 469 U.S. 965, where the defendant was precluded from introducing as evidence in mitigation poetry that he had written. The people argued that the poetry was hearsay. The ***Harris*** court noted that evidence could nevertheless be admissible: "In punishment of a capital case, a defendant's proffered evidence must be admitted if it is highly relevant and substantial reasons exist to assume its reliability, despite the fact that the evidence is inadmissible hearsay under state law." (***People v. Harris***, *supra* 36 Cal.3d 36, 70.) The ***Harris*** opinion admitted evidence of the defendant's poetry under ***Green*** and Section 1250 of the Evidence Code even though its relevance was unclear and even in the face of the well-settled rule that a defendant may not introduce hearsay evidence for the purpose of testifying while avoiding cross examination. (*Id.* at 69.)

Here, Appellant testified and the relevancy of the evidence cannot be doubted. Moreover, the trial court's conclusion that Appellant's expression of remorse to Father John McAndrew and professed inability to remember the commission of the crime were cumulative is unjustifiable in light of its decision to allow the prosecution to introduce expert testimony from Dr. Dietz in rebuttal that

Appellant did not block out his memory of the crime. As previously noted, the prosecution vigorously attached Appellant for his remorseless murders. (R.T. 6407 – R.T. 6416.) The only issue, then, is whether "substantial reasons existed to assume its reliability." The indicia of reliability surrounding Appellant's statements are as strong as those in ***Green***.

First and foremost, there is no question that Appellant had an opportunity to escape awaiting trial, and yet chose not to. This indisputable objective facts lead special weight to Appellant's expressions of remorse, which otherwise might be dismissed as self-serving. Likewise, there is no question that Appellant was a heavy drinker at the time of the homicide and that the phenomena of a memory "blackout" truly exists. Anecdotal evidence from Janis Hunt was also before the jury that Appellant suffered such blackouts around the time of the homicides. (R.T. 5961 – R.T. 5965.) Again, under such circumstances, Appellant's protestation that he did not remember committing the crimes cannot be dismissed as a convenient fabrication to avoid punishment.

Under these facts, the rigid and formulistic application of the hearsay rule "defeated the ends of justice." It denied the Appellant a fair trial on the issue of punishment necessitating that the sentence must be vacated. (***Green***, *supra*, 44 U.S. at 97.)

B. The Trial Court Prevented Appellant from Introducing Mitigating Victim Impact Testimony

1. Statement of Facts

Appellant called Marjorie Deeble's son, Scott, to testify about how his mother's murder impacted him. The following exchange occurred:

"Q	In the nearly twelve years since your mother's death, have you reflected upon her death and how your life has changed as a result?
A	Yes.
Q	What sort of things have you thought about that is caused changed in your life?
A	I have learned the big lesson of the blessing of grief, in that I cannot appreciate the ecstasy of my joy if I do not embrace the depth of my grief. I have learned the big lesson in forgiveness.
Q	What do you mean by forgiveness?
Q (Mr. Brent)	Objection, relevance.
The Court	Sustained.
Q (Mr. Severin)	Do you feel forgiveness for Mr. Edwards?
Q (Mr. Brent)	Objection, Your Honor, relevance.
The Court	Sustained."

(R.T. 5653, Lines 16 –22.)

The court also struck Scott Deeble's testimony that "I am entitled (to forgiveness) if I don't deny someone else the same" and prevented the defense

from bringing out that he was testifying voluntarily, and not in response to a subpoena. (R.T. 5858.)

2. The Court Erred in Concluding that Scott Deeble's Feeling of Forgiveness was an Inadmissible attempt to Introduce his Opinion that Appellant Should Not Receive the Death Penalty

In restricting Scott Deeble's testimony, the court made it clear that it considered it as an impermissible attempt to voice an anti-death penalty sentiment:

> "I am going to sustain the objection to anything that sounds like he's asking this jury not to impose the death penalty."

(R.T. 5656, Lines 20 – 22.)

Yet, the tempering of Scott Deeble's grief by an eventual feeling of forgiveness is plainly distinguishable from an opinion as to the appropriate punishment. Indeed, defense counsel represented to the court that it did not know whether the witness was opposed to capital punishment. (R.T. 5656, Lines 13 – 15.) Thus, the case is distinguishable from ***People v. Smith*** (2003) 30 Cal.4th 581, 622 – 623, *cert. denied*, 540 U.S. 1163. There, this court prevented a rape victim from testifying that a defendant should live, based upon her general views of the death penalty. Similary, Mr. Deeble's testimony pertained to the impact of his mother's death upon him, and not the potential impact of Mr. Edward's execution. (*See*, ***People v. Smith*** (2005) 35 Cal.4th 334, 367: "(E)vidence that a family member of friend

wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness.") Rather, the excluded testimony outlined in ***People v. Boyette***, *supra*, 29 Cal.4th 381, which explained that victim impact testimony is part of the circumstances of the crime as it informs the sentence authority about the homicide the harm caused by the crime. Under this standard, the cessation of grief, or its moderation, is a relevant consideration, no matter what the cause. The court erred in preventing the jury from considering it.

3. The Trial Court Committed Reversible Error by Infringing Upon Appellant's Constitutional Right to Present Mitigating Evidence

This court has recognized that in cases involving the unconstitutional exclusion of evidence, the United States Supreme Court has reversed "without discussing a test of prejudice." (***People v. Lucero*** (1988) 44 Cal.3d 1006, 1031 – 1032, *citing* ***Skipper, Eddings, Lockett***.) This court concluded, however, that "the appropriate test to prejudice is ... ***Chapman v. California***.... Under that test, error is reversible unless the state proves 'beyond a reasonable doubt' that the error complained of did not contribute to the verdict obtained.'" (***Lucero***, *supra*, 44

Cal.3d at 1032. *Accord*, ***People v. McLain*** (1988) 46 Cal.3d 97, 901, *cert. denied,* (1989) 489 U.S. 1072.)[70]

The unconstitutional exclusion of direct and circumstantial evidence of Appellant's remorse, as well as evidence that Scott Deeble's grief was not as unrelenting as that of his sister and aunt, cannot be said, beyond a reasonable doubt, not to have affected the jury's verdict. This is especially true in case as close as the instant case. Appellant's prison behavior was exceptional, and he demonstrated compassion and care for others throughout his life. He was closely bonded to his family, particularly his son, Robbie. It is noteworthy that the first penalty phase jury was unable to reach a death verdict. After it heard and considered significant portions of the evidence that the trial court excluded at the second penalty phase. At the first proceeding, Sergeant Morris was permitted to describe Appellant's response to his inquiry as to why he did not join the escape attempt: he wanted to "do his time." (R.T. 3593.) Likewise, Father McAndrews was allowed to tell the first penalty phase jury that Appellant did not have a clear recollection of his crimes, and that he expressed remorse. (R.T. 3897, R.T. 3898; R.T. 3913.) Under these circumstances, it cannot be said beyond a reasonable doubt that had the jury been allowed to hear this and other excluded evidence of

[70] Appellant requests that the court reconsider this holding in ***Lucero*** and ***McLain***. Appellant believes that the standard under ***Skipper*** and ***Hitchcock*** is whether the court can conclude that the excluded evidence would have "no effect" on the jury.

the Appellant's remorse it would have had no effect upon their verdict. Appellant's death sentence must therefore be reversed.

XVIII. THE COURT VIOLATED STATE LAW AND DENIED APPELLANT HIS FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT REFUSED JURY INSTRUCTIONS PROPOSED BY THE DEFENSE

A. The Court Erred when it Refused to Deliver a "Lingering Doubt" Instruction, Which it Gave in the First Penalty Phase, where the Jury was Unable to Unanimously Agree that Appellant Deserved Death

1. Introduction

At the first penalty phase, Appellant requested the so-called "lingering doubt jury instruction. (C.T. 1198.) The court agreed to deliver it, even though the People objected, arguing that it was unnecessary because the defense had conceded Appellant's guilt. (R.T. 3979.) As set forth above, after the jury heard the court's instructions, including that pertaining to lingering doubt, it was unable to reach a unanimous verdict and a mistrial was declared.

At the second penalty phase trial, evidence of "lingering doubt" was introduced without objection. This included testimony from Sharon Kenz, a senior forensic specialist for the Orange County Sheriff's Department, as well as from Sergeant James Jessen, a retired police sergeant from the Los Alamitos Police

Department, which established that a quantity of latent fingerprints were found at the crime scene, but did not belong to Appellant. (R.T. 5598 – R.T. 5631.) At the close of the evidence, the defense asked for a lingering doubt instruction, as the court delivered at the first trial. (R.T. 1629.) The court denied the request, ruling that the defense was entitled to argue the concept and that the jury would be adequately informed by the court's instruction on Subsection (k) of Section 190.3.[71] (R.T. 6273, R.T. 6278.)

The defense filed a written motion for the court to reconsider its ruling. (C.T. 1591 – C.T. 1593.) The defense argued that fairness required an instruction on lingering doubt, especially since the prosecution was receiving a "pin point" instruction victim impact evidence.[72] The court denied the motion. (R.T. 6297.)

During closing argument, the defense argued that if the jury had a "lingering residual doubt" it was entitled to consider that doubt as a reason to vote for life imprisonment without parole, instead of death, citing to the absence of any

---

[71] Subsection (k) reads:
In determining which penalty is to be imposed, "the jury shall consider, taken into account, and be guided by the following factors, if applicable: any circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime even though it is not a legal excuse and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial." (R.T. 6493, Lines 20 – 26.)

[72] The proposed defense instruction read as follows:

> "Although the defendant has been found guilty of murder in the first degree, and the special circumstances of torture and burglary have been found to be true, by proof beyond a reasonable doubt, the jury may demand a greater degree of certainty of guilt for the imposition of the death penalty. It is appropriate to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt."

evidence linking Appellant to the charged murder as well as the many dissimilarities between that crime and the murder of Muriel Delbecq many years later. (R.T. 6456 – R.T. 6464.) Although the court had previously ruled that it was proper for the jury to consider this defense argument, the prosecutor sought to persuade it that it was not an appropriate consideration:

> "There was a portion of defense case that seemed to be pointing to this notion that Mr. Edwards wasn't really guilty of any crime. That Mr. Edwards really was not the killer of Marjorie Deeble. And I started thinking, oh, my gosh, do I have to worry about that? Do I got to worry there is going to be a juror up here, who is going to say could I ever vote for the death penalty? I am not even sure he did it. So if the defense is trying to do that, shame on them. As a matter of law, this defendant was convicted and is guilty of those murders beyond a reasonable doubt, as a matter of law. Since you can consider really anything you want to be mitigating, the defense presents that kind of evidence."

(R.T. 6359, Lines 6 – 20; *emphasis supplied.*)

The jury began deliberations on the morning of April 14th. After two days of deliberations, during which the testimony of Appellant and Dr. Park Dietz was read back to the jury, it reached a unanimous verdict. (R.T. 6513 – R.T. 6520.)

The defense filed a motion for a new trial, based upon the court's failure to deliver the lingering doubt instruction. (C.T. 1790 – C.T. 1883.) In this motion, and during its argument, the defense pointed out that a lingering doubt instruction

---

(C.T. 1594; C.T. 1596; C.T. 1629.)

was especially important since the penalty phase jury had not heard the guilt phase portion of the trial and was therefore unfamiliar with the evidence that supported the guilt verdict and whatever residual reservations the trier of fact may have had to reach it. (R.T. 6525 – R.T. 6533.) The prosecutor disingenuously replied that there was no reason to believe that the jury didn't consider the defense's lingering doubt argument as legitimate. (R.T. 6531.) The court ruled that the instruction was discretionary and denied the motion. (R.T. 6532 – R.T. 6533.)

2. The Trial Court Abused Its Discretion When It Refused to Deliver the Lingering Doubt Instruction Since the Prosecution Attempted to Dissuade the Jury from Even Considering the Defense Argument on this Point

As a preliminary matter, it is important to recognize that the proffered "lingering doubt" instruction was neither argumentative nor a duplicative pinpoint instruction. (*See, e.g.,* ***People v. Brown***, *supra*, Cal.4th 518, 568 – 570, where the court upheld the refusal of the trial to deliver a special penalty phase instruction on various aspects of the defense background as argumentative.) Rather, this court has favorably characterized an instruction to the jury that "the adjudication of guilt is not infallible and any lingering doubt you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered." (***People v. Snow*** (2003) 30 Cal.4th 43, 125, *cert. denied*, 540

U.S. 1076.) Indeed, recent cases have more often addressed the proper formula of lingering doubt instructions to penalty phase jurors, rather than whether the instruction was improperly denied. (*See, e.g.,* ***People v. Harrison***, *supra*, 35 Cal.4th 208, 255 – 256; ***People v. Snow***, *supra*.) Similarly, it is also important to recognize that arguments of counsel are not adequate substitute for proper instructions by the court. ***People v. Vann***, *supra*, 12 C.3d 220, 227, n. 6. Finally, counsel had the right to expect that the instruction would be given as the "law of the case" and craft its mitigation presentation accordingly. This is especially true since the trial court acknowledged before the beginning of the second penalty phase trial that "lingering doubt is typically an issue." (R.T. 4385, Line 19.) It is certainly evident from the record that the defense was blindsided by the trial court's decision at the end of the second penalty phase proceeding.

In holding that lingering doubt instruction was unnecessary in the case, the trial court relied on an argument raised in ***Brown***; that is, that the so-called "Factor (k) Instruction" allowed jurors who had never even considered defendant's guilt at a penalty phase "to consider any lingering doubts the juror might have had and/or reject the death penalty in favor of a life sentence." (R.T. 6278.) (***People v. Brown***, *supra*, 31 Cal.4th 518, 568.) However, there is one crucial difference between this record and that considered in ***Brown***. Here, the prosecutor frustrated the court's expectation that the jury would freely and fairly consider the defense

counsel's attempt to argue "lingering doubt" by telling the juror that it was a "shameful" argument. The prosecution did not respond to the lingering doubt argument as a legitimate, but factually unsupported, contention by the defense. Rather, the plain thrust of the prosecution's closing remarks was that lingering doubt should not be considered at all; it was a "shameful" improper attempt to subvert the guilt phase findings. The prosecution defense to freely and fairly ask the jury to consider the concept of lingering doubt by arguing that "since you can consider really anything you want to be mitigating, the defense presents this kind of evidence." As the prosecutor well knew, the court ruled that the could argue lingering doubt because it was potentially an appropriate circumstance which extenuated the gravity of the crime under Section 190.3(k). The law did not allow the defense to argue "really anything (it) wanted" as mitigating evidence; the prosecutor's suggestion on the contrary was an invitation to disregard a legitimate defense argument as a makeweight fantasy. To put in another way, had the court refused the prosecutor's "pinpoint" victim impact jury instruction as superfluous because of the factor (k) instruction, it would have been equally improper for the defense to suggest to the jury that the prosecution's reliance upon that evidence was a "shameful" attempt to inflame the jury's passion. Thus, under the circumstances in this case, the generalized language of the subsection (k) instruction did not "adequately convey the concept of lingering doubt in its proper

relevance to the penalty decision; ***People v. Snow***, *supra*, 30 Cal.4th at 125." Rather, the record displays an "appropriate circumstance" where the trial court was required to give "a requested instruction that pin points a defense theory of the case." (***People v. Harrison***, *supra*, 35 Cal.4th 208, 235, *citing*, ***People v. Bolden,*** (2002) 29 Cal.4th 515, 558; *see, also*, ***People v. Roncon-Pineda*** (1975) 14 Cal.3d 864, 884 – 886.)

3. The Failure to Instruct the Jury on Residual Doubt Compels a Reversal of the Death Sentence

The Supreme Court has clearly stated that in capital cases "the fact finder must have before it all possible relevant information about the individual defendant whose fate it must determine." (***Jurek v. Texas*** (1976) 428 U.S. 262, 276.) In ***Lockheart v. Ohio*** (1978) 438 U.S. 586, 604, the Court held that the Eighth and Fourteenth Amendments" require that the sentencer, in all but he rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record or circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (438 U.S. 586.)

Finally, as set forth in another context, Appellant has constitutional rights to present a defense, heightened reliability and to due process under the Sixth, Eighth and Fourteenth Amendments. (***Beck v. Alabama***, *supra*; ***Hicks v. Oklahoma***, *supra*.

As the court and prosecution conceded, standing alone, the evidence that Appellant committed the charged offense was insufficient as a matter of law. There are many dissimilarities between the manner and means by which the offense was committed in the commission of the Delbecq murder thousands of miles away. When presented with these facts, the jury that received the lingering doubt instruction could not reach a unanimous verdict. Under the particular facts of this case, it is reasonably possible that at least some members of the jury harbored residual or lingering doubts. It therefore cannot be said that the failure to the requested instruction did not, beyond a reasonable doubt, affect the jury's verdict. (***Chapman v. California*** (1967) 386 U.S. 18, 24.)

B. The Trial Court Committed Per Se Reversible Error When it Failed to Discharge its Duty, *Sua Sponte*, to Instruct the Jury that it Cannot Base its Verdict upon Circumstantial Evidence Unless it is Consistent with the Defendant's Guilt and Cannot be Reconciled with any other Rational Explanation

1. Statement of Facts

The prosecution and court initially agreed that neither standard instruction on circumstantial evidence (CALJIC 2.01 or CALJIC 2.02) need be given to the jury. The defense asked to consider the question further. (R.T. 6259.) Eventually, the defense requested CALJIC 2.02 because the defendant's mental state needed to

be proven by circumstantial evidence. (R.T. 6479 – R.T. 6481.) The court agreed and delivered CALJIC 2.02, but not CALJIC 2.01. (R.T. 6486; C.T. 1637.)[73]

2. The Court had a *Sua Sponte* Duty to Deliver the Omitted Instruction

It is well settled that CALJIC 2.01 or a similar instruction must be given by the court, on its own motion, where the case rests substantially on circumstantial evidence. (***People v. Yrigoyen*** (1995) 45 Cal.2d 46, 49; California Jury Instruction (Criminal) October 2005 Ed., CALJIC 2.01 (use note); Judicial Counsel of California; General Jury Instructions, Section 224, V.I Page 53 (bench notes.) This duty applies to the penalty phase instructions in a capital case. (*See, e.g.,* ***People v. Anderson*** (2001) 25 Cal.4th 543, 581 – 582, *cert. denied*, (2002) 534 U.S. 1136.) CALJIC 2.01 and CALJIC 2.02 are alternative instructions. The use note to CALJIC 2.01 provides, in its pertinent part, as follows:

> " . . . if the only circumstantial evidence relates to specific intent or mental state, CALJIC 2.02 should be given. If the circumstantial evidence relates to other matters, or relates to other matters as well as specific intent or mental state, CALJIC 2.01 should be given and not CALJIC 2.02." (*cases cited.*)

Many cases has approved the deliver of CALJIC 2.01 over a defendant's request for CALJIC 2.02, reasoning that "(b)ecause the more general instruction logically includes the more specific, and because more than one element here rested on

[73] CALJIC 2.01 instructs the jury as to the sufficiency of circumstantial evidence, generally, CALJIC 2.02 limits the discussion to the sufficiency of circumstantial evidence to prove specific intent or mental state.

circumstantial evidence, the trial court did not commit error by providing only the more inclusive instruction." (***People v. Cole***, *supra*, 33 Cal.4th 1158, 1222.) Here, however, the reverse situation is present: the jury was given the narrower instruction, limited to mental state, rather than the more expansive instruction contained in CALJIC 2.02. Appellant contends that this improper election violated his right to due process under the Fourteenth Amendment to the United States Constitution and his right to a reliable sentence under the Eighth Amendment to that Constitution.

As set forth in the previous argument regarding the failure of the court to deliver the "lingering doubt" instruction, a substantial portion of the defense argument was based upon an attempt to persuade the jury that Appellant did not commit the charged offense as well as other acts attributed to him. (R.T. 6456 – R.T. 6466.) Although the prosecution improperly sought to denigrate the argument and prointed to Appellant's conviction of the offense,[74] a substantial portion of the penalty evidence was devoted to circumstantially establishing the alleged factual similarities between the charged offense in the Delbecq murder. Accordingly, its proof was substantially based on circumstantially evidence; the court's failure to deliver CALJIC 2.01 violates Appellant's federal constitutional right to due process of law, under the Fifth, Eight and Fourteenth Amendments and a reliable

[74] R.T. 6359.

determination of the sentence and requires a new trial. (***Hicks v. Oklahoma***, *supra*, 447 U.S. 343, 346; ***Chapman v. California***, *supra*, 386, U.S. 18, 24. (*Compare*, ***People v. Anderson***, *supra*, 25 Cal.4th 543, 582, where a CALJIC 2.01 was not required because the circumstantial evidence merely corroborated direct eyewitness testimony.)

C. The Court Erred When It Refused to Deliver an Instruction that Factors (d), (h) and (k) can only be Considered as Evidence in Mitigation of Punishment

At the defense request, the jury was only instructed as to factors (d), (h) and (k) as evidence that it "shall consider" in determining the appropriate penalty. (R.T. 6265 – 6266):

> (d) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> (h) whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effect of intoxication;
>
> (k) any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial." (R.T. 6493.)

The defense specifically requested an instruction that these factors could only be considered as mitigating. (R.T. 6268, Line 8.) The trial court denied it and, instead, substituted an instruction that "All evidence related to factors (d), (h) and (k) cannot be considered as aggravating factors." (R.T. 6494, Lines 1 – 2.) For the reasons set forth in Argument XX(C)(7), the trial court's failure to instruct that statutory mitigating factors were relevant solely as potential mitigators was erroneous and precluded a fair, reliable and evenhanded administration of the capital sanction in violation of Appellant's Eighth and Fourteenth Amendment rights. (***Woodson v. North Carolina***, *supra*, 428 U.S. 280, 304; ***Zant v. Stephens***, *supra*, 462 U.S. 862, 876.)

XIX. THIS COURT SHOULD REVERSE ROBERT EDWARDS SENTENCE OF DEATH DUE TO THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE

In the proceeding arguments, Robert Edwards has demonstrated that reversal of his sentence of death is required as a result of the various errors occurring at trial. However, even if this Court determines that none of the errors warrant reversal standing along, it is necessary to consider their cumulative impact. (***Taylor v. Kentucky*** (1978) 436 U.S. 478, 487, fn. 16.) This Court has also held that the cumulative effect of multiple errors may be so unduly prejudicial that

reversal is necessary though the prejudice from any one instance of error would not be sufficient standing alone. (***People v. Hill***, *supra*, 17 Cal.4th 800.)

The penalty phase of Robert Edwards' trial was dominated by the unlawful admission of expert testimony from Dr. Dietz. The prosecutor used his inadmissible opinion that Robert Edwards consciously intended the murders to brand Appellant as a liar, as well as a "monster" and an "animal," and to deride his blackout defense as a sham. Any hope of a fair outcome was extinguished when the prosecutor gratuitously, but with obvious intent, disclosed to the jury that the hands of its brethren in Hawaii had been tied because the death penalty was unavailable as a penalty in that state. He therefore urged them to imagine the sufferings of the two victims in the most lurid and speculative rhetoric possible in an obvious, and successful, attempt to make sure that Robert Edwards did not, once again, avoid his "just punishment."

The defense was hobbled in its efforts to tem the tide of prejudice. Admissible mitigation evidence from the victim's family was excluded, which would have counterbalanced the improperly inflammatory victim impact evidence admitted against Robert Edwards. Robert Edwards' ability to argue a defense routinely raised in virtually every capital case – lingering doubt – was crippled when the trial court improperly refused to instruct the jury that lingering doubt was a permissible reason under the law to vote against death. The importance of this

omitted instruction need not be imagined; it is evident in the record. The first penalty phase jury that received it could not agree death was an appropriate sentence; the jury that had the defense withheld from its instructions imposed death.

The errors in the guilt and penalty phases of Robert Edwards' capital trial were tremendously prejudicial because they involved interrelated issues. Each erroneous evidentiary ruling strengthened the overall presentation of the prosecution's theory of the case while simultaneously weakening the defense. Under these circumstances, it cannot be said that the errors had "no effect" on at lease one juror. (***Caldwell v. Mississippi***, *supra*, 472 U.S. 320, 341.) The combined effect of the guilt phase and penalty phase errors was a fundamentally unfair capital trial. Robert Edwards' sentence of death must be reversed.

XX. 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, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, Appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court

to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (***Kansas v. Marsh*** (2006) 126 S.Ct. 2516, at p. 2527, fn. 6.)[75] *See, also,* ***Pulley v. Harris*** (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of

---

[75]In ***Marsh***, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the

sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code Section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural

---

overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at 2527.)

protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction

A. Appellant's Death Penalty is Invalid Because Penal Code Section 190.2 is Impermissibly Broad

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, 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. (*Citations omitted.*)" (***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in Section 190.2. (***People v Bacigalupo*** (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (*See*, 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7".) This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained

over twenty special circumstances[76] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (***People v. Dillon*** (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (*See*, ***People v. Hillhouse*** (2002) 27 Cal.4th 469, 500 - 501, 512 - 515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

---

[76]The number of special circumstances has continued to grow and is now thirty-three.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down 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 U.S. Constitution and prevailing international law.[77] (*See*, Section E of this Argument.)

B. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.3(a) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in Section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting

---

[77]In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in ***Furman v. Georgia*** (1972) 408 U.S. 238, 33 L.Ed.2d 346, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[78] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[79] or having had a "hatred of religion,"[80] or threatened witnesses after his arrest,[81] or disposed of the victim's body in a manner that precluded its recovery.[82] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (*See, e.g.*, ***People v. Robinson*** (2005) 37 Cal.4th 592, 644 - 652, 656 - 657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (***Tuilaepa v. California*** (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

---

[78]***People v. Dyer*** (1988) 45 Cal.3d 26, 78; ***People v. Adcox*** (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[79]***People v. Walker*** (1988) 47 Cal.3d 605, 639, fn.10, *cert. denied*, 494 U.S. 1038 (1990).

[80]***People v. Nicolaus*** (1991) 54 Cal.3d 551, 581-582, *cert. denied*, 112 S.Ct. 3040 (1992).

[81]***People v. Hardy*** (1992) 2 Cal.4th 86, 204, *cert. denied*, 113 S.Ct. 498.

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. (***Tuilaepa,*** *supra*, 512 U.S. at 986 - 990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, Section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (***Maynard v. Cartwright*** (1988) 486 U.S. 356, 363 [discussing the holding in ***Godfrey v. Georgia*** (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious

---

[82]***People v. Bittaker*** (1989) 48 Cal.3d 1046, 1110, *cert. denied,* (1990) 496 U.S. 931.

Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" (Section 190.2) or in its sentencing guidelines (Section 190.3). S`ection 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire

process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated

Except as to prior criminality, Appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In ***People v. Fairbank*** (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in ***Apprendi v. New Jersey*** (2000) 530 U.S. 466 [hereinafter ***Apprendi***];

Ring v. Arizona (2002) 536 U.S. 584 [hereinafter ***Ring***]; and ***Blakely v. Washington*** (2004) 124 S.Ct. 2531 [hereinafter ***Blakely***].

In ***Apprendi***, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In ***Ring***, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (***Walton v. Arizona*** (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598.) The court found that in light of ***Apprendi***, ***Walton*** no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In ***Blakely***, the high court considered the effect of ***Apprendi*** and ***Ring*** in a case where the sentencing judge was allowed to impose an "exceptional" sentence

outside the normal range upon the finding of "substantial and compelling reasons." (***Blakely v. Washington***, *supra*, 124 S.Ct. at 2535.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the supreme court stated that the governing rule since ***Apprendi*** is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant `statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 2537, italics in original.)

This line of authority has been consistently reaffirmed by the high court. In ***United States v. Booker*** (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5 - 4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. ***Booker*** reiterates the Sixth ***Booker***, *supra,* 543 U.S. at 244.)

a. In the Wake of ***Apprendi***, ***Ring***, and ***Blakely***, any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (***People v. Fairbank***, *supra; see, also*, ***People v. Hawthorne*** (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (***People v. Farnam*** (2002) 28 Cal.4th 107, 177), which was read to Appellant's jury (R.T. 6507,)" an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; *emphasis added.*)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[83] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[84]

In ***People v. Anderson*** (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), ***Apprendi*** does not apply. After ***Ring***, this Court repeated the same analysis in ***People v. Snow*** (2003) 30 Cal.4th 43 [hereinafter Snow], and ***People v. Prieto*** (2003) 30 Cal.4th 226 [hereinafter ***Prieto***]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (*citation omitted*), ***Ring*** imposes no new constitutional requirements on

---

[83]In ***Johnson v. State*** (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though ***Ring*** expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that ***Ring*** requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[84]This Court has held that despite the "shall impose" language of Section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (***People v. Allen*** (1986) 42 Cal.3d 1222, 1276 - 1277; ***People v. Brown (Brown I)*** (1985) 40 Cal.3d 512, 541.)

California's penalty phase proceedings." (***People v. Prieto***, *supra*, 30 Cal.4th at p. 263.)

This holding is based on a truncated view of California law. As section 190, subd. (a)[85] indicates, the maximum penalty for any first degree murder conviction is death.

Arizona advanced precisely the same argument in ***Ring***. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and ***Ring*** was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks Apprendi's instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S. at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [***Ring***] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; *see* 200 Ariz., at 279, 25 P.3d, at 1151

(***Ring***, 124 S.Ct. at 2431.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first-degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense."

(***Ring***, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (Section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (2006).

It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by Section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88). This Court has recognized that a particular special circumstance can even be argued to the jury as a mitigating circumstance. (*See*, ***People v. Hernandez*** (2003) 30 Cal.4th 835, 863-864.)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency (Ariz. Rev. Stat. Ann. Section 13 - 703(E)),

---

[85]Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances (Section 190.3). There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (***Ring***, 530 U.S. at 604.) In ***Blakely***, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; *emphasis in original.*) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

A California jury must first decide whether any aggravating circumstances, as defined by Section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that the statutorily-specified

finding as to the relative weightiness of aggravating and mitigating circumstances is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (*See*, ***State v. Ring***, *supra*, 65 P.3d 915, 943; *accord*, ***State v. Whitfield***, 107 S.W.3d 253 (Mo. 2003); ***Woldt v. People***, 64 P.3d 256 (Colo.2003); ***Johnson v. State***, 59 P.3d 450 (Nev. 2002); *see, also*, Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126 - 1127.)

No greater interest is ever at stake than in the penalty phase of a capital case. (***Monge v. California*** (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in ***Ring***, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their

significance, but as to their accuracy. This Court's refusal to accept the applicability of ***Ring*** to the death-eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

b. The Requirements of Jury Agreement and Unanimity

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; ***People v. Stanley*** (2006) 39 Cal.4th 913, 963.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1 - 11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefore – including

which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[86] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The United States Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (***Ring***, *supra;* ***Blakely***, *supra.*)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (***Brown v. Louisiana*** (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].[87]) Particularly given the "acute need for reliability in capital

---

[86]See, *e.g.*, ***Griffin v. United States*** (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; ***Murray's Lessee v. Hoboken Land and Improvement Co.*** (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

[87]In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (***Johnson v. Louisiana*** (1972) 406 U.S. 356; ***Apodaca v. Oregon*** (1972) 406 U.S. 404.) Even if that level of jury

sentencing proceedings" (***Monge v. California,*** *supra*, 524 U.S. at p. 731-732; *accord*, ***Johnson v. Mississippi*** (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (*See, e.g.*, Sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (*see*, ***Monge v. California,*** *supra*, 524 U.S. at p. 732; ***Harmelin v. Michigan*** (1991) 501 U.S. 957, 994), and certainly no less (***Ring***, 122 S.Ct. at p. 2443).[88] *See*, Section D, post.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[89] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often 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)

---

consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[88]Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. Section 848, subd. (k).)

[89]The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (*See*, ***People v. Wheeler*** (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

– would by its inequity violate the equal protection clause (*See*, Section D, post), and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury. (*See*, ***Richardson v. United States*** (1999) 526 U.S. 813, 815 - 816.)

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist, and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (***Speiser v. Randall*** (1958) 357 U.S. 513, 520 - 521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree

of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (***In re: Winship*** (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (***Gardner v. Florida*** (1977) 430 U.S. 349, 358; *see, also,* ***Presnell v. Georgia*** (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (***Winship,*** *supra*, 397 U.S. at 363-364; *see, also,* ***Addington v. Texas*** (1979) 441 U.S. 418, 423; ***Santosky v. Kramer*** (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (*See*, ***Winship***, *supra* (adjudication of juvenile delinquency); ***People v. Feagley*** (1975) 14 Cal.3d 338

(commitment as mentally disordered sex offender); ***People v. Burnick*** (1975) 14 Ca1.3d 306 (same); ***People v. Thomas*** (1977) 19 Ca1.3d 630 (commitment as narcotic addict); ***Conservatorship of Roulet*** (1979) 23 Ca1.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In ***Santosky***, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [*citation omitted.*] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [*citation omitted*], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755.)

The penalty proceedings, like the child neglect proceedings dealt with in ***Santosky***, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (***Santosky,*** *supra*, 455 U.S. at 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth

as "a prime instrument for reducing the risk of convictions resting on factual error." (***Winship,*** *supra*, 397 U.S. at 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (***Woodson,*** *supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In ***Monge***, the United States Supreme Court expressly applied the Santosky rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([***Bullington v. Missouri***,] 451 U.S. at p. 441 (*quoting*, ***Addington v. Texas***, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (***Monge v. California,*** *supra*, 524 U.S. at p. 732 (*emphasis added*).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond

a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (***California v. Brown,*** *supra*, 479 U.S. at p. 543; ***Gregg v. Georgia,*** *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (***People v. Fairbank,*** *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (*See,* ***Townsend v. Sain*** (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (***People v. Fauber*** (1992) 2 Cal.4th 792, 859; ***People v. Rogers*** (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (***In re: Sturm*** (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefore." (*Id.*, 11 Cal.3d at p. 267.)[90] The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Section 1170, subd. (C).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (***Harmelin v. Michigan,*** *supra*, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see, generally,* ***Myers v. Ylst*** (9th Cir. 1990) 897 F.2d 417, 421; ***Ring v. Arizona,*** *supra*; Section D, post), the sentencer in a capital case is constitutionally required to

---

[90]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must

identify for the record the aggravating circumstances found, and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (*See*, ***Mills v. Maryland***, 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (***People v. Demetroulias***, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (***People v. Hawthorne***, *supra*, 4 Cal.4th at p. 79) its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-Furman state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury (See, Section C.1, ante.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (*See*, ***Kansas v. Marsh***, *supra* [statute interpreting a jury's equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed

---

consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (*See*, Title 15, California Code of Regulations, Section 2280 et seq.)

by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In ***Pulley v. Harris*** (1984) 465 U.S. 37, 51 (*emphasis added*), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in ***Harris***, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (***Harris***, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first-degree murders that cannot be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in ***Furman v. Georgia***, *supra*. (*see*, Section A of this Argument, ante.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (*see*, Section B of this Argument). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (*see*, ***Kansas v. Marsh***, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 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***, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (*See, e.g.*, ***People v. Marshall*** (1990) 50 Cal.3d 907, 946 - 947.)

This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under 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, 108 S.Ct. 1981, 100 L.Ed.2d 575; ***State v. Bobo*** (Tenn. 1987) 727 S.W.2d 945.)

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) 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; ***Lockett v. Ohio*** (1978) 438 U.S. 586.)

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" 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; ***Lockett v. Ohio*** (1978) 438 U.S. 586.

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (***People v. Hamilton*** (1989) 48 Cal.3d 1142, 1184; ***People v. Edelbacher*** (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors

could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (***Woodson v. North Carolina*** (1976) 428 U.S. 280, 304; ***Zant v. Stephens*** (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (***People v. Kraft***, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; *see*, ***People v. Memro*** (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors. (***People v. Arias***, *supra*, 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

People. v. Morrison (2004) 34 Cal.4th 698, 730; *emphasis added.*)

This assertion is demonstrably false. Within the Morrison case itself, there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at 727 - 729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (*See, e.g.*, ***People v. Carpenter*** (1997) 15 Cal.4th 312, 423-424.)[91]

The very real possibility that appellant's jury aggravated his sentence upon the basis of non-statutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest — the right not to be sentenced to death except upon the basis of statutory aggravating factors (***People v. Boyd*** (1985) 38 Cal.3d 765, at 772 - 775) – violated appellant's Fourteenth Amendment right to due process. (*See*, ***Hicks v. Oklahoma*** (1980) 447 U.S. 343; ***Fetterly v. Paskett*** (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth

---

[91]There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to aggravate the sentence. See, ***People v. Cruz***, No. S042224, Appellant's Supplemental Brief.

Amendment); and ***Campbell v. Blodgett*** (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that Appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (***Stringer v. Black*** (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (***Eddings***, *supra*, 455 U.S. at 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By

Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (*See, e.g.,* ***Monge v. California****, supra*, 524 U.S. at 731 - 732.) Despite this directive 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. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (***People v. Olivas*** (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (***Westbrook v. Milahy*** (1970) 2 Cal.3d 765, 784 - 785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (***People v. Olivas****, supra;* ***Skinner v. Oklahoma*** (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In ***Prieto***,[92] as in ***Snow***,[93] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (*See, also,* ***People v. Demetroulias***, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (*See, e.g.*, Sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, Rule 4.42, Subd. (e) provides: "The reasons for selecting the upper or lower term

---

[92]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (***Prieto***, 30 Cal.4th at 275; *emphasis added.*)

[93]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (***Snow***, 30 Cal.4th at 126, fn. 3; *emphasis added.*)

shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

In a capital sentencing context, however, there is no burden of proof except as to other-crimes aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (*See*, Sections C.1-C.2, ante.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (*See,* Section C.3, ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[94] (***Bush v. Gore*** (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (*See, e.g.*, ***Mills v. Maryland***, *supra*, 486 U.S. at p. 374; ***Myers v. Ylst*** (9th Cir. 1990) 897 F.2d 417, 421; ***Ring v. Arizona***, *supra.*)

E. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

---

[94]Although ***Ring*** hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (***Ring***, *supra*, 122 S.Ct. at pp. 2432, 2443.)

Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (***Soering v. United Kingdom***: *Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366. The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (*See, e.g.*, ***Stanford v. Kentucky*** (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; ***Thompson v. Oklahoma***, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as

their public law.'" (1 Kent's Commentaries 1, quoted in ***Miller v. United States*** (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; ***Hilton v. Guyot***, *supra*, 159 U.S. at p. 227; ***Martin v. Waddell's Lessee*** (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (***Atkins v. Virginia***, *supra*, 122 S.Ct. at 2249, fn. 21, citing the Brief for The European Union as Amicus Curiae in ***McCarver v. North Carolina***, O.T. 2001, No. 00 - 8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (*See*, ***Atkins v. Virginia***, *supra*, 122 S.Ct. at p. 2249.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a

CERTIFICATE OF WORD COUNT

I, MICHAEL D. ABZUG, counsel on appeal for Appellant Robert M. Edwards in Automatic appeal No. SO73316, certify that Appellant's Opening Brief consists of 99,973 words excluding tables, proof of service, and this certificate, according to the word count of the word-processing program with which it was produced. (Cal. Rules of Court, Rule 36(b)(1)(A).) Appellant has separately filed "Appellant's Application to File Over Length Opening Brief (Rule 36(b)(5)." On November 9, 2006, this Court granted permission to file an Opening Brief not to exceed 460 pages.

Dated: December 22, 2006

Respectfully submitted,

Michael D. Abzug
California Bar No. 63306
Counsel for Appellant

part of our law. (***Hilton v. Guyot*** (1895) 159 U.S. 113, 227; *see also*, ***Jecker, Torre & Co. v. Montgomery*** (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[95] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (*Cf.*, ***Ford v. Wainwright*** (1986) 477 U.S. 399; ***Atkins v. Virginia***, *supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

Dated: December 22, 2006

Respectfully submitted,

Michael D. Abzug
California Bar No. 63306
Counsel for Appellant

---

[95]*See*, ***Kozinski*** and ***Gallagher***, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

DECLARATION OF SERVICE

Re: People v. Robert M. Edwards – Automatic Appeal No. SO73316

Orange County Superior Court
Case No. 93WF1180

I, MICHAEL D. ABZUG, declare that I am over 18 years of age, and not a party to the within case; that my business address is: PMB 47, 137 North Larchmont Boulevard, Los Angeles, California 90004; that on December 27, 2006, I served a true copy of the attached, **APPELLANT'S OPENING BRIEF** on each of the following, by placing same in an envelope addressed respectfully as follows:

Michael Lasher
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

Arlene Sevidal
California Attorney General's Office
P.O. Box 85266
San Diego, CA 92186-5266

Robert M. Edwards
P-11700 5-EB-92
San Quentin Prison
San Quentin, CA 94974-0002

The Honorable John Ryan
Orange County Superior Court
401 Civic Center Drive West
Santa Ana, CA 92702-4045

David Brent
Orange County District Attorney's Office
Office
401 Civic Center Drive West
Santa Ana, CA 92702-4515

Timothy Severin
Orange County Public Defender's

14 Civic Center Plaza
Santa Ana, CA 92701-4014

Clerk, Criminal Appeals
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92702-1994

and that each said envelope as then, on December 27, 2006, sealed and deposited in the United States mail at Los Angeles, California, in the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on December 27, 2006, at Los Angeles, California.

Michael D. Abzug,
DECLARANT