IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DANIEL ANDREW LINTON, Defendant and Appellant.	No. CR 60158 (Riverside County) California Supreme Court No. S080054

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF RIVERSIDE COUNTY
THE HONORABLE GORDON R. BURKHART, JUDGE PRESIDING

APPELLANT DANIEL ANDREW LINTON'S OPENING BRIEF

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Defendant and Appellant Daniel Andrew Linton

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STATEMENT OF THE CASE

I. INFORMATION AND NOTICE OF INTENTION TO SEEK CAPITAL PUNISHMENT

On June 13, 1995, the Riverside County District Attorney's Office filed a four-count felony information, charging appellant Daniel Andrew Linton as follows:

Count I	Murder while engaged in the commission or attempted commission of first degree burglary (Pen. Code, §§ 190.2(a)(17)(vii), 459); Rape (Pen. Code, §§ 190.2(a)(17)(iii), 261(2)); and Lewd Act by Force with a Child (Pen. Code, §§ 190.2(a)(17)(v); 288(b)).
Count II	First Degree Burglary (Pen. Code, § 459)
Count III	Attempted Rape (Pen. Code, §§ 261, 664)
Count IV	Lewd act by Force with a Child (Pen. Code, § 288(b).

(1CT 20-22)

The District Attorney filed a Notice of People's Intention to Seek Capital Punishment. (1CT 23)

II. REPRESENTATION AND ARRAIGNMENT

Appellant was represented by the Riverside County Public Defender's Office at all proceedings. On June 14, 1995, he was advised of and waived his constitutional rights, was arraigned, waived formal arraignment, and pled not guilty to all charges. (1CT 29) Appellant stated on the record that the public defender, Robert Ebert, was not his attorney. The court asked if appellant had been advised of his legal and constitutional rights, and Mr. Ebert stated that appellant would not speak to him. (1CT 29; 1RT 49-52) The court ordered filed a letter from appellant's father. The letter accused the public defender of attempting to prevent contact between appellant and his father, cause appellant to forego his constitutional rights, and "place himself at the mercy of a court, county and state that has shown a prejudice against him and seems bent on harming my son without lawful due process." (1CT 26-27, 29)

On July 14, 1995, appellant appeared and repeated that Mr. Ebert was not his attorney. (1CT 55)

On July 21, 1995, appellant appeared and stated that Mr. Ebert was not his counsel. The court told him to be seated. Appellant did not want to bring a *Marsden* motion but asked that a different attorney be appointed to represent him. The Court denied that request. (1CT 44; 1RT 56-62)

On August 10, 1995, appellant filed a document entitled, "Judicial Notice / Objection" and stating that he was without counsel, without having waived his rights thereto. (1CT 45-46)

On September 5, 1995, appellant appeared. He still was not speaking to Mr. Ebert. He filed a document entitled "Constructive Notice" and stating that he felt some of his rights had been violated. (1CT 50, 51-53; 1RT 64-66)

On April 19, 1996, Deputy Public Defender Gail Cronyn appeared as assistant counsel to Mr. Ebert. (1CT 77; 1RT 85-86)

III. PRELIMINARY HEARING AND PENAL CODE SECTION 995 MOTION

On May 28, 1997, the trial court heard and denied the defense motion to set aside the special allegations charged in the information, pursuant to Penal Code section 995. (1CT 80-96 [Def. Mot.], 1CT 109-118 [Def. Reply], 1CT 247-270 [Pro§ Opp.], 1CT 125-126 [Min. Order]; 1RT 104-114)

IV. PRETRIAL LAW AND MOTION

A. Motion to Suppress Defendant's Statements

On February 27, 1998, the trial court heard the defense motion to suppress appellant's statements. After hearing the testimony of Craig Rath, Ph.D. and Detective Glenn Stotz, the court decided that the matter should instead be heard as a pretrial in limine motion and postponed the hearing. (1CT 198; 1CT 162-177, 189-192 [Def. Mot.]; 2CT 498-504 [Def. Supp. Pts and Auth.]; 3CT 811-820 [Def. Reply]; 2CT 450-453 [Prosec. Resp.]; 3CT 773-779 [Prosec Opp.]; 2RT 137-190; Def. Exhs. A [tape], B [*Miranda* form], and C [transcript, 1 page], all made part of the record at 2RT 173-175)

On October 27 and 28, and November 2 and 3, 1998, the court resumed the hearing, and heard the testimony of Detective Stotz, Deputy District Attorney John Chessell, Dr. Rath, Michael Lynn, and Frederick Rodriquez. (3CT 825-831; 5RT532-1198; Def. Exhs K [audio tape Rodriquez], L [transcript of San Jacinto interview, at 4CT 835-884]; Peo. Exhs. 1 (two audio tapes of 11/30/98 interview), 2 (two audio tapes of Dr. Rath interview], 3 [transcript of 11/30/98 interview, all marked and admitted into evidence, at 3CT 833; 9RT 1199-1205)

On November 9, 1998, the court heard argument and denied the motion. (5CT 887; 9RT 1214-10RT 1343; see 4CT 908-912 [Mot. for Reconsideration].)

B. Motion to Sever Counts

On June 19, 1998, the trial court heard the defense motion to sever counts. (1CT 290-2CT 298 [Def. Mot.], 2CT 321-329 [Prosec. Opp.]; 2CT 363; 2RT 211-216.) The court took the matter under submission and said it would issue a written ruling. (2RT 218) The court in its minute order ruled, "The counts are properly joined and that continued joinder will not deprive the defendant of his constitutional right to due process and a fair trial. [para.] Motion denied." (2CT 363.)

C. Motion to Suppress Defendant's Statements to His Mother While in Jail

On June 19, 1998, the trial court heard and denied a defense motion to suppress statements between appellant and his parents, while he was in jail. The court found no due process violation and denied the motion. (2CT 299-304 [Def. Mot.], 2CT 311-313 [Prosec. Opp]; 2CT 367; 2RT 219-221)

D. Motion to Call Prosecuting Attorney as a Witness (Recusal)

On June 19, 1998, the trial court heard a defense motion to call the prosecuting attorney at a witness. The court held the motion in abeyance until trial. (1CT 214-225 [Def. Mot.], 3CT 305-310 [Prosec. Opp.]; 3CT 345-362 [Def. Reply]; 3CT 408-411 [Def. Reply]; 3CT 365; 2RT 221-223.)

On August 17, 1998, the court heard the motion to recuse prosecuting attorney William Mitchell. (2CT 423; 3RT 252-254) The court heard the testimony of Mitchell (3RT 255-330), argument (3RT 331-347), and the taped

interview (3RT 348-349; Def. Exh. C [tape], B [11/29/94 transcript, at 3RT 425-446].) The court took the matter under submission. (2CT 423; 3RT 348-349.)

On August 19, 1998, the court denied the motion. (2CT 447-448.)

On October 1, 1998, the Court of Appeal, Fourth District Division Two, denied the defense petition for writ of mandate/prohibition in case number E023346. (3CT 797; see 4RT 472-483; SCT "Writ of Mandate".)

E Motion to Suppress Items Seized from Defendant's Room

On June 26, 1998, the trial court heard the defense motion to suppress items seized, pursuant to Penal Code section 1538.5. The court took the matter under submission (1CT 270-281 [Def. Mot. to Quash Warrant], 2CT 330-333 [Pro§ Opp.]; 2CT 454-458 [Def. Mot. to Exclude Underpants]; 2CT 459-463 [Def. Mot. to Exclude Literary Evidence]; 2CT 369-373 [Def. Reply]; 2CT 375; 2RT 228-234.)

On December 4, 1998, the court heard and granted the prosecution's request that it deny the defense motion to suppress physical evidence taken pursuant to the search warrant. (4CT 889; 11RT 1350-1351)

F. Motion to Exclude Evidence Based on Tampering With Interview Tape

On August 25, 1998, the trial court heard the defense motion, heard testimony of defense expert Fausto Poza and district attorney investigator Lodric Clark, argument, and took the matter under submission. (1CT 282-289 [Def. Mot.], 2CT 465; 3RT 357-430; Def. Exh. G-M, 2CT 467-476.) The court found "no credible evidence of police or district attorney misconduct or gross negligence in providing to defense counsel the detective copy of the tape recording of the initial questioning of the defendant by Detective Stotz and Deputy District Attorney William Mitchell" and denied the motion. (2CT 466.)

G. Motion to Suppress Defendant's Statement to Dr. Rath Based on the Psychotherapist / Patient Privilege.

On December 4, 1998 and January 22, 1999, the trial court heard argument on this motion. (2CT 299-304 [Def. Mot.]; 3CT 784-795 [Def. Pts and Auth.]; 4CT [Prosec. Opp.]; 4CT 889; 11RT 1356-1358.) On January 22, 1999, the court heard additional argument and denied the motion. (4CT 1039; 11RT 1424-1434.)

H. Motion to Estop or Otherwise Preclude the People from Charging Special Circumstances

On December 4, 1998 and January 22, 1999, the trial court heard argument on this motion. (4CT 1035-1037 [Prosec. Opp.]; 4CT 889; 11RT 1358-1359.) On January 22, 1999, the court denied a defense request to call Deputy District Attorney Mitchell and denied the motion. (4CT 1038; 11RT 1395-1423.)

I. Motion to Exclude Defendant's Statements Regarding Counts II, III, and IV

On December 4, 1998, the trial court heard and denied this motion. (4CT 899-907 [Def. Mot. re Conduct Two Weeks before 11/29/94]; 4CT 889; 11RT 1359-1363; renewed and denied at 16RT 2427-2433.)

V. GUILT PHASE

Appellant was tried as to the guilt phase in a 28-day jury trial. The trial began on January 25 and concluded on March 15, 1999, as follows:

A. Voir Dire

Voir Dire was conducted on January 25 (4CT 1061; 12RT 1482-1584), January 26 (7CT 1862; 12RT 1585-1721), January 29 (12CT 3267; 13RT 1722-

1723), February 1 (12CT 3268; 13RT 1807-1824), February 2 (12CT 3269; 14RT 1825-2071, February 3 (12CT 3273; 15RT 2072-2302), and February 8, 1999. (12CT 3281, 3283; 16RT 2341-2387, 2390-2405)

On January 25, the trial court heard and denied a defense motion objecting to the voir dire of groups of 30 prospective jurors per day, instead of two groups of 24 per day. The defense objected under the Fifth and Sixth Amendments. (4CT 1061; 12RT 1473-1481.)

On February 2, the defense moved for the entire first panel of jurors to be excused. The court ruled that the defense could question jurors how they would judge the district attorney's credibility, but only in generic terms. The defense objected and stated that its inability to question jurors about the district attorney's role as a witness in this case deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment Rights. (12CT 3269; 14RT 1825-1830.)

On February 3, the district attorney objected to the fact that the defense was suggesting to prospective jurors that appellant's appropriate punishment during the penalty phase should be determined by fitting his crime in a hierarchy compared with other special circumstance murders. The court admonished the defense not to suggest that the jury would be comparing appellant with other persons who have been convicted of the same or similar offenses. The defense objected and stated that its inability to voir dire on this issue deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (12CT 3272; 15RT 2072-2083.)

The district attorney commented that jury instructions are based on common sense, the defense objected, and the court overruled the objection. The defense stated that the district attorney's comment violated appellant's Fifth and Fourteenth Amendment rights to due process, and was designed to directly mislead the jury. The defense further objected to the fact that the court did not ask that morning's group of jurors if they could vote for death, but did tell them they should be neutral. The defense argued that the court's comments could convince those jurors that they were to remain neutral and consider all possibilities but

prevented them from being candid about what they would do in this case. (12CT 3272; 15RT 2182-2184.)

The defense requested further voir dire as to all four groups of prospective jurors that day, based on the fact that it had not had the opportunity to intelligently exercise challenges for cause. The court denied the request. (12CT 3272; 15RT 2295-2302.)

On February 8, the defense made a motion to dismiss the entire jury panel based on prejudicial pretrial publicity and requested a change of venue. The defense stated that the district attorney had been quoted in two different newspapers, in violation of the rules of professional conduct in the California Rules of Court, rule 5-120. The district attorney stated that the quotes were accurate and not a violation of his canon of ethics. The court ruled that it would question potential jurors and excuse them if necessary. (12CT 3281; 16RT 2303-2319.) The court excused two prospective jurors who read portions of the article. (16RT 2354-2374.) The court asked the remaining jurors if they saw the article; 13 jurors raised their hands and all stated that they did not read it. (16RT 2375-2378.)

The defense moved for a new jury panel based on *People v. Wheeler* (1970) 22 Cal.3d 258. The court denied the motion, noting that of the 12 jurors presently seated, four were black. (16RT 2388-2390.)

Twelve jurors and two alternates were sworn. (12CT 3283; 16RT 2390-2397.) The jury was admonished not to read any articles about the case. (16RT 2401-2405)

B. Prosecution and Defense Cases

The prosecution presented its case-in-chief on February 9, 10, 11, 16, 17 and 18, 1999. (12CT 3283, 3370, 3373, 3376, 3377, 3379; 17RT 2505-22RT 3293.) The defense motion for judgment of acquittal (Pen. Code, § 1118.1) was deemed made and was to be argued at a later date. (22RT 3293)

The defense presented its case on February 18, 19, 22, 23, 24, and 25, and March 1 and 2, 1999. (12CT 3379-3382, 3384, 3386, 3387, 3432, 3434; 22RT 3294-27RT 4191.)

The prosecution presented rebuttal on March 2. (12CT 3434; 28RT 4216-4227.) Both parties rested. (12CT 3434; 28RT 4228-4229.) The court heard and denied the defense motion for judgment of acquittal. (12CT 3435; 28RT 4251-4262.)

C. Renewed Motions and Objections

On March 2, 1999, the court heard and denied a renewed defense corpus delicti motion that Linda Middleton testified that Melissa experienced a nightmare. The court ruled that something beyond a nightmare occurred. (12CT 3435; 28RT 4262-4263.)

The court heard and denied a defense motion to cross-examine Dr. Rath regarding his adherence to the American Psychological Association guidelines for interviewing in-custody suspects. (12CT 3435; 28RT 4263-4266.)

The court heard and denied a defense motion to cross-examine district attorney Chessell regarding his motive, bias and interest in conducting appellant's interrogation. (12CT 3435; 28RT 4266-4272.)

D. Instruction Settlement

The court and counsel argued and settled jury instructions on March 2, 3, 4, and 8, 1999. (12CT 3435-3438; 28RT 4273-30RT 4554.)

E. Closing Argument and Instructions

On March 8 and 9, 1999, the court preinstructed the jury. (12CT 3438; 30RT 4554-4585) The prosecution presented its closing argument. (12CT 3438-3439; 30RT 4586-4640.) The defense presented its closing argument. (12CT

3439; 30RT 4641-4718.) The prosecution presented its rebuttal argument. (12CT 3439; 30RT 4718-4774) The court further instructed the jury. (12CT 3439; 30RT 4774-4786)

F. Deliberations

On March 9, 1999, at 12:35 p.m., the bailiff was sworn and the jury retired to deliberate. (12CT 3439; 30RT 4774-4786.) The jury continued its deliberations on March 11, from 8:42 a.m. to 2:33 p.m. The jury submitted three notes. (12CT 3440; 31RT 4791-4843)

In the second note, the jury asked when a waiver of *Miranda* rights takes place. The court responded over defense objection that "a *Miranda* waiver is effective when a subject orally agrees to speak with investigators after his rights are read to him. There is no requirement that a *Miranda* waiver be documented in a written form, signed by the person being questioned." (31RT 4803-4815.) The defense objected that this answer deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (31RT 4803-4815.)

In the third note, the foreman reported that one of the jurors had admitted discussing a specific aspect of the case with her husband. Juror #1 said to her husband that if someone she knew came into her house, she would not automatically scream. The other jurors did not discuss this further. (12CT 3440; 31RT 4816-4823.) The court asked Juror #1 if the fact that she had been called in would affect her ability to be a fair and impartial juror, and she said no. The court admonished her not to discuss the case with anyone. (31RT 4828- 4836.) The defense objected and asked that Juror #1 be excused. (31RT 4836-4842) The court denied the defense request, commenting, "It's certainly ... at the edge of propriety. And I think I've admonished her again not to do it any further. But I don't think she's gone over the edge. And so I think to – to excuse her at this point would not be appropriate or necessary." (31RT 4843.) The other jurors were not questioned.

The jury continued its deliberations on March 15, 1999, from 9:00 a.m. to 3:13 p.m. (12CT 3441; 31RT 4844-4885.) The jury submitted two additional notes. The first note asked:

"1. Is it too far to speculate whether Melissa let Daniel into the house?

2. Please clarify if speculation can be used in determining innocence in this case?

3. What is the definition of speculation?

4. A juror believes the entire interview is a lie and is interjecting speculation. Where do we go from here?"

(31RT 4844)

The second note asked:

"1. What is the definition of 'cross-admissibility'?

2. Is it, cross-admissibility, applicable both ways, 10/1/94 for 11/29/94 and 11/29/94 for 10/1/94?"

(31RT 4972)

While the parties were arguing as to how to respond to these concerns, the jury reached a verdict. (See 31RT 4844-4879)

G. Verdict

The jury found appellant guilty as charged on all counts and found all special allegations to be true. (12CT 3441-3442 [Minute Order]; 13CT 3589-3604 [Verdict]; 31RT 4885-4889.) The jury was polled. (31RT 4889-4898.)

VI. PENALTY PHASE

A. Law and Motion

On March 16, 1999, the trial court heard and denied a defense motion to call Dr. Leo in the penalty phase. (13CT 3617; 31RT 4902-4914) The court heard and granted a defense motion to call Dr. Whiting, but with the same limitations as in the guilt phase: Dr. Whiting was not to testify as to what he was told by appellant or appellant's relatives, but only as to what was in the record. (13CT 3617; 28RT 4914-4922.) The court heard and denied a defense motion to call district attorney Mitchell as a witness, to testify relative to factor (k) and the idea of "lingering doubt." (13CT 3617; 28RT 4923-3926)

The prosecution refused a defense stipulation that appellant had no prior criminal record, because his record or lack of record already was in evidence. (13CT 3617; 31RT 4926-4929) The defense submitted a declaration from Candyce Mills, who observed outbursts from Mr. and Mrs. Middleton during the trial; the court ordered the declaration filed over prosecution objection. (13CT 3617; 31RT 4954-4961)

B. Prosecution and Defense Cases

The prosecution presented its case-in-chief on March 17, 1999. (13CT 3618; 32RT 4966-5015.) The defense presented its case on March 18, 23 and 24, 1999. (13CT 3647-3651; 33RT 5096-5253; 34RT 5254-5416; 35RT 5417-5503) The parties rested. (35RT 5502-5503)

C. Instruction Settlement

The court and counsel argued and settled jury instructions on March 16 (13CT 3617; 31RT 4931-4954) and March 17, 1999. (13CT 3618; 32RT 5018-5066; see Peo. Memorandum at 13CT 3620-3644 and Defense Memorandum at 13CT 3644-3646.)

D. Closing Argument and Instructions

On March 24, 1999, the prosecution presented its closing argument. (13CT 3651; 35RT 5528-5567.) On March 24 and 25, the defense presented its closing argument. (13CT 3651; 35RT 5559-36RT 5598.) The prosecution presented its final closing argument. (13CT 3662; 36RT 5598-5622.) The defense presented its final closing argument. (13CT 3662; 36RT 5623-5679.) The court instructed the jury. (13CT 3651, 3662; 35RT 5524-5528; 36RT 5648)

E. Deliberations and Verdict

On March 25, 1999, at 2:00 p.m., the jury retired to commence deliberations. (13CT 3662.) The jury continued its deliberations on March 29, 1999, from 9:15 a.m. to 3:11 p.m. (13CT 3664.) At that time, the jury sent the court a note that they were unable to reach a verdict. The court sent a note back stating, "Due to the length of these proceedings and the complex issues and the fact that you have been deliberating only one day, the Court requests that you continue your deliberations." (13CT 3664; 36RT 5688-5696.)

The jury continued its deliberations on March 30, 1999, from 9:00 a.m. to 10:52 a.m. (13CT 3664.) The jury announced that it had reached a verdict on penalty. (36RT 5699-5700)

At the same time, the court received a note from the jury stating, "I, Juror No. 9, received at my e-mail address two e-mails from individuals on the jury regarding the conduct of other jurors. One juror was upset at another for saying they did not have compassion. One juror was upset at another for saying they were having too much fun in the deliberation room and not taking the case seriously. Is this appropriate? Is this a problem?" (13CT 3664; 36RT 5697-5698.) The prosecution suggested that the court tell the foreperson to inform the other jurors that individual contact is not proper and that issues have to be brought up in the presence of all 12 jurors. The defense stated that the jurors were not

following the court's admonition and should be identified and spoken to individually. (36RT 5697-5698)

The court questioned Juror No. 9, who confirmed that both emails were sent to him without copies to others. Both statements were made in the deliberations room, in front of all the jurors, and the emails were deleted. (36RT 5700-5705) The defense argued that the jurors who sent the emails should be identified and that other jurors might be sending emails to each other. The prosecution argued that there was no evidence of misconduct. The court found that there was no juror misconduct at this point, the discussion was within the context of jury deliberations, and some jurors were "venting" not discussing the case. (36RT 5706-5707)

The jury reached a verdict and fixed the penalty at death on count 1. 13CT 3677 [Minute Order]; 13CT 3670 [Verdict]; 36RT 5711-5717.) The jury was polled, thanked and discharged. (36RT 5711-5717.)

VII. POST TRIAL MOTIONS FOR NEW TRIAL AND TO MODIFY VERDICT

On June 17, 1999, the trial court heard and denied a defense motion for new trial. (14CT 3746-3769 [Def. Mot. for New Trial]; 14CT 3770; 37RT 5736-5799) The court heard and denied a defense motion to modify the verdict, pursuant to Penal Code section 190.4. (14CT 3736-3745 [Def. Pts and Auth. In Support of Mot. to Reduce Penalty]; 13CT 3685-3689 [Pro§ Opp.]; 14CT 3772; 37RT 5781-5789.)

VIII. SENTENCING

The trial court denied probation and sentenced appellant as follows:

Count 1		Death
Count 2	Middle term	4 years concurrent
Count 3	Low term	1 year, 6 months, stayed

Count 4 Middle term (Principal) 6 years

The court credited appellant with 2,491 days of presentence custody. (14CT 3790 [Minute Order]; 14CT 3795-3797 [Abstract]; 37RT 5793-5799)

IX. APPEAL

Appellant's conviction and sentence were automatically appealed to the California Supreme Court pursuant to Penal Code section 190.6 and California Rules of Court, rule 34(a).

STATEMENT OF FACTS

I. GUILT PHASE

A. PROSECUTION CASE

1. Background

In 1994, Linda and Robert Middleton lived in a two-story home at 364 Oleander Street in San Jacinto, in Riverside County, with their daughter Melissa, age 12, and son Brian, age 19. Carl and Jean Linton lived next door with their two children, appellant Daniel Linton, age 20, and Stacey, age 8. Melissa and Stacey were close friends, like sisters, and spent a lot of time at each other's houses.[1] Appellant tended to play with younger children, ages 12 and 13. Brian, the Middleton's son, had friends his own age and did not socialize with appellant. (17RT 2526-2529, 2534-2536, 2570-2571) Melissa was 5'8" tall and weighed 136 pounds. (18RT 2657-2683, 2706-2709)

In April 1994, the Middletons went on vacation. Linda gave appellant a house key, so that he would take care of the Middletons' lizards while they were away. After they returned, Linda tried to get the keys back from appellant a couple of times, but he was not home. Eventually, Linda paid appellant for taking care of the lizards but forgot he had the key. She never noticed anything missing from her home during the time appellant had the key. (17RT 2572-2573, 2595-2600)

2. Prior Incident: Late September - Early October 1994

One night in late September or early October 1994, at approximately 2:30 a.m., appellant was in Melissa's upstairs bedroom. She woke up and started to scream. He thought about raping her but decided not to do so. He commented, "I

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[1]Linda Middleton testified that Melissa had enough underwear that if she left a pair at the Linton's house, Linda would not notice it right away. (17RT 2570-2571)

grabbed her by the throat and while she gasping for breath I tried to leave." (22CT 3301, 3311, 3313, 3362-3369)[2]

Melissa ran into her parents' bedroom and woke them up. She was loud and upset and said, "Mommy, Mommy, why didn't you come in? I was screaming for you." Melissa said that someone had been in her room, was on top of her, and was choking her. Robert got dressed and went downstairs, while Linda comforted Melissa. Melissa spent the rest of the night in her parents' room. She denied it was a nightmare. She could only describe her assailant as male and nude. Linda did not see any marks on Melissa's neck. Linda and Robert discussed the incident and concluded Melissa must have had a nightmare, because nothing was out of place in the house and she went right back to sleep afterwards. (17RT 2564-2565, 2574-2476, 2577-2578, 2587-2588)

Robert checked outside. He saw Joseph Montero through the window, in the Linton's computer room, in the front of the house. Montero was a friend of appellant and lived with the Lintons for a month in the fall of 1994. Robert told Montero that Melissa said someone had been in her room and asked if Montero had seen anyone. Montero said he had not. Appellant had not been in the house for 15 to 90 minutes. (17RT 2592-2594, 3122-3126.) He returned about 20 minutes later, after Robert left. Appellant looked scared and out of breath. (21RT 3127-3133, 3153-3154.)[3]

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[2] The portions of the facts from appellant's perspective are taken from his November 30, 1994 police interrogation, which is discussed in more detail later in the Statement of facts and in Argument, *post.*

[3] Montero, age 23, had been thrown out by his mother for drug use. (21RT 3159-3160.) Appellant and Montero had been using methamphetamine all day, and they did so nearly every day. They also smoked marijuana sometimes. While Montero was living at the Linton's, he looked in the master bedroom and found Penthouse magazines, a book about incest, and a magazine with pictures of naked 16-year-old girls. (21RT 3127-3133, 3153-3154.) Montero stole marijuana from the Lintons, and eventually they asked him to leave. He went back to live with his mother. (21RT 3159-3160.)

3. Events of November 29 and 30, 1994

On the morning of November 29, 1994, Melissa was ill with a cold or the flu and said she did not want to go to school that day. Linda told Melissa to stay in bed, sleep and take her medicine. Melissa had stayed home alone several times that year and was comfortable staying home alone. Linda left for work at 7:30 a.m. and locked the front door, but she did not secure the deadbolt. Robert had left earlier. (17RT 2539-2545)

a. Strangling of Melissa Middleton

Between 10:00 and 11:00 a.m., appellant walked next door to the Middleton's house, to look for money. He still had a key to the house from taking care of the Middletons' pets. He did not know that Melissa would be home. He walked upstairs and saw Melissa. She ran to her parents' room, started screaming and said she was going to call the police. He pushed her down on the bed so that she could not reach the phone. He grabbed her by the throat and did not realize how far it had gone until it was too late. (12CT 3317-3318, 3288-3291, 3320, 3359) He thought Melissa screamed and was afraid of him because of the earlier incident. (12CT 3291-3292)

Appellant started choking Melissa with his hands. He did not mean to kill her. "I only meant for her to fall unconscious. I didn't know that it would go that far." She was struggling and breathing and let out a small yelp. He grabbed the cord of some stereo headphones, on the nightstand, and wrapped it around her neck. He was in front of her the whole time. The cord broke so he used his hands again. She was still fighting. (12CT 3293-3297) He never hit her. (12CT 3301)

Appellant thought about having sex with Melissa but did not to try to do so. He just wanted to scare her. He unzipped her pants to scare her. He did not put his hands down her pants. He told her he would leave her alone if she did not say anything and remained quiet. (12CT 3339, 3340, 3342, 3348, 3356, 3364-3369; 20RT 2908-2918)

Appellant said, "I didn't really notice how it was, exactly how far it had gone until I noticed that she was colorless." (12CT 3355) He added, "I wouldn't have tried to kill her or anything or hurt her. (12CT 3302) After Melissa went unconscious, he propped her up into a sitting position at the foot of the bed. (12CT 3356; 20RT 2927-2928) He was scared that "she was that pale and she was dead." (12CT 3358) He used a rag to wipe off fingerprints from doorknobs, other surfaces, and "the wire thing" and he left. (12CT 3306-3308, 3356-3357) He thought he was in the Middleton house about ten minutes. (12CT 3299)

At 12:00 p.m., Linda telephoned Melissa. When Melissa did not answer the phone, Linda became concerned but concluded she probably was still asleep. (20RT 2539-2545)

b. Discovery of Melissa and Police Investigation

At 3:20 p.m., Linda left work and arrived home. She used her key to open the front door, which was locked. She called out for Melissa but did not get an answer. She checked Melissa's room, but Melissa was not in there. She checked her own bedroom and discovered Melissa sitting in front of the bed, with her legs crossed, arms out, and head to the side. Linda knew Melissa was dead by the way she felt and looked, but she attempted to resuscitate her. (17RT 2554-2555)

Linda screamed for her neighbor, Valerie Elliott, who came over and told her to call 911. The 911 operator instructed Linda to lay Melissa down, put pillows underneath her, and cover her because she was cold. Sean Grady, a paramedic who lived in the neighborhood, came over. Melissa was wearing a plaid shirt and shorts, which was not a common combination of clothing for her. Her pants were unzipped. There were red marks on her neck that had not been there earlier in the morning, including a red bruise line from the middle of the throat to directly behind the right ear lobe. There were stereo headphones at the bottom of the bed. (17RT 2556-2559)

At 3:40 p.m., Detective Michael Lynn of the San Jacinto Police Department responded to the scene. Officer Pollitt was at the scene, as well as several paramedics. When Lynn entered the bedroom, Melissa was on the floor. A firefighter was with her. Given the circumstances, Lynn concluded Melissa's death was suspicious and made it a crime scene. The residence was secured and photographs were taken. There were no signs of forced entry into the house and no indication that the house had been burglarized. Robert arrived home after the police were already at the scene. The police collected the headphones, bed sheets, a white sock, and a cameo ring, and a cloth on a stool found at the scene. (17RT 2611-2627)

c. First Interviews of Appellant

Detective Glenn Stotz of the San Jacinto Police Department knocked on the door of appellant's house and appellant answered the door. Stotz introduced himself as a detective with the San Jacinto Police Department and asked if appellant had heard about what happened next door. Appellant replied that he had already heard that Melissa had been killed. Stotz questioned appellant as to whether he had heard or seen anything out of the ordinary during the day. Appellant said that he had been home all day and that he did not see anything out of the ordinary. He added that he did not know Melissa well but that she was a good friend of his sister. (18RT 2745) Appellant asked how she was killed, and Stotz replied that she was choked to death. (18RT 2746)

Stotz left to canvass other residences in the neighborhood. He returned 30 to 40 minutes later accompanied by Detective Lynn. (18RT 2746) Appellant answered the door again. Lynn and Stotz introduced themselves and talked to him on the front porch. Lynn noticed some scratches on appellant's right arm near the wrist. (17RT 2628-2629; 18RT 2743-2745) When they asked appellant about his relationship with Melissa, he repeated that he did not know her that well. Stacey, appellant's sister, said, "Huh-uh, you play fight with her all the time." Appellant looked at Stacey with a shocked look. Lynn asked Stacey to step away so he

could speak with her alone. Lynn then returned to the crime scene to ensure that it had been properly processed. (17RT 2628-2632; 18RT 2742-2753)

Stotz remained with appellant. Appellant asked how Melissa had been killed. Stotz said she had been choked to death. Stotz asked appellant if he knew anything about an incident in which she had been attacked in her bedroom in the middle of the night. Appellant initially denied any knowledge of that attack. Later, he described an incident two or three weeks earlier, in which he woke up with his jeans on around midnight, in his front yard. He thought he might have been sleepwalking. (18RT 2752-2755)

Stotz asked to look at appellant's hands so see if there were any injuries. Appellant appeared visibly nervous. His arms and hands were shaking and his palms were extremely sweaty. There was a scratch mark and a gouge mark on his lower right forearm. When asked about the scratch marks, appellant said they probably resulted from playing with the cat earlier that day. Appellant walked back inside the house. (18RT 2754-2757)

d. Second Interview of Appellant

At approximately 8:00 p.m., Detective Stotz returned with District Attorney William Mitchell. Appellant's parents were in the house. Appellant was told he was not under arrest and had no obligation to speak to Stotz. Stotz did not tell appellant that this interview was being tape recorded. Appellant agreed to speak to Stotz and Mitchell. He said he had not seen Melissa at all on November 29 and had last spoken to her two or three weeks before. He said he woke up at 9:45 a.m. that morning, stayed awake for a short time, then fell asleep and woke up again at 11:00 a.m. He did some laundry and recycled some trash. The previous night, he had gotten home about 1:00 a.m. and stayed up until 4:00 a.m. He noted that he had been to the Middleton house before to take care of the animals, but had not been there for about three months, when he returned the key. (RT 2756-2762, 2766-2767, 2847-2848)

When asked if he heard what had happened to Melissa, appellant said he heard she had been strangled with a cord and that there were fingerprints present. He added that she had been found dead on the floor in the bedroom and later said it was her parents' bedroom. He said he learned all this information from Stotz, but Stotz had not told him anything, and he denied having spoken to anyone else about it. He agreed to speak to investigators the next day. (18RT 2763-2765)

e. Third Interview of Appellant

On November 30, 1994 at approximately 9:00 a.m., Lynn and Stotz drove to appellant's house and picked him up. He sat in the back seat. He was not handcuffed or under arrest at that point. Appellant was quiet and sad and started crying and shaking; he said he did not think he could, but wanted to admit he was responsible for Melissa's death. He continued that he was sorry he wasted their time but could not turn himself in the night before, in front of his parents. He agreed to go to the police station and talk about what happened. He said he would tell them everything. Before the interview, appellant asked Lynn why he was laughing at him; Lynn had said nothing to appellant and was filling out paperwork. Lynn said he was not laughing at appellant. Appellant said, "Yes, you are." (17RT 2631-2636, 2644-2648; 18RT 2768-2769)

Lynn remained with appellant, while Stotz gathered the necessary equipment for the taped interview. Before the tape was turned on, appellant was told that it would be turned on and that he would be read his constitutional rights. Appellant asked some questions for five to ten minutes. Stotz was in contact by telephone with Deputy District Attorney William Mitchell and spoke to him once in the morning and once in the afternoon. (19RT 2861-2864) At 9:45 a.m., Stotz turned on the tape recorder. (18RT 2780-2781) Appellant was read his rights and signed the San Jacinto PD-5 waiver form. (12CT 3287-3288; 19RT 2827-2829;

Peo. Exh. 3.) The taped interview was played for the jury. (Peo. Exh. 15A [tape] played for the jury; Exh. 15B [transcript], at 12CT 3286-3369)[4]

At 10:40 a.m., Deputy District Attorney John Chessell entered the room and participated in the interrogation. (12CT 3304) At 11:20, the detectives and appellant took a lunch break. After that, Dr. Rath interviewed appellant. There was a break from 3:15 p.m. to 3:40. (19RT 2861-2862) At 3:40 p.m., Stotz and appellant returned to the interview room. (12CT 3351) At 3:45 p.m., Detective Rodriguez joined them. (12CT 3354)

Stotz did not promise any leniency regarding the killing of Melissa, but he assured appellant that he would not get in any trouble for any prior contact with Melissa, including sex. (19RT 2849-2852, 2879-2880.) He offered appellant something to eat and drink during each break. Appellant eventually admitted that he had tried to rape Melissa in the incident two weeks or two months earlier. (19RT 2865-2866; 20RT 3079-3081.)

At 4:00 p.m., the interview concluded. (12CT 3369; 19RT 2861-2864) Appellant was formally placed under arrest and taken into custody. (19RT 2794-2797.) He signed the waiver form after the interview. (19RT 2827-2829.) Appellant asked whether or not he would be receiving the death penalty. Stotz told him that the police can recommend charges but the decision is up to the district attorney. (19RT 2867-2873.)

f. Search and Seizure of Items from Linton Home

Pursuant to a search warrant, Detective Stotz searched appellant's residence. He retrieved a pair of Melissa's underwear from a trash can in the kitchen (Peo. Exh. 6, 16A), two whole bloodstains in a brown envelope (Exh. 16); a ring identified as belonging to Melissa (Peo. Exh. 13); and a pair of keys to the Middleton home (Peo. Exh. 6C and 6E). (19RT 2802-2807)

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[4] The contents of the November 30, 1994 interview are discussed in more detail in Argument I., post.

4. Forensic Evidence

a. Autopsy Results

The coroner examined Melissa. He concluded that she died from ligature and manual strangulation, indicated by petechial hemorrhages on the eyelids and eyes and behind the ears. The linear abrasion across her neck was a bright reddish area and consistent with strangulation by a cable, cord, or headphone wire. A large red mark on the neck could have been caused by blunt force trauma by a finger or knuckle. There were signs of a struggle, but she probably lost consciousness within one to two minutes. Her death resulted from the fact that both her blood and air supply was cut off. There was no trauma indicating sexual assault, and all the swabs came back negative. Her injuries were not consistent with a carotid or bar choke hold. (18RT 2657-2683, 2706-2709)

b. Fingerprint, DNA and ABO Typing Results

Also found at the scene were two latent prints, one on the inner portion of the door to the Middletons' bedroom and one on the dresser top compartment door. (21RT 3197-3203.) Trace evidence and fingernail clippings were collected from Melissa's body. (21RT 3208-3209.) The crotch area of Melissa's underwear, found in the Linton trash can (Peo. Exh. 6, 16A), tested negative for sperm. Sperm was found on the front and back panels of the underwear. PGM and ABO typing were performed. (21RT 3217-3225.) Appellant was a "Type A" secretor, consistent with the two stains on the underwear and could not be eliminated as a possible donor of the semen. "A- secretors" such as appellant are found in about 31 percent of Caucasians, 19% of Blacks, and 25% of Hispanics. (21RT 3230-3232A.)

DNA tests were performed. The prosecution criminalist compared appellant's blood sample with the three underwear stains, using an RFLP DNA analysis. In all four of the DNA locations, appellant's banding pattern matched the patterns in both the sperm and nonsperm fractions. Based on population data,

this combination of DNA would be present in less than one in one billion people. (21RT 3265-3271.) With respect to the DNA in Melissa's fingernails, appellant fit the profile, but one in 11,000 Caucasians could be expected to fit the profile. (21RT 3276-3281.)

B. DEFENSE CASE

1. Summary of Testimony

Appellant did not testify. Since there was no dispute as to the fact that appellant strangled Melissa, the defense focused on the likely scenario that resulted in her death; a possible history of abuse by Carl Linton of appellant; appellant's cognitive psychological functioning; and appellant's mental state during the police interrogations. Werner Spitz, M.D., a forensic pathologist, was of the opinion that Melissa was strangled by the twisting of her own tee shirt, not manually, and may have lost consciousness and died within 20 to 30 seconds. (22RT 3310-3324, 3346-3348, 3418-3423) Craig Rath, Ph.D., the prosecution's psychologist that interviewed appellant on November 30, also administered psychological tests that indicated he suffered from Attention Deficit Hyperactivity Disorder, and was highly depressed, uncomfortable with women, socially compliant and submissive, and was using marijuana and methamphetamine. (23RT 3485-3527) John Chessell, a deputy district attorney who interviewed appellant, denied unethical interview tactics. (24RT 3637-3649) A neighbor, Melody Morris, R.N., suspected that Carl Linton physically abused appellant. (24RT 3686-3695) Cecil Whiting, Ph.D., the defense psychologist, questioned Dr. Rath's interview ethics, methods and results; he concluded that appellant suffered from social phobia; manic panic disorder with manic attacks, based on right temporal lobe damage; avoidant personality disorder featuring social phobia and panic attacks; and neuropsychological impairment. (25RT 3748-3820, 3826-3829; 27RT 4071-4074) He also concluded that appellant was experiencing a

panic attack during Melissa's homicide and could not recall what happened. (26RT 3909-3912)

2. Werner Spitz, M.D., Forensic Pathologist

Werner Spitz, M.D., a board-certified forensic pathologist, reviewed a series of autopsy photographs. Spitz's opinion was as follows: Mark number three was a ligature mark, but it was not made by the headphone cord. (22RT 3304-3309; Def. Exh. H) Melissa was strangled by clothing rather than a cord, which would have made a different kind of impression. The impression was made by a twisting of the tee shirt Melissa was wearing, up around her neck. (22RT 3310-3319, 3346-3348, 3418-3423; Def. Exh. I) In a case such as this, where there appears to have been fear and a struggle, Melissa likely passed out, suffered brain damage, and may have died after 20 to 30 seconds of maintained pressure. (22RT 3320-3324) There was no evidence of manual strangulation, despite appellant's statement to the contrary. (22RT 3354-3357, 3373-3376)

3. Craig Rath, Ph.D., Prosecution Psychologist

On November 30, 1994, Deputy District Attorneys John Chessell and William Mitchell contacted Craig Rath, Ph.D., a licensed clinical psychologist. Dr. Rath had interviewed in-custody suspects in the past, on Mitchell's request, and had testified in court many times. The district attorney hired Rath to interview appellant and perform a psychological evaluation of him. Rath understood that the purpose of the interview was to determine appellant's mental functioning and gather evidence based on appellant's answers. He also knew that the district attorney was interested in an admission appellant had a sexual interest in Melissa either before or on the date he killed her. That evidence, in turn, would be presented to a trier of fact if and when the case came to trial. (23RT 3475-3479, 3525, 3534-3539)

Rath normally would draw a diagnostic impression from such an interview. Rath was not hired to treat appellant. Rath was briefed before the interview by Chessell and a detective. They told Rath that three or four times during their interview with appellant, he had denied threatening sex with Melissa and said he just wanted to scare her. Rath took notes and at one point wrote, "Two months ago or two weeks ago and now equals prior." (Def. Exh. J, p. 4) Rath knew that if appellant killed Melissa during an attempted rape, the homicide became death penalty-eligible. (23RT 3475-3479, 3525, 3534-3539)

From 12:45 to 1:50 p.m., Rath interviewed appellant. (23RT 3485-3488) He said he was there to figure out what was going on mentally with appellant. (23RT 3516-3518) From 1:50 to 3:15 p.m., Rath administered the Minnesota Multiphasic Personality Inventory (MMPI), a long and widely-used true-false test. (23RT 3482-3488) The interview was audiotaped and was played for the jury. (23RT 3543-3546; Def. Exh. M)

With respect to the MMPI, appellant answered 400 of 566 questions. (23RT 3485-3488) The fact that appellant completed only 400 questions did not affect the test's validity. Appellant scored high on the "O" scales, meaning that he was extremely introverted, unassertive, often uncomfortable around members of the opposite sex, sensitive to what others think of them, and sometimes submissive and compliant to authority. (23RT 3489-3493) He also scored high on the depression scale, indicating that he was highly depressed. On the energy scale, his score was low for anyone, particularly a 20-year-old male. (23RT 3494-3496) He had a high psychopathic deviant score, with subscales of antisocial acting out, social alienation and self-alienation. (23RT 3497-3498)

Appellant had a history of Attention Deficit Hyperactivity Disorder (ADHD) but appeared to have outgrown the hyperactivity symptomatology. (23RT 3499-3500) He had been treated with Ritalin; there is a higher incident of amphetamine usage among people treated with Ritalin as children. (23RT 3501-3502) He had repeated the third grade, not unusual for a child with ADHD.

(23RT 3512-3513) He had a flat affect, meaning that his facial expressions did not change. (23RT 3506-3507) There was no evidence that he was a sociopath or a pedophile. (23RT 3497-3498, 3572-3573)

In the interview, appellant answered every question about his alleged sexual interest in Melissa. He denied any sexual fantasies about her. When asked about a typical fantasy, he replied that it would be to go out on a date with a girl. (23RT 3508-3509) He did not become sexually aroused when he would horseplay with Melissa and his sister. He said he would have been too scared even if he had found Melissa attractive. (23RT 3525-3527)

Rath asked appellant why he went into the Middleton house two months before, and appellant said it was because he was missing $100. He said he choked Melissa to keep her quiet. (23RT 3532-3533) He denied threatening sex with Melissa and just wanted to scare her. (23RT 3538) He said he was scared and had no real perception of time when he killed Melissa. (23RT 3541-3542) He unzipped her pants to scare her also. (23RT 3563-3565)

Appellant related that he had been physically abused but when asked about sexual abuse, he answered, "I don't think so." He did not recall much from ages 5 to 12. (23RT 3510-3511) He was hit by a car and knocked unconscious when he was 14. He said alcohol and marijuana made him stupid, he needed all the brains he could get, and he was trying to stop using methamphetamine. (23RT 3516-3518)

4. John Chessell, Deputy District Attorney

Deputy District Attorney John Chessell testified that he assisted in the November 30, 1994 interrogation to assist the officers. (24RT 3637-3638) After he interviewed appellant, he briefed Dr. Rath. (24RT 3639-3641) He also wrote a search warrant for Detective Stotz to sign. (24RT 3639-3641) He did not have a particular method of interrogating in-custody suspects and he did not try to plant the answers he wanted in appellant's mind. (24RT 3645-3649) He did not know

if appellant was telling the truth when he denied having sex with Melissa, but he repeatedly denied it. (24RT 3644)

5. Melody Morris, R.N.

Melody Morris was the next-door neighbor to the Lintons, on the other side, at 340 Oleander Drive. She was a registered nurse and worked the night shift. She did not know appellant very well, but he occasionally would borrow her bicycle pump. He did not always look at her or talk to her. As an R.N., Morris was under a duty to report suspicious of physical abuse. On one occasion, she was in bed and heard some big thumps on the wall between her house and the Lintons' house, which are close. She wondered if she should call the police, but did not hear any yelling and decided not to. Between 1992 and 1994, Morris had seen Carl Linton scold appellant. Appellant did not talk back to his father. (24RT 3686-3695)

6. Cecil Whiting, Ph.D., Clinical Psychologist

Cecil Whiting, Ph.D., a licensed psychologist, saw appellant six times and spent 15 hours with him, beginning on July 12, 1997. (25RT 3742-3756) Dr. Whiting administered a number of tests to appellant, including a test for prefrontal functionality, mental status and logical reasoning, judgment, short-term memory, long term history, ability to remain focused, and concentration. Whiting found impairment in all of these areas and concluded that appellant may have had ADHD. (25RT 3757-3762)

Dr. Whiting administered the MMPI, the same test administered by Dr. Rath. He concluded that appellant was socially isolated, depressed, shy, self-conscious, uninvolved and a self-critical person. (25RT 3789-3792) Appellant's propensity for assaultiveness was relatively low. He was under a great deal of stress and may have thought about suicide. (25RT 3809-3813) Dr. Whiting

concluded that appellant's diagnosis was avoidant personality disorder. (25RT 3817-3820)

Dr. Whiting was concerned that Dr. Rath gave appellant the MMPI when appellant was in the process of a police interrogation, because the test should not be given when the subject is fatigued, and appellant's voice indicated extreme fatigue. He also felt that at that time appellant was depressed and suffering from psychomotor retardation, where the subject does not want to move, think or be bothered and experiences a great deal of lassitude and malaise. (24RT 3763-3767)

Dr. Whiting also was concerned that Dr. Rath did not make a diagnosis. Most of Rath's letter was devoted to appellant's family history, relationship with his father, complicity in the killing of Melissa, social history, ADHD, and fantasy of going out on a date with a 19-year-old girl, which showed social impairment. (25RT 3770-3771) He was further concerned that Dr. Rath did not finish administering the MMPI, because there was not enough data to interpret some of the answers. The first issue was the involvement of a psychologist in a manner in which his title might be misinterpreted by a patient who expected to receive help. The second issue was use of the truncated MMPI in a forensic setting. (25RT 3774-3775)

Dr. Whiting administered the Luria-Nebraska and Hooper Visual Organization tests. He found appellant had mild expressive aphasis affecting the ability to pronounce certain words; tactile sensation indicating a right temporal problem, astereognosis, and the ability to read complex but not simple material. (25RT 3817-3823) Based on the right temporal damage, appellant also had a manic panic disorder, where a quick flood comes from the autonomic nervous system creating rapid heart rate, profound breathing, cold hands and cold feet. (25RT 3826-3829, 3830-3836)

Dr. Whiting reviewed the psychological assessments of appellant, going back to age five. Those assessments indicated as follows: He was socially

isolated, not functioning properly and not experiencing normal development. He was not able to cope with kindergarten; there were emotional outbursts that seemed related to the environment and interaction with other children. (26RT 3877-3878) He had a flat affect and minimal eye contact, consistent with social phobia. He was preoccupied with swatting invisible insects; his hands were always moving; and he seemed to feel the environment around him was active with insects. He also had fears of robotic monsters out to kill him or anyone else who crossed their path. (26RT 3879-3883) When asked to draw a picture of his family, he was unable to do so with the exception of one robotic figure that was armed with weapons and looked violent. (26RT 3882-3883)

One of appellant's teachers, Susan McKenzie, reported that he was in the top five of the most emotionally disturbed children she had ever seen and was socially retarded. She believed the root of his mental disturbance came from the home and that to be identified as emotionally disturbed at that young age was extremely rare. (26RT 3884-3886) In 1986, appellant was prescribed Dilantin to help with memory and focus. (26RT 3894-3897)

Appellant reported that his father, Carl, hit him a number of times, until he was 16. Carl dragged appellant into the house by his head, and he slid into something, cut himself and required stitches, although Carl would not take him to the hospital right away. The incident was reported to social services. Carl also kicked appellant on one occasion. Appellant suffered from continuous headaches, a sign of stress or the inability to respond to external stimuli. (26RT 3884-3889, 4048-4059)

Appellant reported (in Dr. Rath's report) that during the attack on Melissa, he did not have a clear perception of time. This can be explained as a derealization syndrome, meaning he probably was not living in the moment, which is common with panic attacks. He denied any sexual fantasies regarding Melissa, said he had never had sex with a woman, and masturbated about once every three days. (26RT 3890-3897) Dr. Whiting concluded that appellant was experiencing

a panic attack during Melissa's murder and could not recall what happened. (26RT 3909-3912)

Appellant's score on the psychopathic deviant scale was 81; the paranoia scale 81; obsessive worries and compulsive rituals or exaggerated fears, 90; schizophrenia, 90. Dr. Whiting wrote that appellant "suffers from disordered thinking and an inability to control his thoughts. It is likely that his behavior is odd or eccentric, that he tends to be socially reclusive, and that "his reality contact is impaired and he experiences frequent delusions and hallucinations. (26RT 4023-4027)

C. REBUTTAL

Linda Middleton was recalled and testified that she purchased the shorts Melissa was wearing when she died. Melissa wore those shorts on a regular basis and the zipper was working the last time Linda saw the shorts. (28RT 4217-4218) Robert Middleton testified that the headphones were only four months old and were in good condition when he left them on the nightstand. There was a lot of damage to the cord after the last time he used them. (28RT 4220-4223)

II. PENALTY PHASE

A. PROSECUTION CASE

1. Victim Impact Evidence

Both of Melissa's parents, Robert and Linda Middleton, testified. Linda testified that Melissa was her only daughter and was born on August 18, 1982. Melissa was a friendly, outgoing girl who liked to go camping and horseback riding. She had many friends and pets. (32RT 4968-4971; Peo. Exh. 1 – Melissa's school picture, taken in September or October 1994.) The jury was shown additional photographs of Melissa and her family, from the time she was born. (32RT 4972-4981; Peo. Exh. 2-16, 18.) Her death was especially hard for her grandparents. (32RT 4972-4981.)

Linda closed off Melissa's room after her death and had just begun cleaning it out. (32RT 4982.) She thought about her every day and about the fact that she would never see her get married, have children, become a teacher, graduate from junior high and high school, and the like. (32RT 4982-4983.) Melissa's murder changed both Linda and her husband. On her birthday, they might visit her at the grave and sit and talk to her for awhile. The Middletons no longer celebrated Thanksgiving or Christmas; they did not want to be around during that time, because it was too hard. (32RT 4983-4984.) The Middletons' son moved to Spokane, Washington, and said he would never be able to live in California again. (32RT 4984.) The Middletons sought psychiatric help for about a year after Melissa died, and they eventually found a support group of parents with murdered children. (32RT 4984.) Linda did not feel that it ever would become easier. (32RT 4985.)

Robert testified about Melissa's personality and talents. She played the clarinet and alto saxophone in the band at school. Robert played for 30 years and taught her himself. They also bicycled together and she wrote stories that he

would critique for her. (32RT 4986-4987, 4988.) Melissa wanted to be a teacher but also felt that she was born to play music. (32RT 4988.)

The night before Melissa was killed, she was at a Girl Scout meeting, helping out with the younger girls. Robert picked her up from the meeting, and she ran up and put her arms around him. (32RT 4989.) The following morning, she was not feeling well and asked if she could stay home, and Robert said he could. Her last words to him were, "Thanks, Dad," as though he was doing her a favor. (32RT 4989.)

The next thing Robert remembered was a telephone call from his wife at around 4:00 p.m. Linda was screaming and said Melissa was dead. Three co-workers had to help him out to his car, and one of his friends drove him home. When he arrived home, it was mayhem. One of the police officers took him into the kitchen and said Melissa had been murdered. He could not understand why somebody would murder a little girl, and he still cannot comprehend it. (32RT 4990- 4991.) His life was destroyed and he had suffered from panic attacks, total despair, and thoughts about suicide. (32RT 4991.)

Robert had to live with images of Melissa being hurt, pleading for her life. (32RT 4991-4992.) The Middletons were a close family, focused on their children, and decided to stay in the house to preserve all the memories of Melissa. (32RT 4993.) He described a family vacation on the Big Red Boat at Disney World; a Girl Scout father-daughter sock hop, and another cruise through the Panama Canal. (32RT 4994-4995.) There was a Christmas parade and monument dedicated to her at school. (32RT 4996.)

Robert did not like to do things associated with Melissa any longer; he did not like to go to the movies or to Disneyland, and he did not play the saxophone anymore. (32RT 4993.) Life events like weddings and graduations were hard, because he felt cheated out of them. (32RT 4993.) One friend was so upset that he could not see Robert anymore because it was too painful. (32RT 4997.)

The hardest thing Robert had to do was telephone his parents. They can hardly talk about it. It was also very hard to make the funeral arrangements. (32RT 4993-4994.)

Two of Melissa's friends testified. Jessica Holmes had known Melissa since the second grade and lived on the next block. (32RT 5003.) They rode bikes, walked Melissa's dog, and started to build a clubhouse. (32RT 5003.) They went to school together and played in the band. (32RT 5003-5004.) Jessica's brother told her Melissa had been killed. Jessica was at home, cleaning her instrument. They went and stood on her driveway. The police were there. (32RT 5006.) After Melissa was killed, the school had a ceremony in her memory. It was a very hard experience that no one had ever had happen before. (32RT 5004.) Jessica tried to forget about Melissa's death, but it was always there, "kind of one of the lower times in your life." (32RT 5006-5007.)

Another friend, Lindsay Bryan, had known Melissa since the fourth grade and lived down the street. They rode the bus to school together and shared similar interests. (32RT 5008.) Lindsay loved to listen to Melissa play the clarinet. (32RT 5009.) Melissa loved the outdoors and animals and was very cheerful. She was one of Lindsay's best friends. (32RT 5009.) Lindsay was at school when she found out that Melissa had been killed. They had plans to do something that weekend, and at first she did not believe it. (32RT 5010.) Lindsay cried a lot. The school offered counseling, and they talked to her a little bit. (32RT 5011.) Melissa had given Lindsay her school picture the day before she was killed. (32RT 5011.)

B. DEFENSE CASE

1. Educational History

Two school psychologists and two teachers testified. Randall Knack, Ph.D., was working for the Prince William County school system in March 1980, when appellant's kindergarten teacher requested he be evaluated. (33RT 5108-5110.)

At that time, appellant was five years, five months old. He had a short attention span. He engaged in silly "acting out" behavior and erratic and unpredictable behavior patterns. He had poor peer relationships and frequently complained. (33RT 5108-5110.) He would whine, cry, kick, crawl on the floor and refuse to do work. (33RT 5129-5131.)

Knack administered the Stanford Binet intelligence test to appellant. Appellant scored in the 70 to 80 range, which is considered borderline retarded. In some areas, appellant showed high capability, and his potential appeared to be above average to superior. He was experiencing significant emotional interference and had problems with comprehension and concentration. (33RT 5113-5116.)

Knack also gave appellant the Bender-Gestalt Test. Appellant functioned below his chronological age, although it was one of his stronger tests. There appeared to be a neurological problem, and Knack suggested that appellant's parents have a pediatrician conduct a neurological evaluation. Once again, Knack concluded that significant emotional problems interfered with appellant's ability to concentrate, comprehend information, and express thoughts. At times he demanded a lot of attention and wanted to be praised, and at other times he would pull away. He had so much difficulty concentrating that it took three days to complete the testing. (33RT 5117-5119.)

Knack took a social history which indicated that appellant's behavioral problems began at age two. At age five, he was a confused boy who felt he could not meet the demands that were placed on him. (33RT 5120-5124.) Knack recommended that appellant be placed in a special education class for emotionally disturbed children, and referred him for possible neurological evaluation, and family counseling. (33RT 5120-5124.) While it is a professional practice to avoid labeling students as emotionally disturbed so early, longitudinal studies of those identified in kindergarten and first grade result in a high probability that the situation will continue into adulthood. (33RT 5125-5126.) Emotional disturbance, in the educational realm, is defined as the inability to build or

maintain peer and adult relationships which also interferes with the ability to learn in the classroom. (33RT 5126-5128.)

Appellant's parents were supportive of Knack's recommendations. (33RT 5133-5137.) He eventually was placed in a class for emotionally disturbed children, at another school. He scored A's and B's in a third grade class for emotionally disturbed children. (33RT 5135-5136.)

Susan Prather McKenzie was a math teacher at Baldwin Elementary School in Manassas, Virginia for 21 years. In 1982, McKenzie taught a class for emotionally disturbed ("ED") children from kindergarten through third grade. For a child to be placed in the ED class, he would have to be tested and reviewed by a committee. (33RT 5142-5146.)

Appellant was in the class in the second grade, for a little over a year, because he had been identified as seriously emotionally disturbed. (33RT 5147-5149.) He had imaginary fights with inanimate objects, such as his fingers or pencils. He appeared to have two different personalities and would be fighting and often appeared mad. He often did not pay attention in class and was in his own world. (33RT 5147-5149.)

Appellant was not aggressive towards the other children. Rather, he was withdrawn and kept to himself. (33RT 5150-5152.) He was a loner and did not socialize much. One of the goals was for him to interact appropriately and reduce inappropriate verbalization. He did not play with other children very much and his social skills were behind children his age. (33RT 5153-5154.) He responded to positive reinforcement and the strict structure of the classroom. The grading system was the same but students were assigned work at their ability level. For example, as a third grader, appellant was reading second grade work. (33RT 5150-5152.) McKenzie thought he was bright. (33RT 5153-5154.)

McKenzie was concerned about appellant's safety. In late winter, appellant came to school with stitches in his head; said he had been to the hospital the night before; and commented that he did not understand how he could have hurt his

head sledding, because he had a round, not a rectangular sled. School procedure at that time was to notify the principal, who in turn notified social services. (33RT 5153-5154.) McKenzie learned shortly afterwards that appellant had fallen and hit his head on a banister. (33RT 5157-5161.)

Appellant remained in McKenzie's classroom until June 1984 and finished the third grade. (33RT 5157-5161.) After that, he transferred to a private religious school. McKenzie felt that the placement was not appropriate, because the new school was religiously based and not trained to handle a child with appellant's problems. (33RT 5155-5157.) In the new school Manassas Christian School, he was placed in third grade and was doing third grade work. His grades there from third through fifth grade indicated that he was an average to above average student. (33RT 5162-5169.)

In McKenzie's opinion, appellant was among five of the most seriously disturbed children she had seen in her career. His coping mechanism was to put himself away from reality. (33RT 5155-5157.)

Becky Ott was a school psychologist at Manassas City Public Schools in 1983. Appellant was in her class at Baldwin Elementary when she evaluated him that year. In the state of Virginia, children in special education are re-evaluated every three years to determine whether they still need services. (33RT 5172-5173.)

Ott administered the Wechsler Intelligence Scale for children, the Bender Test, human drawing test and the Rorschach Test. (33RT 5172-5173.) Appellant tolerated frustration poorly, talked to himself during testing, and swatted at imaginary flies on the table. He had poor eye contact and a flat affect. He had problems recalling information read to him orally during the intelligence portion of the test. (33RT 5174-5478.)

Appellant scored average to high average on the Wechsler, with indications of higher intellectual ability. He had a great deal of difficulty with the Bender test, because it required him to perform unstructured tasks and organize ten designs on

paper. He made a face with all ten designs. There was violence in his drawings. When asked to draw a person, appellant drew a monster or robot with weapons to kill anyone who crossed its path. (33RT 5177-5178.)

Ott concluded that appellant was significantly emotionally disturbed. Based on the level of violence that she saw in the test results, she felt appellant viewed the world as very dangerous for him. When asked to draw his family, appellant said he could not do that and instead drew a robot protecting himself, revealing a strong likelihood of violence in the family. (33RT 5179-5180.)

Appellant's reality was distorted in that he viewed the world as a dangerous place and used fantasy to cope. During the stressful parts of the test, when he became frustrated, appellant seemed to begin swatting the imaginary flies, in a sense, as if to say, "go somewhere else." His emotional disturbance was so great that it handicapped his learning. (33RT 5181-5182.) Appellant seemed able to cope with routine and structure, but if given something he was not familiar with, he had difficulty. His main weaknesses were his intellectual ability, attention span, and focus. (33RT 5183-5185.)

Ott did not find appellant to be a danger to others and recommended continuance in the small ED classroom, teaching in social skill development and counseling. Like McKenzie, Ott did not feel that the move to Manassas Christian School was a good placement for him. He was one of the more disturbed children she had seen in her career. (33RT 5183-5185.)

Jack McLaughlin had been teaching for 27 years, currently at San Jacinto High School, and was working on his doctorate. He had extensive experience teaching children with learning disabilities and mental problems. He was appellant's teacher at Mt. View High School. (34RT 5341-5348.) There were never more than 60 children at a time at Mt. View and their issues encompassed the gamut from discipline problems, teen mothers, and those needing to make up credits. Appellant was there for one-and-a-half to two years, because he was 15 credits behind what he needed to graduate. His records indicated a 1.8 [C-] grade

point average from ninth through twelfth grade. (34RT 5349-5352; Def. Exh H – school records.)

McLaughlin did not know that appellant had been diagnosed at age five as severely emotionally disturbed. (34RT 5349-5352.) Appellant's enrollment form dated January 1989 and did not indicate that he ever had been in special education or received any type of counseling. (34RT 5356-5358.) McLaughlin never was informed that appellant had problems in the past. The classes at Mt. View were generally easier. (34RT 5368-5370.)

Had McLaughlin received such records, it would have red-flagged that there had been psychological testing, and he did not recall that. It would be hard to answer if appellant would have been placed in a different educational environment based on such information. McLaughlin did not know appellant had been in special classes for children with emotional issues. He had a lot of experience teaching children in mental hospitals. Depending on the illness, he took the problem into consideration as to what program and teaching method to use with the child. (34RT 5353-5355.)

McLaughlin did not know appellant had been diagnosed with attention deficit disorder (ADD) In his experience, treatment with Ritalin often helps ADD children improve dramatically. To accurately evaluate appellant's progress, McLaughlin would have had to know that he was diagnosed with ADD and had been on Ritalin. (34RT 5404-5407.) Had appellant's problems in elementary school been known, he probably would not have been admitted to Mt. View because there would have been other educational alternative programs for him. He sometimes would talk back to teachers under his breath or mumble disrespectfully. (34RT 5407-5411.)

McLaughlin met the Lintons several times and personally taught appellant. Appellant was very slow in earning his credits. (34RT 5359-5362.) Appellant was never a discipline problem at school and tended to be a loner. He barely maintained the 30 credits he needed for each semester. An exception was made

and he was allowed to stay at Mt. View until he was 19, to graduate high school. A note was sent to the Lintons, informing them appellant was behind in his credits so that they could assist in helping him complete his education. (34RT 5363-5370, 5376-5378; Def. Exh. H, p. 10.) When they were informed that he was behind, the Lintons threatened legal action. McLaughlin felt they held the teachers responsible for appellant not succeeding. (34RT 5368-5370.)

Carl Linton told McLaughlin that he wanted appellant to go to college and become an electrical engineer, but appellant could not do the work. Appellant did not interact with other children very often and did not seem to have any friends other than Montero, who also went to Mt. View. Appellant usually did not attend physical education classes. He was not prepared to attend college, but could have gone to a community college. (34RT 5371-5375.) McLaughlin's impression was that appellant had the potential but did not pay attention in class and daydreamed a lot. His SAT scores were normal. (34RT 5387-5393.)

2. Family History

Carl Linton, appellant's father, testified. He married appellant's mother, when he was 24 and she was 20. They belonged to a church called The House of Bread and attended regularly. Although they did not feel ready to start a family, peers at the church said birth control should not be used. (33RT 5196-5197.) They were married a little over a year when appellant was born. Appellant was a blue baby and had to be resuscitated after a 28 hour labor. His mother was given Demerol and Scopolamine to ease the labor. Appellant spent the first 24 hours of his life in neonatal intensive care because of his blood sugar. (33RT 5200-5201.)

The House of Bread was extremely fundamentalist and said children should not be disciplined or struck with hands, so a lot of members used spoons with scriptures inscribed on them. Carl got a spoon which he inscribed with scriptures about discipline of young children. He began using the spoon when appellant was between one and two years old. The spoon was supposed to be used on the child's

bottom when he transgressed authority; both Carl and his wife used it. (33RT 5198-5199.)

Appellant was a joy the first year of his life. (33RT 5202-5204.) Carl's temper began to get out of control when appellant learned to walk. He punished appellant with the spoon when he lost his temper. Afterwards, Carl felt crushed, ashamed and a failure. He hit appellant so hard sometimes that he broke to spoon or bruised appellant. Sometimes he hit appellant on the back and shoulders. Afterwards, Carl would try to make up with appellant and explain that he had been wrong and would try not to do it again. (33RT 5200-5201.)

Carl lost his temper sometimes once a month and sometimes every other day. Once he lost his temper, it was hard to control. Appellant started talking shortly before his second birthday and had problems understanding Carl, which continue to the present. Carl reacted physically and verbally when he lost his temper, but not always at the same time. (33RT 5202-5204.)

One instance in which Carl went beyond corporal punishment was mentioned in court. It was snowing, and Carl gave appellant a specific time to come home, which appellant exceeded. Carl called appellant from the door, and appellant did not respond. Carl screamed at the top of his lungs, and appellant came to the door, but Carl was in a rage at that point. When appellant got to the door, Carl grabbed him by the hair and pulled him in. Appellant tripped on the rug or step and banged his head on the iron portion of the banister. (33RT 5202-5204.)

The cut appeared to be about an inch long and Carl thought it would heal. When appellant's mother got home, she said it needed stitches. Carl feared the authorities would file an incident report on him and take appellant away. Appellant's mother took him to the hospital. (33RT 5205-5206.) Pursuant to the recommendations of Ott and Knack, the Linton family went to family counseling at three different times. Carl felt that it did not help. (33RT 5219-5221.)

In 1992, when appellant was 15 or 16, another incident of abuse occurred. They were visiting appellant's mother's father. Stacey was screaming at appellant. Carl saw appellant reach over and grab Stacey by the throat. Carl went into a rage, grabbed appellant by the throat, just about lifting him up, and said, "See, this is how it feels. Don't do that." Appellant started babbling incoherently, knocked Carl's hand away and ran out the door, continuing to scream and babble. (33RT 5205-5206.) Appellant was gone the entire night. (33RT 5207-5209.)

As a child, appellant had trouble communicating. This in turn frustrated Carl, who would react sometimes by hitting appellant. Appellant's communication skills have improved drastically since going to jail. He also showed steady improvement since he started taking Ritalin in 1985. (33RT 5207-5209.) There was a dramatic change when he was placed on Ritalin; he could do his homework in 30 to 45 minutes, instead of hours. He stayed on Ritalin for a number of years but then developed side effects such as hand and internal tremors. Some naturopathic remedies were attempted but nothing worked as well as Ritalin. After he went off the Ritalin, some of the old problems returned. (33RT 5213-5216.)

Carl was associated with a research program investigating Dilantin, and he gave some to appellant. Appellant seemed to fit some of the indications for Dilantin: Lack of concentration, flat affect, lack of cognition, learning disabilities, and depression. Carl also thought Dilantin could help him because sometimes the rages Carl experienced felt like seizures. Carl and appellant went on a trial of Dilantin. After 30 or 90 days, there were no noticeable positive results, so they discontinued the program. (33RT 5219-5221.)

Appellant's first year at Manassas Christian was extremely difficult. The Lintons had to tutor appellant every night. Appellant graduated high school from Mt. View School, a continuation school in San Jacinto. In his last semester, he earned five A's and two B's. He attended Mount San Jacinto Community College

for a quarter and a half before dropping out. He said he was tired of school. (33RT 5210-5216, 5240-5243.)

Carl tried to teach appellant to drive. Appellant had a learner's permit but not a driver's license. He took the written test four times and the behind-the-wheel test once, at age 19. He had odd jobs. Carl paid him $40 per week to do light housekeeping and baby-sit Stacey, who was 12 years younger. Appellant also took care of the Middleton's animals when they were on vacation. (33RT 5213-5218.) Both of the Lintons worked throughout their children's lives. (33RT 5217-5218.) Carl pressured appellant to get a job, but he never got one. Appellant did not have a lot of confidence, although he was a teacher's aide, played in the band, and took Tae Kwon Do and karate through high school. (33RT 5247-5249.)

In 1994, appellant did chores, played games such as Nintendo, was involved in a weekly role-playing thing, watched television, read and slept. (33RT 5213-5218.) Appellant was involved in the role-playing game of Dungeons and Dragons, every week with a group in Hemet. (33RT 5247-5249.) Stacey was a completely different type of child from appellant. Appellant loved Stacey and took excellent care of her. (33RT 5217-5218, 5222-5223.) Stacey could be very aggressive and would tell on appellant. Half the time, he would "catch hell" and half the time he would not. Appellant rarely stood up for himself, which frustrated Carl. He never saw appellant hurt anyone. (33RT 5222-5223.)

Appellant was very compliant to Carl's demands and said and acted as though he was afraid of Carl. (33RT 5235-5238.) He was loving towards Carl, his mother, his sister and his grandmother. He was loyal and always had been a good boy. He misunderstood instructions. He never hit anyone in the family. (33RT 5235-5238.)

Carl did not notice any signs that appellant was using drugs. Carl smoked marijuana on occasion but not in front of appellant. Appellant was not given access to the movies and pornography in the Lintons' bedroom. He was physically abused by Carl, but never sexually. As a child, appellant was given

aspirin suppositories because he could not keep any oral medicine down. (33RT 5244-5246.)

Carl was still working on his temper problem. When appellant was 17 or 18, Carl punched him in the stomach and knocked the wind out of him. (33RT 5250-5253.)

Lawrence Linton, Carl's younger brother and appellant's uncle, testified. Lawrence lived two miles away from the Lintons when they were first married and saw them frequently. Carl had a hair-trigger temper and often lost control. He lost his temper with appellant when appellant was still an infant. (34RT 5256-5258.) Carl is the kind of person who goes overboard and is fanatical one way or another; for instance, he objected to standardized medicine and organized religion. (RT 5256-5258.) Lawrence thought Carl's involvement with The House of Bread was good for him. In the recent past, Carl had used drugs in high school and in the Navy, leading to his discharge. Carl was irresponsible but not a criminal. (34RT 5259-5261.)

From the time appellant was two-and-a-half in 1974, Lawrence saw the Lintons beat appellant on the buttocks with a wooden spoon with Biblical scriptures on it any time he did something of which they did not approve. Carl's mother, Alice, was very opposed to the use of the spoon and interceded after seeing bruises on appellant's body. Appellant was beaten for not conforming to what his parents wanted. (34RT 5259-5261, 5282-5284.)

Appellant would be locked in his room if he was cranky or doing something his parents disapproved of. (34RT 5266-5268.) Alice threatened to have appellant taken away if there was any more evidence of abuse. (34RT 5288-5292.) Lawrence felt Carl had extreme views on how he raised appellant and that his irresponsibility and inconsistencies were very damaging. After beating appellant, Carl would hug him and tell him he loved him and was sorry. (34RT 5274-5275.) Carl told Lawrence that he was bisexual. Lawrence never saw signs

of sexual abuse with respect to appellant. Carl's wife did not allow any pornography or pornographic movies in the house. (34RT 5293-5296.)

As a child, appellant was quiet, not outspoken or demanding. He was obedient to Carl. The Lintons were very strict with appellant, to the point of physical abuse. They spent one to two years as members of The House of Bread and then totally went in the opposite direction and stopped going to church. Lawrence saw his mother take appellant to church. (34RT 5269-5270.) Carl started using marijuana again. (34RT 5288-5292.)

Lawrence recalled a time when the Lintons left appellant, age two, home alone in his crib and went out to the movies. When they returned home, appellant was crying. (34RT 5262-5265.) Appellant was not able to put sentences together and converse until he was five or six, and he was not toilet trained until he was about six. (34RT 5262-5265.)

The Lintons moved five or six times after appellant was born and appellant attended several different schools. (34RT 5271-5273.) Lawrence helped the Lintons move to California. He visited on Labor Day and Thanksgiving 1993 and spent time talking to appellant. Lawrence cherished those times, because appellant really opened up. (34RT 5266-5268.) He stayed with the Lintons for three weeks after Labor Day. (34RT 5276-5278.)

Lawrence observed that appellant baby sat Stacey, played video games, and played Dungeons and Dragons. He did not see appellant interact with children his own age. The first day the Lintons moved in, Melissa Middleton came over and became fast friends with Stacey. Melissa was at the Linton house quite often. (34RT 5276-5278.) On one occasion when he was visiting in September 1993, Lawrence saw Carl shove appellant against a brick wall and shake him for not taking the trash out. Afterwards, Carl hugged appellant and said he was sorry. (34RT 5276-5278.)

The Lintons treated Stacey completely differently from appellant. She was never hit or yelled at. Appellant loved Stacey and seemed to have no animosity

towards her. He was a good kid and was never mean to any person or animal. The murder of Melissa was totally out of character for appellant. His best qualities were his unconditional loyalty and love. Appellant had matured while in prison and now acted like a man. (34RT 5279-5282.)

Diane Sams, Carl's sister and appellant's aunt, testified. She and Carl had been close as children but after he went to college and the Navy, they drifted apart because of lifestyle differences. (34RT 5301-5302.) Diane saw appellant at her mother's home every month and did not approve of how he was treated. He was neglected and not kept clean – he was not bathed and his diaper was not changed very often. The Lintons referred to appellant as "it" and would not permit baby talk. Appellant was slow at speaking and probably could not form a sentence and be understood until he was five. (34RT 5303-5305.)

Diane thought appellant was disciplined too harshly when he was too young to understand what he had done wrong. She saw the wooden spoon used. (34RT 5303-5305.) Appellant was very passive and did not react to the discipline. He did not appear mean. He responded to affection when Diane was affectionate towards him. He spent some time with Diane and her husband when he was little, and they took him to a museum. He was very easy to deal with and did not misbehave. After the family moved to California, appellant visited Diane in Virginia. (34RT 5306-5311.)

The Lintons treated Stacey very differently, as if they were not happy when appellant was born and Stacey was the answer to their prayers. He was shunted aside when Stacey was born. At Easter 1992, the Lintons visited. Appellant tried to be part of the adult's conversation. Every time appellant would try to say something, Carl would direct attention back to Stacey. After that, he stopped trying to be part of the conversation. (34RT 5312-5313.)

Carl did everything to the extreme. He would find an obsession and follow it wholeheartedly. He was obsessed with psychedelic music, then born-again Christian religion, then holistic medicine. He worked as a respiratory therapist.

Diane's mother is the person to whom appellant is the closest in the family. She writes letters and speaks to him on the telephone. Appellant was always a kind and good boy. (34RT 5314-5315.) His best qualities were his loyalty, sweetness and generosity. He was a man now and had a confidence and personality that was not there before. He was able to express himself and to understand others now. (34RT 5316-5317.)

Alice Linton, appellant's father's mother, lived near the Lintons when appellant was an infant and visited frequently. For the first couple of years of his life, she felt the Lintons were immature and neglected him. He was not a problem baby. (35RT 5472-5474.) He did not exhibit behavior that attracted negative attention, but was disciplined with the spoon many times. Alice tried to intervene. The Lintons attended The House of Bread church. Appellant was small for his age and was not able to carry on a conversation until he was three-and-a-half to four years old. (35RT 5475-5477.)

Carl had a quick temper and hit appellant with the spoon many times. Alice saw bruises on appellant's back, shoulders, and thighs. On one occasion, she told the Lintons that if there were any more bruises, she would report them to the authorities. After Carl's temper subsided, he would hug appellant. (35RT 5478-5479.) Stacey was loved very much and treated very differently from appellant. She was pampered and catered to, while appellant was "subjected." Her speech developed sooner. Appellant loved her and never did anything mean to her. (35RT 5480-5481.)

The Lintons moved from Virginia to California because Carl felt he had some good business connections. Alice financed the move. (35RT 5480-5481.) Since that time, appellant came back to visit, once alone and once with the family. Alice visited California once a year and stayed at the Linton's home. The Lintons used marijuana, but only in their bedroom. Alice met Melissa. (35RT 5482-5484.) Stacey went to Melissa's house often and they appeared to be very close friends. (35RT 5488-5489.)

In California, appellant had to take care of Stacey while the Lintons worked. Alice felt they continued to play favorites with Stacey after the move to California. When Stacey yelled, appellant would get in trouble. The only friend Alice recalled was Montero. She was concerned about appellant's introverted life and suggested tae kwon do to help with his self-confidence and also because of his small stature. He was a good kid, but shy. (35RT 5485-5487.) Alice was concerned when appellant was a child that he was so introverted that he would not make it in the dog-eat-dog world, but she never thought appellant would murder. (35RT 5488-5489.)

Alice loved appellant very much and felt he loved her. She intended to continue to visit him after he went to prison. She put money in his account, and he sent her cards on every occasion. She sent him $50 once, and appellant used the money to buy "goodies" for other inmates. Since being in jail, appellant had matured and appeared to have more self-confidence. (35RT 5490-5492.) She spoke to him weekly on the phone. He felt dreadful about Melissa. Melissa was pretty at 12 years old and a normal young man might have been interested in her. Appellant did not display any interest in her. (35RT 5492-5494.)

Carl was raised in a strict environment, but not physically abused. Carl's father used a belt to hit. Alice did not know Carl was using drugs in high school. Lawrence was involved in burglarizing residences when he was younger but is now employed. (35RT 5495-5497.) Alice would not call her family dysfunctional but would characterize Carl's family as such. (35RT 5498-5499.)

3. Involvement in Live Action Role-Playing Games

Robert Osborne, age 45, was a computer support technician retired from the Air Force. He met appellant in 1990 after appellant responded to an ad for people

interested in role-playing games.[5] The club was still in operation. In 1990, the club met every Saturday, from noon to midnight. Osborne spoke with appellant's mother to obtain permission for him to become a member of the club. There were seven members, including appellant, and appellant was the youngest. (35RT 5418-5421.) The other men in the group were three men in the Air Force, one in the Army, one ex-Marine, and one other man. (35RT 5422-5423.) Other high school students were allowed into the group from time to time. (35RT 5448-5450.)

Osborne's role was Dungeon Master, and he was considered a leader. Appellant was a follower and respected authority. (35RT 5422-5423.) Osborne asked appellant why he was in continuation school, because it was the group's policy that high school students maintain a B average. (35RT 5435-5438.) At their first meeting, it became clear that appellant had book knowledge of gaming but had not played with experienced players. He needed help in generating character. (35RT 5439-5440.)

Anybody in the group eventually was able to talk appellant into doing something he might not have wanted to do in the first place. In one incident, the

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[5]"A **live action role-playing game (LARP)** is a form of role-playing game where the participants physically act out their characters' actions. The players pursue goals within a fictional setting represented by the real world, while interacting with each other in character. The outcome of player actions may be mediated by game rules, or determined by consensus between players. [para.] The first LARPs were run in the late 1970s, inspired by role-playing games and genre fiction. The activity gained international popularity during the 1980s, and has diversified into a wide variety of styles. Play may be very game-like, or may be more concerned with dramatic or artistic expression. The fictional genres used vary greatly, from realistic modern or historical settings to fantastic or futuristic eras. Production values are sometimes minimal, but can involve elaborate venues and costumes. LARPs range in size from small private events lasting a few hours to huge public events with thousands of players lasting for days." ("Live Action Role Playing Game" in *Wikipedia*)

group talked him into having his character do something different than he wanted within five minutes, to the point that he believed he wanted to do it in the first place. Appellant did not appear to have a social life outside of the gaming sessions. He was overly shy and lacked confidence. (35RT 5424-5427, 5435-5438.) The group teased appellant in a friendly way, although one member went too far and Osborne put a stop to it. (35RT 5428-5429.)

Appellant appeared to be a "whiz" at math. He usually chose to play a fighter character. (35RT 5444-5450.) Appellant took Tae Kwon Do lessons with Osborne's son, who was 16 at the time. (35RT 5428-5429.) Appellant progressed until the brown belt. Osborne met Carl Linton at some of the belt progression competitions. Carl seemed to notice what appellant did wrong rather than what he did right. Appellant seemed fearful and submissive around his father. The only complaint appellant made about his home life was having to baby sit. (35RT 5430-5434.) He tried hard for improvement in gaming and Tae Kwon Do. (35RT 5451-5452.)

In 1991 and 1992, Osborne was sent to Iceland on an Air Force assignment. (35RT 5439-5440.) When Osborne left, appellant's confidence had increased and he was able to say what his character would do without being asked. He was playing the cleric, a harder class to play. When Osborne returned, appellant seemed to have returned to a confused state, concerned whether or not his character would do something to meet with approval. Appellant did not handle pressure well and took the longest amount of time to figure out what his characters would do. (35RT 5441-5443.)

During the last few months of 1994, appellant behavior started to change. He would leave the game around 9:00 or 10:00 p.m. (35RT 5448-5450.) When Osborne asked what was going on, he said he had a friend to meet with. Osborne did not think appellant was using drugs, although sometimes he showed up at gaming sessions with dark circles under his eyes, as if he had not been sleeping.

Appellant became angry a few times but got it under control; it usually happened when someone was teasing him. (35RT 5451-5452.)

Osborne asked appellant why he was not dating, and appellant replied that he was not ready. Sex was not involved in role-playing games. Appellant's characters were usually lawful, good-natured and spoke up for morals. He could distinguish right from wrong and did not have any confusion between reality and fantasy. Osborne continued to correspond regularly with appellant after appellant was in jail. (35RT 5456-5459.)

ARGUMENT

GUILT PHASE ISSUES

I.

THE PROSECUTION'S HOUSE OF CARDS: INVOLUNTARY CONFESSION AND RELATED ISSUES

A. The Trial Court Violated Appellant's Right to Due Process and Against Self-Incrimination Under the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, Section 7 of the California Constitution, When It Overruled Legal Challenges to Police Interrogation Tactics Which Vitiated His *Miranda* Waiver, Overbore His Will and Rendered His Confession Involuntary.

1. Evolution of a False Confession From "Water Under the Bridge" To "I Tried To Reap Her": How the Prosecution Got Its Special Circumstance

During deliberations, the jury sent a note that, "A juror believes the entire interview is a lie and is interjecting speculation. Where do we go from here?" (31RT 4844) The note reveals that at least one juror questioned the reliability of appellant's interrogation. The juror[s]' skepticism had ample support in the record.

"'[C]ustodial police interrogation, by its very nature, isolates and pressures the individual,' [Citation], and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see e.g., Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C.L. Rev. 891, 906-907 (2004)." (*Corley v. United States* (2009) ___ U.S. ___, ___ [2009 WL 901513, slip opn. at p. 11].) All roads in this case lead back to the same core issue about which the Supreme Court in *Corley* was so concerned: Whether the police and the district attorney violated appellant's *Miranda* rights and coerced a confession from him about a prior crime in which he was alleged to have entered the Middleton house late at night and tried to rape Melissa. The prosecution used the confession about

the earlier incident to demonstrate intent to commit sexual assault or rape when weeks or months later, appellant strangled and killed Melissa, giving rise to this capital prosecution.

The authorities' repeated false assurances that any prior sexual incident between appellant and Melissa was "water under the bridge" vitiated his *Miranda* waiver and caused it to be neither knowing nor intelligent. (*Miranda v. Arizona* ((1966) 384 U.S. 436.) Appellant's confession also was coerced and may have been false because once he purported to waive his *Miranda* rights, the police employed tactics that induced him to confess to the prior incident that may not have occurred or may not have occurred in the manner described. After a day of interrogation, appellant wearily whispered, "I tried to reap [sic] her ... two months ago...whatever..." and a capital case was born. (Mot. to Supp., Exh. 3, at 5 SCT 233)

The trial court's decision to admit the confession violated appellant's privilege against self-incrimination and right to due process and fundamental fairness, because the confession was extracted in violation of appellant's rights and because the interrogation tactics also yielded a result that lacked reliability. (U.S. Const., Fifth, Eighth and 14th Amend.) Once admitted, the confession of the prior act was incurably prejudicial because the prosecution argued and the jury was instructed that it was cross-admissible to prove appellant's intent and attempt to rape Melissa on the morning he strangled her. Appellant's conviction and sentence should be reversed based on admission of the confession. (*Chapman v. California* (1967) 384 U.S. 18, 24.)

2. Standard of Review

"Without exception, the [Supreme] Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination. [Citations]" (*Miller v. Fenton* (1985) 474 U.S. 104, 110.) The voluntariness of a statement is determined by an assessment of the "totality of the

circumstances" surrounding the interrogation. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 286 [111 S.Ct. 1246]; *Colorado v. Spring* (1987) 479 U.S. 564, 573 [107 S.Ct. 851].) "In reviewing the trial court's determinations of voluntariness, [the reviewing court applies] an independent standard of review, doing so 'in light of the record in its entirety, including "all the surrounding circumstances--both the characteristics of the accused and the details of the [encounter]"....' [Citations]" (*People v. Neal* (2003) 31 Cal.4th 63, 80.)

The reviewing court "must examine the uncontradicted facts surrounding the making of the statements to determine independently whether the prosecution met its burden and proved that the statements were voluntarily given without previous inducement, intimidation or threat. [Citations] With respect to the conflicting testimony, the court must 'accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' [Citation]" (*People v. Hogan* (1982) 31 Cal.3d 815, 835; accord, *People v. Anderson* (1990) 52 Cal.3d 453, 470, *People v. Smith* (2007) 40 Cal.3d 483, 502)

The validity of the suspect's waiver of *Miranda* rights, which is affected by the voluntariness of the statement, must be demonstrated by a preponderance of the evidence. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168-169 [107 S.Ct. 515].)

"...'In order to introduce a defendant's statement into evidence, the People must prove by a preponderance of the evidence that the statement was voluntary. [Citation.] ... When... the interview was tape-recorded, the facts surrounding the giving of the statement are undisputed, and the appellate court may independently review the trial court's determination of voluntariness.' [Citation]" (*People v. Perdomo* (2007) 147 Cal.App.4th 605, 614, citing *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)

3. Factual and Procedural Background

a. Appellant's Coerced Confession: Prior Attempted Rape

On the evening of November 29, 1994, not long after Melissa Middleton was found dead, prosecuting District Attorney William Mitchell and Detective Glenn Stotz walked next door and talked to appellant Daniel Linton in his bedroom. At that time, they claimed, appellant was not a suspect, and they did not *Mirandize* him. (Mot. to Supp., Exh. D, at 5SCT 67) Mitchell assured him that any prior sexual encounter or activity with Melissa was "water under the bridge," and not grounds for appellant to be legally in trouble:

> DDA Mitchell: "Like, if – if you and Melissa had had some problems sexually in the past, and you're trying to hide that, that might set it [lie detector] off, so you'd have to tell us that ahead of time. What we're interested in, the murder, of course, we don't care about anything else that happened, ... that's water under the bridge now." (5SCT 86)

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On the following morning of November 30, 1994, when the police picked appellant up at his home, he was sobbing and almost immediately admitted that he killed Melissa. (9RT 1066-1068) The police wanted more. They had their minds made up that appellant sexually molested Melissa, or tried to, and steered their investigation to fit that theory, which in turn would render the homicide eligible for the death penalty. When appellant doubted that he was involved in a prior late-night attack on Melissa, both the district attorney and the police again assured him that it was "water under the bridge." (5SCT 81, 86.) Stotz read appellant his *Miranda* rights, and appellant signed a form stating that he understood his rights and wished to talk to the police, but the damage had been done before the interview commenced. (5SCT 4)

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By the late afternoon of November 30, 1994, appellant had been questioned by two detectives, two deputy district attorneys, and a clinical psychologist retained by the district attorney to evaluate him. (See 2RT 144-146) He likely was exhausted, hungry and sleep-deprived. He had been assured repeatedly by the district attorney and the police that any prior incident was "water under the bridge" and not subject to criminal prosecution. (See 5SCT 8, 9, 34, 63, 81, 86; 2RT 144-146) He had denied at least 50 times that he intended to sexually assault Melissa on either the day he strangled her or any prior occasion. Around 4:00 p.m., after yet another promise that if he would just confess the interrogation would be over, appellant recanted his denials and finally provided the confession Detective Stotz was looking for:

Detective Stotz:	"The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way."
Daniel Linton:	"So I have to say it out loud?"
Detective Stotz:	"Yes, you do."

After more discussion, appellant whispered, "I tried to reap [sic] her ... two months ago...whatever..." (Mot. to Supp., Exh. 3, at 5 SCT 233) Shortly after 4:00 p.m., the interview concluded and appellant was booked. (6RT 692-694; 9RT 1088-1090) At Rodriguez's direction, appellant telephoned his parents. (9RT 1091-1093) The police never were able to persuade appellant to admit that he was attempting to rape Melissa when he killed her, but as evident from the last sequence of questioning, they did extract a confession as to the prior incident that he "tried to reap [sic] her ... two months ago... whatever ... whenever."

b. Motion to Suppress - Hearings

On May 28, 1997, at the close of the preliminary hearing, the defense brought a motion to dismiss pursuant to Penal Code section 995, alleging that the police interrogation of appellant was coercive and based on false promises of leniency. The court, the Hon. W. Charles Morgan presiding, heard argument and denied the motion. (1RT 104-114)

On February 6, 1998, the defense filed a motion to suppress appellant's statements to the police. (1CT 189-192 [Def. Mot.]; 2CT 498-504 [Def. Supp. Pts and Auth.]; 3CT 811-820 [Def. Reply]; 2CT 450-453 [Pro§ Resp.]; 3CT 773-779 [Pro§ Opp.]; 2RT 137-190; Def. Exhs. A [tape], B [*Miranda* form], and C [transcript, 1 page], all made part of the record at 2RT 173-175.)

On February 27, 1998, the court, the Hon. Robert J. McIntyre, presiding, stated that it would consider all previous hearings, including the preliminary hearing, in considering appellant's motion to suppress. (2RT 137-139) Hearing commenced on the motion to suppress. After hearing the testimony of Craig Rath, Ph.D. (2RT 144-161) and Detective Glenn Stotz (2RT 162-184), the court decided that the matter should instead be heard as a pretrial in limine motion and postponed the hearing. (1 CT 162-177, 185-187, 198)

On October 27, 1998, the hearing resumed before the trial court, the Hon. Gordon Burkhart, presiding. The court heard the testimony of Detective Stotz, Deputy District Attorney John Chessell, Dr. Rath, Detective Michael Lynn, and Sergeant Frederick Rodriquez. (5RT 532-1198; Exhibits set forth in Endnote, *post.*, all marked and admitted into evidence, at 4CT 833; 9RT 1199-1205.) The court denied a defense request that Deputy District Attorney William Mitchell's testimony during the August 17, 1998 recusal hearing be part of the record of this hearing. (9RT 1169-1197)

c. Motion to Suppress - Denial

On November 9, 1998, the trial court heard argument from the parties and ruled, "I am going to deny the motion. And again, without going into a lot of reasons, I think that the statements are admissible. I think they are free and voluntary. I don't think his will was overborne. I don't see a violation of the due process provisions of the various Bill of Rights provisions that you've referenced, including the Fourteenth Amendment. [para.] So the – the statement will be admitted. And I feel that, for the reasons – for the most part, for the reasons stated by Mr. Mitchell, I am denying the motion. Again, without spending a lot of time going over it, I'm simply adopting his argument as my reasons." (RT 1343; see defense argument at RT 1214-1297; prosecution argument at RT 1297-1341)

d. Interrogation Evidence Presented to the Jury

Appellant's taped interviews with Detective Stotz, Sergeant Rodriguez and District Attorney Chessell were played for the jury and admitted. (Peo. Exh. 15A [tape] played for the jury; Exh. 15B [transcript], at 12CT 3286-3369) His interview with Dr. Rath also was played and admitted. (Peo. Exh. Peo. Exh. 26A [tape], 26B [transcript], at 12 CT 3389-3431) The prosecution also called Detective Stotz, Deputy District Attorney John Chessell, Dr. Rath, Detective Michael Lynn, and Sergeant Frederick Rodriquez, all of whom testified about the interrogation. (5RT 532-1198; Exhibits marked and admitted into evidence, at 4CT 833; 9RT 1199-1205.)

e. Prosecution Theory of the Case in Closing Argument

As the foregoing makes clear, appellant finally confessed to sexual motivation for a prior incident -- but never confessed to sexual intent or attempt during the incident when he strangled and killed Melissa. The fact that the authorities were not able to extract a confession that appellant killed Melissa while trying to rape or sexually assault her undoubtedly shaped the prosecution theory

that the prior incident was cross-admissible to prove appellant's intent to commit sexual assault on the morning he strangled Melissa. To that end, the prosecution contended:

- On November 29, 1994, appellant strangled Melissa with the special circumstance that the murder occurred during a burglary, attempted rape, and attempted lewd act on a child (Count 1). Sometime two weeks or two months before the murder, appellant broke into the Middleton house, got into Melissa's bedroom around midnight and attempted to sexually assault and strangle her (Counts 2, 3, 4). (See Information, at 1CT 20-22; Pro§ Closing Arg., at 30RT 4621-4641)

- The evidence that appellant intended to rape or commit a lewd act on November 29 was (1) Melissa's shorts were partially unzipped and (2) appellant's semen was found on the side panels (but not the crotch) of a pair of her underpants, found in the trash can under the Lintons' kitchen sink. (See Pro§ Closing Arg., at 30RT 4615, 4621, 4633-4634)

- The evidence that appellant intended to rape or commit a lewd act before November 29 was the trial testimony of Melissa's parents, Linda and Robert Middleton that on or about October 1, 1994 (the first cold evening of the fall, per Robert), **two months** before the homicide, Melissa screamed and told them someone had appeared in her bedroom and tried to choke her. (See Pro§ Closing Arg., at 30RT 4637)

- The Middletons' recollection is corroborated by the testimony of Joseph "Joey" Montero, who was staying with the Lintons and recalled that about **two weeks** before the homicide, Robert stopped by the window to ask if Joey had seen anything. Montero further testified that Daniel arrived home,

out of breath and excited, shortly after Montero talked to Robert. (See Pro§ Closing Arg., at 30RT 4745-4746)

- The Middletons' testimony also is corroborated by the confession of appellant, after a day of interrogation, he had tried to "reap" [sic] Melissa **two months earlier, "whatever" time the detectives said**. His intent to commit rape or a lewd act on November 29 is proved by the prior incident, which is a charged offense and also cross-admissible to prove his intent on November 29. (See Pro§ Closing Arg., at 30RT 4622, 4624-4625)

f. Verdict

After several days of deliberations, the jury found appellant guilty of all counts and found true the special circumstance – that appellant murdered Melissa while engaged in the commission or attempted commission of first degree burglary (Pen. Code, §§ 190.2(a)(17)(vii), 459); Rape (Pen. Code, §§ 190.2(a)(17)(iii), 261(2)); and Lewd Act by Force with a Child (Pen. Code, §§ 190.2(a)(17)(v); 288(b)). (12CT 3441-3442 [Minute Order]; 13CT 3589-3604 [Verdict]; 31RT 4885-4889.) The verdict indicates that the jury ultimately decided that appellant's attempt to rape or sexually assault Melissa when he killed her was proved by his admission that he tried to rape her during the prior incident. The prosecution had succeeded in bootstrapping appellant's confession about the prior incident onto the foundation for the special circumstance.

4. Governing Law and Application

a. The Interrogation Of Appellant In His Bedroom On the Evening Of November 29, 1994 Was Custodial and Required Suppression Of His Responses.

On November 29, 1994, at approximately 8:00 p.m., Detective Glenn Stotz returned to appellant's house with District Attorney William Mitchell. Appellant's

parents were in the house. Appellant was told he was not under arrest and had no obligation to speak to Stotz and Mitchell. Stotz did not tell appellant that this interview was being tape recorded. Appellant agreed to talk. (Mot. to Supp., Def. Exh. D, at 5SCT 67-68; RT 2756-2757; see RT 2756-2762, 2766-2767, 2847-2848) The interrogation that followed between Stotz, Mitchell and appellant was custodial, but they did not read him his *Miranda* rights. The fruits of this first segment of appellant's interrogation should have been suppressed.

In *United States v. Craighead* (9th Cir. 2008) 539 F.3d 1073, the Ninth Circuit in a case of first impression held that under certain circumstances, an interrogation by law enforcement officers in a suspect's own home turns the home into such a police-dominated atmosphere that the interrogation becomes custodial in nature and requires *Miranda* warnings. (*Id.* at p. 1077, 1082-1089, cited)

In *Craighead*, several police officers executed a search warrant at the defendant's home, looking for child pornography. At the same time, two detectives told the defendant that they would like to talk to him about the warrant, that he was not under arrest, that any statement he made would be voluntary, and that he would not be arrested that day regardless of what information he provided. (*Craighead, supra,* 539 F.3d at pp. 1078-1079) The detectives then directed the defendant to a storage room at the back of his house and proceeded to interrogate him. They did not read him *Miranda* warnings. Other law enforcement personnel were also in the house, including the FBI. The defendant testified the he felt he was not free to leave. During the interrogation, he admitted that he had downloaded child pornography on his computer. (*Id.* at pp. 1078-1079)

The Ninth Circuit in *Craighead* held that under these circumstances, the interrogation in Craighead's home was custodial, *Miranda* warnings should have been given, and all incriminating statements by Craighead during the interrogation should have been suppressed. (*Craighead, supra,* 539 F.3d at p. 1089) The court began, "In cases such as this in which the suspect has not formally been taken into police custody, a suspect is nevertheless considered 'in custody' for purposes of

Miranda if the suspect has been 'deprived of his freedom of action in any significant way.' [Citation] To determine whether the suspect was in custody, we first examine the totality of the circumstances surrounding the interrogation. [Citation] We then ask whether a reasonable person in those circumstances would 'have felt he or she was not at liberty to terminate the interrogation and leave.' [Citations]" (*Craighead, supra,* at p. 1082, citing *Dickerson v. United States* (2000) 530 U.S. 428, 444; *Thompson v. Keohane* (1995) 516 U.S. 99, 112; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442, fn. 35, and cited by *United States v. Bassignani* (9th Cir. 2009) ___ F.3d ___.)

The court in *Craighead* explained, "Applying this standard to an interrogation conducted within the home presents some analytical challenges, however, and presents an issue on which our court thus far has said little. The usual inquiry into whether the suspect reasonably believed he could 'leave' the interrogation does not quite capture the uniqueness of an interrogation conducted within the suspect's home. 'Home,' said Robert Frost, 'is the place where, when you go there, they have to take you in.' Robert Frost, The Death of the Hired Man, *in* The Poetry of Robert Frost 38 (Edward C. Latham ed., 1967). If a reasonable person is interrogated inside his own home and is told he is 'free to leave,' where will he go? The library? The police station? He is already in the most constitutionally protected place on earth. To be 'free' to leave is a hollow right if the one place the suspect cannot go is his own home. [Citation]" (*Craighead, supra*, 539 F.3d at pp. 1082-1083)

The court in *Craighead* added, "Our approach of using the 'police-dominated atmosphere' as the benchmark for custodial interrogations in locations outside of the police station is consistent with the Supreme Court's adaptations of *Miranda* to these types of locations. [Citation]" (*Craighead, supra,* 539 F.3d at p. 1083) The Court further commented, "The determination of whether an in-home interrogation was custodial 'is necessarily fact intensive.' [Citation] Although our opinion today 'should not be interpreted as an exhaustive pronouncement,'

[citation], reviewing the facts of Craighead's case and the relevant factors identified by our sister circuits, we conclude that several factors are relevant to whether the circumstances of Craighead's interrogation effected a police-dominated atmosphere: (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made. [fn omitted]." (*Craighead, supra*, at p. 1084)

Based on the foregoing criteria, appellant found himself on the evening of November 29 in a police-dominated atmosphere in his own home, in his own bedroom. He was in the presence of two law enforcement personnel, an experienced police officer and a seasoned district attorney. He was not restrained, but by virtue of the fact that he was alone with them in his room, he was isolated from the rest of his family. He was told he was not under arrest and did not have to talk, but no one told him that he was free to leave. (Mot. to Supp., Def. Exh. D, at 5SCT 67-68; RT 2756-2757) As the court in *Craighead* pointed out, where could he go that would be more private than his own room? (*Craighead, supra*, 539 F.3d at pp. 1082-1083) Under the circumstances, appellant was in custody, Detective Stotz and District Attorney Mitchell should have provided him with his *Miranda* rights, and all of his statements should have been suppressed. (*Ibid.*)

Appellant's comments during this interrogation were extremely prejudicial because they provided the context and foundation of the prosecution's theory of the case, to wit, that he had attacked and attempted to sexually assault Melissa several weeks [or months] earlier. Shortly into the interview, Stotz promised:

> Stotz: "Well, because, frankly, because she's no longer living, y'know. Nothing would happen to you if – if you had kissed her or grabbed her or touched her or even had sex with her. Y'know, at this point she's – she's no longer the victim wouldn't be her. She's no longer

with us. So nothing would happen to you. We just need to know because – okay

Linton: Okay ... Of course you know I'm not confessing to that." (5SCT 34, 81)

Later in the interview, Mitchell picked up on the assurances that Stotz had given appellant and made his "water-under-the bridge" promise for the first time. Mitchell commented that the authorities would ask people on the block who were at home that day to take a polygraph. (5SCT 85)[6] Appellant was very concerned that he would set it off because he was nervous. (5SCT 85, 86) Mitchell assured him that

> "if you and Melissa had... some problems sexually in the past and you're trying to hide that, that might set it off, so you'd have to tell us about that ahead of time. What we're interested in, the murder, of course, we don't care abut anything else that happened, if you and Melissa, she stopped coming over here, 'kay, **that's something that's water under the bridge now**." (5) (5SCT 63, 86 [Emphasis added)

Stotz claimed at the hearing on the motion to suppress that he agreed and truly believed that appellant would not get in trouble for the prior incident. (5RT 611-618, 645-646; 6RT 741-745) At that point, appellant denied that he had anything to do with Melissa's death. (5SCT 87)

Based on this false promise, appellant first told Stotz and Mitchell about a sleepwalking incident two or three weeks before, in which he woke up outside in his underwear. From the context of the questions and answers, it is clear that before being recorded, appellant must have said something about the prior

[6] Stotz testified at the hearing on the motion to suppress that he and Mitchell said appellant did not have to take a polygraph. (5RT 625-627) Stotz also testified at the hearing that he said in effect that a lie detector test would clear appellant's name. (5RT 631-636) Neither of these statements is in the interview transcript.

incident:[7] Appellant then provided a seemingly innocuous statement that several weeks earlier he woke up late at night, outside his house, wearing only his jeans and underwear:

Stotz: "You were talking about, ah, you were talking about a couple of weeks ago, two, three weeks ago and I asked you about, ah you said you woke up in the middle of the front yard.

Linton: Every once in a while . . . [inaudible]

Stotz: And this particular time you woke up in your front yard over by the garage, by the garage.

Linton: No, it was by the door.

Stotz: In the driveway or in the grass next to the, right between you and …

Linton: The driveway.

Stotz: In the driveway?

Linton: Between the grass and sidewalk.

Stotz: Okay. You woke up and about what time did you say it was?

Linton: [Inaudible]

Mitchell: When you woke up out there you just had your underwear on?

Linton: Yeah.

Mitchell: Does that happen a lot?

Linton: No…

[7] Stotz testified he did not recall anything said that was not either in the report or the transcription. (4RT 541-543)

Stotz: So you said when you woke up outside two weeks ago you had your pants on or just your underwear on?

Linton: Pants and underwear.

Stotz: Oh, pants and underwear. How about shoes?

Linton: No.

Stotz: Didn't have any shoes on – how about socks?

Linton: I don't think so.

Stotz: Did you, did you have a shirt on?

Linton: No.

Stotz: No? Two or three weeks ago when we're talking about that – would that have been around the same time, the last time you talked to Melissa, you said you talked to her three, about three weeks ago, so?

Linton: Probably, a little bit after that, yeah."

(5SCT 27-28, 52-53, 75-76)

Thus by end of the evening of November 29, the police and the district attorney already had expressly promised appellant leniency, in that any prior incident with Melissa was "water under the bridge" and that he could not get in trouble for it; and then extracted a story from appellant in which he woke up late at night, outside his house, wearing only his jeans and underwear. The authorities' promise that evening foreshadowed and facilitated a *Miranda* violation the following morning, because appellant reported the sleepwalking only after assurance that it was not something for which he could get into trouble: It is likely that the improperly-induced sleepwalking discussion at Time 1 (the evening of November 29) created a misunderstanding in appellant's mind that rendered invalid his subsequent *Miranda* waiver at Time 2 (the morning of November 30).

b. The False Promise Made By Detective Glenn Stotz and Deputy District Attorney William Mitchell on November 29, 1994 in Appellant's Bedroom That Any Prior Sexual Encounter With Melissa Was "Water Under the Bridge" Vitiated Appellant's Purported *Miranda* Waiver the Next Morning, November 30, 1994.

Appellant's waiver of his *Miranda* rights after the police picked him up the morning of November 30, 1994 was neither knowing nor intelligent. The waiver was induced the night before by statements by Detective Glenn Stotz and District Attorney Mitchell that appellant faced no legal consequences based on any prior sexual contact with Melissa, because whatever happened in the past was "water under the bridge."

The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself," the privilege against self-incrimination. (U.S. Const., Amend. 5.) In *Miranda v. Arizona* (1966) 384 U.S. 436, the United States Supreme Court held that under the Self-Incrimination Clause of the Fifth Amendment, a person questioned by the police in custody or when he otherwise was deprived of his freedom of action in any significant way must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Id.*, at p. 444; accord, see *Edwards v. Arizona* (1981) 451 U.S. 477, 482.).) If an interrogation occurs without a knowing or intelligent waiver of these rights, the trial court must suppress any statement, admission or confession occurring during questioning of the accuse. (*Id.*, at p. 444.) A statement provided during custodial interrogation is also not admissible unless the prosecution can demonstrate procedural safeguards were employed to protect the privilege against involuntary self-incrimination. (*Id.*, at p. 444.)

Thus a proper *Miranda* waiver has two aspects: the defendant must **knowingly and intelligently** waive his rights, and must also **voluntarily** waive them. (*Colorado v. Spring* (1987) 479 U.S. 564, 573 [107 S.Ct. 851].) According to the United States Supreme Court, these are two distinct dimensions:

> "[F]irst, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. (Citations omitted.)" (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135], quoting *Fare v. Michael* (1979) 442 U.S. 707, 725 [99 S.Ct. 2560].)

As noted above, on the evening of November 29, the police and the district attorney gave appellant the false assurance that any prior sexual issue with Melissa was "water under the bridge." That false promise caused appellant's *Miranda* waiver the following morning, November 30, to be neither knowing nor intelligent. The waiver was not knowing, because appellant was misinformed and proceeding on the misinformation that if he waived his rights and talked about the prior incident, he could not get into trouble for it. The waiver was not intelligent, because appellant was misled into not fully comprehending the consequences of talking to the authorities about the prior incident.

c. Appellant's Confession on November 30, 1994 was Involuntary Under the Totality of the Circumstances, Induced by the False Promise and Other Factors Creating an Atmosphere of Coercion.

Appellant's waiver of his *Miranda* rights also was not voluntary, rendering the resulting confession both involuntary and coerced.

The determination whether a waiver is "voluntary" is a separate inquiry from whether a waiver is "knowing" or "intelligent". Even when further communication is initiated by the accused, the burden still remains upon the prosecution to show that subsequent events support a finding that he waived the Fifth Amendment right to have counsel present during the interrogation. *(Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044.) To carry this burden, the waiver must be "found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *(Ibid.; Edwards v. Arizona, supra,* 451 U.S., at 486, n. 9.) If it can be demonstrated that an individual's will was overborne, the waiver is involuntary. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208, citing *Rogers v. Richmond* (1961) 365 U.S. 534, 544 [81 S.Ct. 735]; *People v. Sanchez* (1969) 70 Cal.2d 562, 572; *In re J. Clyde K.* (1987) 192 Cal.App.3d 710, 720.)

The police also are prohibited from employing coercive tactics in interrogating a criminal suspect pursuant to the Due Process Clause of the Fourteenth Amendment. When the police violate this precept, the resulting suspect statement is involuntary and inadmissible. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *Brown v. Mississippi* (1936) 297 U.S. 278; *People v. Neal* (2003) 31 Cal.4th 63, 79; *People v. Smith* (2007) 40 Cal.4th 483, 501.) If it can be demonstrated that the suspect's will was overborne by police tactics, the suspect's waiver of *Miranda* rights also is deemed involuntary. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208, citing *Rogers v. Richmond* (1961) 365 U.S. 534, 544 [81 S.Ct. 735]; *People v. Sanchez* (1969) 70 Cal.2d 562, 572; *In re J. Clyde K.* (1987) 192 Cal.App.3d 710, 720 [emphasis added]; *Lynumn v. Illinois* (1963) 372 U.S. 528, 534)

Beginning with the decision in *Brown v. Mississippi, supra,* 297 U.S. 278 , the United States Supreme Court analyzed the admissibility of confessions as a question of due process under the Fourteenth Amendment. Under this approach, the Court examined the totality of circumstances to determine whether a

confession had been "'made freely, voluntarily and without compulsion or inducement of any sort.' [Citations]." The Court has continued "to employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process." (*Withrow v. Williams* (1993) 507 U.S. 680, 689, citing, *inter alia, Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 223-227; *Arizona v. Fulminante* (1991) 499 U.S. 279; and *Miller v. Fenton* (1985) 474 U.S. 104, 109-110.)

A confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.]" (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, 147 Cal.Rptr. 172, 580 P.2d 672, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17, 20 Cal.Rptr.2d 582, 853 P.2d 1037; see also *Bram v. United States* (1897) 168 U.S. 532, 542-543, cited with approval in *Brady v. United States* (1970) 397 U.S. 742, 753-754.) "The line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. Thus, 'advice or exhortation by a police officer to an accused to "tell the truth" or that "it would be better to tell the truth" unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary.' [Citation.]" (*People v. Hill* (1967) 66 Cal.2d 536, 549, 58 Cal.Rptr. 340, 426 P.2d 908.) "When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but

may be implied from equivocal language not otherwise made clear. [Citations.]" (*People v. Hill, supra,* 66 Cal.2d at p. 549, 58 Cal.Rptr. 340, 426 P.2d 908; see also *Hutto v. Ross* (1976) 429 U.S. 28, 30; *Malloy v. Hogan* (1964) 378 U.S. 1, 7; *People v. Neal, supra*, 31 Cal.4th at p. 79; *People v. Benson* (1990) 52 Cal.3d 754, 778; *In re Shawn D., supra,* 20 Cal.App.4th at p. 210; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1483; *People v. Jiminez* (1978) 21 Cal.3d 595, 611-612.)

In this case, both the police and the district attorney repeatedly told appellant the glaring untruth that he faced no criminal consequence for any prior sexual encounter with Melissa. (See interrogation sequences above at 5SCT 8, 9, 34, 63, 81, 86.) In fact, the entire thrust of the interrogation was to get appellant to admit a sexual motive which would support a special circumstances murder prosecution. As set forth above, shortly into the interview on the evening of November 29, with District Attorney William Mitchell at his side, Detective Stotz promised that appellant could not get in trouble for something that had happened between him and Melissa in this past: "water under the bridge."

Any reasonable person would understand that the police were making serious promises of leniency to appellant that they knew or should have known they could not keep. Furthermore, the assurance that anything appellant admitted regarding his intent during the earlier event, whether it actually occurred or not, was "water under the bridge" and therefore of no consequence to appellant, directly let to appellant's statement that he intended to "reap" Melissa during that earlier incident. The actions of the police and district attorney the following day resulted in an involuntary confession.

(1) 8:45 a.m.: Questioning by Detectives Glenn Stotz and Michael Lynn, Including Repeated Assurances of Leniency

On November 30, 1994, at 8:45 a.m., Detectives Lynn and Stotz picked up appellant at his home to take him back to the station for a polygraph test. (5RT 550-551) While en route to the police station, appellant started crying, said he

wanted to confess and was brought to the station for the interview. (5RT 550-551, 654-655 6RT 739-740; 9RT 1064-1068) Lynn was alone with appellant for 20 minutes, while Stotz got the interview room ready. During that time, Lynn filled out forms. Appellant asked why Lynn was laughing at him, and Lynn said he was not. Appellant repeated that he was. There was no further conversation. (9RT 1066-1068)

Before the tape was turned on, Stotz told appellant that it would be turned on and that he would be read his *Miranda* rights. Appellant asked some questions for five to ten minutes. Stotz was in contact by telephone with Mitchell and spoke to him once in the morning and once in the afternoon to discuss strategy. (5RT 550-551; Peo. Exh. 3 at 5SCT 4; Def. Exh. C, at 5SCT 17-18) Stotz read appellant his *Miranda* rights, and appellant signed a form stating that he understood his rights and wished to talk to the police. (5SCT 4) Almost immediately, the police and district attorney interrogators repeated the false assurance that appellant faced no criminal exposure for any prior incident with Melissa, rendering in admissible his subsequent comments, admissions, and ultimate confession. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, 147 Cal.Rptr. 172, 580 P.2d 672, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17, 20 Cal.Rptr.2d 582, 853 P.2d 1037; see also *Bram v. United States* (1897) 168 U.S. 532, 542-543, cited with approval in *Brady v. United States* (1970) 397 U.S. 742, 753-754.)

At the same time, the authorities began to conflate what Melissa's parents had told them about a nightmare two months earlier, with the sleepwalking incident appellant described as having occurred two or three weeks earlier:

Stotz: "Okay, ... like I said, you're not going to get in trouble for what happened two weeks ago, okay?

Linton: Why not?

Stotz: Well because like I told you last night, that's that's water under the bridge.

Linton: That's until today.

Stotz: No, that's got nothing to do with it. I just need to know why she would see you and why she would run away from you screaming like that and it's kind of odd for a neighbor who lived there for six years..." (5SCT 8-9)

The above sequence is noteworthy for several reasons. It is the first time that an interrogator posed a question based on the assumption that Melissa's nightmare was in fact appellant's sleepwalking incident. Second, appellant did not answer the question but rather asked why he would not be in trouble for it. And third, Stotz assured appellant once again that whatever happened (if something happened), it was "water under the bridge." (5SCT 8-9)

Believing that the nightmare and the sleepwalking were one and the same, the authorities set out to persuade appellant to admit a sexual motivation for one, the other, or both. Ultimately, they only persuaded him to admit a sexual motivation for the prior incident, but it is important to recognize the length, sequence, and duration of the interrogation to understand how they got from Melissa's nightmare and appellant's sleepwalking to a prior incident in which he got into her bedroom in the middle of the night and attempted to sexually assault her.

(2) 9:45 a.m.: Questioning by Detective Glenn Stotz, Including Repeated Unsuccessful Attempts to Elicit Sexual Motivation As To Both Incidents

At 9:45 a.m., Stotz turned on the tape recorder. (See 18RT 2780-2781) Appellant was read his rights and signed the San Jacinto PD-5 waiver form. (Peo. Exh. 3 at 5SCT 4.) Appellant said he did not know Melissa was home the previous morning. (4CT 837) At around 10:00 a.m., he went into the Middleton house to look around. (4CT 837) Melissa saw him and ran to her parents' room. (4CT 837) She tried to call her parents and he pushed her down away from the phone. (4CT 837-838) She started to scream, and he grabbed her. (4CT 838-839)

He did not mean to kill her. He just wanted her to "fall unconscious" and "didn't know that it would go that far." She struggled and let out a small yelp. (4CT 839) He wrapped a cord from a stereo headphone around her neck, and it broke. He put his hands around her neck. (4CT 839-840) Everything happened very quickly and he thought he was in the house for about ten minutes. (4CT 840-841)[8]

At this point, Stotz asked appellant if he raped Melissa after she was dead:

Stotz: "You didn't rape her.

Linton: No I didn't. [] Wouldn't you have found something in there?

Stotz: Well, to be honest with you, the coroner's office checks all that. That's something they'll do probably tomorrow, okay.

Linton: I think you would have found it by now.

...

Stotz: Did you do anything after she was dead sexually [sic]?

Linton: I don't think so.

Stotz: Okay, let me ask you this, do you know what masturbating is?

Linton: I didn't do that

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[8] At an earlier point, appellant said it seemed like an hour until Melissa stopped moving. However, it appears that he was confusing the time it took for Melissa to die with the time it took for the police to arrive at his house the following morning:

Linton: "I don't know, it seemed like an hour.
Stotz: It seemed like an hour?"
Linton: But it wasn't. It seemed like a long time because it, I don't know, it seemed like a long time I had to wait for you.
Stotz: Had to wait for me?
Linton: To get to my house, this morning." (4CT 841)

Stotz: You didn't do that at all? Okay. We found her, her shorts were unzipped and unbuttoned, do you know how they got like that?

Linton: Maybe she was changing them.

Stotz: Maybe she was or she was?

Linton: I saw her in the room and she was, it looked like she was, looked like she was changing, putting jeans on or something, putting some clothes on and she was almost done."

(4CT 841-842)

After a few more questions, Stotz asked:

Stotz: "Okay. Did, did you and her, did you and her ever have sexual relationships at all?

Linton: No.

Stotz: Did you ever have sex with her?

Linton: No I didn't

Stotz: The thing two weeks ago, you didn't have sex with her?

Linton: No."

(4CT 842)

With respect to the incident alleged to have occurred two weeks earlier, Stotz asked:

Stotz: "Okay. Did you just go into the house and go up to her room, is that what happened. Or was....

Linton: No, I just kind of looked around, I didn't. . .

Stotz: Okay, what happened? Did you, what happened two weeks ago? Did you try to have sex with her?

Linton: No, I was just looking around and she woke up and she started to scream.

Stotz: And then what did you do?

Linton: I grabbed her by the throat and while she gasping for breath I tried to leave."

(4CT 843)

(3) 10:40 a.m.: Questioning by Detective Glenn Stotz and Deputy District Attorney John Chessell, Including More Unsuccessful Attempts to Elicit Admission of Intent to Commit Sexual Assault

At 10:40 a.m., Deputy District Attorney John Chessell entered the room and joined in the interrogation. (4CT 844-845; 6RT 788-791) Chessell did not recall any conversation in the 20-second delay between tapes. (6RT 828-830) When the tape was turned off, appellant stated in response to questions about sexual assault, "Won't forensics tell you everything you want to know?" (7RT 886-888) Chessell denied advising the officers to continue to interrogate appellant until appellant divulged a sexual interest in Melissa or to tell appellant he would not get in trouble for past conduct with Melissa. (6RT 836-838)

After a few more minutes of questioning, Stotz again asked:

Stotz: "Okay now, it's important for us, it's important for her family that to know, you didn't sexually assault her at all?

Linton: No I didn't." (4CT 847)

Appellant denied that Melissa wanted a boyfriend or anything like that. He said they used to wrestle and roughhouse, but that she was his sister's friend, not his. (4CT 848)

Chessell returned to the alleged prior incident and appellant repeated what he had told Stotz earlier. He said he was half asleep during the incident. (4CT 848-851) He said he had a key to the Middleton's house and had used it to get in the previous day and then thrown it in the trash. (4CT 851-852)

Stotz repeated his earlier questions about whether appellant tried to have sex with Melissa during the alleged prior incident:

Stotz: "Do you think you, do you, you went in the house a couple of weeks ago and yesterday to maybe fool around a little bit, try to have sex with Melissa?

Linton: I didn't know she was home, I, I'm honest about that. I, I did not know she was home.

Stotz: But you knew she was home two weeks ago?

Linton: Yeah.

Stotz: Do you think two weeks ago you went in the house to try to have sex with her?

Linton: No."

(4CT 852-853)

Following that, Chessell questioned appellant about the events of the previous day, and appellant repeated what he had told Stotz. (4CT 852-856) Appellant commented, "You'll find her body, you know there won't be, there's nothing in her body...I didn't do anything, and you've been asking me a lot of questions like that.... I didn't molest her." (4CT 863)

Chessell then asked appellant, again, whether he had sex with Melissa or thought about it:

Chessell: "Okay. You didn't have sex with her?

Linton: No, I didn't.

Chessell Okay. Did you at any time think about having sex with her?

Linton: No, not really. I was too busy just, I was really scared.

Chessell: Had you thought about having sex with her at some point?

Linton: Not really."

(4CT 863)

Stotz stepped in again and questioned appellant as to how Melissa's shorts came undone:

Stotz: "Daniel, did you try to take her pants off during the struggle?

Linton: No. How would I be able to choke her and take off her pants at the same time?

Stotz: Did you maybe try to take her pants off first and then and then choked her afterwards?

Linton: No.

Stotz: It's important you tell us the truth.

Linton: I didn't do anything to her.

Stotz: Okay. But did you try to though?

Linton: Not really, no. I was just busy choking her.

Stotz: How about before you choked her though, did you try to taker her, lift her t-shirt up or try to take her pants off?

Linton: We moved around a lot in the bedroom, I was trying to make her quiet but, no, I didn't."

(4CT 863-864)

After a few more questions from Chessell, appellant admitted that he unzipped Melissa's pants, but only to scare her so that she would not say anything. (4CT 864-865) Chessell asked again, "You weren't going to have sex with her?" Appellant responded, "I wasn't going to have sex with her. I was just doing it to scare her so she wouldn't say anything." (4CT 864-865)

Stotz then asked if appellant tried to take his own pants off, and the following ensued:

Stotz:	"At any time, Daniel, during the time you were at the house, did you ever unbutton your pants or unzip your pants?
Linton:	No.
Stotz:	You never exposed yourself to her?
Linton:	No."

(4CT 866)

A few minutes later, both Chessell and Stotz questioned appellant again about sexual motivation:

Stotz:	"Did you say anything to her like that you were going to if she didn't shut up or that you were going to have sex with her or that you were going to rape her to make her, to make her believe that you were going to have sex with her. Did you tell her, 'I'm going to rape you?
Linton:	I didn't say that, I didn't say I was going to rape her. I said, 'Just be quiet, I'll. I'll leave. Don't say anything...
Stotz:	But did you say anything pertaining to having sex with her to scare her?
Linton:	No, I was going to but I decided not to.
Chessell:	What, what were you going to say?

Linton: I don't know what I was going to say, I was just going to try and scare her so she wouldn't say anything so I could leave, I didn't want to bother her anymore.

Chessell: Well did you say something to her like 'all I want to do is make love to you', or 'just have sex with me and I'll go.'

Linton: No, I didn't say anything like that, I didn't say anything like that.

Stotz: Is it safe to say that we have what happened yesterday and then we have two weeks ago and and, did you just, were you kind of infatuated with Melissa? I mean... (28)

Linton: Not really."

(4CT 871-872)

(4) 12:45 p.m.: Questioning by Craig Rath, Ph.D., Prosecution Psychologist, Including Yet Another Unsuccessful Attempt to Elicit Admission of Intent to Commit Sexual Assault

At 12:45 p.m., Dr. Rath interviewed appellant. (5RT 576-578) His handwritten notes (Def. Exh. H, at 5SCT 126-134), letter to the district attorney (Def. Exh. I, at 5SCT 135-143), the interview tape (Def. Exh. J, at 5SCT 90-125) and a transcript of the tape (Def. Exh. G, at 5SCT 89-125) were marked and entered into evidence. (8RT 1019-1023) He did not re-read appellant's *Miranda* rights.

Dr. Rath's interview did not yield any additional admissions by appellant. It is significant, however, for two reasons. First, it should be viewed as an overall strategy of "softening up" appellant to confess to the prior incident and harboring a sexual intent. While Dr. Rath never repeated the already oft-quoted "water under the bridge" mantra, he did contribute to the coercive atmosphere by

repeatedly broaching the subject of appellant's sexual motivation and by the very fact that he was a mental health professional. Second, his interview presents a related issue that further underscores the fundamental unfairness of the November 30 interrogations.

Dr. Rath administered the Minnesota Multiphasic Personality Inventory (MMPI) to determine appellant's psychological functioning. During the testing, the interview tape was turned off. (8RT 914-915, 1026-1028) He concluded that appellant was socially introverted and uncomfortable with peers, chronically depressed with a flat affect, lacked social skills, and suffered from Attention Deficit Hyperactivity Disorder (ADHD). (8RT 933-937, 964-968, 974-975) He further concluded that appellant was not a pedophile or a sociopath and did not have a social personality disorder. (8RT 943-944, 990-991)

Dr. Rath interviewed appellant about the offense and a number of psychological issues, including his sexual intent towards Melissa:

Dr Rath: "Okay. Now I'm going to talk about a sensitive area because the topic is going to come up. And the topic has to do with sex. And the topic is come up because the victim's pants were found unbuttoned and unzipped and so on. They're trying to figure out what was going on there. How did her pants get unzipped and unbuttoned.

Linton: I was trying to scare her so she can quiet [sic]."

(5SCT 120)

Dr. Rath: "Did you ever have any sexual fantasies about the victim?

Linton: No.

Dr. Rath: Even when you were wrestling on the bed?

Linton: No. ...

Dr. Rath: So you were too scare [sic] to become aroused even if you...

Linton: Even if I did find her attractive, yeah.

Dr. Rath: Does that mean you kind of did find her attractive?

Linton: No, not really." (5SCT 124-125)

Dr. Rath confirmed in his testimony that appellant repeatedly denied sexual intent and said he unzipped Melissa's pants to scare her into being quiet. (8RT 1007-1012)

When the tape was turned off, Dr. Rath told appellant that the interview would not be confidential; that someone else might read it; that he did not have to answer any questions; and that he could terminate the interview at any time. (8RT 1035-1036) The interrogation process would have caused appellant to feel distress and if he knew the death penalty was pending, it would increase his stress. (7RT 949-954) Depression can affect memory and cause confusion. (8RT 978-980) Appellant said he was scared and Rath responded, "I'll get to that," meaning he would discuss the topic later. Rath was not saying he would help alleviate the fear. (8RT 997-999)

(5) 3:40 p.m.: Resumed Questioning by Detective Stotz and Sergeant Frederick Rodriguez, Including "Good Cop-Bad Cop" Technique and Further Unsuccessful Attempt to Elicit Admission of Intent to Commit Sexual Assault

At 3:40 p.m., Stotz and appellant returned to the interview room. (4CT 873) Appellant still had not admitted a sexual interest in Melissa. (6RT 775-776) Prior to continuing the interview, Stotz talked to Mitchell and said he would continue to attempt to get appellant to admit a sexual interest in Melissa. (5RT 592-593)

At 3:45 p.m., Sergeant Rodriguez joined them. (5SCT 220; 4CT 875; 5RT 590-591) Lynn and Stotz had kept Rodriguez apprised during the day. (9RT 1117-1119, 1124-1125, 1138-1141) At this point, Stotz became a little more aggressive in his questioning while Rodriguez was gentler: (5SCT 220-232; 6RT 775-776)

As Stotz continued to question appellant, Rodriguez soothed: "You know, Daniel, what ... we're doing now is you've got all this stuff that's in your mind and I know, Detective Stotz knows, and you know you just want to get it off your chest... (5SCT 232) Shortly after that, after appellant described how he strangled Melissa and she went unconscious very quickly, the following question-and-answer ensued:

Stotz:	"And then finally when she went unconscious she just kind of fell off the foot of the bed and then you propped her back up into sitting position, right?
Linton:	Uh huh
Stotz:	Why did you do that?
Linton:	I don't know"

At this point Rodriguez stepped in again and commended appellant for the "noble" act of propping up Melissa's corpse shortly after he strangled her:

Rodriguez: for	"Well, ... I think I think it was kind of a noble thing your [sic] to do actually?
Linton:	Why is that?
Rodriguez:	Well, she was on the ground, you didn't want her to be on the ground so you propped her up sitting down. That's just my own personal feeling."

(5SCT 222-223)

Rodriguez recalled also that if appellant needed to use the bathroom, he would have been allowed to do so, accompanied by an officer. (9RT 1088-1090) He also was offered food and drink, but Rodriguez did not recall if appellant ate anything. (5SCT 232; 9RT 1094-1095) Stotz told appellant, "The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way." (9RT 1147-1148)

Towards the end of the interview, Stotz accused appellant again, "I think that, at least in my mind, I think that you had sex with her." Appellant again denied knowing Melissa was home, having sex with her, masturbating, or putting his hands down her pants. Stotz asked if he tried to rape her during the earlier incident, and appellant said no. (4CT 880)

(6) 4:00 p.m.: Appellant's Stress-Compliant Answer to "Tell me the truth, and I'll turn the machine off [sic]: "I tried to reap her."

A stress compliant false confession occurs when a suspect "decides to confess as a reaction to the stress of the interrogation." (*Lunbery v. Hornbeak* (E.D. Cal. 2008) ___ F.Supp. ___ [slip opn. at p. 10].) It is a "well recognized type of confession," and "[t]his type of false confession comes about when persons who are exceptionally vulnerable to interpersonal pressure and are unable to cope with the intensity of even a non-coercive interrogation are put in a position from which it appears to them that the only way to end the intolerable pressure they are experiencing is to comply with the interrogator's demand for a confession." (*Lunbery v. Hornbeak, supra*, ___ F.Supp. at p. ___ [slip opn. at p. 10][9]

The record gives rise to a strong inference that appellant finally confessed to sexual motivation, not because it was true but rather to end the intolerable pressure of the interrogation. By 4:00 p.m., the interrogators had accused appellant of sexually assaulting Melissa at least 50 times. (See 5SCT 66-232) Six different people – three law enforcement officers, two district attorneys, and a psychologist – had been questioning him on and off since the previous afternoon, and nearly

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[9] The concept of a stress-complaint false confession was testified to in *Lunbery* by Dr. Richard Ofshe, one of the two false confession experts proffered by the defense in this case and rejected by the trial court. (*Lunbery v. Hornbeak, supra*, ___ F.Supp. at p. ___ [slip opn. at p. 10] (See argument, post.)

without a break since early that morning. At this point, appellant finally confessed, not to a sexual assault the day before, when he strangled Melissa, but rather to intent to sexually assault her during the purported incident two weeks or two months earlier.

During the last few minutes of the interview, Detective Stotz said, "The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way." (4CT 881) Detective Rodriguez added, "we know you are not telling us the entire truth and we feel, okay, that if you tell the entire truth, you'll feel better." (4CT 881) The following ensued:

Rodriguez: "Do you want a soda or something?

Linton: No.

Rodriguez: Do you want a glass of water?

Linton: No.

Rodriguez: Are you hungry?

Linton: No.

Rodriguez: Okay

Linton: So I have to say it?

Stotz: I want you to tell me the truth.

Linton: Why with the tape on?

...

Linton: So I have to say it out loud?

Stotz: Yes, you do.

Linton: I tried to reap her. [sic]

Rodriguez: When was this?

Linton: **Like the very first time like two months ago whatever whenever it was.**

Stotz: Okay. Tell me what happened.

Linton: I didn't do anything though.

Stotz: Okay, well how far did you get with her?

Linton: Not very far at all. No where.

Stotz: Did you go there today to try to rape her?

Linton: No, I didn't know she was there. I'm honest about that.

Rodriguez: Okay, so you tried to rape her – how many times

Linton: Once, and after that I didn't ever try it again.

Rodriguez: Okay, so you tried to rape her, what do you mean by tried to rape her? Did you take her pants off?

Linton: No, I didn't.

Rodriguez: Did you take your pants off?

Linton: No.

Rodriguez: Did you have a boner?

Linton: No.

Rodriguez: Okay then how can you try to rape her with without any of those things? Did you think it or did you actually do something?

Linton: I just think about it but then like when I, when I was going through with it, I decided not to cause I was, I just, it was wrong, I didn't want to, I changed my mind.

Stotz: Did a thought cross your mind yesterday when you went in there and found her there? Obviously it must have crossed your mind.

Linton: Initially, but I decided not to.

Stotz: Okay, how far into it?

Linton: Just the zipper and I just, no.

Stotz: So you didn't try to put your hands down her pants?
Linton: What? … No I didn't. No I didn't.

Stotz: So the thought crossed your mind of raping her just for a moment?

Linton: Just for a split second, yeah.

Rodriguez: Okay, why did you feel that thought, or why did you think that thought to rape her?

Linton: I don't know.

Rodriguez: Do you think it would have felt good for you?

Linton: No, I don't think it now.

…

Rodriguez: Well the, so, it came across a split second that you thought about raping her but it was after…

Linton: Yeah, but I totally disdained the thought after… Disdained the thought, I didn't finally want that… I didn't want to do it… I changed my mind.

Rodriguez: You changed your mind? Okay.

Linton: Totally.

…

Stotz: Let me ask you something, had she not, had she not put up such a fight, had she not screamed, do you think you would have continued, raped her?

Linton: No I don't think so.

Stotz: You don't think you would have raped her?

Linton: No, I don't think I would have. I had a chance the first time, didn't I?

...

Rodriguez: Have you ever kissed her?

Linton: No.

Rodriguez: Did you kiss her yesterday?

Linton: No.

Rodriguez: Did you ever want to kiss her?

Linton: I don't think so."

(4CT 881-884; highlighting added)

Shortly after 4:00 p.m., the interview concluded and appellant was booked. (6RT 692-694; 9RT 1088-1090) At Rodriguez's direction, appellant telephoned his parents. (9RT 1091-1093) The police never persuaded appellant to admit that he was attempting to rape Melissa when he killed her, but as evident from the last sequence of questioning, they did extract a confession as to the prior incident that he "tried to reap [sic] her ... two months ago... whatever ... whenever." Based on the foregoing facts, appellant's "confession" was based on a desire to end the interrogation rather than admit the truth, a classic stress compliant false confession. (*Lunbery v. Hornbeak, supra*, ___ F.Supp. at p. ___ [slip opn. at p. 10]

(7) Other Circumstances Rendering the Interrogation Involuntary

Appellant's confession also was involuntary based on surrounding circumstances and characteristics about appellant that rendered the situation additionally unfair and its fruits a denial of due process. A long, protracted interrogation can render the resulting confession involuntary. (*Ashcraft v. Tennessee* (1944) 322 U.S. 143, 153-154 [36 hours, in relays]; *Reck v. Pate,* 367 U.S. 433, 441; *Doody v. Schriro* (9th Cir. 2008) 548 F.3d 847, 867 [12 hours, overnight].) Here the authorities interrogated appellant for an entire day, not counting the evening before. They also interrogated him in relays or tag-teams; first one detective, then the district attorney, then a psychologist chosen and instructed by the district attorney; then an additional detective. As noted above, they asked appellant over 50 times whether he had a sexual interest or motivation towards Melissa. (See 5SCT 66-232) Detective Stotz and Deputy District Attorney Chessell spent the entire morning of November 30 trying to get appellant to admit that he either had sex with Melissa, or wanted to. (4CT 837-872) When appellant consistently denied the accusation, they brought in a clinical psychologist, Dr. Craig Rath, to try to get him to admit to a sexual interest in Melissa and of raping or attempting to rape her. (5SCT 90-125)

When that did not yield results, at 3:40 in the afternoon, Stotz reappeared with Sergeant Rodriguez, with Stotz acting as the "bad cop" and Rodriguez as the "good cop." (5SCT 220-232; 6RT 775-776) While Rodriguez soothed, "the sooner you tell the entire truth, you'll feel better" (4CT 881), Stotz continued to accuse appellant and finally said, "The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way." (4CT 881)

Other characteristics and surrounding circumstances also may render a defendant more vulnerable to improper coercion. Such characteristics may include the fact that the defendant is young and/or immature (*Haley v. Ohio* (1948) 332

U.S. 596, 599-601; *Reck v. Pate* (1961) 367 U.S. 433, 441-442 [defendant 19 and mentally retarded]; *Doody v. Schriro, supra*, 548 F.3d at p. 866-867 [defendant age 17], citing *United States ex. rel. Lewis v. Henderson* (2nd Cir. 1975) 520 F.2d 896, 901, "noting that the twenty-two-year-old suspect had 'little prior experience with police methods, thus rendering him particularly susceptible to police pressure'" (*Doody, supra*, at p. 867).) Appellant was very young for his age: He was 20 years old but looked 15. (5SCT 128) He still lived with his parents. (5SCT 95, 100) He had never had a girlfriend. (5SCT 111) He did not work other than to watch his younger sister Stacy when his parents were working. (5SCT 99-101) He was not going to college. He did not have a driver's license. (See 5SCT 77, 128)

A suspect's inexperience in the criminal justice system may cause him to be more vulnerable to coercive interrogation techniques. (*Stein v. New York* (1953) 346 U.S. 165, 185-186; *Doody v. Schriro, supra*, 548 U.S. at p. 867; *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28.)) Appellant had no criminal history and thus no experience with the criminal justice system. (5SCT 101-102)

A lack of education and/or learning problems also may contribute to a suspect's vulnerability to coercive interrogation techniques. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 286 [defendant of low average to average intelligence]; uneducated (*Arizona v. Fulminante, supra*) 499 U.S. 279, 286 [defendant dropped out of school in the fourth grade]; *Clewis v. Texas* (1967) 386 U.S. 707, 713; *Ashcraft v. Tennessee,* 322 U.S. at pp. 144, 148, 153-154 [defendant had a grade school education]; and see *Stawicki v. Israel* (7th Cir., 1985) 778 F.2d 380, 382-384.) Appellant may have possessed normal intelligence but he had a history of learning disabilities and had been in special education classes in elementary school. (5SCT 96; RT 1004-1006)

Physical or mental health issues may make a defendant more susceptible to coercion. (*Greenwald v. Wisconsin* (1967) 390 U.S. 519, 520-521 (per curiam); *United States v. Hack* (10th Cir. 1986) 782 F.2d 862, 866; *Fikes v. Alabama* (1957) 352 U.S. 191, 196.) Appellant suffered from depression, anxiety, and headaches.

(5SCT 112-113; RT 943-944) He had been diagnosed with attention deficit disorder. (5SCT 97; RT 964-968) He may have had a dissociative disorder. (RT 983-986) He had suffered physical abuse from his father. (5SCT 92-95, 98) He was experimenting with marijuana and methamphetamine. (5SCT 109-110) When Detective Stotz picked him up the morning of November 30, appellant was distraught and started crying. (See 5SCT 232; 9RT 1094-1095)

Fatigue or hunger also may cause the interrogation atmosphere to be coercive. (*Leyra v. Denno* (1954) 347 U.S. 556, 561; *United States v. Wauneka* (1981) 842 F.2d 1083, 1087-1088) Appellant had little to eat or drink all day November 30. (See 5SCT 232; 9RT 1094-1095)

5. Conclusion

The authorities decided early in the investigation that in order to make him eligible for the death penalty, they needed to establish that appellant strangled Melissa to death while attempting to sexually assault or rape her. To that end, they utilized a textbook littany of coercive interrogation techniques to extract a confession from appellant, including false promises of leniency, psychological manipulation, and sheer dogged insistence on sexual motivation denied by appellant at least 50 times over an entire day of relentless questioning. They constructed a hypothetical framework in which they assured appellant that if he picked "Door Number One," e.g., that he got into Melissa's room and tried to rape her in an earlier incident, he would not be prosecuted for what was behind "Door Number Two," the special circumstance that subjected him to the death penalty. Their assurances were readily believed by appellant, who was young, immature, had learning disabilities and mental health issues, and had never been in trouble with the law. (See 4.b.(7), *ante*.)

Under these circumstances, there is a grave risk that appellant waived his *Miranda* rights and confessed to the prior incident, based on the mistaken belief in the authorities' promise that he could not be prosecuted for it, in order to put an

end to a relentless and exhausting interrogation. The trial court erred in denying the defense motion to suppress appellant's confession. (*Miranda v. Arizona* (1966) 384 U.S. 436; *Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *Brown v. Mississippi* (1936) 297 U.S. 278; *Arizona v. Fulminante* (1991) 499 U.S. 279.)

6. Prejudice

n *Arizona v. Fulminante* (1991) 499 U.S. 279, 296, the United States Supreme Court observed that, "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.' [Citations] While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." (*Arizona v. Fulminante, supra*, 499 U.S. at p. 296.)

In the case of a coerced confession, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." (*Arizona v. Fulminante, supra,* at p. 296.) Reviewing courts are required to exercise extreme caution in determining whether the introduction of an involuntarily-obtained statement is "harmless" under that standard; the rule is that "[i]mproper admission of a defendant's statement warrants reversal unless [the reviewing court] can conclude the admission of such evidence was harmless beyond a reasonable doubt." (*People v. Allen* (1992) 9 Cal.App.4th 1619, 1624.)

Where such federal constitutional error has occurred, the "burden shifts to the state 'to prove 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; *People v. Barajas* (1983) 145 Cal.App.3d 804, 810.) Justice Mosk provided a helpful analysis of *Chapman* error in his dissent in *People v. Sims (*1993) 5 Cal.4th 405, a decision concerning a *Miranda* violation not apposite to this case. Justice Mosk began by noting that *Chapman* errors are "intolerant and unforgiving of error." (Id., at p. 474.) He then quoted the United States Supreme Court's own clarification of what it meant by the *Chapman* standard of review:

> "As the *Chapman* court itself declared: 'The California constitutional [harmless error] rule emphasizes a 'miscarriage of justice,' but the California courts ... have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.' We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut* [citation omitted]. There we said: 'The question is whether there is a reasonable possibility that the evidence might have contributed to the conviction'.'" (*People v. Sims, supra*, 5 Cal.4th at p. 474; italics in original, emphasis added.)

Justice Mosk continued:

> " ... as explained, *Chapman* effectively prohibits an appellate court from indulging in its own views as to the weight of the improperly admitted evidence. Rather, it requires the court to concentrate on the improperly admitted evidence from the perspective of the jury." (*Id.*, at p. 476; italics in original.)

In short, when reviewing a conviction under the *Chapman* standard of prejudice, an appellate court must not consider whether there is sufficient evidence to sustain the conviction absent the complained-of evidence; rather, "[t]he *Chapman* test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained'." (*Id.*, at p. 475; Mosk, J. in dissent. Italics in original; emphasis added.)

The state cannot meet its burden of establishing the error was harmless beyond a reasonable doubt under *Chapman*. Without appellant's confession about the encounter with Melissa two months earlier, the prosecution had nothing more than a homicide case that appellant strangled Melissa to death. The only evidence other than appellant's confession that remotely would support a finding that appellant killed Melissa during a sexual assault was the fact that her pants were slightly unzipped and a pair of her underpants (stained on the side with semen but not in the crotch) were found in the Lintons' trash can. (See Prosec. Closing Arg., at 30RT 4615, 4621, 4633-4634) This evidence alone was insufficient to convince a jury beyond a reasonable doubt that appellant killed Melissa in the course of trying to rape or assault her.

With introduction of the appellant's confession, on the other hand, the prosecution was able to make its argument that appellant's attempt and intent to commit rape or a lewd act on November 29 was proved by the prior incident, which is a charged offense and also cross-admissible to prove his intent on November 29. (See Pro§ Closing Arg., at 30RT 4622, 4624-4625) The only other evidence about the prior event was the testimony of the Middletons that they thought Melissa had a nightmare (See 17RT 2653, *post.*) and that of Joey Montero, if believed, that appellant was outside and ran in out of breath the same night. (21RT 3127-3133, 3153-3154.)

a. Deconstructing Prosecution Theory of the Case: How Melissa's Nightmare Morphed Into Prior Sexual Assault and Rape-Murder Special Circumstance

While it ultimately voted to convict, the jury's comments and questions during the deliberative process bring to light a healthy skepticism about the prior

act evidence. (See *post.*) For that reason, it is useful first to analyze the origin, progression and development of that evidence, from its inception.

(1) Genesis: Melissa's Nightmare

The prosecution's theory appears to have had its genesis in the recollections of Melissa's parents, Robert and Linda Middleton, testified to at trial.[10] The Middletons both testified that **two months** before the homicide,[11] Melissa screamed for them in the middle of the night. She was crying and upset, and said someone had come into her room and tried to choke her. (17RT 2564-2565, 2588-2589)[12] There were no marks on Melissa's neck. (17RT 2603)

Robert put on his clothes and walked outside. (17RT 2565) It was a weeknight, about 2:30 a.m., and the first cold night of the fall. (17RT 2588, 2593) He did not see appellant. (17RT 2593) He saw Joseph "Joey" Montero, the friend of appellant and houseguest of the Lintons, through the window in the Lintons' house, working on the computer. (17RT 2592, 2603) Robert told Montero that his daughter thought she saw someone in the house and asked Montero if he had seen anyone around. Montero said no. (17RT 2593)[13]

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[10] There is very little testimony in either the preliminary hearing or the hearing on the motion to suppress as to what the Middletons actually told the investigators shortly after Melissa was found dead. For sake of clarity, the Middletons' trial testimony is used here for context.

[11] Robert recalled it was about two months before the homicide, the first really cold night that year, on a weekday in late September or early October. (17RT 2588, 2602-2603, 2608 The information alleged that the prior incident occurred on or about October 1, 1994, which would have been about two months prior to November 29, when Melissa was killed. (1CT 20-22.)

[12] Linda did not recall telling the investigator that Melissa recalled the assailant being on top of her. (17RT 2575)

[13]The district attorney's investigator did not interview Montero until 1998, shortly before trial. The belated interview supported the prosecution's fully-developed theory at trial that the prior incident occurred two weeks before appellant strangled Melissa, not two months earlier, as Robert Middleton's recollected (17RT 2596; 21RT 3135-3139)

Robert checked and found no evidence that anyone had tried to break into the house. (17RT 2593) A couple of days before, he had impressed upon Melissa that it was important to lock the back door, because she forgot occasionally. (17RT 2604) Appellant had a key to the Middletons' house, because he had taken care of their animals while they were on vacation, and they had forgotten that he had not returned the key. (17RT 2595-2596)

The Middletons talked to other people and concluded that Melissa had experienced a nightmare. For that reason, they decided not to call the police. (17RT 2573) Linda told the prosecution investigator in 1995 that she believed Melissa had a nightmare. (17RT 2574) At trial, she still dismissed the incident as a nightmare. (17RT 2578) Although Melissa was friendly with appellant's sister, Stacey, Robert did not recall her spending the night at the Lintons between the night of the nightmare and the time Melissa was killed. (17RT 2596)

(2) Evolution: Nightmare + Sleepwalking + Coercive Interrogation Encompassing Express Promises of Leniency = Counts 2, 3 and 4 Prior Bad Acts

It is apparent from the context of the questions asked by the police officers and District Attorney Mitchell during the afternoon and evening of November 29, 1994, that they had begun to focus on appellant as a suspect and knew about the prior incident, believed by Robert and Linda Middleton to be a nightmare. There is no evidence that at the point the authorities interrogated appellant on November 29, they had additional information about a prior incident.[14] Nonetheless, the interrogators began to pose questions based on the assumption that Melissa's nightmare was in fact appellant's sleepwalking incident. In addition, this was the first time that Stotz and Mitchell assured appellant that whatever happened (if something happened), it was "water under the bridge." (5SCT 86) By end of the evening of November 29, the police and the district attorney through the use of

[14] See Footnote 3, above. The investigator did not interview Joey Montero until years later, in 1998.

false assurances already had extracted a story from appellant in which he woke up late at night, outside his house, wearing only his jeans and underwear

On November 30, believing that the nightmare and the sleepwalking were one and the same, the authorities set out to persuade appellant to admit a sexual motivation for one, the other, or both. Ultimately, they only persuaded him to admit a sexual motivation for the prior incident, but it is important to recognize the length, sequence, and duration of the interrogation to understand how they got from Melissa's nightmare and appellant's sleepwalking to a prior incident in which he got into her bedroom in the middle of the night and attempted to sexually assault her. The questions and answers the morning of November 30 reveal again that Stotz was convinced that the incident originally described by the Middletons as having occurred two months earlier in a nightmare actually occurred two weeks earlier when appellant claimed to be sleepwalking, and that he was the individual who got into the house and assaulted Melissa. (5SCT 4-9)

(3) Result: Prior Sexual Assault = Murder With Special Circumstance

By November 30 at 4:00 p.m., police had persuaded appellant to admit that his sleepwalking incident was the prior assault on Melissa, that her nightmare was real, and that during the prior incident that he "tried to reap [sic] her ... two months ago... whatever ... whenever." (5SCT 233) But the prosecution was never able to resolve the discrepancy between Robert Middleton's recollection in 1994 that the incident had occurred two months earlier and Joey Montero's statement to the authorities in 1998, some four years later, that the incident occurred only two weeks before the killing. (See again, 17RT 2596; 21RT 3135-3139.) The prosecution also relied on, and was not able to contradict, appellant's own confession that the incident occurred two months earlier. (5SCT 233) And although the prosecution tried to minimize it during final argument, it also had a

problem explaining why Linda Middleton testified at trial that she still suspected the incident was a nightmare. (See 17RT 2578; 30RT 4742)

Based on the foregoing, it is likely that the jury went into deliberations questioning whether or not Melissa's nightmare was the same incident as appellant's sleepwalking and even if so, whether appellant's confession was reliable evidence as to what happened during the prior incident, or whether it happened differently. The record bears out all of this uncertainty on the part of the jury.

b. Close Case Indicators

(1) The Jury Deliberated for Three Days

Long deliberations is one factor that demonstrates a case was close and difficult for the jury to decide. Jury deliberations of almost six hours are an indication that the issue of guilt is not 'open and shut', and strongly suggest that errors in the admission of evidence are prejudicial." (*People v. Cardenas* (1982) 31 Cal.3d 897, 907; see also, *People v. Filson* (1994) 22 Cal.App.4th 1841 [deliberations longer than the evidentiary phase of the trial]; *People v. Rubalcava* (1988) 200 Cal.App.3d 295, 301 [jury deliberations for "almost two days"], and *People v. Zucker* (1980) 26 Cal.3d 368, 391 [jury deliberations for nine days].) Here, the jury was out from March 9, 1999 at 12:35 p.m., through March 11 from 8:42 a.m. to 2:33 p.m., and again on March 15, from 9:00 a.m. through 3:13 p.m. (12CT 3439-3441; 30RT 4774-4786; 31RT 4791-4843, 4844-4885) Since there was no dispute that appellant strangled Melissa, the sole guilt issue before the jury was his intent and state of mind at the time of the homicide. The long deliberations reveals that even with the benefit of appellant's "confession," the jury struggled to decide this issue.

(2) The Jury Was Concerned about the Efficacy of Appellant's *Miranda* Waiver; the Truth About Appellant's Confession; and the Possibility of Appellant's Innocence

Perhaps the most revealing of the jury's comments occurred on the last day of deliberations. At that time, the jury submitted a note that read, "A juror believes the entire interview is a lie and is interjecting speculation. Where do we go from here?" (31RT 4844) This note reveals that at least one juror likely questioned the reliability of the answers produced by the police interrogations and Detective Stotz's credibility in general, a bit of skepticism which is supported by multiple instances in the record, in which he was caught lying under oath and/or distorting the truth, in order to provide "evidence" of a prior incident and appellant's sexual intent. The existence of notes and questions on the part of the jury during deliberations also can indicate a close and difficult jury determination. (*People v. Markus* (1978) 82 Cal.App.3d 477, 480.) The jury also submitted several other notes and asked questions that reveal skepticism about the interrogation of appellant.

Several times in the course of the proceedings the authorities engaged in what euphemistically can be termed "creative recollection" to "help along" the finding of probable cause on the current offense. Appellant raises these incidents not to argue that the testimony should not be believed, which of course is not the function of a reviewing court. Rather, these instances are raised to highlight inherent weaknesses in the prosecution case that foreshadow and underscore matters that likely concerned the jury during deliberations, including but not limited to the overall credibility of Detective Stotz.

Detective Stotz testified at the preliminary hearing that appellant said he put his hands down her pants:

Q [by DDA Mitchell]. "Did he [appellant] say anything in regards to following through with that intent or decision?

A [by Stotz]. Yes, he did.

Q. What did he say he did?

A. He stated that he had unbuttoned and unzipped her shorts, and I believe he stated that he had tried to put his hands down her shorts.

Mr. Ebert [DPD]: Your Honor, could we have – if the detectives referring to the transcript, tell us where he is? He's not?

The Witness: No, I'm not. I'm not reading from anything, if that's what you're asking?

The Court: But if you do, please indicate that for the benefit of counsel.

Q [by Mr. Mitchell]: After unzipping her shorts, did he indicate what he did next?

A. I believe he stated he tried to put his hands down her pants, but because of the struggle he was unable to." (1SCT 92-93 [Prelim. Hearing].)

This was a lie. When Stotz asked appellant in the interrogation whether he put his hands down Melissa's pants, appellant said no, twice. (See 5SCT 227, 235) Appellant could not have made such an admission off the record, because Stotz testified at the hearing on the motion to suppress he did not recall anything said that was not either in the report or the transcription. (4RT 541-543) More significantly, at trial Stotz admitted that he lied:

Q [by DPD Cronyn] "And that's not what Daniel Linton said, is it?

A [by Stotz]. No, it's not.

Q In fact, he said that he didn't put his hands down her pants or try to.

A. That's correct."

(19RT 2911)

When asked at trial about a statement in his police report that the thought crossed appellant's mind to rape Melissa and that "therefore, that's why he unbuttoned the button on her pants and unzipped them," Stotz was not able to point to where in the interview appellant made the statement. (19RT 2913-2914) The statement does not exist in the interview; appellant stated that he started to unzip her pants but stopped. (4CT 881-884)

The jury also asked when a waiver of *Miranda* rights takes place. The court responded over defense objection that "a *Miranda* waiver is effective when a subject orally agrees to speak with investigators after his rights are read to him. There is no requirement that a *Miranda* waiver be documented in a written form, signed by the person being questioned." (31RT 4803-4815.) The defense objected that this answer deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (31RT 4803-4815.) This question demonstrates concern about whether appellant understood his rights when he waived them and whether that waiver was effective, critical issues with respect to his interrogation and confession.

The foreman reported that one of the jurors had admitted discussing a specific aspect of the case with her husband. Juror #1 said to her husband that if someone she knew came into her house, she would not automatically scream. The other jurors did not discuss this further. (12CT 3440; 31RT 4816-4823.) This note exposes the skepticism of at least one juror as to what really happened between appellant and Melissa.

The jury also submitted additional notes. The first note asked: "1.Is it too far to speculate whether Melissa let Daniel into the house?" Another note asked,

"2. Please clarify if speculation can be used in determining innocence in this case?" A third note asked, "3. What is the definition of speculation?" Together, these final notes reveal that one or more jurors did not believe the interview occurred as recounted by the prosecution witnesses and were concerned about appellant's innocence, but felt constrained as to how much they could speculate.

c. The Verdict Was Not Reliable and Reversal is Required

Based on the foregoing, there is a serious question as to whether the verdict reached by the jury was a reliable reflection of what it actually believed. At least one juror appears to have believed, at some point, that the confession extracted from appellant was a false confession. Others appear to have wondered whether the encounter between appellant and Melissa was consensual and somehow got out of hand. Another juror felt compelled to discuss the case with her husband, even through she had been admonished not to do so. Whatever the jurors thought, it is clear that improper admission of the coerced confession tainted the deliberative process and was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The trial court's decision to admit appellant's confession requires reversal.

Under these circumstances, and those set forth in additional detail under "Cumulative Prejudice," introduction of the fruits of the authorities' interrogations of appellant was extremely prejudicial and not harmless beyond a reasonable doubt. Even standing alone, however, admission of appellant's statements and confession requires reversal. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

B. The Trial Court Unfairly Frustrated Defense Efforts to Present a Defense Establishing that Appellant's Confession Was False and Involuntary, in Violation of His Rights to Due Process and Confrontation of Witnesses Under the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution and Article I, Section 7 of the California Constitution,

1. Introduction

The trial court made a number of rulings that restricted appellant's right to present his principal defense that the confession to the prior act extracted from him by the authorities was coerced, unreliable and potentially false. Each of those rulings violated that right and require reversal under the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution and Article I, Section 7 of the California Constitution.

In *Chambers v. Mississippi* (1973) 410 U.S. 284, the Supreme Court held that exclusion of evidence vital to a defendant's defense constitutes a denial of a fair trial in violation of the due process clause of the Fourteenth Amendment to the Untied States Constitution. (See comment in *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.) In *Chambers*, state evidentiary rules required exclusion of a recanted confession of another man, McDonald, who was believed to be the actual shooter; forbade cross-examination of McDonald, who was technically Chambers' witness; and also required exclusion of the hearsay testimony of three witnesses that McDonald had confessed to them. (*Chambers, supra*, at pp. 287-293) Under these circumstances, the Supreme Court ruled that the combined effect of the trial court's rulings deprived Chambers of a "trial in accord with traditional and fundamental standards of due process." (*Id.* at p. 302.)

The Court in *Chambers* observed, "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. ... 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a

minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' (*Chambers, supra,* at p. 294, citing *In re Oliver* (1948) 333 U.S. 257, 273.)

In *Davis v. Alaska* (1974) 415 U.S. 308, a Supreme Court concerned with the abridgement of a defendant's right to present all evidence in his defense, overturned his conviction because the lower court would not allow impeachment of a material witness with a prior juvenile record. (*Id.*, at p. 317.) The Court concluded, "[A] defendant's right to present his defense theory is a fundamental right and . . . all of his pertinent evidence should be considered by the trier of fact." (*Id.*, at p. 317.)

In *Rock v. Arkansas* (1987) 483 U.S. 44 [97 L.Ed.2d 37, 107 S.Ct. 2704], the Supreme Court issued another decision supporting this principle. There, the defendant was convicted of manslaughter after the lower court, pursuant to an Arkansas statute, refused to allow her to testify to matters recalled only after she had been hypnotized. The Arkansas Supreme Court affirmed and reasoned, much as the court did here, that the prejudicial effect of such testimony outweighed its probative value. The Supreme Court reversed, once again emphasizing the important right to present exculpatory evidence. (*Rock, supra*, 97 L.Ed.2d, at pp. 43-44.)

The California courts also support the fundamental right of the accused to present all relevant evidence vital to his or her defense. In *People v. McDonald* (1984) 37 Cal.3d 351, our Supreme Court commented that, "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it. Rather, it should be accompanied by instructions clearly explaining to the jury the purpose for which it is introduced." (*Id.*, at p. 372.)

In *People v. De Larco* (1983) 142 Cal.App.3d 294, the Court emphasized that, "'Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.' [Citation.] . . . Inclusion of relevant evidence can safeguard the defendant's rights as much as that of the prosecution. [Citation.] Indeed,

discretion should favor the defendant in cases of doubt because in comparing the prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.' [Citations.]" (*Id.*, at pp. 305-306.)

All these authorities make clear that a defendant has a right to introduce evidence in his or her defense, and state evidentiary rules impinging that right must give way to the federal constitutional mandate. (See e.g., *Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *Davis v. Alaska, supra,* 415 U.S. at p.; 317.)

2. The Court Refused to Admit the Testimony of False Confession Expert Richard Ofshe, Ph.D., Whose Testimony Would Have Assisted the Jury in Deciphering Why Appellant Would Falsely Confess to Attemped Rape

a. Standard of Review

A trial court's decision to exclude expert testimony is reviewed under the abuse of discretion standard. (*People v. Manriquez* (1999) 72 Cal.App.4th 1486, 1492; *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1307-1308; *In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558.)

b. Factual and Procedural Background

On September 3, 1998, the defense filed a *Memorandum of Points and Authorities in Support of Defendant's Introduction of Expert Testimony at Trial.* The defense argued that the proffered testimony of false confession expert Richard A. Leo or Richard J. Ofshe was necessary to demonstrate "how police interrogation techniques utilized in this case affect the trustworthiness of the defendant's statements." (3CT 544-554) The Memorandum included Exhibit A, "The Decision to Confess Falsely: Rational Choice and Irrational Action," Ofshe and Leo, in *Denver University Law Rev.*, Nov. 1997. (3CT 555-701)

The prosecution did not file written opposition. (See 23RT 3425, 3591) The court heard argument and denied the defense motion without prejudice. (22RT 3423-3429 [2-18-99]; 23RT 3587-3614 [2-22-99].) The court ruled that the defense failed to establish a foundation to support a finding appellant had made a false confession, because he had not recanted. The court also reasoned that any testimony he had made a false confession was speculative. (23RT 3609, 3611, 3612) The defense renewed the motion. The court again denied the motion. (25RT 3733-3741 [2-24-99].)

c. Governing Law and Application

In *Crane v. Kentucky* (1986) 476 U.S. 683, the United States Supreme Court reversed a state court finding that a confession was voluntary and admissible, because it was extracted from a defendant under coercive circumstances and the jury was not allowed to hear about the environment in which the defendant was interrogated. The Court held that

> "[T]he Kentucky courts erred in foreclosing petitioner's efforts to introduce testimony about the environment in which the police secured his confession. As both *Lego* and *Jackson* make clear, evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility. Such evidence was especially relevant in the rather peculiar circumstances of this case. Petitioner's entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed. To support that defense, he sought to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a protracted period of time until he confessed to every unsolved crime in the county, including the one for which he now stands convicted. We do not, of course, pass on the strength or merits of that defense.

> We do, however, think it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding. Especially since neither the Supreme Court of Kentucky in its opinion, nor respondent in its argument to this Court, has advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence, the decision below must be reversed."

(*Crane v. Kentucky, supra,* 476 U.S., at p. 691.)

Neither this Court nor the Ninth Circuit has addressed whether *Crane* compels the admission of expert testimony about how the circumstances or environment of an interrogation can result in the extraction of a false confession. The most helpful analysis that is directly on point is set forth in the Seventh Circuit case of *United States v. Hall* (7th Cir. 1996) 93 F.3d 1337.

In *Hall*, the defense theory of the case was that due to a personality disorder which made the defendant susceptible to suggestion and pathologically eager to please, he "confessed" to a crime that he did not really commit, in order to gain approval from the law enforcement officers who were interrogating him. (*Hall*, at p. 1341.) To substantiate its theory, the defense tendered Dr. Ofshe pursuant to Federal Rules of Evidence, rule 702 regarding expert witnesses. Dr. Ofshe, the defense contended, "would have testified about the fact that experts in his field agree that false confessions exist, that individuals can be coerced into giving false confessions, and that certain indicia can be identified to show when they are likely to occur. He described his methodology in general terms, and what factors experts in the field rely upon to distinguish between reliable and unreliable confessions." (*Ibid.*) The district court in *Hall* "rejected the proffer of Dr. Ofshe's testimony in its entirety, on two grounds: (1) Dr. Ofshe would need to judge the credibility of Randolph's and Miller's [interrogating detectives] testimony about what happened during the interrogation of Hall, and (2) in the final analysis, Dr. Ofshe's testimony

would add nothing to what the jury would know from common experience." (*Id.* at p. 1341.)

The Seventh Circuit vacated Hall's conviction and remanded the matter for further proceedings (*Hall, supra*, 93 F.3d at p. 1346), explaining that, "The [district] court indicated that it saw no potential usefulness in the evidence, because it was within the jury's knowledge. This ruling overlooked the utility of valid social science. Even though the jury may have had beliefs about the subject, the question is whether those beliefs were correct. Properly conducted social science research often shows that commonly held beliefs are in error. Dr. Ofshe's testimony, assuming its scientific validity, would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." (*Hall, supra*, at p. 1345.)

The Court in *Hall* concluded, "The district court's conclusion therefore missed the point of the proffer. It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision. It would have been up to the jury, of course, to decide how much weight to attach to Dr. Ofshe's theory, and to decide whether they believed his explanation of Hall's behavior or the more commonplace explanation that the confession was true. [Citation] But the jury here may have been deprived of critical information it should have had in evaluating Hall's case." (*Hall, supra*, at p. 1345.)

As in *Hall*, the trial court erred when it excluded the testimony of Dr. Ofshe in this case. Appellant's confession was the cornerstone of the prosecution case, not as to whether he strangled Melissa, which was not in dispute, but rather as to whether he strangled her in the course of an attempt to sexually assault or rape her. In order to obtain the information they needed to establish the latter, the interrogators metaphorically crawled into appellant's head to assess his state of mind and in the process may have convinced him that he committed an act (the

prior attempted assault/rape) that did not occur, or did not occur as recounted in his confession. As discussed extensively in Argument I.A., appellant was interrogated by two district attorneys, three police officers, and a clinical psychologist beginning at his home the evening of November 29 and then resuming again at the station on November 30, 1994. Despite the fact that appellant denied at least 50 times that he intended to sexually assault or rape Melissa, the interrogators were relentless and finally, at the end of the day on November 30, appellant stated that he tried to rape her in an previous incident.

The jury deserved tools to assess whether the confession that resulted from law enforcement's questioning was accurate and reliable. By excluding Dr. Ofshe's testimony, the court allowed the jury to remain in the dark about a body of research which has established that under certain circumstances, an innocent suspect will confess to something he simply did not do. Based on Dr. Ofshe's research, at the very least, the jury should have been informed that "some suspects will give a coerced-compliant false confession" in response to "classically coercive interrogation techniques such as ... promises of leniency." (See *Memorandum of Points and Authorities in Support of Defendant's Introduction of Expert Testimony at Trial,* Exhibit A, "The Decision to Confess Falsely: Rational Choice and Irrational Action," Ofshe and Leo, in *Denver University Law Rev.*, Nov. 1997; and (*Lunbery v. Hornbeak, supra,* ___ F.Supp. at p. ___ [slip opn. at p. 10]). (3CT 555-701, at p. 574) There simply was no reason to deny appellant the ability to present Dr. Ofshe's testimony, other than to fortify the prosecution position that the confession was reliable.

Even if there was some question as to the efficacy of empirical studies about false confessions at the time this case was tried in 1999, there is no question now that such studies have established false confessions as a widespread problem

in the criminal justice system. In Drizin & Leo,[15] "The Problem of False Confessions in the Post-DNA World," *supra,* 82 *N.C.L. Rev.* 891, cited with approval in *Corley v. United States, supra,* ___ U.S. ___, ___ [2009 WL 901513, slip opn. at p. 11], the authors observe, "Interrogation-induced false confession has always been a leading cause of miscarriages of justice in the United States. [Fn 157] As mentioned earlier, the methodologically sound studies that have systematically aggregated and quantified case data have found false confession to be the primary cause of wrongful conviction in 14-25% of the documented cases. [Fn. 158] While it is not presently possible to provide a valid quantitative estimate of the incidence or prevalence of interrogation-induced false confessions in America, [Fn. 159] the research literature has established that such confessions occur with alarming frequency. [Fn 160] Social psychologists, criminologists, sociologists, legal scholars, and independent writers have documented so many examples of interrogation-induced false confession in recent years that there is no longer any dispute about their occurrence." ("The Problem of False Confessions in the Post-DNA World," *supra*, at pp. 920-921)

There appear to be three California cases that have addressed the admissibility of false confession expert testimony. All three are Court of Appeal cases and none are either as helpful or as apposite as *Hall.* The first Court of Appeal case to confront the issue was *People v. Page* (1991) 2 Cal.App.4th 151. The prosecution in this case relied on *Page* to support its argument that the testimony of Dr. Ofshe should not be admitted at all, but in reality *Page* actually reinforces the defense position. (See 22RT 3424 [prosecution argument]; 23RT 3591 [defense argument], and 23RT 3593 [trial court ruling].)

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[15] Richard Leo, Ph.D., the co-author of this article also was the co-author of the article, "The Decision to Confess Falsely: Rational Choice and Irrational Action," Ofshe and Leo, in *Denver University Law Rev.*, Nov. 1997, Exhibit A to the defense motion to introduce Dr. Ofshe's expert testimony. In addition, the defense proffered Dr. Leo as a witness during the penalty phase, see *post.*

In *Page*, the defendant was interrogated by the police and eventually confessed that he "backhanded" his girlfriend, which caused her to fall to the ground unconscious, her nose bleeding. He later returned to the scene, saw that she was dead, and buried her. Her body was found a few days later, and the defendant was taken into custody. The police interrogated the defendant, and he eventually broke down and provided lurid details (for example, that he had sex with her dead body before burying her), some recalled by him but many supplied by the interrogators. (*Page, supra,* at pp. 164, 174-176.) The defendant later recanted his confession. (*Id.* at pp. 175-176.) He testified at trial, denied any involvement in the killing, and claimed that the police "fed" him the details of the homicide and the confession, which he agreed to because he was overwrought. (*Id.* at pp. 177-178.)

The defense in *Page* sought to introduce the testimony of Elliot Aronson, a professor of psychology at the University of California, Santa Cruz, an expert on the subject of false or unreliable confessions. (*Page, supra,* 2 Cal.App.4th, at pp. 179-180) "Professor Aronson's proposed testimony fell into three general categories: (1) the general psychological factors which might lead to an unreliable confession, along with descriptions of the supporting experiments; (2) the *particular evidence* in Page's taped statements which indicated that those psychological factors were present in this case; and (3) the reliability of Page's confession, given the overall method of interrogation. Although the trial court's rulings are somewhat obtuse, it appears the court permitted testimony from the first category only, and excluded evidence from the other two categories." (*Id.* at p. 183.)

The defendant in *Page* was convicted of voluntary manslaughter and appealed. (*Page, supra*, 2 Cal.App.4th at pp. 163-164.) He argued on appeal that the restrictions on Professor Aronson's testimony violated his Sixth and Fourteenth Amendment right to present a complete defense, relying heavily on the reasoning in *Crane v. Kentucky, supra*, 476 U.S. 683. (*Page, supra,*. at p. 184.)

The Court of Appeal in *Page* disagreed with the defendant's analysis of *Crane* and affirmed his conviction. (*Id.* at pp. 185-191.)

As noted above, the prosecution in this case relied on *Page* to justify wholesale exclusion of expert testimony about the psychology of false confessions, and the trial court agreed (See again, 22RT 3424; 23RT 3593.) The trial court's interpretation of *Page* was wrong. Unlike the trial court in this case, the court in *Page* permitted false confession expert Dr. Aronson to testify but restricted his testimony to the general psychological factors and interrogation techniques which result in an unreliable, false confession. It was in this context that the court in *Page* explained, "the restriction on Professor Aronson's testimony is a far cry from the 'blanket exclusion' of evidence the Supreme Court faced in *Crane.* Unlike Crane, Page was not 'stripped of the power to describe to the jury the circumstances that prompted his confession.' [Citation]" (*Page, supra*, at p. 185, citing Crane, supra, 476 U.S. at p. 689.) "In the present case," the *Page* court continued, "that power was, at most, marginally curtailed. Consequently, in our view, the trial court's ruling did not deprive Page of '" 'a meaningful opportunity to present a complete defense.' "' [Citation]" (*Page, supra,* citing *Crane, supra,* at p. 690, fn. omitted.)

Once it becomes clear that *Page* was a "selective exclusion" case, not a "blanket exclusion" case, its rationale makes perfect sense. The defendant in *Page*, like appellant, was able to present evidence about the physical and psychological environment in which his confession was extracted: "There are obvious and important differences between this case and *Crane.* Here the trial court permitted Page and the prosecutor to thoroughly explore the physical and psychological environment in which the confession was obtained. Among other things, the jury learned that: Page was questioned by two police sergeants, both of whom were thoroughly cross- examined on the method of interrogation; the police lied to Page to extract his confession; the officers made him feel guilty; Page took and failed a polygraph exam; and Page had only recently learned of Bibi's death.

The jury also knew Page's educational level and physical condition. With respect to the physical circumstances of the interrogation, the jury knew the size and layout of the interrogation room (through testimony and pictures), how long the interrogation sessions lasted, when Page ate, when he drank water, and used the restroom or the telephone. In short, the defense and prosecution painted a detailed picture of the physical and psychological circumstances of the interrogation." (*Page, supra*, at pp. 185-186.)

However, unlike the defendant in *Page*, appellant was not allowed to present the testimony of a false confession expert as a critical tool to assist the jury in understanding in general how certain interrogation techniques operate so as to elicit false information from a suspect and thereby enable the jury to reach its own, fair conclusion about the effect of the interrogation on the veracity and reliability of the confession. It is this blanket exclusion that was disapproved of in *Crane* and was error here. As the court in *Page* acknowledged, "'stripped of the power to describe to the jury the circumstances that prompted his confession, [he] is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" Consequently, the court concluded that where the prosecutor's case is based on the defendant's confession, the defense must be permitted to delve into the circumstances under which the confession was secured.' [Citation]" (*Page, supra,* at p. 185, citing *Crane, supra*, 476 U.S. at p. 689.)

For other reasons, the more recent case of *People v. Ramos* (2004) 121 Cal.App.4th 1194, is not apposite. In *Ramos*, the defense sought to introduce the testimony of Dr. Richard Leo [co-author of "The Decision to Confess Falsely: Rational Choice and Irrational Action," Ofshe and Leo, in *Denver University Law Rev.*, Nov. 1997, appended to the original defense motion in this case. See 3CT 555-701]. The Court of Appeal in *Ramos* upheld the trial court's exclusion of Dr. Leo's testimony because the interrogating officer "did not misrepresent the state of the evidence to Ramos, did not subject him to a polygraph examination and did

not question him repeatedly over an extended period of time. Thus, as the trial court concluded, the defense failed to demonstrate the need for Leo's expert testimony." (*Ramos, supra*, at p. 1207.) In another case, *People v. Son* (2000) 79 Cal.App.4th 224, the Court of Appeal upheld exclusion of Dr. Ofshe's testimony because "there was no evidence that police engaged in tactics wearing down Son into making false admissions. Hence the proffered expert testimony on police tactics was irrelevant." (*Id.* at p. 241.) Here, by contrast, the actions of Detective Stotz, et al., read like a textbook in how to coerce a confession. (See argument A, *ante*.)

d. Prejudice

The trial court ruling excluding Dr. Ofshe's expert testimony deprived appellant of his right to present a defense, in violation of the due process clause of the Fourteenth Amendment, as well as Article I, Section 7 of the California Constitution. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Like admission of the confession, the error is evaluated under the harmless-beyond-a-reasonable-doubt standard for federal constitutional error. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Once again, the state will not be able to meet its burden of establishing harmless error.

At the conclusion of their study, Professors Ofshe and Leo provided an apt analogy as to false confessions. They observed that, "A judge would never admit into evidence a doctored photograph that is the product of modern computer graphic techniques and depicts a scene that never happened. [para.] A false confession is analogous to a doctored photograph. The mechanism for creating it is the ancient technology of human influence carried forward into the interrogation room." (3CT at p. 697, in "The Decision to Confess Falsely: Rational Choice and Irrational Action," Ofshe and Leo, in *Denver University Law Rev.*, Nov. 1997.)

The jury could not be expected to know about this body of research regarding false and coerced confessions. The court's ruling excluded information

that would have fairly informed it about the effect of overreaching interrogation techniques before making its own assessment about the reliability of appellant's his confession and, ultimately, his guilt. The jury also was not instructed to be wary of the unrecorded portions of the interrogation and to view those portions with caution. (See Argument III, *post.)* Under these circumstances and those set forth in additional detail under "Cumulative Prejudice," exclusion of the testimony of Dr. Ofshe was not harmless beyond a reasonable doubt and requires reversal. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

4. The Court Refused Cross-Examination of the Architect of Appellant's False Confession, Deputy District Attorney William Mitchell.

a. Standard of Review

The standard of review for a ruling on the admissibility of evidence is abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) The trial court's discretion must be "neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impeded or defeat the ends of substantial justice. [Citations]" (*People v. Stone* (1999) 75 Call.App.4th 707, 716.) Although the abuse of discretion standard is deferential, "it is not empty." (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The standard "asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (Ibid.)

b. Factual and Procedural Background

On April 21, 1998, the defense filed a *Notice of Intent to Call the Prosecuting Attorney [Deputy District Attorney William Mitchell] as a Witness and Objection to His Dual Role Based on the Fifth, Sixth, and Fourteenth*

Amendments to the United States Constitution. (1CT 214-225) The thrust of the defense argument was that Deputy District Attorney Mitchell ("DDA Mitchell") was actively involved in questioning appellant on November 29, 1994, the evening of the day Melissa was killed, and told appellant that any prior sexual problem between him and Melissa was "water under the bridge." (1CT 217-218) The defense theory was that DDA Mitchell's active personal involvement in the questioning on November 29 and in directing the interrogation on November 30 (including but not limited to the retention of a psychologist to try to extract a confession that he had a sexual motive in strangling Melissa) made him a percipient witness to the critical issue of the voluntariness of appellant's confession. The defense contended that DDA Mitchell's dual role as active interrogator necessitated that the defense call him as a witness at trial, thus creating a conflict with him also acting as lead prosecutor. (1CT 220-221)[16]

The district attorney vigorously opposed the defense motion. On May 26, 1998, it filed an *Opposition to Defendant's Motion to Recuse Prosecuting Attorney.* (3CT 305-310) In that opposition, the district attorney took the position that the defense failed to establish a conflict of interest. The district attorney characterized Mitchell's role as an observer during the pre- and post-arrest

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[16] At the time this motion was in process and heard, there apparently was a great deal of concern on the part of the defense as to whether there were critical gaps in the initial poor-quality interview tapes, specifically as to promises of leniency by Detective Stotz and DDA Mitchell. On the first copy of the tape given to the defense, Stotz's initial promise that appellant would not get in trouble for any prior sexual issue with Melissa was either not on the tape at all or not audible. (See 2CT 216-217, fn. 1) Similarly, DDA Mitchell's promise to appellant that any prior incident was "water under the bridge" may have not been audible on the first tape; the defense in its reply commented, "The People's Opposition gives the impression that Mr. Mitchell was merely a passive observer of the November 29th interrogation. To the contrary, Dr. Poza's [tape quality expert's] transcript establishes that Mr. Mitchell was an active participant in the effort to elicit incriminating statements and that he personally made promises of leniency." (See 2CT 347, fn. 1)

interviews and on that basis concluded that his testimony was cumulative to that of Detective Stotz and of minimal weight. (2CT 306-307)

On June 17, 1998, the defense filed a *Reply to People's Opposition to Notice of Intent to Call Prosecuting Attorney at a Witness*. (3CT 345-362) The defense disputed the district attorney's characterization of DDA Mitchell's role as a "passive observer" when he was clearly in the background orchestrating the interrogation. (3CT 347) The defense also challenged the argument that DDA Mitchell could be shielded from testifying as a witness, pointed out that appellant's reaction to promises of leniency were central to the defense, and noted the necessity of calling DDA Mitchell to impeach a number of "inaccuracies" testified to by Stotz at the preliminary hearing, whose credibility was later seriously questioned by the jury during deliberations. (See argument I.A.6, *ante*.) The defense concluded, "when a deputy district attorney chooses to become personally involved in the collection of evidence, he has by his voluntary, affirmative conduct made himself a material witness who 'ought' to be called to testify." (3CT 352)

On June 19, 1998, the court called the motion for hearing. (3CT 365; 2RT 221-223.) [17] At that time, DDA Mitchell argued he had no objection to the defense calling him to testify regarding pretrial motions but objected to being called to testify at trial. (2RT 222) The court denied the motion as premature, reasoning that the issue of voluntariness must be resolved first. (2RT 222-223)

On August 6, 1998, the defense filed a supplemental *Reply to People's Opposition to Defendant's Motion to Recuse Prosecuting Attorney*. (3CT 408-411) The defense pointed out that if DDA Mitchell was allowed not to testify at trial, he unfairly would become a witness beyond the reach of cross-examination as to his percipient knowledge about the interrogations. The defense concluded, "Every comment [DDA Mitchell] might make concerning the defendant's

[17] This hearing was before the Honorable Robert J. McIntyre, who was not the judge at trial. (See 2RT 207)

personality and motivation therefore would violate the Sixth Amendment Right to Cross-Examination, as well as the Fifth and Fourteenth Amendment Rights to Due Process... From voir dire to final argument, the issue of William Mitchell's personal knowledge and credibility will be before this court and the trier of fact." (3CT 409-410)

On August 17, 1998, the court heard the motion to recuse prosecuting attorney William Mitchell. (2CT 423; 3RT 252-254)[18] The defense called DDA Mitchell. DDA Mitchell testified as follows. During the November 29, 1994 interview, he did not tell appellant he was a suspect. (3RT 261) Stotz told appellant that if he were not guilty, a lie detector would help clear his name. (3RT 262-263) DDA Mitchell did not say on tape that he was a district attorney, but before the tape was turned on, he met appellant's parents and said he was the district attorney. (3RT 264-265) He participated in the interview for about thirty minutes. (3RT 271) He probably brought up the issue of the polygraph examination. (3RT 275) He asked questions of appellant that focused on a sexual attraction or interest in Melissa. (3RT 277) He told appellant that any prior sexual problems with Melissa were "water under the bridge." (3RT 293)

The defense turned to the "water under the bridge" issue. The defense asked:

> Q [by PD Cronyn] "[D]id you make sure Daniel Linton understood that if he did commit the murder and had problems sexually in the past, that you would charge special circumstances?"

The prosecution objected, and the court sustained the objection. (3RT 296-297)

The following set of questions and answers followed:

> Q [by PD Cronyn] "Do you explain to him at the time that the words that we use could be used against him in a

[18] This hearing also was before the Honorable Robert J. McIntyre. (3RT 252)

court of law regarding his problems sexually in the past?

A [by DDA Mitchell] No. I think you misunderstood. He was contending he did not kill Melissa, so we were offering him the polygraph so he could prove or clear his name in that regard, if he wanted to avail himself of that. So that wasn't something I would tell him at that time, that everything in regard to the past incidents with Melissa could be used. In fact, we were telling him if he was not the murderer, that nothing he says about the problems would be used against him in court.

Q Where does it say that you say that?

A That's the gist of the interview with him. The problems of leniency that you referred to on the numerous other portions where I say "water under the bridge" and those other portions, that was the gist of the interview. He was contending he was not the murderer.

Q Do you specifically tell him at that time, you will get in trouble for problems sexually in the past with Melissa if you are the murderer?

A No. That was not the gist of the interview. The interview was the opposite of that.

Q Did you tell him at any time that, that only the murderer will get in trouble for problems sexually in the past?

A That's not said."

(3RT 300-301)

At this point, the prosecution objected. The court stated, "I tend to agree that we're looking at what was said for purposes of this recusal motion. And I'll sustain your objection as to the last question." (3RT 301)

The defense continued its questioning of DDA Mitchell. Mitchell was the on-call deputy when the homicide occurred and in that capacity directed the investigation. (3RT 328) He arranged for Dr. Rath to participate in the investigation to interview appellant (3RT 304-306) He did not recall how Deputy District Attorney John Chessell became involved in the interrogation. (3RT 306-307) He was in contact with Detectives Stotz, Lynn, Rodriguez, DDA Chessell and Dr. Rath as the interrogation progressed. (3RT 308) He denied telling the interrogators to try to find a sexual motivation for the offense. (3RT 324-325)

With respect to the tape of the November 29 interview, DDA Mitchell acknowledged that portions of the tape were of poor quality but adamantly maintained that he did not instruct that any portions of the tape be deleted before it was given to defense counsel. (3RT 310) He acknowledged that portions of the tape were inaudible but did not know whether that was the condition of the tape when it was provided to Deputy Public Defender Robert Ebert prior to the preliminary hearing. (3RT 322)

The parties argued the issue. (3RT 330-347) The court commented that it was going to assume for purposes of the motion that the motion to suppress appellant's confession would subsequently be denied. (3RT 345) The court admitted the taped interview into evidence and took the matter under submission for 24 hours. (3RT 348-349; Def. Exh. C [tape], B [11/29/94 transcript, at 3RT 425-446].)

On August 19, 1998, the court issued a minute order containing written findings and denying the motion. The court ruled that the recusal of DDA Mitchell was not necessary because he participated in an early, "non-confrontational" portion of the interrogation that did not elicit any confession, and there was no evidence DDA Mitchell acted unethically or did not conduct his duties in a fair and even handed manner. The court further ruled that if the defense were to call DDA Mitchell as a witness, a second district attorney could stand in during his testimony. Finally, the court ruled that recusal was not

necessary for the orderly administration of justice and the fact that DDA Mitchell continued to be the prosecutor on the case did not deny appellant due process or a fair trial under the federal or state constitution. The court cited no legal authorities in its ruling. (2CT 447-448.)

On September 8, 1998, the defense filed a *Petition for Writ of Mandate / Prohibition* in the Court of Appeal, Fourth District Division Two, seeking to overturn the trial court's denial of the motion to recuse DDA Mitchell. (SCT: Writ of Mandate 1-16)

On October 1, 1998, the Court of Appeal, Fourth District Division Two, denied the *Petition* without comment, case number E023346. (3CT 797) DDA Mitchell did not testify again, either at the hearing on the motion to suppress or at trial. Mitchell's involvement in the interrogation process was referred to during the trial testimony of Detective Stotz, Detective Michael Lynn, Deputy District Attorney John Chessell, Craig Rath, Ph.D., and Detective Frederick Rodriguez.

During trial at the close of its case, the defense tried to call Mitchell as a witness. Mitchell objected. (27RT 4177) The defense made an offer of proof as to why it should be allowed to call Mitchell as a witness:

> "He is a proper witness. He is a percipient witness. And as Mr. Mitchell himself said on page 3932, ...'the most probative evidence we can get [is] from somebody looking and seeing and dealing with Daniel Linton in close proximity to the time of the crime.' And that would be, of course, Mr. Mitchell, who sat in Daniel Linton's bedroom for over half an hour on the very day that Daniel killed Melissa. And he has observations about Daniel's behavior... [para.] Mr. Mitchell then came to the crime scene and interviewed Daniel Linton personally, sitting just a few feet away from him. I think this jury is – this jury is entitled to see and evaluate the testimony of Mr. Mitchell and to understand that when a

person of Mr. Mitchell's stature and credibility promises someone that 'problems sexually in the past are water under the bridge,' that they would necessarily rely upon that. In fact, that they would absolutely a believe it, just as Officer Stotz did, who also heard that promise and testified that he truly believed the promise to be true. But I think that that's very important in the jurors' assessment of – of the situation in terms of the voluntariness and trustworthiness of the confession." (27RT 4178)

The defense also argued that Mitchell's testimony was necessary to explore, *inter alia*, his perception of appellant's demeanor the evening of the killing (27RT 4179); to clarify a number of matters testified to by Detective Stotz, who had been impeached based on poor recollection and in a few instances outright falsity (27RT 4180); to nail down a contradiction between Detective Stotz and Detective Lynn as to when Lynn gave Stotz the tape recorder (27RT 4180); to corroborate that Mitchell retained Dr. Rath to extract from appellant a sexual interest in Melissa (27RT 4181); and to demonstrate that Mitchell was directing the interrogation to build a special circumstance case, and without which "the interrogation would have ended at 10:05, and we wouldn't have a felony murder here, let alone a special circumstance murder." (27RT 4180)

Mitchell, of course, fought having to testify, contending that his testimony would be cumulative and that he was not present during the November 30 interview. (27RT 4185) The court agreed and ruled that, "I'm going to forbid the prosecution [sic] from calling him as a witness." (27RT 4186) The defense stated, "If I could just say for the record, our – our inability to call Mr. Mitchell violates Daniel Linton's Sixth Amendment right to present a complete defense, his fifth and Fourteenth Amendment rights to due process, and Eighth Amendment right to reliability of a verdict in a capital case." (27RT 4186)

c. Governing Law and Application

In refusing to allow the defense to call Mitchell as a witness, the trial court denied appellant his federal constitutional right to present a defense and confront a critical percipient witness. (See again, *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [denial of examination of confessing accomplice violated due process]; *Davis v. Alaska* (1974) 415 U.S. 308, 317 [denial of examination of witness with juvenile record violated due process].)

In *United States v. Edwards* (9th Cir. 1998) 154 F.3d 915, under a set of circumstances remarkably similar to those here, the Ninth Circuit reversed because a federal prosecutor was intimately involved in the discovery of a critical piece of evidence and was not subject to cross-examination. (*Edwards, supra*, at p. 922.) In *Edwards*, the government sought to introduce a black nylon bag that was recovered from the defendant's girlfriend and contained cocaine. (*Edwards*, at pp. 917-919) On the first day of trial, the defense argued in opening statement that there was no evidence linking the bag to the defendant. That evening, the Assistant United States Attorney (AUSA) prosecuting the case was looking at the bag and allegedly found a bail receipt with the defendant's name on it, thus tying him to the bag and its contents. The following morning, the district court overruled defense objection to introduction of the receipt and also denied a defense motion for mistrial. (*Id.* at p. 919)

The AUSA in *Edwards* then introduced the receipt into evidence "through the same police officer who had earlier testified that there was nothing in the bag linking it to Edwards. The prosecutor had replaced the receipt in the bottom of the bag and asked the officer, who had not been present when he found the evidence, to look under the cardboard. By doing so, the prosecutor presented to the jury a re-enactment, albeit undisclosed, of his own discovery of the evidence with the witness playing his role. The prosecutor directed the scene, first instructing the officer to pull up the cardboard "and see if there is anything underneath it." (*Id.* at

p. 919) The prosecutor in closing argument identified the receipt as a key piece of evidence. (*Edwards, supra,* at p. 920.)

The defendant was convicted and the Ninth Circuit reversed. The Court in *Edward* explained, "It is well settled that a prosecutor in a criminal case 'has a special obligation to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge."' [Citations]. A prosecutor may not impart to the jury his belief that a government witness is credible. [Citation] Such improper vouching may occur in at least two ways. The prosecutor may either 'place the prestige of the government behind the witness or ... indicate that information not presented to the jury supports the witness's testimony.' [Citation] When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial. [Citation]" (*United States v. Edwards, supra*, 154 F.3d at p. 921)

The Circuit in *Edwards* then analyzed this situation using the advocate-witness rule, which precludes an attorney to take the stand and testify in a case he or she is litigating. The court concluded that where the prosecutor's own credibility with respect to an item of evidence is before the jury, the very fact that he is a percipient witness will result in the jury being unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors: "Akin to the rule against vouching is the advocate-witness rule, under which attorneys are generally prohibited from taking the witness stand to testify in a case they are litigating. [Citation]. As with vouching, the policies underlying the application of the advocate-witness rule in a criminal case are related to the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors. Moreover, the rule reflects a broader concern for public confidence in the administration of justice, and implements the maxim that 'justice must satisfy the appearance of justice.' This concern is especially significant where the testifying attorney represents the prosecuting arm of the

federal government. [Citations] Essentially, the danger in having a prosecutor testify as a witness is that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise." (*United States v. Edwards, supra*, 154 F.3d at p.921.)

The Court in *Edwards* continued, "[A]s the Eleventh Circuit has observed, the policies underlying the advocate-witness rule apply equally when a prosecutor implicitly testifies to personal knowledge or otherwise attains 'witness verity' in a case in which he appears as an advocate for the government. Thus, it would be improper for a government attorney who has independent personal knowledge about facts that will be controverted at the trial to act as prosecutor (1) if he uses that inside information to testify indirectly by implying to the jury that he has special knowledge or insight, or (2) if he is selected as prosecutor when it is obvious he is the sole witness whose testimony is necessary to establish essential facts otherwise not ascertainable." [Citation] (*United States v. Edwards, supra*, at pp. 921-922).

The Ninth Circuit in *Edwards* noted, "In this case, all the prosecutor had to do in order to convey to the jury his belief-indeed his representation, based on personal knowledge-that the receipt was legitimate and that it was found on the up-and-up, was simply to continue to play the role of objective prosecutor. His continued participation in the trial was, in effect, an implicit guarantee to the jury that the receipt was a trustworthy piece of evidence, that it had not been planted, and that the officers who testified regarding the circumstances of the receipt's discovery were credible, honest witnesses whose accounts of the events were to be believed." (*Edwards, supra,* at p. 922.)

The Court in *Edwards* further reasoned, "An improper message conveyed in this manner is even more prejudicial to the defense than the usual vouching message ...The prosecutor's personal involvement in the discovery of the receipt plainly served to inform the jury that he had special knowledge regarding its discovery. His involvement also necessarily advised the jury that he personally

believed, based on his own observations, that the receipt had not been planted-he was there, he saw the bag, he saw the crumpled up piece of paper lodged underneath the cardboard bottom, he knew somehow that the bag had not been tampered with. Even more, the prosecutor directly asked the witnesses to testify that he had done nothing improper when he discovered the receipt, that neither he nor anyone else had, in fact, planted it." (*Edwards, supra*, at p. 922)

The Court in *Edwards* concluded "The prosecutor's implicit testimony was devastating to Edwards's only theory of defense, and it was a blow against which he had no way to defend. Because the prosecutor was not subject to cross-examination, defense counsel did not have a fair opportunity to cast doubt on the circumstances under which the receipt was found." (*Id.* at p. 922.)

Other federal courts also have applied the advocate-witness rule and found a conflict where a prosecutor's percipient knowledge places him in the conflict of being both an advocate for the government/prosecution and a witness to a key fact. In *United States v. Prantil* (9th Cir. 1985) 764 F.2d 548, 552-53, the Ninth Circuit found that the district court abused its discretion in refusing to recuse a prosecutor, whose testimony as a witness as to grand jury proceedings was key to the defense of the case. (*Ibid.*).

Taken together with *Chambers* and *Davis*, *Edwards* compels the conclusion that appellant's rights to confrontation and due process were seriously abridged by the trial court's refusal to allow the defense to cross-examine Mitchell. It must be remembered that Mitchell's actions and perceptions became important because he sought to inject himself into the interrogation process. As an experienced prosecutor, surely he knew that the risk of such involvement was that he put his own credibility and actions in issue. Had he not been so involved, his testimony would not have been so important. And because the successful prosecution of this case rested almost entirely on the jury's evaluation of all of the surrounding circumstances of appellant's confession, denial of the ability to confront and cross-

examine Mitchell – the architect of the promise-induced confession -- was a gross violation of appellant's right to present a defense.

A brief review of Mitchell's testimony at the hearing on the motion to recuse exemplifies why it was so critical for the jury to hear from him. Recall, originally there was some problem with the tape recorder Detective Stotz had in his pocket the evening of November 29, when he and Mitchell "interviewed" appellant in his bedroom. On the first copy of the tape given to the defense, Stotz's initial promise that appellant would not get in trouble for any prior sexual issue with Melissa was either not on the tape at all or not audible. (See 2CT 216-217, fn. 1) Similarly, DDA Mitchell's promise of leniency to appellant may have not been audible on the first tape. The defense in its reply commented, "The People's Opposition gives the impression that Mr. Mitchell was merely a passive observer of the November 29th interrogation. To the contrary, Dr. Poza's [tape quality expert's] transcript establishes that Mr. Mitchell was an active participant in the effort to elicit incriminating statements and that he personally made promises of leniency. (See 2CT 347, fn. 1)

It was in this context that the defense questioned Mitchell, and he answered as follows:

> Q [by PD Cronyn] "Do you explain to him at the time that the words that we use could be used against him in a court of law regarding his problems sexually in the past?
>
> A [by DDA Mitchell] No. I think you misunderstood. He was contending he did not kill Melissa, so we were offering him the polygraph so he could prove or clear his name in that regard, if he wanted to avail himself of that. So that wasn't something I would tell him at that time, that everything in regard to the past incidents with Melissa could be used. In fact, we were telling him if he was not the murderer, that nothing he says about the problems would be used against him in court.
>
> Q Where does it say that you say that?

A That's the gist of the interview with him. The problems of leniency that you referred to on the numerous other portions where I say "water under the bridge" and those other portions, that was the gist of the interview. He was contending he was not the murderer.

Q Do you specifically tell him at that time, you will get in trouble for problems sexually in the past with Melissa if you are the murderer?

A No. That was not the gist of the interview. The interview was the opposite of that."

(3RT 300-301)

Mitchell's response appears to be akin to a now infamous answer, reminiscent of Orwellian Doublespeak, that it depends on what "is" is. A trier of fact evaluating the circumstances under which appellant was tape recorded might wonder if Mitchell and Stotz expected the promise of leniency to be picked up by the tape. Otherwise, it is difficult to understand why an experienced prosecutor would not be careful to clarify that the "gist" was that appellant only would get leniency if he were not the murderer. Equally troubling is the fact that the court would not allow an answer to that critical question.

The defense asked,

Q "Did you tell him at any time that, that only the murderer will get in trouble for problems sexually in the past?"

Mitchell answered,

A "That's not said."

Mitchell then stepped out of his role as witness and back into his role as advocate, and objected to the question. The court stated, "I tend to agree that we're

looking at what was said for purposes of this recusal motion. And I'll sustain your objection as to the last question." (3RT 301)

In addition to Mitchell's role in the initial questioning of appellant, the defense also was entitled to present his role in orchestrating the interrogation the following day. His shadow lingers through the entire day of November 30, leaving a huge gap in the body of knowledge the jury should have had to make its decision, including but not limited to his instructions to all interrogating officers, the other district attorney involved, John Chessell, and Dr. Rath. None of this information is cumulative, because it potentially contradicts the recollection of each witness as to what he was told to do with appellant, and when.

d. Prejudice

Mitchell's intimate involvement in the initial stages of the interrogation on November 29 put him in a unique position to assist the jury's evaluation of appellant's demeanor and state of mind after the killing and also should have required him to explain his own overreaching promise of leniency. His actual involvement in the interrogation on November 30 is unknown because the defense was prevented from developing the record at trial, but the testimony of the other interrogators gives rise to a compelling inference that he was orchestrating efforts that resulted in overreaching and produced a false confession. Based on the foregoing, the trial court erred when it denied the defense request to call Mitchell as a witness and the error was prejudicial because the jury was denied yet one more tool to evaluate allegations that the interrogation process was fundamentally unfair. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

5. The Court Restricted Cross-Examination of Detective Glenn Stotz, Appellant's Chief Interrogator

a. Standard of Review

The standard of review for a ruling on the admissibility of evidence is abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) The trial court's discretion must be "neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impeded or defeat the ends of substantial justice. [Citations]" (*People v. Stone* (1999) 75 Cal.App.4th 707, 716.) Although the abuse of discretion standard is deferential, "it is not empty." (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The standard "asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (Ibid.)

b. Governing Law and Application

The credibility of a key witness is never irrelevant. Relevant evidence includes evidence relevant to the credibility of a witness that has any tendency in reason to prove or disprove a disputed fact. (See Evid. Code, § 350; *Wood v. State of Alaska* (9th Cir. 1992) 957 F.2d 1544 [thorough analysis of what is and is not relevant in light of defendant's version of events]. Relevant evidence which bears on the credibility of a witness never should be excluded; to do so impinges the defendant's right to present his defense.

"Cross examination is the principle means by which the believability of a witness and the truth of his testimony are tested." (*Davis v. Alaska, supra,* 415 U.S., at p. 316.) It is the "greatest legal engine ever invented for the discovery of truth.' " (*California v. Green* (1970) 399 U.S. 149, 158.) The Confrontation Clause is designed, through the vehicle of cross-examination, "to promote reliability in the truth-finding functions of a criminal trial." (*Kentucky v. Stincer*

(1987) 482 U.S. 730, 737.) In refusing to allow the defense to fully cross-examine Detective Stotz, the court denied appellant his right to confront and cross-examine the key witness to his interrogation and fully test his credibility and the reliability of the interrogation process itself, which often was in question. (U.S. Const., Amend. 6; *Pointer v. Texas* (1965) 380 U.S. 400; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [denial of examination of confessing accomplice violated due process]; *Davis v. Alaska* (1974) 415 U.S. 308, 317 [denial of examination of witness with juvenile record violated due process; *United States v. McLernon* (1984) 746 F.2d. 1098; *United States v. Vargas* (9th Cir. 1991) 933 F.2d 701 (9th Cir. 1991).

The following excerpts from the defense's attempts at cross-examination of Stotz reveal a pattern of sustained objections every time the defense posed a question that would require an answer as to the following categories of evidence. This evidence was extremely relevant and critical to the ability of the defense to demonstrate that the authorities overreached, appellant's will was overborne, and his confession was not reliable and may have been false:

(1) Understanding of Proper Interrogation Technique

Where the defense seeks to challenge a confession as involuntary or false, it is necessary and proper to lay a foundation as to a police officer's experience and training in interrogation techniques. (See *Missouri v. Seibert* (2004) 542 U.S. 600, 611 [discussing police interview and interrogation techniques]; *Miller v. Fenton* (1985) 474 U.S. 104, 109 [condemning certain interrogation techniques]; *Arizona v. Mauro* (1987) 481 U.S. 520, 532, fn. 1 [J. Stevens, dissenting, discussing in general testimony before the Arizona Supreme Court regarding police officer's interrogation experience and techniques]; *Orozco v. Texas* (1969) 394 U.S. 324, 328-329 ["The danger [about which the Court in *Miranda* was concerned] was that in such circumstances the confidence of the prisoner could be eroded by techniques such as successive interrogations by police acting out friendly or

unfriendly roles."], citing *Miranda v. Arizona* (1966) 384 U.S. 436, 445.) When the defense attempted to do so in this case, however, the trial court improperly sustained prosecution objections on grounds of overbreadth, relevancy, and assuming facts not in evidence.

During its examination of Detective Stotz, the defense attempted to lay a foundation as to his training and experience with respect to properly interrogating suspects and avoiding false confessions. The court sustained a relevance objection by the prosecution and then added that the question was overly broad and vague:

> Q [By Ms. Cronyn] "Could you describe the training that you had regarding interrogation of suspects?
>
> A [By Det. Stotz] Up until 1994 at the time of the murder, the only specific training that I had received in interrogating suspects or witnesses, for that matter, was that included during the basic academy, which I attended from August of 1983 to December of 1983.
>
> Q What did you learn in the academy about interrogating suspects in custody?
>
> Mr. Mitchell: Objection. Irrelevant.
>
> The Court: And overly broad and vague, I think. Sustained."

(19RT 2823)

After the court sustained the objection as overly broad and vague, the defense attempted to question Stotz as to specific areas in which he received training. The trial court, having prohibited the defense from a obtaining a response to a question characterized as too broad, then sustained objections by the prosecution when the defense attempted to asked questions which were narrower and more specific:

Q [By Ms. Cronyn] "Well, did you have any training on the job as well from any officers?

Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained.

Q (By Ms. Cronyn] Did you receive any training in – in how to avoid eliciting false confessions?

Mr. Mitchell: Irrelevant and assumes a fact not in evidence.

The Court: Sustained.

Q [By Ms. Cronyn] Did you receive any training in the techniques of proper interrogation?

Mr. Mitchell: Objection. Assumes a fact not in evidence and irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Do you – did you train in—did you receive any training either at the academy or in your experience as a police officer in recognizing false confessions?

Mr. Mitchell Objection. Assumes a fact not in evidence and irrelevant.

The Court: Sustained."

(19RT 2823-2824)

Once again, the court put the defense in a double-bind, disallowing an entire line of questioning first because it was too broad and second because it was too narrow. After that, the court improperly sustained objections as to relevance and assuming facts not in evidence, when in reality the questions were entirely relevant: The defense was trying to find out specifics as to Stotz's training, to lay a foundation to demonstrate that he used interrogation techniques that were

improper and possibly outside department policy. The questions also did not assume any facts not in evidence: The defense was asking about Stotz's training in the area of false confessions; it was not assuming he had training as to false confessions.

(2) Direction and Instructions Received From District Attorney Mitchell

Another key issue in this case is whether the authorities made a determination as to what crimes they wished to charge appellant, and then worked backwards to justify that decision. For that reason, the actions of Deputy District Attorney William Mitchell were a critical part of the defense case that the confession extracted from appellant was not reliable and may have been false. Just as the trial court refused to allow the defense to develop the record by examining Mitchell directly, the court also disallowed questions as to his involvement in directing the interrogation process. A plain review of this portion of the transcript also leaves the reader with the impression that Mitchell was metaphorically sitting in court as a silent percipient witness to the interrogation and then jumping up and donning his prosecutor's hat:

> Q "Did anyone give you any advice as to how to proceed in this interrogation?
>
> A Yes.
>
> Q Who was that?
>
> A Mr. Mitchell from the DA's office over the telephone.
>
> . . .
>
> A Yet you spoke for 10 to 15 minutes in the morning before you turned on the tape?
>
> Q That's correct.

A Did Mr. Mitchell make any suggestions about the information he wanted you to inquire about?

Mr. Mitchell: Object as irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] When we're talking about Mr. Mitchell, it's the gentleman who's sitting in court as the prosecutor in this case, is that right?

A That's correct.

Q Did Mr. Mitchell tell you that he wanted you to focus your inquiry on whether or not Daniel Linton had any sexual interest in Melissa?

Mr. Mitchell: Object again as being irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Did Mr. Mitchell ask you to focus your inquiry as to whether or not Melissa was killed during the course of a burglary?

Mr. Mitchell: Objection, again. Irrelevant.

The Court: Sustained.

. . .

Q And at that time did Mr. Mitchell offer any suggestions as to how the interview should proceed?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Did you formulate in your own mind at that time an interview strategy to conclude the interview?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained."

(19RT 2862-2863)

(3) Gaps occurring when the tape recorder was not on and questions as to who initiated conversation

Prompted by gaps in the record, the defense also attempted to make a record as to any conversations that were not recorded. It is important to understand that initially, the quality of the tape of the November 29 interview in appellant's bedroom was of such poor quality that the promises by District Attorney Mitchell and Detective Stotz that the past incident with Melissa was "water under the bridge" were not initially audible. Recall, there apparently was a great deal of concern on the part of the defense as to whether there were critical gaps in the initial poor-quality interview tapes, specifically as to promises of leniency by Detective Stotz and DDA Mitchell. On the first copy of the tape given to the defense, Stotz's initial promise that appellant would not get in trouble for any prior sexual issue with Melissa was either not on the tape at all or not audible. (See 2CT 216-217, fn. 1) Similarly, DDA Mitchell's promise to appellant that any prior incident was "water under the bridge" may have not been audible on the first tape. (See 2CT 347, fn. 1)

Once again, the court allowed Mitchell to orchestrate what the defense was, and was not, allowed to elicit from Detective Stotz:

> "Q And you also, I believe, testified that your conversation with Daniel was only prompted by his questions, isn't that fight? [para.] In other words, you didn't initiate a conversation with Daniel, and you used the word, I believe, "prompted by his questions" in describing how this interview of this conversation with Daniel was conducted before the tape was turned on?
>
> Mr. Mitchell: Object as vague.
>
> The Court: Sustained.

Q [By Ms. Cronyn] Didn't you testify, page 50, lines 26 27: 'Any conversation he and I had about the case was prompted by his questions?'

Mr. Mitchell: Objection. Vague as to time.

The Court: Sustained.

Q [By Ms. Cronyn] When you testified in 1995 at the preliminary haring, you were referring, on page 50, to the conversation that you had with Daniel Linton before you turned on the tape recorded on 11/30/94, and you said, "But any conversation he and I had about the case was prompted by his questions." Isn't that right?

Mr. Mitchell: Object as assuming a fact not in evidence, and Miss Cronyn is testifying.

The Court: Hold on.

Mr. Mitchell: As to what area he was referring to in the preliminary hearing transcript.

Ms. Cronyn: I'll withdraw the question."

(19RT 2868-2869)

(4) Untruths and misrepresentations made to a appellant to elicit admissions

The defense also tried to explore what means the authorities used to elicit admissions from appellant, to no avail:

Q [By Ms. Cronyn] "In other words, you made it clear to Daniel that the promises you had made the night before were still in effect, right?

Mr. Mitchell: Objection, calls for speculation.

The Court: Wait a minute. [para.] Sustained.

Q [By Ms. Cronyn] Did Mr. Mitchell tell you when you talked to him on the phone on 11/30/94, or before you parted company on 11/29/94, please make sure that Daniel understands that those promises that were made to him won't be in effect if he confesses that he killed Melissa?

Mr. Mitchell: Object as irrelevant.

The Court: Sustained.

. . .

Q [By Ms. Cronyn] And, Officer Stotz, you were honestly truthful with Daniel when you made those comments about it being water under the bridge; isn't that right?

Mr. Mitchell: Object again as calling for speculation and irrelevant.

The Court: Sustained.

. . .

Q [By Ms. Cronyn] Well, did you explain to Daniel at this point because we want some evidence that we can play in court so that jury can hear it? Did you tell him that?

Mr. Mitchell: Assumes a fact not in evidence. Objection.

The Court: Sustained.

Q [By Ms. Cronyn] Well, did you tell Daniel we're gathering evidence here and one day it's going to be played in public and people are going to hear it?

Mr. Mitchell: Objection, argumentative.

The Court: Sustained.

Mr. Mitchell: And irrelevant.

Q [By Ms. Cronyn] Did you tell Daniel if we don't get you to say it out loud, the jury won't hear it?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained.

Mr. Mitchell: Calls for speculation.

The Court: Sustained.

. . .

Q [By Ms. Cronyn] Now, over 40 times between November 30th – pardon me, November 29th, 1994, and November 30th, '94, Daniel had denied any sexual interest in Melissa, isn't that right?

Mr. Mitchell: Objection, calls for speculation and conclusion on this officer's part.

The Court: Sustained.

. . .

Q [By Ms. Cronyn] And isn't it a fact that he had consistently up to this point denied any sexual interest in Melissa?

Mr. Mitchell: Objection, calls for speculation and a conclusion.

The Court: You can answer. Overruled.

The Witness: No, I would say that's – that's not true."

(19RT 2881-2882)

Q [By Ms. Cronyn] "And he [Sergeant Rodriguez] tells you – he tells Daniel that he knows that Daniel's not telling the entire truth; isn't that right?

A [by Det. Stotz] That's correct.

Q And if he tells the entire truth, he'll feel so much better, right?

A Yes.

Q And isn't that a time-honored interrogation technique detectives use to – when a suspect is about to crack or give up?

Mr. Mitchell: I'm going to object as calling for speculation and assuming facts not in evidence.

The Court: Sustained.

Q [By Ms. Cronyn] You think that Officer Rodriguez was honestly concerned at this moment that Daniel confess to something so he would feel better?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained.

. . .

Q [By Ms. Cronyn] But part of the process of catching a criminal is to manifest or to feign or to fake a kind of real concern, brotherly concern, for someone, right?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained."

(19RT 2886-2887)

(5) Strategy to Persuade Appellant That He Intended to Rape or Sexually Assault Melissa Either at the Time of Her Death or Several Weeks (or Months) Earlier

Finally, the defense tried to question Stotz as to the closing moments of the interrogation, when based on the sound of his voice on tape appellant clearly was exhausted and also had little to eat all day. This information about a defendant's mental state and fatigue is critical in assessing the voluntariness of his confession.

(See again, *Leyra v. Denno* (1954) 347 U.S. 556, 561; *United States v. Wauneka* (1981) 842 F.2d 1083, 1087-1088.) Recall also that appellant had little to eat or drink all day November 30. (See 5SCT 232; 9RT 1094-1095)

> Q [By Ms. Cronyn] "And you could tell, couldn't you, from the tone of his voice at 3:40, when you go in to summarize the interview, that Daniel from his tone of voice is starting to sound tired, isn't he?
>
> Mr. Mitchell: Objection, calling for speculation
>
> The Court: Sustained.
>
> Q [By Ms. Cronyn] When you summarize what you believe Daniel had told you that day, Daniel answers sort of robotically, 'yeah,' ' yes,' 'yes' 'yes,' is that right?
>
> Mr. Mitchell: Objection, calls for speculation and –
>
> The Court: Sustained."

(19RT 2892-2893)

> Q [By Ms. Cronyn] "Officer, why is it at this point, when you could see that Daniel is under some duress, under some stress, that you just didn't back off and say, "It's okay, Daniel. We'll take a rest. You don't have to say anything you don't want to say"? Why didn't you do that at this point?
>
> Mr. Mitchell: Objection.. Irrelevant.
>
> The Court: Sustained.
>
> Q [By Ms. Cronyn] Why did you tell Daniel that he had to say something out loud?
>
> Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained."

(19RT 2900-2901)

Q [By Ms. Cronyn] "There was something in particular – there was a goal here from Mr. Mitchell, Deputy District Attorney Chessell, Dr. Rath, Detective Sergeant Rodriguez – they had a goal, didn't they?

Mr. Mitchell: Objection. Calls for speculation.

The Court: Sustained.

Q [By Ms. Cronyn] Well, because this was your first homicide investigation, you weren't really calling the shots in terms of where – the direction of this interrogation; is that right?

A No. Actually, as far as the San Jacinto Police Department personnel goes, I – I was, with some direction and some advice from Mr. Mitchell.

Q Okay. But isn't it a fact that Mr. Mitchell specifically asked you to inquire at the end about Daniel's sexual interest in Melissa?

Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Well, why was it necessary for you to get Daniel to say this out loud?

Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Well, after Daniel said, 'I tried to rape her,'Detective Rodriguez asked, 'When was this?' Right?

A. That's correct.

. . .

Q Now, in order to validate a confession, isn't it a fact that you look for the details to see whether or not the – the person confessing has a memory of what they did or they are just simply telling you what you want to hear?

Mr. Mitchell: Object as assuming facts not in evidence and calling for opinion and irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Well, why did you ask, 'Tell me what happened?' after Daniel said, 'Like the very first time, like 2 months ago, whatever – whenever it was'?

Mr. Mitchell: Objection. Irrelevant.

The Court . . . Sustained.

. . .

Q [By Ms. Cronyn] Well, you – you testified that you wanted to get all of the details about what happened. Right?

A That's correct.

Q Well, didn't it cause you some concern that he didn't seem to have any details about this attempted rape?

Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] And then you say, "Okay. Well, how far did you get with her? Is that right?

A That's correct.

Q And Linton says, 'Not very far at all. Nowhere.' Right?

A Yes.

Q Well, what details did Daniel Linton give you that made you certain that his 'I tried to rape her' statement was true?

Ms. Mitchell: Objection. Irrelevant.

The Court: Sustained."

(19RT 2904-2906)

Q [By Ms. Cronyn] "Oh. Let me see. On page 80, after this, you say, 'Did a thought cross your mind yesterday whey you went in there and found here there?' Right?

A That's correct.

Q And then you tell Daniel, 'Obviously, it must have crossed your mind.' Isn't that right?

A That's correct.

Q So you were telling Daniel that he had a thought. Right?

Mr. Mitchell: Objection. Calling for speculation.

The Court: Sustained.

Q [By Ms. Cronyn] Why did you tell Daniel that it must have crossed his mind?

Mr. Mitchell: Objection. Irrelevant why he said something.

The Court: Sustained.

Q [By Ms. Cronyn] You told Daniel Linton on 11/29/94 that you thought Melissa was a pretty cute gal.

A That's correct.

Q When you saw Melissa, did you think because she was a pretty cute gal – did the thought cross your mind of some sexual interest in her?

Mr. Mitchell: Objection. Argumentative.

The Court: Sustained.

Q [By Ms. Cronyn] Why did you tell Daniel that Melissa was a pretty cute gal?

Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Why did you tell Daniel, 'Obviously, it must have crossed your mind'?

Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Now, for the first time, Daniel concedes what you already believed.

Mr. Mitchell: Objection.

Q. [By Ms. Cronyn] He says, 'Initially, but I decided not to. 'Right?

Mr. Mitchell: Objection. Assumes a fact not in evidence.

The Court: Sustained.

Q [By Ms. Cronyn] Well, you believe that it must have crossed Daniel's mind about raping Melissa on the 29th. Right?

Mr. Mitchell: Objection. Vague.

The Court: Sustained.

Q [By Ms. Cronyn] Well – and then you say, 'Okay. How far into it?' Right.

A That's correct.

Q So now finally Daniel's giving up, isn't he? Copping out. Right?

Mr. Mitchell: Objection. Calls for speculation.

The Court: Sustained."

(19RT 2908-2909)

Q [By Ms. Cronyn] "Did you tell him that one day this tape that you were making would be played to a jury?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Well, part of the procedure in obtaining evidence is getting a taped interview; isn't that right?

A That's correct.

Q What is the purpose of getting a tape-recorded interview?

Mr. Mitchell: Object as irrelevant.

The Court: Overruled. I think you can answer that.

The Witness: The purpose of taking the interview is to memorialize what is said between myself and Mr. Linton.

Q [By Ms. Cronyn] And isn't it also true that the purpose of getting a taped interview is so that you have concrete evidence to play in front of a jury? Isn't that right?

Mr. Mitchell: Objection. Argumentative.

The Court: Sustained."

(20RT 2980-2981)

Q [By Ms. Cronyn] "And when you said, 'Tell me what happened,' he said, 'I didn't do anything, though,' right?

A Yes.

Q And you said, 'Well, how far did you get?' And he said, 'Not very far at all, no where.' Right?

A Correct.

Q But he was referring at this point to something that happened two months before, right?

Mr. Mitchell: Objection, calls for speculation on the officer's part.

The Court: Sustained.

Q [By Ms. Cronyn] Page 79, what does Daniel tell you when you ask, 'When was this' in reference to the time he tried to rape her? What does he tell you?

A 'Like the very first time, like two months ago, whatever, whenever it was.'

Q Does Daniel Linton describe anything happening two or three weeks before Melissa died in your last interrogation from 3:40 to 4 o'clock?

A Again, I'd have to review the transcripts from that time period.

Q Please do.

Mr. Mitchell: Your honor, I'm going to object as calling for speculation on his part as to whether or not Daniel's referring to two weeks before or two months before and improper opinion. We have the transcript in evidence. I don't think it's necessary to have his opinion as to what he's talking about in it.

The Court: I agree. Sustained.

Q [By Ms. Cronyn] Well, when Daniel spoke of a prior incident, you wanted to clarify, did you not, what had occurred? Is that right?

Mr. Mitchell: Objection, irrelevant.

The Court: Overruled. [para] You can answer.

The Witness: Yes, that's correct.

Q [By Ms. Cronyn] So what, if anything, does Daniel Linton tell you that he did to Melissa two to three weeks before she died in your last interrogation from 3:40 to 4 o'clock?

Mr. Mitchell: Objection. Asked and answered.

The Court : Sustained.

Ms. Cronyn: Asked, Your Honor, but not answered.

The Court: I believe it was.

Ms. Cronyn: I think he was going to review the transcript.

The Court: Yes, but that was – it was still asked and answered previously, and I sustained the earlier objection as asked and answered."

(20RT 3081-3082)

Q [By Ms. Cronyn] "It was after that that you told Daniel, 'The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way,' right?

Mr. Mitchell: I'm going to object as asked and answered. And under 352 this whole line of questioning is irrelevant, because what was said by the officers and by Linton is on tape and in a transcript, and I don't think it's necessary to have the officer go over it line by line.

The Court: I agree. It's been asked and answered, and I think under 352 we'll just move on to another line of questioning.

. . .

Q [by Ms. Cronyn] And you told Mr. Mitchell that Daniel at this point had not yet admitted to a sexual interest in Melissa?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] You told Mr. Mitchell that you would continue to pursue this line of questioning as to whether or not Daniel had a sexual interest in Melissa; isn't that right?

Mr. Mitchell: Objection, assumes a fact not in evidence and irrelevant.

The Court: That's correct. Sustained.

Q [By Ms. Cronyn] Mr. Mitchell made some suggestions to you about how you might be able to get these words from Daniel in your last interrogation; isn't that right?

Mr. Mitchell: Objection. Assumes a fact not in evidence and irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] You were trying to threaten Daniel when you told him that you would not stop the interrogation until he told you what you wanted to hear; isn't that right?

Mr. Mitchell: Objection. Irrelevant and argumentative.

The Court: Sustained.

Ms. Cronyn: Crane v. Kentucky, Your Honor.

The Court: It's argumentative, Counsel. Move on.

Ms. Cronyn: Okay.

Q [By Ms. Cronyn] What, if anything, did you say to encourage Daniel to tell you what you had previously told him you personally believed?

Mr. Mitchell: Objection, irrelevant. Under 352 is repeating what's in the transcript, is irrelevant and unnecessary.

The Court: Sustained.

Q [By Ms. Cronyn] Well, you ask questions for a purpose in an interrogation, do you not, Officer?

Mr. Mitchell: Objection, asked and answered.

The Court: Sustained.

Q [By Ms. Cronyn] Now, up to 11:40, isn't it a fact that Daniel Linton had not admitted that he had any sexual interest in Melissa either on 11/29 or on any previous occasion?

Mr. Mitchell: Objection, asked and answered, and irrelevant opinion evidence.

The Court: Sustained.

Q [By Ms. Cronyn] You testified, did you not, that at this point, 11:20, Daniel had not admitted to you that he had a sexual interest in Melissa Middleton; isn't that right?

Mr. Mitchell: Objection, asked and answered.

The Court: Counsel, your questions are incredibly redundant. Move on to something else. You're covering the same territory over and over and over again.

Ms. Cronyn: Okay. I apologize, Your Honor, but I don't think it's clear in the record. Last time we asked this question, he said, yes, he had. He has previous testimony where he says that he does not believe that Daniel admitted a sexual interest in Melissa at this point.

The Court: I think we've covered this area quite adequately. Move on.

Q [By Ms. Cronyn] At 3:40 in the afternoon, before you went in with your final interrogation, isn't it a fact that at this point Daniel Linton had not admitted that he had a sexual interest in Melissa either on the 29th or any previous occasion?

Mr. Mitchell: Objection, asked and answered.

The Court: Counsel, do you have a new line of questioning or should we just cut this off right now?

Ms. Cronyn: That's –

The Court: I'm going to cut you off if that's all, because you're just going over the same things.

Ms. Cronyn: No, it's not 11:20. This is 3:40. We were talking about 11:20 before. This is 3:40.

The Court: It's still the same subject matter. Move on to something else."

(20RT 3084-3087)

Q [By Ms. Cronyn] "How many times did you ask Daniel Linton or how many times did he deny that he had an intent to steal on 11/29/94 before he said on page 18 'maybe'?

A Well –

Mr. Mitchell: Objection, irrelevant. Also, excuse me, misstates his testimony.

The Court: It is irrelevant. Sustained.

Q [By Ms. Cronyn] Well, you were searching for the truth; is that right, Officer?

Mr. Mitchell: Objection, asked and answered..

The Court: Sustained.

Q [By Ms. Cronyn] In your search for the truth, Daniel denied going into steal at least three times before he finally said maybe he did; is that right?

Mr. Mitchell: Objection, assumes a fact not in evidence and irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] You told Daniel at a certain point at the end of the interrogation, 3:40 to 4 o'clock, 'I don't buy this story about you going over there to look for money.' Was that a lie or is that the truth?

Mr. Mitchell: Objection, irrelevant and argumentative.

The Court: Sustained.

Q [By Ms. Cronyn] Isn't it a fact that you, in fact, didn't buy this story about Daniel going over there to look for money?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Isn't it a fact, Officer, that one of the time-honored techniques of police interrogation is that sometimes you tell a suspect what isn't true, like, for example, we have forensic evidence, fingerprints?

Mr. Mitchell: Objection, asked and answered.

The Court: Sustained.

Q [By Ms. Cronyn] Well, when you told Daniel, 'I don't buy this story about you going over there to look for money,' were you trying to get Daniel to agree with you about something else?

Mr. Mitchell: Objection. Irrelevant what he was trying to do.

The Court: Sustained.

Q [By Ms. Cronyn] You were trying to coerce a confession, were you not, Officer?

Mr. Mitchell: Objection. Argumentative and irrelevant what he was trying to do.

The Court: Sustained.

Q [By Ms. Cronyn] You gave Daniel Linton a choice earlier in the interview between telling you that he went in to steal and he went in there to try to have sex with Melissa, isn't that right?

Mr. Mitchell: Objection. Argumentative and calls for improper opinion evidence.

The Court: Sustained.

Q [By Ms. Cronyn] You said to Daniel, 'Do you think -- do you – you went in the house a couple of weeks ago and yesterday to maybe fool around a little bit, try to have sex with Melissa?' And Daniel said, 'I didn't know she was home.' [para] And then after that Daniel said he needed some money; isn't that right?

Mr. Mitchell: Objection, compound and irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] You wanted Daniel to explain why he went into the house, did you not?

A Yes.

Q And he told you that he did not go in to steal, right?

Mr. Mitchell: Objection, asked and answered.

The Court: Yeah. Sustained.

Q [By Ms. Cronyn] You told Daniel that he went in to fool around a little bit and try to have sex with Melissa, isn't that right?

Mr. Mitchell: Objection, asked and answered.

The Court: Sustained.

Mr. Mitchell: And irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] After you told Daniel what your opinion was about him having a sexual interest, then he decided that he needed some money, isn't that right?

Mr. Mitchell: I'd object as calling for speculation on the officer's part and, again, on this line of questioning. She is asking him to repeat what's in the transcript, in 15B, and that's unnecessary testimony, and I'd object to the whole line of questioning.

The Court: Sustained."

(20RT 3090-3093)

Q [By Ms. Cronyn] "Did you mention in your report that Mr. Mitchell and yourself made express promises to Daniel on 11/29/94 in his bedroom?

Mr. Mitchell: Objection, assumes a fact not in evidence and calls for an improper legal opinion.

The Court: Sustained.

Q [By Ms. Cronyn] Did you put anything in your report about what you told Daniel Linton on 11/29/94 with regard to whether or not he ever grabbed, touched, kissed or even had sex with Melissa in the past?

Mr. Mitchell: Objection, irrelevant.

The Court: Sustained."

(20RT 3097-3098)

Q [By Ms. Cronyn] "Approximately how many questions – pardon me. I misspoke myself. The 29th, in Daniel's bedroom –

A That's correct.

Q -- was when you conducted the half-hour interview with Mr. Mitchell; is that right?

A That's correct.

Q And how about – approximately how many questions did Mr. Mitchell ask?

Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained.

Q [By Ms. Cronyn] Isn't it a fact that of the 227 questions that were asked, Mr. Mitchell asked 129 of them?

Mr. Mitchell: Objection. Assumes facts not in evidence.

The Court: Sustained.

Q [By Ms. Cronyn] Isn't it a fact that Mr. Mitchell conducted at least half, if not more than half, of that interrogation?

Mr. Mitchell: Objection. Irrelevant.

The Court: Sustained.

. . .

Q [by Ms. Cronyn] Were you attempting to leave the impression that you were the person who was doing – conducting the interview of Daniel, the principal interviewer?

Mr. Mitchell: Objection. Argumentative.

The Court. And irrelevant. Sustained.

Q [By Ms. Cronyn] Well, isn't it a fact that it was Mr. Mitchell who was actually taking the lead in terms of the direction of the interview of Daniel Linton in his bedroom on November 29, 1994?

Mr. Mitchell: Objection. Calls for improper opinion evidence.

The Court: Sustained."

(21RT 3111-3112)

c. Prejudice

Detective Stotz was appellant's primary interrogator. It was Stotz, often at the direction of Mitchell, who controlled the strategy, tactics, and inquiries that ultimately led appellant to whisper wearily after a long day of questioning, "I tried to reap [sic] her . . ." But when the defense attempted to probe Stotz's strategy, tactics and observations of appellant's demeanor, the trial court cut off the line of questioning, usually on relevance grounds. In fact, these factors were extremely relevant to the issue of voluntariness. Stotz, like Mitchell the night before, was a key percipient witness to appellant's apparent emotional state. Stotz, like Mitchell, appears to have wanted to persuade appellant to confess to sexual intent, at all costs. By restricting the cross-examination of Stotz, the court took away from the defense another critical tool in dispelling the notion that appellant voluntarily confessed to wanting to, and attempting to, have sex with Melissa on the prior occasion. Based on the foregoing factors rendering this a close case and in combination with the other errors that impinged the jury's assessment of appellant's confession, the trial court erred in restricting the cross-examination of Stotz. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

II.

JUROR MISCONDUCT: THE TRIAL COURT REFUSED TO EXCUSE A JUROR WHO ADMITTEDLY VIOLATED INSTRUCTIONS AND DISCUSSED THE CASE WITH HER HUSBAND, IN VIOLATION THE SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 7 and 16 OF THE CALIFORNIA CONSTITUTION.

At the beginning of deliberations, Juror #1 confidently shared with her fellow jurors the fact that, "I'm the first to admit that I discussed this with my husband and we were talking about the case." (31RT 4821) After this was revealed, a hearing was held in which Juror #1 told the court that she told her husband she questioned Melissa's screaming reaction when appellant entered the house. Juror #1 claimed she also told her husband not to respond when she told him about the case, as she would need to "vent" from time to time. Based on these facts, the trial court ruled, "It's certainly ... at the edge of propriety. And I think I've admonished her again not do it any further [sic]. But I don't think she's gone over the edge. And so I think to – to excuse her at this point would not be appropriate or necessary." (31RT 4842-4843) The court was in error.

A. Standard of Review

In reviewing a claim of juror misconduct or juror bias, the reviewing court "accept[s] the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citation]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations]" (*Nesler, supra*, at p. 582.]

B. Factual and Procedural Background

On March 11, 1999, the second day of deliberations, the jury foreperson sent a note to the court that was read into the record. The note stated that, ""As foreman, I feel I should report that one of the jurors, during our discussion, said ...they had a discussed a specific aspect of the case with her husband". (31RT 4820) The court questioned the foreperson further, and he said the juror made the statement when the jury was discussing the point in time when appellant came into the Middleton house and walked upstairs. The juror said that if it were her and someone came in that she knew, she would not automatically scream. (31RT 4820-4821) The juror also said, "I'm the first to admit that I discussed this with my husband and we were talking about the case." (31RT 4821) The other jurors indicated that they "don't want to go there," meaning they had been instructed not to discuss the case with anyone except other jurors. (31RT 4821)

After some discussion (31RT 4821-4828), the juror, Juror #1, entered the courtroom and was questioned by the court. Juror #1 said that during the first few days of the trial, she told her husband that she would have reacted differently than Melissa did when appellant appeared in the room. She said she would not have freaked out and started screaming if her neighbor walked in the way appellant did. (31RT 4820-4832) She told her husband that if something "slipped out" or she needed to vent, he should not respond or ask her any questions. Her husband never responded to her and they have never had any discussions regarding the case. (31RT 4832-4835)

The court admonished Juror # 1 not discuss the case with anyone. The defense argued that Juror #1 should be excused because of her actions and because she was disingenuous in her claim that she just needed to "vent" and that her husband did not respond. The prosecution felt the defense argument was speculative. (31RT 4835-4842) The court overruled the defense objection and allowed Juror #1 to remain on the jury because she only "vented" and there was no

indication she received feedback from her husband. The court concluded, "It's certainly ... at the edge of propriety. And I think I've admonished her again not do it any further [sic]. But I don't think she's gone over the edge. And so I think to – to excuse her at this point would not be appropriate or necessary." (31RT 4842-4843)

C. Governing Law and Application

A criminal defendant has a constitutional right to trial by unbiased, impartial jurors. (U.S. Const., Sixth and 14th Amend.; Cal. Const., art. I, §16; *Irwin v. Dowd* (1961) 366 U.S. 717, 722; *People v. Hughes* (1961) 57 Cal.2d 89, 95.) A single juror who is partial or motivated by prejudice deprives a defendant of his Sixth Amendment right to trial by an impartial jury. (See *United States v. Plache* (9th Cir. 1990) 913 F.2d 1375 [Eastern Dist. of Calif.]; *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517; *United States v. Hendrix* (9th Cir.) 549 F.2d 1225, 1227, cert. den. (1977) 434 U.S. 818.) A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, 269 Cal.Rptr. 530, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.)

"Juror misconduct .... leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. [Citations]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) The effect of out-of-court information upon the jury is assessed in the following manner. "When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will

be set aside only if there appears a substantial likelihood of juror bias. [Citation] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra*, at p. 578.) If there is a "substantial likelihood that a juror was actually biased," the verdict must be set aside, "no matter how convinced [the Court] might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*Nesler, supra*, at p. 578.)

What constitutes "actual bias" of a juror varies according to the circumstances of the case. [*Nesler, supra*, 16 Cal.4th t p. 580.) The United States Supreme Court has set the following standard for assessing juror partiality, "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." (*United States v. Wood* (1936) 299 U.S. 123, 145-146, 57 S.Ct. 177, 185, 81 L.Ed. 78.) " 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' [Citation.] [¶] It is not required, however, that the jurors be totally ignorant of the facts and issues involved.... It is sufficient if the juror can lay aside his impression or opinion *and render a verdict based on the evidence presented in court.*" (*Irvin v. Dowd, supra,* 366 U.S. at pp. 722-723, 81 S.Ct. at pp. 1642-1643, italics added, (quoting *Reynolds v. United States* (1878) 98 U.S. (8 Otto) 145, 155, 25 L.Ed. 244.) An impartial juror is someone "capable and willing to decide the case solely on the evidence" presented at trial. (*Smith v. Phillips, supra,* 455 U.S. at p. 217; *In re Carpenter* (1995) 9 Cal.4th 634, 652.)

Under California law, "if a juror's partiality would have constituted grounds for a challenge for cause during jury selection, or for discharge during trial, but the juror's concealment of such a state of mind is not discovered until after trial and verdict, the juror's actual bias constitutes misconduct that warrants a new trial under Penal Code section 1181, subdivision 3. [Citations]" (*People v. Nesler, supra*, 16 Cal.4th at p. 581, citing *People v. Galloway* (1927) 202 Cal. 81, 89-92, 259 P. 332; *People v. Meza* (1987) 188 Cal.App.3d 1631, 1642-1643, 234 Cal.Rptr. 235.) "Thus, actual bias supporting an attack on the verdict is similar to actual bias warranting a juror's disqualification. [Citations]." (*People v. Nesler, supra*, at p. 581.) "[J]uror misconduct may still be found where bias is clearly apparent from the record. [Citation]" (*People v. San Nicholas* (2004) 34 Cal.4th 614, 646.)

A juror who violates his or her oath and the trial court's instructions is guilty of misconduct. "'"When a person violates [her] oath as a juror, doubt is cast on that person's ability to otherwise perform [her] duties." ' [Citation]" (*People v. Nesler, supra*, 16 Cal.4th at p. 586, citing *In re Hitchings* (1993) 6 Cal.4th 97, 120.) "Misconduct by a juror, or a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable 'presumption' of prejudice. [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 295.)

Juror #1 clearly committed misconduct under both the federal and state tests. She demonstrated – indeed flaunted to the other jurors – a willingness to "vent" to her husband about the case, despite the fact that she specifically had been instructed not to do so. (*People v. Nesler, supra*, 16 Cal.4th at p. 586; *In re Hamilton, supra,* 20 Cal.4th at p. 295.) It appears from her testimony, moreover, that Juror #1 formed an opinion about the case early in the trial in which she questioned whether and why Melissa screamed when appellant entered the house. (See again, 31RT 4820-4832) This opinion, which she conveyed to a third-party, had to be based on evidence that came directly from appellant and bore on his credibility, either as described in opening statements or in one of his statements to

the police, because appellant was the only person who witnessed Melissa's reaction. Juror #1 held this opinion within her through the entire trial and then on the first full day of deliberations felt compelled to share her conversation about it with fellow jurors. Her misconduct was palpable.

D. Prejudice

Under federal law, Juror #1's misconduct is structural error, because he was deprived of his right to a unanimous verdict of 12 impartial jurors. (See *Arizona v. Fulminante* (1991) 499 U.S. 279.) In *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630, the Ninth Circuit observed that the presence of a biased juror was a structural defect because, "... 'The entire conduct of the trial from beginning to end is obviously affected ... by the presence on the bench of a judge who is not impartial.' [Citation] We see little differences between a trial by a judge who is not impartial and trial by a biased jury. [fn. omitted]" (*Mach, supra,* at p. 634.) Under this standard, appellant need not demonstrate prejudice. (See *Mach, supra,* at p, 634, citing *Arizona v. Fulminante, supra,* 499 U.S. 279.)

Under California law, once misconduct has been established, the defendant must demonstrate that it was prejudicial. (*People v. Danks* (2004) 32 Cal.4th 269, 302, relying on *In re Hamilton* (1999) 20 Cal.4th 273, 295.) However, "The defendant need not affirmatively prove the jury's deliberations were improperly affected by the misconduct, for that cannot be done under Evidence Code section 1150 . . . Therefore, '"The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred. The law thus recognizes the substantial barrier to proof of prejudice which Evidence Code section 1150 erects, and it seeks to lower that barrier somewhat." [Citation]'" (*In re Carpenter* (1995) 9 Cal.4th 634, 652.)

Bias will be found under California law if "'the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror.' [Citation] " (*Danks, supra*, at p. 303.) "'[E]ven if the extraneous information was not so prejudicial, in and of itself, as to cause "inherent" bias under the first test,' the nature of the misconduct and the 'totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose.' [Citation] 'Under this second, or "circumstantial," test, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered. 'The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, *upon examining the entire record,* that there is no substantial likelihood that the complaining party suffered actual" bias.' [Citation]" (*Danks, supra*, at p. 303.)

The trial court's decision to allow Juror #1 to remain on the jury fails under the second test. As stated above, Juror #1 formed an opinion about the case early in the trial in which she questioned whether and why Melissa screamed when appellant entered the house. (See again, 31RT 4820-4832) This opinion, which she conveyed to a third-party, had to be based on evidence that came directly from appellant and bore on his credibility, either as described in opening statements or in one of his statements to the police, because appellant was the only person who witnessed Melissa's reaction. Juror #1 held this opinion within her through the entire trial and then on the first full day of deliberations felt compelled to share her conversation about it with fellow jurors. Based on the totality of the circumstances, there is a substantial likelihood that Juror #1 was actually biased against appellant and that her bias infected the deliberative process with the other jurors. The trial court's ruling is even more problematic because Juror #1's bias and misconduct were revealed on the first full day of deliberations, at a time when

replacing her with an alternate would not have wasted judicial resources and at the same time assured appellant's rights were honored. Reversal is required.

III.

THE TRIAL COURT DEPRIVED APPELLANT DUE PROCESS, A FAIR TRIAL AND THE RIGHT TO A JURY DETERMINATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND ARTICLE I, SECTIONS 7 AND 16 OF THE CALIFORNIA CONSTITUTION, WHEN IT FAILED TO INSTRUCT PURSUANT TO CALJIC NO. 2.70 THAT UNRECORDED ORAL ADMISSIONS SHOULD BE VIEWED WITH CAUTION

The defense theory of the case included the contention that Detective Glenn Stotz was not a credible witness and one of the two primary architects of the false confession coerced from appellant. His credibility proved questionable in several instances during cross-examination at trial. (See argument _, *ante.*) One of the precursors of this defense theory was that the interview by Stotz on appellant's front porch the afternoon of November 29, 1994 may not have occurred the way Stotz portrayed. It is during this interview that the idea of a prior attack on Melissa by appellant is first introduced in the form of a purported admission by appellant that he woke up two or three weeks earlier half-clothed and believed he had been sleepwalking. This admission, if made, was the foundation of the prosecution charge that the prior incident was not just sleepwalking but rather an attempted sexual assault and that it demonstrated appellant's intent to sexually assault Melissa several weeks or months later when he strangled her. The problem with appellant's sleepwalking story is that it was not tape-recorded and the jury was not given the critical instruction that an unrecorded admission such as the sleepwalking story should be viewed with caution pursuant the final paragraph of CALJIC No. 2.70.

The error was prejudicial not only because the jury was not admonished to be cautious about Detective Stotz's uncorroborated and unrecorded testimony, but also because the sleepwalking story was returned to by the prosecution again and

again in the coercive interrogation that resulted in a questionable confession by appellant at the end of the day on November 30, 1994 that "I tried to reap [sic] her ... two months ago...whatever..." (Mot. to Supp., Exh. 3, at 5 SCT 233) The instructional error requires reversal.

A. Standard of Review

Instructional errors and omissions are subject to independent or *de novo* review. (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411, relying on *People v. Waidla* (2000) 22 Cal.4th 690,733, 737.)

B. Factual and Procedural Background

1. Motion to Suppress

The police interviewed appellant several times: Twice during the afternoon of November 29, 1994 in front of his house; in the evening of November 29, 1994 in his bedroom; and on November 30, 1994 in the police car and at the station. With the exception of these first two interviews on appellant's doorstep, all of the interviews were tape recorded. At the hearing on the defense motion to suppress, there was no testimony about the two first unrecorded interviews. (See 5RT 541-549)

2. Trial Testimony

At trial, Detectives Michael Lynn and Glenn Stotz both testified about the first two interviews. Stotz knocked on the door of appellant's house and appellant answered the door. Stotz introduced himself as a detective with the San Jacinto Police Department and asked if appellant had heard about what happened next door. Appellant replied that he had already heard that Melissa had been killed. Stotz questioned appellant as to whether he had heard or seen anything out of the ordinary during the day. Appellant said that he had been home all day and that he did not see anything out of the ordinary. He added that he did not know Melissa

well but that she was a good friend of his sister. (18RT 2745) Appellant asked how she was killed, and Stotz replied that she was choked to death. (18RT 2746)

Stotz left to canvass other residences in the neighborhood. He returned 30 to 40 minutes later accompanied by Detective Lynn. (18RT 2746) Appellant answered the door again. Lynn and Stotz introduced themselves and talked to him on the front porch. Lynn noticed some scratches on appellant's right arm near the wrist. (17RT 2628-2629; 18RT 2743-2745) Stotz asked appellant again about his relationship with Melissa, and he replied again that he did not know her that well. (17RT 2630; 18RT 2747) Appellant's sister Stacey was standing next to him this time and said, "Huh-uh, you play fight with her all the time." (17RT 2630; 18RT 2745-2748) Appellant looked at Stacey and had a shocked look on his face. (17RT 2631; 18RT 2752-2753)

The defense objected to Stotz's characterization of appellant's reaction to Stacey's statement and commented that when it attempted to elicit the same information during the hearing on the motion to suppress, it was irrelevant. The prosecution argued that Stacey's statement was admissible as an adoptive admission and for a non-hearsay purpose to explain appellant's subsequent conduct. (18RT 2749-2751) The court overruled the defense objection. (18RT 2751)

Lynn stepped away to talk to Stacy, and Stotz stayed with appellant. (17RT 2631) Stotz continued his testimony as follows:

> Q "And what did he explain to you was his relationship, if any, with Melissa Middleton at that time?
>
> A I believe he continued to say that he didn't know her very well. That he [sic] was friends with his sister Stacey.
>
> Q Did you make known to him that – or did you ask him if he knew anything about an incident in which Melissa had indicated to her parents that she had been attacked up in the room in the middle of the night sometime previously?

A Yes, I did.

Q And did you question Daniel about that then?

A I did.

Q Was he able to give you any information about that, or did he –

...

The Witness: Initially he denied any knowledge of what I was referring to regarding the attack.

Q Did he subsequently provide you with a description of an incident he recalled?

Ms. Cronyn: Objection. Leading.

The Court: Overruled.

The Witness: Yes. He, later on, I guess you could say, recanted his story and told me that he thought he knew what I was referring to. And he talked about an incident that occurred 2 to 3 weeks prior where he said he woke up in his front yard at around midnight or so with –

Ms. Cronyn: Objection. Narrative. And move to strike. Improper opinion as to 'recanted.'

The Court: Overruled.

The Witness: Where he woke up with his jeans on and underwear, no shirt and no socks. He felt that he may have been sleepwalking.

Q [by Mr. Mitchell] Did he say where he woke up at during that incident or occasion?

A Well, he referred to the driveway near the door. And then when I asked him about the garage door, he – he said no. On the sidewalk between the grass and the door. So I never – I was never quite sure exactly where he was talking about where he woke up. I just know it was somewhere in his front yard.

Q Did you ask him why he would wake up in strange places?

A He said that he believed he sometimes sleepwalked, and that on occasion he had woke up sometimes in front of his refrigerator, and he thought because he was hungry during the night."

(18RT 2752-2754)

Stotz further testified that he saw scratches on appellant's hands. Photographs were taken of those scratches. (18RT 2755) When Stotz asked appellant to hold out his hands, he noticed that appellant "was visibly nervous. His arms and hands were shaking, and his palms were extremely sweaty." When Stotz asked about the marks, "He told me that he thought he'd received those scratches earlier in the day from playing with his cat." (18RT 2756) At that point, Stotz left. (18RT 2756)

3. Instructions

After a lengthy discussion about several special instructions about confessions and admissions proposed by the defense, this discussion followed:

Mr. Mitchell: "... the use note under 2.70 says that the paragraph dealing with 'Oral statements of a defendant should be viewed with caution' is unnecessary when an oral statement is proved by a tape –recording. So I would move to strike that bracketed paragraph because it's not necessary in this case. It's under People v. Hines. It's at the top of page 104 in the book.

Ms. Cronyn: The second interview at the defendant's door, the first interview, were not tape-recorded. There's evidence of statements made off tape in this case. ... because we have evidence in this case of unrecorded portions and because it's our belief that the jury should be instructed to view confession evidence with caution, whether or not it's recorded, we would request that it stay in.

Mr. Mitchell: Well, the whole purpose of this was designed and included for purposes of nontape-recorded statements, and it should not be used where you have a tape –recorded statement.

The Court: Well, I'm going to include language about – I'm going to include language about – I'm going to insert something about not made in court or not taped or exclude the whole thing or take the whole thing out, one or the other.

Ms. Cronyn: Okay. Well, then, in light of that, take the whole thing out.

The Court: Take the whole thing out?

Ms. Cronyn: But you have – but please note our objection for the record.

The Court: Right. [para.] So, for the record, on No. 5 I am taking out lines, looks like, 18, 19 20 basically."

(29RT 4479-4481)

The court instructed the jury with CALJIC No. 2.70 as follows:

"CALJIC 2.70

CONFESSION AND ADMISSION – DEFINED

A confession is a statement made by a defendant in which he has acknowledged his guilt of the crime for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crimes as well as the required criminal intent.

An admission is a statement made by the defendant which does not by itself acknowledge his built of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether the defendant made a confession or an admission, and if so, whether that statement is true in whole or in part.

You should consider evidence about the manner in which defendant's admissions were made in determining the probative weight of those admissions."

(13CT 3466)

C. Governing Law and Application

"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." (*Mathews v. United States* (1988) 485 U.S. 58, 63; *Conde v. Henry* (2000) 198 F.3d 734, 739) Even in the absence of a request, the trial court must instruct on the general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*Neder v. United States* (1999) 527 U.S. 1; *United States v. Gaudin* (1995) 515 U.S. 506, 515; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.) "The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses, including self-defense and unconsciousness, and on the relationship of these defenses to the elements of the charged offense." (*People v. Sedeno* (1974) 10 Cal.3d 703. 716 [overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 157]; accord, *People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. San Nicolas* (2004) 34 Cal.4th 614, 669.)

The failure to instruct the jury as to such a defense deprives the defendant of his due process right to present a defense. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a *meaningful* opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U..S. 479, 485.) Subjecting a defendant to a criminal trial with a jury incorrectly charged as to the applicable law so infuses the trial with unfairness as to deny appellant equal

protection under the law and his right to due process of law. (U.S. Const., Sixth Amend.; *Estelle v. McGuire* (1991) 502 U.S. 62, 75; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

The due process clauses of the Fourteenth Amendment of the United States Constitution and of Article I, sections 7 and 15 of the California Constitution provide that a person may not be deprived "of life, liberty, or property without due process of law." Due process of law requires that a person accused of a crime is entitled to an orderly legal procedure in which his substantial rights are respected. (*People v. Sarazzawski* (1945) 27 Cal.2d 7, 11.) A state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. (*See Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 875-876 (granting habeas relief under AEDPA because the erroneous self-defense instruction deprived the defendant's of a "meaningful opportunity to present a complete defense") (relying on *Trombetta, supra*, 467 U.S. at p. 485.).

CALJIC No. 2.70 instructs the jury as to how to evaluate a confession or admission. The final paragraph of No. 2.70 provides, "Evidence of an oral admission of the defendant not made in court should be viewed with caution." (CALJIC No. 2.70, *California Jury Instructions – Criminal*, Fall 2008 Ed.) "When the evidence warrants, the court must give the cautionary instruction sua sponte. [Citations]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 392, citing *People v. Lang* (1989) 49 Cal.3d 991, 1021, and *People v. Beagle* (1972) 6 Cal.3d 441, 455, superseded on other grounds by statute in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106.) "The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." (*People v. Beagle, supra*, at p. 456.) This rule applies only where the confession or admission is not tape-recorded. (*People v. Hines* (1964) 61 Cal.2d 164, 173, overruled on other grounds by *People v. Murtishaw* (1981) 29 Cal.3d 733, 775-775, fn. 40.) CALCRIM No. 358 contains similar language that, "You must consider with caution evidence of a defendant's oral statement unless it was

written or otherwise recorded." (CALCRIM No. 358, *Judicial Council of California, Criminal Jury Instructions*, Spring 2008 Ed.)

In this case, the defense maintained that Officer Stotz was not credible as to his testimony regarding his multiple interrogations of appellant. The first two of these on the afternoon of November 29, 1994 were not recorded, making the cautionary paragraph of CALJIC No. 2.70 particularly critical. By refusing to give the cautionary instruction, the trial court deprived appellant of a recognized defense, a denial of due process, fundamental fairness, and the right to a jury determination as to all issues. (U.S. Const., Sixth Amend.; *Estelle v. McGuire* (1991) 502 U.S. 62, 75; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

D. Prejudice

The trial court's failure to provide the cautionary portion of No. 2.70 raises federal constitutional issues under the Sixth and Fourteenth Amendments, as set forth above. As noted above, where such federal constitutional error has occurred, the burden shifts to the state to prove 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.) As also discussed, appellant's unrecorded admission about the prior incident formed the basis for questioning by the authorities as to whether what appellant recalled as sleepwalking was actually the sexual assault described by Melissa to her parents several weeks or months before her death. Had the jury been told to view appellant's unrecorded statements with caution, it is likely it would have been wary of Detective Stotz's testimony.

In addition to several instances at the preliminary hearing and hearing on motion to suppress, the defense caught Stotz lying at trial during cross-examination. Stotz admitted:

Q [by DPD Cronyn] "And that's not what Daniel Linton said, is it?

A [by Stotz]. No, it's not.

Q In fact, he said that he didn't put his hands down her pants or try to.

A. That's correct."

(19RT 2911)

When asked at trial about a statement in his police report that the thought crossed appellant's mind to rape Melissa and that "therefore, that's why he unbuttoned the button on her pants and unzipped them," Stotz was not able to point to where in the interview appellant made the statement. (19RT 2913-2914) The statement does not exist in the interview.

For these reasons and all the reasons discussed regarding cumulative prejudice, admission of appellant's unrecorded admissions on the afternoon of November 29 was not harmless beyond a reasonable doubt and requires reversal. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

IV.

CUMULATIVE PREJUDICE

As the foregoing arguments demonstrate, the trial court made major legal errors in this case, any one of which calls out for reversal. When the errors are viewed together, however, it also becomes clear that each error was amplified by every other error, so that the cumulative effect was greater than the sum of the parts.

In *Chambers v. Mississippi* (1973) 410 U.S. 284, the Supreme Court held that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. In *Chambers*, the high court concluded that the cumulative effect of individual errors "denied [the defendant] a trial in accord with traditional and fundamental standards of due process" and "deprived [him] of a fair trial". (*Chambers, supra*, at pp. 298,302-303.)

In *Chambers,* state evidentiary rules required exclusion of a recanted confession of another man, McDonald, who was believed to be the actual shooter; forbade cross-examination of McDonald, who was technically Chambers' witness; and also required exclusion of the hearsay testimony of three witnesses that McDonald had confessed to them. (*Chambers, supra*, at pp. 287-293) Under these circumstances, the Supreme Court ruled that the combined effect of the trial court's rulings deprived Chambers of a "trial in accord with traditional and fundamental standards of due process." (*Id.* at p. 302.) In *Parle v. Runnels* (9th Cir. 2007) 505 F.3d. 922, the court analyzed the cumulative error analysis and observed, "Like the evidence excluded in *Chambers,* this wrongfully admitted and excluded evidence went to the heart of the central issue in the case. In *Chambers,* the excluded evidence pertained to the identity of the shooter-Chambers's primary defense-while, here, the erroneously admitted and excluded evidence pertained to the only relevant issue (and Parle's only defense): Parle's state of mind at the time of the crime." (*Parle v. Runnels, supra*, at p. 932.) Accordingly a due process

violation occurs pursuant to *Chambers* and *Parle* when several errors combine to unfairly impugn the central issue raised by the defense.

The interplay of the errors in this case, like those in *Chambers*, undermine confidence in the reliability of the jury's determination. First and foremost, appellant's "confession" had all the hallmarks of having been coerced, involuntary, and possibly false. The jury did not know that, although at least one juror was skeptical about the reliability and accuracy of the confession. (See p. 99, *ante.*, citing 31RT 4844.). When the defense attempted to educate the jury as to why the confession was unreliable and should be discounted, the trial court metaphorically tied its hands behind its back: The court would not allow the defense to examine District Attorney Mitchell as to the surrounding circumstances of his questioning of appellant the night of the homicide and the following day, even though it was Mitchell himself who promised appellant leniency in his "water under the bridge" pronouncement. It would not allow the defense to examine any of the detectives involved in the interrogation, to the point that the record is still not clear as to whether anything was said to appellant off the record. It would not allow the defense to call Dr. Ofshe or Dr. Leo, respected experts who would have told the jury about the body of empirical research demonstrating the unreliability of confessions obtained under coercive circumstances. It failed to instruct the jury pursuant to CALJIC No. 2.70 that unrecorded oral admissions should be viewed with caution, which impacted the jury's assessment of the testimony of Detective Stotz about his unrecorded conversations with appellant. Finally, it allowed a juror to remain on the panel, even though she admittedly violated her oath to not discuss the case.

The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. (*Chambers, supra,* at p. 290, fn. 3; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922.) "[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due

process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal. [Citations]" (*Parle v. Runnels, supra*, 505 F.3d at p. 926, citing *Chambers, supra*, 410 U.S. at p. 290, fn. 3, 298, 302-303 and *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; accord, *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845.)

Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *(United States* v. *Wallace, supra,* 848 F.2d at p. 1476.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. *(Chapman* v. *California, supra,* 386 U.S. at p. 24; *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].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People* v. *Hayes* (1990) 52 Ca1.3d 577, 644 [court considers prejudice of guilt-phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. "Conceivably, an error that we would hold non-prejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another

by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error." *(People* v. *Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People* v. *Brown* (1988) 46 Ca1.3d 432. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584,605,609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Other courts similarly have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." *(Irving* v. *State* (Miss. 1978) 361 So.2d 1360, 1363.) Accordingly, even if the individual errors are harmless on their own, the cumulative effect of these errors upon the penalty verdict must be examined with special caution. (See *Burger* v. *Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

Based on the foregoing, individually and cumulatively, the trial court's errors unfairly prejudiced appellant's defense in violation of due process. The errors resulted in an unbalanced case that unfairly tilted the evidence in favor of the prosecution. Reversal is required. (*Chambers v. Mississippi, supra,* 410 U.S. at pp. 298, 302-303.)

PENALTY PHASE ISSUES

V.

THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO PRESENT A DEFENSE PURSUANT TO THE FEDERAL AND STATE CONSTITUTIONS, WHEN IT REFUSED TO ADMIT EVIDENCE THAT THE AUTHORITIES COERCED HIM INTO MAKING A FALSE CONFESSION, GIVING RISE TO LINGERING DOUBT PURSUANT TO PENAL CODE SECTION 190.3, SUBDIVISION (K)

A. Introduction

The jury did not go into penalty deliberations in a vacuum. Ten days earlier, the jury had reached a guilt verdict only after great difficulty. Recall, the jury commented that one juror felt that the police interrogation of appellant was "a lie" (31RT 4844); asked when a *Miranda* waiver occurs (31RT 4803-4815); and also asked "1.Is it too far to speculate whether Melissa let Daniel into the house?" and "2. Please clarify if speculation can be used in determining innocence in this case?" and "3. What is the definition of speculation?" (31RT 4844) Taken together, the record of guilt deliberations reveals that one or more jurors did not believe the interrogation occurred as recounted by the prosecution witnesses and were concerned about appellant's innocence, but felt constrained as to how much they could speculate. The jury eventually reached a verdict of guilt beyond a reasonable doubt, but a lingering doubt hung like a big question mark in mid-air.

At the beginning of the penalty phase, the defense sought to introduce evidence tending to reinforce that lingering doubt, as it was permitted to do under Penal Code section 190.3, subdivision (k) and established authorities. To that end, the defense proffered evidence that appellant may have been innocent of sexual motivation when Melissa was strangled, the special circumstance that was the basis for the prosecutor's decision to seek the death penalty. That offer of proof

encompassed the testimony of three witnesses also proffered at the guilt phase, Richard Leo, Ph.D., Cecil Whiting, Ph.D., and Deputy District Attorney William Mitchell, whose testimony cumulatively and individually would have reinforced the defense contention that appellant was coerced by the police and the district attorney to make a false confession.

As could be expected, the district attorney vigorously opposed admission of any of this testimony, especially when it involved the prospect of being called as a witness. He argued that the evidence either was not relevant or was minimally probative or was cumulative.

The court was focused a little differently. It took the position that unless appellant recanted, the issue of the confession was speculative. From that premise, the court implied that appellant would have to testify to establish a foundation for the fact that he was recanting but then insisted that it was not suggesting that he had to take the stand. Having placed the defense in this classic double bind, the court then would not allow the defense to use any of its proffered testimony to further educate the jury as to why the confession may not have been a reliable recitation of what actually happened.

In so ruling, the court deprived the defense of its ability to present a penalty phase defense and establish lingering doubt under Penal Code section 190.3, subdivision (k) as to whether appellant was guilty of the special circumstances of attempted rape or lewd acts with a child under the age of 14, as set forth in sections 190.2, subd. (a)(17)(iii) and (v) and charged in the information. (See 1CT 20-22) The error was prejudicial and requires reversal of the penalty of death.

B. Factual and Procedural Background

1. Proffered Testimony of Richard Leo, Ph.D. About False Confessions, Argument and Ruling

At the commencement of the penalty phase, the defense indicated that it would like to call Richard Leo, Ph.D. to testify as to the factors which may have caused appellant to give a false confession relative to the issue of lingering doubt pursuant to Penal Code section 190.3, subdivision (k). (31RT 4902-4914) The defense relied on its offer of proof during the guilt phase. (31RT 4903) Recall, the defense sought to call Dr. Leo or his partner, Richard J. Ofshe, Ph.D., during the guilt phase to demonstrate "how police interrogation techniques utilized in this case affect the trustworthiness of the defendant's statements." (See *Memorandum of Points and Authorities in Support of Defendant's Introduction of Expert Testimony at Trial,* at 3CT 544-554) The Memorandum included Exhibit A, "The Decision to Confess Falsely: Rational Choice and Irrational Action," Ofshe and Leo, in *Denver University Law Rev.*, Nov. 1997. (3CT 555-701) The trial court denied the defense motion during the guilt phase. (22RT 3423-3429 [2-18-99]; 23RT 3587-3614 [2-22-99]; 25RT 3733-3741 [2-24-99].)

The prosecution opposed the penalty phase request to call Dr. Leo as a witness on the grounds his testimony was irrelevant and that its probative value was outweighed by the fact that it would be unduly time consuming. (31RT 4903) The defense explained that Dr. Leo had made an empirical study of taped police interrogations, was able to correlate the factors that produce false confessions, and could speak to the factors that called into question the trustworthiness of appellant's confession, specifically the coercive nature of the interrogation and express promises of leniency. (31RT 3905) The defense concluded, "our expert should be able to express an ultimate opinion upon [whether the confession was false] at the penalty phase, but we would be content with being able to put him on

to express a more limited opinion, if that's what we were allowed to do." (31RT 4906)

The trial court focused on whether appellant had recanted the confession. When the defense pointed out that during the interrogation appellant repeatedly denied sexual intent, the court responded that he finally said that he did have sexual intent. (31RT 4909) When the defense protested that it should not have to put appellant on the stand to establish the fact that he recanted, the court said it was not suggesting that he testify but if a defendant in his situation does not testify "he'll be found guilty if he doesn't, in many cases, if there's no evidence. But there was some evidence. So doesn't he have some obligation, if he wants to be found not guilty, to present evidence on his behalf, which you haven't done?" (31RT 4912-4913)

The defense responded that the reliability of the confession was undermined by the testimony of its pathologist, who demonstrated that the strangulation could not have occurred the way appellant described. (31RT 4913) The court overruled the defense request, stating "we have these people coming in theorizing about these confessions, because all we have is speculation, and we don't base these cases on speculation." (31RT 4912) The court ruled, "I'm not going to allow Dr. Leo to testify. I just don't see any basis for it whatsoever." (31RT 4914)

2. Proffered Testimony of Cecil Whiting, Ph.D. About Appellant's Mental State, Argument and Ruling

Next, the defense requested permission to call Cecil Whiting, Ph.D. "to talk about some of the defendant's general psychological characteristics and how those correlate to the facts of the crime, since this is penalty phase. ... I would ask Your Honor for a ruling as to whether or not Dr. Whiting could express an opinion based on his interviews with the defendant." (31RT 4914-4915) The defense

added that "any psychologist who offers an opinion about a person based on a psychological test and interview have to rely at least partly on what they hear from the client, just like any doctor relies in making a diagnosis on where the ... patient says he has pain... if the jury can't know ... the basis for that opinion ... he's totally hamstrung in getting that portion of the defense case before the jury in a proper way." (31RT 4915) The defense further explained that Dr. Whiting would be able to testify concerning whether appellant entered the Middleton residence with the intent to rape or molest, or with the intent to steal. (31RT 4915-4916)

The prosecution countered that the defense "is seeking to ... bring before the Court through the testimony of Dr. Whiting the defendant's self-serving extrajudicial statements to supposedly this doctor. I don't know. I have not been given discovery of what the defendant said to this doctor. And it completely prohibits the People from cross-examining the nature of that statement. It was not tape-recorded.... All we have are those excerpts of what the defendant told him that he decided to put into his written opinion, which through numerous instances in cross-examination was shown to be in error... So to allow under the guise of giving his reasons and then giving opinions based upon what the defendant said, the court is allowing incompetent hearsay without the People's ability to cross-examine and test the basis and/or reliability of that information." (31RT 4916) The prosecution then analogized this situation to one in which a defendant attempts to avoid testifying by having another inmate testify as to what the defendant told him. (31RT 4917, citing *inter alia, People v. Carpenter* (1997) 15 Cal.4th 312; *People v. Whitt* (1990) 51 Cal.3d 620, 642)

The defense clarified that "we're not talking about anything more than the support for Dr. Whiting's opinion that Daniel was suffering a panic attack. And this really has to do with Daniel's statements to Dr. Whiting concerning his physical sensation concerning what he was physical [sic] feeling at the time. And it is supported by the record we have in front of Your Honor when he told Dr. Rath how scared he was, scared, scared, scared, scared. Too scared. 'Even if I did

find her attractive, I was too scared.' ... And if Dr. Rath had, I submit, really been looking for evidence of his true intent at the time and not trying to gather the prosecution's evidence, he might have obtained from Daniel Linton the additional information that he had heart palpitations or shortness of breath or whatever it was, narrowing of vision, all those things that might contribute or assist Dr. Whiting and might assist Daniel at this state in showing that he was suffering a panic attack." (31RT 4920)

The court ruled that Dr. Whiting could testify but could rely only on what was already in the record and the results of his tests, and not on anything appellant said to him. (31RT 4920, 4922) The defense did not call Dr. Whiting.

3. Proffered Testimony of Deputy District Attorney William Mitchell About Appellant's Interrogation, Argument and Ruling

The defense also made an offer of proof that Deputy District Attorney William Mitchell was a necessary percipient witness as to all aspects of appellant's interrogation, including the fact that Mitchell was the person who told appellant that any prior encounter with Melissa was "water under the bridge" and that he retained Dr. Rath to extract a confession from him. (31RT 4923-4925) Mitchell vigorously opposed this request and argued that the offer of proof was cumulative to other evidence. (31RT 4925-4926) The court denied the defense request to call Mitchell. (31RT 4926)

4. Jury Instructions

The court instructed the jury with CALJIC No. 8.85, which provides in relevant part:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into

account and be guided by the following factors, if you determine them to be applicable...

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true. ...

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle."

(13CT 3657)

5. Prosecution Closing Argument

The prosecution argued in closing,

"It may be argued to you that there's lingering doubt that you can consider in this case now, and that you should use this to impose a sentence less than death. Lingering doubt, will be argued to you, is that feeling or that gnawing at you, based upon the evidence in this case, that you're not completely, positively, 100 percent absolutely sure of some aspect of the charges in this case...

"And based upon the physical evidence that we have – the underwear, the semen on the underwear, the possession of the ring, and the defendant's own words and statements – his statements aren't lies in their entirety. He lied about the key at first. And he didn't want to admit what his sexual motivation was. But you have his own statements that corroborate the physical evidence and the

condition with which Melissa Middleton's body was found, her zipper unzipped, the circumstance of the prior offense.

"All of that shows you – no lingering doubt here as to why the defendant committed these crimes, how he committed these crimes, or why he committed the crimes. He killed Melissa Middleton. He did it because of some sexual frustration, some urge, some need that he had. There's no lingering doubt."

(35RT 5564)

C. Governing Law and Application

Penal Code section 190.3 provides in relevant part that in determining whether in a capital case to fix the penalty at death or life without the possibility of parole, "the trier of fact shall take into account any of the following factors if relevant... (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Evidence that gives rise to lingering doubt under this factor is required under both state and federal authorities.

The California courts recognize the admissibility and importance of evidence of lingering doubt at the penalty phase of a capital trial. Beginning with *People v. Terry* (1964) 61 Cal.2d 137, this Court has recognized that at a penalty retrial, the trial court should admit "evidence tending to show defendant's possible innocence of the involved crimes" so that the jury may consider any lingering doubts of the defendant's guilt as a mitigating factor in the penalty determination. (*Id.* at p. 153; see comment regarding origination of lingering doubt concept in *Terry* in *People v. Gay* (2008) 42 Cal.4th 1195, 1218.) "[R]esidual doubt about a defendant's guilt is something that juries may consider at the penalty phase under California law, and a trial court errs if it excludes evidence material to this issue.

[Citations.]" (*People v. Hawkins* (1995) 10 Cal.4th 920, 966-967, cited in *People v. Gay, supra,* at p. 1219-1220.)

In *People v. Gay* (2008) 42 Cal.4th 1195, this Court revisited the issue of lingering doubt and held that in a capital case the circumstances of the offense, including evidence creating a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial under Penal Code section 190.3 [subdivisions (a) and (k)]." (*Gay,* supra, at p. 1221) The Court in *Gay* further explained that the fact "'the defendant cannot relitigate the issue of guilt or innocence[ ] does not preclude the admission of evidence relating to the circumstances of the crime or the aggravating or mitigating circumstances, including evidence which may mitigate a defendant's culpability by showing that he actually did not kill the victim. The test for admissibility is not whether the evidence tends to prove the defendant did not commit the crime, but, whether it relates to the circumstances of the crime or the aggravating or mitigating circumstances.' [Citation]" (*Id.* at p. 1223.)

In a concurring opinion, Justice Werdegar clarified that the holding in *Gay* extends to any penalty phase: "Whether in the penalty phase of a unitary trial or in a penalty retrial, Penal Code section 190.3 provides the applicable substantive law. We hold today, as we have in past decisions, that lingering doubt evidence is relevant under that statute. (Maj. opn., *ante,* at p. 462, 178 P.3d at p. 439-40.) Our holding today, although made in the context of a penalty retrial, logically applies as well to an ordinary penalty phase. What is relevant in one is equally relevant in the other." (*People v. Gay, supra*, at p. 1229 [Werdegar, J. concurring opn., Kennard, Acting C.J., and Marchiano, J., concurring]; see also *People v. Alcala* (1992) 4 Cal.4th 742, where both phases of the trial were heard by the same jury.) At the penalty phase "defendant testified on his own behalf (not having done so at the guilt phase)" and denied committing the murder. (*Id.* at p. 766.) This Court did not indicate any disapproval of that procedure. It held instead that the exclusion of evidence of wrongful convictions in other capital cases "did not prevent

defendant from introducing relevant evidence regarding the circumstances [of the victim's death]" (*Alcala, supra*, at pp. 807.)

Thus California recognizes lingering doubt as a legitimate defense and valid mitigating factor at the penalty phase of a capital trial. (See *People v. Anderson* (2001) 25 Cal.4th 543, 591, fn. 16; *People v. Riel* (2000) 22 Cal.4th 1153, 1209; *People v. Padilla* (1995) 11 Cal.4th 89, 951-952; *People v. Hawkins, supra*, 10 Cal.4th at pp. 966; *People v. Terry, supra*, 61 Cal.2d at p. 153; *People v. Sanchez* (1995) 12 Cal.4th 1, 77.) Innocence is a constitutionally relevant mitigating factor. (*Herrera v. Collins* (1993) 506 U.S. 390, 417; id. at p. 419 [conc. opn. of O'Connor, J..],430-431 [dis. opn. of Blackmun] "Eighth Amendment concerns are satisfied when a capital defendant is not deprived of the opportunity to present evidence on lingering doubt and to have the jury weigh this evidence." (*People v. Wader* (1993) 5 Cal.4th 610,660; accord, *People v. Cox* (1991) 53 Cal.3d 618, 677.) The same principles apply to evidence of innocence. Because both are relevant mitigating factors, "a defendant may not be precluded from offering such evidence" (*People v. Cox, supra,* at p. 677), "and a trial court errs if it excludes evidence material to this issue" (*People v. Hawkins, supra,* 10 Cal.4th at p. 967 [citations omitted].)

Federal law that addresses the right to present a defense further reinforces the importance of admitting lingering doubt evidence. The right to present a defense is protected by the federal guarantee of due process of law. (U.S. Const., Amend. 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295,1300.)

In *Chambers v. Mississippi* (1973) 410 U.S. 284, the Supreme Court held that exclusion of evidence vital to a defendant's defense constitutes a denial of a fair trial in violation of the due process clause of the Fourteenth Amendment to the Untied States Constitution. In *Chambers*, state evidentiary rules required exclusion of a recanted confession of another man, McDonald, who was believed to be the actual shooter; forbade cross-examination of McDonald, who was technically

Chambers' witness; and also required exclusion of the hearsay testimony of three witnesses that McDonald had confessed to them. (*Chambers, supra*, at pp. 287-293) Under these circumstances, the Supreme Court ruled that the combined effect of the trial court's rulings deprived Chambers of a "trial in accord with traditional and fundamental standards of due process." (*Id.* at p. 302.)

The Court in *Chambers* observed, "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. ... 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.'" (*Chambers, supra,* at p. 294, citing *In re Oliver* (1948) 333 U.S. 257, 273.)

In *Davis v. Alaska* (1974) 415 U.S. 308, a Supreme Court concerned with the abridgement of a defendant's right to present all evidence in his defense, overturned his conviction because the lower court would not allow impeachment of a material witness with a prior juvenile record. (*Id.*, at p. 317.) The Court concluded, "[A] defendant's right to present his defense theory is a fundamental right and . . . all of his pertinent evidence should be considered by the trier of fact." (*Id.*, at p. 317.)

In *Rock v. Arkansas* (1987) 483 U.S. 44, the Supreme Court issued another decision supporting this principle. There, the defendant was convicted of manslaughter after the lower court, pursuant to an Arkansas statute, refused to allow her to testify to matters recalled only after she had been hypnotized. The Arkansas Supreme Court affirmed and reasoned, much as the court did here, that the prejudicial effect of such testimony outweighed its probative value. The Supreme Court reversed, once again emphasizing the important right to present exculpatory evidence. (*Rock, supra*, 483 U.S. at p. 62.)

The California courts also support the fundamental right of the accused to present all relevant evidence vital to his or her defense. In *People v. McDonald*

(1984) 37 Cal.3d 351, this Court commented that, "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it. Rather, it should be accompanied by instructions clearly explaining to the jury the purpose for which it is introduced." (*Id.*, at p. 372.) In *People v. De Larco* (1983) 142 Cal.App.3d 294, the Court emphasized that, "'Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense.' [Citation.] . . . Inclusion of relevant evidence can safeguard the defendant's rights as much as that of the prosecution. [Citation.] Indeed, discretion should favor the defendant in cases of doubt because in comparing the prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.' [Citations.]" (*Id.*, at pp. 305-306.)

Moreover, at the penalty trial in a capital case, the defendant is entitled to introduce all relevant mitigating evidence that might persuade the jury to return a verdict less that death. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 7,15, and 17; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The right to introduce relevant evidence on any material issue is separately secured by provisions of state law. (Cal. Const., art. I, § 28, subd. (d); Evid. Code, § 351.)

All these authorities make clear that a defendant has a right to introduce evidence in his or her defense, and state evidentiary rules impinging that right must give way to the federal constitutional mandate. (See e.g., *Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *Davis v. Alaska, supra,* 415 U.S. at p.; 317.)

The trial court in its foregoing rulings gutted the defense's ability to establish lingering doubt, even though the defense rightfully was entitled to do so under Penal Code section 190.3, subdivision (k), the federal and state constitutions (U.S. Const. Amend. 14; Cal. Const., art. I, §15), and the authorities set forth above. The court deprived the jury of critical information when it refused to allow

the defense to call Richard Leo, Ph.D., Cecil Whiting, Ph.D., and Deputy District Attorney William Mitchell to establish that appellant may have been innocent of sexual motivation when Melissa was strangled. The court took away appellant's right to present the only penalty phase defense that could spare his life: If the defense had been properly allowed to educate the jury as to why the confession resulting from his interrogation was not reliable, it is likely the jury would have maintained a lingering doubt as to whether he was not guilty of the rape and lewd conduct special circumstances and sentenced him to life without the possibility of parole rather than death.

D. Prejudice

Impingement of appellant's constitutional right to present a defense is evaluated under the standard of prejudice for federal constitutional error. Where federal constitutional error has occurred, the "burden shifts to the state 'to prove 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.) The state cannot meet that burden here.

In assessing prejudice, it is critical to put the penalty phase evidence in context. During guilt phase deliberations, several jurors were very concerned about the possibility appellant made a false confession and may have actually been innocent of the rape/lewd conduct special circumstance. (See again 31RT 4844 and Introduction, *ante.*) Because the jury was not apprised of the dynamics that could have led appellant to falsely confess he intended to sexually assault Melissa, exclusion of this evidence alone was sufficient to destroy the fairness of the trial.

It also is important to note that during its penalty phase closing argument, the prosecution relied heavily on the confession, remaking that, "you have his own statements that corroborate the physical evidence and the condition with which Melissa Middleton's body was found, her zipper unzipped, the circumstance of the prior offense" and "He killed Melissa Middleton. He did it because of some

sexual frustration, some urge, some need that he had. There's no lingering doubt." (35RT 5564)

Several indicators in the penalty phase record raise a compelling inference that the jury struggled with the penalty determination and could – and should – have been fairly assisted by evidence as to why appellant may have wholly or partially been coerced into making a false confession.

As discussed, long deliberations are one factor that demonstrates a case was close and difficult for the jury to decide. (See *People v. Cardenas* (1982) 31 Cal.3d 897, 907; see also, *People v. Filson* (1994) 22 Cal.App.4th 1841 [deliberations longer than the evidentiary phase of the trial]; *People v. Rubalcava* (1988) 200 Cal.App.3d 295, 301 [jury deliberations for "almost two days"], *People v. Rucker* (1980) 26 Cal.3d 368 [deliberations for nine hours]; and *People v. Zucker* (1980) 26 Cal.3d 368, 391 [jury deliberations for nine days].) The length of deliberations for the penalty phase was as almost as long as those for the guilt phase. On March 25, 1999, at 2:00 p.m., the jury retired to commence deliberations. (13CT 3662.) The jury continued its deliberations on March 29, 1999, from 9:15 a.m. to 3:11 p.m. (13CT 3664.) After sending the court a note about deadlock (discussed below), the jury continued its deliberations on March 30, 1999, from 9:00 a.m. to 10:52 a.m. (13CT 3664.) At that point, the jury announced that it had reached a verdict on penalty. (36RT 5699-5700)

The fact that a jury becomes deadlocked is another factor that indicates a close and difficult jury determination (See *People v. Barraza* (1979) 23 Cal.3d 675, 684; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336 [lack of deadlocked or holdout jurors demonstrated no prejudice].) On the second day of deliberations, the jury sent the court a note that they were unable to reach a verdict. The court sent a note back stating, "Due to the length of these proceedings and the complex issues and the fact that you have been deliberating only one day, the Court requests that you continue your deliberations." (13CT 3664; 36RT 5688-5696.)

Finally, the jury apparently was broken into factions and some of the jurors

may have committed misconduct by exchanging emails among themselves and outside the presence of other jurors. (13CT 3664; 36RT 5697-5698.) As well as raising a substantive issue (see argument XI., *post.*), the specter of juror misconduct reinforces the fact that protracted deliberations occurred and that the determination of penalty was close and difficult.

Based on the foregoing, there is a serious question as to whether the verdict reached by the jury was a reliable reflection of what it actually believed. There was dissension within the ranks, with at least one juror having some concern about compassion for appellant, which goes directly to the definition of lingering doubt under section 190.3, subdivision (k). Whatever the jurors thought, it is clear that had they been presented with a more balanced view of the factors that can render a confession false and unreliable, whether in whole or in part, it is very likely they would have voted to spare appellant's life. Accordingly, improper exclusion of evidence about false confessions in general and in this case was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The trial court's decision to exclude it requires reversal.

VI.

THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO PRESENT A DEFENSE PURSUANT TO THE FEDERAL AND STATE CONSTITUTIONS, WHEN IT REFUSED TO ALLOW THE DEFENSE TO INTRODUCE THIRD PARTY CULPABILITY EVIDENCE ABOUT A NAKED LATE-NIGHT MALE INTRUDER IN THE NEIGHBORHOOD

A. Introduction

The defense proffered the testimony of a neighbor who knew appellant, Bettie Mercado, that three years earlier a man in his twenties or early thirties had broken into her home in the middle of the night wearing only underwear, that she confronted him in the hallway near her children's rooms, and that her husband had chased him out of the house and called 911. (34RT 5325-5328) The defense argued that the existence of this intruder, who Mercado clearly saw and said was not appellant, raised an issue of lingering doubt as to whether it really was appellant who broke into Melissa's bedroom and frightened her in the prior incident that occurred weeks before the homicide. (34RT 5322-5323, 5326, 5334-5335)

The prosecution contended that this evidence was not relevant, because, "It doesn't have any bearing whatsoever on raising a lingering doubt because it is a separate incident, a separate person. Happened 3 or more years prior to the '94 incident. [sic]" (34RT 5334; see 5321, 5323.) The defense countered, "Well, of course it's not the same person. That's – that's the point of us offering it." (34RT 5334) The trial court sustained the prosecution objection on relevance grounds. (34RT 5334-5335) The court was in error.

B. Standard of Review

In assessing the admissibility of third party culpability evidence, the trial court must consider whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325) The trial court's determination of this issue is reviewed for abuse of discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 372.) "[J]udicial discretion is .... 'the sound judgment of the court, to be exercised according to the rules of law.' [Citation.] ... [T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.] Moreover, discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

C. Factual and Procedural Background

The defense made an offer of proof that Bettie Mercado, a neighbor who knew appellant, was the victim of a late-night intruder similar to the one described by Melissa to her parents. The defense argued that this evidence was relevant to the issue of lingering doubt because "this is a similar act occurring – somewhere within 2 or 3 years of the time in the same neighborhood, similar to what was described by Melissa' parents as – as what she described to them: Someone who didn't have their clothes on, who grabbed her in – entered her room and grabbed her. So it's – that's the relevance of the prior incident in this case. And it goes to the 'lingering doubt' issue." (34RT 5322-5323)

The prosecution objected on relevance grounds, and Mercado testified outside the presence of the jury that in late 1991, at 2:15 a.m., she heard her children talking. She got up and encountered a strange man in the hallway wearing only underwear. He was not appellant. The man ran back to her son's

room and grabbed his clothes. She woke up her husband, who chased him away, and she dialed 911. (34RT 5323, 5325-5327)

After Mercado testified, the prosecution argued, "About the intruder, People's position has already been stated. I just don't see any connection here. Has nothing to do with the defendant's record. It's a totally separate incident. It doesn't have any bearing whatsoever on raising a lingering doubt because it is a separate incident, a separate person. Happened 3 or more years prior to the '94 incident. [sic]" (34RT 5334)

The defense countered, "Well, of course it's not the same person. That's – that's the point of us offering it. It is – it is a similar incident where someone entered someone's home at night. Turns out this man was wearing, I guess, his briefs and nothing more. [para.] The evidence the prosecution put on in Daniel's case is that he was wearing – he wasn't wearing anything when he entered the home. I think it – to show that there was another intruder in the neighborhood – albeit sometime before that – could, I think – can raise – can help to raise a doubt as to whether or not it was Daniel, if – if Melissa, in fact, saw somebody in the house, whether or not it was her – whether or not that she saw Daniel." (34RT 5334)

The court ruled, "Okay. I'm going to sustain the objection as to that – that – the incident involving the intruder, the 3-year prior. I don't see the relevance of that whatsoever. I think it's – first of all, I think it's irrelevant. And even if it were relevant – well, that's sufficient. It is not relevant." (34RT 5334-5335)

D. Governing Law and Application

In *Holmes v. South Carolina* (2006) 547 U.S. 319, the Supreme Court reiterated that while state and federal rule-makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials, "[t]his latitude...has limits. 'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of

the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."' [Citations]" (*Holmes,* supra, at p. 324.) "This right is abridged," the Court continued, "by evidence rules that 'infringe upon a weighty interest of the accused' and are '"arbitrary" or "disproportionate to the purposes they are designed to serve."' [Citations]" (*Id.* at pp. 324-325, citing inter alia *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; and *Rock v. Arkansas* (1987) 483 U.S. 44 [97 L.Ed.2d 37, 107 S.Ct. 2704.)

In *Holmes*, the accused challenged a South Carolina evidentiary rule that allowed the defense to present third party culpability evidence only if it "tend[ed] clearly to point out such other person as the guilty party." (*Holmes,* supra, at p. 328.) The Court commented, "Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues." (*Holmes, supra,* 547 U.S. at p. 329.)

The Court in *Holmes* concluded, "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is 'arbitrary' in the sense that it does not rationally serve the end that . . . third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have '"a meaningful opportunity to present a complete defense."'[Citations]" (*Holmes, supra,* at p. 331.)

In California, the defendant has a right to present evidence of third party culpability. "'The principles of law are clear.... [T]he standard for admitting evidence of third party culpability [is] the same as for other exculpatory evidence: the evidence [has] to be relevant under Evidence Code section 350 and its probative value [can]not be 'substantially outweighed by the risk of undue delay, prejudice, or confusion' under Evidence Code section 352.' [Citation] 'At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.... [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetrator of the crime.' [Citations]" (*People v. Geier* (2007) 41 Cal.4th 555,581, citing *People v. Hall* (1986) 41 Cal.3d 826, 833 and *People v. Panah* (2005) 35 Cal.4th 395, 481; accord, see *People v. Page* (2008) 44 Cal.4th 1, 38.)

In *People v. Hall*, our Supreme Court held that in evaluating admissibility of third-party culpability evidence, "[t]he court's proper inquiry was limited to whether this evidence could raise a reasonable doubt as to defendant's guilt and then applying section 352." (*Id.* at p. 833.) The Court explained that this type of evidence should be evaluated "like any other evidence: if relevant it is admissible (§ 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion (§ 352)." (*Id.* at p. 834.) The Court added,

> "We recognize that an inquiry into the admissibility of such evidence and the balancing required under section 352 will always turn on the facts of the case. Yet courts must weigh those facts carefully. . . . Furthermore, courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice and confusion. As Wigmore observed, 'if the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused

> every opportunity to create that doubt.' (1A Wigmore, Evidence (Tillers rev. ed. 1980) § 139, p. 1724." (*Hall, supra,* 41 Cal.3d at p. 834.)

Although *Hall* "refused to impose a distinct and elevated standard of admissibility on defense evidence of a third party's guilty of the charged crimes," it also made clear that "evidence of mere motive or opportunity to commit the crime in another person, without more, is not sufficient to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra,* at p. 833, cited in *People v. Pride* (1992) 3 Cal.4th 195, 237.)

Subsequent authorities have confirmed that a third-party culpability defense would need to identify a possible perpetrator. (*People v. Marshall* (1996) 13 Cal.4th 799, 802.) "[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

The facts and circumstances surrounding Mercado's testimony meet all of the standards set forth in *Hall.* The intruder she described matched Melissa's description of her intruder almost exactly, right down to the fact that he somehow had broken into the house in the middle of the night, was young, and had little or nothing on. (See Mercado testimony at 34RT 5325-5328.) Recall, Melissa told her parents that someone had been in her room, was on top of her, and was choking her. She described her assailant as male and nude. (17RT 2564-2565, 2574-2476, 2577-2578, 2587-2588)

The only factor differentiating the two incidents is that one occurred several years before the other. Given the significance of lingering doubt testimony, especially in light of the similarity between the two incidents, the time discrepancy did not render this very important evidence irrelevant at all, contrary to the district attorney's argument. Moreover, the incident described by Mercado has a tendency to reinforce the defense contention that another individual, not appellant, was the intruder in the prior incident described by Melissa. That possibility, in turn, reinforces the likelihood that appellant's admission to the prior incident was coerced by the authorities and resulted in a false confession.

The trial court in this case erred when it precluded the defense from presenting to the jury relevant and compelling evidence which, if believed, not only exculpated appellant but also pointed strongly to the fact that another identified individual was the actual perpetrator of the prior incident. The court deprived appellant of due process when it prevented the jury from hearing this evidence. (See e.g., *Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *Davis v. Alaska, supra,* 415 U.S. at p.; 317.)

E. Prejudice

The trial court's exclusion of Mercado's testimony should be evaluated in light of the strong record in the guilt phase that several jurors questioned whether appellant was the perpetrator of the prior assault on Melissa and whether his confession to that prior incident was false. For these reasons and those set forth in argument V, *ante.*, exclusion of Mercado's testimony was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

VII.

THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO PRESENT A DEFENSE PURSUANT TO THE FEDERAL AND STATE CONSTITUTIONS, WHEN IT ADMITTED EMOTION-PROVOKING PHOTOGRAPHS AND TESTIMONY AS VICTIM IMPACT EVIDENCE

A. Introduction

While the prosecution is entitled to put on victim impact evidence, there are limits to emotion-provoking material that can have no effect other than to inflame the jury into a decision that looks more like passion-inducing retribution than a reasoned consideration as to whether a capital defendant's life should be spared. In this case, the testimony of Melissa's mother, father and friends was accompanied by a running commentary about a series of photographs depicting her life. Jurors wept. The testimony was gut-wrenching. It should have been toned down and the court's refusal to do so on defense request was error.

B. Standard of Review

This Court has long held that during the penalty phase of a capital trial, the prosecution may present evidence regarding not only the physical and emotional effects of the capital offense being tried under factor (a) of Penal Code section 190.3, but also the effects of a defendant's violent criminal activity under factor (b) of section 190.3 on victims and survivors of that activity. (See *People v. Clark* (1990) 50 Cal.3d 583, 628-629; *People v. Edwards* (1991) 54 Cal.3d 787, 832-837; *People v. Mickle* (1991) 54 Cal.3d 140, 187; *People v. Garceau* (1993) 6 Cal.4th 140, 201-202, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. Holloway* (2004) 33 Cal.4th 96, 143.) According to this Court, the prohibition against victim impact evidence at the sentencing phase of a capital trial has largely been overruled and thus is not barred

by the federal Constitution. (*People v. Holloway, supra*, 33 Cal.4th at p. 143, fn. 13, citing *People v. Garceau, supra*, 6 Cal.4th at pp. 201-202.) A trial court's erroneous admission of victim impact evidence is analyzed under the harmless-error standard for federal constitutional error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Clark, supra*, 50 Cal.3d at p. 629; *Payne v. Tennessee* (1991)501 U.S. 808, 824.).

C. Factual and Procedural Background

1. Pretrial Motion to Limit Penalty Phase Victim Impact Evidence

Prior to trial, the defense filed a *Motion to Limit Victim Impact Evidence,* pursuant to Penal Code section 190.3, the Eighth Amendment to the United States Constitution, and Article I, section 17 of the California Constitution. (4CT 917-942) The motion was filed prior to trial because the defense anticipated that the prosecution would be referring to some of the victim impact evidence during voir dire. (See 13RT 1725) The prosecution informed the defense that it intended to present at the penalty phase a videotape containing 53 pictures accompanied by fades to black and music from the death scene in the movie Elephant Man. One set of pictures depicted Melissa as a baby, with Santa Claus, with her father, mother and brother. Another set of pictures showed her grave and a memorial service at her school. The tape included interviews with Melissa's mother and four friends from school. (4CT 918-919; see 13RT 1728, during which prosecution played videotape designated as People's Exh. 1 in the penalty phase)

The defense argued that the proposed videotape was likely to overwhelm the jury's emotions and ability to follow the law at the penalty phase regarding whether to sentence appellant to death or life without the possibility of parole. (13RT 1725) The defense was particularly concerned about the emotional impact likely to be evoked by the music (13RT 1730); the graveside and memorial tribute (13RT 1731); and the dozens of pictures of Melissa as a baby. (13RT 1743, 1748,

1750-1751) The defense also pointed out that the case law still prohibited an overbroad admission of victim impact evidence. (13RT 1729)

The prosecution argued that existing case law gave it wide latitude in terms of introducing the videotape. (7CT 1863-1869; 13RT 1737) The prosecutor commented, "The evidence that the people seek to present [is] merely what *Payne* [*v. Tennessee* (1991) 501 U.S. 808] and the California... Supreme Court have told us we can put on: a brief glimpse of the life that the defendant chose to extinguish and the impact on the family, the friends, and the community. And we are entitled to do that through photographs, and we are entitled to do that through testimony. There is no other way you can present that." (13RT 1739) Later, the prosecution offered to show the photographs without the music or with different music. (13RT 1753, 1754)

The trial court denied the motion and said it would allow the videotape including the music. (13RT 1757-1758) The court overruled defense objection to testimony that Melissa raised pigeons or was kind to animals and said it would craft a cautionary instruction for the penalty phase, similar to 1.00 used in the guilt phase, that jurors should not be influenced by mere sentiment, conjecture, and the like. (13RT 1757-1761) The court denied a defense request to play People's Ex. 1 during voir dire and inquire if veniremen will still be able to follow the law after seeing Ex. 1, but allowed counsel to ask if veniremen feel they will be able to be fair after viewing a tape with photos of Melissa from a baby to her age at death. The court also said it would allow the defense to show some photos of Melissa during voir dire to see if that will prejudice potential jurors. (13RT 1761-1767)

2. Penalty Phase Victim Impact Evidence

Prior to the penalty phase, the prosecution decided to pare down some of the victim impact evidence it chose to present. The defense commented, "We filed our trial motions to limit victim impact evidence based ... on the video and the music, which apparently the prosecutor doesn't intend [to] play." (32RT 4999)

Nonetheless, the prosecution still introduced 13 photographs of Melissa, over defense objection. (See 13CT 3665; 32RT 4969-4994; 35RT 5510-5514; Peo. Exhs. 1-27) The prosecution commented, "And I would indicate to the Court that all of these photographs that were marked and were used were part of the 53 that were originally on the video that the Court had allowed me to use in evidence, had I chosen to. And I decided not to and to use photographs and the testimony instead, complimenting the photographs. And I'm now further pairing [sic] it down to approximately 13 photographs. And had the video been in evidence, the jury could have re-watched that, had they wanted to, and seen all 53 photographs with stop-action capabilities." (35RT 5511-5512)

Those photographs depicted Melissa as follows:

Exhibit 2: Melissa held by her father, as an infant. (32RT 4972)

Exhibit 5: Melissa at age three, asleep. (32RT 4973)

Exhibit 6: Melissa at age two or three, on her tricycle. (32RT 4973)

Exhibit 8: Melissa at a scouting event, wearing a uniform, age ten or eleven. (32RT 4974)

Exhibit 10: Melissa at a Christmas parade, in Hemet, unspecified age. (32RT 4975)

Exhibit 14: Melissa with her grandparents at Sea World, unspecified age. (32RT 4977)

Exhibit 17: Melissa dressed up for a dance recital, unspecified age. (32RT 4995)

Exhibit 18: Melissa on her horse and in Canada, in the summer of 1994 [age 12]. (32RT 4978-4979)

Exhibit 20: Melissa at "sock hop" Girl Scout event, shortly before she died [age 12]. (32RT 4995)

Exhibit 21: Melissa with her clarinet, unspecified age. (32RT 4987)

Exhibit 26: Plaque for Melissa, underneath school flag pole. (32RT 5004)

Exhibit 27: Melissa at the wheel of a cruise ship, approximately age eight. (32RT 4994; and see 35RT 5513-5514)

The photographs were referred to during the penalty phase testimony of Melissa's mother, father, and friend Jessica Holmes. (See 32RT 4968-5015) In addition to the photos actually entered into evidence, these prosecution witnesses were looking at several other photographs during their testimony. (See 32RT 4968-4971 [Peo. Exh. 1-16, 18], 4991-4998 [Peo. Exh. 17, 19, 20, 22 and 23])

The defense interposed a continuing objection to all of the photographic evidence. (32RT 4991, 4998-5001; 35RT 5513-5514) At the close of the prosecution penalty phase case, the defense made a motion to strike the testimony of Melissa's parents [Mr. and Mrs. Middleton], and her friends Holmes and Bryan, as exceeding the bounds of the permissible scope of victim impact testimony under *Payne v. Tennessee, supra,* and *People v. Edwards* (1991) 54 Cal.3d 787. The court denied the motion. (32RT 5013-5015) The defense later interposed an objection that the photographs and testimony had been so emotion provoking that several jurors and the court reporter were crying. (35RT 5510-5516)

D. Governing Law and Application

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court upheld admission of evidence describing the impact of a state defendant's capital crimes on a three-year-old boy who was present and seriously wounded when his mother and sister were killed. The court held the Eighth Amendment did not preclude admission of, and argument on, such evidence (*id.* at p. 827), thereby overruling the blanket ban on victim impact evidence and argument imposed by its earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 49, and *South Carolina v. Gathers* (1989) 490 U.S. 805. The court did not hold that victim impact evidence must, or even should, be admitted in a capital case, but instead merely held that if a state decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." (*Payne v. Tennessee* (1991) 501 U.S. at p. 827; see also *id.* at

p. 831 (conc. opn. of O'Conner, J.).) The court was careful to note that the Due Process Clause of the Fourteenth Amendment would be violated by the introduction of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (*Payne v. Tennessee* (1991) 501 U.S. at p. 825; see also *id.* at pp. 836-837 (conc. opn. of Souter, J.).)

Payne recognized that while the federal Constitution does not impose a *blanket ban* on victim impact evidence, such evidence may violate the Fifth, Sixth, Eighth and Fourteenth Amendments where it is so inflammatory as to invite an irrational, arbitrary, or purely subjective response from the jury. (*Payne v. Tennessee* (1991) 501 U.S. at pp. 824-825; *Edwards, supra*, 54 Cal.3d at 836.) The admissibility of victim impact evidence therefore must be determined on a case-by-case basis. As Justice Souter explained in his concurring opinion in *Payne:*

> Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. Cf. *Penry v. Lynaugh* [(1989)] 492 U.S. 302, 319-328 [] (capital sentence should be imposed as a "'reasoned *moral* response'") (quoting *California v. Brown* [(1987)] 479 U.S. 538, 545 [](O'Connor, J., concurring)); *Gholson v. Estelle* [(5th Cir. 1982)] 675 F.2d 734, 738 ("If a person is to be executed, it should be as a result of a decision based on reason and reliable evidence"). . . . With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." (*Payne v. Tennessee* (1991) 501 U.S. at pp. 836-837 (conc. opn. of Souter, J.), citing *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

While this Court has tolerated a wide range of victim impact evidence, it also has recognized its limits. In a series of cases, for instance, the Court has upheld admission of videotapes portraying victims' lives. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1287-1291 [25-minute video interview with the victim, taped a few months before her death]; *People v. Kelly* (2008) 42 Cal.4th 763, 793-

799 [videotape of 19-year-old victim's life prepared and narrated by her mother]); *People v. Zamudio* (2008) 3 Cal.4th 327, 363-370 [14-minute video montage of victims as adults, narrated by their children and grandchildren].) It also has upheld admission of photographs and letters written by the victim. (See *People v. Valencia* (2008) 43 Cal.4th 268, 300 [photograph of 22-year-old victim, accompanied by testimony of his father, who lived in poverty in Oaxaca, Mexico and was supported by him and who read his final letter to the jury]; *People v. Edwards* (1991) 54 Cal.3d 787, 832-835 [photographs of the victim while she was alive].)

The fact that victim impact evidence is admissible does not, however, mean that admission of such evidence has no limits. The *Kelly* and *Zamudio* cases eventually made their way to the United States Supreme Court, which on November 10, 2008 denied certiorari. Two justices, however, expressed grave concerns as to whether victim impact evidence should be admitted at all because of its impingement of due process, and a third justice, Souter, joined in their concern as to one of the cases. (*Kelly v. California* (2008) 555 U.S. ___ [J. Stevens, and J. Breyer, dissenting from denial of certiorari])

Justice Stevens commented,

> "As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the

jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.

"I remain convinced that the views expressed in my dissent in *Payne* are sound, and that the *per se* rule announced in *Booth* is both wiser and more faithful to the rule of law than the untethered jurisprudence that has emerged over the past two decades. Yet even under the rule announced in *Payne*, the prosecution's ability to admit such powerful and prejudicial evidence is not boundless.

"These videos are a far cry from the written victim impact evidence at issue in *Booth* and the brief oral testimony condoned in *Payne*. In their form, length, and scope, they vastly exceed the 'quick glimpse' the Court's majority contemplated when it overruled *Booth* in 1991. At the very least, the petitions now before us invite the Court to apply the standard announced in *Payne*, and to provide the lower courts with long-overdue guidance on the scope of admissible victim impact evidence. Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use." (*Kelly v. California* (2008) 555 U.S. ___ [J. Stevens, dissenting from denial of certiorari])

Justice Breyer added,

"[T]he film's personal, emotional, and artistic attributes themselves create the legal problem. They render the film's purely emotional impact strong, perhaps unusually so... It is this minimal

probity coupled with the video's *purely emotional* impact that may call due process protections into play.

> "This Court has made clear that 'any decision to impose the death sentence' must 'be, and appear to be, based on reason rather than caprice or emotion.'*Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality opinion). A review of the film itself, ... makes clear that the due process problem of disproportionately powerful emotion is a serious one. Cf. *United States* v. *Johnson*, 362 F. Supp. 2d 1043, 1107 (N D Iowa 2005) (describing 'juror's sobbing' that 'still rings' in judge's 'ears'). I understand the difficulty of drawing a line between what is, and is not, constitutionally admissible in this area. But examples can help elucidate constitutional guidelines. And in my view, the Court should grant certiorari and consider these cases in an effort to do so." (*Kelly v. California* (2008) 555 U.S. ___ [J. Stevens, dissenting from denial of certiorari])

Even though the United States Supreme Court has not yet provided a litmus test for what is and is not constitutionally admissible as victim impact evidence, as Justices Breyer and Stevens advocate, it is clear that some cases have attempted to draw limits. In *Prince, supra*, this Court recognized, "Case law pertaining to the admissibility of videotape recordings of victim interviews in capital sentencing hearings provides us with no bright-line rules by which to determine when such evidence may or may not be used. We consider pertinent cases in light of a general understanding that the prosecution may present evidence for the purpose of '"reminding the sentencer ... [that] the victim is an individual whose death represents a unique loss to society" [Citation]' but that the prosecution may not introduce irrelevant or inflammatory material that '"diverts the jury's attention from its proper role or invites an irrational, purely subjective response."

[Citation]'" (*Prince, supra*, at p. 1288, citing *Payne v. Tennessee, supra*, 501 U.S. at p. 825, and *People v. Edwards, supra*, 54 Cal.3d at p. 836.)

The Court in *Prince* noted that, "Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents. The trial court in the present case clearly understood the power of this type of evidence, commenting early in the proceedings that 'I have a great deal of concern about the medium of a videotape creating a situation of grave prejudice,' and that 'there is a qualitative difference between a videotape and a still photograph from an emotional standpoint.' In order to combat this strong possibility, courts must strictly analyze evidence of this type and, if such evidence is admitted, courts must monitor the jurors' reactions to ensure that the proceedings do not become injected with a legally impermissible level of emotion." (*Prince, supra*, at p. 1289, cited with approval in *Kelly, supra*, at pp. 794-798 and *Zamudio, supra*, at p. 367)

People v. Edwards, supra, 54 Cal.3d 787, 832-835 upheld the admission of photographs of the victim while she was alive, and the prosecutor's argument referring to the impact of the crime on her family. In so doing, the Court held that "factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim," but "only encompasses evidence that logically shows the harm caused by the defendant." (*People v. Edwards, supra,* 54 Cal.3d at p. 835.) The Court was careful to note that it was not holding that factor (a) includes all forms of victim

impact evidence and argument. (*Ibid.*) Rather, there are "limits on emotional evidence and argument . . . [and] the trial court must strike a careful balance between the probative and the prejudicial. . . . [I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836.)

The striking feature of the victim impact evidence that *Payne* deemed appropriate, and not so inflammatory as to risk a verdict based on passion, is the extremely limited nature of this evidence. In *Payne,* the grandmother of the three-year-old surviving victim testified in response to a single question (*Payne v. Tennessee* (1991) 501 U.S. at p. 826: "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie." (*Id.* at pp. 814-815)

The victim impact evidence introduced in appellant's case was so voluminous, inflammatory and unduly prejudicial as to "divert the jury's attention from its proper role [and] invite[] an irrational, purely subjective response[.]" (*People v. Edwards, supra,* 54 Cal.3d at p. 836.) The jury was so moved by the testimony of Melissa's parents, accompanied with reminiscences of events depicted by the photographs, that four jurors were either actively weeping or wiping their eyes during Mr. Middleton's testimony. (See 32RT 4998-5001 and Justice Stevens' concern about photographs depicting the victim's life, at *Kelly v. California, supra,* 555 U.S. at ___) Later, the defense argued against admission of all of the photographs, noting, "Several members of the jury were crying. I think the court reporter was crying, the one we have here now. We have – so these – these pictures will evoke emotion and drying. [para.] Now, they're supposed to make a rational, reasoned decision as to what happens to Daniel Linton. Is the

Court now going to allow Mr. Mitchell to put in that stimulus so that they can begin crying again during their deliberations and make – and try to make this reasoned, rational decision with the pictures being used to evoke the emotional response again? [para.] There's way too many of them to justify this kind of – their receipt into evidence." (35RT 5510-5511) See *People v. Raley* (1992) 2 Cal.4th 870, 916 [in deciding whether victim impact evidence violates the federal Constitution, this Court examines victim impact evidence to determine if it "led the jury to be overcome by emotion."].)

The emotional and inflammatory nature of the victim impact testimony and argument in this case, and sheer quantity of this evidence, was so out of proportion to the evidence introduced in other cases as to shift the focus of the jury from "a reasoned *moral* response" to appellant's personal culpability and the circumstances of his crime (*Penry v. Lynaugh, supra,* 492 U.S. 302, 319) to a passionate, irrational, and purely subjective response to the sorrow of Melissa Middleton's family. (See *Cargle v. State* (Ok.Cr.App. 1995) 909 P.2d 806, 830 ["The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process."].)

The emotionally charged and detailed testimony introduced in this case was precisely the type of evidence that *Payne* and progeny recognized as unduly prejudicial and likely to provoke irrational, capricious, or purely subjective responses from the jury. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825; *People v. Edwards, supra,* 54 Cal.3d at p. 836.) Introduction of this testimony violated appellant's rights to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for rationality and reliability in the application of the death penalty mandated by the Eighth Amendment.

E. Prejudice

The trial court's decision to admit the photographs of Melissa, accompanied by the commentary of her parents and friends, went far beyond the purpose of victim impact evidence, having no effect than provoking jury emotion and subjective response. If one or more jurors had any lingering doubt about whether appellant confessed truthfully about wanting to sexually assault Melissa, that doubt was unfairly neutralized by the photographic evidence depicting her life and the abject sorrow of those testifying about her. (See again dissents to denial of certiorari in *Kelly v. California, supra,* 555 U.S. ___) Introduction of this testimony violated appellant's rights to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for reliability in the application of the death penalty mandated by the Eighth Amendment. As previously noted and argued in this brief, the penalty phase case was extremely close. The jury deliberations were lengthy and there was substantial mitigation evidence presented. Victim-impact evidence is especially emotional and evocative, and the erroneous admission of such testimony in a close case cannot be deemed harmless. Accordingly, admission of the victim impact evidence in this case was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

VIII.

THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS, A FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION, WHEN IT INSTRUCTED THE JURY ABOUT MITIGATING FACTORS UNSUPPORTED BY THE EVIDENCE IN CALJIC NO. 8.85

A. Introduction

The trial court instructed the jury under CAI.JIC No. 8.85 as to all aggravating and mitigating factors listed in Penal Code section 190.3, subdivisions (a) through (k). The defense challenged use of six of these mitigating factors that were not supported by the evidence in appellant's case: Factor (d): Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; Factor (e): Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; Factor (f): Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral ,justification or extenuation for his conduct; Factor (g): Whether or not the defendant acted under extreme duress or under the substantial domination of another person; (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication; and (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. The court's failure to excise these factors as requested was error.

B. Factual and Procedural Background

The defense objected to standard CALJIC No. 8.85 regarding factors the jury is instructed to consider when deliberating penalty. That instruction was as follows:

> **CALJIC No. 8.85: Penalty Trial—Factors for Consideration**
>
> In determining which penalty is to be imposed ... you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if you determine them to be applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> (b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(13CT 3656-3657)

The defense argued that factors (d), (e), (f), (g), (h), and (j) should be deleted from the standard No. 8.85 instruction because these factors were irrelevant and posed a risk of cluttering the jury's penalty determination by preventing them from focusing on appellant's background alone and the particular circumstances of the case. (13RT 3621-3622) After argument, the court decided to leave all of the factors in, although it acknowledged it was permitted to take them out. (32RT 5023-5027, citing *People v. Marshall* (1990) 50 Cal.3d 907)

The defense also argued that in No. 8.85, subdivision (d), the use of "extreme" to describe mental or emotional disturbance was error, because it precluded the jury from specifically considering as mitigation a mental or emotional disturbance which may be less than extreme. (13CT 3632-3633) The defense was particularly concerned that the jury would interpret this instruction to mean that the disturbance **has** to be extreme. (32RT 5041) The court denied the defense request and gave the instruction as written. (32RT 5041)

C. Governing Law and Application

A jury should not be instructed on principles of law that are not supported by the evidence presented at trial. (See, e.g., *People* v. *Williams* (1992) 4 Cal.4th 354, 361 (defendant not entitled to consent instruction absent evidence); *People* v. *Hannon* (1977) 19 Cal.3d 588, 597.) An exception to this general rule has arisen in capital cases, where the jury is routinely instructed on mitigating factors that have nothing to do with the case. This Court has upheld this practice. *(People* v. *Ghent* (1987) 43 Cal.3d 739, 776-777.) The Court held there was no danger the jury would draw a negative inference from the fact that many of the listed mitigating factors did not apply because the jury is instructed that the absence of a mitigating factor cannot be considered to be an aggravating factor. *(Ibid.)*

Although it is presumed that jurors understand and follow jury instructions, there are practical limits to this maxim. "The naïve assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction."*(Krulewitch* v. *United States* (1949) 336 U.S. 440, 453) The problem is not cured by the admonition that the absence of mitigation is not aggravation. First, the admonition (which reads like a proverb) is too vague to be widely understood. Second, even if each juror understood it in the proper sense, the jury still hears the list of mitigating factors that do not apply and is left with the inescapable sense that the appellant has failed to satisfy many (or most) of the

legal requirements for a sentence of life without parole. The inclusion of these inapplicable factors in the list of aggravating and mitigating factors violates the defendant's federal constitutional right to due process and to a reliable and fair sentencing process. (See also *People* v. *Aranda* (1965) 63 Cal.2d 518, 528.)

Instructing the jury on inapplicable mitigating factors is error because those extraneous instructions inject irrelevant information into the jury's deliberations. Only relevant factors may be considered in making the capital sentencing decision; and the state is only permitted to use in aggravation those statutory factors that have been designated aggravating. *(People* v. *Boyd, supra,* 38 Ca1.3d 762.) This danger is heightened because the instructions do not explicitly designate which factors are mitigating and which are aggravating, permitting jurors improperly to assign aggravating weight to a factor that can only be considered as mitigation, or to conclude that the crime is particularly aggravated because proof of some factor in mitigation has not been proved. (See *People* v. *Davenport* (1985) 41 Ca1.3d 247,289-290.)

Finally, the failure to delete unsupported factors leaves the jury to decide which factors were relevant and applicable to appellant's case, thus creating the possibility that the jury rejected relevant mitigating evidence because it thought that it was somehow inapplicable to appellant's case. Such a risk violates his rights under the Eighth Amendment. *(Boyde v. California* (1990) 494 U.S. 370, 380 [instructions which create the reasonable likelihood that the jury was prevented from giving mitigating effect to relevant evidence violate the Eighth Amendment].) Empirical research undercuts the argument that deleting inapplicable factors is unnecessary because jurors fully understand the penalty phase instructions and follow them expertly. This research demonstrates a critical misunderstanding by large numbers of jurors as to basic constitutional concepts underlying capital sentencing. (See Haney & Lynch, "Comprehending Life and Death Matters: A Preliminary Study 0f California's Capital Penalty Instructions" (1994) *18 Law & Human Behavior* 411,423-424, 428-429.) Another study of

California jurors who had actually served in capital cases found that many of the jurors who were interviewed simply dismissed mitigating evidence that had been presented during the penalty phase because they did not believe it fit in with the sentencing formula that they had been given by the judge, or because they did not understand that it was supposed to be considered mitigating. (Haney, et al., "Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death" (1994) 50 (no. 2) *J. of Social Issues* 149, 167-168.)

In summary, the failure to delete inapplicable factors deprived appellant of his rights to an individualized sentencing determination based on permissible factors relating to him and the crime. In addition, this error, by artificially inflating the factors on death's side of the scale, violated the Fifth, Sixth, Eighth and Fourteenth Amendments' requirement of heightened reliability in the death determination. *(Ford* v. *Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck* v. *Alabama* (1980) 447 U.S. 625,637.)

Appellant recognizes that this Court previously has rejected challenges to CALJIC No. 8.85's recitation of all factors. In *People v. Lindberg* (2008) 45 Cal.4th 1, the Court commented, "Defendant contends that CALJIC No. 8.85 [fn. omitted] describes the aggravating and mitigating factors the jury may consider in determining penalty, is constitutionally flawed because (1) the instruction fails to inform the jury which factors are mitigating and which factors are aggravating, and (2) the use of the modifiers "extreme" and " substantial" in the instruction acts as a barrier to the jury's consideration of mitigation. [fn. omitted] We previously have rejected these challenges. [Citations] Defendant offers no persuasive reason to reconsider our prior decisions." (*Lindberg, supra*, at pp. 50-51, citing *People v. Ramirez* (2006) 39 Cal.4th 398, 469 ["instructions in the language of CALJIC No. 8.85 do not violate the Eighth and Fourteenth Amendments by failing to delete inapplicable sentencing factors or delineate between aggravating and mitigating circumstances"]; *People v. Perry* (2006) 38 Cal.4th 302, 319 [the terms "extreme" and "substantial" do not unconstitutionally limit the mitigating factors the jury

may consider]; see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 675-676, CALJIC No. 8.85 does not preclude jurors from considering lesser mental or emotional disturbance as a mitigating factor in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments].) However, for the foregoing reasons it should reconsider its position, particularly in light of the facts of this particular case, as discussed below.

D. Prejudice

Appellant maintains that the error in this section was a violation of appellant's federal constitutional rights. However, even state law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. *(People* v. *Jackson* (1996) 13 Cal.4th 1164, 1232*; People* v. *Brown* (1988) 46 Cal.3d 432, 447.) The state reasonable possibility standard is the same, in substance and effect, as the harmless beyond-a-reasonable-doubt standard of *Chapman* v. *California, supra,* 386 U.S. 18, 24. *(People* v. *Ochoa* (1998) 19 Cal.4th 353, 479.) Thus, the standard of prejudice is the same whether the error is one of state law only, or one of federal scope dimension. (See *Boyde* v. *California* (1990) 494 U.S. 370, 380 [instructions which create the reasonable likelihood that the jury was prevented from giving mitigating effect to relevant evidence violate the Eighth Amendment].)

It is reasonably likely that the instruction confused and misled the jury. The listing of a number of mitigating requirements that the appellant did not meet could have no effect other than to lead a juror to conclude that appellant's case for mitigation does not measure up to the standards for life in prison set by law. Two of the factors in CALJIC No. 8.85 are particularly problematic in appellant's case. Factor (d) instructs the jury, once again, to consider: "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Factor (h) instructs the jury to evaluate, "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the

criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication." Taken together these instructions easily could have been interpreted by the jury as a mandate not to consider appellant's mental impairment if (1) it was not "extreme" under (d) and therefore (2) what mental disease he did have, if any, under (h) that led him to strangle Melissa, was not mitigating if it was not extreme.

Inclusion of these factors readily could have further impinged the fairness of the deliberative process because appellant's mental state was the only issue in this case and was critical for the jury to evaluate whether or not he provided a false confession, as set forth in arguments above. Based on the closeness of the case, as evidenced by the length of deliberations and the number of questions posed by the jury that went directly to appellant's state of mind, it is reasonably likely that this error affected the death verdict. Reversal is required.

IX.

THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS, A FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION, WHEN IT INSTRUCTED THE JURY ABOUT THE PROCESS OF WEIGHING FACTORS UNDER MODIFIED CALJIC NO. 8.88

A. Introduction

CALJIC 8.88, as written and as modified in this case, violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and the corresponding sections of the state constitution. The instruction was vague and imprecise, failed accurately to describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The instruction also was improperly weighted toward death and contradicted the requirements of Penal Code Section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances Reversal of the death sentence is required. Appellant recognizes that similar arguments have been rejected by this Court in the past. (See, e g, *People v. Lindberg, supra*, 45 Cal.4th at pp. 51-52; and *People v. Duncan* (1991) 53 Cal 3d 955, 978.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and should be reconsidered

B. Factual and Procedural Background

Over defense objection, the trial court instructed the jury with CALJIC No. 8.88 as follows:

"CALJIC 8.88 Penalty Trial—Concluding Instruction

It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. There is no need for you as jurors to unanimously agree to the presence of a mitigating or aggravating factor before considering it. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the

mitigating circumstances that it warrants death instead of life without parole.

You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom."

(13CT 3659-3660)

The defense requested the court add the following language to the second paragraph of CALJIC No. 8.88:

"The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence."

(13CT 3641)

The defense also requested the court instruct the jury that jurors do not need to find mitigation to impose life without possibility of parole. (32RT 5055) The court denied this request as well. After argument, the court denied these modifications, relying on *People v. Roybal* (1998) 19 Cal.4th 481, 525. (32RT 5054-5057)

C. Governing Law and Application

1. CALJIC No. 8.88 Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Impose a Sentence of Life With out Possibility of Parole

California Penal Code Section 190 3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating, circumstances." (Pen. Code, § 190.3[19] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*Boyde v. California, supra,* 494 U S at 377)

This mandatory language, however, is not included in CALJIC No.8.88 Instead, the instruction informs the jury merely that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code Section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the

[19]The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (*People v Brown* (1985) 40 Cal 3d 512, 544, n 17)

specific mandate of Penal Code Section 190.3, the instruction violates the Fourteenth Amendment. (*Hicks v Oklahoma* (1980) 447 U S. 343, 346-347)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by the applicable statute. An instructional error which mis-describes the burden of proof, and thus "vitiates all the jury's findings," can never be shown to be harmless. (*Sullivan v Louisiana* (1993) 508 U.S. 275, 281 (Emphasis in original).)

This Court has found the formulation set forth in CALJIC No 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*People v. Duncan* (1991) 53 Cal 3d 955, 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition, and appellant respectfully urges that the case is in conflict with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e g, *People v. Moore* (1954), 43 Ca1.2d 517, 526-29, *People v Costello* (1943) 21 Cal.2d 760; *People v Santana* (2000) 80 Cal App 4th 1194, 1208-09.)

In *People v. Moore, supra,* 43 Cal 2d 517, this Court stated the following about a set of one-sided instructions on self-defense: "It is true that the instructions do not incorrectly state the law, but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but *that principle should not have been left to implication.* The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. *There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of*

familiar principles." (*Id.* at pp. 526-27 [internal quotation marks omitted, emphasis added].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law Even assuming it were a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. .*Moore* is thus squarely on point.

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the defendant's case. (*Zemana v Solem* (D.S.D. 1977), 438 F.Supp 455, 469-470, aff'd and adopted, 573 F 2d 1027, 1028 (8th Cir 1978), see *Cool v United States* (1972) 409 U.S 100 [disapproving instruction placing unauthorized burden on defense].) Thus the defective instruction violated appellant's Sixth Amendment rights as well. Under the standard of *Chapman v California*, 386 U S at 24, reversal is required

2. CALJIC No. 8.88 Failed to Inform the Jurors That They Had Discretion to Impose Life Without Possibility of Parole Even in the Absence of Mitigating Evidence

Recall, the court also denied the defense request to instruct that jurors do not need to find mitigation to impose life without possibility of parole. (32RT 5055) The court denied this request. (32RT 5057) The court was in error. "The weighing process is `merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances '" (*People v Jackson* (1996) 13 Cal.4th 1164, 1243-44 [citations omitted].) Thus, this Court has held that the 1978 death penalty statute permits the jury in a capital case to return a

verdict of life without possibility of parole even in the complete absence of any mitigating evidence. (*People v Duncan, supra*, 53 Cal.3d at 979, *People v Brown* (1985) 40 Cal 3d 512, 538-541, reversed on unrelated grounds in *California v Brown* (1987) 479 U.S. 538 [jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].)

The jurors in this case, however, were never informed of this critical fact. To the contrary, the language of CALJIC No 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," death was the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled. Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation - and even if they found no mitigation whatever. As framed, then, the CALJIC No 8.88 had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal App 2d 894, 909.)

Since the defect in the instruction deprived appellant of an important procedural protection that California law affords noncapital defendants, it deprived appellant of due process of law. (*Hicks v Oklahoma, supra*, 447 U S at 346; see *Hewitt v Helms* (1980) 459 U.S. 460, 471-472), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments. (*Furman v Georgia* (1972) 408 U S 238.)

3. The "So Substantial" Standard for Comparing Mitigating and Aggravating Circumstances Set Forth in CALJIC No. 8.88 Is Unconstitutionally Vague and Fails to Set Forth the Correct Statutory Standard

Under the standard CALJIC instructions, the crucial question of whether to impose death hinges on the determination of whether the jurors are "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole " (CALJIC No 8.88, 13CT 3660) There is nothing in the words "so substantial" that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v Georgia* (1980) 446 U.S. 420, 429.) The phrase "so substantial" creates a standard that is vague, directionless and impossible to quantify. It thus invites arbitrary application of the death penalty in violation of the Eighth and Fourteenth Amendments.

The word "substantial" caused constitutional vagueness problems when used as part of aggravating circumstances in the Georgia statutory death penalty scheme. (*Arnold v State* (1976) 224 S E 2d 386). In *Arnold*, the Georgia Supreme Court ruled that while it "might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death sentence compels a different result." (*Ibid*) The United States Supreme Court has specifically praised the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*Gregg v Georgia* (1976) 428 U.S. 153, 202.) The phrase "so substantial," as used in CALJIC No 8.88, is too amorphous to constitute a clear standard by which to judge whether the penalty is appropriate, and its use in this case rendered the resulting death sentence constitutionally indefensible.

4. CALJIC No. 8.88 Failed to Convey to the Jury That the Central Decision at the Penalty Phase Is the Determination of the Appropriate Punishment

As noted above, CALJIC No 8.88 informed the jury that, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole " (13CT 3659-3660.) Clearly, just because death maybe warranted in a given case does not mean it is necessarily appropriate. To "warrant" death more accurately describes that state in the statutory sentencing scheme at which death eligibility is established, that is, after the finding of special circumstances that authorize or make one eligible for imposition of death.[20]

Eighth Amendment capital jurisprudence demands that the central determination at the penalty phase be whether death constitutes the appropriate, and not merely a warranted, punishment. (See *Woodson v North Carolina* (1976) 428 U S 280, 305) CALJIC No 8.88 does not adequately convey this standard, it thus violates the Eighth and Fourteenth Amendments.

D. Prejudice

As set forth above, based on the closeness of the case, as evidenced by the length of deliberations and the number of questions posed by the jury that went

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[20] "Warranted" is a considerably broader concept than "appropriate." Webster's defines the verb "to warrant" as "to give (someone) authorization or sanction to do something, (b) to authorize (the doing of something) " WEBSTER'S UNABRIDGED DICTIONARY (2d Ed 1966). In contrast, "appropriate" is defined as, "1 belonging peculiarly, special 2 Set apart for a particular use or person [Obs.] 3 Fit or proper, suitable, " (Id at 91) "Appropriate" is synonymous with the words "particular, becoming, congruous, suitable, adapted, peculiar, proper, meet, fit, apt" (id), while the verb "warrant" is synonymous with broader terms such as "justify, authorize, support." (*Id.,* at 2062.)

directly to appellant's state of mind, it is reasonably likely that this error affected the death verdict. Reversal is required.

X.

THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL, WHEN IT PERMITTED THE DISTRICT ATTORNEY TO COMMIT MULTIPLE ACTS OF MISCONDUCT DURING FINAL ARGUMENT

A. Introduction

A prosecutor "may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.) In this case, the prosecutor repeatedly stepped over the line in closing argument, striking foul blows that denigrated defense counsel and in so doing appealing to the passion or prejudice of the jury. Both tacks deprived appellant of due process and fundamental fairness. The misconduct was prejudicial and requires reversal.

B. Issue Preservation

Except where indicated, trial counsel did not object to instances of prosecutorial misconduct, and also did not request limiting instructions when they were called for. It is anticipated that respondent will contend appellant waived all issues in which counsel did not, and could have, preserved the record. (See regarding prosecutorial misconduct, *People v. Bell* (1989) 49 Cal.3d 502, 548.) Whether or not counsel failed to act, every assignment of error in this case should be deemed preserved and reached on its merits, for the following reasons.

First, with respect to misconduct, appellant acknowledges that, "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."

(*People v. Samayoa* (1997) 15 Cal.4th 795, 841, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Our Supreme Court recently noted that "the foregoing, however, is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*People v. Arias* (1996) 13 Cal.4th 92, 159.) In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

In light of this precedent, lack of defense objections to numerous instances of misconduct will not preclude appellate review where repeated objections followed by timely admonitions still could not have cured the harm of misconduct interwoven throughout a case. (See, e.g., *People v. Kirkes* (1952) 39 Cal.2d 719, 726 [repeated objections and admonitions would have emphasized rather than cured repeated misconduct interspersed throughout prosecutor's argument to the jury]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692 [where improper comments and assertions are interspersed throughout trial and/or closing argument, repeated objection might well serve to impress upon the jury the damaging force of the misconduct, and a series of objections will not generally cure the harmful effect of such misconduct]; *People v. Johnson* (1981) 121 cal.App.3d 94, 103-104; *People v. Bandhauer* (1967) 66 Cal.2d 524, 530.) Under these unusual circumstances, trial counsel's failure to object is excused and the asserted grounds for misconduct were preserved for appellate review. (*People v. Hill, supra,* 17 Cal.4th at pp. 820-821; *People v. Arias, supra,* 13 Cal.4th at p. 159; *People v. Noguera, supra,* 4 Cal.4th at p. 638.)

Second, because of the misconduct, the failure to object or otherwise preserve the record as to other issues also should be excused and the merits of the issues reached. As in *People v. Pitts, supra,* 223 Cal.App.3d 606, the prosecutor's incessant misbehavior and the trial court's inability to control him infected this case to the point that appellant was denied due process. In this situation, defense counsel's failure to object to evidence or request curative admonitions also should be

excused. (See *Pitts, supra,* at pp. 692-694; *People v. Green* (1980) 27 Cal.3d 1, 27-34.) As the court observed in *Estrada, supra:*

> "We recognize objections were not made of all of the cited references to the search warrant, and in particular no objection was made to . . . closing arguments on the subject. Generally, such failure to object results in a waiver of consideration of the claimed misconduct. The reason for the rule requiring objection is to give the trial court an opportunity to correct the abuse and prevent any harmful effect. [Citation] When, however, as in the present case, the misconduct is part of a pattern, when the misconduct is subtle and when multiple objections and requests for mistrial are made, we conclude it proper for a reviewing court to consider the cited misconduct in evaluating the pattern of impropriety. [Citation]." (*People v. Estrada, supra,* 63 Cal.App.4th at p. 1009.)

Fourth, appellant should not be precluded from raising all issues for the first time on appeal because individually and collectively these errors were a denial of his fundamental federal constitutional rights to due process, a fair trial, and confrontation, under the Fifth, Sixth and 14th Amendments. Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (Penal Code, § 1259; *People v. Vera* (1998) 15 Cal.4th 269, 277. See, e.g., *People v. Saunders* (1993) 5 Cal.4th 580, 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial].) Where an important federal constitutional right is sought to be preserved, the lack of a specific objection does not waive the issue. If the introduction of inadmissible evidence constitutes a denial of federal due process, failure to make the specific proper objection should not waive the issue on appeal. (*People v. Matteson* (1964) 61 Cal.2d 466, 468-469; *People v. Underwood* (1964) 61 Cal.2d 113, 126; *People v. Hinds* (1984) 154 Cal.App.3d 222, 237, citing *Jackson v. Denno* (1964) 378 U.S. 368, 376-377.)

Fifth, in situations such as presented by this case, the trial judge must bear some responsibility "for safeguarding both the rights of the accused and the interest of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.' [Citations.]" (*People v. McKenzie* (1983) 34 Cal.3d 616, 627.)

Finally and in the alternative, the issues should be preserved based on ineffective assistance of counsel in not interposing appropriate objections or requesting admonitions, and thereby waiving otherwise meritorious issues, which directly prejudiced appellant by not giving the trial court the opportunity to correct the misimpression of the jury. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685.) In order to prove ineffective assistance, the defendant must demonstrate both that counsel's performance was deficient and that this deficiency caused prejudicial error. (*Strickland, supra,* at pp. 684-685; *People v. Ledesma* (1987) 43 Cal.3d 171.) It is often necessary to establish such ineffective assistance by means of a separate action in which additional evidence is presented pursuant to petition for writ of habeas corpus. (*People v. Pope* (1979) 23 Cal.3d 412, 422.)

This Court has stressed that where the record on appeal does not indicate why counsel acted or failed to act, a claim of ineffective assistance of counsel is more appropriately decided in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) However, where as here the record reveals no tactical reason for not taking the appropriate action, the issue of ineffective assistance is cognizable on direct appeal. (*People v. Jones* (1994) 24 Cal.App.4th 1780, 1783, fn. 5; *People v. Ellis* (1987) 195 Cal.App.3d 334, 338.)

C. Governing Law and Application

1. The Prosecutor Was Duty-Bound to Seek Justice and Fairness In Pursuing Appellant's Conviction

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citations.]" (*Hill, supra,* at p. 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

A prosecutor is entitled to vigorously pursue his case. However, he or she also is held to an elevated standard of conduct. "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*Hill, supra,* at p. 820.) The prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States, supra,* 295 U.S. at p. 88.)

Thus it is without question that a prosecutor has a solemn duty not just to seek a conviction but also to see to it that justice is done. "'It is a prosecutor's duty "to see that those accused of crime are afforded a fair trial." [Citation.] "The role of the prosecution far transcends the objective of high scores of conviction; its function is rather to serve as a public instrument of inquiry and, pursuant to the tenets of the decisions, to expose the facts." [Citation.]' [Citation.]" (*People v.*

Daggett (1990) 225 Cal.App.3d 751, 759.)

The defense is not required to show bad faith in order to obtain relief for prosecutorial misconduct. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) Misconduct is judged by an objective standard and the good faith *vel non* of the prosecutor is not determinative. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) In fact, our Supreme Court in *Hill* observed "that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1.)

2. The Prosecutor Portrayed Defense Counsel As Dishonest Villains Who Sought To Mislead the Jury

A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. (*People v. Hill* (1998) 17 Cal.4th 800, 832, citing *People v. Wash* (1993) 6 Cal.4th 215, 265; *People v. Thompson* (1988) 45 Cal.3d 86, 112; *People v. Perry* (1972) 7 Cal.3d 756, 789-790; and *People v. Bain* (1971) 5 Cal.3d 839, 847-848) "An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable." (*Hill, supra*, at p. 832, citing 5 Witkin & Epstein, supra, Trial, § 2914, p. 3570.) "While a prosecutor may properly sympathetically portray a victim, he may not include defense counsel as a villain who was attacking the victim. [Citation.] By so doing, he casts aspersions on the defendant's right to defend himself and to be represented by counsel. [Citation.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 704.) "Moreover, such misconduct cannot be justified even though the prosecutor's remarks may be in reply to those made by defense counsel. [Citations]" (*Pitts, supra,* at p. 704.) "A defendant's conviction should be based on the evidence adduced at trial, and not on the purported improprieties of his counsel." (*People v. Sandoval* (1992) 4 Cal.4th 155,

183.) "When a prosecutor denigrates defense counsel, it directs the jury's attention away from the evidence and is therefore improper." (*Id.* at pp. 183-184.) Personal attacks on counsel are unprofessional, and if prejudicial, require reversal. (See *United States v. Young* (1984) 470 U.S. 1, 10, citing ABA Standards for Criminal Justice.)

The prosecutor in this case, William Mitchell, could not restrain himself from demonizing defense counsel. While he certainly was entitled to vigorous advocacy, his characterization of counsel and imputation of evil motives completely crossed the line,[21] as the following excerpts make very clear:

> "Defense counsel will belittle the facts, accuse me of speculation. I didn't create this evidence..." (36RT 5606)

> "The defense, in the People's position, has exaggerated the abuse the defendant has suffered in his childhood. ..." (36RT 5608)

> "The defense in this case has been designed to desensitize you to the crimes that the defendant committed. I want you to recognize, if you have not already, the language of manipulation. Her murder is referred to as a tragedy. It's not a tragedy, it's a murder. It's repeatedly said that Melissa died. Melissa didn't die, she was killed.... The defense has attempted to present evidence of his entire childhood to you, especially at the ages of five and eight, to attempt to humanize him, to divert attention away from the crime he committed and the reason why he's here.

[21]While the defense interposed many objections during argument, counsel did not object to this aspect of the prosecutor's argument. For the reasons set forth above, the issue nonetheless is preserved for appellate review.

"And perhaps the most glaring example of a technique used to divert attention away form the defendant, who is the focus of these proceedings, is to paint other people, other persons, as the bad guy, as the bad guy. It's been the big bad D.A. in this case who's overfilled it, who's overcharged it, who's made or tried to make it look, according to the defense, as if the defendant did more than he actually did, committed more crimes than he actually did.

"And Mr. Ebert gets up here and tries to analogize the charges in this case to a disciplinary marker..." (36RT 5609-5610)

"The defense will belittle the charges, they belittle the evidence, they belittle the crime, all for the goal of diverting attention away from Daniel Linton." (36RT 5610-5611)

"And they know they only need one of you. They only need one of you to fall for their diversion. They want you to believe the defendant is not that bad. It's his first time committing a crime. It's his first time, so he deserves the more lenient sentence. Think about that argument for what it is." (36RT 5613)

"Particularly appalling is the audacity of defense counsel in calling or evoking Melissa Middleton's name in an attempt to make a plea for the lesser sentence in this case. Not only appalling, it was offensive." (36RT 5618)

Each of these statements violated the precepts against attacking defense counsel. (See again, *People v. Pitts, supra,* 223 Cal.App.3d at p. 704; *People v. Sandoval* (1992) 4 Cal.4th 155, 183; *United States v. Young* (1984) 470 U.S. 1, 10,

citing ABA Standards for Criminal Justice.) Even worse, some of the accusations by Prosecutor Mitchell strayed into the realm of misleading the jury about his own actions. For example, Mitchell claimed, "I didn't create this evidence" (36RT 5606) and complained that the defense "paint[ed] other people, other persons [including the district attorney], as the bad guy, as the bad guy." (36RT 5609-5610)

One wonders whether the prosecutor protested too much. This case encompasses a compelling record that law enforcement authorities, led by Mitchell, made an assumption that appellant's strangulation of Melissa was sexually motivated and then worked backwards to create evidence to fit their theory. There is a strong possibility that the police interrogations and promises by Mitchell himself resulted in a false confession by appellant as to a prior incident which may not have involved him and/or may not have been an attempted sexual assault. Yet that prior incident may have been created or embellished as a result of improper police techniques of which the jury was not educated because of other rulings about the trial court. (See arguments, *ante.*)

This aspect of Prosecutor Mitchell's closing argument was plain misconduct. (*People v. Pitts, supra,* 223 Cal.App.3d at p. 704; *People v. Sandoval* (1992) 4 Cal.4th 155, 183; *United States v. Young* (1984) 470 U.S. 1, 10, citing ABA Standards for Criminal Justice.)

3. The Prosecutor Vouched For Key Prosecution Witnesses.

It also is unacceptable for a prosecutor to vouch for the veracity of a witness by attesting to the credibility of that witness. (See *People v. Perez* (1962) 58 Cal.2d 229, 245-247; *People v. Johnson* (1981) 121 Cal.App.3d 94.) Vouching "constitutes improper argument if there is substantial danger that jurors will interpret the statement of opinion or belief as being based on information other than evidence adduced at trial, but not if it is merely the prosecutor's view of deductions and inferences warranted by the evidence. [Citations]" (*People v. Pitts, supra,* 223

Cal.App.3d at p. 702, fn. 27, citing *People v. Adcox* (1988) 47 Cal.3d 207, 236-237; *People v. Bain* (1971) 5 Cal.3d 839, 848; *People v. Kirkes* (1952) 39 Cal.2d 719, 723-724; *People v. Prysock* (1982) 127 Cal.App.3d 972, 997.) The prosecutor's argument about defense counsel's nefarious motives also contained elements of vouching for the prosecution team. Recall, Prosecutor Mitchell argued,

> "And perhaps the most glaring example of a technique used to divert attention away from the defendant, who is the focus of these proceedings, is to paint other people, other persons, as the bad guy, as the bad guy. It's been the big bad D.A. in this case who's overfilled it, who's overcharged it, who's made or tried to make it look, according to the defense, as if the defendant did more than he actually did, committed more crimes than he actually did." (36RT 5609-5610)

This passage is problematic because it implies that the district attorney is the "good guy" who has evidence that the jury does not know about and that the jury should trust him, as the public prosecutor, to be doing the right thing. "Since it comes from an official representative of the People, it carries great weight..." (*Pitts, supra,* at p. 694, citing *People v. Talle, supra*, at p. 677) The argument is improper vouching and misconduct.

4. The Prosecutor Argued Facts Not In Evidence

In *People v. Hill, supra,* the Court condemned the practice of referring to facts not in evidence during final argument: "'We have explained that such practice is clearly ... misconduct' [Citation] because such statements 'tend[] to make the prosecutor his own witness-offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special

regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations] 'Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal.' (*People v. Hill, supra,* 17 Cal.4th at p. 828, citing *People v. Pinholster* (1992) 1 Cal.4th 865; *People v. Bolton* (1979) 23 Cal.3d 208, 213; *People v. Benson* (1990) 52 Cal.3d 754. 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57; *People v. Kirkes* (1952) 39 Cal.2d 719, 724; 5 Witkin & Epstein, supra, Trial, § 2901, p. 3550.)

The prosecutor in this case repeatedly argued facts to the jury that were not fair or reasonable inferences from the evidence:

a. "Fact" that Appellant Masturbated in Melissa's Underwear Immediately After the Killing

The prosecutor argued without foundation that appellant took Melissa's underwear and masturbated into them right after he killed her. He returned to this theme repeatedly during closing and final argument, always over objection. There was no foundation to support this speculation, which the district attorney argued as though it were undisputed fact.

During initial closing argument, Mitchell argued as follows:

> Mr. Mitchell; "The defendant masturbated after he killed Melissa Middleton. It's a disgusting thought, I know.
>
> Ms. Cronyn: Your Honor, there's no evidence of that.
>
> Mr. Mitchell: The evidence shows that –
>
> The Court: Mr. Mitchell is discussing reasonable interpretations. It's up to the jurors to determine whether or not that's reasonable.

Mr. Mitchell: Why else does he destroy or attempt to destroy and conceal that underwear after the commission of the murder? He had had that underwear for months before. Why doesn't he just throw it away after it's found in his room or in – he does the laundry or something? He's got possession of it. [para] does it make sense that he's just going to have this stuff? Why does – why does he use it to masturbate? Melissa's dirty underwear. Think about it." (35RT 5559)

In final closing, Mitchell returned to this argument:

Mr. Mitchell: "...And the most glaring, unremorseful and disgusting fact of this case is that with Melissa's face, dead face, fresh in his mind, the defendant, Daniel Linton, his sexual urges unrequited, had to satisfy himself using Melissa's underwear.

Ms. Cronyn: Your Honor, objection. There's absolutely no evidence of that whatsoever.

The Court: Again, it's something that the jurors can determine for themselves, if it comes within the reasonable range of the evidence.

Ms. Cronyn: Your Honor, may we preserve an objection under the Fifth, Sixth, Eighth and Fourteenth Amendments?

The Court: Certainly.

Mr. Mitchell: ... I didn't create this evidence. I didn't have Melissa's underwear in my possession and put them in the trash can with the keys, with her ring. The defendant did. And it's that proximity in time and place in his possession that leads to rational inferences. They didn't just happen to fall into the trash at the same time by somebody else putting there other than the defendant.

[para.] With the face of death fresh in his mind, he had to – and excuse me for being blunt – get himself off, which shows you his true intent and his obsession with Melissa Middleton." (36RT 5605-5606)

The court erred in overruling the defense's objection to this argument for several reasons. It is not in dispute that appellant apparently masturbated into the underpants or used them to clean himself afterwards. However, the prosecution established no foundation whatsoever as to when Melissa's underwear ended up at the Linton residence. If the underwear had been in the Linton household ragbag for months, as the prosecutor initially argued, appellant may not even have known it belonged to Melissa. If on the other hand, he stole them from her room right after he killed her, as the prosecution later and contradictorily implied, there is no evidence to support that speculation.

The prosecution failed to provide a foundation as to when appellant masturbated and no technology was presented as to the age of the semen found on the underwear. The supposition that appellant killed Melissa and then went home and masturbated was nothing more than a theory posed by the prosecution to inflame and over-persuade the jury with the revolting image of appellant killing her and then satisfying himself sexually. The prosecutor's decision to argue it as fact was misconduct. (See *Pitts, supra*, 223 Cal.App.3d at p. 702-703)

b. "Fact" that Appellant Expressed No Remorse

On the heels of its final argument that appellant reacted to the fact that he killed Melissa by masturbating into her underpants, the prosecutor further contended that he showed no remorse:

Mr. Mitchell: "Nothing Daniel Linton did the next day, November 30, 1994, when the officer came to pick him up at his house to talk to him some more, nothing he did that day can erase or

mitigate what he had done to Melissa and to her family the prior day. When you're looking for any sign of remorse that is important as a mitigating factor in this case, look at his actions on the day that it counts, on the day that it matters, on the day when one would be revolted.

Ms. Cronyn: Your Honor, Sixth Amendment right to confrontation. We had no opportunity to cross-examine this witness.

The Court: Overruled.

Mr. Mitchell: The day where one would be revolted by one's conduct if one had in him that human feeling, natural emotion, not the mentality of a killer. That's when it counts. Not after police suspicion has focused on you, not after they have been asking probing questions about a prior incident, not after they've noticed scratches on your arm, and not after they've asked you to come down to the police station to talk further about the case. It wasn't until the next day that Mr. Linton ever expresses any sorrow or grief.

Ms. Cronyn: Again, Sixth Amendment right to confrontation.

The Court: Overruled."

(36RT 5606-5607)

This argument also was very misleading based on the facts. There is little evidence about appellant's demeanor the day of the killing when he spoke to the police. It is clear, however, that he was not very sophisticated and broke down almost immediately the following morning when Detective Stotz picked him up. At that time, he expressed concern, possibly fear, that he did not want to tell the police the truth when his parents had been around the night before. (17RT 2631-2636, 2644-2648; 18RT 2768-2769) Thus for the prosecutor to characterize this scenario as one of no remorse was an inaccurate portrayal of what actually occurred.

c. "Fact" that Appellant Would Have a Comfortable Life in Prison, With Amenities Such as Books and Television

The prosecutor argued that life without parole was insufficient punishment in this case: "I suggest to you it's not enough in this case. The defendant will have a life, if you let him have life without parole. He will have a community of people that he deals with. He will have his friends. He will have money to buy things. He will have television. He will have books. He will have visits from his family..." The trial court overruled a defense objection to this line of argument. The court was in error.

From the tenor of this argument, a juror unversed with the ways of the criminal justice system might conclude that appellant would be living the cushy life at a "Club-Fed" type facility. Of course, there was no evidence to support such a portrayal of what appellant's life would be like in prison. Not only was there no evidence that he would have books or television in his cell, there also was nothing to support a supposition that his family could visit him on a regular basis or that he would have friends. The only effect of this argument was to mislead the jury about facts that were not in evidence and may not be true. Once again, "Argument is improper when it is neither based on the evidence nor related to a matter of common knowledge. [Citations]" (*Pitts, supra*, 223 Cal.App.3d at p. 702-703)

5. The Prosecutor Appealed to Public Passion and Sentiment

It also is misconduct to appeal to the jury's passion or prejudice and/or urge jurors to personalize the case. "An argument by the prosecution that appeals to the passion or prejudice of the jury is improper." (*People v. Pitts, supra*, 223 Cal.App.3d at p. 696, citing *People v. Haskett* (1982) 30 Cal.3d 841, 863; *People v. Talle* (1952) 111 Cal.App.2d 650,. 676.)

The prosecution violated this rule as well. In closing the prosecutor urged,

Mr. Mitchell: "I'd suggest to you that a death verdict, ladies and gentlemen, is the ultimate validation of what we hold and value most dear in our community and as individuals: Our life, our children, and the sanctity of our home. And if you were to find that death is the appropriate sentence for Mr. Linton, you are doing no more than affirming in the loudest voice possible those values in our community.

Ms. Cronyn: Your Honor, public community and public sentiment is improper argument, and there's a reference to that, the sanctity of our homes.

Mr. Mitchell: Should I be heard, Your Honor?

The Court: Yes

Mr. Mitchell: I'm commenting on the circumstances of this crime warranting – or how they warrant the more appropriate sentence here is death. He violated the sanctity of a home in our community when he killed a child who was to be safe in that home.

Mr. Cronyn: That's wasn't the argument, Your Honor. It's appeared –

The Court Well, I'm going to sustain the objection.

Mr. Mitchell: A death verdict is the ultimate validation of our community values. Let the punishment fit the crime. A death verdict says we will not tolerate this type of crime.

Ms. Cronyn: Again, Your Honor, it's appealing to the public sentiment. It's improper.

The Court: I don't think he stepped over the line at that point. Overruled."

(36RT 5619-5620)

Here, the emphasis by the prosecutor on community values and the implication that any juror who voted against the death penalty would not be upholding those values, was misconduct. "The overall tone of the argument, however, was purely an attempt to play upon the passions and prejudices of the jurors." (*Pitts, supra*, 223 Cal.App.3d at pp. 701-702.)

D. Prejudice

Reversal is mandated based on the sheer volume of misconduct set forth here. The misconduct should be judged under the *Chapman* standard for evaluating the prejudicial effect of federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Each and every inappropriate action taken by the prosecutor resulted in a due process violation. (U.S. Const., Amend. XIV) Where the prosecutor argued facts that were not in evidence or vouched for law enforcement witnesses, he denied appellant his right to confront and cross-examine pursuant to the Sixth Amendment. (U.S. Const., Amend. VI; *People v. Bolton, supra,* 23 Cal.3d 208, 214.) His appeals to community passion or prejudice were equally inflammatory. (*People v. Pitts, supra*, 223 Cal.App.3d at p. 696, citing *People v. Haskett (1982)* 30 Cal.3d 841, 863; *People v. Talle* (1952) 111 Cal.App.2d 650,. 676.) For these reasons and those set forth in argument I, *ante.*, reversal is required.

XI.

THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO A JURY TRIAL, WHEN IT FAILED TO FURTHER INQUIRE INTO ALLEGATIONS OF MISCONDUCT AFTER TWO JURORS EXCHANGED EMAILS DURING DELIBERATIONS, OUT OF THE PRESENCE OF OTHER JURORS

A. Introduction

Juror misconduct may have occurred again during penalty deliberations, when at least two jurors emailed the foreperson, Juror No. 9, to complain about each other's attitudes. The trial court briefly questioned No. 9, concluded there was not a problem, and took no further action to investigate the allegations, over defense objection that the errant jurors also should be identified and questioned. The trial court abused its discretion when it refused to conduct further inquiry.

B. Standard of Review

A trial court may conduct a hearing to determine the truth of jury misconduct allegations, when the court "in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415, cited with approval in *People v. Lewis* (2001) 26 Cal.4th 334, 388.) In reviewing a claim of juror misconduct or juror bias, the reviewing court "accept[s] the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citation]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations]" (*Nesler, supra*, at p. 582.]

C. Factual and Procedural Background

On the third day of penalty deliberations, March 30, 1999, the court received a note from the jury foreperson stating, "I, Juror No. 9, received at my e-mail address two e-mails from individuals on the jury regarding the conduct of other jurors. One juror was upset at another for saying they did not have compassion. One juror was upset at another for saying they were having too much fun in the deliberation room and not taking the case seriously. Is this appropriate? Is this a problem?" (13CT 3664, 3670; 36RT 5697-5698.) The prosecution suggested that the court tell the foreperson to inform the other jurors that individual contact is not proper and that issues have to be brought up in the presence of all 12 jurors. The defense stated that the jurors were not following the court's admonition and should be identified and spoken to individually. (36RT 5697-5698)

The court questioned Juror No. 9, who confirmed that both emails were sent to him without copies to others. Both statements were made in the deliberations room, in front of all the jurors, and the emails were deleted. (36RT 5700-5705) The defense argued that the jurors who sent the emails should be identified and that other jurors might be sending emails to each other. The prosecution argued that there was no evidence of misconduct. The court found that there was no juror misconduct at this point, the discussion was within the context of jury deliberations, and some jurors were "venting" not discussing the case. (36RT 5706-5707)

D. Governing Law and Application

A criminal defendant has a constitutional right to trial by unbiased, impartial jurors. (U.S. Const., Sixth and 14th Amend.; Cal. Const., art. I, §16; *Irwin v. Dowd* (1961) 366 U.S. 717, 722; *People v. Hughes* (1961) 57 Cal.2d 89, 95.) A single juror who is partial or motivated by prejudice deprives a defendant of his Sixth

Amendment right to trial by an impartial jury. (See *United States v. Plache* (9th Cir. 1990) 913 F.2d 1375 [Eastern Dist. of Calif.]; *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517; *United States v. Hendrix* (9th Cir.) 549 F.2d 1225, 1227, cert. den. (1977) 434 U.S. 818.) A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors. 'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, 269 Cal.Rptr. 530, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.)

"Juror misconduct .... leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. [Citations]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) The effect of out-of-court information upon the jury is assessed in the following manner. "When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Nesler, supra*, at p. 578.) If there is a "substantial likelihood that a juror was actually biased," the verdict must be set aside, "no matter how convinced [the Court] might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few

structural trial defects that compel reversal without application of a harmless error standard." (*Nesler, supra*, at p. 578.)

What constitutes "actual bias" of a juror varies according to the circumstances of the case. (*Nesler, supra*, 16 Cal.4th t p. 580.) The United States Supreme Court has set the following standard for assessing juror partiality, "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." (*United States v. Wood* (1936) 299 U.S. 123, 145-146, 57 S.Ct. 177, 185, 81 L.Ed. 78.) " 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' [Citation.] [¶] It is not required, however, that the jurors be totally ignorant of the facts and issues involved.... It is sufficient if the juror can lay aside his impression or opinion *and render a verdict based on the evidence presented in court.*" (*Irvin v. Dowd, supra,* 366 U.S. at pp. 722-723, 81 S.Ct. at pp. 1642-1643, italics added, (quoting *Reynolds v. United States* (1878) 98 U.S. (8 Otto) 145, 155, 25 L.Ed. 244.) An impartial juror is someone "capable and willing to decide the case solely on the evidence" presented at trial. (*Smith v. Phillips, supra,* 455 U.S. at p. 217, 102 S.Ct. at p. 946; *In re Carpenter, supra,* 9 Cal.4th at pp. 648, 656.)

Under California law, "if a juror's partiality would have constituted grounds for a challenge for cause during jury selection, or for discharge during trial, but the juror's concealment of such a state of mind is not discovered until after trial and verdict, the juror's actual bias constitutes misconduct that warrants a new trial under Penal Code section 1181, subdivision 3. [Citations]" (*People v. Nesler, supra*, 16 Cal.4th at p. 581, citing *People v. Galloway* (1927) 202 Cal. 81, 89-92, 259 P. 332; *People v. Meza* (1987) 188 Cal.App.3d 1631, 1642-1643, 234 Cal.Rptr. 235.) "Thus, actual bias supporting an attack on the verdict is similar to actual bias warranting a juror's disqualification. [Citations]." (*People v. Nesler, supra*, at p. 581.) "[J]uror misconduct may still be found where bias is clearly

apparent from the record. [Citation]" (*People v. San Nicholas* (2004) 34 Cal.4th 614, 646.)

A juror who violates his or her oath and the trial court's instructions is guilty of misconduct. "'"When a person violates [her] oath as a juror, doubt is cast on that person's ability to otherwise perform [her] duties." ' [Citation]" (*People v. Nesler, supra*, 16 Cal.4th at p. 586, citing *In re Hitchings* (1993) 6 Cal.4th 97, 120.) "Misconduct by a juror, or a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable 'presumption' of prejudice. [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 295.)

In *People v. Hedgecock* (1990) 51 Cal.3d 395, the Supreme Court held that "it is within the discretion of a trial court to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. [fn. omitted]" (*Hedgecock, supra*, at p. 419, cited with approval in *People v. Lewis, supra*, 26 Cal.4th at p. 388 and *People v. Hayes* (1999) 21 Cal.4th 1211, 1255; cf. *People v. Cox* (1991) 53 Cal.3d 618-698.)

The Court in *Hedgecock* observed, "There are substantial advantages to a rule recognizing the trial court's discretion to order an evidentiary hearing at which jurors may testify. Most important, when compared to the use of affidavits, a hearing at which witnesses testify and are subject to cross-examination is a more reliable means of determining whether misconduct occurred. As observed in *Ryan v. United States* (D.C.Cir.1951) 191 F.2d 779, 781: 'If the use of affidavits be thought a doubtful method for getting at the facts [citations], hearing witnesses on examination and cross-examination is free of such doubt.' And, as Justice O'Connor noted in her concurring opinion in *Smith v. Phillips* (1982) 455 U.S. 209, 222, 102 S.Ct. 940, 948, 71 L.Ed.2d 78: 'A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of

the particular circumstances of the case.'" (*Hedgecock, supra*, 51 Cal.3d at pp. 417-418)

The Court in *Hedgecock* added, "Permitting jurors to testify at an evidentiary hearing is consistent with procedures at other stages of criminal proceedings. For example, if during a trial the court becomes aware of possible juror misconduct, it must 'make whatever inquiry is reasonably necessary to determine if the juror should be discharged....' [Citation] Inherent in the court's power to make this inquiry is its discretion to examine jurors under oath. And we have suggested that jurors may be called to testify in habeas corpus proceedings initiated in California state courts. [Citation]" (*Hedgecock, supra*, at pp. 417-418)

Of course, "This does not mean... that a trial court must hold an evidentiary hearing in every instance of alleged jury misconduct. The hearing should not be used as a 'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Hedgecock, supra*, at p. 417) "At such a hearing, jurors 'may testify to "overt acts"--that is, such statements, conduct, conditions, or events as are "open to sight, hearing, and the other senses and thus subject to corroboration"--but may not testify '"to the subjective reasoning processes of the individual juror..."' [Citation]" (*People v. Staten* (2000) 24 Cal.4th 434, 466, citing *In re Stankewitz* (1985) 40 Cal.3d 391, 398.)

The jurors who felt compelled to exchange emails between themselves clearly violated their oaths and the court's instructions and thereby committed misconduct. (*People v. Nesler, supra*, 16 Cal.4th at p. 586; *In re Hamilton, supra,* 20 Cal.4th at p. 295.) Their heated exchange raised a strong possibility that the misconduct was prejudicial and separate questioning of the jurors was needed to resolve the conflict in the information provided by the foreman. The court

exacerbated the problem by not following the defense suggestion that the errant jurors should be identified and questioned as to what they said in the emails, and for not attempting to obtain a copy of the emails. The court's dismissive conclusion that the jurors were just "venting" was inadequate and was error. (See again 36RT 5700-5707)

D. Prejudice

The possibility that juror misconduct has occurred implicates a defendant's Sixth Amendment rights and therefore any error in failing to inquire and develop a record as to allegations of misconduct should be evaluated under the harmless-beyond-a-reasonable-doubt standard of prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. The prosecution will not be able to carry its burden of negating prejudice in this instance. The specter of juror misconduct reinforces the fact that protracted deliberations occurred and that the determination of penalty was close and difficult, at one point leading to a deadlock. (see argument I, *ante*.) At least two emails were exchanged between individual jurors but not all of the jurors, and they were factionalized as to what other jurors were advocating, raising a serious question as to whether the verdict reached was truly unanimous. (13CT 3664; 36RT 5697-5698) By not exercising its discretion and conducting an evidentiary hearing as to what were the actual points of contention between the two jurors (as opposed to the foreman's hearsay recounting of what they said), the trial court failed to develop the record when heated and serious accusations were being cast about. Accordingly, the court abused its discretion in failing to conduct an evidentiary hearing and deprived the defense of the ability to make a full record. (See *People v. Hedgecock, supra*, 51 Cal.3d at p. 420.) The trial court's decision not to fully question the errant jurors and rule accordingly was an abuse of discretion, not harmless beyond a reasonable doubt and requires reversal. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

XII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[22] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

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[22] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The

result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 26 special circumstances[23] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special

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[23] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in People v. Superior Court (Engert) (1982) 31 Cal.3d 797. The number of special circumstances is now 33. (Pen. Code §190.2)

circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[24]

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[24] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[25] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[26] or having had a "hatred of religion,"[27] or threatened witnesses after his arrest,[28] or

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sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[25] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[26] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).

[27] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[28] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

disposed of the victim's body in a manner that precluded its recovery.[29] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa, supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that

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[29] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire

process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the

maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. In the Wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4

Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[30] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[31] These factual determinations are essential prerequisites to death-

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[30] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[31] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact –

eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[32]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[33] In *Cunningham* the principle that any fact which exposed a

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no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[32] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

[33] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of

defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (Id., pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra,* p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

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factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[34] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

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[34] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond

a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Ariz. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[35])

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[35] See also Stevenson, "The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing" (2003) 54 *Ala L. Rev.* 1091,

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[36] As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for

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1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[36] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri* (1981) 451 U.S. 430,. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at

stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable

> doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis

added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11

Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[37] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

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[37] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high

court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review.

(See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors*." (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law

generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

XIII. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non- capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[38] as in *Snow*,[39] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[40]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2,

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[38] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra*, 30 Cal.4th at p. 275; emphasis added.)

[39] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

[40] In light of the Supreme Court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

ante.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[41] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

XIV. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. ("Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking" (1990) 16 *Crim. and Civ. Confinement* 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in

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[41] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for

extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[42] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[42] See Kozinski and Gallagher, "Death: The Ultimate Run-On Sentence," 46 *Case W. Res. L.Rev.* 1, 30 (1995).

XV

THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS UNDER THE FEDERAL AND STATE CONSTITUTIONS, WHEN IT PERMITTED APPELLANT TO BE CONVICTED BASED ON ERRORS THAT CUMULATIVELY AND INDIVIDUALLY, DENIED HIM A FAIR TRIAL

As the foregoing arguments demonstrate, the trial court made major legal errors in this case, any one of which calls out for reversal. When the errors are viewed together, however, it also becomes clear that each error was amplified by every other error, so that the cumulative effect was greater than the sum of the parts.

A. Governing Law Regarding Cumulative Error and Prejudice

In *Chambers v. Mississippi* (1973) 410 U.S. 284, the Supreme Court held that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. In *Chambers*, the high court concluded that the cumulative effect of individual errors "denied [the defendant] a trial in accord with traditional and fundamental standards of due process" and "deprived [him] of a fair trial". (*Chambers, supra*, at pp. 298,302-303.)

The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. (*Chambers, supra,* at p. 290, fn. 3; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922.) "[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal. [Citations]" (*Parle v. Runnels, supra*, 505 F.3d at p. 926, citing *Chambers, supra*, 410 U.S. at p. 290, fn. 3, 298, 302-303 and *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

In *Chambers,* state evidentiary rules required exclusion of a recanted confession of another man, McDonald, who was believed to be the actual shooter; forbade cross-examination of McDonald, who was technically Chambers' witness; and also required exclusion of the hearsay testimony of three witnesses that McDonald had confessed to them. (*Chambers, supra*, at pp. 287-293) Under these circumstances, the Supreme Court ruled that the combined effect of the trial court's rulings deprived Chambers of a "trial in accord with traditional and fundamental standards of due process." (*Id.* at p. 302.) In *Parle v. Runnels, supra*, 505 F.3d at p. 922, the court analyzed the cumulative error analysis and observed, "Like the evidence excluded in *Chambers,* this wrongfully admitted and excluded evidence went to the heart of the central issue in the case. In *Chambers,* the excluded evidence pertained to the identity of the shooter-Chambers's primary defense-while, here, the erroneously admitted and excluded evidence pertained to the only relevant issue (and Parle's only defense): Parle's state of mind at the time of the crime." (*Parle v. Runnels, supra*, at p. 932.) Accordingly a due process violation occurs pursuant to *Chambers* and *Parle* when several errors combine to unfairly impugn the central issue raised by the defense.

The combination of errors in this case, like those in *Chambers*, undermine confidence in the reliability of the jury's determination that appellant should be sentenced to death. The jury's task pursuant to Penal Code section 190.3 is to "determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole" based. *inter alia*, on an evaluation of aggravating and mitigating circumstances encompassing the circumstances of the crime, mental and/or emotional impairment of the accused, and any other extenuating circumstance that is not a legal excuse for the crime. (Pen. Code, section 190.3)

The court committed multiple errors which interacted to make the sum of the errors greater than each part, gutting the defense case and deprived the jury of

critical and admissible evidence in mitigation, which in turn skewed its duty to evaluate and balance mitigating and aggravating factors.

B. The Court Neutralized the Defense Case in Mitigation By Excluding Evidence that Raised a Lingering Doubt as to Whether Appellant Committed the Prior Attack on Melissa and Refusing to Excise the Portion of CALJIC 8.85 That Allowed Consideration of Mental or Emotional Disturbance Only if it Was "Extreme."

The defense proffered evidence addressing the issue of lingering doubt as to whether appellant actually committed the prior attack on Melissa, the foundation of the rape and/or lewd conduct special circumstances. That evidence encompassed empirical research about the phenomenon of false confessions, which experts see regularly in law enforcement settings but of which lay people are unaware; actual percipient testimony from the district attorney about the process of obtaining appellant's confession to demonstrate the risk that he testified falsely, and why; and evidence about an unknown third party who had entered another home in the neighborhood several years earlier and frightened a homeowner and her family. By refusing to admit this evidence, the trial court eliminated any possibility that the jury deliberate about lingering doubt or evaluate mitigation vis-à-vis the crimes charged.

The trial court left the defense to present in mitigation a recitation of appellant's social and educational history, including a history of abuse, learning problems, hyperactivity, and unspecified mental and/or emotional impairment. The jury's evaluation of that remaining portion of the defense was neutralized because of the court's instruction with CALJIC 8.85. The portion of CALJIC 8.85 that required the jury to consider only "extreme" mental or emotional disturbance (factor (d)) permitted the jury incorrectly to review appellant's life history with an eye towards considering it as mitigation only if it was in fact extreme. Thus the fact that appellant probably was an emotionally disturbed individual was not

enough. The instruction had the effect of leading the jury to minimize appellant's terrible childhood because it was "not that bad" and he was "not that disturbed."

C. The Court Amplified the Prosecution Case In Aggravation by Allowing Victim Impact Evidence That Overrode Emotion and Impaired the Jury's Ability to Reach a Reasoned Moral Response Whether to Spare Appellant's Life, and Permitting the Prosecution to Engage in Improper Argument that Demonized the Defense and Mischaracterized the Evidence Against Appellant

Balanced against what little was left of the defense case was the prosecution's victim impact presentation of the series of photographs of Melissa's life, narrated by her father, mother and friends. The prosecution case went far beyond the purpose of victim impact evidence, having no effect than provoking jury emotion and subjective response. If one or more jurors had any lingering doubt about whether appellant confessed truthfully about wanting to sexually assault Melissa, that doubt was unfairly neutralized by the photographic evidence depicting her life and the abject sorrow of those testifying about her. (See again dissents to denial of certiorari in *Kelly v. California, supra,* 555 U.S. ___)

The prosecution unfairly reinforced its penalty phase case – which was solely based on victim impact evidence – by demonizing the defense, arguing aggravating facts that were not established, vouching for prosecution witnesses who should have been scrutinized for generating appellant's false confession, and unfairly playing to public passion and sentiment.

D. The Court Instructed the Jury With CALJIC No. 8.88 So That It Weighed the Aggravating Evidence of Victim Impact and Crime Circumstances More Heavily than Mitigating Evidence

The jury entered deliberations with almost no case in mitigation and an emotional, compelling case in aggravation, in the form of the victim impact evidence and the prosecutor's impassioned and plea to kill appellant for what he

did. (See 35RT 5528-5567; 36RT 5598-5622) CALJIC No. 8.88 finished off the defense. It distorted the jury's evaluation of penalty in favor of the aggravating factors – which already were presented more prominently than the meager remains of the defense mitigation case – by telling the jury to impose the death penalty if the aggravating circumstances were "so substantial" as to outweigh what was left of mitigation. It also did not tell the jury that it could impose life. The weighing process was irreparably distorted in favor of death.

E. The Record of Jury Deliberations Reveals Multiple Close Case Indicators as Well as Jury Misconduct

Several indicators in the penalty phase record raise a compelling inference that the jury struggled with the penalty determination and would have reached a more favorable result had the mitigation portion of the defense case not been so unfairly circumscribed and the aggravating circumstances so highlighted as set forth above: The jury deliberated for three days, was deadlocked at one point after a day of deliberations, and broke into factions that may have encompassed misconduct on the part of some jurors. (13CT 3662-3664; 36RT 5688-5700) Based on the foregoing, there is a serious question as to whether the verdict reached by the jury was a reliable reflection of what it actually believed. Based on the foregoing and the prejudice arguments set forth as to each individual assignment of error, *ante.*, cumulatively and individually, the trial court's errors unfairly prejudiced appellant's defense in violation of due process. Reversal is required. (*Chambers v. Mississippi, supra,* 410 U.S. at pp. 298,302-303.)

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and appellant Daniel Andrew Linton that the judgment of conviction and sentence of death must be reversed.

Dated: June 10, 2009

Respectfully submitted,

_____

DIANE E. BERLEY
Attorney by Appointment of the Supreme Court
For Defendant and Appellant
Daniel Andrew Linton

CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(l), California Rules of Court, states that an appellant's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 95,200 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit. Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software which was used to prepare this document, I certify that the word count of this brief is 84,724 words.

Dated: June 10, 2009

Respectfully submitted,

_____

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For Defendant and Appellant
Daniel Andrew Linton

PROOF OF SERVICE BY MAIL

State of California)
)
County of Los Angeles)

I am employed in the County aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business address is 6520 Platt Avenue, PMB 834, West Hills, California 91307-3218.

On June 10, 2009, I served the within Appellant's Opening Brief on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at West Hills, California, addressed as follows:

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DIANE E. BERLEY