IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. GERALD PARKER, Defendant and Appellant.	No. S076169 Orange County Superior Court No. 96-ZF-0039 *Automatic Appeal/* *Death Penalty*

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of
Death of the Superior Court of Orange County

Honorable Francisco P. Briseño, Judge

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DEATH PENALTY

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

TABLE OF AUTHORITIES

CASES **PAGE/S**

CONSTITUTIONS

STATUTES

TABLE OF AUTHORITIES

CASES **PAGE/S**

JURY INSTRUCTIONS

TEXT AND OTHER AUTHORITIES

TABLE OF AUTHORITIES

CASES **PAGE/S**

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant, a black man, was tried for the rape and murder of five white women, and the murder of another's fetus, by a jury from which the prosecutor excluded both black prospective jurors. Appellant objected that the prosecutor's peremptory challenges were based inappropriately on the prospective jurors' race. The judge found that appellant had not made a prima facie showing of discriminatory purpose, refused to require the prosecutor to provide reasons for the challenges, and overruled appellant's objection. The prosecutor's exclusion of all the black prospective jurors and the judge's refusal to require him to provide reasons for the challenges deprived appellant of his right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and his right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution.

During the guilt phase of the trial, the judge denied appellant's motion to exclude evidence of admissions he made to investigating officers at Avenal and Corcoran State Prisons. These admissions were obtained only after appellant had repeatedly invoked his right to silence. The jury's consideration of evidence of the unlawful interrogations violated his right to remain silent under the Fifth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

Also during the guilt phase, despite substantial evidence of unconsciousness which was unrelated to appellant's voluntary consumption of alcohol and/or drugs, the judge refused to instruct the jury on the complete defense of unconsciousness. The judge's failure to instruct on this defense prevented defense counsel from arguing that appellant lacked the requisite intent because he was unconscious and thereby effectively

removed appellant's defense from the jury's consideration. It also enhanced the risk of an unwarranted conviction and thereby diminished the reliability of the jury's sentencing determination. The error violated appellant's Sixth Amendment right to a jury trial (Cal. Const., art. 1, § 16), his Fourteenth Amendment right to due process (Cal. Const., art. 1, § 7), and his Eighth Amendment right to a reliable guilt determination (Cal. Const., art. 1, § 17).

In the penalty phase of the trial, the judge permitted irrelevant and inflammatory victim impact testimony which diverted the jury's attention from its proper role and invited an irrational, purely subjective response. This evidence was so unduly prejudicial that it rendered the trial fundamentally unfair and deprived appellant of his rights to a fair and a reliable capital sentencing hearing and to a penalty determination based on reason rather than emotion in violation of the Sixth, Eighth, and Fourteenth Amendments to the United State Constitution and article 1, sections 7, 15 & 17 of the California Constitution. It also violated the Ex Post Facto Clause of article I, section 9 of the United States Constitution and article I, section 9 of the California Constitution.

Finally, the judge forbade defense counsel from addressing the issue of future dangerousness in their closing penalty phase arguments. This arbitrary and erroneous restriction of argument deprived appellant of his right to present a defense and violated his right to an individualized penalty determination, his right to due process, and his right to present a closing argument in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution.

Individually these errors require reversal of the judgment of conviction and sentence in their own right. Collectively they deprived

appellant of his rights to due process and a fair trial and they rendered the sentence of death imposed by the jury unreliable. Appellant respectfully submits that, for the reasons set forth herein, the errors require reversal of the judgment of conviction, the special circumstance findings, and the death sentence in this case.

* * * * *

STATEMENT OF JURISDICTION

This appeal is from a final judgment imposing a verdict of death. It is automatic. (Cal. Pen. Code, § 1239, subd. (b);[1] Cal. Rules of Court, rule 8.600(a).)

* * * * *

[1] Unless otherwise noted, all statutory references are to California Codes.

STATEMENT OF THE CASE

On September 8, 1998, in a third amendment (by interlineation) to a first amended indictment filed in the Orange County Superior Court on or about September 9, 1996, appellant Gerald Parker was charged with six counts of murder in violation of Penal Code section 187, subdivision (a), as follows:

Count 1: Sandra Kay Fry, on or about December 1, 1978;

Count 2: Kimberly Gaye Rawlins, on or about April 1, 1979;

Count 3: Marolyn Kay Carleton, on or about September 15, 1979;

Count 4: Chantal Marie Green, a human fetus, on or about September 30, 1979;

Count 5: Debora Kennedy, on or about October 7, 1979; and

Count 6: Debra Lynn Senior, on or about October 20, 1979.

Three special circumstances were alleged: appellant committed the murders while he was engaged in the commission or attempted commission of the crimes of rape in violation of Penal Code section 261 (Pen. Code § 190.2, subd. (a)(17)(iii)) and burglary in violation of Penal Code sections 459 and 460 (Pen. Code § 190.2, subd. (a)(17)(vii)); and he committed multiple murders. (Pen. Code § 190.2, subd. (c)(5).) Each murder was alleged to be a serious felony which precluded plea bargaining. (Pen. Code § 1192.7, subd. (c)(1).)

Two prior convictions were alleged pursuant to Penal Code section 667.5(a): a forcible rape conviction (Pen. Code § 261.3) in the Orange County Superior Court on May 13, 1980; and a robbery with great bodily injury conviction (Pen. Code §§ 211 & 12022.7) in the Los Angeles Superior Court on October 2, 1980. (2 CT 533-537; 3 CT 849-852, 861-864; 8 CT 2325; 1 RT 2, 34-35, 37-38; 3 RT 449-450, 512-513 7 RT 1224-

1228; .)[2] Trial of the prior conviction allegations was bifurcated from that of the substantive charges on August 27, 1998. (3 RT 464-465.)

Jury trial commenced on September 17, 1998. (8 CT 2357; 4 RT 552.) On October 20, 1998, the jury returned verdicts of guilt on each count, found each murder to be in the first degree, and found each alleged special-circumstance to be true. (10 CT 2963-2981, 3012-3032; 9 RT 1968-1975.)

The penalty phase began on November 2, 1998. (10 CT 3165; 10 RT 2061.) On November 12, 1998, the jury returned its verdict fixing the penalty as death. (12 CT 3739, 3743-3744; 12 RT 2618-2620.) After the verdict, the trial court granted the prosecutor's motion to dismiss the prior conviction allegations. (12 CT 3744; 12 RT 2622-2623.)

On January 21, 1999, the judge denied appellant's motions for a new trial and to modify the jury's verdict (12 CT 3762-3769, 3861-3862, 12 RT 2632-2638) and sentenced him to death. (12 CT 3862-3863; 12 RT 2639-2659.) He also imposed a $10,000 restitution fine and ordered 946 days of custody credit. (*Ibid.*)

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[2] "CT" refers to the clerk's transcript; "CTHS" refers to the clerk's transcript of exhibits 1-9 (hardship applications); "CTJQ" refers to the clerk's transcript of exhibits 12 & 13 (juror questionnaires); and "RT" refers to the reporter's transcript.

STATEMENT OF FACTS
GUILT PHASE
PROSECUTION CASE

A. Sandra Fry

On December 1, 1978, Sandra Fry and Georgena Hurley lived in an apartment at 704 South Knott Avenue in Anaheim. Fry, who had just moved in, had the only key to the apartment. Hurley came home that night around 11:00 p.m. The lights were on and the stereo was playing, but no one responded to her knock on the locked door. A friend crawled through Hurley's bedroom window and let her in. Hurley found Fry lying across the bed in her (Fry's) bedroom with her head off the side of the bed and her pants down around her ankles. She spoke to Fry but did not get an answer, then moved the hair from her face and saw that it was bloody, like she had been beaten up. Hurley asked her friend to call the police. (7 RT 1272-1275.)

Officers began arriving at the apartment around 11:25 p.m. (7 RT 1259, 1288.) Fry was lying on the bed in the northeast bedroom. She was warm to the touch but did not appear to be breathing. There was blood around her mouth and nose and in her hair, and there were signs of trauma to her head. Her blouse had been pulled up, exposing her bra, and her legs were completely exposed. A pair of pants covered her vaginal area. (7 RT 1263-1264.) Blood stained the bedroom floor and walls, the hallway carpet, and the bathroom sink. (7 RT 1262, 1266, 1268-1269, 1282-1283, 1295-1296.) Candy and a broken glass jar were laying on the living room carpet next to a metal shelf which was askew. (7 RT 1261-1262.) A button, an inspection label, and a broken portion of a fingernail were found on the bedroom floor. (7 RT 1296-1298.)

Fry was taken to the hospital where she was pronounced dead. There, officers saw several purplish/bluish marks on her face, neck, and upper chest area. Blood was coming from her nose and mouth. An indentation on the back of her head appeared to have been caused by blunt trauma. There was what appeared to be semen on her thighs and abdomen. (7 RT 1283-1285, 1291-1292, 1312.)

Dr. Robert Richards performed an autopsy on Fry's body on December 2, 1978.[3] Orange County's chief forensic pathologist, Dr. Richard Fukumoto, reviewed the autopsy report and photographs. (8 RT 1711, 1714-1715.) Fukumoto believed the cause of Fry's death was subarachnoid and subdural hemorrhage with cerebral laceration due to blunt force trauma to the head with skull fractures. He explained that Richards had observed bruises over the bridge of Fry's nose and a laceration of her lip. Both injuries were consistent with having been struck in the face. Bruises over her upper chest area were also consistent with blunt trauma and a bruise on the right side of her neck was consistent with having been choked or strangled. A two to three inch skull fracture extended from behind Fry's right earlobe to the back of her head.[4] The fracture resulted in substantial subdural and subarachnoid hemorrhage, and the resulting irritation and swelling of her brain eventually caused her death. Fukumoto explained that a tremendous amount of force is required to crack the skull and such an injury quickly would render one unconscious. He believed

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[3] Richards was unable to testify due to medical difficulties resulting from a stroke. (7 RT 1315.)

[4] Measurements were not taken at the autopsy. Fukumoto based his estimate of the size of the bruise and fracture on the autopsy photographs. (8 RT 1720.)

Fry's injuries were inflicted by a blunt instrument like a baseball bat, a two-by-four, or a metal pipe. He could not say whether they were caused by one or several blows. No defensive-type wounds were noted. (8 RT 1715-1724, 1726, 1747, 1753.)

Investigating officers surmised that the point of entry into Fry's apartment had been a window above the bed in Hurley's bedroom. The window had been jimmied and jarred, and dust in its lower, right-hand corner appeared to have been disturbed. Books lying next to the bed appeared to have been knocked from its headboard. The window was dusted for fingerprints and an identifiable latent fingerprint was developed from the outside, lower-right-hand corner of the window glass. The latent fingerprint matched appellant's left index finger. (7 RT 1269-1271, 1289-1290, 1292-1295, 1303-1305.) Hurley did not know appellant and had not given him permission to enter her apartment on December 1, 1978. (7 RT 1276.)

PCR testing of the semen stain on Fry's thighs revealed DNA matching appellant's profile at the following loci: D1S80, DQ-Alpha, and the CT Triplex (CSF1PO, TPOX, THO1, and Aamelogenin). (8 RT 1620-1624, 1631-1633.)

B. Kimberly Rawlins

On March 31, 1979, Kimberly Rawlins and Roberta Birrittella lived in a one-bedroom apartment at 307 Avocado Street in Costa Mesa. (7 RT 1328.) Birrittella left the apartment around 7:30 that night to go dancing with her cousin, Donna Chavez, and their dates.[5] (7 RT 1329, 1336-1337.)

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[5] Birrittella recalled that these events occurred on the evening of March 30th, not March 31st. (7 RT 1329.)

Chavez and her date returned to the apartment between 11:30 p.m. and midnight and visited with Rawlins for about 30 minutes. When they left, Rawlins asked them to leave the front door unlocked because Birrittella did not have a key. She said she was going to take a shower and go to sleep. (7 RT 1337-1340.)

Birrittella came home around 4:45 the next morning. The front door was ajar and the bathroom light was on. As she entered the apartment, she heard what sounded like a heavy sigh or a forced breath. She found Rawlins in the bedroom lying half-on and half-off of her (Rawlins's) bed with her robe open. She began putting Rawlins into bed and noticed that she was very cold to the touch and did not respond. She summoned a neighbor who checked on Rawlins and then called the police. (7 RT 1330-1334.)

Officers began arriving at the apartment around 5:00 a.m. (7 RT 1316-1317.) Rawlins was lying on the bed in the southwest corner of the bedroom. She was still warm to the touch and she had a faint pulse. Her face was badly battered; both eyes were blackened and there was froth in her nostrils and swelling above both ears. The blue bathrobe she was wearing had been pulled up behind her, and a pink blanket covered part of her body. There was a blue tampon string between her legs. The officers pulled Rawlins off the bed, onto the floor, and started administering CPR. Paramedics arrived and took over, but she was pronounced dead shortly thereafter. (7 RT 1317-1319, 1321, 1324-1326, 1342-1343.)

There were no signs of forced entry into the apartment. The bedroom window was open a half-inch to an inch and the screen on the outside of the window had been partially removed, but dust on the window frame had not been disturbed. (7 RT 1319-1320.) The officers found a pair

of inside-out, women's underpants behind a dresser in the bedroom. (7 RT 1327, 1343-1344.)

Dr. Peter Yatar, Jr., conducted an autopsy on Rawlins's body on April 1, 1979. (7 RT 1362.) He believed the cause of her death was brain contusions with subdural hematoma resulting from blunt force trauma to the head and three skull fractures: a nine-inch fracture which extended from her left ear across the top of her skull; a three-inch fracture in her right temporal lobe; and a two-and-one-half-inch fracture in her right anterior cranial fossa, just over her eyes. (7 RT 1368-1371, 1374.) A large area of hemorrhage appeared around her right eye and a smaller area around her left eye. (7 RT 1363-1364.) There were small hemorrhages underlying areas of contusion to her temporal lobes and there were blood clots on her left subdural space. (7 RT 1371-1372.) Yatar noted small abrasions in her right and left ring fingertips and a small laceration in her lower lip. The fingernails of her right ring and small fingers were broken. (7 RT 1364-1366.) He believed her injuries had been inflicted by a blunt force instrument. They required a great amount of force and would have rendered her unconscious immediately. She would not have lived for more than six hours without medical intervention. (7 RT 1368, 1372-1373.)

PCR testing of Rawlins's tampon string revealed DNA matching appellant's profile at the following loci: D1S80, DQ-Alpha, and the CT Triplex. (8 RT 1620-1624, 1633-1636.) RFLP testing revealed that, at the D1S7 and D2S44 probes, bands generated from appellant's blood standard matched the bands generated from the sperm fraction from the tampon string. (8 RT 1574, 1578-1592.) The RFLP profile obtained from Rawlins's tampon string matched the RFLP profiles obtained from the vaginal swabs taken from two of the other victims, Kennedy and Senior. (8

RT 1614-1615.)

Birrittella had never given appellant permission to enter her apartment. (7 RT 1335.)

C. Marolyn Carleton

On September 14, 1979, Marolyn Carleton and her nine-year-old son, Joey, lived in an apartment at 224 Avocado Street in Costa Mesa. Between 11:30 p.m. and midnight that night, the manager of the apartment complex walked by Carleton's apartment. She noticed that the drapes covering Carleton's patio door were open a couple of feet. The sliding glass door was open and the screen door was closed. A light was on in the dining area. Carleton appeared to be sleeping on the floor. (7 RT 1414-1416.)

Officer Dennis Sanders arrived at the apartment around 2:56 a.m. He noticed that the patio door drapes were closed and both the sliding glass and screen doors were open. Joey Carleton was outside the apartment. He said his mother had been hurt. He directed Sanders into the apartment where Sanders found Marolyn Carleton lying on the master bedroom floor, partially propped up against the bed and night stand. Her breathing was forced and her pulse was weak. She appeared to be unconscious. Her face and hair were covered with blood and there was a large wound on the top left of her skull. Her short nightgown had been pulled up above her waist and her underwear was down around her right leg between her knee and ankle. A wadded-up sheet or blanket was laying across her midsection. (7 RT 1406-1413.) She was admitted to the hospital in the early morning hours of September 15, 1979, and was pronounced dead shortly after noon on September 16, 1979. (8 RT 1777.)

Dr. Walter Fischer performed an autopsy on Carleton's body on September 17, 1979.[6] Dr. Fukumoto reviewed the autopsy report and photographs. Fukumoto believed that Carleton died as a result of subarachnoid and subdural hemorrhage, along with contusions to the brain, as a result of blunt force trauma. He explained that Fischer noted an almost three-inch stellate laceration in the left posterior part of Carleton's scalp. Just beneath this laceration was an extensive depressed skull fracture which extended all the way to the base of her skull and lacerated the brain tissue beneath it. The fracture caused "owl eyes" (bleeding around the eyes), particularly around her left eye. She also had areas of bleeding in her right anterior shin, medial calf, and thigh. Fukumoto did not see any defensive-type wounds and believed Carleton had not offered any resistance. According to Fukomoto, a large amount of force was required to inflict the injuries to her skull. They could have been the result of one blow by a blunt instrument like a baseball bat or a wood mallet. (8 RT 1724-1731, 1747, 1753.)

The Orange County Sheriff's Department analyzed the rape kit which was taken from Carleton shortly after her admission to the hospital and found it to contain insufficient biological evidence for any type of testing or analysis. (8 RT 1777.)

D. Chantal Green

On September 30, 1979, Dianna Green and her husband, Kevin Green, lived in an apartment at 230 West Sixth Street in Tustin. Dianna was about nine months pregnant. She had complained to her father that

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[6] Fischer was deceased at the time of trial. (7 RT 1237, 1315; 8 RT 1724.)

Kevin beat her. (7 RT 1490-1491, 1495.)

Officer Paul Wright arrived at the apartment around 2:15 that morning. Kevin Green was standing outside in a state of shock. He told Wright that his wife was in the bedroom lying on the bed. (7 RT 1477-1479.) Wright entered the apartment and found an obviously-pregnant Dianna Green lying nude on the bed with her legs spread open. She was unconscious and appeared to be having a hard time breathing, and she was bleeding from a hole about two inches in diameter in the middle of her forehead. The injury had exposed her brain tissue. She was also bleeding from her ear and, maybe, her nose. There was blood on the bed and floor and there was blood spatter on the wall behind the bed. (7 RT 1480-1482, 1486, 1488.)

Wright suspected that Dianna might have been shot. He searched for but did not find a gun. He rode in the ambulance with her to the hospital where a rape kit was taken from her in his presence. (7 RT 1482-1483, 1767-1769.) Wright recalled seeing a certificate bearing a Marine Corps emblem on the apartment's kitchen table. (7 RT 1485-1486.) He saw some glasses and a tall goblet-type object on the right side of the chest in the bedroom. (7 RT 1487-1488.)

Dianna's unborn fetus, Chantal Marie Green, ceased to have vital signs that afternoon and was delivered stillborn. (7 RT 1492-1493, 8 RT 1777.) Dr, Fukumoto performed an autopsy on Chantal's body on October 1, 1979. He believed she had been dead less than 12 hours. He saw no evidence of trauma or for congenital anomaly, but her lungs would not float, indicating that she had not taken a breath and was born dead. He believed she died of intrauterine anoxia caused by a marked decrease in the oxygenation of Dianna's blood. He opined that Dianna's injuries had been

caused by a blunt instrument like a mallet or the end of a baseball bat. The injury to her skull would have rendered her unconscious immediately and would have resulted in severe underlying damage to her brain. (8 RT 1731-1736, 1747.)

Dianna spent about ten days in a coma. When she regained consciousness she had total amnesia and did not remember anyone. She did not know how to talk or spell. She remained hospitalized for several weeks. It took her years to learn to talk. As time went on she regained her memory, but she still has problems communicating if one talks too fast, especially about something technical. (7 RT 1492-1494.)

PCR testing of the sperm fraction of the vaginal swab obtained from Dianna Green revealed DNA matching both appellant's and Kevin Green's profiles at the D1S80 and TPOX loci. DNA matching appellant's profile was also found at the DQ-Alpha, CSF1PO, THO1, and Aamelogenin loci. (8 RT 1621-1624, 1649-1653.)

Kevin Green was convicted of Chantal's murder in the second degree and, also, of attempting to murder Dianna and assaulting her by means of force likely to commit great bodily injury. He was committed to prison for the term prescribed by law on November 7, 1980. On June 20, 1996, an Orange County Superior Court judge set aside the convictions and dismissed the case against him and he was released from custody. (10 CT 3224-3225; 7 RT 1473-1476, 9 RT 1830-1831.)

E. Debora Kennedy

On October 6, 1979, Debora Kennedy and her sister, Yvette Levay, lived in an apartment at 15561 Boleyn Circle in Tustin. Levay and her friend, Nanette Peavy, left for Las Vegas around 9:00 that night. When they returned the next day around 6:00 p.m., the apartment door was open

and Kennedy was lying on the floor with blood about her face. According to Peavy, Kennedy was seeing a man named Kermit Boyd on a social basis. (7 RT 1388-1390, 1404-1405.)

Officer Mark Bergquist arrived at the apartment just before 6:00 p.m. and found Kennedy lying nude on her back in an exaggerated, spread-eagle position on a blood-soaked mattress pad. She showed no signs of life. There was massive blunt force trauma to her face. Between her legs, in her vaginal area, was what appeared to be a mucous substance. Her body was covered with a knitted shawl and a blue robe had been opened and laid out neatly on each side of her. (7 RT 1378-1380, 1769-1771.) Berquist saw no signs of forced entry or of any type of struggle in the apartment. (7 RT 1380.) There was blood spatter on a credenza near the body. (7 RT 1384-1385.) A television was on in the apartment. (7 RT 1380, 1382.)

Dr. Richards performed an autopsy on Kennedy's body on October 8, 1979. Dr. Fukumoto reviewed the autopsy report and photographs, and he believed the cause of Kennedy's death was laceration of the brain along with subdural and subarachnoid hemorrhage due to blunt force trauma to the head with skull fractures. Fukomoto explained that Richards had observed periorbital hemorrhage (owl eyes) around Kennedy's eyes. He noted five injuries to her face, mostly around the hairline area: a midline bruise in her forehead; a three-quarter inch laceration in her left hairline; a five-eighth inch laceration just above her left eyebrow; a three-quarter inch laceration in her right hairline; and another one-and-three-quarter to two inch laceration in her right hairline. Beneath these lacerations was extensive fracturing of the skull, starting above the right earlobe and radiating down to the base and the opposite side of the skull. The fracture

lacerated Kennedy's brain tissue. Fukumoto believed the injuries had been caused by at least five blows from a blunt instrument like a two-by-four, a baseball bat, a pipe, or the flat end of a hammer. He thought the fracture would have required a large amount of force. No defensive wounds were noted. (8 RT 1736-1742, 1747, 1753-1754, 1771-1772.)

A blood sample was taken from Kermit Boyd on October 2, 1996. (7 RT 1376.) PCR testing of the sperm fraction of Kennedy's vaginal swab revealed DNA matching appellant's and Kermit Boyd's profiles at the D1S80, CSF1PO, and TPOX loci. DNA matching appellant's profile was also found at the DQ-Alpha, THO1, and Aamelogenin loci. (8 RT 1620-1624, 1636-1641.) RFLP testing revealed that, at the D1S7, D2S44, D4S139, D5S110, and D10S28 probes, bands generated from appellant's blood standard matched the bands generated from the sperm fraction from Kennedy's vaginal swab. (8 RT 1574, 1592-1605.) The RFLP profile obtained from Kennedy's vaginal swab matched the RFLP profiles obtained from Rawlins's tampon string and from another victim, Senior's, vaginal swab. (8 RT 1614-1615.)

F. Debra Senior

On October 20, 1979, Debra Senior and Debra Chamberlain lived in an apartment at 2256 Maple Street in Costa Mesa. That night, around 10:30 p.m., Senior drove Chamberlain's car home from a party they both had attended in Fountain Valley. Chamberlain got a ride home with a friend, Mark Weber, around 2:30 a.m. The apartment was well-lit when they arrived, and the stereo was playing, but Chamberlain could not get in through the front door. Weber crawled through the living room window and let her in. She turned the stereo off, then went to Senior's bedroom and found her lying unclothed on the floor with obvious head injuries. She

asked Weber to call the police. (7 RT 1434-1439.)

Officers began arriving at the apartment around 3:00 a.m. Senior was lying on the floor near the foot of the bed. She had no pulse. There was severe trauma to her head. Two lacerations in her hair, near the right side of the top of her skull, had bled profusely and her hair was matted with blood. There appeared to be blood spatter leading from her left shoulder, elbow, and forearm onto the foot of the bed. She had white socks on her feet and her torn blouse and unsnapped brazier had been pulled up to her shoulders. Buttons from the blouse were found on the floor next to her body. A green towel had been partially wrapped around her neck. A pair of Levi overalls near her body appeared to contain a blood stain. Underwear which appeared to have been ripped in half was lying on a pair of shoes at the foot of the bed. What looked like the contents of a purse was on the floor near Senior's feet. A stack of Polaroid photographs had been dumped on the floor next to a Polaroid camera. (7 RT 1419-1420, 1425-1429, 1441-1442, 1445-1446, 1451.)

Dr. Fischer performed an autopsy on Senior's body on October 21, 1979. Dr. Fukumoto reviewed the autopsy report and photographs and believed Senior died as a result of hemorrhage to her brain as a result of laceration and contusions caused by blunt force trauma with skull fractures. Fischer noted at least five lacerations and contusions in Senior's head and facial area, including a half-inch laceration in the outside of her right eyebrow; a one-and-one-half-inch laceration in her right upper forehead; and two elongated lacerations, each measuring about two-and-one-half to two-and-three-quarter-inches, on the side of her head behind her right earlobe. Her right eye had periorbital hemorrhage, or owl's eye appearance. A fracture associated with the lacerations radiated downward to the base

and around to the left side of her skull. Fragments from the fracture lacerated her brain. Fukumoto believed Senior's injuries required a large amount of force. They could have been inflicted by a pipe, a two-by-four, or a baseball bat. If untreated, they probably would have killed her in less than six hours. According to Fukumoto, blood spatter at the scene was consistent with Senior not having moved after being struck in the right side of the head while she was lying on the bed. Autopsy photographs showed that the head injuries suffered by Senior and Kennedy were both slightly-curved lacerations, leading Fukumoto to suspect that the same blunt instrument might have been used in both cases. (8 RT 1742-1754.)

Officers believed the point of entry into Senior's apartment had been a two-square-foot, crank-open, bathroom window. The bottom of the window was about five feet from the ground and it would have been easy to boost oneself into the window from a row of gas meters below it. Partial shoe prints were found on top of one of the gas meters and on a bar of soap on the floor of the bathtub directly under the window inside the apartment. A shower curtain and shower rod lying on the floor of the bathtub appeared to have been knocked down.[7] There were what looked like corduroy fabric marks (like someone had slid down the wall) on the tile wall of the bathtub, and there were what appeared to be hand prints on the window sill. (7 RT 1421, 1425, 1449-1455.) One of the prints matched appellant's left palm. (7 RT 1455-1460.)

PCR testing of the sperm fraction of Senior's vaginal swab revealed DNA matching appellant's profile at the D1S80, DQ-Alpha, and CT Triplex

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[7] The shower rod and curtain had been in their normal place when Chamberlain left that evening. (7 RT 1439.)

loci. (8 RT 1620-1624, 1641-1644, 1774-1776.) RFLP testing revealed that, at the D1S7, D2S44, D4S139, D5S110, and D10S28 probes, bands generated from the sperm fraction from Senior's vaginal swab matched the bands generated from appellant's blood standard. (8 RT 1574, 1605-1611.) The RFLP profile obtained from Senior's vaginal swab matched the RFLP profiles obtained from Rawlins's tampon string and from Kennedy's vaginal swab. (8 RT 1614-1615.)

G. Appellant's Statements

Much of the evidence presented to the jury concerned admissions appellant made to investigating officers at Avenal and Corcoran State Prisons.

1. June 14, 1996; Avenal State Prison

a. 10:30 a.m.

Costa Mesa Police Department detective Bill Redmond obtained DNA test results in June 1996 which linked appellant to a number of unsolved Costa Mesa homicides. On June 14, 1996, he, investigator Lynda Giesler,[8] and Tustin Police Department investigator Tom Tarpley drove from Orange County to Avenal State Prison, where appellant was housed, to interrogate him and to serve a search warrant on him. (7 RT 1501-1503, 1512-1513, 1520.) The officers met appellant in the prison's investigation unit, then went to an interview room where Redmond and Giesler

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[8] Giesler retired from the Costa Mesa Police Department in December 1995, but was hired on a part-time, temporary basis in 1996 to work on the investigation of Rawlins's and Senior's deaths. (7 RT 1519-1520.)

interrogated him.[9] (7 RT 1504-1505, 1520-1521.)

Redmond advised appellant of his *Miranda* rights, then explained that a blood sample obtained when appellant was last released from prison had been run through a computer database and his DNA "came up on a couple of Costa Mesa homicides back in 1979." Appellant told the officers he had been through Costa Mesa, but he never lived there and he could not recall the area that well. (7 RT 1505-1506; 8 CT 2467-2469, 2473.) He said he was in the Marines at the time, and he had been stationed at Tustin from 1975 to 1978. He was assigned to a helicopter squadron and worked in the aviation supply field. He worked night shifts, from 4:30 p.m. until 8:00 a.m. He normally did not work on the weekends. He never had an off-base job. He did not get along well in the military, especially late in his career when he was drinking heavily and using drugs, and he was transferred from Tustin to El Toro, where he spent just a few months. (8 RT 2470, 2474-2479, 2482-2484.)

In 1975 and early-1976 he shared an apartment in the Cedar Glen complex, on the corner of McFadden and Pasadena in Tustin, with another Marine, Albert Garcia. Garcia's uncle stayed with them for a while.[10] He

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[9] Tapes of this interrogation (Exhibits 92-A and 92-B) were played for the jury. A transcript of the tapes (Exhibit 93) was provided to jurors. Counsel stipulated that the court reporter need not transcribe the recordings. (7 RT 1507-1510, 1512-1513, 1519-1521; 8 CT 2465-2543.) Redmond intended to tape-record the entire interrogation, including the introduction, and told appellant so, but the pause button on the recorder malfunctioned and the recorder did not voice-activate. Consequently, the introduction portion of the interrogation was not recorded. (7 RT 1506-1507.)

[10] There is some confusion in the record about who lived with appellant and Garcia in the Cedar Glen apartment. Appellant referenced

(continued...)

was older than appellant and Garcia. He worked a few blocks from the apartment at Henning's Auto Paint Shop on Harbor Boulevard. Garcia and his uncle eventually moved out and rented another apartment in the same complex, then moved to Buena Park. They lived from 1978 through February 1980 in an apartment complex near the Deja Vu nightclub in Costa Mesa. Appellant often drank beer with Garcia at this apartment, and he slept there numerous times. They did not drive or walk around the area. They mainly stayed at the apartment drinking, partying, and barbecuing. In the late-1970's appellant bought a canary yellow, 1973 Audi. Later he bought a black Dodge van. Garcia drove a maroon, Ford Econoline van. (8 CT 2470-2472, 2475-2476, 2479-2482, 2487-2495, 2497, 2501-2502, 2511-2512.)

Appellant's lifestyle at the time centered around drinking and using drugs. He drank anything he could get his hands on, most of the time by himself. He smoked marijuana for a number of years, and he used PCP and as much LSD as he could. He used cocaine and heroin for about three months when he lived in Tustin. He had no close friends other than Garcia. Garcia was a year or two older and was more stable. He did not like to drink and use drugs as much as appellant did. They kind of drifted apart in early 1980. (8 CT 2495-2498.)

Appellant said he was born in Phoenix, Arizona. His mother passed away in childbirth when he was about nine years old. His father abandoned the family after her death. Four sisters and a baby brother were parceled out

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[10] (...continued)
both Garcia's uncle (see, e.g., 8 CT 2472, 2475, 2486, 2488-2489, 2497, 2501-2502) and his brother. (8 CT 2513-2515.) In the penalty phase, Garcia clarified that it was his brother who lived with them. (11 RT 2274.)

to relatives, but four brothers were left to fend for themselves. Two who were around 18 or 19 basically went to prison. Appellant and Calvin, who was a year older than appellant, were taken to juvenile hall. They stayed there for about a year-and-a-half until the court appointed Florence Russel, a cousin from San Diego, and her husband, a career Navy man, as their adoptive mother and father. Appellant went into the Marine Corps two months before his 18th birthday and he no longer has any contact with Florence Russel or her husband. His father passed away in 1980 and his brothers and sisters are scattered around Southern California and Arizona. He has quite a few relatives in San Diego, mostly first cousins. They do not talk to him any more. The last time appellant saw Calvin, he was living somewhere in Los Angeles. Calvin once wrote describing some of the problems he was having with his girlfriend and drugs. Appellant wrote back explaining some alternatives. (8 CT 2502-2511.)

Appellant said he had always had problems meeting women. Some of the women from the base came to a couple of their parties, but none of the neighborhood women did. Garcia's brother knew a man who owned a car glass company and he sometimes brought women employees over, but appellant never developed a relationship with any of them. He said he did not keep track of Orange County news and he could not recall hearing in 1979 about women in Costa Mesa who were sexually assaulted and murdered. (8 CT 2512-2519.) Giesler explained that appellant's DNA matched that found on four of the victims. Appellant responded, "I don't know what to tell you." (8 CT 2519-2523.)

Redmond advised that the DNA was obtained from semen and that the victims had been hit on the head and raped. He asked if appellant had ever experienced violent tendencies while he was using PCP. Appellant

said, "I'm on psychotropic medication now for, incidents or, that I experience, I've been experiencing violent tendencies, and, and voices for some time." Redmond asked if it was possible that appellant "met a girl, saw a girl, followed a girl home, and then, whatever happened happened?" Appellant said, "We're talking about four, we're not just talking about one. . . . I don't think that's possible that I could forget something like that. I have a problem believing, sitting here believing that all four of them, the DNA was a match on all four." Giesler told him they had no reason to lie, that they were proceeding based on the scientific data and felt that appellant deserved an opportunity to sit down and talk with them. (8 CT 2523-2525.) She encouraged him to confess:

> **Detective Giesler:** . . . it's been a long time with a monkey on your back, this is a good opportunity to tell us the truth and let's talk about it and get on down the road.
>
> **Gerald Parker:** Yeah.
>
> **Detective Giesler:** Which is why we made the drive. You know, it's pretty much a scientific ah, ah fact. You carried this a long time Gerald, I mean we're talking 17 years that you've walked around with this; I'm here to give you the opportunity to let's talk about it.
>
> **Detective Redmond:** Release it.
>
> **Detective Giesler:** It's a long time, isn't it?
>
> **Gerald Parker:** I'll tell you, you know, you've lived a life, you wouldn't know.
>
> **Detective Giesler:** I probably wouldn't.
>
> **Gerald Parker:** You probably wouldn't.

Detective Giesler: But I'm willing to listen. I can't walk in your shoes Gerald . . . I admit that . . .

Gerald Parker: No, you can't do that.

Detective Giesler: But I'm willing to listen and I'm willing to try to understand, but you're right, I can't walk in your shoes. No one can walk in those but you.

Gerald Parker: Who would of thought?

Detective Giesler: I'm sorry?

Gerald Parker: No, I was just talking to myself.

Detective Giesler: I mean 17 years is long enough, I think it's time to talk about it, don't you?

Gerald Parker: Oh yeah.

Detective Giesler: Why don't you tell us what happened?

Gerald Parker: The thing is, I will reserve the right to speak at another time, let's say I . . . this . . .

Detective Giesler: I'm not going to do anything to violate your rights Gerald, I mean we read you your rights and, I'm not going to step on your toes, but ah, um . . .

Detective Redmond: I think this weight's been on your [sic] long enough.

Detective Giesler: You know, I carried ah, ah, I waited 17 years.

Gerald Parker: Yeah. You and a lot of other people.

Detective Giesler: Yes, yeah, there are still family and loved ones out there that would like, would like some explanation, would like some answers, each one of these girls had, you

know, a brother or sister or a lover, or a mother or a father. And I don't know with you're [sic] background that you've shared with us, your childhood and your lack of family development, or ties, maybe that doesn't mean anything to you, but the family members would like an explanation. You know we're not fishing. You know we didn't drive the distance to come up here and lay some scam on you about blood tests and DNA, I mean, you're much more of an intelligent man than that, I wouldn't try to pull that kind of scam on you.

Gerald Parker: Yeah.

Detective Giesler: I'm speaking the truth to you and all I can ask in return is that you speak the truth to me. Get the monkey off your back.

Detective Redmond: I think you deserve that more than anybody.

Gerald Parker: Yeah, the day is not today though.

Detective Giesler: Why is today not the day?

Gerald Parker: I can't take it.

Detective Redmond: You won't have to talk about it anymore after today, just get it off your back and get it out of the way and . . . there's a reason.

Detective Giesler: I'll tell you the truth Gerald, if we were in Orange County and sitting in Costa Mesa Police Department and you were booked in jail, 30 feet away, I'd probably say, let's go have cigarette and I'll see you tomorrow.

Gerald Parker: Yeah.

Detective Giesler: But I can't do that, logistically speaking, I can't do that.

Gerald Parker: Oh, I believe that.

Detective Giesler: Believe what?

Gerald Parker: I doubt very seriously they're going to let me walk out of this prison.

Detective Giesler: Oh, I doubt that also.

Gerald Parker: After listening to what you just said.

Detective Giesler: I doubt that, okay, I'm not going to lie to you, I doubt that. Your lifestyle as far as in prison is probably going to change the minute we walk through that door.

Gerald Parker: Oh yeah.

Detective Giesler: And you know the system better than I do.

Gerald Parker: Of course.

Detective Giesler: So sure, you're right, but, what I'm saying is, logistically, I can't say, well, go back to your bunk and I'll see you in the morning.

Gerald Parker: No.

Detective Giesler: You know, if we were in Costa Mesa, I could do that.

Gerald Parker: Right. But, ah.

Detective Giesler: Gerald, it's, you know I have been doing this for 32 years, this isn't my first homicide, probably won't be my last, ah, it's very obvious, talking to you, looking at you, watching you, that you want to get this off your chest, but right now, you're scared shitless, and I don't blame you. And that's why I'm not going to lie to you, because you're absolutely correct, I mean, we've already made contact with the authorities here and when we walk out the door, I don't

know what takes place, but you're right, your lifestyle changes.

Gerald Parker: Right.

Detective Giesler: I'm not going to lie to you, but there is not anything I can do about that, and, there's not anything you can do about it, based on what happened 17 years ago, Darryl, ah, Gerald. Can't change it.

Detective Redmond: What she's saying, get it off your chest, well, give somebody the reason why? Everybody's got a reason.

Gerald Parker: Yeah, but there's also a reason for wanting to wait too.

Detective Giesler: Can you explain that, can you explain that to me?

Gerald Parker: Now, this is going to be a long, drawn out process, the rest of my life is going right out the door, it probably went out the door years ago, I just didn't recognize it.

Detective Giesler: You're just scared, basically, Gerald.

Detective Redmond: Let me ask you this, Gerald, if you don't mind, ah, did you expect this day to come?

Gerald Parker: Not really.

Detective Redmond: You never expected this day to come? Reading, listening to the TV about DNA, why they take your blood.

Gerald Parker: Oh, I've read that information and I've, as a matter of fact, it's ironic, there was a book, written in '84 somewhere in there, called the Blooding, by Joseph Wambaugh.

Detective Giesler: Uh-huh.

Gerald Parker: I just stumbled on it one day. This was when I was doing time the first go round and I read it, and ah, it snapped my mind quite a bit, brought me back to reality quite a bit, but ah, like I say, once again, there's, there's I think for me, there's a time, and a place for saying what I have to say, and, in reference to what happened, I, there's nothing else that I can tell you.

Detective Redmond: Well, maybe you can answer us this, ah, okay, what should we tell the families?

Detective Giesler: Who are unaware what's taking place by the way, but I can't, I can't keep them unaware forever."

Detective Redmond: There is only a handful of people that know about this right now.

Gerald Parker: Right.

Detective Giesler: You're looking at two of um. Um . . .

Gerald Parker: The only thing that I can say to, to you, when you - leave this room, to go speak to the families is ah, look to God, I have no, there's nothing I can say to anybody, that anybody would want to hear, would take for, you know, as satisfaction, after saying what I have to say, regardless, ah, just look to God.

Detective Redmond: You don't know that Gerald. People, I know I would, people probably want to know, okay, there's a reason why what happened happened.

Detective Giesler: And that's one of the first questions, can you tell me why?

Gerald Parker: I don't know.

Detective Giesler: I mean, that's going to be one of the first things they're going to say to me, can you tell me why?

Detective Redmond: Was it an urge?

Detective Giesler: And I would like to be able to say, I've talked to Gerald and this is what Gerald says. I'm not saying they're going to accept it or that they're going to like it . . .

Detective Redmond: But it's from you.

Detective Giesler: Gerald, I can guarantee you, they're going to say, Lynda, did he say why? Can you tell me why? Can you try to tell me why? Did you know any of these women?

Gerald Parker: Like I say, I think I should wait until later on before . . .

Detective Giesler: What do you mean later on? Are you saying, Lynda come back and see me?

Gerald Parker: No, what I'm saying is, I'm, once again, I know they're not going to let me leave this prison, they'll transfer me back to the Orange County jail, when my date of release, supposedly date of release comes up.

Detective Giesler: You're probably right.

Gerald Parker: And, ah, oh I know the procedure quite well.

Detective Giesler: You probably know it better than I do.

Gerald Parker: And, ah . . .

Detective Giesler: But I don't understand what you're saying to me, are you saying, okay Lynda, when I get back to Orange County, come and see me?

Gerald Parker: No, no, what I'm saying.

Detective Giesler: Are you saying, Lynda, I don't want to talk to you? I mean, I'm being blunt with you Gerald, be blunt with me.

Gerald Parker: I'm going to be blunt with you.

Detective Giesler: Be blunt. I can take it, I've got broad shoulders. You want to tell me to go fuck off, I, you know.

Gerald Parker: No, no, this, this, I, I just need some time to call upon myself, to bring, to draw upon some strength.

Detective Giesler: Okay

Gerald Parker: To say what I have to say.

Detective Giesler: But . . .

Gerald Parker: When they take me down there, yes, you can come back.

Detective Giesler: I can come and talk to you at that time?

Gerald Parker: Right.

Detective Giesler: Okay.

Gerald Parker: It's only 24 days, 23 days.

[¶]

Detective Giesler: . . . are you serious, when you get down to Orange County, I can come and see you again?

Gerald Parker: Right, right.

Detective Giesler: All right.

Gerald Parker: I'll be there.

Detective Giesler: Okay, I will too. Now, again, because I don't want to play head games with you. We did not come up here alone today, ah, there is an investigator with us from the city of Tustin who wants to talk to you, so we're going to see what his availability is . .

Gerald Parker: Can we, to speak to the family, can we kill the tape please?

Detective Redmond: Speak to the family?

Gerald Parker: Yeah.

Detective Giesler: I would prefer not to turn the tape off and let me tell you why, let me tell you why, because, I, I don't want to get in a situation where, I said Gerald said or Gerald said Lynda said.

Gerald Parker: Right.

Detective Giesler: The tape keeps us both honest Gerald.

Gerald Parker: Right.

Detective Giesler: Okay. Can I leave it on?

Detective Redmond: It's your protection.

Gerald Parker: Like I said, I think I should wait for, you may, can come to Orange County.

Detective Giesler: Okay, okay.

Gerald Parker: Tustin the only one here?

Detective Giesler: At this time, yeah. That's what Bill said earlier, we have ah, there's a limited amount of people ah, involved as we speak, but ah, that may change too. Okay. Are you going to turn the tape off now and I'll . . .

Detective Redmond: Yeah, in a minute.

Detective Giesler: Okay.

Detective Redmond: Gerald, how are you feeling right now?

Gerald Parker: I'm doing exactly as I said that I think what you should tell the family, is ah, look towards God. That's the only person I have left. Have mercy on my soul.

(8 CT 2525-2541.)

b. 12:09 P.M.

Redmond and Giesler left the interview room and investigator Tarpley entered. His entire conversation with appellant was tape recorded.[11] (7 RT 1513-1514.)

Tarpley confirmed that Giesler and Redmond had advised appellant of his *Miranda* rights and he read appellant his rights again. Appellant agreed to talk with him "about why I'm here today." Tarpley explained that he was investigating a 1979 Tustin homicide and asked where appellant was living in 1979. Appellant said he was staying at the Marine Corps Air Station in El Toro. (9 CT 2546-2549.) He told Tarpley that he was born in Phoenix and that his mother had died in childbirth when he was fairly young. He stayed in Arizona for a year or two after her death, then moved to San Diego when he was ten or 11 years old. He joined the Marines a couple of months before his 18th birthday and went to the Marine Corps depot in San Diego for training. He was not married and did not have any

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[11] Tapes of Tarpley's interrogation (Exhibits 94-A and 94-B) were played for the jury. A transcript of the tapes (Exhibit 95) was provided to jurors. Pages one through 72 of the transcript correspond to Exhibits 94-A and 94-B. Counsel stipulated that the court reporter need not transcribe the recordings. (7 RT 1514-1516; 9 CT 2544-2588.)

girlfriends at the time. After training he spent about 13 or 14 months in Adak, Alaska, then spent about a year during late 1974.and 1975 at Camp Lejune, North Carolina. He went to school at Meridian, Mississippi for about two or three months and was then stationed at Tustin from 1975 through 1978. He lived on base for the first six months, then moved to the Cedar Glen apartment complex on the corner of McFadden and Pasadena, near the 55 freeway. He shared the apartment with Albert Garcia, a Marine who was also stationed at Tustin. They were both in their late teens or early 20's and they worked together in the Mag 16 Group Supply. He had not spoken to Garcia in well over 16 years. (9 CT 2549-2556.)

After seven or eight months, maybe longer, Garcia moved to a different apartment in the complex and appellant moved to the Los Flores apartments on the corner of McFadden and Walnut. He stayed there for four or five months, then moved somewhere off of Lincoln in Anaheim. Garcia moved from the Cedar Glen apartments to Buena Park. Appellant often went to the Buena Park residence to drink and party and then "crash out." He stayed with Garcia for two or three weeks before Garcia and his brother moved to Costa Mesa. He had no girlfriends at the time. (9 CT 2559-2564.)

Appellant said he was not close with anyone in his family. He explained that his father had abandoned the family after his mother died, and his brothers and sisters were all taken separate ways. He and another under-age brother were taken into custody by an Arizona court. (9 CT 2564-2568.) He said his problems in the Marines involved drinking and drugs. He used PCP, cocaine, a little bit of heroin, and some acid. He explained that he was on psychotropic drugs - Mellaril and Benadrine - as they spoke, and he knew he had been diagnosed with a particular

psychological disorder but had no idea what it was. (9 CT 2568-2569.) He said he knew a couple of girls who lived in the apartment complex and a couple who were in the Marine Corps, but he had no serious relationships with women while he was in Tustin. Tarpley showed appellant a picture of Deborah Kennedy. Appellant said he had never seen her and had no idea why his semen would be in her. "I find it hard to believe that it matched four and here's a fifth. I have no idea. [. . .] None whatsoever." (9 CT 2570-2572.)

Tarpley then picked up where Giesler and Redmond had left off:

Investigator Tarpley: . . . I don't want to talk about, you know, their four, I would rather, that's independent of ours, that's why I didn't come in here with them.

Gerald Parker: Right.

Investigator Tarpley: And, you know, it's been a long time, it's been, you know, 1979, we've all, we've all grown up a lot.

Gerald Parker: Yeah.

Investigator Tarpley: You know, my life has gone this way, your life has gone this way, um, you know. I was just hoping that maybe, you know, deep down inside yourself, you know, maybe today you could set at least this situation straight.

Gerald Parker: Yeah.

Investigator Tarpley: I think the family would really appreciate that.

Gerald Parker: And I can understand that.

> **Investigator Tarpley:** Is there anything that you can do to, you know, ease their pain a little bit, tell them what happened to their daughter that day?
>
> **Gerald Parker:** There's nothing I can say. The only thing I can say in this case, is that's already said, is I can tell, I can only tell the family, you know, look towards God, because there's nothing that I can say, I've never seen this woman before in my life.

(9 CT 2572-2574.) Tarpley described the Boleyn Street area where Kennedy lived. Appellant said he recalled driving through the area (on his way to and from work, going to the market, or "going back there to have a drink with a friend of mine" (9 CT 2576-2577)) but he had never been on the street. (9 CT 2574-2577.)

Tarpley then described an incident in 1979 where a woman was attacked in her house and her husband, Brian Green, a Marine, had been convicted of the crime.[12] Appellant said he remembered reading about the case in the newspaper. He recalled that there had been an argument and Green had hit the woman over the head. He was convicted. Appellant said he doubted if he knew Green or had worked with him in the Marines. He asked if Green was on death row. Tarpley said he knew Green had been convicted but did not know if he was on death row.[13] (9 CT 2577-2579.)

Appellant said he had not heard anything about the series of murders that had occurred. Tarpley asked him if he had ever killed anyone.

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[12] Tarpley's references to Brian Green should have been to Kevin Green. (7 RT 1516.)

[13] Tarpley knew that Green had been convicted and was in prison but he had no idea what institution he was in or what the status of his sentence was. He learned later that Green was not on death row and so informed appellant. (7 RT 1517-1518; see 9 CT 2673.)

Appellant said, "If I have, that's something I'm not knowledgeable about." He admitted that he might have killed someone while he was under the influence of drugs and did not have current knowledge of it. Tarpley asked if it was possible that he might have done something to Kennedy "that if you had it to do over again, you wouldn't do?" (9 CT 2579-2582.) The following colloquy occurred:

> **Gerald Parker:** I hope to God not, you know, like I said, I never, I can't recall ever seeing this woman and I don't think so.
>
> **Investigator Tarpley:** Would it be possible that early in the morning one, one day in October, 1979; that you might have gone into a ah, two story apartment, gone in through the ground floor, and found a woman in bed and, and might have attacked her, but just might not remember her, um, because of the condition that you were in? Would that be possible?
>
> **Gerald Parker:** It's possible.
>
> **Investigator Tarpley:** Okay.
>
> **Gerald Parker:** And the reason why I say it's possible because, just because some of the people that I have known have told me about. I, I have friends that told me that I black out sometimes and say things, have said things and done things that I don't recall, you know, that they said I did, I don't know, I . . .
>
> **Investigator Tarpley:** Gerald, I have read, um, you know, I've read the report from the psychiatrist, and it's a psychiatrist that I'm sure you saw this one who wrote that he thought you were evasive about the way you answered questions. I don't know if you ever saw that or not.
>
> **Gerald Parker:** No.

Investigator Tarpley: As I sit here with you today, all right, um, I think deep down inside of you, okay, you're how old now, you're . . .?

Gerald Parker: 41.

Investigator Tarpley: 41, um, you're not a kid anymore. You're, you're a man, you know, we've all done things in our life that we, we regret; I'm nine years younger than you and you know, I regret a lot of things I've done in my life, okay, and I know that if I had the chance to maybe do something right, if I could, I would make it right. And I think that this is the time to put all this, bring all this to the surface, clear this up and give these families a chance to go on with their life, and to give you a chance to go on with your life, because if you did do these things, it's got to be eating you up inside.

Gerald Parker: If I did do those things . . .

Investigator Tarpley: Uh-huh.

Gerald Parker: . . . that you're saying I did.

Investigator Tarpley: I'm just asking you if you did.

Gerald Parker: No, I understand, I understand. I don't have a life, there is no life, no more tomorrow.

Investigator Tarpley: Not true. Everybody has a life.

Gerald Parker: No more tomorrow. It's gone, see. I can understand your position, you know, and believe me, I would be speaking the same way if I was on that side of the table.

Investigator Tarpley: All right.

Gerald Parker: But I know what's on this side of the table, I've been through this system.

Investigator Tarpley: Sure.

Gerald Parker: I know what the State of California is about to do.

Investigator Tarpley: Sure.

Gerald Parker: Like I said, when you first came in, the wheels have already started turning.

Investigator Tarpley: Sure.

Gerald Parker: If I'm found guilty of these murders, it's over with.

Investigator Tarpley: I know what you're saying, and I understand that and I respect that, but we all have a life to live, okay, and regardless of my feeling, my philosophy about life, okay, and I understand, you know, you're thinking in your head, you're going, you know, I'm never going to get outside these, these prison walls again, okay? But what I'm saying is, I'm not talking about what outside forces do to a person, regardless of what outside forces do to a person, a person still lives their life the way they want to live their life.

Gerald Parker: I agree.

Investigator Tarpley: And I read these reports and you know what? Sitting here and talking to you for this 45 minutes or whatever, I don't think I necessarily agree with a lot of these reports.

Gerald Parker: Maybe not.

Investigator Tarpley: I think I see a man that is not the man he's made out to be in some of these reports. I see a man who's at a point in his life where he's done, he's done some things, okay? And he, he's worried right now, but you still make the decision about the way that you live your life and I don't care, I'm not saying I don't care about you, I'm saying that I don't care about what outside forces, I make my decisions for my life the way I'm going to live my life.

Gerald Parker: Right.

Investigator Tarpley: And I think you are the same way. I think you want to do what's right, okay?

Gerald Parker: Uh-huh.

Investigator Tarpley: And I think what's right for you, because whatever happens that we do, it doesn't matter, you still have to live with yourself. Okay? And today is the day that you are in the driver's seat, because whatever happens from here on out, outside forces control. You're the man, you're in the driver's seat. Okay? And this is the chance for you, maybe you've never gone, maybe you say to yourself at night in your dorm, I've never done anything right in my whole life, I'm a screw up, I screwed everything up, but know what, today's the day to do the right thing. Today's the day that you take control and you say, you know what? Enough of this garbage. Enough of this crap, you know, I'm going to do the right thing, and that's what we're here for.

Gerald Parker: Right.

Investigator Tarpley: And that's what I'm asking you to do.

Gerald Parker: Right.

Investigator Tarpley: Can you do that for me?

Gerald Parker: Is Costa Mesa still here?

Investigator Tarpley: Costa Mesa is still here.

Gerald Parker: Can I use the bathroom and then we can get this over with.

(9 CT 2582-2588.)

c. 1:05 P.M.

Tarpley turned the recorder off and appellant went to the bathroom. When he returned, Redmond and Giesler had joined Tarpley in the interview room. (9 CT 2588-2589; 7 RT 1521.) Appellant proceeded to admit his responsibility for several homicides:[14]

1. Dianna Green

> **Gerald Parker:** First of all, I believe that there is a man on death row because of something that I did, and ah, out of all these murders and the crimes that I committed over the years, that was the one that bothered me the most, now, don't ask me why.
>
> **Investigator Tarpley:** Okay.
>
> **Gerald Parker:** But ah, I knew that in his case, there was something that I could do to retrieve it, and a couple of times I almost called, I actually called the Orange County Register and asked them to, if they had a reporter that had actually covered the case, and I was sincere about it, I didn't, I hadn't followed the case other than I heard it over the radio one day driving down the 405 freeway, but I didn't know the extent, and I was also sincere when I told you that there had been murders that I had possibly committed and do not know the number, because I didn't know if the person had died and ah, I didn't actually know that I had actually committed murder until that day that I heard it on the radio, they was using the term "blungeon murderer," and so, that was the first time that I knew I had committed murder and so, while I was incarcerated, I was reading the paper and I was, about the Marine and his wife, and this one was in Tustin, and ah, I, if I'm not mistaken, they sent him to death row, and so there's a man on death row because of a murder that I committed, she was pregnant at the time, and ah, he, they were arguing in the

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[14] Tapes of this interrogation (Exhibits 94-B through 94-E) were played for the jury. Pages 74 through 130 of the transcript (Exhibit 95) correspond to Exhibits 94-B through 94-E. (7 RT 1521-1522; 9 CT 2588-2674.)

house, I was standing outside the window, and then ah, I didn't know he was coming out, and he got in his car and left, and I didn't actually know that, until I entered the home, but I did, I did that murder, the one, the face, I do not recall the actual faces, you know, but she looks pretty much like the lady that I killed and ah, then the Tustin, I mean, the Costa Mesa murders, I didn't know it was four, you know, I thought it was one or two.

Detective Giesler: Let me correct, I might have mis-spoke Gerald, there were three women sexually assaulted and three women bludgeoned. So actually, you're only talking three murders.

(9 CT 2589-2592.)

Tarpley asked appellant if he could describe how he committed the murder "because we're going to have to be able to go back and show that you're the killer and not him." Appellant said his memory was hazy due to drinking and drugs. He could specify the location of the assaults but could not recall the dates, how he entered, or what he used as a weapon. "I can give you the locations and, and, the scenarios in some cases, but not all." Tarpley said, "Okay, let's start with the Green homicide that you and I talked about, ah, before. Um, you said you were outside and [. . .] saw the two of them arguing." Appellant said, "No, no, I was just walking past the complex, I was leaving the complex. [. . .] You know, I usually just went, just went out drinking and just went out, driving." Tarpley asked if he remembered the street name. Appellant said, "I know exactly what street it's off. There's [sic] was a Tasty Freeze right there."[15] He explained that he usually was unsuccessful meeting women in bars because he did not say

[15] A Tasty Freeze could be seen from one of the entrances to the apartment. (7 RT 1478-1479.)

anything to anyone. He often came out of a bar in a drunken stupor and went out looking for a prostitute or a woman. "[T]hat's where this started, you know, looking through windows or hoping that you find a door open, that sort of thing and this is the case scenario." He said he had never seen the Greens before. He was drunk and he parked his black van behind the Tastee Freeze and started walking through the apartment complex. He heard the Greens arguing up in their bedroom, then heard a car door slam and an engine start. He left for about an hour or so and drank some more, then came back and entered the apartment through the unlocked front door. Dianna Green was in the bedroom. He opened the bedroom door and she sat up in bed. He did not remember what she was wearing, but it could have been a negligee or something of that nature. He did not think she was wearing underwear. He believed she thought he was her husband or boyfriend because she lay back down as though she recognized him. He rushed into the room, hit her over the head with a board or something he had picked up outside the apartment, knocked her out, and raped her vaginally, but not rectally, and ejaculated inside of her. He said "I couldn't even get an erection, you know, in most of these cases, because I was drunk and under the influence of drugs." (9 CT 2593-2602, 2607-2608.)

He denied taking anything from the apartment. "In no case, it was never a case where, you know, there was a robbery involved or there was a specific item that I was looking for and found it in the house, these were all cases of rape and then out of the house." He said the paper had published many of the things he could recall, like the fact that the door to the Greens' apartment was on the side of the building. (9 CT 2602-2604.) The newspapers said he used something inside the house as a weapon, but that was not true. He used a board or something he picked up outside the

apartment. (9 CT 2599.) Giesler asked how he knew that Mr. Green had not come back to the apartment while he had been off drinking. Appellant said:

> Good point. This, this is what I'm trying to tell everybody, I was, as these things occurred, just out of fluke and mostly all situations, there could have been a raving lunatic on the other side of that door, I, I'm drunk to the point to wheres, I just didn't, I didn't, I either didn't know, didn't care, and that, that was the, the way I was driven in those days, the drugs and the alcohol that I drank. I didn't know what the hell was on the other side of that door, and most of the times, you know, it, it was just luck, you know, that's what, many times, I'd, I'd just be driving around in circles all over the county and nothing, nights there was nothing, you know, I didn't know, didn't know, from time to time as to what, what my target was going to be or whether or not I was going to be successful, it could have been a pit bull on the other side of that door for all . . .

Tarpley asked "How, how many women do you think, um, how many women have you attacked?" Appellant said, "That's, that's, I said that earlier, I didn't know these people were actually dying, until I heard it . . . on the radio." He did not recall his first attack, but it possibly could have been in 1977. He denied perpetrating any attacks in other states where he had been stationed. (9 CT 2604-2607.)

In 1980 or 1981 he learned that Kevin Green had been arrested and convicted. Giesler asked, "you said you wanted to call somebody from the Santa Ana Register, did you ever tell anyone?" Appellant said, "Nobody. This is the first time I've ever spoken the words that I'm speaking now to anybody." He said he did not know Kevin Green. "Never seen the man before in my. . . [. . .] if I bumped into him five minutes from now, I wouldn't know who he was." He recalled that Dianna Green had a medium build and that she was pregnant and noticeably showing. (9 CT 2616-

2618.)

2. Deborah Kennedy

Tarpley asked appellant, "What can you tell me, what do you know, that only a killer is going to know about [Deborah Kennedy's] death?" Appellant said, "the front door was wide open. [. . .] But I didn't go through that front door, I came through a window in the back." Tarpley asked, "Was that window open or . . .?" Appellant said, "Yeah, it was, it was cracked and I lifted it the remainder of the way up, and when I entered, entered the living room, where she was at, she was sitting on the floor, with her back to the couch and she had a blanket over her, and she wasn't, she was nude, she wasn't wearing anything." Tarpley asked, "do you remember a TV set in the place, was that, was it on or off?" Appellant said, "I think it was on." He said he had a weapon when he came through the window, a mallet he found in a pickup truck about two apartments down. He raised the kitchen window up, crawled through it, and peeked around the corner. Kennedy was sitting on the floor with her back to the couch. She appeared to be watching television but was asleep. He hit her on the head with the mallet, raped her vaginally, and ejaculated inside of her. There was no sodomy involved. He said there was no particular reason for selecting Kennedy's single-story apartment, "just once again, drinking, using drugs, and out and about." He recalled that Kennedy was kind of heavy. He did not recognize her picture. He said the incident occurred late at night or during the early morning hours. He could not recall if Kennedy was his first murder.

> [W]hen I heard the information over the radio, the num . . . the count was three at that time, and I, there was no other information that I heard before or after that, so I, I'm not positive as to when and what number this one could possibly

be. . . . [T]oday I can't recall whether or not those had occurred or the Costa Mesa's had come before or Tustin's had come after, I, because I was going back and forth

(9 CT 2608-2616.)

3. Kimberly Rawlins

Giesler asked appellant if the Costa Mesa killings might have started in 1977. Appellant replied, "when you said three and four, there's going to be a couple of those that somebody's going to have to help me with, because, I can't, that number seems kind of large for Costa Mesa. Even, even three, I, I can picture two in my mind, but I'm having trouble with the third." She asked if he was familiar with Avocado Street. Appellant said no, but he did not know the names of a lot of the streets he drove up and down. She described a 1979 assault of "a gal living in an apartment" on Avocado Street. Appellant asked if she had a roommate. Giesler said yes and he said,

> Okay, I can give you a description of, a scenario of what happened on, on an evening that I did go out and I, this was Costa Mesa and it could be Avocado Street. Okay, I was out one night in, looking through, I was listening through the window, it was two or three people, possibly three, in the apartment. They were talking, but two of them were leaving, a man and another woman. The other, the other person was a woman, so I left and went and drove around for an hour or so, and came back. The apartment buildings, the lights were out at this time, so I went and checked one of the back windows and it was ajar, but I didn't, for some reason, I didn't use the window this time, I went to the front door, because at this apartment, single story apartment, and it's all the way in the back, all the way in the corner in the back. . . . And I tried the front door, it's open. So I go in, living room on the right, kitchen on the left. The bedroom is directly ahead. So I go straight back for the bedroom, which was the bedroom of the window that I told you was ajar, but I didn't, I didn't go

> through, and ah, there was a woman, she was also sleeping in the nude. . . . And that may be the Avocado one that I'm, I'm thinking about, that's about much about it that I can remember.

(9 CT 2619-2623.)

Giesler asked, "Do you remember anything unusual about her?" Appellant said he did not turn the lights on and could only recall that she was short and petite. He said he hit her with a two-by-four twice, maybe three times. He thought, but was not positive, that he was unable to achieve an erection. He did not recall a tampon inside of her. He denied attempting anal intercourse with Rawlins or with any of the other victims. He left the apartment the same way he had entered and threw the two-by-four on top of the garage roof. He was driving his 1973 Audi. He did not take anything from the apartment; there was a purse sitting on the kitchen counter but he did not touch it. He never went through drawers or closets because there was not enough time. He never wore gloves and did not wash anything or wipe anything clean when he left. He expected that fingerprints would have been taken from window sills and door handles. (9 CT 2623-2628.)

Giesler recalled that Rawlins's apartment was not a single-story apartment, as appellant related, but his description of it being all the way in the corner in the back of the complex was accurate. (7 RT 1523.)

4. Marolyn Carleton

Giesler asked appellant if he remembered "one, again, on Avocado, where, her little boy was home." Appellant said, "Oh yeah. Geez, how did I forget that one?" He described the incident:

> I entered this complex from the back, it was about a seven foot concrete wall in the back. Okay? Over the wall, around the corner, hers wasn't the first one, hers was the next one over, next apartment over. I believe that they were single

> story and the sliding glass door was open, or it wasn't ajar, it was just unlocked. That's what it was. And ah, I went in, I didn't know the little boy was in there, until it was too late, and ah, I can't recall what I hit her in the head with, three maybe four times.

(9 CT 2629.) Giesler said, "But you don't recall what you used?"

Appellant responded,

> No. Why I don't recall on this case, I don't know. Once again, in most cases, it was 2 x 4's. . . . Why these things were laying all over the place at that time, I don't know, once again, maybe construction companies left them out, but ah, that's what I hit her, I would say that's what I used. . . . She was laying in the, the lights were on the bedroom, she was laying in the bed, with a nightgown on, but no underwear, I can recall that. And this is another one, where I can't recall, you know, an erection, you know, could have been ejaculation, but without the erection, okay? I turned to leave and the little boy said something about his mother.

Giesler asked where the little boy came from. Appellant said, "The bedroom was right next door. . . . I knew that there was another room right next door, but like I say, I didn't know there was a little boy. He was probably about three feet tall." (9 CT 2630-2631.)

Giesler asked if he knew how old the boy was. Appellant said,

> My guess would be no more than 10, 11, that would be my guess, just the way he spoke. . . . Because he asked, he was asking, what was wrong, something was wrong with mommy, what's wrong with mommy. . . . he didn't come in, he stayed in the darkness in the hallway. . . . When I opened the door, I stepped outside into the hallway and I bumped into him, that's why I know about how tall he was. . . . And I moved him aside and then exited the apartment complex. I didn't hurt him. [. . .] I just put him to the side and left.

Appellant said he did not know what woke the little boy up or if he was asleep at all. He did not say anything to him. He exited the apartment

through the sliding glass door, the same way he came in. He recalled hitting Carleton three or four times. He attempted to sexually assault her but did not recall whether he actually entered her or just ejaculated. He did not recall what she looked like. He did not remember if she yelled or screamed either before or after he hit her or if she urinated or defecated "or anything like that." (9 CT 2631-2636.)

According to Giesler, appellant's description of a seven-foot concrete wall in the back of Carleton's apartment complex was accurate. (7 RT 1523.)

5. Debra Senior

Appellant said he was not familiar with Maple Street in Costa Mesa, but when Giesler described the area he said, "Oh, I already, I know, I gotcha. . . . this one was young. I don't know, 17, 18 something like that." He said he got into the apartment through a small, sliding glass, bathroom window. Giesler asked, " Okay and when you come out the other side of that bathroom window, what are you coming out into or on?" Appellant said, "Onto the bathtub. . . . and there was a shower, the rod that holds the shower curtain. . . . It wasn't bolted into the wall, like normally they would be. . . . And I grabbed hold to it, and it was one of those spring loaded type deals. . . . I fell into the bathtub and almost broke my . . ." He said he had looked through the window like he normally did and did not see anyone. He had been in the apartment for about 20 minutes when Senior came home. He was hiding in the bathroom but he could see the living room through the crack in the door. It seemed like Senior had been drinking a little bit. She went into the kitchen and mixed a drink, then sat down on the couch and started drinking and fell asleep. He could not recall if the television was on. He came out of the bathroom and crossed the living

room. She opened her eyes and he hit her in the head one to three times with a two-by-four, knocking her unconscious. He closed the living room curtains and carried her into what he assumed was her bedroom, which did not have a bed, just a mattress on the floor. The back of her head may have hit the floor a little too hard when he laid her down, but he did not recall hitting her again. She did not make any noise. He laid her on the floor, removed her underwear, entered her vaginally, and ejaculated. He described Senior as petite and about 5'5" or 5'6" in height. (9 CT 2636-2648.)

Appellant said he generally parked his car and got out and started walking and looking in windows to see if the slider glass was open and if people were home, basically looking for women living alone. His car was never more than six or seven blocks away. He never followed a woman home:

> It's almost like you've been drinking all of your life and you never had a DUI, you know, and as much alcohol as I've consumed throughout the course of my time, I've never had a DUI, you know, why I don't know, but it just, just one of those things. . . . Same situation, you know, it was just, my time, I guess, I don't how else to put it, why these, these particular people were at home at the, at those times, like I said, I looked in many a windows, and nobody was there or somebody was there, and there was never an opportunity. . . . So, you know, I, I couldn't have been drunk as I thought I was or I was drunker than I thought I was for actually going inside those places. . . . But no, I never, I followed no one. There was no stalking or anything like that at all.

Nor had he ever gone into an apartment during the day time:

> Most of the time I was at work in the days. See these, these ah, um, years and these months here, are all after my ah, graveyard shift and even, even when I was on my graveyard shifts, you know, I'd get off, I could, I could still leave the

> base sometimes without anybody saying anything because, I was an E6, and ah, the people that were above me were in maintenance control, which was right next to me and they were friends and I would make a run down the street, get some alcohol or something, you know, get drunk on the job, that sort of thing, so I pretty much had the, or these times were before those hours, those months that I was working on the graveyard shift, one or the other, I'll remember that too, I guess, as time goes by.

(9 CT 2648-2653.)

Appellant said he read a couple of articles about the incidents while he was incarcerated, and he had heard things on the radio. Until that day, though, he never knew the full extent of what had happened. He sometimes recalled the next day that he had "gone out," but sometimes there was a total blackout and he would recall everything a month later. He never sought out the local newspaper to read up on it. (9 CT 2654-2656.)

Appellant's description of Senior's apartment - a bathroom, two bedrooms, and a mattress on the floor - was extremely accurate. (7 RT 1524.)

6. Sandra Fry

Appellant described an incident which occurred just off of Knott Avenue fairly early one night in December 1978. He entered the residence through a bedroom window which was ajar. The woman was sitting at the kitchen table fully clothed. She was in her mid-30's.[16] She had a real slim build and was probably about 5'6" or 5'7" in height. He snuck up behind her and hit her over the head twice, maybe three times, then took her to the

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[16] When Redmond told appellant the victim was only 17, appellant said, "Well, maybe she was younger than I thought she was. Remember now, I'm coming up from behind, but she didn't look that old." (9 CT 2662.)

bedroom and took her jeans off. He did not recall if he had an erection or if he penetrated her. He recalled a stereo unit on the wall in the living room being on. He did not touch it and he did not take anything from the apartment. (9 CT 2659-2663.)

Appellant said he was alone during the incidents and he had never said anything about them to anyone. He thought about them while he was in custody. He had gone through a drug rehabilitation program two or three years before, and he remembered thinking:

> [N]ow what the hell am I supposed to do, you know, do I go back to the drunken stupor phase or do I go on with my life and ah, I didn't want that, that's probably what I've been doing all these years is trying not to face what's, what I'm facing now and I'm trying to stay away from it, because, I, I didn't know what, I don't know how to handle it, I don't know what the hell is coming next, I got a pretty good idea, but ah, you know.

Redmond asked, "Did you ever think this day was going to come?" Appellant said,

> Oh, I knew it was coming. . . . I just didn't know when, but you would have had to have caught me on a day when I hadn't had a drink or some drugs in a week or two, you couldn't have told me that from moment to moment when I was actually being intoxicated, I didn't want to hear it, you know.

Redmond asked if appellant could remember anything else. Appellant said,

> the only way I remembered those last three or four was by you, you know, shaking my memory here. . . . And if, if I could think of something, I, I'd go ahead and bring it out. I've thought of most everything that I can recall.

(9 CT 2663-2667.) Appellant denied ever having gone by a house and returning a day or two later:

Like I'd, I'd go to a place and look and then if I saw nothing, I'd continue on and like on the way back to the car or something, just back track and check again, that sort of thing, because a lot of these places, early in the evening, nobody's home anyway, so . . . You know, just sun, the sun is just going down, nobody's home and I go backtrack to find somebody there.

He also denied ever having gone back to a location after the incident. He said the police never stopped or questioned him. (9 CT 2669-2671.)

He said he could not recall any other Tustin cases. (9 CT 2671.) Tarpley told him,"I will work on ah, Mr. Green's situation for you. All right. I've already been working on that." Appellant asked, "So he is on death row, right?" Tarpley responded, "He is not on death row. [. . .] No, no, he is in prison though." (9 CT 2673.)

Blood was drawn from appellant after the interrogation pursuant to the search warrant. (7 RT 1524-1526.)

2. June 16, 1996: Corcoran State Prison

Anaheim Police Department detective Richard Raulston interrogated appellant at Corcoran State Prison around 10:30 that night (June 14th). Raulston recorded the interrogation but inadvertently erased a portion of the tape while trying to duplicate it. He returned to the prison on June 16, 1996, and re-interrogated appellant.[17] (7 RT 1306-1308.)

Appellant said he recalled their visit the previous Friday, and he acknowledged that he had been advised of and waived his *Miranda* rights and had not been forced to confess. Raulston advised him of his rights again and appellant said he was willing to talk about an incident that

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[17] Tapes of this second interrogation (Exhibits 22 and 23) were played for the jury. Transcripts of the tapes (Exhibit 24) were provided to jurors. (8 CT 2438-2464.) Counsel stipulated that the court reporter need not transcribe the recordings. (7 RT 1309-1310.)

occurred in Anaheim around Christmas 1978. During the ensuing interrogation he reiterated much of what he had told Redmond, Giesler, and Tarpley about Sandra Fry's death. (8 CT 2440-2464.)

3. June 18, 1996: Corcoran State Prison.

Redmond and Giesler went to Corcoran State Prison on June 18, 1996, with their supervisor, sergeant Tom Boylan, and technician Bruce Radomski to re-interrogate appellant on video tape.[18] They met with him in a conference room and told him the interrogation would be recorded. The recording equipment was in plain view. With the exception of a brief period when appellant was being escorted into the room and pleasantries were being exchanged, the entire interrogation was captured on video tape.[19] (8 RT 1696-1700, 1702, 1704.)

Redmond advised appellant of his *Miranda* rights and appellant agreed to be interrogated.[20] (9 CT 2683-2684.) He reiterated much of what he had told the officers about the crimes at Avenal State Prison (9 CT 2684-2869), and he provided additional information. He said that he stayed with his cousin, Florence Russel, for about five years, until he was 15 or 16, when the courts put him in the Boys Republic in Chino. He stayed there

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[18] Investigator Tarpley was unavailable. He asked that the Costa Mesa officers try to obtain more details about the Green case for him. (8 RT 1697.)

[19] Tapes of the interrogation (Exhibits 102a through 102c) were played for the jury. A transcript of the tapes (Exhibit 103) was provided to jurors. (9 CT 2680-2873A.) Counsel stipulated that the court reporter need not transcribe the recordings. (8 RT 1698-1702.)

[20] Kimberly Rawlins (9 CT 2711-2737); Marolyn Carleton (9 CT 2739-2765); Debra Senior (9 CT 2765-2805); Dianna Green (9 CT 2810-2869; 8 RT 1705-1706.)

until February 1973, three or four months before his 18th birthday, when he went into the Marine Corps. He received a high school diploma from the Chino Unified School District at the Boys Republic. He decided to join the Marine Corps because he had no relatives and no place to go and he was getting to the age where he was a man and he needed a place to go. Thinking back, he felt he could and should have gone on to college. His grades were excellent; he recalled that he had a 3.9 grade average. He said he chose the Marine Corps because he was a wild and out-of-control kid and he wanted to get away from schooling. He thought it would give him a little more freedom. He did not realize he was just going from one institution to another. (9 CT 2690-2692.)

He said that Adak, Alaska had been his introduction to alcohol, and he described how he went into a bar but did not know what to order. He ordered a gin and tonic because he heard someone else order it. He was served a glass of tonic water and a shot of gin and he started drinking the tonic water. He said "this stuff is pretty good." Someone commented that it would probably taste even better if he poured the gin in there with it. He lamented, "if I would have just known at that time, I would have stopped drinking, or never started drinking, actually, I probably wouldn't be sitting talking to you today." (9 CT 2693-2695.)

He said he began using LSD and mescaline in junior high school in San Diego, and he used drugs at the Boys Republic, too. In Alaska there was a much freer drug atmosphere. He drank every day there, including his duty days, and all his off days involved drinking and drugs. He said, "if I'm not mistaken, the record, my record should reflect that, unless the military, you know, decided, decided it would be more of an embarrassment to them to print it, but I did get caught quite a few times using drugs and drinking

too heavily while I was in the Marine Corps." He said his main problem was arguing with senior staff NCO and officers about things he thought the military should have paid closer attention to, like its lack of care for "nonrated individuals." (9 CT 2695-2700.)

After Adak, he spent about 12 months in Camp Lejune, North Carolina. Everything went smoothly there except he could not get the drugs he was used to getting in California. ("[T]here was no such thing as a ten dollar bag of marijuana, they wanted three . . . joints for $10.00.") He started buying as much LSD as he could get his hands on and he went back to drinking again. He went to aviation supply school in Meridian, Mississippi, for three or four months, then transferred to the LTA (Lighter Than Air) Station in Tustin where he stayed from 1975 until mid-1979. His drinking and drug use reached the point that he was not reporting to work and was not functioning to the best of his ability. By mid-1979 he was about to be kicked out of the military and he was transferred to El Toro. (9 CT 2700-2704.)

He said that he did not know he had killed Kimberly Rawlins until the detectives told him. He assumed the 1979 news report about three women having died was talking about him, but the first time he knew for sure was the previous Friday. (9 CT 2734-2735.) The thought of murdering women was the furthest thing from his mind. His intent was to hit them in the head, knock them out, and sexually assault them. It never occurred to him that he was killing them. He explained that he once was in a fight and knocked his opponent out by hitting him in the head with a two-by-four. There was a small amount of blood, but it did not kill him. He was under the impression that everyone's skull can withstand the same amount of force. He thought hitting them in the head only rendered them

unconscious. (9 CT 2722, 2725-2726.) He denied attempting anal sex with any of the women. (9 CT 2730.) He never took any objects from any of their homes. (9 CT 2732.) He can only think of one incident (not this one) where he actually got blood on him. (9 CT 2735.)

He explained that he hit his victims over the head in order to render them unconscious so he could rape them. He was not as concerned about them struggling as he was about them making a lot of noise. He said he never went into an unoccupied residence in Costa Mesa. He could tell if someone was home from looking through the windows and whether the lights were on inside an apartment. He never entered an apartment when a male was inside. (9 CT 2747-2750.) He never went to another apartment on the same night. He was always so frustrated with his inability to achieve an erection and ejaculate normally that he thought, "I couldn't get it right the first time, so why would I want to try it a second time?"

> A man in my position, doing what I'm doing as it is, you know, I mean you got to be pretty low on the totem pole to do what I was doing, in the first place, and then assuming that, well I, I can get it up the next, next one, let's just go next door and try it again, it just wasn't that kind of motivation there. [. . .] I'm already, you know, as far as bottom as I can get, in my opinion. [. . .] As, as going, it's going as far to the bottom of my life as I can get by doing this sort of thing and ah, there was just no motivating, no team motivation there so to speak. There was nothing egging me on other than my own self-gratification and that was, that's about the size of it.

(9 CT 2752-2755.)

He first thought about assaulting women shortly before he actually started. (9 CT 2804-2805.) He never went into an apartment and raped a woman without hitting her over the head.

I determined I was just plain ole' being a coward, to have, the only thought that occurred, it never occurred to me that I could do that without killing somebody. . . . [I]f I was going to go about this at all, that that should have been the way that I should have went about it. . . [D]ealing with somebody, without harming them, actually doing serious harm, and it never, the thought never occurred to me. . . Just rape them. . . . Never even, never even dawned on me. . . . Not until later on, when, like I said, when the radio report, it slapped me back to reality that some of these people, that it was possible that some of these people would die. . . . It didn't occur to me until then.

(9 CT 2794-2795.)

He said he could not recall the precise date in 1979 when he heard the radio broadcast saying three women had died. It had lasted just a few seconds. He recalled that the term "bludgeoned" was used. He does not recall hearing that the women had been sexually assaulted. He is not much of a radio person, and he was not watching television or reading the newspaper at all. He does not recall committing any of these crimes after the radio broadcast. (9 CT 2788-2792, 2796.) Later on, when he was in prison, he thought the cases were so old that the victims might have passed away or that no evidence which would lead to a conviction had been left behind, and that he might have gotten away with it. He had not penetrated the victim in many of the cases and most of the semen had run down his pant leg, so maybe there was not enough DNA evidence to identify him. The thought that he might have hit one of the women a little hard and killed her never occurred to him. He thought that everyone's cranial capacity is about the same and that you really had to beat someone to kill them. He knew there was blood, but he did not think he was harming them to the point they would die. He did not start thinking that the women might have died until the late 1980's when he realized he was drunk on each occasion and may have hit the women harder than he thought.

> [I]f that thought entered my mind at any point, during that period. . . . I was praying to God that I was wrong. That I was truly wrong. And plus, you got to remember, this was an ongoing thing, it was get up in the morning with a drink, get up in the morning with, with some type of a drug to get me through the day.

The longest he was sober from April to October 1979 was two or three days when he did not drink because he did not have any money. He was thinking rationally on the day he heard the radio broadcast because he had not had a drink for a day or two. He thought about it quite a bit. (9 CT 2796-2804.)

Giesler explained that the Tustin authorities had not come with them because they had another commitment at another prison and they wanted her to talk to appellant about the Green case. She said there were problems with the case because appellant and Kevin Green had both been in the Marines and in prison together, and they might have put their heads together and devised a plan to free Kevin should appellant ever be arrested. She asked appellant to articulate and detail as much as he humanly could because Green deserved to be a free man if he was innocent, but she had to be able to prove his innocence. (9 CT 2810-2813.)

Appellant said he had almost called The Register a couple of times to talk to one of the reporters who covered Green's case, but he was not man enough to do it. (9 CT 2803.) He did not know Green from either the Marines or prison, and he never sat down with him and devised a master plan that would get him out of custody. (9 CT 2846-2847.) He had read an article about the crime that said Dianna had been hit in the head with a cup made out of some type of hard metal. He recalled seeing the goblet-shaped cup on top of the chest of drawers, but he never touched it. (9 CT 2865-2569.) Giesler encouraged appellant to tell her something about the assault

that he could not have read in the newspaper. (9 CT 2841-2842.) He described the interior of the Greens' apartment in detail and drew a diagram of the residence. He said that the bed in the bedroom was up against the back wall and a chest of drawers was next to the bed. He also described a Tastee Freeze restaurant near the apartment complex. (9 CT 2835, 2857-2865; 8 RT 1705-1706.)

H. DNA Evidence

The weighted, multilocus genotype frequency of the RFLP findings was calculated using the Orange County DNA Database which is composed of seven different databases, three racial (African-American, Caucasian, and Hispanic) and four Asian ethnic (Korean, Chinese, Vietnamese, and Japanese). It consists of about 1,299 samples collected a "number of years ago . . . from all these different groups because these are the groups that . . . compose the peoples in Orange County." This calculation produces a number which applies in a general way to the whole population of Orange County. (8 RT 1612-1613.) Using this database, the probability of a random RFLP match in these cases is one in approximately 670 billion unrelated individuals. In the database for the African-American population (a database containing genetic profiles for only 200 to 250 individuals) the probability is one in 404 billion. (8 RT 1613-1617.) According to the prosecution expert, once the numbers exceed the number of people on earth (five to six billion at the time of trial), one can safely say this is probably the only profile like this on earth. (8 RT 1568.)

The genotype frequency for PCR results was calculated using both the Alabama and the FBI databases. In the Alabama database, the genotype frequency is one in three million for Caucasians and one in ten million for African-Americans. In the FBI database, the genotype frequency is one in

6.9 million for Caucasians and one in 4.4 million for African-Americans. (8 RT 1644-1647.)

DEFENSE CASE

Appellant rested without presenting any evidence. (9 CT 2876; 8 RT 1778.)

PENALTY PHASE

PROSECUTION CASE

A. Jane Pettengill

On July 19, 1979, Jane Pettengill lived in an apartment at 381 Hamilton Street in Costa Mesa. She went to bed that night around 11:00 or 11:30 p.m. The apartment was locked up except for the windows. She was awakened later that night by noises in her hallway. She looked down the hallway and asked a man coming towards her, "who is it?" The man grabbed her and, in a curt, angry voice, told her to shut up and be quiet. She then lost consciousness. During the brief encounter she did not notice any evidence of her assailant's intoxication. (10 RT 2193-2196.)

Pettengill had planned to meet a friend, Gary Susienka, the next day for lunch. Susienka tried to call Petengill that morning to confirm, but he could not reach her. He called and talked to her boss who did not know where she was. Susienka drove to Pettengill's apartment around 10:30 or 11:00 a.m. Her car was parked in its parking place and her apartment's front door was ajar about three or four inches. He called her name from the front door, but there was no answer. He pushed the door open and looked down the hallway and saw her lying in bed on her back. He entered the apartment and walked down the hallway and saw that her eyes were swollen and she had been beaten up. She reminded him of a prize fighter after a fight. Her pillow was covered in blood and blood was splattered on the

bedroom wall. Her bed sheet had been brought up to below her neck, then folded across. Susienka worried that someone was still in the apartment. He found a telephone and called the police. They arrived on the scene and called paramedics. (10 RT 2198-2202.)

Investigator Giesler responded to the scene that afternoon. She noticed that the screen was off a sliding glass window leading into Pettengill's dining area and the window was open. There was a bicycle in the apartment's hallway. Blood stained the bed, the bedroom wall and the door to the heater, and there were bloody, rolled-up towels in the bedroom. A rape kit was collected from Pettengill at Hoag Memorial Hospital in Giesler's presence. There, Giesler observed Pettengill's right eye to be extremely black and blue. There were scratches on her face and bruising behind her right ear. She did not note any defensive wounds. (10 RT 2207-2215.)

Pettengill awoke from a coma about four weeks later and learned that her skull had been fractured. She required a permanent tracheostomy. As a result she cannot breathe well and cannot swim or engage in heavy exercise. She still has difficulty chewing due to nerve damage caused by her strangulation, and forming words is sometimes difficult. (10 RT 2196-2198.)

Appellant discussed the Pettengill assault during his interrogation at Avenal State Prison on June 14, 1996.[21] He said he thought it might have been his first in Costa Mesa. He remembered the incident because Albert

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[21] A tape of this portion of the interrogation (Exhibit 140) was played for the jury. A transcript of the tape (Exhibit 139) was provided to jurors. (10 CT 3190-3202.) Counsel stipulated that the court reporter need not transcribe the recordings. (10 RT 2215-2217.)

Garcia lived right up the street. It was pretty late at night and he was drinking. Pettengill lived in a downstairs apartment in a two-story building all the way in the back of the complex. There were two windows - a bedroom window and a kitchen window - on the same side of the house. He crawled through the open kitchen window. He believed the window lifted up and down, but it could have been a sliding type. He went through the hallway and almost tripped over a bicycle. He went into the bedroom and hit the victim over the head with a two-by-four. She was sleeping in the nude. He never turned the light on, so he could not say what she looked like. From what he could tell her build was slim. He believed he was unable to obtain an erection and ejaculated without entering her. He believed she woke up and was in a state of semi-consciousness - gurgling a little bit - before he left. He left the apartment the same way he had entered. He did not take anything. He noticed the police going in and out of the apartment later that morning when he was at Garcia's apartment, but he never knew whether she lived or died. (10 CT 3192-3202.)

He described the incident in more detail during his interrogation at Corcoran State Prison on June 18, 1996.[22] He said he recalled it well because it was right down the street from Garcia's residence. He had been drinking. He parked his Audi and started walking through the neighborhood, looking in windows. He came across an apartment building where a light was on in the bedroom. He could not hear any voices. As in most of the cases, he did not enter right away. He either went back to his

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[22] A tape of this portion of the interrogation (Exhibit 142) was played for the jury. A transcript of the tape (Exhibit 141) was provided to jurors. (10 CT 3204-3222.) Counsel stipulated that the court reporter need not transcribe the recordings. (10 RT 2217-2219.)

car or to a nearby bar and drank some more. He returned to the apartment between 11:00 p.m. and midnight, possibly later, took the screen off a small kitchen window which was ajar, and crawled in. The window actually entered into the dining area. He turned to his right and went down the hallway. After three or four feet he bumped into a bicycle. (10 CT 3207-3210.)

He explained that part of the reason he did not go into places right away was so that he could find a weapon. In this case he did not know whether the weapon was a two-by-four or a piece of firewood. He entered the apartment to see if there was a female inside and, if so, to knock her unconscious and rape her. The bedroom was dark and he did not know who was in the bed. He started feeling around trying to figure out the person's head from his or her toes. He raised the weapon over his head and delivered two or three blows. He explained that he never counted how many times he hit someone, but he knew it was not excessive, "to the point to where I was standing there beating on somebody for 20 minutes, because once again, that was not my intent, to kill." (10 CT 3210-3214.)

Pettengill fought to maintain consciousness more than the other women he had assaulted. She was flopping around a bit and actually spoke a few words. He turned her nude body sideways on the bed, unzipped his pants, and dropped them down to his ankles. He believed that he ejaculated without obtaining an erection. He said there were seven or eight incidents where this occurred. Giesler told him that semen was found in Pettengill's vagina and suggested that his memory was failing him. He said he recalled that "it just didn't happen . . . in that manner . . that portion of the crime just didn't happen." Giesler asked, "In this case, yeah, but it's possible [. . .] that you did penetrate her vaginally [. . .] [a]nd ejaculate?" Appellant said

"Right." (10 CT 3214-3217, 3221-3222.)

He pulled up his pants when he was done and left the residence the same way he had entered, through the dining room window. Pettengill was still struggling, moving around on the bed and breathing with a loud gurgling noise. He could make out words over the gurgling. He did not see any blood. He did not look around the apartment or take anything. He tossed the weapon into a nearby dumpster. He found his car and probably did some more drinking. He did not think he went to Garcia's house because it was late, possibly 2:00 or 3:00 a.m. (10 CT 3217-3221.)

The Orange County Sheriff's Department crime laboratory typed DNA samples extracted from the vaginal swabs from Pettengill's rape kit using RFLP procedures for four different probes - D2S44, D10S28, DS110 and D4S139. The probes matched appellant's DNA at all four locations. A population frequency was computed using a database which takes into account all the different ethnic and racial databases in Orange County. Using a weighted statistic, the estimated frequency of the pattern occurring is about one in two billion persons. The estimate using only the African-American database is approximately one in 1.4 billion people. (10 RT 2203-2206.)

B. Aida Demirjian

On February 2, 1980, Aida Demirjian lived in an apartment at 1033 East Cordova Street in Pasadena. She arrived home around 10:00 that night and parked in the complex's underground parking structure. As she was getting out of her car and locking the door, a black man hit her two or three times with an iron rod. She fell down and pretended to be unconscious, hoping that he would just take her purse and leave, but he kept hitting her. There was blood all over. She got up and started running and yelling for

help, but he ran after her and grabbed her and hit her again. She held up her hands to defend herself and he hit her in the hand, breaking her thumb and ring and middle fingers. He pulled her necklace off and drug her a couple of yards. She pretended to be unconscious again as he stood at her feet looking through her purse. When he lifted up her skirt, she got up and ran to the first floor and banged on her manager's door, asking for help. She was hospitalized that night and had surgery to repair a skull fracture. Her fingers were permanently injured; she cannot bend her middle finger at the first joint and her ring finger is now shorter and crooked. (10 RT 2112-2120.)

Donald Barra lived in an apartment across the street from Demirjian's complex. Shortly after 10:00 p.m. on February 2, 1980, he went to investigate a "blood-curdling, moaning kind of scream." He determined that the noise was coming from a lower parking structure across Cordova Street. He walked down into the parking structure but could not see much because it was dark. He eventually saw a black man wearing a light T-shirt and darker pants standing over a whimpering Demirjian with some kind of a bludgeon in his hand. Barra yelled at the man to stop. He stopped for a second and turned around and looked at Barra, then started to "saunter" around. Barra told him again to stop where he was and the man "took off like a rabbit" up the ramp and East on Cordova. Barra then turned his attention to Demirjian. Her head was matted with blood and her right hand was severely damaged. Her fingers had swelled so much they looked like "ballpark franks." She wore quite a few rings and the paramedics had to cut them off to save her fingers. Later that evening police officers took Barra to look at a person who was in custody. As far as his clothes and general appearance, the person looked similar to the man Barra had seen

earlier that day. (10 RT 2120-2124.)

Pasadena police officer Dennis McQueeny was dispatched around 10:20 p.m. to respond to the scene. He noticed appellant when he was about a half-block from the apartment complex. The knees of appellant's pants were scuffed, and they appeared to be stained. McQueeny stopped and confronted appellant and saw that he had blood on his pants, shirt, and hands. Appellant gave McQueeny identification indicating he was a staff sergeant in the Marine Corps. McQueeny kept appellant at the location until Barra came by, then took him into custody. According to McQueeny, appellant was calm, cooperative, and compliant. They had no trouble communicating. He did not see any evidence of intoxication. (10 RT 2124-2130.) Another officer found a metal pipe, approximately eight inches long and three inches in diameter, near one of three puddles of blood on the floor of the parking structure. It had what appeared to be blood on it. He found a gold and pearl necklace three parking spaces away from the metal pipe. (10 RT 2271.)

Exhibit 122 (10 CT 3176-3189) was introduced as evidence. Along with fingerprints and photographs from the Department of Corrections, it included a certified copy of appellant's conviction in Los Angeles County for robbery. (10 CT 3180; 10 RT 2170, 2254.)

C. Paula Shimp

Around 3:30 p.m. on February 15, 1980, 13-year-old Paula Shimp bought her mother a greeting card and a belated birthday gift at a Thrifty Drug Store in Tustin. The gift was late because Shimp's father had just died. His funeral had been earlier that day. As she walked home on Nisson Street, Shimp noticed a black van pass by. Minutes later she saw the van approach and stop in front of her. The driver, appellant, got out and opened

the side door, then went around to the back of the van like he was checking the tire. He grabbed Shimp by the sweater as she walked by and punched her in the face. She screamed as he threw her into the van. (10 RT 2080-2083.)

Appellant got in the van and started driving. He kept looking at her through the rearview mirror and saying "stay down, stay down, or I'll kill you." She was very scared. She noticed that he was wearing green pants and a white T-shirt, and she saw a tan military shirt with three insignias or chevrons hanging behind the driver's seat. They drove for about 20 to 25 minutes. From the street signs she was able to see, she thought they were heading towards Westminster. They stopped in the parking lot of a small shopping center. Appellant got in the back of the van, closed the curtain that separated the driver's compartment and the cargo area, and asked her if she had ever been raped before. She said no.[23] Appellant said, "Well, this is what it's like." (10 RT 2084-2088.)

Appellant told her to take off her clothes, but she refused. He got a towel from under the driver's seat and ripped it into strips with his mouth. He put some of the strips in her mouth and one around her head, and he tied her hands together. He asked if she could breathe and she said no, so he took the strip off of her face. He told her to "take off your clothes or I'll kill you." She complied because she was very scared. He got on top of her, penetrated her, and had intercourse for about five or ten minutes. She was on her back and he was on top of her the entire time. He stopped and got off her and allowed her to put her clothes on. When she got up she felt fluid run down her leg from her genital area. He put his clothes on and

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[23] In fact, Shimp had no sexual experience at all. (10 RT 2088.)

asked what was in the bag she was carrying. She told him it was a birthday present for her mother. He asked to see it and she gave it to him. He took it out of the bag and started asking her personal questions like what her name was and how old she was. She told him her true name but said she was only ten years old. She thought he would not hurt her if she told him she was younger than she really was. She told him about what had happened to her father and that she had been to his funeral. (10 RT 2088-2092.)

As they sat in the van, appellant smoked. He said he was going to wait until it got dark and take her back. He asked if she would go to the police or tell her mother when she got home. She said no. He asked if she would identify him if he was in a police lineup. She said no. He got on the freeway and took her close to where she lived. While they drove, she tried to remember every single detail. She recalled that the van was black with bubbled, tinted windows on the sides in the back. The interior was gray and there were just two bucket seats in the front. Appellant got off the freeway and pulled into an alley. He told her "If you tell anybody, I'll come back and I'll kill you." As he drove away, she saw the word "Dodge" on the van and noticed that there was no license plate. She ran into her brother, who was out looking for her, as she walked home. When she got home, she told her mother what had happened and the authorities were called. (10 RT 2092-2096.)

On February 18, 1980, a military police officer at the El Toro Air Station took Orange County Sheriff's Department investigator Fred Geller to a parking area on the base and showed him a black 1979 Dodge van with cargo doors. He said the owner of the van was on base and available for questioning. Geller contacted the van's owner, appellant, and asked him to come to the sheriff's department. (10 RT 2096-2098.) There, appellant

was advised of and waived his *Miranda* rights. Geller told him during the interrogation that he was going to show his picture to Shimp. Appellant said, "I did it. I'm guilty." He told Geller he had been returning from a mechanical shop when he saw Shimp walking down the street. He parked his van in front of her, opened up the side doors, and went to the right rear tire. He grabbed her as she approached the vehicle and threw her into the van. They drove around and ended up somewhere in Westminster. He parked the van, ordered her to disrobe, and raped her. (10 RT 2098-2101.)

Appellant talked about "a rape he had been convicted of in 1980" during his interrogation at Avenal State Prison on June 14, 1996.[24] He said what probably saved the girl's life was learning that she was only 13. He drove back and let her out down the street from where she lived, near the Pasadena on-ramp to the 55 freeway. (10 CT 3171.) He also discussed the rape during the video-taped interrogation at Corcoran State Prison on June 18, 1996.[25] He said he was arrested for the offense in 1980. He never wore his military clothes, even fatigues, during the incidents, but he did during this one. If the girl had been older, he probably would have killed her. (10 RT 2102-2103.)

Exhibit 122 (10 CT 3176-3189) was introduced as evidence. Along with fingerprints and photographs from the Department of Corrections, it

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[24] A tape of the interrogation (Exhibit 117) was played for the jury. A transcript of the tape (Exhibit 115) was provided to jurors. (10 CT 3169-3171.) Counsel stipulated that the court reporter need not transcribe the recordings. (10 RT 2101-2104.)

[25] A tape of the interrogation (Exhibit 118) was played for the jury. A transcript of the tape (Exhibit 116) was provided to jurors. (10 CT 3172-3175.) Counsel stipulated that the court reporter need not transcribe the recordings. (10 RT 2101-2104.)

included a certified copy of appellant's conviction in Los Angeles County for kidnaping and rape by threat. (10 CT 3178; 10 RT 2170, 2254.)

D. David Feurtadot

On February 13, 1984, David Feurtadot was incarcerated for burglary in a Tehachapi facility. He shared a room with appellant. Each had a locker where they kept their clothing, toiletries, and personal articles. Feurtadot fell asleep that night before appellant returned to the room. He was awakened by appellant, who was hitting him in the back of the head. He was bleeding profusely and the pain was excruciating. He chased appellant out of the room and into the hallway. He wanted to kick appellant's ass, but he had to sit down because he was in so much pain he was about to pass out. He asked why appellant had attacked him. Appellant did not say anything and calmly walked away. The guards came and took Feurtadot to the hospital. He had a three or four-inch gash in his head which required stitches. He was in the hospital facility for a week, then went to administrative segregation. He still suffers headaches as a result of the incident. (10 RT 2147-2152.)

Feurtadot said he did not know the motive for appellant's attack. He did not spend a lot of time with appellant. They only saw each other when they were in their room. He admitted that he was a member of the prison's African-American cultural group and that appellant was not, but he was not aware that appellant feared members of the group because they had accosted him in the past. He said he had seen appellant in the Caucasians's television rom, and he believed that caution, not animosity, had been displayed. He wishes he had paid attention to advice that he should think twice about being in a room with appellant. Appellant never accused him of stealing his toiletry articles out of the room. He did not know if appellant

was taking psychotropic medication during that period of time. (10 RT 2153-2158.)

Correctional Officer Michael Sinks recalled a scuffle that night between Feurtadot and appellant in the hall adjacent to the office. Feurtadot come into the office with a major injury to his head which was bleeding profusely. Sinks was on the telephone with his watch commander and requested immediate assistance. After other officers arrived, he went to Feurtadot's and appellant's room. There was a lot of blood on the floor and on Feurtadot's bed, and there was a curved piece of steel, splattered with blood, on the floor. It was a little over 24 inches long and approximately a half-inch in diameter with a "bulge, circular-shaped ball look" towards one end. Inmates had access to such materials in the prison, but they were not allowed to bring them into the living unit. Sinks did not believe appellant was taking any psychotropic medication at the time of the incident. He did not conduct an investigation into whether Feurtadot had stolen from appellant. (10 RT 2159-2170.)

Exhibit 122 (10 CT 3176-3189) was introduced as evidence. Along with fingerprints and photographs from the Department of Corrections, it included a certified copy of appellant's conviction in Kern County for assault on an inmate. (10 CT 3182; 10 RT 2170, 2254.)

E. Victim Impact Evidence

1. Sandra Fry

Sandra Fry was Judith Brown's younger sister. There were ten children in the family. All were raised in Orange County and went to parochial school. Brown recalled that Fry was very compassionate, the kind of person who would bring home animals. She loved people and was very nice. She particularly liked family get-togethers. At the time of her death,

Sandra had just moved out of her parents' house and had lived in her apartment for only three days. Brown learned of Sandra's death when her father called. The news devastated her. It was like her heart had been ripped out. She has gradually reached the point where she rarely leaves the house. The last time the family got together was at Sandra's funeral. After her death they all gradually left California. Brown believed "everyone was afraid to love that hard again." Brown was pregnant with her son when Sandra died. She was so afraid of losing him that she did not let him do anything and she instilled a lot of fear in him. When he was three, his nurse told her his chart read like a battered child's and she had to stop bringing him in for every sniffle and groan. He graduated from high school with honors and she bought him a vehicle so he would go to the University of Nevada, Las Vegas, but he wold not leave. Brown identified a photograph of Sandra that was taken about four months before her death. (10 RT 2106-2110.)

2. Kimberly Rawlins

Kimberly Rawlins was Cheryl Rawlins's baby sister and her best friend in life. According to Cheryl, the Italian and Indian blood came out in Kimberly and she was a very gorgeous, petite young woman. When she walked into a room, her laughter or one of her comments usually brought her attention. She was a very giving person. She was always bringing someone home and feeding them and letting them spend the night. She once brought someone home from school who was being abused by his parents, and he actually became a brother. (10 RT 2140-2141, 2145-2146.)

Cheryl and Kimberly were extremely close. The majority of their friends had never seen them apart. They had gone camping the weekend before Kimberly's death and they were supposed to go to the Spaghetti

Factory on the night of her death, but Kimberly stayed home because she had the cramps. The biggest impact of her death is that there is no way to describe her laughter. She was a contagiously happy person with a lot of moxie. She was a friend and stood up for Cheryl a lot. (10 RT 2141-2142, 2144.)

Kimberly's goal in life was to do everything twice; once for the thrill and the second time with a little bit of grace. She wanted a lot of kids, but she wanted to do a backpack trip to Europe and other things before she got married. She worked in a warehouse shipping critical implant devices. The engineers there always talked about how good she was with her hands and at visualizing things in her mind. Several were trying to convince her to go back to school, like Cheryl had. Kimberly's motto was to "play as hard as you work," so she made sure that Cheryl did not spend her weekends in the books. Their plan was that Cheryl would finish her first two years of college and then help Kimberly through her first two years. (10 RT 2141-2142.)

They moved to Costa Mesa because it was supposed to be where the good white people lived, and they were striving to be part of the middle class neighborhood and have the good life. At the time of her death Kimberly had just moved out of their apartment. Cheryl learned of her death when an officer came to the door and said he needed to talk to her. She thought it was an April fool's joke, then saw a friend behind the officer and knew from the way she was trembling that Kimberly was gone. She was so shocked that the officers had to tell her to put more clothes on before she could go with them to identify Kimberly's body. Kimberly's death was very hard on her. She was very alone. Everyone thought that she and Kimberly's friend Q-Tip had something to do with the death. Even her

friends were afraid. (10 RT 2142-2144.)

The family could not afford to mark Kimberly's grave at first. Their brother, who had been sober for quite some time, went to the cemetery and was not able to find Kimberly's grave. He started drinking again and kept going down the tubes after that. His family is not even sure where he is now. They had to send their mother to Texas after the funeral so she could be around some close blood relatives. Cheryl eventually got married and her husband, a very giving man, made arrangements for her mother to have a home with them. Of Kimberly's death she said, "It's like a rip. And you can do whatever you want, but all you're doing is wiping the pus away. The wounds stay." She missed the camping trips with Kimberly. She identified a picture of her which had been taken the Christmas before her death. (10 RT 2144-2146.)

3. Marolyn Carleton

Marolyn Carleton was Joseph Lee's mother. He was nine years old when she was killed. He remembers being awakened that night by his mother screaming his name. He saw a figure in his doorway and went to her bedroom to see what the problem was. He knocked on the door and yelled "Mom, what's wrong?" but he did not get an answer. The door swung open a couple of seconds later and a dark-complected, dark-haired figure pushed him against the sink, fled down the hall, and left the apartment. He then saw someone looking in the bedroom window. He turned on the light and found his mother lying on the floor, propped up against her night stand and not coherent at all. He put his hand behind her head and saw that it was bloody. He went to the bathroom and got a wet washcloth to try to stop the bleeding, but he realized there was too much bleeding so he called the operator for assistance. (10 RT 2171-2172.)

Joseph read the following statement to the jury:

> It was very hard growing up, especially my younger years, to answer to my friends when they'd say "well, why did you call that lady your mother when that was your aunt just a year ago?" And at times I would have to explain why. That was very hard growing up and hard to deal with. My mother, she was the most understanding, loving, and caring person, always looking out for my well-being. No matter what I did, right or wrong, she was my mother. I can talk about a few memorable moments such as popping popcorn in a tin pan and putting tin foil over the top of it because we didn't have a popcorn machine and watching scary movies together. Saturdays were always our time. We'd always make bacon, she'd make it for me, and that's what we'd do. I can also remember a very memorable time for how much she cared about me and loved me, she'd always try to do everything I wanted. And in her busy life, trying to get her life in order and going to school and working, she always put me first. I wanted to go and have pizza one day, and that was my favorite, and we were going to Pizza Hut, and we were hit by an oncoming car, just hit the side. And we drove up into the pizza place, the driver took off, and my mother still wanted to go in and have pizza. And I told her, no, I said no, we shouldn't, I said, because I think we're going to have to save money to pay for this car. And she said okay, fine. And we went home. And loving me the way she did, she made pizza for me still because she knew it was my favorite. But telling you a few of these memorable moments does not serve her justice. What I can say and needs to be known is that my mother was everything a young boy like myself at that time would want in a mother. She cared, protected, guided, put me first before herself, and loved me like only a mother could. She was everything to me. She was my friend, my teacher, my life, and most of all she was my mother. When she died that early morning, a part of me died. That can never be replaced.

(10 RT 2172-2174.)

Marolyn Carleton was Mary Lee's sister. Lee read the following statement to the jury:

> I'm here today to tell you about my sister. She was more than a sister. She was my friend. It's very hard for me to talk about her. There are so many things I loved about her. We shared in each other's lives, we called each other every day on the phone, we shared everything. Shared secrets, recipes, and how Joe was doing in school. In September, 1979, she was so excited about her new job. She'd gotten a new job, and she was setting goals for herself. She'd gone back to school, and she said, "Mary, you know, you should set some goals, too, you know, you sing so well." And I had studied music at Cal State Fullerton, I was a music major, and she said, "you know, I bet you could sing the national anthem at Anaheim Stadium, just send a tape of your voice, and I know they'd pick you." So reluctantly I did send a tape, and to my surprise I got a call, and they asked me what night I wanted to sing and how many tickets I wanted. And I was shocked and thrilled, and I called Marolyn, and she was so happy. And I picked August 20th, 1979, because it was my son's birthday and of course he loved the Angles [sic]. She was there, and it was a wonderful night, and this picture I carry in my wallet, this was taken August 20th, 1979, the last picture of my sister and I. Less than a month later, September 15th, her life was taken. The reason it's so hard for me to talk about my sister -- death is going to come to all of us. Death maybe through illness, maybe in an accident, old age will take us, but my sister's life was taken in such a cruel and senseless act of violence. My mother passed away of cancer last December, and she can't be here to tell you what my sister meant to her, but she wrote a poem, and I'm going to share it with you. She wrote this in April, 1988. And it's called "What If?"
>
> What if tomorrow I'd awaken and see
> that you had never been taken from me,
> The tragic loss was a nightmare I'd had,
> the agony I'd suffered so long was so sad.
> What if?

And what if you came home and would walk through this door,
my knees just wouldn't hold me up anymore.
In gratitude I'd whisper oh, thank you, dear God,
this darling child is here, now isn't this odd?
For I dreamt I'd lost her. That just isn't true.
She's here, now we'll start to live more for you.
Let's check our appointments, we'll see what's been planned,
we have so much to talk about, now isn't this grand?

What if I still have your cookbooks, I put them away.
We'll get them out and come what may,
We'll get busy and hunt all the dishes you liked,
we'll cook and we'll bake from now until night.
What if?

I'll look for your garments, I've packed some away.
There's a dress you wore often, the background was gray,
You liked it especially, it looked good on you, too.
I must hurry and call old friends and new.
For I want them to visit and say hi to you.
We'll tell Mary to bring Joe on the run.
He's grown so tall now, such a wonderful son.
What if?

Maybe we could just sit and quietly talk
or together stroll slowly outside for a walk.
How I'd cherish each moment, each second must last.
For a lifetime is fleeting, too soon it is past.
Treasures and riches, houses and lands
are nothing compared to the touch of a hand
of a loved one who is suddenly taken away
and you're left alone with nothing to say
. . . except what if?

(10 RT 2180-2184.) Lee identified a photograph of her sister. (10 RT 2183-2184.)

4. Deborah Kennedy

Deborah Kennedy was Sandra Kennedy's aunt. Sandra recalled

Deborah as a very giving, sensitive, and creative person, one with a lot of potential who would give you the shirt off of her back. She had been Sandra's babysitter even though she was only two years older than Sandra, and they were like sisters. They were pretty much inseparable during the summer. They both loved horses and spent their summers riding in the Santa Ana riverbed. Sandra recalled an incident about which they laughed for years and years. One night they went to the riverbed against their parents' wishes and Deborah got stuck with a wild little pony named Taco who would "just take off" the minute you got on him. It was foggy and they could not see anything in front of them and Taco took off as soon as they got to the flat. About three minutes later they heard Deborah screaming in the distance. Taco had flown past a big boulder and Deborah, who was wearing a pair of sandals, struck her foot on the rock. They thought her foot was broken. (10 RT 2184-2186.)

On the night she learned of Deborah's death, Sandra had gone to Knott's Berry Farm with her boyfriend. She was still at his house when she got a telephone call from a family friend saying that something very serious had happened and she needed to come home immediately. She went home and found police officers there. Family members were crying. She was in shock and could not believe the news. Sandra's aunt, who found Deborah's body, now looks about twenty years older than her twin sister. She married a man who is very possessive (a neo-Nazi in Sandra's opinion) and she has isolated herself from the family. Even her own daughters do not have a good rapport with her. (10 RT 2186-2187.)

Sandra lived near Deborah, and for a long time she worried about whether there was a vendetta against the family. She constantly looked over her shoulder. She worked a swing-shift job at the time and did not get

home until 1:00 a.m. It was very scary coming home at night because she never knew who was around the corner. Shortly after the murder she saw a man standing at the bottom of the stairwell. She would still like to know if it was appellant. (10 RT 2187.)

Debbie's murder was devastating to the family of eight children. Out of respect for their grandmother, who suffered a stroke shortly after the murder, they chose not to talk about it a whole lot, but each has had to deal with the inner turmoil all these years. Sandra identified a picture of her aunt. (10 RT 2187-2188.)

On cross-examination, defense counsel asked Kennedy, "You don't believe that there was a family vendetta, do you?" She responded:

> Now, after hearing all the evidence in court, he's just a cold-blooded murderer with no dignity, regard, or respect for anyone, including himself. And, Mr. Parker, I suggest you meet God before you get executed and ask forgiveness for all of these lives that you took. I've forgiven you, I have. I will never forget. I have a compassion for you that God has put in my heart after months and months of prayer, preparing for this trial. I have prayed for you. I have you on a prayer chain at my church. I'm even prepared to write you from prison if you don't get the death penalty because I want you to know that your eternal life, your spiritual life, weighs in the balances right now. And the Bible says that you will be tormented in hell for eternity if you do not accept responsibility for what you've done and ask God on bended knees in humility and brokenness for forgiveness and ask him to cleanse you and prepare you to take you home because I'm quite certain you will get the death penalty. God does not withhold consequences for actions, but in the spiritual realm he can still save you. I have a lot of pain and a lot of disregard for you, but God also spoke something to me concerning you and your heart, and that is that somewhere along the line you were so hurt or so abandoned that you felt no self-worth. I may be wrong about that, but that's what I believe God spoke to my

heart and that you have been numb from early childhood and that this vendetta that you have against women has nothing to do with you hating women, it has to do with you feeling broken and hurt and abandoned and worthless. And I'm really sorry that that has taken place in your life from early childhood, but it by no means was any, any excuse for doing what you did. And the fact that you said that you were under the influence of drugs when it happened, well, you know what? You weren't under the influence of drugs when you decided to take the drugs. You should have gotten yourself some help to take care of your anger. And I'm really sorry that you didn't because I'm quite certain that you lived a violent life, you will die a violent death. That is scriptural.

(10 RT 2188-2190.)

5. Debra Senior

Jackie Bissonnette, Debra Senior's older sister, read the following statement to the jury because she "just didn't think [she] could get through it any other way."

I'm going to talk for both my mom and I today.

People will tell you that all things happen for a reason, but 19 years later our family is still trying to understand why we were chosen to walk through the doors of hell, because that's where we've been.

I was 21 years old and still living at home when I found out Debbie had been killed. My parents were both out of town on separate trips. My mom had gone to a wedding up north, and my dad and brother Mike had gone for a weekend trip to Yosemite. Mike was on leave from the Navy, and they were trying to spend some time together. My boyfriend had come over and we were going to go out somewhere.

Around 12:30 in the afternoon two officers in suits came to my door. I thought they were there to tell me we had too many dogs. If only life was that simple. They told me about Debbie's death, and I instantly thought how am I ever going

to tell my parents. They stayed for a few minutes, asked a few questions, and then left.

Brian left a few minutes later and I was left alone. I didn't know what to do. I had no way to reach either of my parents as they were both on the road to come home by now. After awhile I called some friends of my parents, and they came to stay with me, and we waited. Part of me wanted them to just get home, and part of me wanted them to stay away. If they stayed away maybe they'd never have to know the news that would destroy their lives.

I dreaded the news I had to tell them. I knew this news was going to change our lives forever. Mom got home first. She walked in the door carrying a box of little cakes for my brother Mike. It had been his birthday on Friday, and we were going to celebrate that night. I told her Debbie had died. And the pain I saw in her eyes I've only seen one time, since about an hour later in my father's eyes when we told him. The pain we all felt was indescribable. A pain so great. My dad died three years later.

Debbie was the youngest of the four children. I'm sure you've all heard the saying she wouldn't hurt a fly, but with Debbie this was her life's motto. A fly swatter was not allowed when Debbie was in the room. She would open the door and spend as long as it took to shoo the fly out of the door. If mom set mouse traps, Debbie would find them and set them off. Once she missed a trap. While we were watching TV we heard it go off. Debbie ran to the cupboard to find the mouse caught by the tail. She promptly released it back to the yard.

When Debbie was about 10 my dad took both of us to the pound to get us each a new puppy. They weren't open when we arrived, so we waited in line outside. Someone was walking around trying to give away the ugliest puppy you've ever seen. Of course no one wanted it, no one but Debbie. My dad try to convince her to take a look inside before she decided, but Debbie had to have this puppy. She was named

Whiskey, because she looked like a whisk broom. Hair sticking out just about everywhere.

Of course I went inside, picked out the cute, fluffiest puppy most people would want. When we got home my mom just laughed. She never expected anything else of Debbie's choice.

Debbie and I developed a very strong bond. It wasn't until the death of Debbie that I knew just how strong of a bond this was. I was home alone the night of Debbie's murder. I had gone to bed around ten, and soon after, Whiskey started crying. She sat at the top of the stairs and cried for no reason. I later found out that this was about the time that Debbie was being attacked.

Around two in the morning Whiskey started to cry again. This was the approximate time the coroner placed Debbie's death.

Debbie loved all animals, and you never knew what creature she would be bringing home. I guarantee, we were the only house in Mesa Verde with chickens.

Her dream was to own a horse. She loved to ride and found a special place while riding. I'm sure Debbie would be on a farm with all of her pets if she had had a chance to live.

Even though Debbie was only 17, she had graduated from high school and was working full time. We had grown up in Costa Mesa, and when my parents moved to Orange she missed her friends, so, when one asked her to rent an apartment with her, Debbie decided to give it a try. She was ready to take on the world.

After a few months she decided she'd like to come home and continue her education. She had registered at Orange Coast College and was going to move home the next month. She never made it home.

Debbie and I were at a special time in our lives. There was a four-year age difference, and we didn't always see things eye-to-eye. But now she and I were sharing things sisters do. She tried to loan me her clothes even though she was five-ten and weighed 120 pounds, and I was only five-four, and let's say not 120 pounds.

I envied her strength in moving out. I was older and still at home. I was proud she had accomplished something I had only dreamed of.

I know when all of you were looking at the bloody picture of my sister you saw a dead little girl. And I still saw my sister. For all the wounds, I could still see Debbie and remember her smile, her laugh, and her kindness.

Debbie's death left a void in my life that 19 years later is still there. Not a day goes by without Debbie being in my thoughts. There's no special occasion, no happiness, without the void of Debbie's absence felt. She wasn't able to be the maid of honor at my wedding, but I took her my bouquet anyway.

She couldn't be there for the birth of my children, but my oldest carries her name.

She can't be the aunt to my children she always wanted to be, but each of my children has a little of Debbie in them.

Yes, there are days without tears. But the wounds caused by Debbie's death don't heal. They have become scars, and the scars become a part of you. They're engraved into your soul.

My mom has asked me to read a statement for her.

My husband and I were immigrants from England via Canada. We came here in October 1959 full of hopes and dreams. At the time we had three small children and not much money. But that was of little worry to us.

My husband John, John and I felt we were in good health, had two good arms apiece and three wonderful children, so there was no reason for concern. We both worked. And I being a registered nurse was able to work my shifts around the children's schedule, so babysitters were seldom needed.

In March 1962 we were blessed with Debbie. Not only was she the perfect baby, but she was also an American. John searched for the most American name he could think of. Since Debbie Reynolds was a big name at the time, that was the one decided on, and it had to be spelled the American way.

Sometimes one looks at your life and you realize just how wonderful it was. There was very little we could not accomplish, and very few hurdles we could not overcome. We bought a home, the children grew up, and each day proved to us that if one worked hard, there were very few dreams that did not come true.

We were able to make sure the children were safe, and that they were growing up to be good and kind people.

One day in 1979 a stranger entered our lives and ended our dreams. Debbie was buried on October 27th. The next night we had a heavy downfall of rain. John and I sat up all night because our dear, sweet child was getting soaked and cold, and there was nothing we could do to help her. We would both have given our lives to help her, but someone else had made that decision to take her away from us. And for the first time we realized there was nothing we could do to make things better.

John died three years later. The official reason was myocardial infarction, but I'm sure his heart was broken.

Debbie loved poetry and used to copy poems, and I'd like to close by reading two of the poems she had saved.

Of all the creatures that creep, swim or fly,
Peopling the earth, the waters and the sky,
From Rome to Iceland, Paris to Japan,
I think the greatest fool is man.

From wilderness man built this world,
Carved paths and harnessed the forces that were thought forever wild,
Made reality from dramas, and dreamed anew.
Man civilized the earth. Now who will civilize man.

Damn you Gerald Parker for ruining our lives.

(10 RT 2132-2140.) Counsel stipulated that exhibit number 120 was a photograph of Debra Senior. (10 RT 2271.)

DEFENSE CASE

A. Albert Garcia

Albert Garcia met appellant in 1973 at the town tavern in Adak, Alaska, where they had some words and went outside to fight. Nothing really happened, though, and they became fast friends after that and Garcia got to know appellant quite well. Both were Marines, and they were stationed in the same place a number of times. Between 1974 and 1977, when they were stationed at Tustin, they were roommates. They lived at the Cedar Glen Apartments in Tustin with Garcia's brother. Garcia and appellant then moved to the Bradford Apartments. Garcia worked nights and appellant worked days, but they saw each other on the weekends and partied a few times. They "smoked pot, some angel dust, and I think I seen him shooting one time." This upset Garcia because he does not believe in needles. (11 RT 2272-2277.)

According to Garcia, appellant was a smart, quiet person who was always mellow. If there was an argument he would just go to his room. Garcia had never seen appellant fight anyone. He had good control of his

temper and if there was a fight he would always walk away from it. Garcia did not think appellant had an alcohol problem. He had never seen appellant get violent after he used PCP and alcohol. Garcia did not think appellant had ever been married. In fact, he had never seen him with a girlfriend or a date. Garcia introduced appellant to his family, and appellant spent some weekends at Garcia's parents' house. He was very respectable and he handled himself well. They once went on a camping trip with a van club. They drank a lot of alcohol and there were no problems. There weren't any problems, either, when Garcia took appellant to party with his high school friends in East Los Angeles. (11 RT 2277-2278, 2280-2282.)

Their friendship deteriorated around 1980, and each started going his own way. Garcia learned shortly thereafter that appellant had suffered a rape conviction. He tried to correspond, but appellant said what he had done was wrong and he did not want Garcia as a friend any longer. Garcia believed he was ashamed. Garcia had seen appellant around females when he had been drinking and he had never observed a problem, never any aggressiveness or violence. He never saw appellant act really strange. In fact he seemed pretty together. He was a model Marine and he made staff sergeant in five years. Garcia and his brother were both surprised when they found out about the rape conviction and about this case. Garcia never saw any indication that appellant was acting that way. (11 RT 2278-2280, 2283-2285.)

B. Gerald Parker

Appellant expressed his profound remorse for the crimes:

> I know that I have caused the families and the friends of the victims quite a bit of pain throughout the course of the last 19, 20 years, and I accept full responsibility for that. I am truly, truly sorry for the crimes that I have committed and the

> reasons why we are all here today in this courtroom. If there was anything that I could do to take away the pain and the sorrow of the families of the victims, I would. And if my life is what it takes for them to feel that their family members have been vindicated, then that is what I believe should be done, the taking of my life should be taken away from me.

(11 RT 2318.)

He told the jury he began taking prescribed psychotropic medication in 1984 at the California Men's Institution in Chino. The medication makes him calm so that he is not out of control or nervous when he is around people. He did not take the drugs for about eight years after his release from prison, but he has taken them continuously while awaiting trial at the Orange County jail. He talked with Dr. Blair, a defense psychiatrist, about discontinuing the medication so he could testify, but they decided it would not be a good idea because he was under too much stress from the trial. In January 1996 he began taking stelazine, a psychotropic drug. On February 15, 1996, while he was on the medication, he said, "I'm out of control. I have no doubt I could murder someone." On July 17, 1997, when he was in the Orange County jail and taking psychotropic medication to control both aggression and psychotic symptoms, he said he was going to stay in his cell because he felt like hurting other people. On January 13, 1998, he said he was fearful of losing control in court and becoming violent. On both these latter occasions his attorneys called the jail and had his medication changed and the violent feelings went away. (11 RT 2316-2320, 2345-2346.)

The prosecutor asked appellant when he started feeling sorry for what he had done and whether it was before the police told him he had been identified by DNA on four murders. Appellant said he did not recall when he first expressed feelings of sorrow, but "I've always felt this way, sir."

He did not recall when he started having thoughts about attacking and raping women. He just went out one night and started doing it, then kept doing it. He made the decision to rape and kill of his own free will, and he used alcohol and drugs to help get up the nerve to do the crimes. He knew what he was doing was wrong. He was raised to know right from wrong and to respect women, and he respected his sisters and their friends. He does not know why he kept on killing. He did not like killing people. He could not say if anything was wrong with his mind and its functioning at the time. He thought about what he had done and that he ought to stop, but he just put it out of his mind. (11 RT 2320-2322, 2331, 2342-2343.)

The crimes were committed for sexual gratification, but he did not get any. He felt sorry after each of the incidents, but it did not stop him from attempting to rape and kill other women. He did not recall exactly how he felt after he killed Sandra Fry, his first victim. He was working as a staff sergeant and probably went to work the next day without thinking about what he had done to her or her family. He felt sorry, too, after he killed Rawlins. Although he had not achieved sexual gratification or sexual intercourse with Fry, Rawlins, or Carleton, he hit Dianna Green, the pregnant wife of a Marine, over the head and pulled up her gown and realized she was nine months pregnant, then went ahead and raped her anyway. It was the first time he had completed an actual act of intercourse during one of the incidents, but it was not sexually gratifying. He hit Kennedy in the head three times with an iron mallet. He did not think it was going to kill her. He did not see how her face looked. He had sex with her and ejaculated as she was dying. It was not sexually gratifying. He felt sorry for what he had done to Kennedy. He did not know she was dying when he left. He thought she was going to live. (11RT 2322-2332.)

He probably used a two-by-four to attack Debra Senior. He broke into her apartment before she got home. He was about to leave and she just happened to come home. He had never seen her before. He knocked her unconscious in the living room and took her into the bedroom and raped her. He did not hit her again in the bedroom. He does not know where all the blood on the floor and the bedspread came from. He completed an act of sexual intercourse and then left. He did not think about getting her help or medical attention. He felt bad about what he had done. He could not explain it, but he knew there were feelings that he had done wrong. (11 RT 2332-2335.)

He attacked Demirjian in Pasadena while he was visiting his brother. He had been drinking. He decided to hit someone over the head and rob them because he needed money. He found a steel pipe in the parking structure and hit Demirjian with it. He checked the contents of her purse and then left and ran into a police officer. He did not think about raping Demirjian. He did not pick up her dress while she was lying on the ground to see what kind of underwear she was wearing. (11 RT 2337-2341.)

He had no idea why he kidnaped and raped Shimp. But for his shirt, he had on his full military uniform. He knew she was a child. He did not know exactly how old she was until after he raped her. He was not sexually gratified. He did not know her father's funeral had been that day. He did not know what he meant when he told the detectives "that's what saved her. If she hadn't been so young, I probably would have killed her too." He barely recalls making the statement. He did not know what he would have done had she been older. He would have kept on raping and murdering if he had not been arrested two days later. (11 RT 2335-2337, 2341-2342.)

He hit Feurtadot in the head with a pipe when he was asleep because Feurtadot was stealing from him. He was not taking psychotropic medication at the time. On November 2, 1988, he was arrested in Garden Grove for possession of a switchblade knife and attempting to force a woman to orally copulate him, and he went back to prison. Since his most recent arrest he has been housed all by himself in the maximum security section of the Orange County jail. He knows he will never get out of prison and that, if the jury decides not to put him to death, he will be sentenced to life without the possibility of parole. He told the jury that he no longer had a reason to lie. What he told the detectives was true. He did not know the women were dead when he left their apartments. He learned from a radio broadcast sometime in 1979, before he raped Shimp, that they had been killed. He did not kill Shimp or Demirjian after that. (11 RT 2343-2348.)

C. Paul Blair

The judge appointed forensic psychiatrist Paul Blair to evaluate appellant.[26] (11 RT 2354-2355, 2362.) Blair interviewed appellant twice in the jail, and he conducted a mental status evaluation and a brief neurological examination. He also reviewed the Orange County jail's psychiatric team notes from June 4, 1996, to October 29, 1998, and tapes and transcripts of appellant's statements. (11 RT 2363-2364, 2385.) He did not find any significant difference between his mental status examination and the psychiatric team's diagnosis. Appellant was serious, pleasant, and cooperative throughout the course of the evaluations. He demonstrated

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[26] Although he had testified in a murder case for the Orange County District Attorney's office within the last year, Blair served as an expert witness for the public defender's office "[p]robably more than 90 percent of the time." (11 RT 2391-2392.)

unusual mouth movements, including lip smacking and a more minor form of tongue thrusting. He also demonstrated mild, bilateral, upper-extremity tremors (shaking of the hand). He visibly relaxed when Blair explained that he was not going to ask trick questions and that he would tell appellant beforehand about any unusual types of questions. (11 RT 2364-2366.)

Appellant reported experiencing non-command auditory hallucinations, the voices of a male and a female psychiatrist. At times the female voice seemed to be his grandmother. He could not recognize what the voices were telling him. He made it clear that he did not commit the crimes because the voices told him to. He continues to hear the voices while incarcerated. There was no evidence of olfactory, gustatory, tactile, or any other type of hallucinations. He admitted to having Schneiderian first rank symptoms,[27] including ideas of reference (the belief that people whom you do not know are talking about you, but in fact they are not) and the delusion that thoughts were being inserted into and extracted from his brain. (11 RT 2366-2369.)

Appellant said his formal psychiatric history began when he overdosed on heroin in prison in 1984. (11 RT 2369-2370, 2404.) He was evaluated at a state prison in Vacaville and was treated without medication. He received psychiatric medication while he was at the California Institution for Men, and he has been treated with psychiatric medications during his entire stay at the Orange County jail. He has been prescribed

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[27] Schneiderian first rank symptoms are a series of delusions that psychiatrists used at the turn of the century to diagnose schizophrenia. The terms are no longer used to determine diagnosis, but rather to help understand whether someone is having a very unusual experience or a series of unusual experiences. (11 RT 2367-2368.)

Zyprexa and Risperdal, antipsychotic medication which helps reduce, if not eliminate, his psychosis by putting him in touch with reality and controlling any aggression; reducing his confusion and disorganized thinking; and reducing his Schneiderian first rank symptoms. More recently he has been prescribed Haldol, Mellaril, and Trilafon, all of which have a great number of side effects, including dry mouth, blurred vision, and constipation. (11 RT 2370-2371.) At some point he was given Thorazine, Vasotec (an antihypertensive medication), and Clonidine (a psychotropic medication used in psychiatry to help detoxify individuals who are having withdrawal symptoms from methadone or heroin.) He was also given Navane, Vistaril, Atarax, and Benadryl (antidepressant and sedative medications.) As of October 16, 1998, he was using the antidepressant Zoloft. He is in a "safety gown," as well, which precludes him from hurting himself. (11 RT 2371-2374.)

Appellant told Blair he drank a case of beer and half of a fifth of vodka every day for 10 to 11 years. He said he regularly sniffed glue, paint, and paint thinner between the ages of seven and 15. According to Blair, sniffing paint and paint thinner can result in a whopping headache, dizziness, and confusion. Sniffing glue can result in hallucinations and unusual, sometimes bizarre, thinking. Both cause significant liver and brain damage and can cause death. At age 11 he began using marijuana, and it served as a gateway drug for red devil pills[28] and angel dust (Sherman

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[28] Blair told the jury that these "are generic uppers on the street." Counsel asked, "Those are uppers?" Blair responded, "Yeah." (11 RT 2375.) In fact, red devil is a street term that refers not to drugs which are stimulants but rather to drugs which are depressants and to PCP. (White House Office of National Drug Control Policy, Drug Policy Information

(continued...)

cigarettes dipped in a liquid PCP). According to Blair, PCP can acutely affect brain tissue. It can be stored in tissue from two to three years and in cerebral tissue for even longer. In fact, experts really are not sure how long it can be stored in the brain. When former users exercise or get extremely excited about something, there can be a re-release of PCP that looks to clinicians as if the PCP had been ingested recently when in fact it is a re-release of PCP stored in tissue.

Appellant reported having used mescaline and magic mushrooms,[29] and said he had experienced at least a thousand LSD trips. Blair said, "That's an extremely high number of trips on LSD. And I'm not sure of anybody that I have ever met, with rare exception, who has taken more trips on LSD than - and had a brain left - than Mr. Parker has." Appellant also used "speedballs," which Blair explained is street terminology for intravenous use of a combination of heroin and cocaine. "You know the old cartoon characters have steam coming out of the ears? That's what you get with this. You get steam coming out of both ears. You don't know what you're really in for, in terms of the wild ride you're about to experience." All the drugs appellant talked about have an affect upon the brain. (11 RT 2374-2378.) He also described five head injuries, three where he was knocked unconscious and two where he was knocked dizzy. (11 RT 2380.)

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[28] (...continued)
Clearinghouse, *Street Terms: Drugs and the Drug Trade*, March 1997.)

[29] According to Blair, "This is a veritable chemical factor for unknown psychogenic and hallucinogenic chemicals that are released. Where they're stored is anybody's guess, because they don't even know how many there are in mescaline." (11 RT 2376.)

The jail's psychiatric team saw appellant over a period of two years and prescribed 12 or so psychotropic drugs for him. Blair agreed with the psychiatric team's diagnosis. In his view appellant suffers from organic mental syndrome secondary to five head injuries and the inhalation of gas, glue and/or paint thinner; psychotic disorder not otherwise specified; chronic alcohol abuse in institutional remission; and major depression with psychotic features. (11 RT 2378-2380, 2383-2384.) He believed appellant showed signs of institutionalization, a process wherein a person becomes unable to function outside of the highly-regimented structure of an institution. Such people become less and less capable of functioning in a capacity where they are not told what to do. They would rather be in jail than free "[b]ecause free and on the street they get taken advantage of, and they don't know how to do things." On the street, when he is not taking psychotropic drugs, appellant is a danger to himself and others. He probably would not be a danger in prison, treated with psychotropic drugs and under a controlled environment. (11 RT 2380-2383.)

Blair acknowledged on cross-examination that part of his opinion was based on facts related by appellant. Appellant knew that Blair might be able to give beneficial testimony, and he may have had a tendency to overstate or understate certain things like alcohol and drug consumption. Blair did not view references in his report to appellant as the patient as a forensic mistake. He explained that he came to view appellant as a patient only after he read all the data, after his interviews, and after his evaluation of the tapes. (11 RT 2385-2389.) He also recommended that appellant's case be handled as a conservatorship (a civil commitment) and that appellant receive psychiatric treatment for the rest of his life at Atascadero State Hospital. Blair explained that he realized a civil conservatorship was

not going to happen here, but he did what he needed to do to best serve appellant's interests. (11 RT 2389-2391.)

Blair asked appellant about what he was charged with, but he did not go over the details or ask questions about appellant's mental status at the time. Although appellant had spent most of his entire adolescent/adult life in three institutions - the Boys Republic, the Marine Corps, and the Department of Corrections - Blair was not privy to the records of these institutions. He knew that appellant had been in the Marine Corps and the Department of Corrections, but he did not ask for or get those records. He was not aware that appellant went to the Boys Republic. The records would have been important in reviewing appellant's history. Nor did Blair review police reports, coroner's reports and photographs pertaining to the six charged homicides or police reports pertaining to the rape and kidnaping of Shimp, the assault and robbery of Demirjian, and the assault and rape of Pettengill.[30] He was not given and did not review MDSO reports from 1980, a Naval Criminal Investigation Service interview of June 21, 1996, appellant's rap sheet, or a report written by his commanding officer, Colonel Kuester, when he was in the Marine Corps. He explained that he had asked the defense to send him all the germane records and he reviewed only what they sent him. (11 RT 2391-2401.)

Blair knew that appellant was given an administrative discharge from the service for being convicted of a felony. His discharge had nothing to do with alcohol or drug abuse. According to Blair, a Marine Corps

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[30] Blair explained that he was in court on the day Shimp testified and he was aware of the facts of the offense to the extent her testimony revealed them. Also, the facts of the offenses were included in the video-taped statement he reviewed. (11 RT 2397-2398.)

photograph of appellant dated February 9, 1979, might depict a person who had consumed the amount of alcohol appellant claimed but, "In my candid opinion it does not look like a person who would be drinking that heavily." Records of a Marine Corps physical examination on March 12, 1979, showed that appellant was running six miles a day without difficulty. Blair thought it would be possible for appellant to run that far and to look like that if his liver had grown accustomed to consuming excessive amounts of alcohol. "Believe it or not, I've seen it. Not frequently, but I have seen it." Blair was not aware that the Marine Corps had random urine testing during the 1970's. Nor was he aware that drugs or alcohol are not mentioned once in appellant's Marine Corps record from 1973 to 1979. He acknowledged that he would consider this a factor in forming his diagnosis. (11 RT 2416-2422.)

Blair did not know that, before appellant enrolled in the Boys Republic, he had been evaluated by two psychiatrists who were looking for damage as a result of glue sniffing. Their findings might have proved to be important in generating his report. He was not aware that appellant's grade point average when he completed the Boys Republic was 3.8. He thought appellant mentioned that he excelled in football, track, and basketball in high school and that he was recruited by three service branches, including the Marine Corps. Blair did not know that appellant was in prison in Tehachapi in 1984 when he claimed to have overdosed on heroin. He was unaware of any record corroborating the overdose. He had not seen a 1980 probation and sentencing report wherein appellant reported that he stopped using PCP in 1997. He did not know that appellant told another psychiatrist he gave up using LSD in 1975. He agreed that being in the Marine Corps would be a good reason to quit using the drug. (11 RT 2401-2407.)

Blair's diagnosis of organic mental syndrome secondary to five head injuries was based solely on appellant's statements. He acknowledged that the DSM-IV had abolished organic mental syndrome because it incorrectly implies that nonorganic mental disorders do not have a biological basis. The correct diagnosis should have been either psychotic disorder or personality disorder due to general medical condition specifically (blows to the head, alcohol, PCP, etc.). He admitted that his terminology was old but contended that the DSM-IV only removed the nomenclature for the particular diagnosis, not the illness which still exists under a different name.

Appellant's noncommand auditory hallucinations were also self-reported. He gave three examples: he believed that the radio and television had special messages just for him; that people whom he did not know (except for his grandmother) were able to take thoughts from and put them into his brain; and that people whom he did not know were talking about him. Blair did not know when appellant first reported noncommand hallucinations. The records he reviewed showed that appellant was first prescribed Stelazine in January 1996, but he believed the hallucinations began before that. He explained that noncommand auditory hallucinations can begin as early as the first use of marijuana, but they do not generally begin until more substantial drugs, such as amphetamine or LSD, begin to be used on a routine basis. (11 RT 2423-2430.)

Appellant was evaluated by the Orange County jail's psychiatric team on June 17 and 27, 1996, after he made admissions to the officers in this case. The psychiatric team considered and rejected the notion that he was malingering. With respect to the diagnosis of major depression, Blair conceded that appellant has good reason to be depressed. He did not think there was enough data present to form a diagnosis of antisocial personality,

but he conceded that he needed appellant's juvenile records, which he did not have, to make this evaluation. Nonetheless, he did not feel that appellant met the criteria for that diagnosis because he thought there was more to it than the DSM-IV includes. He had no information, for example, about the torture of small animals, bedwetting, or early-onset fire setting, and he felt there were both normal and abnormal parts to appellant's sexual history. He was not "particularly aware" of the fact that appellant had raped a 13-year-old, and appellant did not mention it. (11 RT 2431-2436, 2443.)

Appellant's commitment papers to the Boys Republic and the Youth Authority show that he had run away from foster homes on numerous occasions and that he had suffered convictions for petty theft and burglary. Although these offenses are sufficient for a diagnosis of antisocial personality, and while Blair agreed that appellant's conduct was "pretty bad," he could not diagnose antisocial personality disorder because "in my mind and in my clinical experience there has to be more time spent, more testing done than time allowed." (11 RT 2437-2440.) In addition, appellant's record at the Boys Republic and in the Marine Corps was inconsistent with antisocial personality disorder. Blair reiterated his full agreement with the Orange County jail's psychiatric team which had examined appellant over a 29-month period. (11 RT 2441-2445.)

Appellant's jail and department of health records contain a report dated June 25, 1996, and updated on February 10, 1998, which includes an axis 1 diagnosis of psychotic disorder not otherwise specified. Blair explained that this means there was psychosis and appellant was out of touch with reality, but there was not enough other data to support a diagnosis of schizophrenia, manic depressive illness, or schizoaffective disorder. The axis 2 diagnosis was antisocial personality disorder, followed

by the comment "has been incarcerated most of his adult life." According to Blair, an antisocial person can perform well in school and can be a good Marine. They usually are intelligent. One of the symptoms can be that they have the capability of committing crimes without conscience and remorse. (11 RT 2446-2449.) Appellant's prison file also contained a record dated March 11, 1994, and signed by a clinical psychologist, which contains an axis one diagnosis of polysubstance dependence and an axis two diagnosis of antisocial personality. Blair noted that the diagnosis was not by a medical doctor. He did not find it surprising that a doctor of philosophy would list antisocial personality when dealing with people who have committed felonies in a prison. He saw no evidence that the clinical data supported the psychological test data. (11 RT 2552-2554.)

PROSECUTION REBUTTAL CASE

A. Park Dietz

$500-an-hour forensic psychiatrist Park Dietz reviewed about 8,000 pages of records concerning appellant and the case, three videotapes, and an audio tape.[31] He did not personally interview appellant. Dietz believed that appellant's mind was functioning perfectly adequately on June 18, 1996, the date of his videotaped interview at Corcoran State Prison. He was logical, coherent, rational, and understandable. Dietz saw no evidence at all of a psychotic disorder, organic brain damage, or any problem that was so significant it could affect how blameworthy appellant would be if he committed crimes on that date. Based on the crime scenes, the testimony of surviving victims, and what was known about what appellant did, Dietz was

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[31] Dietz acknowledged that his billing rate was considerably higher than the rate allowed by the superior court for appointed psychiatrists. (11 RT 2476.)

very confident that appellant's mind was working at least that well in 1978 and 1979 at the time of the commission of the offenses in this case. The only difference between the videotape and what went on at the time of the offenses is that appellant might have been intoxicated with alcohol or drugs at the time of the crimes.[32] (11 RT 2461, 2465-2470, 2476.)

Dietz did not disagree with the jail's psychiatric team's diagnosis of psychotic disorder not otherwise specified, organic mental syndrome, and depression as well as polydrug and alcohol abuse. He was aware that appellant had been taking antipsychotic drugs - Risperdal, Zyprexa, Haldol, Mellaril, Trilafon, Thorazine, Navane, Stelazine, Vistaril, Benadryl, and Zoloft - serially throughout the 29 months he had been in the jail. He was aware, too, that appellant was treated with antipsychotic medications at the California Men's Institute and that, in 1980, when appellant first went into prison, someone had written that he had a history as a paranoid schizophrenic. Nonetheless, according to Dietz, appellant has a sufficient number of features to meet the criteria for having antisocial personality disorder. (11 RT 2470-2478, 2483.)

> Antisocial personality disorder is the current term for what previously was known as sociopath. And prior to that was known as psychopath. But then Hollywood made psychopaths sound like they were crazy, so the term was dropped. And before they were known as psychopaths, the term was moral imbecile. And before that the term was evil.

(11 RT 2471-2472.) He explained that one simply has to have a sufficient number of youthful and adulthood misbehaviors to earn the diagnosis.

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[32] Dietz acknowledged that alcohol and street drugs can affect a person's ability to think and make rational judgments, and that people who are drunk do things they would not do when they are sober. (11 RT 2478-2479.)

People with the disorder don't learn from their experience. It starts out when they're very young, under 15, and their conduct is consistent all the way through. They don't respond to treatment or discipline. Many respond to structure, but someone has to be controlling them. They tend to want to do anything they think will make them happy. "Nobody has found any way to change them yet." (11 RT 2480.)

Dietz did not believe that appellant's history (being involved in the juvenile justice system, going to Boys Republic and doing well, earning a high grade point average and graduating from high school, going into the Marine Corps as a private and working his way up to staff sergeant, not only following but enforcing the rules) was significant in negating the possibility of antisocial personality.

> I think he was responding to structure, that he learned how to play that system. At the same time that he is being a functional Marine doing a good job with procurement, running six miles a day, being physically fit, passing each physical very well, what he is doing at night is patrolling for victims. That's his secret life.

(11 RT 2481-2482.) Defense counsel reminded Dietz that "The things that you have described were things that happened to Mr. Parker after he had become staff sergeant in the Marine Corps - after Mr. Parker started to ingest heavily into street drugs, cocaine, heroin, PCP, LSD, alcohol." Dietz responded,

> I'm aware that some of the time he says that. . . . I know of no other evidence for it. . . . I already indicated that I think it's true that he has abused alcohol and drugs. The question is when, and how much. . . . I don't think it's possible to learn what one would want to learn about the alcohol and drug abuse at that time, because one has only the unconfirmed reports of the defendant himself.

(11 RT 2483.)

B. Larry Kuester

From 1978 through May 1979 appellant was a staff sergeant assigned to a heavy helicopter Marine squadron, HMH 361, under the command of Lieutenant Colonel Larry Kuester. Appellant served as the Material Chief, a difficult job running the parts section, and he was responsible for a very critical function, obtaining the necessary parts to keep helicopters flight ready. The military had undergone a significant build-down at that time which made parts difficult to get. HMH 361 posted outstanding readiness numbers, so appellant had to have performed in an outstanding manner. Providing that kind of support required an exceptional dedication to the task at hand. (11 RT 2486-2489.)

Kuester explained that staff sergeant is a very significant position in the Marine Corps. Of nine enlisted ranks, it is E-6, the beginning of what one would consider senior enlisted leadership, which "anyone who has any military experience will tell you is the backbone of the organization." Kuester's predecessor had recommended appellant for warrant officer's school, a tremendous honor. Kuester reviewed and signed the evaluations in appellant's fitness reports. Appellant received outstanding evaluations. The officers who wrote the reports were very demanding. In order to receive outstanding reports from them one truly had to be outstanding. (11 RT 2489-2490.)

Kuester saw appellant on at least a weekly basis. He never saw him intoxicated, hung over, or anything like that. He explained that the Marine Corps has a zero tolerance policy on the use of drugs or alcohol while on duty, particularly for aviation units where lives are on the line and minimum performance cannot be tolerated even in training situations. The Marine

Corps conducted random urine testing of its troops. A positive result would not have been widely advertised, but it would certainly be known to the commanding officer and key personnel in the chain of command. While an officer under his command might have handled an alcohol problem personally, a drug problem would have been brought to his attention. He did not hide or ignore drug problems. A small number of junior personnel were in the rehabilitation program. He was not aware that appellant had any alcohol or drug problems while he was commanding officer, and no such problems are reflected in his service records. Kuester thought it would be impossible for someone intoxicated on alcohol and drugs to perform appellant's job. It requires an exceptional amount of motivation. One has to be a self-starter. Successful material personnel are "people who walk the extra mile." Appellant passed every one of his semi-annual personal fitness tests. Kuester's observations led him to believe that appellant was a good Marine. Otherwise he would have done something about it and brought it to the attention of other officials. Kuester acknowledged that he did not know if appellant was drinking and taking drugs at night when he was off duty. And he could not discount the possibility that appellant was ingesting drugs but the Marine Corps failed to detect it. He classified appellant's job in the Marine Corps as a high stress job. Many individuals thrive under that sort of pressure. Some do not and react by sedating themselves with alcohol and drugs. (11 RT 2490-2498.)

* * * * *

ARGUMENT

I.
THE PROSECUTOR'S EXCLUSION OF ALL THE BLACK PROSPECTIVE JURORS VIOLATED THE STATE AND FEDERAL CONSTITUTIONS AND REQUIRES REVERSAL OF THE JUDGMENT

Appellant, a black man, was tried for the rape and murder of five white women and the murder of another's fetus by a jury from which the prosecutor excluded all the black prospective jurors. Appellant objected that the prosecutor's challenges were based inappropriately on group bias. (*People v. Wheeler* (1978) 22 Cal.3d 258 [*Wheeler*].) The judge found there was no prima facie evidence of misconduct, refused to require the prosecutor to provide reasons for the peremptory challenges, and denied the motions. The prosecutor's exclusion of all the black prospective jurors and the judge's refusal to require him to provide reasons for doing so violated appellant's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution (*Miller-El v. Dretke* (2005) 545 U.S. 231 [*Miller-El*]; *U.S. v. Martinez-Salazar* (2000) 528 U.S. 304) and his right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*People v. Wheeler supra,* 22 Cal.3d at pp. 276-277.)

A. Relevant Law

Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race or gender. (*Ibid.*, *Batson v. Kentucky* (1986) 476 U.S. 79, 97 [*Batson*]; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130-131.) Such a use of peremptories by the prosecution "violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the

community under article I, section 16 of the California Constitution. Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341; *People v. Avila* (2006) 38 Cal.4th 491, 541.)

There is a rebuttable presumption that peremptory challenges are being exercised properly and the burden is on the opposing party to demonstrate impermissible discrimination. (*People v. Bonilla, supra*, 41 Cal.4th at p. 341.) To do so, a defendant must show that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the exclusion by offering permissible justifications for the strikes. If such a justification is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful discrimination. (*Snyder v. Louisiana* (2008) ___ U.S. ___ , 128 S.Ct. 1203, 1207; *Johnson v. California* (2005) 545 U.S. 162, 168.) The same three-step procedure applies to state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596; *People v. Bonilla, supra*, 41 Cal.4th at p. 341; *People v. Howard* (2008) 42 Cal.4th 1000, 1016.) An objection under *Wheeler* suffices to preserve a *Batson* claim on appeal. (*People v. Gray* (2005) 37 Cal.4th 168, 184, fn.2; *People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3; *People v Lancaster* (2007) 41 Cal.4th 50, 73.)

Ordinarily, in reviewing the denial of a *Wheeler/Batson* motion the Court considers only whether substantial evidence supports the trial court's conclusions. (*Snyder v. Louisiana, supra*, 128 S.Ct. at pp. 1207-1208; *People v. Avila, supra,* 38 Cal.4th at p. 541.) However, "[w]here, as here, it is not clear whether the trial court used the reasonable inference standard,

rather than the recently disapproved '"strong likelihood" standard,'[33] we review the record independently. (*Bonilla*, at p. 342, 60 Cal.Rptr.3d 209, 160 P.3d 84.)" (*People v. Howard, supra*, 42 Cal.4th at p. 1016.)

In deciding whether a prima facie case was stated, the Court considers the entire record before the trial court, but certain types of evidence may be especially relevant:

> [T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic - their membership in the group - and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*People v. Wheeler, supra,* 22 Cal.3d at pp. 280-281, 148 Cal.Rptr. 890, 583 P.2d 748, fn. omitted.)

(*People v. Bonilla, supra*, 41 Cal.4th at pp. 341-342.)

If the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis, the case is remanded to the trial court to attempt to conduct the second and third steps of the *Batson* analysis. If the prosecutor offers a race-neutral explanation, the court must

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[33] See *Johnson v. California, supra,* 545 U.S. at pp. 166-168 [California's standard for deciding whether defendants have made out a prima facie case of discrimination is inconsistent with *Batson* and the federal Constitution].

try to evaluate that explanation and decide whether the defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenges in a permissible fashion, it should reinstate the judgment. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104.)

B. Factual Background

136 prospective jurors survived hardship screening. (10 CT 3113-3116.) Two were black. (6 RT 1117, 1203-1204) 71were questioned on voir dire (5 RT 757-6 RT 1188), and 17 were excused for cause and/or hardship without objection. (5 RT 858-860, 873-875, 980-981, 993-994; 6 RT 1019-1022, 1065-1067, 1070-1076, 1126-1133, 1144-1145, 1155-1158, 1164-1172.) Of the remaining 54, the prosecutor peremptorily challenged 19 prospective jurors, including both black prospective jurors (5 RT 903, 919, 944, 955, 964, 971-972, 987, 997; 6 RT 1009, 1031, 1034, 1039, 1044, 1055, 1070, 1096, 1099, 1109, 1123), and three prospective alternate jurors. (6 RT 1154, 1164, 1176.) The defense peremptorily challenged 14 prospective jurors (5 RT 910, 937, 951, 961, 964, 980, 992; 6 RT 1019, 1048, 1065, 1082, 1105, 1121, 1126) and two alternate prospective jurors. (6 RT 1181, 1185.)

1. Juror No. 719

The prosecutor's fourth peremptory challenge was to Juror No. 719, a black woman. (5 RT 929, 955; 6 RT 1117, 1203.)

a. Hardship Application

On September 29, 1998, the sixth day of jury selection, Juror No. 719 asked to be excused due to hardship, specifically low-back pain caused by sitting. (1 CTHS 140.) Her request was denied. (See 3 RT 454-457; 4 RT 593-595, 754-755, 759, 761. 767-768; 5 RT 825-826, 855-857, 881-882.)

b. Juror Questionnaire

Juror No. 719 wrote in her questionnaire that she was an unemployed, disabled, 51-year-old widow who had worked as a cook for the Tustin Unified School District for 17 years. She lived in a rented apartment with her 23-year-old son and had never lived outside Orange County. She was currently registered to vote and had no difficulty reading and understanding the English language. She had never served in the armed forces and had never been involved in military police work or the military's court-martial system. She did not know the defendant, any of the attorneys, the judge, or any of the witnesses. (6 CTJQ 1872-1873.)

She had completed the 12th grade and had no special education or training in law, medicine, criminal justice, psychology, pharmacology, or psychiatry. She did not know any judges, was not associated with any attorneys who were prosecutors or criminal defenders, and neither she nor a close friend or relative had ever been involved in a criminal case. She had never testified in court and had never served on either a grand or trial jury. (6 CTJQ 1874-1875.) She did not belong to or regularly attend the meetings of any clubs or civic organizations, nor had she been associated with any clubs, groups, or organizations which had goals or activities related to law enforcement, public safety, public health, or public morals. (6 CTJQ 1875-1876.)

Neither she nor anyone close to her had any particularly positive or negative experiences with law enforcement, prosecution, defense, the courts, or lawyers. She wrote that neither she nor a relative or close friend had been arrested for or convicted of a crime, but also that her only experience with visiting a jail occurred when her son was in the Orange County jail. She was not taking medication regularly that might make it difficult for her to concentrate. She thought the only thing that might preclude her from being a good juror was a bad lower back which precluded sitting for a long period of time. (6 CTJQ 1876.)

Both her father and her son had experienced problems with alcohol. Either she or a close friend or relative totally abstained from the use of alcohol for religious reasons. She was neither a follower nor a leader; she "liked to listen to the problem first." Neither she nor a close friend or relative had ever been the victim of a sexual assault or rape. She did not belong to or support any "victims rights" groups. She had no pressing business and nothing pressing in her personal life that might cause her to wish to expedite the process of decision-making in the jury room. (6 CTJQ 1877.) Neither she nor anyone close to her had ever seen or been treated by a psychiatrist or psychologist and she had no bias either for or against psychiatric or psychological testimony. She "hurt" for people with drug or alcohol problems and believed they would be better off without them. When she read, she read the Bible and the newspaper. She did not watch much television. When she did she watched game shows. She had never heard about this case. (6 CTJQ 1878-1879.)

She indicated that she could decide the case based on the evidence and law presented during the course of the case, could avoid media coverage of the case and would immediately report any exposure to such

coverage, and could follow the judge's orders and not discuss the case with anyone else except during deliberations with all the other jurors. She had not followed any criminal cases in the news media during the previous three to four years. (6 CTJQ 1880.)

She would not refuse to find appellant guilty, if she believed him to be guilty, just to prevent the penalty phase from taking place. Nor would she refuse to find an alleged special circumstance to be true, if she believed it to be true, just to prevent the penalty phase from taking place. (6 CTJQ 1884.) She did not belong to any group that advocates increased use or abolition of the death penalty. She did not like the death penalty but she could set aside her personal views regarding what the law ought to be and follow the law as the court explained it. Her views had not changed in the last few years. She did not respond to questions which asked if she would automatically refuse to vote for either the death penalty or life imprisonment without the possibility of parole without considering any of the aggravating and mitigating factors, or if she thought the death penalty was used too often, too seldom, or randomly. (6 CTJQ 1884-1886.)

She had religious beliefs which would impair her ability to serve as a juror on this type of case. Asked to explain, she wrote "Death." Still, she did not feel it would be difficult to refrain from discussing or forming or expressing an opinion about the case until it was finally submitted for decision and she knew of no reason why she would not be a completely open-minded and impartial juror in the case. (6 CTJQ 1886-1887.)

c. Voir Dire

On voir dire, Juror No. 719 told the judge she was a 51-year-old widow who had graduated from high school. She was disabled and unable to work. Her spouse was deceased. She had never been the victim of a

crime and had no bad experiences with courts and law enforcement. She had no friends in law enforcement, did not own any weapons, and had no prior jury trial experience. Her bad lower back might preclude sitting for a long period of time. (5 RT 919-920.) She assured defense counsel she could analyze the evidence, including appellant's video-taped statement, and listen to his answers to determine whether or not he had the required mental state. She agreed that nothing could be more serious than trying appellant for his life. (5 RT 921-923.)

She told the prosecutor that she had a problem with the death penalty for religious reasons and she would find it difficult to impose because of her personal and religious beliefs. She probably would always elect life without possibility of parole over death. The prosecutor challenged her for cause (5 RT 923-924) and the judge retired to his chambers with counsel and the prospective juror. There, he asked her, "Are you telling the court and the parties that under no circumstances would you ever vote for the death penalty?" She replied, "I just don't believe in it. I'm being honest." (5 RT 924.) The judge continued:

> **Q.** I take it that your feelings are so strong that no matter what evidence is presented, no matter what evidence is going to come in, you would never, under any circumstances, vote for the death penalty.
>
> **A.** I won't say that. It depends on the evidence also, I'd take that in consideration. But I just don't believe in it because we can't give life. And that's one reason. And I just don't believe in taking life.
>
> **Q.** Okay. And this is based on your religious beliefs?
>
> **A.** Yeah.

[¶ ¶]

Q. Okay. Are you saying that it's a very small likelihood that you would ever consider yourself considering the death penalty?

A. It depends on the evidence. It really -- it depend on the evidence. What else can I say? What is presented to me.

Q. Would you be willing to look at that evidence?

A. Oh, yeah.

Q. Would you be willing to talk about the evidence with the other jurors?

A. Oh, yes. Oh, definitely, yes. Yes.

Q. All right. And if they convinced you that even though you have a lot of reservations about the merits of the death penalty because, you know, we don't give life kind of situation --

A. Right. Right.

Q. -- would you nevertheless, if they convinced you it was appropriate, could you see yourself voting for it?

A. I can't give you that answer.

Q. Okay. But would you be willing to listen to the --

A. I would be, yes.

Q. Would you look at the evidence before you made that decision?

A. Yes.

Q. And would you be willing to look at the law that goes with that?

A. Right, apply to that particular question.

Q. And you would you make your best efforts to apply the law in an evenhanded manner?

A. That's correct.

(5 RT 925-927.) She reiterated that she had a lower-back problem and that it was painful to walk a long distance or to sit for a long period. She did not know if using a pillow would alleviate the pain. (5 RT 927-928.)

The prospective juror agreed with the prosecutor that her religious and personal beliefs against the death penalty would make it very difficult for her to vote to put someone to death. However, when he suggested that she would "certainly be leaning against the death penalty strongly because of your religious beliefs," she said, "I won't say that's a true statement because I have to look at the evidence. Depend on the evidence." (5 RT 928.)

d. Appellant's First *Wheeler* Motion

Out of the prospective juror's presence, the judge said, "I'm going to disallow the challenge for cause. And so if there's a peremptory challenge, do you have a *Wheeler* situation? And if so, we better make a record of it." One of appellant's attorney's, Mr. Enright, responded that the juror was obviously a black woman and "we have probably in this group maybe three Afro-Americans." Nonetheless, he felt "that you've made the record that Mr. Jacobs probably would not get - not be in a *Wheeler* situation because of her answers. I think that she gave answers that would probably give him reason to use his peremptory in a nonracial manner." (5 RT 929.)

A lengthy discussion ensued between the prosecutor and the judge concerning the court's ruling on the challenge for cause. (5 RT 930-934.)

Mr. Enright then advised the court that he had changed his mind:

> **Mr. Enright:** Yes, your honor. Mr. Zimmerman feels that I was being too generous in my statement about *Wheeler*, and feels --
>
> **Mr. Jacobs:** You want to back out?
>
> **Mr. Enright:** We are going to back out.
>
> **Mr. Jacobs:** You want to back out.
>
> **Mr. Enright:** Jacobs' adamant position with the court's fine ruling and the situation leads me to believe that we may very well be getting into a *Wheeler* situation.
>
> **Mr. Zimmerman:** There's only three blacks in the whole room.
>
> **Mr. Enright:** There's only three blacks out there.
>
> **The Court:** You want to say something?
>
> **Mr. Zimmerman:** Given the limited reservoir pool of potential black jurors, kicking any one off puts us in *Wheeler*. And I'd like to know if and when Mr. Jacobs exercises a peremptory --
>
> **Mr. Jacobs:** I think we can assume I'd use a challenge sometime today. They haven't made a prima facie case for *Wheeler* whatsoever. None.
>
> **The Court:** In view of the comments here, I'm not going to find any *Wheeler* error once Mr. Jacobs excuses this juror. But I wanted to put that on the record so we don't have to come back in here and do this again.
>
> **Mr. Enright:** I want to make one thing clear, I think, where *Wheeler* directs itself to a problem but totally misses the boat. And the problem they direct themselves is if it were up in Los

Angeles and we have a pool of black jurors and Mr. -- and I can show that Mr. Jacobs is setting a pattern, the very pattern that he's setting is going to kill him eventually because he's going to have black jurors eventually on that panel. But what *Wheeler* fails to realize, if you only have one black juror and the prosecutor exercises his peremptory on that black juror, the defense can't say, well, he's setting a pattern because there's no pattern to set. They only can say wait a minute, this is the very damage we have to worry about.

Mr. Jacobs: I have to say you don't need a pattern under *Wheeler*. That's not a showing right now.

Mr. Enright: I think you have to show that.

Mr. Jacobs: You have to show some kind of abuse of the peremptory challenge. I don't believe you have to have systematic showing anymore.

Mr. Enright: All right.

Mr. **Jacobs:** You either have a good reason to use a peremptory or you don't.

The Court: And applying what I heard to be Enright's assessment of the juror's responses and the likelihood that a good prosecutor would challenge such a juror, I don't find any prima facie evidence of misconduct on the part of the prosecutor. And I enjoy listening to the law from Jacobs and I'll listen to the law from Enright, that's fine, it's an enjoyable part of the trial. But here I don't find any basis for a *Wheeler* type of an objection, and I just wanted to make that record before we go back out there.

(5 RT 934-936.) The prosecutor excused Juror No. 719 with his fourth peremptory challenge. (5 RT 955.) The judge revisited his *Wheeler* ruling at the next break:

The Court: Now, during the in-chambers conversation there was a topic came up as to whether the defense is being

precluded from having other black jurors serve on this case, and this conversation came up in reference to (juror 719), who was excused by the people. I'll simply note that my observation is at this stage in the proceeding the defendant, from the court's perception, has not been denied the opportunity to have other black jurors serve. And the defendant has not unduly been denied the opportunity to have minorities serve as a -- as a juror on this case. And I have directed my clerk, even before the topic came up, that we would keep records of all requests of prospective jurors who are asking to be excused, whether they were stipulated to by the parties or not, just because my observation is, that in Orange County, we do have a sizeable number of citizens from the community who come from ethnic minority, who come to the court as prospective jurors. They may not end up serving for particular reasons, whether it's English, health, financial. But, I think we have a good record as to who came here, and who asked to be excused, and what the party's responses were to that. That's all contained in the hardship forms that are being logged as court documents. And I simply wanted to state that for the record. If either side disagrees with the court's observations, other than the objection raised by the counsel for defendant as to the challenge being made by the people as to prospective juror (juror 719), this is the time to make the record.

Mr. Enright: Well, your honor, I think we have made the record as to (juror 719). And I feel that there may, in the remaining jury pool there might be two other African Americans. And you're in a much better vantage position to look back there. But, that's just been my observation.

The Court: Well, I'm reluctant to make any generalization as to the ethnic background of any prospective juror simply from my looking at the appearance of a person. And, so, I just want -- I don't want to add to the issue, but I want to keep a clear record as to the fact that we have had, and continue to receive prospective jurors who come from different ethnic backgrounds that may not end up serving for variety of reasons. And all I can do at this stage of the proceeding is try

> to keep careful accounting of who is coming in, who is asking to be excused, and whether the parties stipulated or whether the court found cause. And what I'm doing in that regard is these request for hardships are just being retained for, permanently, so we have a record as to what took place.

(5 RT 1001-1003.)

2. Juror 213

The prosecutor's 17th peremptory challenge was to Juror No. 213, a black man. (6 RT 1099, 1116-1117, 1203.)

a. Hardship Application

On September 29, 1998, the sixth day of jury selection, Juror No. 213 asked to be excused due to hardship. He indicated that he had served as a juror before, that he had not asked to be excused when he received the jury summons, and that he had time and date problems, specifically doctors appointments on October 1st and 7th and an important school department meeting on October 5th, and he planned to be out of town on November 16th and 17th. "And last but not least, I'm head basketball coach - and basketball season starts Dec 1st! Our schedule could (during that month) coincide with the trial. And I must be on the bus or at the games." (1 CTHS 1-9 122.) His request was denied. (See 3 RT 454-457; 4 RT 593-595, 754-755, 759, 761. 767-768; 5 RT 825-826, 855-857, 881-882.)

b. Juror Questionnaire

In his questionnaire, Juror No. 213 wrote that he was 51 years old and he lived alone in the single family home which he owned. He had been a teacher and a coach at Los Amigos High School in Fountain Valley for 28 years. He had supervisory responsibilities. When asked to list his prior employment, he wrote "Long time ago, can't remember, basically high school jobs: Disneyland, gas station, etc." (6 CTJQ 2057.) His mother

worked in real estate and his father was a bus superintendent. In addition to California, he had lived in Illinois and Ohio. He was currently registered to vote and had no difficulty reading and understanding the English language. He had never served in the armed forces and had never been involved in military police work or the military's court-martial system. He did not know the defendant, any of the attorneys, the judge, or any of the witnesses. (6 CTJQ 2058.)

He had testified in court before as "a character witness for a friends trial." He had two masters degrees, but no special education or training in law, medicine, criminal justice, psychology, pharmacology, or psychiatry. Neither he nor any close friend or relative had ever been associated with law enforcement. (6 CTJQ 2059.) He did not know any judges and was not associated with any attorneys who were prosecutors or criminal defenders. He did, though, have experience with the judicial system. In 1979 or thereabouts a close college friend had been charged with killing his father. Also, he had previously served as a juror in an Orange County murder case in which the jury reached a verdict. He had never been associated with any clubs, groups, or organizations which had goals or activities related to law enforcement, public safety, public health, or public morals, "unless you call teaching public morals." He did not belong to or regularly attend the meetings of any clubs or civic organizations. He had no health, hearing, or vision problems of a serious nature that might make it difficult for him to sit as a juror. He was not taking medication that might make it difficult for him to concentrate. Neither he nor anyone close to him had any particularly positive or negative experiences with law enforcement, prosecution, defense, the courts, or lawyers. He had never visited a jail or posted bail for someone. (6 CTJQ 2060-2061.)

He did not respond to the questions on page six of the questionnaire which included whether he or a close friend or relative had ever been the victim of a sexual assault or rape; whether he belonged to or supported any "victims rights" groups; whether he had any pressing business or anything pressing in his personal life that might cause him to wish to expedite the process of decision-making in the jury room; whether he considered himself a follower or a leader; whether he or a close friend or relative totally abstained from the use of alcohol; and whether he or a close friend or relative had ever experienced problems with alcohol, drugs, or both. (6 CTJQ 2062.)

His feelings about those who abuse drugs or alcohol depended "on how much, when, if they affect lives or other lives, how long, etc." He did not know many people who "totally abuse," but some who did were fairly close to him. He had seen or been treated by a psychiatrist or psychologist, an experience he classified as totally positive, but neither he nor a close friend or relative had ever been hospitalized as the result of a psychiatric or psychological problem. He had no bias either for or against psychiatric or psychological testimony. If he had time, he read books, magazines, and newspapers, but mostly he read his students' essay papers. (6 CTJQ 2063.) He liked to watch Deepspace Nine, King of the Hill, X-Files, Sliders, Murphy Brown, and lots of movies on television, but he was rarely at home. When highly publicized cases were reported in the news, he generally was not interested at all. He wrote "Don't have the time to watch the news that much!" He had never heard about this case. (6 CTJQ 2064.)

He could decide the case based on the evidence and law presented during the course of the case, could avoid media coverage of the case and would immediately report any exposure to such coverage, and could follow

the judge's orders and not discuss the case with anyone else except during deliberations with all the other jurors. He wrote "I hardly watch the news anyway so that wouldn't be much of a hardship." He had not followed any criminal cases in the news media during the previous three to four years. (6 CTJQ 2065.)

He would not refuse to find appellant guilty, if he believed him to be guilty, just to prevent the penalty phase from taking place. Nor would he refuse to find an alleged special circumstance to be true, if he believed it to be true, just to prevent the penalty phase from taking place. He would not automatically refuse to vote for either the death penalty or life imprisonment without the possibility of parole without considering any of the aggravating and mitigating factors. He had "mixed feelings" about the death penalty. "Basically, I try really hard not to think about it. I do feel if you've done something wrong you have to pay for it somehow!" He thought the death penalty was sometimes used tOo seldom, "but it's important for the innocent to have a fair trial and a chance for a rebuttal!" His views about the death penalty had not really changed in the last few years and had been "fairly consistent." He did not belong to any group that advocates increased use or abolition of the death penalty. He could set aside his personal views regarding what the law ought to be and follow the law as the court explained it. (6 CTJQ 2069-2071.) He did not feel it would be difficult to refrain from discussing or forming or expressing an opinion about the case until it was finally submitted for decision. He had no moral or religious beliefs which would impair his ability to serve as a juror on this type of case. He knew of no reason why he would not be a completely open-minded and impartial juror. The only thing that might affect him was the fact that "I do coach basketball and if it lasts longer than

the 30th of Nov then we could have a game and I'm the only coach! I can try and schedule practices around the court as much as possible but game I can not!" (6 CTJQ 2072.)

c. Voir Dire

The initial voir dire of Juror 213 was conducted in chambers. (6 RT 1082.)

> **The Court:** We're in chambers with the next prospective juror, and counsel. And Juror 213 has submitted a statement of hardship. It's indicated about three or four dates that he might have some need to not be here because of doctor's appointments. But, the last portion which I'll read: "Last but not least I'm head basketball coach, and basketball season starts the 1st of December. Our schedule could during that month coincide with the trial, and I must be on the bus or at the games."
>
> [¶ ¶]
>
> **Prospective Juror 213:** . . . The problem I have with December 1st is that after December 1st it's okay because most of our games are going to be in the evening. But, see, I was on a jury trial before, I was on a murder trial, and I know how serious this really is, and I don't want - you might be in the middle of something that is very important to you for your client and he would say well, we're going to have to break right now because coach (Juror 213) has to go to his kids. And that would make me feel bad on general principles, because this is a man's life. This is not just something out of the clear blue sky. My biggest problem I know will be toward Christmas, because then tournaments. When you have tournaments, which you already know they could be at nine in the morning until night, and I cannot change those.
>
> **Mr. Jacobs:** Christmas isn't the problem. We know for sure we'll be done by December 11th -- we hope we will be. That's the outside parameters that I think the court gave everybody.

Mr. Enright: And most likely we'll be done by the end of November.

Prospective Juror No. 213: Either way, if it's by December 11th I might only have maybe one or two at the most. We haven't gotten our schedule yet and the times. But, we wouldn't have more than three or four games before December 11th. We wouldn't have more than three games before December 11th.

Mr. Jacobs: Could I ask you this: December 1st, does that start your game schedule?

Prospective Juror 213: December 1st would be our first game. You can't start before that. You guys took care of the scrimmage we have, because you took that week off at Thanksgiving, and we always have a scrimmage Tuesday of that Thanksgiving, that Thanksgiving week. And you said we're going to be off. So, that took care of that one, and that was the one I was most afraid of.

Mr. Jacobs: What about practice?

Prospective Juror 213: Donny and I, we talked about it and I told him about it, and he said he will try his best to work around the schedule of the court, as much as possible. The worst thing that can happen is that we have practice at 3:30 or four. We're trying to work it out on the girls right now.

Mr. Jacobs: Court usually runs until 4:30.

Prospective Juror 213: Right.

Mr. Jacobs: Does that mean that you would be deprived of practicing with your team the entire time that you're sitting on the jury?

Prospective Juror 213: No, I'm going to try and make it - well, see, we have to get together as a group, you know, with the girls because of the, you know, the girls and the boys

having to share that. We have to go and talk with them. The girls coach is not around right now, and we have a call in to her. I told him if I got picked, then I would for sure have to talk to them about that.

Mr. Enright: Schedule it after 4:30?

Prospective Juror 213: Yeah, I would have to go night. I would have to go -- like that would be kind of tough, but I'd have to go night.

Mr. Jacobs: That would be tough on the kids?

Prospective Juror 213: Yes.

Mr. Jacobs: Usually --

Prospective Juror 213: Well, they're freshmen, and the freshmen parents rather would have them home by six.

Mr. Jacobs: Practice at 3:30?

Prospective Juror 213: Yeah, 3:30, or something around there.

Mr. Jacobs: So if you're in the trial, they're going to have to practice after five?

Prospective Juror 213: They're going to have to practice probably five to seven, that's the next time slot.

(6 RT 1083-1086.)

The judge asked about the prospective juror's medical appointments. He responded, "if we don't start until 9:30, I can move one of them to eight and be here by 9:30 easily. But the problem I'm having is the one, the one on the 14th is impossible to change." (6 RT 1086-1087.) Juror No. 213 exited chambers and the judge asked, "What's your folks' feelings?" Mr.

Enright responded, "We want him." The prosecutor said, "no, I'd be willing to stipulate, they just want to see if I'm going to challenge them (sic), so I'm going to play the game. I'll play the game. They want the kids to practice at 5:30 and seven, so, we'll play the game." (6 RT 1087.)

The proceedings reconvened in open court where Mr. Enright indicated that the defense had no further questions for Juror No. 213. (6 RT 1087.) The prosecutor asked:

> **Q.** You've sat as a juror before in a homicide trial; is that correct?
>
> **A.** Yes, sir.
>
> **Q.** Was that in this county, or L.A. county?
>
> **A.** It was in this county.
>
> **Q.** This building?
>
> **A.** Yes, sir.
>
> **Q.** I don't want to go into the fact, was it similar to this case, or a different type of case?
>
> **A.** I was foreman of a murder trial.
>
> **Q.** Were the charges involved anything like rape or anything like that, or was it different?
>
> **A.** No, there was no rape involved.
>
> **Q.** Okay. Without telling me what the result is, did you reach a verdict, or not?
>
> **A.** Yes, sir.
>
> **Q.** You reached a verdict?

A. Yes, sir.

Q. And how many years ago was that?

A. This is '99 -- probably '95.

Q. About four or five years ago?

A. Yeah.

Q. Now, you've also had occasion to testify a number of years ago in a trial; is that correct?

A. Yeah.

Q. And was it a close friend of yours who was accused of murder; is that what happened?

A. Yeah, a guy next door to me that moved in about two years, when we lived in the apartments, my little brother and I lived in the apartments, and he used to take care of my little brother, so, I got to know him.

Q. He became a friend of yours?

A. Yes, sir, he did.

Q. And I guess what you say, he was charged with killing his father?

A. Correct.

Q. And you testified as a defense witness or a character witness at his trial; is that what happened?

A. Yes, sir. To him?

Q. Is that what happened; you testified?

A. Oh, yeah.

Q. I'm not going into what happened to him. Okay. And that was up in Los Angeles; is that correct?

A. No, it was out here in Orange County.

Q. It was here in Orange County also?

A. Yes, sir.

Q. And you mentioned something, and if it's something you want to keep private or don't want to talk about, I believe you mentioned something about having some kind of psychology or some counseling; is that correct?

A. That was in high school.

Q. That was in high school, just a kid?

A. Basic.

Q. Basic counseling?

A. Basic.

Q. You had a positive experience?

A. Girl friend thing.

Q. We won't go into it.

A. Okay.

Q. Had some problems, I take it you're an assistant basketball coach; is that correct?

A. Head basketball.

Q. Head basketball coach?

A. Yes.

Q. Freshman at what high school?

A. Los Amigos, Fountain Valley.

Q. And when do they start practicing?

A. 14th of November.

Q. November 14th?

A. Yes.

Q. And if you're selected on the jury, if we go past the 14th, you'll have to put practice back late so that you'll be there?

A. We'll have to move it later in the day.

Q. Okay, so that would have to be at like --

A. Five -- I think what we -- well, see, we haven't put the schedule together because they've been waiting for me. But I think the schedule was -- before it was two to 3:30 for the freshman. But that will be changed, so, usually we go in blocks of two hours, and so it would -- usually it's two to four, four to six, six to eight. But, usually they let the freshmen, we go outside the last half hour so they can start on the hour and go 3:30 to 5:30. 5:30 to 7:30. 7:30 to 9:30. They get the older guys out of there by 9:30, they're home by 10.

Q. The freshmen would be 3:30 to 5:30?

A. Usually it would be two to 3:30.

Q. Two to 3:30?

A. But we had talked about me going back in there 3:30 to four if this wasn't a problem. But I'd have to tell them it's got to be later.

Q I take from it some things you said and the way you walked to the jury box, you're not thrilled; is that a bad way to state it?

A That's a bad way to state it.

Q Well, you put it in your words then.

A Okay. I had -- honestly, honestly, when I first came I knew I would be a good juror. I knew that. I wasn't even worried about it. And I listened in the courtroom all yesterday and I still knew I would be a good juror. But, my problem was it's just a matter of this trial is very, very important. The person's life is at stake. And that is very important. And I'm dealing with high school kids who everything they do is way more important than anything else in your life. So, I'm trying -- I'd have to deal --

Q So you're torn?

A Yeah.

Q You have a responsibility to the high school players, and you realize the responsibility here; is that what you're trying to say?

A Yes, this is a very big responsibility, as much as that is a big responsibility, too. If we can work out, if I can get it so they're both on different keels, it's fine with me. Because I don't have to worry about anything. I don't have to worry until I get to the game. Then I worry about that.

Q Okay. Let's talk about the death penalty. You say -- what are your feelings about the death penalty?

A That I voted for it. It's a necessary thing that we must have to deter crime of a very, very violent nature.

Q You said you have mixed feelings about it and you try not to think about it? Is that something you wrote in your questionnaire?

A Yeah.

Q Could you elaborate on that a little bit for me?

A I was a little hungry at that time so I'm not really sure what I was thinking.

Q It's funny, a lot of people have said the same thing, you know?

A My brain was off center.

Q On page 14 you're just writing down whatever came, huh?

A Uh-huh.

Q I take it then you said you had mixed feelings. It's not something you think about every day; is that basically what you're trying to say?

A Right.

Q There's more pleasant things to think about as we go through our day; is that correct?

A Yeah.

Q You voted for it, so I take it philosophically you believe in it?

A Yeah.

Q How about practical aspect, you know you heard my questions over the last couple of days. Are you the kind of person who thinks I believe in it, but let somebody else do it? Or do you think you're the kind of person who could actually vote to put someone to death?

A Well, the dealing with -- this is a smaller, much smaller scale. Dealing with kids every day, you know the people who are -- people that really need to be punished correctly and kids that just really need to just be really talked to, and kids that just need to be hit in the head and they're all right.

Q There's a continuum.

A Yeah, and so when you're talking about the death penalty, it's almost in the same idea, that there are people who are -- that are hardened that you cannot help in any way. And if they have done something that is very, very wrong, it's very, very wrong, it has to be taken care of.

Q So, is what you're saying to me okay, you're saying to me that you can see it being imposed on someone?

A Yes.

Q The question, you know --

A Could I personally

Q And you know there's nothing wrong with saying I believe in it, it belongs there, some people it should be imposed, but I don't want to be involved, you know, or could I do it, you know.

A I thought about it because I've heard it all day yesterday and in the situation that it is, if it is -- if like most of the people said here, if it was proven to me, yes.

Q You mean if the facts of the crime --

A Right.

Q -- were proven, then you could have it as an option?

A Yes.

Q That you would actually do?

A Yes.

Q You don't question yourself in that?

A No.

Mr. Jacobs: Thank you, I'll pass for cause.

(6 RT 1089-1096.)

The prosecutor excused Juror No. 213 with his 17th peremptory challenge. Mr. Zimmerman asked "Could we address the court another time about that?" The court said, "Yes." (6 RT 1099.)

d. Appellant's Second *Wheeler* Motion

Appellant formally objected at the next break:

Mr. Zimmerman: As to the peremptory challenge exercised by the People as to (juror 213), we are interposing, once again, a *People* versus *Wheeler* objection on the basis that that was a systematic exclusion of African American potential jurors. I know that so far the proceedings we have not identified (juror 213) as being African American descent. That's apparent to all who have been here.

The Court: Why do you feel that there's a misconduct by the deputy district attorney by excusing that juror?

Mr. Zimmerman: We only had three black individuals, three African Americans in the whole room, and two of them have been excused by peremptory challenge by the people. I'm just making my record in that regard.

The Court: Well, I'm hesitant to accept the conclusion that you folks have put on the record that there's only three African Americans in the prospective jury pool.

Mr. Enright: I don't think there's three, I think there's two.

The Court: Well, and that's an interesting observation, but, the Court is not accepting that. So, from my perspective there might be more. But, beyond that, other than that conclusion that you stated, which I take it is based on you looked at the jury pool that's out there and you saw two or three people that you thought were African American, is there another reason that you're putting forward to the court as, you know, you need to show prima facie why there's been misconduct?

Mr. Zimmerman: Yes, because (juror 719) was excused yesterday. She was African American descent, also. So, we're contending that that establishes a systematic exclusion of the African American potential jurors. One thing, your honor, we haven't acknowledged (Juror 213) is of African American descent.

The Court: I will accept that representation based on my contact with (juror 213). The only thing I was quibbling about, you folks keep saying there's only three out there. And I don't know that that's the case. However, is there anything else, other than --

Mr. Zimmerman: No, that's my objection.

The Court: I'm going to disallow the challenge. I don't find any basic finding that the district attorney is engaging in misconduct, that he systematically is excluding all Afro-Americans from serving as jurors on this case, or that he is systematically excluding any other minority group from serving on this particular case. (Juror 213) did submit a request to be excused for hardship, and we have that on the record, we'll keep it. In our discussion in chambers he indicated his reticence about serving, although he did opine that if actually selected, he will find a way to make his job work consistent with the nature of the jury duty. But, just watching his expression, and I have to put two things on the record: Yesterday when we broke in the evening one of the first prospective jurors to come up to the bailiff to get a hardship form was (juror 213). As you know, I emptied the courtroom so nobody could return anything at that time, so we

> got (juror 213's) request today. And then I had (juror 213) step out into the courtroom waiting whether there was going to be a stipulation or not. So, when I came back out and advised him what, that he needed to go take the jury seat, there was an audible groan and facial expression consistent with that as he moved from the clerk's area over to the chair. And just watching his demeanor, his facial expressions when he was inquired about his availability, I thought he was indicating that it's going to be extremely difficult. Plus some of the other information that was disclosed to the deputy district attorney upon further inquiry. So, I think we have to be careful, when you make a challenge of this nature, that the court give a legitimate consideration. And I don't mean to make less of the challenge. If I thought that it was even close, I would make the deputy district attorney state on the record his feeling as to why he was excusing this juror, (juror 719), but, there was ample reason to excuse both of those, other than dealing with race. And based on your offer of proof, I'm just denying the challenge.

(6 RT 1116-1119.)

C. Appellant Produced Evidence Which Suffices to Permit an Inference That Discrimination Occurred

"In order to make a prima facie showing, 'a litigant must raise the issue in a timely fashion, make as complete a record as feasible, [and] establish that the persons excluded are members of a cognizable class.' (*People v. Boyette* (2002) 29 Cal.4th 381, 421-422, 127 Cal.Rptr.2d 544, 58 P.3d 391.) The high court recently explained that 'a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.' (*Johnson v. California, supra,* 545 U.S. at p. 231, 125 S.Ct. at p. 2417.) 'An "inference" is generally understood to be a "conclusion reached by considering other facts and deducing a logical consequence from them."'

(*Id.* at p. 230, fn. 4, 125 S.Ct. at p. 2416, fn. 4.)" (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

1. Appellant Raised the Issue in a Timely Fashion and Made as Complete a Record as Was Feasible

Appellant objected to the peremptory challenge of Juror No. 719 both before (5 RT 934-936) and at the first opportunity after (5 RT 1001-1003) her excusal. Similarly, he objected to the peremptory challenge of Juror No. 213 at the first opportunity after his excusal. (6 RT 1099, 1116-1119.) By doing so he timely raised the *Wheeler* issue. (*People v. Roldan* (2005) 35 Cal.4th 646, 702; *People v. McDermott* (2002) 28 Cal.4th 946, 969.)

He also made as complete a record as was feasible. *Wheeler* does not require a complete or perfect record. "In *Wheeler* itself, we noted that '[n]ot surprisingly, the record is unclear as to the exact number of blacks struck from the jury by the prosecutor: veniremen are not required to announce their race, religion, or ethnic origin when they enter the box, and these matters are not ordinarily explored on voir dire.' [Citation.]" (*People v. Motton* (1985) 39 Cal.3d 596, 603.)

> [W]hile direct questions on racial identity would help to make a clear and undisputable record, neither *Wheeler* nor any subsequent decision has insisted upon such questions, for good reasons. First, as *Wheeler* recognized (see 22 Cal.3d at p. 263) and as the judge acknowledged in the present case, such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire. Second, counsel is not required to anticipate that the prosecutor will improperly use peremptory challenges to exclude a racial group. Consequently, when a discriminatory pattern begins to emerge, counsel may have to use some other method of establishing the race of jurors who have already been excused.

> Finally, it is unnecessary to establish the true racial identity of the challenged jurors; discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case under *Wheeler*.

(*Id.* at p. 604.)

Furthermore, having presented a statistical disparity to the trial court based on the information then known to him, appellant cannot be charged, prior to the prosecutor's explanation of his challenges, with developing a record that might refute the prosecutor's possible explanations. If there are other relevant circumstances that might dispel the inference created by that statistical disparity, it was the state's responsibility to create a record that dispels the inference. (*Williams v Runnels* (9th Cir. 2006) 432 F.3d 1102, 1110.)

2. The Prospective Jurors in Question Were the Only Members of the Venire Who Appeared to Be Black

One of appellant's attorneys, Mr. Zimmerman, stated "We only had three black individuals, three African Americans in the whole room."[34] (6 RT 1116; see also 5 RT 934.) The other, Mr. Enright, also believed there were only two African-Americans in the jury pool. (6 RT 1116; see also 5 RT 929, 934, 1003.) The prosecutor did not object to these representations. His silence is a tacit admission of their truth. (See, e.g., Evidence Code section 1221; *Tibbet v. Sue* (1899) 125 C. 544, 546 [silence in the face of a damaging accusation, may furnish ample ground for an inference of

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[34] Appellant is African-American. If there were only three African-Americans in the room, the other two had to be the prospective jurors challenged by the prosecutor.

consciousness of its truth even though it would afford no sufficient basis for an inference of adoption]; *Estate of Snowball* (1910) 157 Cal. 301, 311; *Baldarachi v. Leach* (1919) 44 Cal.App. 603, 606; *Los Robles Motor Lodge v. Department of Alcoholic Beverage Control* (1966) 246 Cal.App.2d 198, 205.)

The judge agreed that the jurors in question were members of a cognizable class, African-American (*People v. Wheeler, supra*, 22 Cal.3d at p. 283), and he acknowledged that defense counsels' conclusions were based on the fact that you "looked at the jury pool that's out there and you saw two or three people that you thought were African American." (6 RT 1117, 1203-1204.) But he was "reluctant to make any generalization as to the ethnic background of any prospective juror simply from my looking at the appearance of a person." (5 RT 1003.) "You folks keep saying there's only three out there. And I don't know that that's the case." (6 RT 1117.) "[T]he court is not accepting that. So, from my perspective there might be more." (6 RT 1116; see also 6 RT 1204.)

There may well have been members of the venire who were of African-American descent but did not appear to be so, as the judge feared. But that fact is largely beside the point. The judge's own observations establish that the prosecutor challenged everyone in the venire who appeared to be black. The prosecutor's failure to use peremptory challenges to excuse prospective jurors who were African-American but not perceptibly so, if in fact there were any such prospective jurors, does nothing to dispel the inference of discrimination created by his excusal of all the perceptibly-black prospective jurors. (*People v. Motton, supra*, 39 Cal.3d at p. 604.)

3. The Prospective Jurors in Question Shared Only Two Characteristics - Their Race and Age - and in All Other Respects They Are as Heterogeneous as the Community as a Whole

The only characteristics shared by Juror No. 719 and Juror No. 213 are their race and age. Juror No. 719 was a disabled, unemployed widow with a high school education. She worked as a cook for the Tustin Unified School District for 17 years and never had supervisory responsibilities. She lived in a rented apartment with her 23-year-old son and had never lived outside Orange County. (6 CTJQ 1872-1874; 6 RT 919-920.) Juror No. 213, a man with two masters degrees, had taught and coached at Los Amigos High School in Fountain Valley for 28 years. He had supervisory responsibilities. He lived alone in the single family home which he owned. In addition to California, he had lived in Illinois and Ohio. (6 CTJQ 2057-2059.)

Juror No. 719 had never testified in court and had never served on either a grand or trial jury. (6 CTJQ 1874-1875; 6 RT 920.) Juror No. 213, on the other hand, had testified as a character witness at a friend's murder trial and had previously served as the jury foreman in a murder trial. (6 CTJQ 2059-2060; 6 RT 1090.)

Juror No. 719's father and her son had experienced problems with alcohol and either she or a close friend or relative totally abstained from the use of alcohol for religious reasons. (6 CTJQ 1877.) She "hurt" for people who abuse drugs or alcohol because they would be better without them. Neither she nor anyone close to her had ever seen or been treated by a psychiatrist or psychologist. (6 CTJQ 1878.) Juror No. 213 did not "know a lot of people who totally abuse but I do some that are fairly close." His

feelings about those who abuse drugs or alcohol depended on "how much, when, if they affect lives or other lives, how long, etc." While in high school he had seen or been treated by a psychiatrist or psychologist about "a girl friend thing," an experience he classified as totally positive. (6 CTJQ 2063; 6 RT 1090-1091.)

Juror No. 719 did not watch much television. When she did she watched game shows. She read the Bible and the newspaper. (6 CTJQ 1878-1879.) Juror No. 213 was rarely at home. When he was he liked to watch Deepspace Nine, King of the Hill, X-Files, Sliders, Murphy Brown, and lots of movies on television. He read books, magazines, and newspapers if he had the time, but mostly he read his students' essay papers. (6 CTJQ 2063-2064.)

Juror No. 719 did not like capital punishment (6 RT 1885) and felt that her personal and religious beliefs would impair her ability to serve as a juror in a capital case. (6 RT 1886.) She would listen to the evidence and make her best efforts to apply the law in an evenhanded manner, but it would be very difficult for her to impose the death penalty. (5 RT 923-928.) Juror No. 213 had no religious beliefs which would impair his ability to serve as a juror in a capital case. (6 CTJQ 2071.) His feelings about capital punishment were mixed. He understood the importance of a fair trial, but he believed that one had to pay for doing wrong and that the death penalty was used too seldom. (6 CTJQ 2070.) He voted for the death penalty and thought it was necessary to deter crime of a very violent nature. He believed he could impose the sentence if appropriate. (6 RT 1093-1096.)

Other than race and age, there are vast differences between these prospective jurors. In fact, they are as heterogeneous as the community as a

whole in every other respect.

4. The Pattern of Systematic Exclusion of Black Prospective Jurors Suffices to Establish a Prima Facie Case under *Batson*

"[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." (*People v. Bell, supra,* 40 Cal.4th at p. 598, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111; see also *People v. Turner* (1994) 8 Cal.4th 137, 167-168.) (*People v. Bonilla, supra*, 41 Cal.4th at p. 343.)

> The ultimate issue to be addressed on a *Wheeler-Batson* motion 'is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias.' [Citation.] But in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group" - as *Bonilla* asks the court to do here - "a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges." (*People v. Bell, supra,* 40 Cal.4th at p. 598, fn. 3, 54 Cal.Rptr.3d 453, 151 P.3d 292.) Such a pattern will be difficult to discern when the number of challenges is extremely small.

(*People v. Bonilla, supra*, 41 Cal.4th at p. 343, fn. 12.)

The Court has not explained why the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion. Inferences of discrimination can be drawn from both the number and the percentage of prospective jurors excused. In cases where there are few minority prospective jurors, it is difficult to argue that the number of challenges raises an inference of discrimination. However, legitimate inferences can and should be drawn from the percentage of minority prospective jurors excused. That figure is just as meaningful, if not more meaningful, in cases where

there are only one or two minority prospective jurors as it is in cases where there are many. As appellant's trial counsel pointed out, potential discrimination in cases where there are many such jurors will usually be made readily apparent by the number of them a party excuses. (5 RT 935.) Where the number of minority prospective jurors is small, parties determined to discriminate have more opportunity to do so because they have fewer prospective jurors to strike. Given this reality, these cases call for more, not less, judicial scrutiny. Rather than giving parties free license to discriminate in cases where there are few minority prospective jurors, the Court should thoroughly examine the actual reasons for the challenges.

Furthermore, trial judges have had no difficulty discerning patterns of discrimination in cases with few minority prospective jurors. In *People v Avila*, for example, the prosecutor excused two of five or more black prospective jurors.[35] The court found, "in view of the small number of African-Americans on this panel, that two does meet a prima facie case." (*People v Avila* (2006) 38 Cal.4th 491, 542, fn. 34.) Likewise, in *People v Williams* the trial judge found that a prima facie case had been made after the prosecutor excused two of at least three Hispanic prospective jurors.[36]

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[35] It is not clear how many black prospective jurors there were in *Avila*. There might have been more than five. The prosecutor challenged two black prospective jurors and a black prospective alternate juror. (*People v Avila, supra*, 38 Cal.4th at p. 542.) The jury included a black female, and one of the alternate jurors was a black male. (*Id.* at p. 540.) There is no indication that the prosecutor excused all the black prospective jurors.

[36] It is not clear how many Hispanic prospective jurors there were in *Williams*. One would assume that the opinion would have noted the excusal of all the Hispanic prospective jurors. Because it did not, appellant assumes

(continued...)

(*People v Williams* (2006) 40 Cal.4th 287, 309-310.)

More importantly, the United States Supreme Court had no difficulty discerning such a pattern in *Johnson v. California* (2005) 545 U.S. 162. There, a black man was convicted by an all-white jury from which the prosecutor used three of 12 peremptory challenges to remove all the black prospective jurors. The trial judge found that *Johnson* had not established a prima facie case under *Wheeler* because he had not shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis, and she did not ask the prosecutor to explain the rationale for his strikes. (*Id.* at p. 165.) Instead, she explained that her own examination of the record had convinced her that the prosecutor's strikes could be justified by race-neutral reasons, specifically that the black venire members had offered equivocal or confused answers in their written questionnaires which provided a sufficient basis for the strikes. (*Id.* at pp. 165-166.) The Supreme Court, noting the "imprecision of relying on judicial speculation to resolve plausible claims of discrimination" (*id.* at p. 173), found that the inferences of discrimination from the removal of the three black jurors were sufficient to establish a prima facie case under *Batson* and reversed. (*Ibid.*)

This case is virtually indistinguishable from *Johnson.* The prosecutor excused two, not three, black prospective jurors, but he excluded all the perceptibly-black prospective jurors in the venire. And, like *Johnson*, the judge's own observations and examination of the record convinced him that the prosecutor's strikes could be justified by

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[36] (...continued)
there were more than two Hispanic prospective jurors in the venire.

race-neutral reasons. (6 RT 1117-1119.) This "judicial speculation" is too imprecise to rely on to resolve plausible claims of discrimination. (*Johnson v. California, supra*, 545 U.S. at p. 173.) For the reasons articulated in *Johnson*, the pattern of systematic exclusion of black prospective jurors in this case is sufficient to establish a prima facie case under *Batson*. When the number of challenges is small, notwithstanding any difficulty in discerning a pattern of discrimination, the excusal of 100 percent of a cognizable group (as the prosecutor did here) establishes a pattern from which an inference of discrimination must be drawn.

5. The Statistical Disparity Between the Percentage of Black and Non-Black Prospective Jurors Challenged by the Prosecutor Suffices to Establish a Prima Facie Case under *Batson*

A defendant can make a prima facie showing of discrimination based on a statistical disparity alone. (*Williams v Runnels, supra*, 432 F.3d at p. 1107; see also *Paulino v. Castro* (9th Cir.2004) 371 F.3d 1083, 1091 [inference of bias where the prosecutor used five out of six peremptory challenges to strike African-Americans]; *Fernandez v. Roe* (9th Cir.2002) 286 F.3d 1073, 1077-1080 [inference of bias where four of seven Hispanics and two African-Americans were excused by the prosecutor]; *Turner v. Marshall,* (9th Cir.1995) 63 F.3d 807, 812, *overruled on other grounds by Tolbert v. Page* (9th Cir.1999) 182 F.3d 677, 681 (en banc) [prima facie showing of discrimination where the prosecutor exercised peremptory challenges to exclude five out of a possible nine African-Americans]; *United States v. Alvarado* (2d Cir.1991) 923 F.2d 253, 255 [prima facie case established where four of seven African-Americans were struck]; *United States v. Hughes* (8th Cir.1989) 880 F.2d 101, 103 [prima facie case

established where three of six African-Americans were struck]; *United States v. Battle* (8th Cir.1987) 836 F.2d 1084, 1085-1086 [prima facie case established where five of seven African-Americans were struck].)

In *Williams*, the defendant alleged that he made a prima facie showing of discrimination under *Batson* when he objected to the prosecutor's use of three of four peremptory challenges to excuse black prospective jurors. (*Williams v Runnels, supra*, 432 F.3d at p. 1103.) The court of appeal reviewed the trial judge's decision with considerable deference and, because the record suggested grounds upon which the prosecutor might reasonably have challenged the jurors, found that Williams had not shown "a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*Id.* at pp. 1104-1105.) This Court denied Williams's petition for review and the federal district court denied his habeas corpus petition, concluding that he had "not come forward with sufficient evidence to show a reasonable inference of purposeful discrimination arose solely on the basis of statistics that would have required the trial judge to perform the entire *Batson* analysis at the time the objection was made." (*Id.* at p. 1105.)

The Ninth Circuit reversed. It concluded that Williams established he is African-American, that only four of the first forty-nine potential jurors were black, and that the prosecutor used three of his first four peremptory challenges to remove black prospective jurors from the jury. "These bare facts present a statistical disparity. We have held that a defendant can make a prima facie showing based on a statistical disparity alone." (*Id.* at p. 1107.)

> [T]he state appellate court and the district court, not having the benefit of the Supreme Court's recent opinions in *Johnson*

> and *Miller-El,* failed to appreciate that (1) *Williams'* showing of statistical disparity was only required to raise an inference of purposeful discrimination, and (2) refutation of the inference requires more than a determination that the record could have supported race-neutral reasons for the prosecutor's use of his peremptory challenges on prospective African-American jurors.

(*Id.* at p. 1110.)

The court then reviewed the record to determine whether "other relevant circumstances" eroded the premises of Williams's allegations of discrimination and found that it failed to disclose a refutation of the inference of bias raised by the statistical disparity. (*Id.* at p. 1109.) In doing so it noted that both the court of appeal and the district court had addressed a different issue, whether the record could support race-neutral grounds for the prosecutor's peremptory challenges. While it may have been reasonable to conclude that the record supported such grounds for the peremptory challenges, "the Supreme Court's clarification of *Batson* in *Johnson,* and its review of the record in *Miller-El,* lead to the conclusion that this approach did not adequately protect Williams' rights under the Equal Protection Clause of the Fourteenth Amendment or 'public confidence in the fairness of our system of justice.'" *Johnson,* 125 S.Ct. at 2418 (quoting *Batson,* 476 U.S. at 87, 106 S.Ct. 1712); *see also Miller-El,* 125 S.Ct. at 2323-24." (*Id.* at p. 1108.)

> This . . . does not measure up to the Supreme Court's pronouncement that the question is not whether the prosecutor might have had good reasons, but what were the prosecutor's real reasons for the challenges. *Johnson,* 125 S.Ct. at 2418; *see also Miller-El,* 125 S.Ct. at 2332 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.").

(*Id.* at p. 1109.)

After reviewing the record, the court concluded that the evidence in support of race-neutral reasons for the peremptory challenges did not dispel the inference of bias raised by the statistical disparity. (*Ibid.*) The court of appeal had opined that one of the excused black jurors might have been a loner who had no track record as a juror and this could have caused the prosecutor to question his ability to effectively function in a group decision-making process, an essential part of jury service. It was also entirely possible that the prosecutor's decision to challenge the juror was motivated by something as simple as the prospective juror's demeanor in the courtroom, a circumstance which frequently would not be apparent to someone reading the cold record, but one which would fully support the exercise of a peremptory challenge.

> This speculation is not consistent with the Supreme Court's admonition in *Johnson* that the first step in the *Batson* test does not require that "a defendant would have to persuade the judge - on the basis of all the facts, some of which are impossible for the defendant to know with certainty - that the challenge was more likely than not the product of purposeful discrimination." 125 S.Ct. at 2417.
>
> Moreover, even accepting that being a "loner" or not having previously served on a jury can be a race-neutral basis for exercising a peremptory challenge, it is not the type of reason that weighs against an inference of bias. Indeed, were the state court's rationale on Juror 18 accepted, it is difficult to imagine how any defendant could prevail on a *Batson* claim following a trial court's summary rejection of the *Batson* challenge at the first step of the *Batson* test. The Supreme Court's exhaustive review of the record in *Miller-El* forecloses such an approach.

(*Id.* at p. 1109, fn. 12.)

In this case, the prosecutor challenged 38 percent of the qualified non-black panel members (20 challenges of 52 panel members) and 100 percent of the black ones (two challenges of two panel members). As in *Williams*, this striking statistical disparity, by itself, establishes a prima facie inference of discriminatory purpose.

6. The Manner In Which the Prosecutor Questioned Juror Nos. 719 and 213 Raises an Inference of Discriminatory Purpose

The prosecutor excluded Juror No. 719 after engaging her in no more than "desultory voir dire." (*People v. Allen* (1979) 23 Cal.3d 286, 294.) He established that she had religious objections to the death penalty, that she would have a very difficult time imposing it, and that she favored life without possibility of parole over a sentence of death. (5 RT 923-924.) But she did not lean strongly against the death penalty because of her religious beliefs, and she indicated, appropriately, that her choice of sentence would depend on the evidence. (5 RT 928.) The prosecutor chose not to explore the depth of this prospective juror's religious convictions and how they might afect her ability to consider and impose a sentence of death. His failure to do so raises an inference of discriminatory purpose.

The prosecutor's voir dire of Juror No. 213 was not desultory, but it nonetheless raises an inference of discriminatory purpose. The prosecutor questioned Juror No. 213 at length about matters which similarly-situated, non-black jurors were not questioned at all. (6 RT 1089-1096, see p. 149, *post.*) The only reason for such questioning can be that he had already decided to challenge Juror No. 213, who was a solid death penalty proponent (6 RT 1093-1096), and who appeared to be an ideal, pro-prosecution juror, and he was laying a record that would overcome any

Wheeler objection. An inference of discrimination can and should be drawn from the fact that the prosecutor's questions were not for the purpose of establishing cause to challenge the prospective juror but rather to serve as justification for a challenge had had already decided to make.

7. The Court Should Conduct a Comparative Juror Analysis in this Case

The Court has concluded that comparative juror analysis is not mandated in "first-stage" *Wheeler/Batson* cases: "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales, and we thus decline to engage in a comparative analysis here. (*People v. Bonilla, supra*, 41 Cal.4th at p. 350.)

The Ninth Circuit has concluded, to the contrary, that comparative juror analysis is required in such cases:

> Some California courts have questioned whether comparative juror analysis is similarly appropriate at the first *Batson* step, where the prosecution has not voiced its rationales for the strikes, instead of at the third *Batson* step. See, e.g., *People v. Gray*, 37 Cal.4th 168, 33 Cal.Rptr.3d 451, 118 P.3d 496, 511 (2005) . . . *People v. Guerra*, 37 Cal.4th 1067, 40 Cal.Rptr.3d 118, 129 P.3d 321, 351 (2006) . . . We believe, however, that Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case.

(*Boyd v. Newland* (9th Cir.2006) 467 F.3d 1139, 1149.)

The *Boyd* court noted that the Supreme Court did not merely review the reasons the prosecutor gave for peremptorily striking the black jurors in *Miller-El II*; instead it also considered the voir dire questions that the prosecutor had posed to the various jurors. (*Ibid.*) Indeed, "[i]n some

circumstances, a court may have to review the questions that the prosecution asked of jurors at step one of the *Batson* analysis to determine whether a defendant has made a prima facie showing of unlawful discrimination. There is nothing that suggests that it is more difficult or less desirable to engage in such analysis at step one rather than step three of *Batson*." (*Ibid.*) The court also observed that both *Johnson* and *Miller-El II* suggest that courts should engage in a rigorous review of a prosecution's use of peremptory strikes. "If a trial court's conclusion that a defendant failed to make a prima facie case could insulate from review a prosecution's use of peremptory strikes, the holdings of those Supreme Court opinions would be undermined." (*Id.* at pp. 1149-1150.)

This Court should reconsider its holding in *Bonilla* and other post-*Johnson* cases and conduct comparative juror analyses in first-stage *Batson* cases. Such an analysis is instructive in this case. For example, the only apparent reason the prosecutor could have had for excusing Juror No. 719, other than her race, was her views about the death penalty. She did not like the death penalty because of her religious beliefs, but she did not lean strongly against it. "I have to look at the evidence. Depend on the evidence." (5 RT 928.) But if the prosecutor challenged Juror No. 719 because of her views about the death penalty, it is simply inexplicable why he did not question Juror Nos. 2, 5, 10, and 11, who were not black, about their similar views. Juror No. 2 wrote in her questionnaire that "There are cases where [the death penalty] is appropriate, and IF appropriate, I would have some reservations, but I would be willing to make such a decision." (1 CTJQ 49.) Even though this juror appeared to have views similar to Juror No. 719, the prosecutor did not ask her any questions about the nature or extent of her reservations about the death penalty. (6 RT 1105-1109.) Juror

No. 5 wrote in her questionnaire that she felt the death penalty was imposed randomly. (1 CTJQ 120.) Juror No. 10 did, too. "Cannot understand how one case can be judged so differently than another case when they are almost identical." (1 CTJQ 160.) The prosecutor asked no questions of these jurors about how their views might impact their ability to sit as jurors in the case. (5 RT 994-997, 968-971.) Juror No. 11 thought imposing the death penalty "would be difficult, I agree with that. But, it would be based on the evidence." (5 RT 845.) Despite her misgivings, which appear to be similar to Juror No. 719's, the prosecutor did not challenge her.

The prosecutor's questioning of Juror No. 213 focused on four areas: his commitment to the high school basketball team he coached (6 RT 1082-1087; 1091-1093); his prior experience in the criminal justice system (6 RT 1089-1090); his psychological and/or psychiatric treatment (6 RT 1090-1091); and his views about the death penalty. (6 RT 1093-1096.) The prospective juror was a proponent of the death penalty. He reported a favorable experience with a psychologist in high school. He had testified as a character witness in a friend's murder trial and he had served as the foreman of a jury that reached a verdict in a murder trial. Finally, he was the head coach of his high school basketball team and its practices and games presented a possible conflict with jury service, but he was confident that the game schedule did not present any problems and that practices could be moved to later in the evening.

If any of these reasons served as the prosecutor's motivation for challenging Juror No. 213, one would think he also would have challenged, or at the very least questioned, panel members who were picked for the jury but had similar experiences. For example, Juror No. 1 or someone close to him had been seen or treated by a psychologist or psychiatrist. (1 CTJQ 8.)

The prosecutor asked him no questions about this response. (6 RT 1031-1034.) Juror No. 4 had been treated by a psychologist or psychiatrist and he was hospitalized in a psychiatric facility for a brief time following his mother's death in a drunk-driving accident in 1970. (1 CTJQ 25.) The prosecutor asked no questions concerning either this juror's treatment or his hospitalization, or the impact it might have on his ability to consider the case. (6 RT 1133-1137.) His failure to question these jurors about their psychological/psychiatric experience makes it unlikely that this was his reason for challenging Juror No. 213.

Juror No. 213's commitment to his basketball team is also an unlikely reason for the challenge because Juror No. 7, who also had time problems, was not questioned about how they might impact her ability to sit on the jury. Juror No. 7 had planned an Hawaii vacation from November 23 to December 2, 1998, and she had already purchased non-refundable airline tickets. (1 CTJQ 189.) The judge intended to question her about her hardship application (1 CTHS 139), and he asked her to remain in the hallway after the other prospective jurors had been excused. The juror, though, apparently misunderstood his instructions and did not wait. The judge denied her hardship application: "That's the Thanksgiving holiday. And, so, if you folks keep her as a juror, I'll just move around that Monday to let her do what she is going to do to complete the case. (5 RT 873.) The juror, though, was never told that her application had been denied, and the prosecutor asked no questions concerning the effect this trip might have on her consideration of the case. (5 RT 797-802, 838-839, 844.) If Juror No. 213's commitment to his basketball team was the reason for his exclusion, surely Juror No. 7, who also had time problems, would have been excluded, too.

Finally, it is unlikely that Juror No. 213's experience with the criminal justice system served as the basis for the prosecutor's challenge because two other prospective jurors with similar experience went unchallenged and were picked to sit on the jury. Juror No. 12, the jury foreman (9 RT 1968), had served on a jury some six years earlier that reached a verdict in a criminal trial involving possession of guns and weapons. (1 CTJQ 93; 6 RT 1027-1028.) The only question the prosecutor asked him about his service was, "The other trial you served on, that was back in '92?" (6 RT 1028.) Juror No. 4 had been a ward of the Oakland County Michigan court for a few years when he was a minor due to "status" offenses (running away from home and school truancy). He spent about two weeks in the "Children's Village" juvenile detention facility. During that time he was assigned a probation/case worker and he testified in court. (1 CTJQ 21, 23.) The prosecutor asked no questions at all of this juror about any of this experience or how it might effect his consideration of the case. (6 RT 1133-1137.)

If Juror No. 213 was excused for reasons related to any of the areas explored by the prosecutor on voir dire, one must ask why several of the sitting jurors who were not black and who had similar experiences, pressures, and views were not questioned at all. Granted, there were subtle differences among the jurors, but they were similar enough that an inference of discrimination can and should be drawn from the fact that the prosecutor asked no questions of sitting, non-black jurors in these areas. "[P]otential jurors are not products of a set of cookie cutters." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 247, fn. 6.) "A per se rule that a defendant cannot win a *Batson* [*v. Kentucky* (1985) 476 U.S. 79] claim unless there is an exactly identical white juror would leave *Batson* inoperable." (*Ibid.*)

The prosecutor's failure to question several sitting jurors who were not black but were similar to Juror Nos. 719 and 213 raises an inference of discriminatory purpose. The Court should reconsider its refusal to conduct comparative juror analyses in first-stage *Batson* cases.

D. The Judge Should Have Conducted Steps Two and Three of *Batson's* Analysis

Appellant made a prima facie case of discrimination by establishing that he is African-American; that the prosecutor used peremptory challenges to excuse all the black prospective jurors; that the excused prospective jurors had only their race and age in common and in all other respects they were as heterogeneous as the community as a whole; that the prosecutor engaged in a pattern of systematic discrimination; that there was a striking statistical disparity between the percentage of black and non-black prospective jurors challenged by the prosecutor; that the prosecutor did not challenge non-black jurors who were similarly situated to the black prospective jurors; and that the manner in which he questioned the black prospective jurors demonstrated his discriminatory purpose.

Based on this showing, the judge should have proceeded to steps two and three of *Batson's* analysis. Instead, he denied appellant's *Wheeler* motion because he believed there was ample reason other than race to excuse both prospective jurors. (6 RT 1119.) He did not specify what those reasons might be with respect to Juror No. 719. His only comment about her excusal was "applying what I heard to be Enright's assessment of the juror's responses and the likelihood that a good prosecutor would challenge such a juror, I don't find any prima facie evidence of misconduct on the part of the prosecutor." After her excusal he added, "at this stage in the proceeding the defendant, from the court's perception, has not been denied

the opportunity to have other black jurors . . . [and] minorities serve as a - as a juror on this case." He also thought it was important that there were "a sizeable number of citizens from the community who come from ethnic minority [sic], who come to the court as prospective jurors," and he directed the clerk to keep records of all hardship requests which would be a "good record as to who came here, and who asked to be excused, and what the party's responses were to that."

> And all I can do at this stage of the proceeding is try to keep careful accounting of who is coming in, who is asking to be excused, and whether the parties stipulated or whether the court found cause. And what I'm doing in that regard is these request for hardships are just being retained for, permanently, so we have a record as to what took place.

(5 RT 1003.)

Of course, this was not all the judge could have done. He could and should have required the prosecutor to provide reasons for the challenges and then proceeded to step three of *Batson's* analysis. With due respect, keeping a record of hardship requests is largely irrelevant to the *Batson* equation, and the fact that other black and minority prospective jurors had not been excluded has little to do with the question whether Juror No. 719 was excused for a discriminatory purpose. The judge never answered this question.

With respect to Juror No. 213, the judge stated that he did not believe the prosecutor "systematically is excluding all Afro-Americans from serving as jurors on this case, or that he is systematically excluding any other minority group from serving on this particular case." He noted that Juror No. 213 had submitted a hardship request asking to be excused and that, during voir dire, he had "indicated his reticence about serving," but he

ultimately concluded that he could "make his job work consistent with the nature of the jury duty." Furthermore, earlier that day, when the judge had informed Juror No. 213 that his hardship request would not be granted,

> there was an audible groan and facial expression consistent with that as he moved from the clerk's area over to the chair. And just watching his demeanor, his facial expressions when he was inquired about his availability, I thought he was indicating that it's going to be extremely difficult. Plus some of the other information that was disclosed to the deputy district attorney upon further inquiry.

(6 RT 1116-1119.)

Again, the question before the judge was not whether there was a pattern of systematic exclusion but rather whether Juror No. 213 had been challenged because of group bias. (*People v. Bonilla, supra*, 41 Cal.4th at p. 343, fn. 12.) The judge never answered this question. He did note that Juror No. 213 had submitted a hardship request asking to be excused, but this is hardly a race-neutral reason for challenging a juror. If it were, Juror No. 7 and Alternate Juror No. 1, who were not black and whose hardship requests were also denied, would not have served on the jury. (1 CTHS 139; 5 RT 857-862, 872-873; 6 RT 1185.) He also noted the prospective juror's demeanor and facial expressions and his "reticence about serving." But there is not a shred of evidence that the prosecutor saw the conduct or, if he did, that he saw the same conduct as the judge. Of course, if he did not observe the conduct it could not possibly be a reason for exercising the peremptory challenge.

Furthermore, the prosecutor addressed the judge's concerns about demeanor when he asked Juror No. 213, "I take it from some things you said and the way you walked to the jury box, you're not thrilled; is that a bad way to state it?" He responded, "That's a bad way to state it." He

explained that he was torn between his commitment to his basketball team and the potential commitment to a jury:

> [T]his is a very big responsibility, as much as that is a big responsibility, too. If we can work out, if I can get it so they're both on different keels, it's fine with me. Because I don't have to worry about anything. I don't have to worry until I get to the game. Then I worry about that.

(6 RT 1093.) He ultimately concluded that he could both serve on the jury and meet his coaching obligations because there would be no more than three games, all in the evening, before the projected conclusion of the trial, and he could move practices from 2:00 p.m. to 5:00 p.m. (6 RT 1083-1085, 1091-1093.) His biggest problem was "toward Christmas," after the projected conclusion of the trial, "because then tournaments." (6 RT 1083-1084.) In view of these statements, neither Juror No. 213's basketball commitments nor his "reticence" about serving are race neutral reasons for the strike. Instead, the judge's observations about this prospective juror are "judicial speculation" which is too imprecise to rely on to resolve plausible claims of discrimination. (*Johnson v. California, supra*, 545 U.S. at p. 173.)

To the extent it was based on his belief that there might be more than two African-American prospective jurors in the venire, the judge's *Wheeler* decision was clearly erroneous. His own comments establish that the prosecutor excused all the members of the venire who appeared to be black. (*People v. Motton, supra*, 39 Cal.3d at p. 604.) If the judge did not understand that this could suffice to establish a prima facie case of discrimination, and it appears that he did not, he could not possibly have

properly weighed the inferences of discrimination in this case.[37] And it was extremely important in this case that the judge properly weigh the inferences of discrimination. Appellant is a black man who was charged with raping and killing young white women. When the victim is a white woman and the evidence suggests she was raped, black defendants are disproportionately sentenced to death. (See, e.g., Crocker, *Is the Death Penalty Good for Women* (2001) 4 Buff. Crim.L.Rev. 917; Crocker, *Crossing the Line: Rape-Murder and the Death Penalty* (2000) 26 Ohio N.U. L. Rev. 689; King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions* (1993) 92 Mich. L. Rev.63, 81-82 [summarizing studies].) Even a prosecutor who harbored no personal animus towards black defendants might have thought that white jurors would be more likely to convict because of the race of the individuals involved.[38]

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[37] The fact that all the members of a cognizable class have been excused makes a big difference in a prima facie case analysis. As the trial judge in *People v Bell* aptly noted, "two out of three is different than two out of two." (*People v Bell* (2007) 40 Cal.4th 582, 598, fn. 2.)

[38] See, e.g., *Mahaffey v. Page* (7th Cir.1998) 162 F.3d 481, 484 ["And lest we forget, the crimes at issue in this case were obviously racially-sensitive – *Mahaffey*, a young African-American male from Chicago's South side, was charged with murdering a White couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to *Mahaffey's* defense at trial, as well as to his arguments in mitigation at the capital sentencing phase.]; *Jones v. Ryan* (3d Cir.1993) 987 F.2d 960, 971 [taking into account that defendant was charged with a violent offense against a white victim in finding a prima facie case]; *Commonwealth v. Mathews* (Mass.1991) 581 N.E.2d 1304 ["[T]he interracial sexual aspect of the crime involved is a factor to be

(continued...)

Respondent will undoubtedly argue that appellant's conviction should be upheld because the prosecutor might have had race-neutral reasons for the peremptory challenges in question. The Court should decline any invitation to speculate about possible reasons for the challenges. The question before the Court is whether "other relevant circumstances" eroded the premises of appellant's allegations of discrimination and refute the inference of bias raised by the statistical disparity, not whether the record could support race-neutral grounds for the prosecutor's peremptory challenges. (*Williams v Runnels, supra*, 432 F.3d at p. 1109.) The United States Supreme Court has directed that first-stage *Batson* claims must be resolved in a manner that "produce[s] actual answers to suspicions and inferences" of discrimination, and avoids "needless and imperfect speculation." (*Johnson v. California, supra,* 545 U.S. at p. 172.) Under *Batson* and *Johnson*, an appellate court reviewing a first-stage *Batson* claim cannot simply speculate about possible reasons for the challenged strikes (*Id.* at p. 173); instead, it must *only* consider (1) the movant's showing in support of the claim, (2) the prosecutor's response to that showing and/or proffered explanations for the strikes, and (3) any explanation by the trial court of its ruling. For a reviewing court to consider other facts, and particularly to consider completely speculative explanations for the

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[38] (...continued)
considered.... That factor made it highly possible that racial prejudice would play a part in the jury process."]; and *Williams v. Chrans* (7th Cir.1991) 945 F.2d 926, 944 (cert. denied (1992) 505 U.S. 1208 ["In a case where the defendant is Black and the victim is White, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many White jurors as possible in order to enlist any racial fears or hatred those White jurors might possess."].)

challenged strikes, would contradict *Batson* and *Johnson*, and make it effectively impossible to appeal a first-stage *Batson* ruling.[39]

Because the prosecutor did not proffer reasons for the challenged strikes in this case, it is improper to review the trial court's ruling by speculating about circumstances that may, might or could have motivated those strikes, particularly circumstances to which neither the prosecutor nor the trial court ever referred. (See *United States v. Stephens*, *supra*, 421 F.3d at p. 516 [after *Johnson*, only "very narrow review" is permissible on appeal of "apparent" reasons for challenged strikes; "apparent reasons [are] relevant only insofar as the strikes are so clearly attributable to [those

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[39] Appellant recognizes that since *Johnson v. California* was decided, this Court has repeatedly decided first-stage *Batson* claims by performing precisely that type of scouring of the record for reasons to support the trial court's ruling. (See, e.g., *People v. Bonilla* (2007) 41 Cal.4th 313, 349 [although the Court found it "virtually impossible to glean . . . any clues" about prospective juror's opinions from her voir dire or questionnaire, it accepted respondent's argument that she "could" have been struck because the fact that murder was for financial gain would not be important to her]; *People v. Hoyos* (2007) 41 Cal.4th 872, 902 [Hispanic juror might have been struck because she had limited language skills]; *People v. Avila* (2006) 38 Cal.4th 491, 554-555 [black juror might have been struck because she had "mixed feelings" about prior jury service, and/or because her brother was convicted of manslaughter]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1102-1103 [black juror might have been struck because she believed her cousin was treated unfairly by the police, or because she had "strong opinions"].) Appellant submits that the Court should not continue this practice because it is clearly inconsistent with both *Batson* and *Johnson*. (See *United States v. Stephens* (7th Cir.2005) 421 F.3d 503, 516 [when prosecutor's "starkly disproportionate use" of strikes "raises suspicions of discrimination that were obvious to the trial judge," under *Batson* and *Johnson* an appellate court should not "speculate as to reasons for" that disproportion, but should rather "simply ask the prosecutor" for his reasons].)

reasons] that there is no longer any suspicion, or inference, of discrimination"].) The obvious problem with such an approach is that with the lengthy questionnaires used in capital cases (e.g., the questionnaire here, which was 20 pages long and included 71 questions, many with multiple subparts (see, e.g., 1 CTHS 55-73)), anyone determined to find a "reason" for a challenged strike certainly could, even if not a particularly likely reason.

Another problem is presented by "mixed motive" cases where the proponent of the strike offers one explanation that is found to be discriminatory and one or more that are found to be non-discriminatory, or where the proponent of the strike is found to have engaged in prohibited discrimination with respect to one but not all struck jurors. A peremptory strike can be sustained only if the prosecution shows, at the least, that discriminatory intent was not a substantial or motivating factor for the challenge. (*Snyder v. Louisiana, supra*, 128 S.Ct. at p. 1212.) Thus, if a reviewing court chooses to speculate about reasons for a peremptory challenge, it must determine how many reasons the prosecutor had for exercising the challenge. Unless it can say that there was only one reason, the court must then determine how big a part each of the reasons played in the decision to strike the prospective juror and whether discriminatory intent was a substantial or motivating factor for the challenge. Appellant respectfully submits that this is an impossible task, even for the most prescient courts. In these circumstances, "needless and imperfect speculation" is simply unlikely to "produce actual answers to suspicions and inferences" of discrimination. (*Johnson v. California, supra*, 545 U.S. at p. 172.)

Perhaps the best reason for declining to speculate about possible reasons for the peremptory challenges is the experience gained from doing so in *People v. Johnson*. In *Johnson*, this Court found that a prima facie showing of discriminatory purpose had not been made based on its speculation that the prosecutor might have challenged one of the black prospective jurors because she had a sister who had faced drug charges and because her questionnaire raised concerns about her ability to understand the proceedings. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1307.) Another might have been excused because she did not disclose until voir dire that one of her parents had a 30-year-old robbery arrest, or because she expressed on the record that she did not know if she could be fair, or because of answers in her questionnaire about her emotions and feelings which "might have caused concern for either side." (*Id.* at p. 1308.) The United States Supreme Court reversed. In his opinion, Justice Souter warned that "[t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Johnson v. California, supra*, 545 U.S. at p. 172.) His words turned out to be prophetic.

On remand, this Court determined that the appropriate remedy for the violation of *Johnson's* constitutional rights was a limited remand to the trial court, where a belated effort to conduct steps two and three of *Batson's* analysis could be undertaken. (*People v Johnson* (2006) 38 Cal.4th 1096, 1103-1104.) Proceedings pursuant to this limited remand have now been

concluded.[40] The judge found that the prosecutor graded all the prospective jurors based on their answers to a pretrial questionnaire and then decided which ones to challenge. He could not satisfactorily explain, though, why he removed a black prospective juror when at least two non-black panelists with as low or lower grades were retained. The judge was left with "serious doubt that the deputy district attorney in fact picked Juror No. 2 over Ms. Turner on the grounds claimed by him at the hearing." He concluded there was a "natural and reasonable inference that Ms. Turner's challenge was exercised discriminatorily" and, accordingly, vacated the judgment and ordered a new trial.

So the answer to the simple question in *Johnson* was not that prospective jurors had been excused because family members had faced drug charges or robbery arrests, or that the prospective jurors could not be fair or could not understand the proceedings or had emotions and feelings which might cause concern. Instead, at least one was excused for inappropriate racial reasons. This serious and substantial violation of not only *Johnson's* constitutional rights but also those of the aggrieved prospective jurors, went undiscovered for 12 years. But for the Supreme Court's intervention, it would never have been discovered at all. This is the real problem with the Court's approach to first-step *Wheeler* cases; too many legitimate cases of discrimination are likely to be simply speculated away.

> [W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can

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[40] Appellant has requested under separate cover that the Court judicially notice the trial judge's February 26, 2008, order after conduct of *Wheeler/Batson* Step 2 and 3 hearing.

> and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.

(*Miller-El v Dretke, supra*, 545 U.S. at p. 252.)

The time and resources devoted to speculating about reasons for the prosecutor's challenges in *Johnson*, particularly when the information was easily obtainable, are simply unjustifiable. Moreover, the failure to acquire this information in 1996 and instead to deny *Johnson* relief based on nothing more than speculation about what might have happened in the trial court tends to "cast[] doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . ." (*Miller-El v Dretke, supra*, 545 U.S. at p. 238, citing *Powers v. Ohio* (1991) 499 U.S. 400, 412.) Indeed, it invites cynicism respecting the jury's neutrality, undermines public confidence in adjudication, and jeopardizes the very integrity of the courts. (*Ibid.*; see also *Georgia v. McCollum* (1992) 505 U.S. 42, 49; *Edmonson v. Leesville Concrete Co.* (1991) 500 U.S. 614, 628; *Batson v. Kentucky, supra,* 476 U.S. at p. 87.)

Speculating about the basis for the prosecutor's excusal of all the black prospective jurors would likely provide as little protection for appellant's constitutional rights, and those of Juror No. 719 and Juror No. 213, as it did for the defendant and the prospective jurors in *Johnson*. The Court should not waste any more time and resources trying to divine why the prosecutor excused these prospective jurors. That question could and

should have been answered over nine years ago. Rather than address possible reasons for or the prosecutor's conduct, the Court should determine his actual reasons and address them now. The Court, after all, has acknowledged that *Johnson v. California* "made clear" that the prima facie case standard set out by *People v. Johnson* "is too demanding for federal constitutional purposes." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1105.) It should therefore apply the *Johnson* standard in deciding first-stage *Batson* cases; i.e., it should reverse a ruling that no prima facie case was established where the claimant has "produc[ed] evidence sufficient to permit the trial judge to draw an inference that discrimination [had] occurred." (*Johnson v. California, supra*, 545 U.S. at p. 170.) Instead, this Court's decisions have reimposed an unduly "onerous" burden in first-stage *Batson* cases while purporting to apply the "reasonable inference" standard, by affirming first-stage rulings where "the record *suggests* grounds upon which the prosecutor *might reasonably have* challenged the jurors in question.'" (*People v. Guerra, supra*, 37 Cal.4th at p. 1101, italics added.)[41]

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[41] This Court has also expressed the dubious view that *Johnson*'s direction that trial courts should not "engag[e] in needless and imperfect speculation" about the prosecutor's reasons only applies to "the third step of the [*Batson*] inquiry, . . ." (*People v. Lancaster* (2007) 41 Cal.4th 50, 76, quoting *Johnson v. California, supra*, 545 U.S. at p. 172.) However, *Johnson* does not state that the language at issue only applies at the third stage of the *Batson* inquiry, and "[t]he question before" the High Court in *Johnson* was whether California had imposed an unduly high burden of persuasion at the *first stage*. (545 U.S. at p.168.) Moreover, both of the cases cited in *Johnson* on that point are first-stage cases. (*Id.* at p. 172; *Paulino v. Castro* (9th Cir.2004) 371 F.3d 1083, 1090; *Holloway v. Horn* (3d Cir.2004) 355 F.3d 707, 725.) Thus, nothing about *Johnson v. Caifornia* – not its facts, its express language, or the cases it relies upon – supports the *Lancaster* Court's conclusion.

The Court should decline any invitation to speculate about possible reasons for the challenged strikes here, and rather should take this opportunity to make its jurisprudence consistent with *Batson* and *Johnson* by limiting its review of first-stage *Batson* claims to a consideration of (1) the movant's showing, (2) the prosecution's response to that showing, and (3) any statements by the trial court in ruling on the claim

Should the Court choose to speculate about possible reasons for the peremptory challenges, the record does not support race-neutral reasons for the challenges in question. Instead, it clearly shows that the totality of relevant facts give rise to an inference of discriminatory purpose. An inference may be reasonably deducible from evidence even if it conflicts with another inference that may also be deducible from the same evidence. (See, e.g., *Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807 ["When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court."]; Code Civ. Proc., § 437c, subd. (c) ["summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence"].) As Witkin points out, "the party's proof need not wholly exclude all unfavorable inferences; i.e., the party is not required to show that, under the circumstances, the inference in his or her favor is the only one that can reasonably be drawn. [Citations.]" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 139, p. 198.) Several inferences can arguably be drawn from the fact that the prosecutor excused 100 percent of the black prospective jurors. One of them certainly is that he did not want black jurors who might somehow favor appellant because of his race, and that he used peremptory challenges against all of them based on group bias. (See

Williams v. Chrans, supra, 945 F.2d at p. 926.) Given the existence of this reasonable inference, appellant made a prima facie case of group bias. (*Johnson v. California, supra*, 545 U.S. at p. 168.)

It would be particularly inappropriate to rely on speculation that the prosecutor might have excused Juror No. 213 because of his commitment to his basketball team. In *Snyder v. Louisiana, supra*, 128 S.Ct. 1203, one of the alleged reasons for the challenge of a prospective black juror was the time pressure created by his student-teaching obligation.[42] The prosecutor claimed to be apprehensive that the prospective juror, in order to minimize the student-teaching hours missed during jury service, might have been motivated to vote for guilt, not of first-degree murder, but of a lesser included offense because this would obviate the need for a penalty phase proceeding. The High Court found this scenario to be "highly speculative." In light of the anticipated brevity of the trial, serving on the jury would not have seriously interfered with the prospective juror's ability to complete his required student teaching. "When all of these considerations are taken into account, the prosecutor's second proffered justification for striking Mr. Brooks is suspicious." (*Snyder v. Louisiana, supra*, 128 S.Ct. at p. 1211.)

In this case, as noted above, the judge himself acknowledged that Juror No. 213 concluded he could fulfill his commitment to both the team

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[42] The prospective juror was a student in his last semester. He was required to student teach in order to graduate, and he was teaching five days a week, 8:30 a.m. through 3:00 p.m. The court contacted the prospective juror's dean who indicated that "as long as it's just this week, he doesn't see that it would cause a problem with Mr. Brooks completing his observation time within this semester." Thereafter, the prospective juror did not express any further concern about serving on the jury, and the prosecution did not choose to question him more deeply about this matter. (*Snyder v. Louisiana, supra*, 128 S.Ct. at pp. 1209-1210.)

and the jury. It is unlikely that his decision was capricious because he had previously served as a jury foreman in a murder trial and he knew exactly what he was getting into. Juror No. 213 explained on the record how serving on the jury would not seriously interfere with his ability to fulfill his obligations to his team. Like *Snyder*, excusing him for time pressure related to his basketball commitment would be suspicious.

Finally, none of the Court's post-*Johnson* cases finding that the defendant had not established an inference of bias provide a basis for concluding similarly in this case. In fact, they are all easily distinguishable. Here there were two black prospective jurors in a 136-member juror pool. (10 CT 3113-3116; 6 RT 1117, 1203-1204.) Appellant is a member of the excluded group and no members of that group served as either jurors or alternate jurors. None of the Court's post-*Johnson* cases address this scenario. In *People v. Cornwell* (2005) 37 Cal.4th 50, 69-70, the prosecutor challenged one of two black prospective jurors, but the other had been passed repeatedly from the beginning of voir dire and ultimately served on the jury. In *People v. Gray* (2005) 37 Cal.4th 168, 187-188, the prosecutor excluded a black prospective juror from the regular jury and one from the panel of alternates, but left one on the jury and one also served as an alternate juror. In *People v Guerra* (2006) 37 Cal.4th 1067, 1100, two African-Americans sat on the jury, other Hispanic and black prospective jurors remained on the panel at the time of the challenges in question, and there was no indication that the prosecutor had excused all the members of a cognizable group. In *People v Avila* (2006) 38 Cal.4th 491, 540, the jury included two Hispanic males, two Hispanic females, and one black female. One of the three alternate jurors was a black male. In *People v Williams* (2006) 40 Cal.4th 287, 309, fn. 5, 312, the defendant was Caucasian and

black women were seated as jurors both before and after the challenge in question. In *People v Bell* (2007) 40 Cal.4th 582, 595, the prosecutor excused two out of three black women and two Filipino Americans. The defendant was not a member of either group. The jury panel included a black woman, three black men, and at least two Filipino-Americans. In *People v Lancaster* (2007) 41 Cal.4th 50, 76, three of the four black women on the panel at the time of the defendant's *Wheeler* motion ultimately served on the jury. In *People v. Bonilla* (2007) 41 Cal.4th 313, 342, 344, the prosecutor struck both African Americans in the 78-person juror pool. *Bonilla,* however, was Hispanic and there were eight Hispanics in the juror pool and an Hispanic man served on the jury. In *People v Hoyos* (2007) 41 Cal.4th 872, 900, there was at least one Hispanic juror on the panel. In *People v Zambrano* (2007) 41 Cal.4th 1082, 1102, the prosecutor excused all five of the black prospective jurors called into the jury box. The regular jury as empaneled had no black members, but there was one black alternate juror. In *People v. Howard, supra*, 42 Cal.4th 1000, the jury as sworn, including alternates, was comprised of eight African-Americans, five Hispanics, three Caucasians, one Asian-American, and one person of mixed race.

In all these cases, the fact that either members of the group allegedly discriminated against or members of the defendant's race served as jurors or alternates weighs against an inference of discrimination. The same cannot be said here. The facts here are virtually indistinguishable from those in *Johnson* itself where the United Supreme Court found an inference of bias. This Court must do the same.

E. Reversal, Not Remand, Is the Appropriate Remedy for a Step One *Wheeler* Violation

The Court concluded in *People v Johnson* (2006) 38 Cal.4th 1096 that the appropriate remedy for step one *Batson* violations is a limited remand to the trial court.

> That court should attempt to conduct the second and third *Batson* steps. It should require the prosecutor to explain his challenges. If the prosecutor offers a race-neutral explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenges in a permissible fashion, it should reinstate the judgment.

(*People v Johnson, supra*, 38 Cal.4th at p. 1103-1104.)

As noted, *Johnson* concerned the remedy for *Batson* violations. "'[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias [also] violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution.' (*Wheeler,* at pp. 276-277, 148 Cal.Rptr. 890, 583 P.2d 748.) Because *Wheeler* was based on state law, nothing we decide today implicates the rule of automatic reversal this court has applied for state constitutional *Wheeler* error." (*Id.* at p. 1105, conc. opn. of Werdegar. J.)

This Court has found that it is "unrealistic" after six years "to believe the prosecutor could recall in greater detail his reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor examined the venire

and exercised his other challenges." (*People v. Snow* (1987) 44 Cal.3d 216, 226.) The United States Supreme Court has found there was no "realistic possibility" more than a decade after petitioner's trial "that this subtle question of causation could be profitably explored further on remand." (*Snyder v. Louisiana, supra*, 128 S.Ct. at p. 1212.) The voir dire examination in this case occurred well over nine years ago and at least a few more years will likely pass before this appeal is finally decided. Appellant has lost more than faded memories due to the passage of time. The observations, recollection, and argument of one of his trial counsel, who is since deceased, cannot be considered on remand. Absent the input of this crucial participant, any assessment of the prosecutor's reasons, and their sincerity, would be less than reliable.

Appellant has established step one *Wheeler* error. The error, as in *Snow* and *Snyder*, is reversible per se.

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II.
THE DENIAL OF APPELLANT'S MOTION TO EXCLUDE EVIDENCE OF HIS ADMISSIONS VIOLATED THE STATE AND FEDERAL CONSTITUTIONS AND REQUIRES REVERSAL OF THE JUDGMENT

Evidence of appellant's admissions, which were obtained only after he had repeatedly invoked his right to silence, should have been excluded. The trial court's refusal to do so violated appellant's rights under Evidence Code section 1204; the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and article I, section 15 of the California Constitution.

A. Factual Background

On the morning of June 14, 1996, investigators Redmond and Giesler from the Costa Mesa Police Department and Tarpley from the Tustin Police Department drove from Orange County to Avenal State Prison to serve a search warrant on appellant and to attempt to obtain a confession from him. They left around 5:30 a.m. and arrived around 10:30 a.m. (1 RT 131-133, 145-146, 173-174, 177-178, 194.)

At the time, appellant was taking psychotropic drugs on a daily basis.[43] An entry in his prison medical records instructed that he not be given his medications on June 14th until after the interview. He alleged that this was done at the request of a "local police department." (3 CT 932, 946-

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[43] Appellant had been prescribed Mellaril, an antipsychotic medication which "reduces the symptoms of mental illness and mental disturbance, perhaps balances out some of the chemical systems," and Cogentin (to reduce the Mellaril's side effects); Depakote (probably for mania and bipolar disorder); and Vasotec and Clonidine (blood pressure drugs). Mellaril and Depakote sometimes cause pronounced drowsiness and are customarily given in the evening or at bedtime. (2 RT 235-239.)

948.) The medical records showed that his blood pressure and heart rate were measured at 6:50 p.m. on June 14th, and he was given his blood pressure medications, Vasotec and Clonidine, but not Depakote.[44] At 11:41 p.m., a nurse's medical report of injury or unusual occurrence notes that he was given 150 milligrams of Mellaril by mouth, as ordered by the doctor. Vina Spiehler, a pharmacologist and a board certified forensic toxicologist, did not believe there would be any effect from a four-hour delay in administration of Mellaril because it takes a number of weeks for the drug to have an effect. (2 RT 229, 238-241.) Redmond testified that he did not make any effort to have the prison refrain from giving appellant any drugs on June 14 or 18, 1996, but he did not know if someone from his department had done so. (2 RT 226-227.) Giesler testified that she did not request that appellant's psychotropic medications be discontinued on the day of their arrival at Avenal State Prison and did not know if anyone had made such a request. (1 RT 192-193.)

During the trip to the prison, the officers decided that Redmond and Giesler would interrogate appellant, and Tarpley would then interrogate him. According to Redmond, the decision to separate the jurisdictions was made because, "through experience, working - talking with suspects, we wanted to not bombard him with a lot of people in the room. A good number would be two to start out with." (1 RT 133-134, 168-169.) At the prison, Redmond advised appellant of his *Miranda* rights and appellant responded with the single word "right" to each advisement. Redmond then asked, "Do you want to talk to us, ah, about anything that might have

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[44] The prison's pharmacy records showed that appellant's medications were not given at all that day. (2 RT 239.)

occurred back '79, '80?" Appellant responded "'79, '80, why, why would I want to talk to you about something that occurred back then?" Redmond said, "Well, some things have come up and ah, we need to talk to you about them, you can stop talking at any time." Appellant told him "I can't, like I said, I, I can't imagine why I would want to talk with the Costa Mesa Police Department." (5 CT 1547-1548; 1 RT 134-135.) Redmond and Giesler proceeded to interrogate appellant. (8 CT 2468-2543; 1 RT 137-140.)

Appellant expressed his desire to remain silent numerous times during the interrogation. For example, when Giesler implored him to confess ("I mean 17 years is long enough, I think it's time to talk about it, don't you?"), he responded "Oh, yeah. . . . The thing is I will reserve the right to speak at another time." (5 CT 1610.) Despite this clear indication that he did not want to continue talking, Giesler forged ahead: "I'm speaking the truth to you and all I can ask in return is that you speak the truth to me. Get the monkey off your back." (5 CT 1612.) Appellant indicated again that he did not want to continue the conversation. "Yeah, the day is not today though. . . . I can't take it." (*Ibid.*) Redmond then gave it a try: "What she's saying, get it off your chest, well, give somebody the reason why? Everybody's got a reason." (5 CT 1615.) Appellant told him, "Yeah, but there's also a reason for wanting to wait too." (*Ibid.*) The response did not deter Redmond, either. "Let me ask you this, Gerald, if you don't mind, ah, did you expect this day to come?" (5 CT 1616.) After a short discussion about DNA appellant said, "like I say, once again, there's, there's I think for me, there's a time, and a place for saying what I have to say, and, in reference to what happened, I, there's nothing else that I can tell you." (5 CT 1616-1617.)

Rather than honor these clear requests to end the interrogation, the officers proceeded to bombard appellant with an appeal for sympathy for the victims' families, during which Giesler asked, "Gerald, I can guarantee you, they're going to say, Lynda, did he say why? Can you tell me why? Can you try to tell me why? Did you know any of these women?" (5 CT 1617-1618.) Appellant said, "Like I say, I think I should wait until later on before . . ." (5 CT 1618.) Giesler professed not to know what he meant: "I don't understand what you're saying to me, are you saying, okay Lynda, when I get back to Orange County, come and see me? . . . Are you saying, Lynda, I don't want to talk to you?" (5 CT 1619.) Appellant explained, "I just need some time to call upon myself, to bring, to draw upon some strength. . . . To say what I have to say" (8 CT 1620.) The officers finally relented, but only after securing appellant's agreement that Giesler could come see him in the Orange County jail. (5 CT 1620-1622.)

They left the interview room and Tarpley entered. He confirmed that Giesler and Redmond had advised appellant of his *Miranda* rights, and he re-*Mirandized* him. (6 CT 1630-1631; 1 RT 146.) He asked if appellant wanted to "talk about why I'm here today?"[45] Appellant said yes and Tarpley explained that he was investigating a Tustin homicide. He proceeded to interrogate appellant (6 RT 1631) and eventually elicited admissions which were introduced as evidence.

Anaheim Police Department detective Richard Raulston and sergeant Steve Rodig visited appellant around 9:30 or 10:00 p.m. that night at Corcoran State Prison, where he was then housed. (1 RT 204.) Rodig said

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[45] Tarpley's precise question was disputed. Defense counsel contended he asked "Would you let me talk about why I'm here today?" (3 CT 942-943; 1 RT 161-163.)

they had learned from the Costa Mesa police department that appellant had admitted involvement in Sandra Fry's homicide. (1 RT 205-206.) He advised appellant of his rights and appellant indicated he was willing to talk. (1 RT 207-210.) A one to two hour interrogation ensued. (7 CT 2042-2076.) Raulston inadvertently erased a portion of the tape recording of the interrogation, including the introduction and the *Miranda* warnings, while he was trying to duplicate it the next morning. (1 RT 206-207.) He returned to Corcoran by himself around 4:30 or 5:00 p.m. on June 16, 1996, to interview appellant again. (1 RT 211.) He confirmed that appellant remembered his visit the previous Friday, that appellant had been advised of and waived his rights, and that "we didn't force a confession out of you, right, we didn't beat you or threaten you or anything like that." (7 CT 2079.) He advised appellant of his rights again and appellant indicated that he understood them. (7 CT 2079-2080.) He elicited admissions from appellant concerning Sandra Fry's homicide. (7 CT 2080-2114.)

According to Vina Spiehler, appellant's Mellaril was discontinued on June 17, 1996, and he started taking Haldol, a drug that had not been previously prescribed, as a substitute. The records showed that appellant was given his medication, including the Haldol, on June 18, 1996, at 5:00 p.m. (2 RT 241-243.) That day, Redmond traveled to Corcoran State Prison with Giesler, sergeant Tom Boylan, and evidence technician Bruce Radomski to interrogate appellant again on video tape. (7 CT 1800-2031.) Appellant was advised of his *Miranda* rights before the interview. (7 CT 1804-1805; 1 RT 164-166.)

Spiehler listened to and watched the tapes of appellant's interrogations. She characterized the sound of his voice on June 14, 1996, as alert, oriented, and responsive. On June 16, 1996, she thought he

sounded "unwell." His speech sounded low, slow, and slurred. On June 18, 1996, he appeared to be calm, alert, oriented, and responsive. (2 RT 243-247.) He appeared healthy to Raulston, too, with no symptoms of illness at all. He did not appear to be tired and he was alert throughout their interviews. Raulston had no trouble communicating with him. (2 RT 253-254.) Redmond also thought appellant appeared to be alert and coherent. He did not appear to be sick and did not complain at all of being ill. They had no problem understanding each other. (2 RT 225, 228-229.) He did not know if appellant ingested any psychotropic drugs before the interview on June 18, 1996. He did not conduct any investigation to determine what, if any, drugs appellant had ingested on June 13, 1996. (2 RT 226-227.)

B. Appellant's Motion to Exclude

Appellant moved "for an order excluding [during the guilt phase] confession statements obtained from him while in custody at Avenal Sate Prison on June 14, 1996, and all subsequent statements obtained from him while in custody." (3 CT 925.) He contended that he invoked his right to silence at the outset of and numerous times during the initial interrogation and again at the outset of Tarpley's interrogation (3 CT 928, 933-936, 941-943); that Tarpley's request for a *Miranda* waiver after he had invoked his right to silence was impermissible (3 CT 943-945); and that his statements were not the product of a free and voluntary waiver but were instead the product of outrageous police behavior. (3 CT 930-932, 937-940.)

The prosecutor acknowledged that the interrogations were custodial and that *Miranda* warnings were required (3 CT 954), and also that appellant did not expressly state he was willing to speak with the officers. (3 CT 959.) He argued, however, that appellant's responses showed he clearly understood it was his choice about whether or not to talk to the

officers (3 CT 954) and that the circumstances surrounding the interrogations showed an implied Fifth Amendment waiver. (3 CT 959-961.) According to the prosecutor, appellant's question about "why he would want to talk, followed immediately thereafter by voluntary, active participation in conversations with the officers, does not come close to constituting an invocation of the right to silence." (3 CT 955.) Appellant purportedly "willingly engaged in the discussion with the detectives in order to draw out from them what information they had regarding him and the crimes in their city." (*Ibid.*) Furthermore, according to the prosecutor, appellant's comments during the interrogation "about reserving the right to speak about the crimes at another time, waiting until later, not today, etc." were not a clear and unambiguous assertion of his rights and "constituted at most, an equivocal reference to the right to silence." (3 CT 958.) Finally, citing *Michigan v. Mosley* (1975) 423 U.S. 96, 104-105, and *People v. Warner* (1988) 203 Cal. App.3d 1122, 1124, the prosecutor argued that it was permissible for investigator Tarpley to request a waiver to discuss a different case. (3 CT 963.)

The motion was heard on April 21, 23, and 28, and May 11 and 22, 1998. (1 RT 128-224; 2 RT 225-265.) The judge denied it without comment. (2 RT 266-268.)

C. Relevant Law

The primary purpose of the *Miranda* rule is to "overcom[e] the inherent pressures of the interrogation atmosphere." (*Miranda v. Arizona* (1966) 384 U.S. 436, 468.)

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any

> statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

(*Id.* at pp. 473-474.) "[A] defendant must be advised of his or her *Miranda* rights, and must make a valid waiver of these rights, before questioning begins or any statements resulting from interrogation can be admitted." (*People v. Rundle* (2008) ___ Cal.4th ___ , 2008 WL 878915, 18; *Dickerson v. United States* (2000) 530 U.S. 428, 433-434.)

"[N]o particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent, and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden* (1994) 9 Cal.4th 83, 129, internal citations omitted.) The question whether words or conduct are "inconsistent with a present willingness" to continue the interrogation, is determined under a reasonableness standard. (*Ibid.)*

"[A]n express waiver is not required where a defendant's actions make it clear that a waiver is intended." (*People v. Whitson* (1998) 17 Cal.4th 229, 250; see *North Carolina v. Butler* (1979) 441 U.S. 369, 373 ["at least in some cases waiver can be clearly inferred from the actions and words of the person interrogated."].) "Whether there has been a valid waiver depends on the totality of the circumstances, including the background, experience, and conduct of defendant." (*United States v. Doe* (9th Cir.1998) 155 F.3d 1070, 1074, quoting *United States v. Bernard S.* (9th Cir.1986) 795 F.2d 749, 751.) If a suspect's waiver of his *Miranda* rights is equivocal, the officers may continue their questioning for the limited purpose of determining whether he is waiving or asserting those rights. (*People v. Johnson* (1993) 6 Cal.4th 1, 27, disapproved on other grounds in

People v. Bestelmeyer (1985) 166 Cal.App.3d 520, 526-527; *People v. Russo* (1983) 148 Cal.App.3d 1172, 1177.) Once it has been determined that the suspect desires to remain silent, the Fifth Amendment requires that "his right to cut off questioning [be] scrupulously honored." (*Michigan v. Mosley* (1975) 423 U.S. 96, 104, internal quotations omitted.)

On appeal, this court reviews independently the trial court's legal determinations of whether a defendant's actions constituted an invocation of his right to silence (*People v. Rundle, supra*, 2008 WL 878915 at p. 19; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125). It evaluates the trial court's factual findings regarding the circumstances surrounding the defendant's statements and waivers and, if supported by substantial evidence, it accepts the trial court's resolution of disputed facts and inferences, and its evaluations of credibility. (*Ibid.*; *People v. Guerra* (2006) 37 Cal.4th 1067, 1092-1093.)

D. The Statement "I Can't Imagine Why I Would Want to Talk to the Costa Mesa Police Department" Is Not a Valid Waiver of *Miranda* Rights

Appellant never expressly waived his right to silence and nothing about his subsequent actions show that he intended to waive that right. After reading appellant his rights, Redmond asked, "Do you want to talk to us, ah, about anything that might have occurred back '79, '80?" Appellant responded, "'79, '80, why, why would I want to talk to you about something that occurred back then?" Redmond said, "Well, some things have come up and ah, we need to talk to you about them, you can stop talking at any time." Appellant told him "I can't, like I said, I, I can't imagine why I would want to talk with the Costa Mesa Police Department." Redmond explained that "your DNA came up on a couple of Costa Mesa homicides

back in 1979." Appellant said, "I never lived in Costa Mesa." Redmond then began to question appellant about his life in Orange County in the late 1970's. (5 CT 1547-1549; 1 RT 134-135.)

Appellant's initial response to Redmond, "why would I want to talk to you about something that occurred back then?" (5 CT 1547), is a rhetorical question that is commonly understood to mean "no." The words are reasonably inconsistent with a present willingness to discuss the case freely and completely and are therefore an invocation of the right to silence. (*People v. Crittenden, supra*, 9 Cal.4th 83 at p. 129.) Any reasonable investigator would have understood that appellant was unwilling to talk and that only clarifying questions, at most, could be asked. Instead, Redmond failed to ask any clarifying questions and launched right into his interrogation without a valid *Miranda* waiver. To the extent there was anything equivocal or ambiguous about the statement, Redmond's response was not for the limited purpose of determining whether appellant intended to remain silent, but rather was an attempt to skirt the issue of invocation altogether. (*People v. Johnson, supra*, 6 Cal.4th at p. 27; *People v. Russo, supra*, 148 Cal.App.3d at p. 1177.) The officers' repeated efforts to wear down appellant's resistance and make him change his mind is surely not a demonstration of "scrupulously honoring" a suspect's rights.

E. Even If Appellant Impliedly Waived His Right to Silence at the Outset of the Interrogation, He Repeatedly Invoked it During the Interrogation

"Even if a defendant voluntarily has waived his or her *Miranda* rights to remain silent and to have counsel present, the defendant later may revoke the waiver. In such a case, 'once a defendant has indicated an intent to assert his right to remain silent or to counsel, all further attempts at police

interrogation should cease.' (*People v. Jennings* (1988) 46 Cal.3d 963, 977.) 'In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect "must *unambiguously*" assert his right to silence or counsel.' (*Davis v. United States* (1994) 512 U.S. 452, 459 (*Davis*), italics added.)" (*People v. Rundle, supra*, 2008 WL 878915 at p. 18.) Like waivers, re-invocations of *Miranda* are viewed in context (*Connecticut v. Barrett* (1987) 479 U.S. 523, 528; *People v. Peracchi* (2001) 86 Cal.App.4th 353, 359-60 ["Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context."]; *In re Joe R.* (1980) 27 Cal.3d 496, 515.)

The *Davis* standard was developed in the context of the right to counsel, but it has been adopted to apply to the right to silence by many courts, including this Court. (*People v. Rundle, supra*, 2008 WL 878915 at p. 18; *People v. Stitely* (2005) 35 Cal.4th 514, 535; *Arnold v. Runnels* (9th Cir.2005) 421 F.3d 859, 970 (dis. opn. of Callahan, J.) [The First, Sixth, Seventh, Eighth and Eleventh Circuits have held that the *Davis* rule applies to the right to remain silent.].) The majority in *Arnold* declined to decide whether the *Davis* rule applies to the right to silence in the Ninth Circuit. (*Arnold v. Runnels, supra*, 421 F.3d at 866, fn. 8 ["We have left open the question of whether the rule in *Davis*, which involved the invocation of the right to counsel, applies equally to the invocation of the right to silence."]; see also *United States v. Soliz* (9th Cir.1997) 129 F.3d 499, 504, fn. 3; and *Evans v. Demosthenes* (9th Cir.1996) 98 F.3d 1174, 1176.). Despite the split of authorities, appellant will analyze the issue of re-invocation of *Miranda* under the *Davis* standard, pursuant to *Stitely*, but without disregarding the

importance of context enunciated by this Court in *In re Joe R.*, *supra*, 27 Cal.3d at p. 515, by the U.S. Supreme Court in *Connecticut v. Barrett, supra*, 479 U.S. at p. 528 and by the appellate courts in *People v. Peracchi, supra*, 86 Cal.App.4th at pp. 359-60 and *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 153-54.

When viewed in context, it is clear that appellant unequivocally and unambiguously asserted his right to silence during the interrogation, and that at least Giesler understood he had done so. After softening appellant up with questions about where he lived, his military experience, and his family history, the officers attempted to convince him that he might as well confess because the DNA evidence demonstrated his guilt. Giesler asked him, "17 years is long enough, I think it's time to talk about it, don't you? [¶] Why don't you tell us what happened?" (5 CT 1610) Appellant responded, "I will reserve the right to speak at another time." (*Ibid.*) This statement can only be viewed as "reasonably inconsistent with a present willingness to discuss the case freely and completely." (*People v. Crittenden, supra*, 9 Cal.4th at p. 129.) Giesler's response makes it clear that she understood appellant had just invoked his right to remain silent. She told him, "I'm not going to do anything to violate your rights Gerald, I mean we read you your rights and, I'm not going to step on your toes" (5 CT 1610) If not appellant's right to silence, what right was it that Gielser feared violating?

Rather than terminate the interview, as she knew she was obligated to do in order not to violate appellant's rights, she spent the rest of the interrogation imploring him to confess. During the ensuing barrage he

repeatedly asserted his right to silence[46] The interrogation was finally called to an end, but only after Giesler clarified the terms under which she could visit appellant in the Orange County jail. This, too, showed her understanding that appellant had invoked his right to silence. If he had not done so, there would have been no need to secure his consent to a second interview. Clearly, if the officers did not understand that appellant had invoked his right to silence at the outset of and several times during the interrogation, they certainly did at the conclusion of the interview.

In *People v. Rundle, supra*, 2008 WL 878915 at p. 20, this Court found that the defendant's request to stop the interview because he had a headache was not an assertion of his right not to incriminate himself. He already had confessed to one murder and provided the officers with a map showing where the body was located. He had not expressed any reluctance to speak further about the murder before asking to stop the interview. The officers stopped the questioning immediately after he asked to end the interview and asked him only whether they could pose more questions during the next few days. "It is clear from this record that defendant did not invoke his right not to incriminate himself, but merely asked for a break from questioning. The statements made by defendant during the later session with the officers, including the questioning by the Sacramento

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[46] "[T]the day is not today . . . I can't take it." (5 CT 1612.) "Yeah, but there's also a reason for wanting to wait too." (5 CT 1615.) "[L]ike I say, once again, there's, there's I think for me, there's a time, and a place for saying what I have to say, and, in reference to what happened, I, there's nothing else that I can tell you." (5 CT 1616-2617.) "Like I say, I think I should wait until later on before . . ." (5 CT 1618.) "I just need some time to call upon myself, to bring, to draw upon some strength. . . .To say what I have to say." (5 CT 1620.)

officers, therefore were not the 'fruits' of any constitutional violation resulting from the continued questioning of defendant after he asked for a temporary suspension of questioning for the night." (*Id.* at p. 20.)

In contrast, appellant expressed reluctance to speak with Redmond and Giesler from the outset of their interrogation. At the time, he had not confessed to any crime and continued to deny any knowledge of or responsibility for the homicides the officers were investigating. He did not assert an ambiguous reason like a headache for wanting the questioning to stop, but rather clearly said that he did not want to talk because he needed time to think, "some time to call upon myself, to bring, to draw upon some strength. . . .To say what I have to say." (5 CT 1620.) The officers did not stop the questioning immediately. Instead, they purposefully continued their efforts to extract a confession from appellant before they asked him whether they could pose more questions when he reached the Orange County jail. Appellant's request was clearly for more than a break from questioning, as was Mr. *Rundle's*. Rather, it was an unambiguous assertion of his right to remain silent and all further questioning should have ceased at that point.

F. Once *Miranda* Was Invoked (Or Reinvoked), Investigators Did Not Scrupulously Honor Appellant's Right to Silence

In *People v. Fioritto* (1968) 68 Cal.2d 714, this Court decided that California's Constitution does not permit the police to lawfully subject a defendant to a new round of interrogation, even if they repeat the *Miranda* warnings, after he has demonstrated he does not wish to waive his privilege against self-incrimination. (*Id.* at p. 719.) The United States Supreme Court subsequently decided in *Michigan v. Mosley* (1975) 423 U.S. 96 that

the police may lawfully reinitiate questioning under the federal Constitution so long as they "scrupulously honor" the suspect's rights. (*Id.* at p. 106.) The Court found that *Mosley's* rights had been "scrupulously honored" when, after he invoked his *Miranda* rights, the police "immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." (*Id.* at p. 104.)

This Court had an opportunity to abandon *Fioritto* and to adopt *Mosley* as the rule for secondary investigations in California in *People v. Pettingill* (1978) 21 Cal.3d 231. Instead, it declared that "the *Fioritto* rule, rather than the *Mosley* test, will remain the rule of decision in all state prosecutions in California." (*People v. Pettingill, supra,* 21 Cal.3d at p. 251.) *Pettingill* was abrogated by Proposition 8 and the ensuing amendment to article I, section 28(d) of the California Constitution. (*People v. Warner* (1988) 203 Cal.App.3d 1122; *People v. Montano* (1991) 226 Cal.App.3d 914.) However, the Proposition and its abrogation of the California Constitution's protection against self-incrimination do not apply retroactively to acts carried out before the effective date of the initiative, June 9, 1982. (*People v. Smith* (1983) 34 Cal.3d 251, 258.)

In *Smith*, the Court recognized the issue of Proposition 8's retroactivity as one of "great public importance," and it exercised its original jurisdiction to determine that the "Truth-in-Evidence" provisions of Proposition 8 would not apply retroactively "for three reasons. First, the primary stated purpose of Proposition 8 is to deter the commission of crimes. . . . It is obvious that no such reform, no matter how effective, can deter criminal behavior or avert disruption of life if that behavior or

disruption has already taken place." (*Ibid.*) The second reason was avoidance of conflict between the state and federal Constitutions. The Court pointed out that "the potential constitutional defect in Proposition 8 [was] that if construed to apply to crimes committed before its adoption, it may [have] amount[ed] to an ex post facto law." (*Id.* at p. 259.) "Finally, by so construing Proposition 8 [the Court] also avoid[ed] a number of practical consequences adverse to the administration of justice and the right of fair trial" (*Id.* at p. 262.)

The Court has since reconsidered its concern about Proposition 8's ex post facto problems (*Tapia v. Superior Court* (1991) 52 Cal.3d 282, 293-294), but it has upheld the other two rationales on numerous occasions. (See *People v. Boyer* (2006) 38 Cal.4th 412; *People v. Gurule* (2002) 28 Cal.4th 557; *People v. Kraft* (2000) 23 Cal.4th 978; *People v. Diaz*, (1992) 3 Cal.4th 495, 520, fn.4.) Further, the Court has held that "the date of the crime, and not the date of the confession, is the controlling benchmark." (*People v. Weaver* (2001) 26 Cal.4th 876, 921 fn.5, quoting *People v. Benson* (1990) 52 Cal.3d 754 at p. 770, fn.1.)

Article I, section 15 of the California Constitution thus affords suspects greater protections against the coercive aspects of interrogation than does the U.S. Constitution for crimes predating the passage of Proposition 8. (*People v. Pettingill, supra*, 21 Cal.3d at p. 246.) In California, once a suspect invokes his *Miranda* rights with regard to acts committed prior to June 9, 1982, all questioning must cease and no new officers may question the suspect at any time unless the suspect initiates the conversation, whether the new officers are aware of the *Miranda* invocation or not and regardless of whether fresh *Miranda* warnings are given. (*Id.* at p. 242.)

Investigator Tarpley's initiation of a conversation appellant had not requested, immediately after he had invoked his right to silence, was a clear violation of *Pettingill's* prohibition against further interrogation. Under *Pettengill*, officers other than Giesler, who had secured approval to see him in the Orange County jail, were not authorized to question appellant unless he initiated the conversation. Appellant did not initiate the conversation with Tarpely. The interrogation was therefore unlawful.

In fact, Tarpley's interrogation does not even meet *Mosley's* standard. Although *Mosley* did not lay out a specific rubric by which courts are to determine whether a suspect's *Miranda* rights have been "scrupulously honored," the court looked to the circumstances of custody (including time and place), the identity of the officer, and the crimes discussed. (*Michigan v. Mosley, supra*, 423 U.S. at pp. 104-105.) The subsequent interrogation in *Mosley* occurred two hours after the invocation, in a different location, by an officer from a different jurisdiction, and concerned entirely different crimes. *(Ibid.)* Tarpley's interrogation of appellant occurred in exactly the same place, immediately after appellant had invoked his right to remain silent, and concerned the same series of crimes as the first interrogation. While this second interrogation was conducted by a different officer, it was part of a strategy designed by all three officers for the very purpose of eliciting a confession. Moreover, Redmond, Giesler, and Tarpley all met appellant in the prison's investigation unit before Redmond and Giesler conducted their initial interrogation. (1 RT 131-132, 145-146; 7 RT 1504.) Keeping in mind "the large majority of suspects who see the uniform only as a symbol of police authority, who neither know nor care about the precise jurisdictional competence of their interrogators, and who do not want to talk to any of

them" (*People v. Pettingill, supra,* 21 Cal.3d at p. 242; see also *People v. Smith, supra* 34 Cal.3d at p. 264), a belief that the officers all represented the same jurisdiction was totally justified. Although Tarpley was investigating crimes from a different jurisdiction, the circumstances of custody were exactly the same as the previous interview and negligible time had elapsed since invocation of appellant's right to remain silent. Appellant's admissions were therefore not legally obtained even under *Mosley*.

G. The Admissions Should Have Been Excluded

The remedy for a *Miranda* violation is exclusion of any statements illegally obtained. (*People v. Pettingill, supra*, 21 Cal.3d at pp. 238-240; *People v. Disbrow* (1976) 21 Cal.3d 101, 113 ["to permit admissibility leaves little or no incentive for police to comply with *Miranda's* requirements"]; *People v. Fioritto, supra*, 68 Cal.2d at p. 718, disapproved on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17; *Miranda v. Arizona, supra*, 384 U.S. at p. 443 ["the prosecution may not use statements. . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"]; *People v. Sapp* (2003) 31 Cal.4th 240, 266, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 992 ["suspect's responses are presumptively involuntary and therefore "are inadmissible as substantive evidence at trial"]; see also *McNeil v. Wisconsin* (1991) 501 U.S. 171, 176-177.) Thus, all statements which were elicited after appellant invoked his right to silence, including the initial interview with Redmond and Giesler, should have been excluded from the trial.

H. The Error Was Prejudicial

Appellant's illegal interrogation violated the Fifth Amendment. (*Michigan v. Mosley, supra*, 423 U.S. at p. 106.) It also deprived him of a state-created liberty interest (*Pettingill's* protections against self-incrimination) which is guaranteed by the 14th Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Because the illegal interrogation violates the federal Constitution, the admission of the evidence must be reviewed in accordance therewith. (*People v. Flood* (1998) 18 Cal.4th 470, 490, 502.) Accordingly, the state must establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24.) "Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18, 24 (1967)." (*People v. Jones* (2003) 29 Cal.4th 1229, 1265.)

Respondent cannot satisfy the Court beyond a reasonable doubt that evidence of appellant's admissions did not contribute to his conviction. In addition to DNA evidence, appellant's finger print was found in Fry's apartment and his palm print was found in Debra Senior's apartment. DNA was the only other evidence of his guilt of the murders of Kimberly Rawlins, Chantal Green, and Debora Kennedy. And in Marolyn Carleton's case, his admissions were the only evidence of his guilt. The admissions were unarguably central to appellant's conviction. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 296 ["A confession is like no other evidence. Indeed, the defendant's own confession is probably the most . . . damaging evidence that can be admitted against him."]; *Anderson v. Terhune* (9th Cir.2008) 516 F.3d 781, 792.) Under the circumstances, it simply cannot be said that words from appellant's own mouth admitting his responsibility for the homicides did not contribute to the jury's willingness

to accept the validity of the DNA evidence. Respondent cannot show that evidence of appellant's admissions did not contribute to his conviction. The conviction must therefore be reversed.

* * * * *

III.
THE REFUSAL TO INSTRUCT THE JURY ON THE COMPLETE DEFENSE OF UNCONSCIOUSNESS VIOLATED THE STATE AND FEDERAL CONSTITUTIONS AND REQUIRES REVERSAL OF THE JUDGMENT

The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *California v. Trombetta* (1984) 467 U.S. 479, 485; see also *Holmes v. South Carolina* (2006) 547 U.S. 319.) A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007-1008; *People v. Lewis* (2001) 25 Cal.4th 610, 645.) "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896); 4 C. Torcia, Wharton's Criminal Procedure § 538, p. 11 (12th ed. 1976) (hereinafter Wharton)." (*Mathews v. United States* (1988) 485 U.S. 58, 63; see *Conde v. Henry* (9th Cir.1999) 198 F.3d 734, 739; *People v. Salas* (2006) 37 Cal.4th 967, 982.) This is true even when a defendant presents inconsistent defenses. (*Mathews v. United States, supra*, 485 U.S. at pp. 63-64.)

To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct, *sua sponte*, on general principles closely and openly connected with the facts before the court, which encompasses an obligation to instruct on defenses, including unconsciousness, and on the relationship of these defenses to the elements of the charged offense, if it appears that the defendant is relying on such a defense or if there is substantial evidence supportive of such a

defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Sedeno* (1974) 10 C.3d 703, 716-717.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' (*People v. Jones* (2003) 112 Cal.App.4th 341, 351, 4 Cal.Rptr.3d 916; see *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180, 270 Cal.Rptr. 286, 791 P.2d 965; *People v. Jeter* (1964) 60 Cal.2d 671, 674, 36 Cal.Rptr. 323, 388 P.2d 355; *People v. Simmons* (1989) 213 Cal.App.3d 573, 579, 261 Cal.Rptr. 760, and cases there cited.)" (*People v. Salas, supra*, 37 Cal.4th at p. 982.)

"Failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible per se and can never be considered harmless error. See *United States v. Escobar De Bright*, 742 F.2d 1196, 1201 (9th Cir.1984) ('[O]ur cases must be read as meaning that a failure to instruct the jury on the defendant's theory of the case is reversible per se .... The right to have the jury instructed as to the defendant's theory of the case is one of those rights "so basic to a fair trial" that failure to instruct where there is evidence to support the instruction can never be considered harmless error.')." (*United States v. Zuniga* (9th Cir.1993) 989 F.2d 1109, 1111; see also *Clark v. Brown* (9th Cir.2006) 442 F.3d 708, 714; *Beardslee v. Woodford* (9th Cir.2004) 358 F.3d 560, 577 (as amended); *Bradley v. Duncan* (9th Cir.2002) 315 F.3d 1091, 1098 ["[T]he right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.") (internal quotation marks omitted).) "[R]egardless of how overwhelming the evidence of guilt may be, the denial of such a fundamental right cannot be

cured by section 13 of article VI of the California Constitution, for the denial of such a right is in itself a miscarriage of justice within that section. (*People v. Conley, supra*, 64 Cal.2d 310, 49 Cal.Rptr. 815, 411 P.2d 911; *People v. Gilbert*, 63 Cal.2d 690, 704, 47 Cal.Rptr. 909, 408 P.2d 365; *People v. Modesto, supra*, 59 Cal.2d 722, 730, 31 Cal.Rptr. 225, 382 P.2d 33.)" (*People v. Wilson, supra*, 66 Cal.2d at p. 762.)

At the conclusion of the guilt phase, the judge instructed the jury on the mental states necessary for each alleged crime (CALJIC 3.31.5;[47] 10 CT 2940; 9 RT 1932-1933) and on the partial defenses of diminished capacity[48] (CALJIC 8.77 and 8.79, combined;[49] 10 CT 2941-2942; 9 RT

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[47] CALJIC 3.31.5, as read to the jury, provided:

> In the crime charged in counts one through six, namely murder of the first degree, and the lesser crimes of murder of the second degree and voluntary manslaughter, there must exist a union or joint operation of act or conduct, and a certain mental state in the mind of the perpetrator. Unless this mental state exists, the crime to which it relates is not committed.
>
> In the crime of murder of the first degree, the necessary mental states may be either: 1. express malice aforethought with premeditation and deliberation; or 2. The specific intent to commit either the crime of rape, or the crime of burglary.
>
> In the crime of murder of the second degree, the necessary mental state is malice aforethought.
>
> In the crime of voluntary manslaughter, the necessary mental state is intent to kill.

[48] "Effective January 1, 1982, the Legislature abolished 'diminished capacity' as a defense, while continuing to permit evidence of voluntary intoxication or mental disorder on the issue whether the defendant 'actually formed' the requisite mental state. ([Pen. Code,] §§ 22, 28.)" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) However, because the

(continued...)

[48] (...continued)
homicides charged in this case occurred in 1979 and 1980, the prosecutor conceded that appellant was entitled to present a diminished capacity defense. "[I]f I play the statements where he says 'I was so intoxicated I don't remember what I was doing,' if that comes in along with the rest, I think that diminished capacity becomes a theory that they can try to advance under the '79 law. And they would be entitled to second degree and manslaughter instructions as a result." (3 RT 496-698.)

[49] The combined CALJIC 8.77 and 8.79, as read to the jury, provided:

> If the determination for the finding of first degree murder is based upon malice aforethought and premeditation and deliberation, then you are instructed as follows:
>
> If you find from all the evidence that at the time the alleged crimes were committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental defect, intoxication, or any other cause, you must consider that effect, if any, this diminished capacity had on the defendant's ability to form any of the specific mental states that are the essential elements of first degree murder, and the lesser crimes of second degree murder and voluntary manslaughter, and of the two alleged special circumstances: murder during the commission or attempted commission of the crime of rape, and murder during the commission or attempted commission of the crime of burglary.
>
> Thus, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he did, maturely and meaningfully, premeditate, deliberate and reflect upon the gravity of his contemplated act, or form an intent to kill, you cannot find him guilty of a willful, deliberate and premeditated murder of the first degree.
>
> Also, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he was able to form the mental states constituting

(continued...)

1933-1935) and voluntary intoxication. (CALJIC 4.21 and 4.22;[50] 10 CT

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[49] (...continued)
either express or implied malice aforethought, you cannot find him guilty of murder of either the first or second degree.

If the determination for the finding of first degree murder is based upon the felony murder rule, then you are instructed as follows:

If you find from an examination of all the evidence that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he was capable of forming the intent to commit or attempt to commit the crimes of rape or burglary, you must give the defendant the benefit of such reasonable doubt and find that he did not have such specific intent.

[50] CALJIC 4.21, as read to the jury, provided:

In the crime of murder of the first degree, as charged in counts one through six, and in the lesser crimes of murder of the second degree and voluntary manslaughter, and in two of the special allegations alleged, murder during the commission or attempted commission of the crime of rape, and murder during the commission or attempted commission of the crime of burglary, a necessary element is the existence in the mind of the defendant of a specific intent or certain mental state which is included in the definition of the crimes and special allegations as set forth elsewhere in these instructions.

If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether or not the defendant had the required specific intent or mental state.

If from all the evidence you have a reasonable doubt whether the defendant formed that specific intent or mental state, you must find that the defendant did not have that specific intent or mental state.

CALJIC 4.22, as read to the jury, provided:

(continued...)

2943-2944; 9 RT 1935-1937.) He denied appellant's request for instructions on involuntary manslaughter and on the defense of unconsciousness pursuant to CALJIC 4.30 and 4.31.[51] (8 RT 1684-1685,

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[50] (...continued)
Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug or other substance, knowing that it is capable of an intoxicating effect, or when he willingly assumes the risk of that effect.

Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug or other substance.

[51] CALJIC 4.30, as submitted by appellant, provided:

A person who while unconscious commits what would otherwise be a criminal act, is not guilty of a crime.

This rule of law applies to persons who are not conscious of acting but who perform acts while asleep or while suffering from a delirium or fever, or because of an attack of psychomotor epilepsy, a blow on the head, the involuntary taking of drugs or the involuntary consumption of intoxicating liquor, or any similar cause.

Unconsciousness does not require that a person be incapable of movement.

Evidence has been received which may tend to show that the defendant was unconscious at the time and place of the commission fo the alleged crime for which he is here on trial. If after a consideration of all the evidence, you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed, he must be found not guilty.

(9 CT 2889.)

CALJIC 4.31, as submitted by appellant, provided:

If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged crime the defendant

(continued...)

1797-1800; 9 RT 1899-1900.)

Unconsciousness is a complete defense to a criminal charge. (Penal Code, section 26.)[52] "[A] defendant cannot be adjudged guilty of any crime with which he is charged if he committed the act while unconscious. (See *People v. Gorshen*, 51 Cal.2d 716, 727, 336 P.2d 492; *People v. Baker*, 42 Cal.2d 550, 575, 268 P.2d 705; *People v. Danielly*, 33 Cal.2d 362, 376, 202 P.2d 18, cert. den., 337 U.S. 919, 69 S.Ct. 1162, 93 L.Ed. 1728.)" (*People v. Wilson* (1967) 66 Cal.2d 749, 761.) "[A]lthough voluntary intoxication may at times amount to unconsciousness, yet it can only have the effect of negating specific intent, the applicable code section being section 22 and not 26(5). *People v. Anderson*, 87 Cal.App.2d 857, 860-861, 197 P.2d 839; *People v. Sameniego, supra*, 118 Cal.App. 165, 173, 4 P.2d 809, 5 P.2d 653."[53] (*People v. Baker* (1954) 42 Cal.2d 550, 575; see *People v. Kelly*

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[51] (...continued)
acted as if he were conscious, you should find that he was conscious, unless from all the evidence you have a reasonable doubt that the defendant was in fact conscious at the time of the alleged crime.

If the evidence raises a reasonable doubt that the defendant was in fact conscious, you must find that he was then unconscious.

(9 CT 2890.)

[52] In 1978 and 1979, Penal Code section 26 provided:

All persons are capable of committing crimes except those belonging to the following classes: . . . Five - Persons who committed the act charged without being conscious thereof.

[53] In 1978 and 1979, Penal Code section 22 provided:

No act committed by a person while in a state of voluntary

(continued...)

(1973) 10 Cal.3d 565, 573.)

In *People v. Bridgehouse* (1956) 47 Cal.2d 406, this Court found that it was error to refuse instructions on the legal effect of unconsciousness offered by the defendant and upon which he relied as a defense. (*Id.* at p. 414; see also *People v. Roerman* (1961) 189 Cal.App.2d 150, 161; *People v. Cox* (1944) 67 Cal.App.2d 166, 171-172; *People v. Sameniego* (1931) 118 Cal.App. 165, 173.) The only evidence of unconsciousness in the case was the defendant's testimony that his recollection of the events was hazy and vague and the fact that he had made similar statements to the police upon his arrest.. (*Ibid.*) Similarly, in *People v. Wilson* (1967) 66 Cal.2d 749, the only evidence of unconsciousness was the defendant's testimony that he did not remember the shooting and that he was distraught and mentally exacerbated by the events which preceded and precipitated his actions. This testimony was consistent with the story he first told the police when he was arrested. (*Id.* at p. 762.) This Court held that "the defendant particularly in a capital case, is entitled to have the jury instructed on the law applicable to the evidence he presents. Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*Id.* at pp. 762-763.) Assuming the defendant's testimony to be entirely true, as it was required to do, the Court found that refusing the

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[53] (...continued)
intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

requested unconsciousness instruction was "clearly error." (*Id.* at pp. 762.) Moreover, the failure to instruct on unconsciousness rendered the instruction on malice aforethought erroneous because it permitted the jury to "find malice aforethought if there was no considerable provocation notwithstanding the fact that defendant was not acting consciously at the time of the killing. This was improper. (*People v. Conley*, 64 Cal.2d 310, 322, 49 Cal.Rptr. 815, 411 P.2d 911.)" (*Id.* at pp. 762-763.)

The judge here refused appellant's requested unconsciousness instruction because he recalled, incorrectly, that the only evidence of unconsciousness related to voluntary intoxication:

> **The Court**: . . . [T]he reason we got into this subject was the People introduced the defendant's statement. In his statement he says that due to the consumption of alcohol he was not conscious of certain behavior or conduct. [¶] So if the state of the evidence is that the -- that the taking of alcohol or drugs was voluntary on the part of the defendant, it would appear that there's a lack of foundation for giving this instruction.

(8 RT 1799.) However, there was evidence of unconsciousness which was totally unrelated to appellant's consumption of alcohol. The prosecutor introduced appellant's statements to investigator Tarpley on June 14, 1996, at Avenal State Prison, which included the following colloquy:

> **Investigator Tarpley**: Okay, um, have you ever killed anybody in your entire life?
>
> **Gerald Parker**: If I have, that's something I'm not knowledgeable about.
>
> **Investigator Tarpley**: You might have killed somebody, but you just don't have knowledge of it today?
>
> **Gerald Parker**: True.
>
> **Investigator Tarpley**: Okay, and that would be because of drugs and, um . . .

> **Gerald Parker**: Drugs and alcohol use. I, I have been a drug and alcohol user for years. I just abuse, abuse over and over.
>
> [¶¶]
>
> **Investigator Tarpley**: It would have been when you were under the influence of drugs or something like that?
>
> **Gerald Parker**: Right.

(9 CT 2580-2581.) Tarpley then pointed out that appellant lived close to Deborah Kennedy and asked if it was possible that he might have attacked her but did not remember because of the condition he was in. (9 CT 2581-2582.) Appellant responded:

> **Gerald Parker**: It's possible. . . . And the reason why I say it's possible because, just because what some of the people that I have known have told me about. I, I have friends that told me that I black out sometimes and say things, have said things and done things that I don't recall, you know, that they said I did.

(9 CT 2582-2583.)

Appellant's statement about blacking out can be construed in two ways. Because the discussion prior to the statement concerned his use of drugs and alcohol, it can be construed to mean that he blacked out due to the voluntary consumption of drugs and/or alcohol. It is important to note, however, that appellant did not say his black-outs had anything to do with drugs and/or alcohol. Rather, he simply said that friends told him he sometimes blacked out. Thus, the statement can also be construed to mean that his bouts of unconsciousness were not drug and/or alcohol-related. Of course, the task of determining which of these constructions was accurate, was for the jury, not for the judge. "The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses.

It is for them, generally, and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story." (*United States v. Bailey* (1980) 444 U.S. 394, 414-415.)

> The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. (Citations.) That is a question within the exclusive province of the jury. However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true.

(*People v. Wilson, supra*, 66 Cal.2d at p. 762, quoting *People v. Carmen* (1951) 36 Cal.2d 768, 773.)

The error requires reversal because the court's failure to instruct on unconsciousness effectively removed appellant's defense from the jury's consideration. Appellant's sole defense was that he lacked the intent necessary for guilt of first degree murder. Indeed, defense counsel advised the jury in his opening statement:

> **Mr. Enright**: [¶¶] We are not contesting the fact that Mr. Parker committed these acts. We are only asking you to look into his state of mind, look into his condition at that time, look at these acts. . . . I want you to listen to and view Mr. Parker's interview by the police department and determine in your own mind that he had the – did he have the necessary mental intent to commit these crimes. The level of crime, not the crime. There's no question that these acts were done by Mr. Parker. We're not questioning that at all. So you're not going to hear any major cross-examination as to fingerprints or DNA. If you want to hear about it, well we'll just let you hear about it. We're not contesting it. But we want you to listen to what Mr. Parker says about his state of mind, his conduct at the time of these events.

(7 RT 1250-1251.) True to counsel's word, the defense conducted minimal cross-examination and presented no defense case at all.

The judge's refusal to instruct on unconsciousness left counsel unable to argue a major portion of their defense that appellant lacked the mental intent necessary to commit the crimes because he was unconscious. Furthermore, "The harm to defendant by the failure to give the unconsciousness instructions was magnified by the instruction on malice aforethought which when given without qualification by an unconsciousness instruction permitted the finding of implied malice without regard to a determination as to defendant's ability to formulate the requisite specific intent." (*People v. Wilson, supra*, 66 Cal.2d at p. 762.) Finally, none of the other instructions given to the jury cured the error. As noted, the jury was instructed on the partial defenses of diminished capacity and voluntary intoxication. However, the complete defense based on unconsciousness is entirely separate from these partial defenses. (See *People v. Baker* (1954) 42 Cal.2d 550, 575.) The judge's refusal to instruct on unconsciousness also enhanced the risk of an unwarranted conviction and thereby diminished the reliability of the jury's sentencing determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

The error violated appellant's rights to a jury trial, to due process of law and to a reliable guilt determination under the Sixth, Eighth, and Fourteenth Amendment to the United States Constitution and article 1, sections 7, 16, and 17 of the California Constitution. Because it tainted not only the verdict of guilt but also the sentence of death, both must be reversed.

* * * * *

IV.
THE ADMISSION OF HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE VIOLATED THE STATE AND FEDERAL CONSTITUTIONS AND REQUIRES REVERSAL OF THE SENTENCE

Over appellant's objection, the judge permitted the prosecutor to introduce highly-emotional and largely-irrelevant victim impact evidence. The admission of this evidence was error under Evidence Code section 352. It violated appellant's rights to a fair and a reliable capital sentencing hearing and a penalty determination based on reason rather than emotion, and it denied him due process by making the penalty trial fundamentally unfair. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. I, §§ 7, 15 & 17; see *Tuilaepa v. California* (1994) 512 U.S. 967; *Payne v. Tennessee*, *supra*, 501 U.S. 808; *Booth v. Maryland* (1987) 482 U.S. 496.) It also violated the ex post facto clauses of the state and federal Constitutions. (U.S. Const., art. I, §§ 9, 10; Cal. Const., art. I, §9.)

A. Legal Principles

"In a capital trial, Eighth Amendment principles ordinarily do not prevent the sentencing authority from considering evidence of 'the specific harm caused by the crime in question.' (*Payne v. Tennessee* (1991) 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720.)" *(People v. Prince* (2007) 40 Cal.4th 1179, 1286.) The prosecutor has a legitimate interest in "reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) Such evidence is admissible in California as a circumstance of the crime under section 190.3, factor (a). (*People v. Prince, supra*, 40 Cal.4th at p. 1286, citing *People v. Robinson* (2005) 37

Cal.4th 592, 650.) There are, however, significant limitations. Victim impact evidence may be "so unduly prejudicial that it renders the trial fundamentally unfair" in violation of a defendant's rights under the Due Process Clause of the Fourteenth Amendment. (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.)

> [T]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*People v. Edwards* (1991) 54 Cal.3d 787, 836.) Such evidence may be introduced only to offer a "quick glimpse" of the victim's life in order to show his or her uniqueness as a human. (*Payne v. Tennessee, supra,* 501 U.S. at p. 822; *People v. Edwards, supra,* 54 Cal.3d at p. 836; Evid. Code, § 352.)

B. Factual Summary

Appellant objected to the introduction of victim impact evidence during the penalty phase (9 RT 2047) and to the admission of photographs of five of the victims which had been taken within a year of their demise.[54] (9 RT 2033, 2040-2041, 2047, 2060-2061.) The judge directed the prosecutor to talk to his witnesses and make sure they knew the limitations on their testimony (e.g., "the witnesses need to be cautioned not to

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[54] The prosecutor did not seek to introduce a photograph of Chantal Marie Green. (9 RT 2033.)

volunteer things about the penalty" (9 RT 1999)), and to reduce their testimony to writing. (9 RT 1997-1998.) The prosecutor assured the court that the testimony would be restricted to the impact of the loss of the person on themselves and their families and that they would be told there were certain areas, like penalty, they could not go into. (9 RT 1998.) He submitted a written summary of their testimony. (9 RT 2026.)

C. Under the Circumstances of this Case, Appellant's Constitutional Guarantees to Due Process, a Fair Trial and a Reliable Penalty Determination Were Violated

Payne does not hold that "victim impact evidence must be admitted, or even that it should be admitted." (*Payne v. Tennessee, supra,* 501 U.S. at p. 831 (conc. opn. of O'Connor, White, and Kennedy, JJ.).) In fact, the Supreme Court cautioned against victim impact evidence that could threaten a defendant's constitutional right to due process. (*Id.* at p. 825.) And this Court has limited victim impact evidence to that which is a "circumstance of the crime" under Penal Code § 190.3, subdivision (a), warning that, "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed in *Payne*. . ." (*People v. Edwards, supra,* 54 Cal.3d at pp. 834-836.)

Other courts have had occasion to explore the outer reaches of victim impact evidence and this Court should observe the limitations they have placed on such evidence so as to ensure it is not admitted in a manner that would violate a defendant's due process rights or allow the arbitrary imposition of the death penalty. In *State v. Muhammad* (N.J. 1996) 678 A.2d 164, for example, a defendant charged with kidnaping, rape and murder challenged the constitutionality of New Jersey's victim impact

statute under the United States and New Jersey Constitutions. The New Jersey Supreme Court held that admission of such evidence during the sentencing phase of a capital trial is constitutional, but it must be limited so as to minimize the possibility of inflaming the jury and preventing it from deciding an appropriate punishment. (*State v. Muhammad, supra,* 678 A.2d at p. 180.) The court observed that "the greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant." Absent special circumstances, one witness per victim is adequate to provide the jury with "a glimpse" of the victim's uniqueness and help jurors make an informed assessment of the defendant's moral blameworthiness. In addition, before a family member is allowed to testify, the trial court should conduct a hearing to determine admissibility. Testimony should also be reduced to writing to enable the trial court to avoid any prejudicial content. (*Ibid.*)

The Texas Court of Criminal Appeals, in *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, determined that the probative value of a seventeen-minute video montage of approximately 140 photographs set to music from the movie *Titanic* was substantially outweighed by the possibility of unfair prejudice. (*Id.* at p. 332.) The court considered the following factors: 1) the probity of the evidence; 2) the potential of the evidence to impress the jury in some irrational but nevertheless indelible way; 3) the time the proponent needs to develop the evidence; and 4) the proponent's need for the evidence. (*Ibid.*) The court acknowledged that victim impact evidence could be inadmissible by sheer volume alone and it encouraged trial courts to place appropriate limits on "the amount, kind, and source" of such evidence. (*Ibid.*)

Victim impact witnesses in this case were permitted to give cumulative, emotional and inflammatory recitations with virtually no limitations. Joseph Lee, for example, was permitted to testify and then read a prepared statement to the jury. (10 RT 2172-2174; see p. 75, *ante*.) His aunt, Mary Lee, was permitted to read her prepared statement and a poem her dead mother had written in memory of Carleton. (10 RT 2180-2184; see p. 76, *ante*.) Jackie Bisonnette was permitted to read both her prepared statement and a statement her mother had prepared, which included two poems Debra Senior had written. (10 RT 2132-2140, 2271; see p. 81, *ante*.) Their rambling narratives included irrelevant, prejudicial information about illnesses and unfortunate circumstances family members had suffered that had no logical connection to appellant's acts. The jury learned, for example, that Mary Lee's mother had recently died of cancer (10 RT 2182); that Sandra Kennedy's aunt married a neo-Nazi and has isolated herself from the family (10 RT 2187); and that Debra Senior's father died three years after her death because his heart was broken. (10 RT 2138.) This evidence went far beyond a "quick glimpse" into each victim's life. (*Payne v. Tennessee, supra,* 501 U.S. at p. 822.) The testimony gave the jury the impression that appellant was responsible for more than just the direct harm caused by his crime and was to be punished for subsequent death and disease as well.

Deliberation of a death sentence in the face of this excessive testimony which reflected the mourning processes of eight family members rendered the verdict unreliable. The emphasis on victim impact diverted the jury's attention from its proper purpose of "soberly and rationally" weighing aggravating and mitigating circumstances to a side show highlighting family members' grief, sorrow, and many extraneous matters.

(See *People v. Robinson* (2005) 37 Cal.4th 592, 651.) Indeed, one of appellant's counsel noted, for example, that "at least one of the jurors has been emotionally affected by the crying in the audience." He thought that walking past a "phalanx of the family members" had to have an effect on the jury. The judge himself admitted that the testimony had created an emotionally charged courtroom:

> Well, I think, to be candid, these types of killings are anticipated to have tremendous emotional impact on jurors. I -- you'd have to be dead not to be impacted by what's going on. But I've been watching the family members as the jury has left the courtroom, and I haven't -- I have not seen any undue display of emotion on their part. I couldn't do what they're doing.

(9 RT 2013-2014.) Later, counsel noted:

> **Mr. Enright**: One thing I did note, your honor, one time, and to tell you the truth, I was misty eyed, you know, I have been around a long time, and I was misty eyed, and I was looking right at the jury, and the jury -- the jury as a whole was crying during the testimony I believe of the -- Mr. Lee?
>
> **Mr. Jacobs**: The son.
>
> **Mr. Enright**: The son, and Mrs. Lee.
>
> **The Court**: Well, you would have to be dead --
>
> **Mr. Enright**: Not to cry, I know.
>
> **The Court**: -- not to feel an impact from what was taking place when victim impact witnesses were called. And so it's understood that the jury, the people who are in this courtroom who saw what took place, are going to have a profound emotional feeling on the subject.

(10 RT 2259-2261.)

"[T]he punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the

life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Salazar v. State, supra*, 90 S.W.3d at p. 336.) While a state may properly admit victim impact evidence and prosecutorial argument that shows the direct harm caused by the defendant (*Payne v. Tennessee, supra,* 501 U.S. at pp. 825-827), in order to be within the scope of § 190.3, subdivision (a), such evidence must present specific harm caused by the defendant that surrounds the crime "materially, morally, or logically." (*People v. Edwards, supra,* 54 Cal.3d at p. 833.) Testimony that is so inflammatory as to elicit from the jury an irrational or emotional response untethered to facts of the case is not admissible. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

The prosecutor assured the court and counsel that victim impact testimony would be restricted to the impact of the loss of the person on the witnesses and their families, and that they would be told there were certain areas, like penalty, they could not go into. (9 RT 1998.) Those witnesses, however, were permitted to read poems by and about the victims which had nothing to do with the impact of the victim's loss. Even worse, on cross-examination, Sandra Kennedy injected both religion and penalty into the proceedings when she told appellant, "the Bible says that you will be tormented in hell for eternity if you do not accept responsibility for what you've done and ask God on bended knees in humility and brokenness for forgiveness and ask him to cleanse you and prepare you to take you home because I'm quite certain you will get the death penalty." (10 RT 2189.) Immediately after this testimony, the judge told the jury, "you're entitled to listen to that evidence, consider it fully, give it whatever weight you deem is appropriate or necessary at the completion of the taking of all the evidence. And that comes under what we describe as factor (a)." (10 RT 2191.)

Appellant's counsel asked that the jury not be admonished about Kennedy's outburst (10 RT 2254-2259), and he attempted to use Kennedy's statements to appellant's best advantage in his closing argument. (12 RT 2564-2565.) Still, it is likely that Kennedy's inflammatory comments, untethered to facts of the case, elicited from the jury an irrational or emotional response. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

Appellant should never have been placed in the position that he had to choose between trying to unring the bell and attempting to use Kennedy's inadmissible comments to his advantage. The judge should have conducted a hearing to determine the admissibility of the proposed victim impact testimony. He then should have limited the presentation of that evidence to as few witnesses as possible so as to minimize the possibility that the evidence would inflame the jury and prevent it from deciding an appropriate punishment. (*State v. Muhammad, supra,* 678 A.2d at pp. 179-180.) His failure to do so was an abuse of discretion which rendered appellant's penalty trial "fundamentally unfair." (*Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

Erroneous admission of this evidence violated appellant's right to a fair and a reliable capital sentencing hearing and to a penalty determination based on reason rather than emotion, and it denied him due process by making the penalty trial fundamentally unfair. There is a reasonable possibility that the error contributed to the penalty verdicts, and confidence in the reliability of the outcome is sufficiently undermined that reversal is required. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Brown, supra,* 46 Cal.3d at p. 448.)

D. Admission of the Evidence Violated the Ex Post Facto Clause and the Due Process Clause of the Fourteenth Amendment

This Court has rejected arguments that, because this type of evidence was not admissible at the time of the killings, applying the holding in *People v. Edwards, supra,* 54 Cal.3d at pp. 835-836, would violate the ex post facto clause and the due process clause of the Fourteenth Amendment. (See, e,g., *People v. Roldan* (2005) 35 Cal.4th 646, 732.) The Court's analysis of this issue fails to recognize that victim impact testimony does more than "simply enlarge the class of persons who may be competent to testify in criminal cases." (*Carmell v. Texas* (2000) 529 U.S. 13, 543-544; *People v. Brown* (2004) 33 Cal.4th 382, 394.) Instead, the testimony which was inadmissible at the time of the offenses in this case tends to make death a more likely outcome and therefore increases the punishment. In order to preserve this claim for federal review, appellant requests the Court to reconsider those decisions. (*People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

E. As Applied, Former Penal Code Section 190.3, Factor (a), Is Unconstitutionally Vague and Overbroad and Creates the Risk of an Arbitrary and Irrational Judgment of Death

The Court has rejected arguments that, as applied, former Penal Code section 190.3, factor (a), is unconstitutionally vague and overbroad, and creates the risk of an arbitrary and irrational judgment of death. (*People v. Brown* (2004) 33 Cal.4th 382, 396-398.) Testimony about the victims and the impact of the killings that was not known and could not have been foreseen by appellant, evidence about events that occurred many years after the crimes, and the continuing emotional impact on the families

more than 20 years later does not fall within any reasonable or common-sense definition of the phrase "circumstances of the crime." Appellant requests the Court to reconsider *Brown* and similar cases.

V.
THE ARBITRARY AND ERRONEOUS RESTRICTION OF APPELLANT'S PENALTY PHASE ARGUMENT REQUIRES REVERSAL OF THE SENTENCE

The trial judge forbade defense counsel from addressing the issue of future dangerousness in their closing penalty phase arguments. This arbitrary and erroneous restriction violated appellant's right to an individualized penalty determination under the state and federal Constitutions, his right to due process, and his right to present a closing argument and an effective defense. (U.S. Const., Amends. V, VI, VIII & XIV; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

A. Relevant Law

Capital sentencing jurors must be permitted to consider and, in an appropriate case, base a decision to impose a life sentence upon any relevant mitigating factor that the defendant proffers as a basis for a sentence less than death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Penry v. Lynaugh* (1989) 492 U.S. 302, 317-328.) That a defendant does not pose a future danger is such a mitigating factor. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117.) "Just as precrime background and character (*Boyde*) and postcrime rehabilitation (*Payton*) may 'extenuat[e] the gravity of the crime,' so may some likelihood of future good conduct count as a circumstance tending to make a defendant less deserving of the death penalty. Cf. *Skipper*, 476 U.S., at 4-5, 106 S.Ct. 1669 (explaining that while inferences regarding future conduct do not 'relate specifically to [a defendant's] culpability for the crime he committed,' those inferences are '"mitigating" in the sense that they might serve "as a basis for a sentence less than death"' (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality

opinion)))." (*Ayers v. Belmontes* (2006) 127 S.Ct. 469, 475.)

Where future dangerousness is at issue, the defendant is entitled to present evidence from which the jury could draw favorable inferences regarding his character and his probable future conduct if sentenced to life in prison (*Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 4-5) and argument on that subject. (See *Kelly v. South Carolina* (2002) 534 U.S. 246, 248, 252-257.) Also, when a capital defendant's future dangerousness is placed in issue, due process requires that he be allowed to rebut or explain the evidence offered or the argument made by the state. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 161 (plur. opn.); *People v. Frye* (1998) 18 Cal.4th 894, 1017.)

The error requires reversal unless it is harmless beyond a reasonable doubt. (*Abdul-Kabir v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 1654; *People v. Brown* (2003) 31 Cal.4th 518, 576.)

B. The Trial Judge Forbade Defense Counsel from Addressing the Issue of Future Dangerousness in Their Closing Arguments

In the penalty phase, after both sides had rested, the judge announced, "Part of that line of questioning [of witness Dietz] by Enright touched on what might be classified as future dangerousness. I don't believe either side is permitted to introduce evidence on that subject, let alone comment during the course of your argument." (11 RT 2507.) Mr. Zimmerman inquired,

> [I]s your ruling taking into account the fact that we plan on mentioning the use of the psychotropic drugs that he is under now? I'm not going to use the word "danger," but I think it's imminently apparent to anybody in the room when he is under these drugs he is a lot less a danger to himself and others. I won't use the word "danger," but I would be talking about the

> drugs, and their availability in the state prison system. That's been going on since the beginning of the trial.

(11 RT 2508-2509.) The judge replied, "I don't want you trying to do indirectly what you cannot do directly. So, I need to know the substance of what you want to say, in that regard." (11 RT 2509.) Mr. Zimmerman responded,

> That he could be continued to be medicated, the same way he is in county jail right now, and the way he was in state prison before he was brought to the county jail. But the facilities exist, the medication exists, the doctors exist. And that can come in. I don't see how that could be irrelevant in light of the testimony we've had on that point.

(*Ibid.*)

On the next court day, the prosecutor informed the judge that he believed *People v. Davenport* (1995) 11 Cal. 4th 1171 permitted both sides to argue future dangerousness or lack thereof. (12 RT 2534-2535.) The judge replied,

> *Davenport* is one of the early cases. . . . I mean it took the Supreme Court some time to catch up with their backlog of capital cases. And *Davenport* -- I would be concerned about relying on *Davenport* holding the day in the future. And I'm also concerned about why does -- why does the D.A. even need to talk about that given the evidence that you have going to the jury. So I just think that you're skating on thin ice if you get on that topic, and if what you're asking for is guidance about argument, don't get into it. . . . I'm more concerned about counsel for defendant because they're the ones that started to touch on this subject, and I don't know whether they did so intentionally, but I want to make sure they don't get into the topic.

(12 RT 2535.) Mr. Zimmerman said, "My plan is to do exactly what I told you yesterday and you said this was all right. I can discuss psychotropic medication." (12 RT 2536.) The judge replied, "That's fine. . . . I'm not

faulting your research or your interpretation. What I'm saying is I think everything I've looked at on that topic is that it's not a given as to what the appellate court would do on that issue, and I see no need for either side to get into this particular subject on this case." (*Ibid.*)

C. The Judge's Arbitrary and Erroneous Restriction of Penalty Phase Argument Violated Appellant's Right to an Individualized Penalty Determination under the State and Federal Constitutions

This Court has concluded that the prosecution is entitled to argue, based on a defendant's violent past, that "there was no evidence suggesting defendant could be rehabilitated, and that defendant posed a threat of violence . . . ." (*People v. Garceau* (1993) 6 Cal.4th 140, 205; *People v. Bell* (1989) 49 Cal.3d 502, 548-550; *People v. Millwee* (1998) 18 Cal.4th 96, 153; *People v. Ray* (1996) 13 Cal.4th 313, 352-353 [prosecutor properly asked the jury to infer from defendant's numerous crimes of violence that he was inherently dangerous and unlikely to change if sentenced to life].) The prosecution may also argue that a defendant's "pattern of criminality . . . demonstrated his violence was a matter of predisposition rather than circumstance and would pose a danger to others if he were sentenced to life imprisonment." (*In re Andrews* (2002) 28 Cal.4th 1234, 1256.) These same standards apply to the defense. (*People v. Harris* (2005) 37 Cal.4th 310, 358.)

In his opening penalty phase argument, the prosecutor urged the jury to find that, despite his medication, appellant remained a danger to society:

> [W]hen these crimes were committed, Mr. Parker exhibited no symptoms that would indicate he needed psychiatric evaluation. . . . [N]one of these so-called mental problems, whatever they are, okay, none of them manifest themselves by

> violence or aggression. That's not a symptom of these problems. Remember, whatever these voices are, they're noncommand, they don't tell him to commit crimes, okay. And why is that significant? Well, where does the violence come from, okay? Where is the -- it comes from him. Now, you can sedate him, you can tranquilize him, but you can't change him. The violence comes from Mr. Parker. . . . None of the problems, these so-called problems, interfere with his ability to make choices and distinguish right from wrong. . . . When he made the decision to rape and murder, he made it on his own free will in all instances. Nothing that has to do with any -- anything with mental problems now even impairs him today as far as making those decisions.

(12 RT 2551-2552.) He explained that,

> The antisocial personality, which Dr. Dietz talked about briefly and the criteria for which Mr. Parker easily satisfies, he does what makes him feel happy. Remember that? That's what the antisocial personality does. He does what makes him feel happy, and he does it without conscience. If Mr. Parker needs drugs or alcohol to feel happy, he'll do it. If he needs to rape and murder, he'll do it.

(12 RT 2553.) Abiding by the judge's ruling, Mr. Zimmerman touched only briefly on the subject in his argument:

> Each case is different. Each defendant is different. And this man is different because this man is not the same man he was twenty years ago. You wouldn't be killing the same man. There is no evidence contrary to this that this man was not diagnosed for his own mental illness twenty years ago, no one diagnosed him, no one sedated him, no one medicated him. What happens? He finally gets arrested after all these horrific crimes, for which I make no excuse, and they eventually diagnose him for his mental illness. Who does that? The prison authorities can't and Mr. Jacobs can't tell you any different, uncontroverted evidence. They put him on antipsychotic/psychotropic medication. They did it. He's been 29 months in the jail waiting for his trial. The jail psychiatric team -- and you'll see the records -- did the same

> thing. They medicated him. And when he's medicated, what happens? The violent tendencies are gone. We even adjusted his medication a couple times as you heard. Violent tendencies are gone. It's not the same man.

(12 RT 2557-2558.) In closing, the prosecutor argued again that appellant remained a danger because the medication only "hides the same guy . . . . who did all these rapes and murders."

> No question whoever did these crimes had a problem. Mr. Parker did have a problem. It's called antisocial personality. And his background from youth -- from his youth to today fits that perfectly, and that's what he has. The problem in his records from the Boys Republic and the Marine Corps is he functioned fine. And the reason why he functioned fine is there's no evidence of mental illness, he didn't have any mental illness. And what he has to do is relatively insignificant. What the defense is talking about and what Dr. Blair is talking about, in 1996, 17 years after these crimes, he's reported that he hears voices. Isn't that too bad. He should hear voices. And now, in the present, to quiet voices, to control his violence in an institutional setting, he's medicated. So what? How does that mitigate his offenses? What does the medication -- what does the medication do? What is it for? It's to hide his symptoms. That's what the medication is for. It hides the same guy. The same guy who did all these rapes and murders. Mr. Parker hasn't changed. He's the same guy.

(12 RT 2560-2561.)

The judge's restriction of appellant's argument prevented defense counsel from making an argument designed to give the jurors a reason to spare appellant's life. The error weighted the penalty decision in death's favor and diminished rather than heightened the reliability of the proceedings. As a result, there is an unconstitutional risk that a death sentence was imposed in spite of factors calling for the lesser sentence. (*Lockett v. Ohio, supra*, 438 U.S. at p. 605.) The error violated appellant's

right to an individualized penalty determination under the state and federal Constitutions (U.S. Const., Amends. VIII & XIV; Cal. Const., art. I, §§ 7, 15 & 17) as well as the heightened standard for reliability in capital cases.

D. The Judge's Arbitrary and Erroneous Restriction of Penalty Phase Argument Violated Appellant's Due Process Rights

Evidence was presented in the guilt phase to show that appellant broke into the apartments of six women at night, hit them over the head with a blunt object, and raped or attempted to rape them. Five of the women and the sixth's fetus died as a result of their injuries. In the penalty phase, evidence was presented to show that appellant had committed acts of violence against three additional women and a prison roommate. This evidence and the prosecutor's argument clearly placed future dangerousness "in issue." (*Kelly v. South Carolina, supra*, 534 U.S. at pp. 253-254 [future dangerousness is placed "in issue" where jurors are presented with evidence "of a defendant's demonstrated propensity for violence" or of a defendant's "dangerous character."] Jurors presented with such evidence "reasonably will conclude that [a defendant] presents a risk of violent behavior, whether locked up or free, and whether free as a fugitive or as a parolee." (*Ibid.*) Appellant, therefore, had a due process right to meet and rebut the state's case. The judge's arbitrary and erroneous restriction of penalty phase argument violated that right.

Section 190.3 requires that capital sentencing jurors "consider[] the arguments of counsel" in their weighing process. Appellant has a life and liberty interest - having capital sentencing jurors consider each and every permissible argument - under this statute. (See *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [a liberty interest protected by the Due Process Clause of the

Fourteenth Amendment may arise from state laws]; *Vitek v. Jones* (1980) 445 U.S. 480, 488 ["state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment"].) The judge's restriction of penalty phase argument violated appellant's right to due process by denying him the protected liberty interest he has in Penal Code section 190.3. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

E. The Judge's Arbitrary and Erroneous Restriction of Penalty Phase Argument Violated Appellant's Right to Present a Closing Argument

Closing argument, counsel's "last clear chance" to persuade the jurors that his client's life should be spared (See *Herring v. New York* (1975) 422 U.S. 853, 862), is a critical part of the sentencing determination. A defendant therefore has a right under the state and federal Constitutions to present a closing argument in a criminal case. (*Herring v. New York, supra*, 422 U.S. at pp. 858-865; *People v. Bonin* (1988) 46 Cal.3d 659, 694.) The importance of closing argument at the penalty phase is underscored by section 190.3, which explicitly requires that capital sentencing jurors be instructed that they must consider the arguments of counsel in their weighing process.

The judge's ruling, based on his erroneous belief that evidence and argument concerning future dangerousness were not permissible, prevented the jurors from hearing and considering appellant's arguments. It was therefore an abuse of discretion which infringed appellant's right to present closing argument. (*Herring v. New York, supra*, 422 U.S. at pp. 858-865.) While a trial court has broad discretion to control the duration and the scope of closing argument (*People v. Benavides* (2005) 35 Cal.4th 69, 110; Pen.

Code, § 1044), there is no issue here concerning the duration of the argument in this case. Defense counsels' penalty phase arguments consume less than ten pages of roughly 2,751 pages of reporter's transcript. (12 RT 2558-2560, 2561-2566.) Appellant was entitled to present argument on the subject of future dangerousness and to meet and rebut the argument made by the prosecution. (*Simmons v. South Carolina, supra*, 512 U.S. at p. 161; *Kelly v. South Carolina, supra*, 534 U.S. at pp. 248, 252-257.) The judge's ruling also infringed a number of other rights, specifically the rights under the state and federal Constitutions to present a defense; to a partisan advocate through which to be heard and through which to meet the prosecutor's advocacy (*United States v. Cronic* (1984) 466 U.S. 648, 654-657; *United States v. Ash* (1973) 413 U.S. 300, 309); and to participate fully and fairly in the adversary fact finding process. (See *Herring v. New York, supra*, 422 U.S. at p. 858.)

F. The Error Was Prejudicial

Having admitted responsibility for the charged homicides, appellant's case strategy was relatively simple. He sought to convince the jury that he did not have the mental state required for the homicides to be first degree murder and that it should spare his life because he no longer posed a danger to society. Thus, he admitted responsibility for the homicides early in the guilt phase and contested only the intent with which the acts had been committed. In order to avoid alienating the jury, his counsel asked very few questions of prosecution witnesses on cross-examination, and they presented no defense case at all. Their arguments were brief

Appellant's entire penalty phase case was devoted to showing the jury that he was no longer a danger. Yet, all his counsel were permitted to

argue was that prison authorities diagnosed appellant's mental illness and put him on antipsychotic/psychotropic medication which made his violent tendencies disappear. They were not permitted to fully develop the theme of their case and make an explicit argument to the jury. The trial judge's aim was to preclude the jurors from considering any argument and any evidence relating to appellant's future dangerousness. The admonition undoubtedly achieved its purpose. The excluded argument was relevant to several crucial penalty phase issues, including whether society would be adequately protected from appellant by a sentence of life without the possibility of parole, whether appellant would adjust to prison or be a danger in the future, and whether a life sentence was appropriate or unduly lenient. Capital sentencing jurors undoubtedly worry that an inmate might be released. (See *People v. Pride* (1995) 3 Cal.4th 195, 268.) "Fear of what a defendant might do in the future overshadows all else and works as a powerful advocate on the side of death." (Garvey, *"As The Gentle Rain From Heaven": Mercy in Capital Sentencing* (1996) 89 Cornell L.Rev. 989, 1030-1031.) Defense counsels' arguments, by suggesting that a sentence of life without the possibility of parole would adequately protect society from appellant, would have mitigated that fear.

The prosecutor's emphasis on future dangerousness in closing argument is a factor to consider in determining whether the exclusion of evidence relevant to a defendant's likely future behavior in prison may have affected the jury's decision to impose a death sentence. (See *Skipper v. South Carolina, supra*, 476 U.S. at p. 8.) Here the prosecutor took full advantage of the exclusion of the mitigation argument and injected the issue of future dangerousness. The judge's exclusion of argument concerning this mitigating evidence risked the imposition of death in spite of factors

calling for the lesser sentence. The error risked the imposition of death by truncating defense counsel's last chance to convince the jurors to spare appellant's life, and removing significant evidence from the jurors' consideration.

In view of the federal constitutional error involved, appellant's death sentence must be vacated unless the state proves that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Fudge, supra*, 7 Cal.4th at p. 1118 [employing the *Chapman* standard]; *Simmons v. South Carolina, supra*, 512 U.S. at pp. 161, 169-171; *Kelly v. South Carolina, supra*, 534 U.S. at p. 258.) The state cannot prove harmlessness to such a certainty for there is a reasonable doubt that, had the jurors been presented with an unrestricted appeal to spare appellant's life, a single juror might have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 536-538; *Chapman v. California, supra*, 386 U.S. at p. 24.) Accordingly, the death sentence must be vacated.

* * * * *

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

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

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

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25

Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (10 CT 3109-3110; 12 RT 2607-2609.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 530 U.S. 584, 604, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 10 CT 3109-3110; 12 RT 2607-2609.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham v. California* (2007) ___ U.S. ___, 127 S.Ct. 856, require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn.

14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi, Blakely,* and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi, Ring, Blakely,* and *Cunningham.*

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

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

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 [defendant

constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (10 CT 3047-3048, 3109-3110; 12 RT 2568-2571, 2607-2609), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

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

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection

to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir.1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 10 CT 3050; 12 RT 2571-2572.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecutor presented extensive evidence

regarding unadjudicated criminal activity allegedly committed by appellant (10 RT 2193-2220) and devoted a portion of his closing argument to arguing these alleged offenses (12 RT 2543, 2546).

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 127 S.Ct. 856, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (10 CT 3109-3110; 12 RT 2607-2609.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and

directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return A Sentence Of Life Without The Possibility Of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See

Wardius v. Oregon (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___; 127 S.Ct. 1706, 1712-1724; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio, supra*, 438 U.S. at p. 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question

that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed On The Presumption Of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

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

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

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

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

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 10 CT 3047-3048; 12 RT 2568-2571) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The prosecutor conceded in his closing argument that factors (c), (d), (e), (f), (g), (h), and (j) had no applicability to this case whatsoever. (12 RT 2547-2549.) The trial court failed to omit those factors from the jury instructions (10 CT 3036-3037, 3047-3048; 10 RT 2067-2068; 12 RT 2569-2570), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook, supra*, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

D. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed,

i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

E. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. , supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

* * * * *

VIII.
THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming, arguendo, that none of the errors in this case is prejudicial by itself, the cumulative effect of those errors nevertheless undermines confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Appellant was tried for sex-related crimes against white women by a jury from which all the black prospective jurors had been excluded. That jury was permitted to hear and consider clearly inadmissible evidence of appellant's statements admitting the homicides. At the penalty phase, the jury was permitted to hear and consider largely-irrelevant and highly-emotional victim impact evidence which was so unduly prejudicial that it rendered the trial fundamentally unfair. Finally, the judge gutted appellant's entire case when he refused to allow defense counsel to argue to the jury that appellant's life should be spared because he was no longer a dangerous man.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (*People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459; *Harris v. Wood* (9th Cir.1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir.1992) 970 F.2d 614, 622; See *Killian v. Poole* (9th Cir.2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"].)

Furthermore, cumulative error analysis is not only a more rational method of assessing prejudice than is "a balkanized issue-by-issue harmless error review" (*United States v. Wallace* (9th Cir.1988) 848 F.2d 1464, 1476), it is also the method which this Court is required to employ in order to vindicate appellant's constitutional right to due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15.) The combined effect of the errors in this case resulted in an unfair trial which constituted a denial of due process of law. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of the trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [considering the prejudice of guilt phase instructional error in assessing prejudice in the penalty phase]; *People v. Brown* (1988) 46 Cal.3d 432, 466 [an error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Reversal of the death judgment is mandated here because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt trial, had no effect on the penalty verdict. (*See Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina, supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

* * * * *

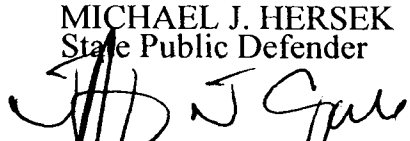
CONCLUSION

For all of the reasons stated above, the judgment of conviction and sentence of death in this case must be reversed.

DATED: May 23, 2008

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I am the Deputy State Public Defender assigned to represent appellant, Gerald Parker, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis generated word count, I certify that this brief excluding the tables and certificates is 71,088 words in length

Dated: May 23, 2008

Jeffrey Gale
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Gerald Parker**
Case Number: **Supreme Court No. Crim. 96-ZF-0039**

I, the undersigned, declare as follows:
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **May 23, 2008**, at Sacramento, California.

Saundra Alvarez